

HOME, HUMAN RIGHTS AND HORIZONTAL EFFECT: AN ENGLISH APPROACH TO ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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ABSTRACT

In *McDonald v McDonald* [2016] UKSC 28, the Supreme Court held that there was no breach of Article 8 of the European Convention on Human Rights if a private landlord sought to evict a tenant using the accelerated possession procedure. In reaching this decision, it refused to imply a proportionality test into the Housing Act 1988 or make a declaration of incompatibility under the Human Rights Act 1998. Against that background, this article provides an analysis of the theoretical and practical concerns affecting a tenant's Article 8 rights to respect for the home, as well as a landlord's correlative duties. It concludes that these rights will only be protected adequately and in accordance with the rule of law if legislation is introduced, with the aim of protecting a tenant's dignity. That is necessary both for legal certainty and to ensure that a fair balance is struck between the interests of landlord and tenant.

Keywords

United Kingdom – Article 8 – Right to Respect for the Home – European Convention on Human Rights – Horizontal Effect – Housing – Possession Proceedings – Landlord and Tenant – Home Interests.

INTRODUCTION

Since the European Convention on Human Rights ('ECHR') was incorporated into English law by the Human Rights Act 1998, there has been an ongoing dialogue between the UK Supreme Court and Strasbourg as to the extent that a tenant's right to respect for the home should be recognised. This culminated in the judgment in *Manchester City Council v Pinnock*,¹ in which the Supreme Court held that Article 8 could form a defence to possession proceedings if the landlord was a public authority and the tenant's eviction was disproportionate. It was against this background that there has been growing speculation as to whether Article 8 can apply to

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¹ *Manchester City Council v Pinnock* [2010] UKSC 45.

possession claims in the private rented sector. By way of explanation, under the Human Rights Act 1998, it is unlawful for a public authority to act in a way that is incompatible with the European Convention on Human Rights.² However, there is no such corresponding obligation on private individuals. Nevertheless, as the definition of ‘public authority’ included courts and tribunals,³ there was an unanswered question as to whether proceedings between private individuals should be subject to a similar proportionality test. In other words, are the English courts required to imply a test of proportionality into possession claims between private individuals in order to comply with their duty to interpret domestic legislation in accordance with the ECHR?⁴ Put simply, can it be said that the Human Rights Act 1998 has horizontal effect in England and Wales?

That issue was recently settled in *McDonald v McDonald*,⁵ when the UK Supreme Court rejected a tenant’s argument that she should be able to challenge her eviction on the basis that it was a disproportionate interference with her right to respect for the home under Article 8. More specifically, it held that domestic legislation already provided tenants with adequate protection from eviction,⁶ even if the claim was brought under the accelerated procedure where there is no formal requirement on a landlord to demonstrate fault⁷ and possession is often granted without a hearing.⁸ Aside from that, the Supreme Court found that there was no coherent body of case law from Strasbourg that allowed the ECHR to be invoked to vary contractual arrangements that had been agreed between private individuals. Rather, any changes to the rights of a landlord or a tenant were a matter for Parliament.

In light of the judgment in *McDonald v McDonald*,⁹ this article will examine how the English courts have dealt with Article 8 in the context of the relationship between landlord and tenant. It will argue that English jurisprudence benefits individuals who own a property, rather than those who have a different type of interest, such as a licence or tenancy. As such, it fails to take account of the attachment that a tenant or an occupier may have to her home,¹⁰ or the role that it plays in constituting her personality and personhood.¹¹ Without a home, an individual may find that her dignity is undermined which, in turn, could have an effect on her everyday life. In essence, she is being denied the opportunity for human flourishing¹² and for her capabilities to be developed.¹³

Despite these concerns, this article will contend that the balance of rights between landlord and tenant should not be determined through the imposition of a proportionality test based on the judgment in *Pinnock*.¹⁴ If the Supreme Court had introduced such a test, there would be real uncertainty over the operation of possession claims in the private rented sector, with the courts attempting to strike a fair balance between a tenant’s human rights and those of the landlord. In any event, it remains unclear as to how a private landlord can act proportionately in seeking possession of her property, and whether she would ever have enough information about a tenant’s personal circumstances to be able to do so. It follows that if the British Government wants to address the issue of tenants’ rights, this would be better done through domestic housing legislation,

² Human Rights Act 1998, s 6(1).

³ Human Rights Act 1998, s 6(3)(a).

⁴ Human Rights Act 1998, s 3(1).

⁵ *McDonald v McDonald* [2016] UKSC 28.

⁶ See, for example, the Protection from Eviction Act 1977 and Housing Act 1980, s 89.

⁷ Housing Act 1998, s 21.

⁸ S Bright and LA Whitehouse, *Information, Advice & Representation in Housing Possession Cases*, (University of Oxford and University of Hull, 25 April 2014) <https://www.law.ox.ac.uk/sites/files/oxlaw/housing_possession_report_april2014.pdf> accessed 20 April 2017.

⁹ *McDonald v McDonald* (n 5).

¹⁰ L Fox, *Conceptualising Home: Theories, Law and Policies* (Hart Publishing 2003).

¹¹ M Radin, ‘Property and Personhood’ (1982) 34 *Stanford Law Review* 957.

¹² GS Alexander and EM Peñalver, *An Introduction to Property Theory* (Cambridge University Press 2012); GS Alexander, EM Peñalver, JW Singer and LS Underkuffler, ‘A Statement of Progressive Property’ (2009) 94 *Cornell Law Review* 743; GS Alexander, ‘The Social-Obligation Norm in American Property Law’, (2009) 94 *Cornell Law Review* 745.

¹³ A Sen, ‘Capability and Well-being’ in M Nussbaum and A Sen (eds), *The Quality of Life* (Routledge 2004) 30–53.

¹⁴ *Manchester City Council v Pinnock* (n 1).

rather than via the courts' *ad hoc* use of the ECHR under the Human Rights Act 1998. That way, a tenant's dignity could be better protected during possession proceedings, while a landlord would be provided with greater certainty as to the considerations that the courts would take into account in any eviction.

I. AN OVERVIEW OF THE JUDGMENT IN *MCDONALD V MCDONALD*

The Factual Background to McDonald

The judgment in *McDonald*¹⁵ concerned the eviction of Miss Fiona McDonald from her home at 25 Broadway Close in Witney. Miss McDonald suffered from serious psychiatric and behavioural problems, which meant that she was unable to work and became upset about changes to her environment. Due to Miss McDonald's condition and her eviction from two previous social tenancies, her parents decided to purchase a property for her to rent, using a mortgage provided by Capital Homes Limited ('Capital Homes'). It was intended that Miss McDonald would live at 25 Broadway Close under a series of assured shorthold tenancies, with her parents being the landlords, and the rent being paid using housing benefit. The mortgage from Capital Homes Limited was an interest-only loan, with the capital to be repaid after eight years and no later than 12 April 2013.

Although Miss McDonald's parents initially managed to pay the mortgage, they quickly fell into arrears as a result of financial difficulties with their business. That led to Capital Homes appointing receivers in August 2008, under the mortgagee's usual statutory powers.¹⁶ At first, the receivers allowed Miss McDonald to remain in the property as the arrears were not substantial, and her parents continued to make payments to Capital Homes. However, since the arrears persisted, the receivers served a Section 21 notice on Miss McDonald seeking possession of the property from 14 March 2012. After the notice expired, the receivers commenced proceedings against Miss McDonald to recover possession of the property. This was resisted by Miss McDonald, acting through her brother, Duncan, as her litigation friend. Relying on the report of an expert psychiatrist, they argued that Miss McDonald's eviction would be disproportionate in light of her 'right to respect for the home' under Article 8 of the ECHR.

At first instance, Corrie J held that he had no jurisdiction to refuse the receivers' application or consider the proportionality of Miss McDonald's eviction under Article 8, since her landlord was not a public authority. Yet, had he been able to do so, he would have refused to make an order for possession in favour of the receivers. In the view of Corrie J, Miss McDonald's eviction gave rise to sufficiently exceptional circumstances, taking into account her mental health, previous violent behaviour and the difficulties she would face in finding alternative accommodation. This ruling formed the basis of Miss McDonald's appeal, with the Court of Appeal¹⁷ and, finally, the Supreme Court being asked to consider whether a judge is required to examine the proportionality of a tenant's eviction from privately rented accommodation and, if so, whether it is possible to imply such a test into the relevant legislation in the Housing Act 1988.¹⁸

The Decision of the Court of Appeal

¹⁵ *McDonald v McDonald* (n 5).

¹⁶ Law of Property Act 1925, s 109.

¹⁷ *McDonald v McDonald* [2014] EWCA Civ 1049.

¹⁸ Housing Act 1988, s 21(4).

In its judgment, the Court of Appeal accepted that Article 8 was engaged: the property at 25 Broadway Close was Miss McDonald's home and s 6 Human Rights Act 1998 provided that the court was a public authority. It further noted that Article 8 allows a social renter to challenge the proportionality of her eviction, as was set out in *Manchester City Council v Pinnock*¹⁹ and *London Borough of Hounslow v Powell*.²⁰ Nonetheless, the Court of Appeal rejected the argument that Miss McDonald should be able to challenge the proportionality of her eviction under Article 8, finding that it was bound by the decision in *Poplar Housing and Regeneration Community Association Ltd v Donoghue*.²¹ In the leading judgment, Arden LJ held that for Miss McDonald's appeal to succeed, she would have to demonstrate that the ECtHR had applied the proportionality test to possession claims by private landlords as part of:

‘a clear and consistent line of decisions whose effect is not inconsistent with some fundamental, substantive or procedural aspect of our law and whose reasoning does not appear to overlook or misunderstand some argument or point of principle’.²²

Even though there were a small number of cases where the ECtHR had applied the proportionality test to a possession claim by a private landlord, Arden LJ held that they could be distinguished from the arguments advanced by Miss McDonald. In particular, there were no successful claims under Article 8 that involved a case in which the landlord had an unconditional right to the return of the property and the date for possession had passed. There was also a public element to the cases that had been cited in support of Miss McDonald's argument. So, for example, *Brežec v Croatia*²³ concerned the eviction of a tenant by a former state corporation that had been privatised. Similarly, in *Zebentner v Austria*,²⁴ the court had to consider whether there was a violation of Article 8 in respect of a forced judicial sale at the instance of a creditor. Developing her argument further, Arden LJ held that in the judgments cited, the ECtHR had proceeded on the basis that Article 8 was applicable, but without considering the terms of tenant's occupation of the land, or whether the landlord was a public authority in sufficient detail. They also had not been determined by the Grand Chamber. By contrast, there is a clear principle that private individuals should not be able to invoke the ECHR as a means of avoiding their obligations under a freely negotiated contract.²⁵

Finally, it is of interest to note that the Court of Appeal would have reversed the judgment of Corrie J and held that Miss McDonald's eviction was proportionate. Arden LJ remarked that in a possession claim, a landlord is simply asserting her right to the return of the property in circumstances where she may have suffered a loss as a result of the tenant's actions. In addition, the interests of banks, creditors, and other third parties could have been prejudiced by the court's failure to make a possession order in favour of the landlord. For the Court of Appeal, these considerations were no less important than the interests of a homeless individual or the ability of a social landlord to recover possession of its housing stock. As such, it was highly relevant that over £200,000 was owed to Capital Homes, which could not be recovered by the lender without the court making a possession order against Miss McDonald.

The Supreme Court's Ruling in McDonald

¹⁹ *Manchester City Council v Pinnock* (n 1).

²⁰ *London Borough of Hounslow v Powell* [2011] UKSC 8.

²¹ *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48.

²² See the judgment of Lord Neuberger in *Manchester City Council v Pinnock* [2010] UKSC 45 [48].

²³ *Brežec v Croatia* [2014] HLR 13.

²⁴ *Zebentner v Austria* (20082/02) (2011) 52 EHRR 22.

²⁵ *Di Palma v United Kingdom* (1986) 10 EHRR 149.

In the Supreme Court, Lord Neuberger and Lady Hale handed down a joint judgment with which Lords Kerr, Reed, and Carnwath concurred. Approving the Court of Appeal's ruling, they held that Miss McDonald was unable to challenge her eviction under Article 8. However, in its judgment, the Supreme Court placed far more emphasis on the statutory regulation of the private rented sector, as well as the difficulty in balancing a landlord and tenant's respective Convention rights. In their commentary on the private rented sector, Lord Neuberger and Lady Hale noted that, in 1987, the Thatcher Government produced a White Paper entitled *Housing: The Government's Proposals*.²⁶ This White Paper indicated that the Government wished to improve both the supply and the quality of housing in the private rented sector, but to do so, it needed to reduce the security of tenure that was afforded to tenants under the Rent Act 1977. This led to the introduction of the assured shorthold tenancy in the Housing Act 1988, which later became the default form of tenure.²⁷ With an assured shorthold tenancy, a landlord is able to recover possession of a property by giving the tenant two months' notice in writing; there is no requirement to provide a reason for the eviction or demonstrate fault.

Against that background, Lord Neuberger and Lady Hale held that the respective duties and obligations of a residential landlord and tenant were set out in both the tenancy agreement and the legislation enacted by Parliament.²⁸ Together, this represented the state's assessment of a fair balance of the parties' rights under the ECHR. Therefore, 'a super-added requirement of addressing the issue of proportionality'²⁹ in any possession claim would be an imposition that did not respect the purpose of domestic legislation. Moreover, if a tenant's rights under Article 8 were enforceable against a private landlord, that would lead to unpredictability. They would need to be balanced against the landlord's rights to recover the property under Article 1, Protocol 1 and, in that respect, it is unclear if a landlord would be compensated for any losses she may suffer. Aside from that, Lord Neuberger and Lady Hale further explained that Article 8 could only be invoked where a possession claim comes before the courts. As such, there may be a perverse incentive for landlords to carry out unlawful evictions, or offer tenants money to leave a property. In effect, a more stringent proportionality test may act as a disincentive to those acting legally and in accordance with the provisions of the Housing Act 1988.

Regarding the courts' interpretation of the Housing Act 1988, Miss McDonald argued that the legislation could be read in such a way, so as to allow the judge to assess the proportionality of any order. This submission was even accepted by the Residential Landlords' Association, intervening in the case. Regardless of that, the Supreme Court held that such an interpretation was not possible. In reaching this decision, it relied on the fact that a private tenant would not be able to challenge the lawfulness of her landlord's actions on the basis of *Wednesbury*³⁰ unreasonableness. By contrast, this course of action is open to a social renter with a demoted or introductory tenancy³¹ and, further, there is a requirement on a public authority or a housing association to provide reasons for terminating such an agreement.³² Since these public sector duties do not apply to private landlords, it follows that neither does the proportionality test set out in *Pinnock*³³ and *Powell*.³⁴ Taking this into account, Lord Neuberger and Lady Hale held that even if the words in s 21(4) Housing Act 1988 did introduce an element of proportionality, the most that could be done was for the court to make a declaration of incompatibility.³⁵ This would not have affected the outcome

²⁶ *Housing: The Government's Proposals* (Cm 214, 1987).

²⁷ Housing Act 1988, ss 19A and 20.

²⁸ See, for example, Protection from Eviction Act 1977 and Housing Act 1980, s 89.

²⁹ *McDonald v McDonald* [2016] UKSC 28 [43].

³⁰ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

³¹ Article 1, Part V of the Housing Act 1996.

³² Housing Act 1996, s143E.

³³ *Manchester City Council v Pinnock* (n 1).

³⁴ *London Borough of Hounslow v Powell* (n 17).

³⁵ Human Rights Act 1998, s 4.

of Miss McDonald's claim, but rather the matter would have been referred to Parliament to amend the relevant provisions of the Housing Act 1988 if it so chose.

Finally, the Supreme Court considered whether Miss McDonald's eviction would have been a disproportionate interference with her right to respect for the home under Article 8. Here, Lord Neuberger and Lady Hale noted that there were several options open to a judge hearing a possession claim: she could refuse to make the order, suspend or postpone it for a period of up to six weeks, or accept the claim on the grounds it was justified.³⁶ They further noted that it was rare for a tenant's Article 8 defence to succeed against a social landlord unless it raised other public law arguments. As a result, it was difficult to envisage when a tenant's Article 8 defence would succeed against a private landlord. In this case, Miss McDonald's parents owed Capital Homes over £164,000, which could only be repaid through the sale of the property. Taking that into account, Miss McDonald would need to demonstrate that not only was her eviction disproportionate, but also that Capital Homes would not be prevented from recovering the outstanding capital sum or any arrears. Unfortunately, she was unable to do so.

II. TOWARDS A THEORETICAL JUSTIFICATION FOR THE RIGHT TO RESPECT FOR THE HOME

The Importance of Ownership in English Law

According to Cowan, the origins of the rhetoric surrounding home ownership can be traced back to Victorian self-help literature.³⁷ In particular, Cowan refers to Samuel Smiles,³⁸ who first drew the link between hard work, thrift, property, and morality. For, as Smiles explained in a lecture in 1864:

The accumulation of property has the effect, which it has always had upon thrifty men; it makes them steady, sober and diligent... they will cease to regard the sight of others' wellbeing as a wrong inflicted on themselves; and it will no longer be possible to make political capital out of their imaginary woes.³⁹

Over time, that rationale developed, and it contributed to the the growth of the building society movement in the early twentieth century. Notably, in 1927, Harold Bellman described ownership as a 'civic and national asset', with both moral and ethical benefits.⁴⁰ Later on, in the 1980s, this preference for home ownership as a form of tenure continued, with the Thatcher Government introducing policies such as the deregulation of the mortgage market⁴¹ and the introduction of the right to buy.⁴²

Against that background, Singer has argued that there are two competing models of ownership, being the 'lord in a castle' and an 'investor in a market economy'.⁴³ The metaphor of the owner as the 'lord in a castle' derives from Sir Edward Coke's judgment in *Semayne's Case*,⁴⁴ and was later

³⁶ Housing Act 1980, s 89(1).

³⁷ D Cowan, *Housing Law and Policy* (Cambridge University Press 2011) 31.

³⁸ S Smiles, *Self-Help* (Oxford University Press 2002).

³⁹ See S Price, *Building Societies: Their Origins and History* (Franey & Co 1959), 139-140.

⁴⁰ D Cowan, *Housing Law and Policy* (Cambridge University Press 2011), 31.

⁴¹ Building Societies Act 1986.

⁴² Housing Act 1980, s 1.

⁴³ J Singer, 'The Ownership Society and the Takings of Property: Castles, Investments and Just Obligations' (2006) 30 *Harvard Environmental Law Review* 309, 314.

⁴⁴ *Semayne's Case* (1604) All ER Rep 62; 5 Co Rep 91 a; Cro Eliz 908; Moore KB 668; Yelv 29; 77 ER 194.

upheld in *Entick v Carrington*.⁴⁵ As an owner, an individual is free to use her property as she so chooses, without unreasonable interference from others or from the state. Nowadays, this can be seen in Atkinson and Blandy's concepts of defensive homeownership⁴⁶ and the domestic fortress in which 'social anxiety, inequality and profound economic changes... produces a defensive and physically bolstered form of home ownership'.⁴⁷ By way of contrast, a Lockean understanding of property⁴⁸ supports Singer's conception of the owner as a market investor. Arguably, it follows that if an individual has applied her labour to land or an object, she should be rewarded with any increase in value or return on her investment. For Singer, this model protects an investor's legitimate expectation that she should be able to exploit property for commercial gain.

Returning to housing, it is common for a distinction to be drawn between renting and ownership in both everyday conversation⁴⁹ and the academic literature.⁵⁰ This is illustrated by the use of analogy and metaphor in our language, such as renting is 'dead money' or 'money down the drain', while homeownership is perceived as 'an investment for the future', with the property being 'yours at the end of the day'.⁵¹ As Gurney explained, these metaphors are imbued with morality, but they have become so common that their status or accuracy is rarely challenged.⁵² It is in these circumstances that the English courts have upheld the rights of an owner against an occupier in the judgment in *McDonald*,⁵³ despite the arguments made by Miss McDonald that her eviction was disproportionate.

To an extent, the judgment in *McDonald*⁵⁴ can be justified by making reference to Honoré's incidents of ownership⁵⁵, namely: (i) the right to use; (ii) the right to possess; (iii) the right to manage; (iv) the right to income; (v) the right to capital; (vi) the right to security; (vii) transmissibility; (viii) the absence of term; (ix) prohibition of harmful use; (x) liability to execution; and (xi) its residuary nature. This means that as owners, Miss McDonald's parents were able to let the property at 25 Broadway Close and claim any rental income. They could impose restrictions on Miss McDonald's tenancy, preventing her from altering the property without their consent or keeping a pet. Furthermore, by owning the property, Miss McDonald's parents were able to obtain a mortgage and divest some of their rights to Capital Homes. Since they subsequently fell into arrears, it followed that Capital Homes was able to appoint receivers to manage the property⁵⁶ and exercise that incident of ownership. Even though the receivers were agents of Miss McDonald's parents, they could not provide them with any instructions or direct them how to act.⁵⁷ Instead, the receivers were under a duty to realise the property for the benefit of the lender, Capital Homes.⁵⁸

From a rights perspective, this emphasis on ownership is unsurprising, particularly given the residuary nature of this interest. After all, it is usually the owner who is able to exercise control

⁴⁵ *Entick v Carrington* (1765) EWHC J98 (KB); 19 Howell's State Trials 1029; 95 ER 807.

⁴⁶ R Atkinson and S Blandy, 'Panic Room: The Rise of Defensive Homeownership' (2007) 22 Housing Studies 443.

⁴⁷ R Atkinson and S Blandy, *Domestic Fortress: Fear and the Home Front* (Manchester University Press 2017) 21.

⁴⁸ J Locke, *Second Treatise of Government and A Letter Concerning Toleration* (Oxford University Press 2016).

⁴⁹ C Gurney, 'Lowering the Drawbridge: A Case Study of Analogy and Metaphor in the Social Construction of Homeownership' (1999) 36 Urban Studies 1705.

⁵⁰ P Saunders, *A Nation of Home Owners* (Allen & Unwin 1990); P King, *Housing Policy Transformed: The Right to Buy and The Desire to Own* (Policy Press 2010); D Cowan, *Housing Law and Policy* (Cambridge University Press 2011); D Cowan, L Fox O'Mahony and N Cobb, *Great Debates in Land Law* (2nd edn, Palgrave Macmillan 2016).

⁵¹ C Gurney, 'Lowering the Drawbridge: A Case Study of Analogy and Metaphor in the Social Construction of Homeownership' (1999) 36 Urban Studies 1705, 1711.

⁵² C Gurney, 'Lowering the Drawbridge: A Case Study of Analogy and Metaphor in the Social Construction of Homeownership' (1999) 36 Urban Studies 1705, 1717-1718.

⁵³ *McDonald v McDonald* (n 5).

⁵⁴ *McDonald v McDonald* (n 5).

⁵⁵ AM Honoré 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 1961).

⁵⁶ Law of Property Act 1925, s 109.

⁵⁷ *Silven Properties Ltd v. Royal Bank of Scotland plc* [2004] 1 WLR 997 (CA).

⁵⁸ *Downsview Nominees Ltd v. First City Corporation* [1993] AC 295; *Medforth v. Blake* [2000] Ch 86.

over property if another party's rights are terminated or abandoned. As Honoré explained, it is a necessary condition of ownership that 'either immediately or ultimately, the extinction of other interests would enure for his benefit'.⁵⁹ For that reason, many land disputes can be seen in the following terms, namely, has a right been divested in such a way that allows the property to revert to the owner? Looking at the judgment in *McDonald*⁶⁰, it was notable that the right to manage the property reverted to the receivers, once they had served notice terminating Miss McDonald's tenancy. Indeed, the focus of the judgment was whether Miss McDonald had a right that entitled her to remain in the property that took priority over the owner's reversionary interest. According to Miss McDonald, she did. Her interest was protected by Article 8, which provided an individual with the right to respect for her family and private life, home and correspondence.

Nonetheless, this article will contend that insufficient attention has been given to the nature of Miss McDonald's Article 8 right, or how it could fit in to the existing legal framework in England and Wales. While it accepts van der Walt's contention that it is easier to consider social justice from a theoretical perspective that 'does not focus exclusively or primarily on strong or central rights positions of property... but takes seriously the no-property interests of people and communities in the margins of society',⁶¹ it will argue that the practicalities of any right to respect for the home should be addressed by the introduction of domestic housing legislation that is designed to protect a tenant's dignity. Not only will this prevent the continuing piecemeal development of Article 8 by the courts, but it will also help to create legal certainty for both landlords and tenants. Taking into account those factors, this article will first analyse Miss McDonald's claim using the personhood theory of property advanced by Radin⁶², progressive property scholarship,⁶³ and the academic literature on home interests.⁶⁴ It will then examine the nature of the right to respect for the home, before addressing the ways in which a tenant's interests can be balanced against those of a landlord.

Dignity-Based Rights or a Personhood Perspective on Property?

Recently, there has been much academic debate about whether or not the home should be afforded particular protection in law. Drawing on Hegel's *Philosophy of Right*⁶⁵, Radin argued that there is a link between an individual's property and her personhood. As she explained:

most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.⁶⁶

To support her argument, Radin contended that for an owner, there are certain goods that cannot be easily replaced if they are lost or destroyed. She describes these items as 'personal

⁵⁹ AM Honoré 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 1961).

⁶⁰ *McDonald v McDonald* (n 5).

⁶¹ AJ van der Walt, *Property in the Margins* (Hart Publishing 2009).

⁶² M Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957.

⁶³ GS Alexander and EM Peñalver, *An Introduction to Property Theory* (1st edn, Cambridge University Press 2012); GS Alexander, EM Peñalver, JW Singer and LS Underkuffler, 'A Statement of Progressive Property' (2009) 94 *Cornell Law Review* 743; GS Alexander, 'The Social-Obligation Norm in American Property Law', (2009) 94 *Cornell Law Review* 745.

⁶⁴ L Fox, *Conceptualising Home: Theories, Law and Policies* (1st edn, Hart Publishing 2003); D. B. Barros, 'Home as a Legal Concept', (2006) 46 *Santa Clara Law Review* 225.

⁶⁵ GWF Hegel, *Philosophy of Right* (Berlin 1821).

⁶⁶ M Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957, 959.

property⁶⁷ and for any individual, they may include antiques, family heirlooms, wedding rings and most importantly, the home. Since the home is both personal property and ‘a moral nexus between liberty, privacy and freedom of association’,⁶⁸ it followed for Radin that tenants should not be subject to eviction without due cause or unreasonable rent rises.⁶⁹ Radin further argued that any residential tenancy agreement should include a non-waivable guarantee of habitability, as these rights are based on a tenant’s ‘dignity as a person’.⁷⁰ Developing an argument advanced by Ackerman,⁷¹ she claimed that if residential tenancy agreements were seen as personal property, this could provide a justification for imposing additional costs on landlords. Put simply, a tenant’s right to enjoy her personal property may override a landlord’s interest in any fungible goods.

Extrapolating Radin’s argument, it could be argued that English law fails to recognise residential tenancy agreements as personal property adequately or at all. By way of explanation, under an assured shorthold tenancy, a landlord’s reversion is not conditional on a length of a tenant’s occupation or continued good behavior.⁷² On a similar note, there is no rent control for these tenancies in the private rented sector. With regards to the judgments in *McDonald*,⁷³ it should be noted that the courts failed to address Miss McDonald’s attachment to the property at 25 Broadway Close in Witney. More specifically, there was no consideration of Miss McDonald’s day-to-day use of the property, or the steps that she had taken to make it home. Yet given the precarious nature of Miss McDonald’s occupation and the legal basis of her claim, this is hardly surprising.

Nevertheless, from a review of the judgment, it remains difficult to ascertain Miss McDonald’s connection to the property or its link with her personhood. Unfortunately, that necessarily raises a question: can Radin’s theory provide a sound basis for the protection of Miss McDonald’s home interests under Article 8? Of course, it could be said that there is an implicit assumption that Miss McDonald treated 25 Broadway Close in Witney as her personal property. The house is referred to as her ‘home’, with both the Court of Appeal and the Supreme Court concurring that Article 8 had been engaged. However, such an argument is based on intuitive thinking, rather than evidence from Miss McDonald’s witnesses or empirical research. By way of explanation, Jones has argued that individuals have a connection to ‘things at large’⁷⁴, rather than particular items of personal property, such as a home. Relying on research from material-cultural studies, he cites the experiments by Knetsch,⁷⁵ where individuals demonstrated a loss aversion to everyday fungible objects, such as coffee cups, chocolate bars and lottery tickets.⁷⁶ That supports a structuralist account of a person’s relationships with ‘things’ as advanced by Miller.⁷⁷ It implies that the self is constituted through a dynamic process of externalisation involving *all* objects, as opposed to items of personal property that require special protection.

Furthermore, Radin’s theory fails to address adequately the different views that an individual may hold about her home, as well as the way in which these are spatially and temporally located.

⁶⁷ M Radin, ‘Property and Personhood’ (1982) 34 Stanford Law Review 957, 960. In this article, the term ‘personal property’ is used in the sense envisaged by Radin, rather than to mean chattels, moveable goods or personality. See, for example, M Bridge, *Personal Property Law* (4th edn, Clarendon Law Press 2015).

⁶⁸ M Radin, ‘Property and Personhood’ (1982) 34 Stanford Law Review 957, 991.

⁶⁹ M Radin, ‘Residential Rent Control’, (1985) 15 Philosophy and Public Affairs 350.

⁷⁰ B Ackerman, ‘Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy’ (1971) 80 Yale Law Journal 1093.

⁷¹ B Ackerman, ‘Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy’ (1971) 80 Yale Law Journal 1093.

⁷² Housing Act 1988, s 21.

⁷³ *McDonald v. McDonald* (n 5).

⁷⁴ JD Jones ‘Property and Personhood Revisited’ (2011) 1 Wake Forest Journal of Law and Policy 93, 110.

⁷⁵ J Knetsch, ‘The Endowment Effect and Evidence of Nonreversible Indifference Curves’, 79 (1989) American Economic Review 1277.

⁷⁶ D Kahneman, JL Knetsch and R Thaler, ‘Experimental Tests of the Endowment Effect and the Coase Theorem’ (1990) 98 Journal of Political Economy 728.

⁷⁷ D Miller, *Material Culture and Mass Consumption* (Wiley-Blackwell 1997).

Take the home of a victim of domestic violence. At first, that home may have seemed to be a place of sanctuary or retreat, but this may change after an incident of abuse. For, as Schnably explained, ‘the home is as much a place of domination and resistance, conflict and discord, as it is the centre of a “healthy” life’.⁷⁸ Similarly, a tenant may enter into an assured shorthold tenancy with a private landlord, knowing that it may only last for six months and she may be evicted without due cause. In those circumstances, she may decide to treat a house less as personal property and more as a fungible asset. This may involve the tenant using furniture belonging to the landlord. Alternatively, she may decide not to carry out any repairs that would usually be undertaken by the owner. In addition, there are likely to be conditions in a residential tenancy agreement that prevent a tenant from treating a house as her personal property. Common tenants’ covenants may include a duty not to alter the property without the landlord’s permission, or a prohibition on keeping pets.⁷⁹ These covenants are a way for the landlord to retain control of the property for the duration of the tenancy. After all, if a tenant is unable to use a property as she chooses, she is less likely to perceive that it is ‘hers’ or develop an attachment to the house.

Aside from that, this article will claim that Radin’s theory fails to provide an adequate explanation for Miss McDonald’s interest in her home because it does not distinguish between items of personal property and property that is necessary to maintain a person’s dignity. To give an example: a person needs appropriate items of clothing to be able to carry out her day-to-day business or progress in life. This may mean she has warm jumpers for cold weather or a business suit for work. Similarly, an individual may need a mobile phone to communicate with others and access the internet, as a way of maintaining her dignity.⁸⁰ Applying Radin’s theory, these items of clothing and a person’s mobile phone would be deemed to be fungible property. To suggest otherwise for Radin is fetishism, particularly as they can be easily replaced with substitute goods. Yet, if an individual was left without adequate clothing, that could have a significant impact on her dignity. She may be unable to find employment, or stigmatised for her appearance.⁸¹ Meanwhile, it is accepted that access to the internet forms part of an individual’s right to freedom of expression⁸² and is an ‘essential part of everyday living’.⁸³ For those reasons, it is perhaps more helpful to analyse Miss McDonald’s interest in her home at 25 Broadway Close in Witney in terms of it upholding and maintaining her dignity, rather than it constituting personal property.

Human Flourishing and the Home

Dating back to ancient Rome, the concept of dignity or *dignitas hominis* came from an individual’s role in public office and the respect that should be owed to a citizen with that status.⁸⁴ Over time, dignity began to be understood as a way of distinguishing Man from animals,⁸⁵ before Kant conceptualised it as a requirement to treat persons as autonomous beings, with the ability to make

⁷⁸ SJ Schnably, ‘Property and Pragmatism: A Critique of Radin’s View of Property and Personhood’ (1993) 45 Stanford Law Review 347, 367.

⁷⁹ S Garner and A Frith, *A Practical Approach to Landlord and Tenant* (7th edn, Oxford University Press 2013); M Davys, *Land Law* (9th edn, Palgrave Macmillan 2014).

⁸⁰ In 2016, the United Nations Human Rights Council adopted a resolution emphasising the importance of access to the internet. See United Nations, Human Rights Council, *The Promotion, Protection and Enjoyment of Human Rights on the Internet*, (A/HRC/32/L.20, 30 June 2016) <https://article19.org/data/files/Internet_Statement_Adopted.pdf> accessed 1 June 2017

⁸¹ JC Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005).

⁸² A Wagner, ‘Is Internet Access A Human Right?’, *The Guardian* (London, 11 January 2012) <<https://theguardian.com/law/2012/jan/11/is-internet-access-a-human-right>> accessed 1 June 2017.

⁸³ *R v Smith* [2011] EWCA Crim 1772, [2012] 1 WLR 1316.

⁸⁴ C McCrudden, ‘Human Dignity and the Judicial Interpretation of Human Rights’ (2008) 19 European Journal of International Law 655, 659.

⁸⁵ H Grotius, *De Jure Belli ac Pactis* (AC Campbell 1814); J Finnis, *Aquinas* (Oxford University Press 1998).

their own decisions.⁸⁶ It has since been seen in responses to the Holocaust,⁸⁷ while others have invoked it in the protection of indigenous rights,⁸⁸ and the use of genetic material.⁸⁹ Of course, that is not to say that the meaning of human dignity is uncontested,⁹⁰ but rather there is a ‘minimum core’ as to what this concept may involve.⁹¹ More specifically, McCrudden has argued that dignity is based on an ‘ontological’ claim relating to an individual’s worth as a human being, together with a ‘relational’ aspect that requires others to respect this intrinsic worth by refraining from certain conduct. Arguably, this emphasis on human dignity can be seen in progressive property scholarship. So, according to Alexander and Peñalver, the law should promote human flourishing by providing individuals with the opportunity to lead a well-lived life through the development of their own capabilities.⁹² This could involve an acknowledgment that some members of a community may require resources to support their development, or the imposition of a duty on a landowner to contribute towards the public good. Most importantly, however, they have argued that property law should allow individuals to obtain the material necessities they need to flourish as human beings, be it clothes, food, or shelter.⁹³

To apply McCrudden’s ‘minimum core’ of dignity to housing, it could be argued this requires a tenant’s inherent worth to be protected against any degrading conduct by her landlord or the state. That may mean she is not subject to unlawful dispossession, and is allowed to use her home freely without any unreasonable interference.⁹⁴ At this juncture, it is perhaps helpful to note that human dignity may derive from due process.⁹⁵ To an extent, this is evident in English law, where it is a criminal offence for a landlord to evict a tenant without first obtaining an order for possession.⁹⁶ However, as long as a landlord has complied with all of the necessary formalities,⁹⁷ there is no requirement for her to provide a tenant with a reason for her eviction.⁹⁸ That, in itself, could have a detrimental effect on a tenant’s dignity, and further, it may mean she is denied the opportunity for human flourishing. It is against this background that Miss McDonald argued that she should be able to challenge the proportionality of her eviction. In other words, the inadequacy of the accelerated possession procedure meant that Miss McDonald’s dignity was infringed. Further, it could be argued that Miss McDonald was using Article 8 as a way of *substantively* protecting her

⁸⁶ I Kant, *Metaphysics of Morals* (2nd edn, Cambridge University Press 2017).

⁸⁷ It is notable that the concept of dignity was incorporated into the new constitutions of Japan, Italy and Germany between 1945 and 1950. See C McCrudden, ‘Human Dignity and the Judicial Interpretation of Human Rights’ (2008) 19 *European Journal of International Law* 655, 664.

⁸⁸ Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc A/CONF 157/24 (Pt 1).

⁸⁹ D Beyleveld and R Brownsword, ‘Human Dignity, Human Rights and Human Genetics’ (1998) 61 *Modern Law Review* 661.

⁹⁰ O Schachter, ‘Human Dignity as a Normative Concept’ (1983) 77 *American Journal of International Law* 848; P Carozza, ‘Human Dignity and the Interpretation of Human Rights: A Reply’ (2008) 19 *European Journal of International Law* 931; BA Mitztal, ‘The Idea of Dignity: Its Modern Significance’ (2012) 16 *European Journal of Social Theory* 101.

⁹¹ C McCrudden, ‘Human Dignity and the Judicial Interpretation of Human Rights’ (2008) 19 *European Journal of International Law* 655, 679.

⁹² GS Alexander and EM Peñalver, *An Introduction to Property Theory* (1st edn, Cambridge University Press 2012); GS Alexander, EM Peñalver, JW Singer and LS Underkuffler, ‘A Statement of Progressive Property’ (2009) 94 *Cornell Law Review* 743; GS Alexander, ‘The Social-Obligation Norm in American Property Law’, (2009) 94 *Cornell Law Review* 745.

⁹³ Alexander and Peñalver (n 92).

⁹⁴ *Bronne v Flower* [1911] 1 Ch 219.

⁹⁵ D Luban, ‘The Rule of Law and Human Dignity: Reexamining Fuller’s Cannons’ (2010) 2 *Hague Journal of Rule of Law* 29; SB Tosdal, ‘Preserving Dignity in Due Process’ (2011) 62 *Hastings Law Journal* 1003; T Weigend and K Ghanayim, ‘Human Dignity in Criminal Procedure: A Comparative Overview of Israeli and German Law’ (2011) 44 *Israel Law Review* 199.

⁹⁶ Protection from Eviction Act 1977, s 5.

⁹⁷ See, for example, The Assured Shorthold Tenancy Notice and Prescribed Requirements (England) Regulations 2015.

⁹⁸ Housing Act 1988, s 21.

own dignity. It was not a proprietary claim for a right to housing, or even a right to respect for the home. Instead, the claim was founded on the harm Miss McDonald would suffer if she lost her home. To use the language of progressive property, Miss McDonald was claiming that if she was evicted from the property at 25 Broadway Close in Witney, she would be denied the opportunity for human flourishing. In that regard, it is notable that the expert medical evidence of Dr Sargent found there was a significant risk that Miss McDonald would commit suicide, become homeless, or be admitted to hospital if she lost her home.

Furthermore, this implicit consideration of a tenant's wellbeing can be seen in other claims where an Article 8 defence has been raised by a social renter against a local authority, such as in *Southend-on-Sea Borough Council v. Armour*.⁹⁹ In that case, Mr Armour successfully challenged his eviction from an introductory tenancy on the grounds of anti-social behaviour. Both the Recorder¹⁰⁰ and the Court of Appeal took Mr Armour's depression and Asperger's Syndrome into account in their judgments. They held that that even though Mr Armour had mental health issues, his conduct had improved over the course of his tenancy and his eviction could no longer be justified. Likewise, the courts referred to a tenant's depression in *Hall*,¹⁰¹ and the effects of a severe head injury in *Price*.¹⁰²

Before progressing any further, it should be noted that this notion of human dignity has been subject to criticism. By way of explanation, dignity has been characterised as being 'vacuous',¹⁰³ while others have argued that it is an empty concept that lacks an agreed definition.¹⁰⁴ Nonetheless, dignity may be regarded as having both subjective and objective elements.¹⁰⁵ In other words, it must be understood from the perspective of the victim who is subject to the degrading treatment, as well as in relation to the norms of her community. For example, if dignity was only assessed by reference to an individual's perception of her treatment, that may lead to its unequal and uneven application. It may also provide the greatest protection for unduly sensitive individuals at the expense of others in the community. On the other hand, if there was no subjective element, that may mean that an individual's particular circumstances are not adequately addressed. That in itself could further undermine a person's dignity. In Canada, the courts have adopted this subjective-objective approach to dignity, with the test being whether a reasonable person with the claimant's history, character traits and personal circumstances would have considered the conduct demeaning.¹⁰⁶

In relation to property, there is an objective element to dignity, meaning that it can be assessed in relation to an agreed list of criteria. Simply put, property can be said to uphold an individual's dignity if its loss, damage, or destruction causes a real or significant interference with that person's day-to-day life. Of course, what constitutes a real or significant interference with a person's day-to-day life is subjective: it depends on her particular circumstances. Take the example of a car or a bicycle. If this is stolen, its owner may not be able to travel to work or any necessary appointments. That could affect her health and ability to provide for her family. From the perspective of progressive property scholars,¹⁰⁷ she has been denied the material necessities required for human-flourishing and a well-lived life. To that end, it is notable that Radin acknowledged that if personal property was defined by an individual's attachment to an object or

⁹⁹ *Southend-on-Sea Borough Council v. Armour* [2014] EWCA Civ 231.

¹⁰⁰ *Southend-on-Sea Borough Council v. Armour* [2014] EWCA Civ 231 [9].

¹⁰¹ *Leeds City Council v. Hall* [2011] UKSC 8.

¹⁰² *Leeds City Council v. Price* [2006] UKHL 10.

¹⁰³ M Bagaric and J Allen, 'The Vacuous Concept of Human Dignity' (2006) 5 *Journal of Human Rights* 257.

¹⁰⁴ R Macklin, 'Dignity is a Useless Concept' [2003] *British Medical Journal* 237.

¹⁰⁵ C McCrudden, 'Human Dignity and the Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655, 706.

¹⁰⁶ *Halpern v Attorney General* 2003 65 OR (3d) 161 (CA Ontario).

¹⁰⁷ Alexander and Peñalver (n 92); Alexander, Peñalver, Singer and Underkuffler (n 92); Alexander (n 92).

a thing, the law would simply enforce a utilitarian scheme based on personal preference.¹⁰⁸ Looking at housing, it should be noted that any eviction is likely to have a real and significant effect on an individual's day-to-day life. As the ECtHR has emphasised, it should be regarded as the 'most extreme form of interference'¹⁰⁹ with the home. Nonetheless, the effects of dispossession on an individual are likely to depend on a number of factors, including the form of tenure and the reasons for her eviction, as well as their perceived fairness.¹¹⁰ As Barros has commented 'there is a lot of research that needs to be done before legal discussion can be well-informed by the psychology of the home'.¹¹¹

Moreover, this subjective-objective concept of dignity has some advantages over Radin's personhood theory. With regards to housing and Miss McDonald's claim, it means there is no requirement on a tenant to prove her connection with her home. All she must do is demonstrate that the loss of property has affected her general wellbeing and ontological security.¹¹² After all, if a tenant was required to demonstrate an attachment to her home, that could have a fundamental effect on her dignity in itself. Such an exercise may be both intrusive and unnecessary, particularly given that an individual's right to a private life is also protected within the ambit of Article 8. Further, there is a risk that personhood theory may favour those with belongings and a settled home at the expense of vulnerable individuals. Imagine that a few weeks ago, a tenant moved into a room in a House in Multiple Occupation ('HMO') to escape domestic violence. Using Radin's notion of personal property, it follows that the tenant's occupation of the property should be afforded the same protection as a fungible asset. She may not have lived in the property for a sufficient length of time to develop a connection that allows her to call the place 'home'. Yet, if we examine the rights of the same tenant from the perspective of her dignity, it follows that her occupation of the room must be protected from the date she arrived. Without this room, she may find herself living in abusive or degrading conditions, where her rights are inadequately protected, and interests subordinated.¹¹³ In other words, the room is a material necessity for her flourishing. Similar considerations apply to those living in poor conditions. For instance, if a tenant is living with inadequate heating or limited access to services, she may not be attached to the property in the sense envisaged by Radin, but rather as a result of having nowhere else to go.

In addition, the difficulties associated with Radin's personhood theory are further illustrated by the House of Lords' judgment in *Westminster City Council v. Clarke*.¹¹⁴ That case concerned Mr Clarke's occupation of a room in a hostel for single, homeless men at 131-137 Cambridge Street in London. As Lord Templeman noted, the occupiers included:

men with personality disorders or physical disabilities, sometimes eccentric, sometimes frail, sometimes evicted from domestic accommodation or discharged from prison or hospital.¹¹⁵

It was against that background that Westminster City Council sought to evict Mr Clarke from his room for nuisance, annoyance, and noise. More specifically, it was alleged that he had smashed

¹⁰⁸ G Calabresi and AD Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089.

¹⁰⁹ *McCann v United Kingdom* [1995] ECHR 31 [50]; *Kay v United Kingdom* [2010] ECHR 1322 [68].

¹¹⁰ DB Barros, 'Legal Questions for the Psychology of Home' (2009) 83 Tulane Law Review 645, 657-8. See also S Bright, 'Dispossession for Arrears: The Weight of Home in English Law' in L Fox O'Mahony and JA Sweeney (eds) *The Idea of Home in Law: Displacement and Dispossession* (Ashgate 2010).

¹¹¹ DB Barros, 'Legal Questions for the Psychology of Home' (2009) 83 Tulane Law Review 645, 655.

¹¹² A Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Polity Press 1991).

¹¹³ C Bunch, 'Transforming Human Rights from a Feminist Perspective' in J Peters and A Wolper (eds), *Women's Rights, Human Rights* (Routledge 1995); T Fenster, 'The Right to the Gendered City: Different Forms of Belonging in Everyday Life' (2005) 14 Journal of Gender Studies 217.

¹¹⁴ *Westminster City Council v Clarke* [1992] 2 AC 288 (HL).

¹¹⁵ *ibid* [296].

up his room and thrown furniture and clothing into the street. To challenge his eviction, Mr Clarke argued that he was a tenant of Westminster City Council, with exclusive possession of his room at the hostel.¹¹⁶ Despite this, the House of Lords rejected Mr Clarke's argument and held that the local authority had retained some control over his room. In reaching this decision, the House of Lords emphasised that it was in the best interests of *both* the local authority and Mr Clarke for the hostel to operate in a harmonious and efficient manner. If so required, Westminster City Council needed to be able to move a resident to another room or require an occupier to comply with the directions of the warden. Yet, it is notable that the House of Lords did not address Mr Clarke's occupation of the property at 131-137 Cambridge Street in London adequately or at all. In particular, it is unclear if residents adhered to the warden's decisions, or moved rooms regularly.

Since the House of Lords was concerned with whether Mr Clarke had a secure tenancy under the Housing Act 1980, there was little consideration of how his eviction from the hostel would affect his dignity. Indeed, the judgment did not examine Mr Clarke's personal circumstances, his mental health, or the possible consequences of his eviction from the hostel. Returning to Radin's personhood theory, it could be argued that Lord Templemann's decision implied that Mr Clarke did not value his belongings as either personal property or fungible goods, having damaged the council's furniture and thrown away his own clothing. As such, Mr Clarke's conduct did not conform to our social norms of ownership, or even Radin's notion of how we deal with 'treasured property'.¹¹⁷ Rather, Mr Clarke's conduct demonstrates his 'otherness' in relation to our usual norms of property. To use Bauman's definition,¹¹⁸ he is acting in a manner that is diametrically opposed to the individual envisaged by Radin, who both treasures her personal property and considers it constitutive of her personality. For that reason, there is a risk that Radin's notion of personal property does not adequately protect the needs of the 'other' or those who are outside the perceived norms of society. By contrast, if Mr Clarke's rights are based on his dignity and ability to live a well-lived life, it is not necessary for a court to consider how he should use his possessions. The question is simply whether that property is necessary for flourishing and wellbeing.¹¹⁹ Of course, that is not to say that the concept of dignity is uncontested, but it does address this criticism of personhood theory, as well as those advanced by Barros¹²⁰ and Stern.¹²¹

Turning first to Barros, he claims that Radin's theory does not take account of the way that certain values of the home are moveable. As he explains, 'when a person moves, the zone of privacy, freedom, and autonomy also moves'.¹²² Barros further argues that an individual's connection to her home may transfer when she moves to a new property, particularly once she has personalised it with her own belongings. Applying this criticism, it could be argued that an individual's dignity derives from an individual's use of a property as 'home', rather than her relationship to one particular place. Here, it is perhaps pertinent to refer to Fox's 'meanings of home', being home as a financial investment, a physical structure, identity, territory and a social and cultural unit.¹²³ These 'meanings of home' may be understood in the context of progressive property, as they demonstrate why the home is necessary to uphold a person's dignity. So, for example, the home may provide an individual with privacy and shelter, or act as a space for social and cultural gatherings. In the same way, an individual has some control over who has access to her home. She may choose to exclude cold callers, door-to-door salesmen, or even her landlord

¹¹⁶ *Street v Mountford* [1985] UKHL 4; [1985] AC 809; [1985] 2 WLR 877.

¹¹⁷ M Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957.

¹¹⁸ Z Bauman, *Modernity and Ambivalence* (1st edn, Polity Press 1993).

¹¹⁹ Alexander and Peñalver (n 92); Alexander, Peñalver, Singer and Underkuffler (n 92); Alexander (n 92).

¹²⁰ DB Barros, 'Home as a Legal Concept' (2006) 46 Santa Clara Law Review 255.

¹²¹ SM Stern, 'Residential Protectionism and the Legal Mythology of Home' (2009) 107 Michigan Law Review 1093.

¹²² DB Barros, 'Home as a Legal Concept' (2006) 46 Santa Clara Law Review 255, 280.

¹²³ L Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29 Journal of Law and Society 580; L Fox, *Conceptualising Home: Theories, Laws and Policies* (1st edn, Hart Publishing 2007); L Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5 International Journal of Law in the Built Environment 156.

if she had no notice of the visit.¹²⁴ Taken together, these factors suggest that the home is property that contributes to human flourishing and therefore, it should be the subject of particular protection.

Stern has noted that there is some evidence that individuals adapt to new surroundings with relative ease,¹²⁵ commenting that:

Forced relocation carries more risk of negative mental health effects than voluntary relocation, but for most people the long-term effects are still benign.¹²⁶

From a dignity perspective, this can be explained by the move being an individual's choice. In other words, she has decided to leave one property to live in another: it is not a result of her circumstances, the landlord's unreasonable decision or repossession by the bank. In essence, she has maintained control over her surroundings and upheld her dignity in doing so. More recently, however, empirical research has demonstrated that eviction may be both symptomatic and causative of poverty.¹²⁷ If a person is forced to seek accommodation, that may prevent her from seeking employment or entering education. In effect, she is being denied the opportunity to live a well-lived life. For instance, in its report, *Poverty, Eviction and Forced Moves*,¹²⁸ the Joseph Rowntree Foundation found that tenants were struggling to find alternative accommodation after a forced move. In part, that was caused by their inability to pay agency fees or a deposit, as well as by landlords requiring references and a guarantor.¹²⁹ Stern further claims that social ties are more likely to be constitutive of personhood than property.¹³⁰ Here, it is perhaps pertinent to note that Alexander and Peñalver conceived that one of the four capabilities required to live a full life was sociality.¹³¹ Therefore, if a court is required to consider an individual's dignity, it may examine her relationships with others as part of that exercise. This can, however, create practical difficulties for the courts in interpreting an individual's human rights and this is addressed in further detail below.

III. PRACTICAL CONSIDERATIONS IN APPLYING ARTICLE 8 AND THE JUDGMENT IN MCDONALD

The Horizontal Nature of Article 8

Under the Human Rights Act 1998, the ECHR has direct effect against public authorities.¹³² So, for example, an individual may bring a claim against a public authority for breaching her rights

¹²⁴ *Goldmile Properties v Lechouritis* [2003] EWCA Civ 49, (2003) 15 EG 143 (CA).

¹²⁵ M Bolan, 'The Mobility Experience and Neighborhood Attachment 34 (1997) *Demography* 225, 226; P Steinglass and E Gerrity, 'Forced Displacement to a New Environment' in JD Noshpitz and RD Coddington (eds), *Stressors and the Adjustment Disorders* (John Wiley & Sons 1990).

¹²⁶ SM Stern, 'Residential Protectionism and the Legal Mythology of Home' (2009) 107 *Michigan Law Review* 1093, 1116.

¹²⁷ M Desmond, 'Eviction and the Reproduction of Urban Poverty' (2012) 118 *American Journal of Sociology* 88; M Desmond, *Evicted: Profit and Poverty in the Urban City* (Crown 2016)

¹²⁸ A Clarke, C Hamilton, M Jones and K Muir, *Poverty, Eviction and Forced Moves* (Joseph Rowntree Foundation 2017) < <https://www.jrf.org.uk/report/poverty-evictions-and-forced-moves> > accessed 1 May 2018.

¹²⁹ A Clarke, C Hamilton, M Jones and K Muir, *Poverty, Eviction and Forced Moves* (Joseph Rowntree Foundation 2017) < <https://www.jrf.org.uk/report/poverty-evictions-and-forced-moves> > accessed 1 May 2018, 36-38.

¹³⁰ SM Stern, 'Residential Protectionism and the Legal Mythology of Home' (2009) 107 *Michigan Law Review* 1093.

¹³¹ Alexander and Peñalver (n 92).

¹³² Human Rights Act 1998, s 6.

under the Convention,¹³³ or seek judicial relief from the court.¹³⁴ Yet, even though the Human Rights Act 1998 does not apply to private individuals, it can be described as having horizontal effect. This may arise from the court's duty to interpret legislation in accordance with the ECHR¹³⁵ or its status as a public authority.¹³⁶ In addition, there may be a duty of 'intermediate horizontality' on the state, requiring it to ensure that the rights of individuals are properly protected. As Gardbaum has argued,¹³⁷ horizontal effect is concerned with the application of the *existing law*. It does not provide a person with a distinct cause of action against a private individual. Nevertheless, the nature of horizontal effect under the Human Rights Act 1998 has been the subject of much debate,¹³⁸ particularly with regards to how the ECHR may apply to causes of action as between private individuals. For example, some academics, including Wade,¹³⁹ Morgan,¹⁴⁰ Beyleveld, and Pattinson,¹⁴¹ have argued for full horizontal effect, where the courts may develop new causes of action to protect an individual's Convention rights. By way of contrast, Williams and Phillipson¹⁴² have advanced a 'constitutional constraint' model, with the law being developed incrementally and in accordance with broader principles of governmentality.

Against that background, the Supreme Court has been criticised for failing to engage with the concept of horizontal effect in *McDonald*¹⁴³ adequately,¹⁴⁴ with Pascoe¹⁴⁵ referring to its absence from the judgment.¹⁴⁶ Nevertheless, in *McDonald*,¹⁴⁷ the court was mainly concerned with the interpretation of s 21(4) Housing Act 1988, as well as the horizontal effect arising from s 3 of the Human Rights Act 1998. To a degree, this aspect of the judgment was straightforward. As Lees pointed out,¹⁴⁸ the provisions in the Housing Act 1988 were mandatory and did not allow for any proportionality assessment of a tenant's eviction. As such, if the Supreme Court had accepted Miss McDonald's claim, it should have issued a declaration of incompatibility. As a matter of contrast, it would have been much more problematic for Miss McDonald's claim to be framed as a breach of the court's duty to act in a manner that was compatible with the European Convention on Human Rights under s 6 Human Rights Act 1998, as is evident from the Court of Appeal's decision.¹⁴⁹ In that respect, it has been argued that a court may be acting in breach of an individual's rights under Article 1, Protocol 1 when it makes an order, depriving her of property or requiring her to pay damages.¹⁵⁰ From this, it follows that for Miss McDonald's claim to succeed, she would need to demonstrate that any interference with her right to respect for the home arose, not as a matter of the landlord seeking possession of the property, but rather as a result of the court making the possession order. This ignores the court's role as 'merely the forum for the determination of

¹³³ Human Rights Act 1998, s 7.

¹³⁴ Human Rights Act 1998, s 8.

¹³⁵ Human Rights Act 1998, s 3.

¹³⁶ Human Rights Act 1998, s 6.

¹³⁷ S Gardbaum, 'Where The (State) Action Is' (2006) 4 International Journal of Constitutional Law 760, 764.

¹³⁸ G Phillipson, 'Clarity Postponed: Horizontal Effect after Campbell' in H Fenwick, G Phillipson and R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press 2007).

¹³⁹ HRW Wade, 'Horizons of Horizontality' (2000) 116 Law Quarterly Review 217.

¹⁴⁰ J Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) 62 Cambridge Law Journal 444.

¹⁴¹ D Beyleveld and SD Pattinson, 'Horizontal Applicability and Horizontal Effect' (2002) 118 Law Quarterly Review 623.

¹⁴² A Williamson and G Phillipson, 'Horizontal Effect and the Constitutional Constraint' (2011) 74 Modern Law Review 878.

¹⁴³ *McDonald v McDonald* (n 5).

¹⁴⁴ E Lees, 'Article 8, Proportionality and Horizontal Effect' (2017) 133 Law Quarterly Review 31.

¹⁴⁵ S Pascoe, 'The end of the road for human rights in private landowners' disputes?' [2017] Conveyancer and Property Lawyer 269.

¹⁴⁶ *McDonald v McDonald* (n 5).

¹⁴⁷ *McDonald v McDonald* (n 5).

¹⁴⁸ Lees (n 144).

¹⁴⁹ *McDonald v McDonald* [2014] EWCA Civ 1049.

¹⁵⁰ G Phillipson, 'The Human Rights Act 1998, Horizontal Effect and the Common Law: A Bang or a Whimper?' (1999) 62 Modern Law Review 824.

the civil right in dispute between the parties',¹⁵¹ as well as the question of causation. In other words, the court cannot make a possession order unless a private landlord has served the correct notice, complied with all of the necessary formalities and issued a possession claim.¹⁵² If it did so, the court would be acting outside its powers and any judgment could be challenged by way of judicial review.

Despite this, there is no legislation that provides a tenant with a specific remedy if a private landlord interferes with her right to respect for the home, or acts disproportionately in seeking eviction. For Howell,¹⁵³ this reasoning creates a degree of circularity. It further demonstrates that there is a 'liability gap' in English law with regards to the application of Article 8 in the private rented sector. Essentially, it means that a tenant has no effective remedy against either her private landlord or the state. All she is able to do is seek a declaration of incompatibility, claiming that the state has failed to protect her Article 8 rights adequately. There is no corresponding obligation on Parliament to address that incompatibility or amend the law in response. In these circumstances, it is only the concept of 'intermediate horizontality' that may provide a tenant with effective protection of her Article 8 rights on an eviction by a private landlord. However, this may depend on the nature of those rights, as well the practicalities of balancing them against the interests of a private landlord.

Private Landlords and Public Functions

Regardless of whether a tenant's interest in her home is based on dignity or Radin's notion of personal property, this article will contend that her rights will only be properly protected if there are corresponding duties of the landlord that can be enforced. This is necessary from both a theoretical perspective and for the purpose of ensuring that an individual's rights under Article 8 are effective, as was illustrated in *McDonald*.¹⁵⁴ To clarify, if a tenant is aware of what her landlord must do, she will be able to take steps to ensure that those rights are enforced. This may involve her reporting poor housing conditions to the local authority,¹⁵⁵ or bringing proceedings against her landlord in court. Aside from that, it will allow a tenant to plead a claim against a landlord with clarity and in a way that entitles her to an effective remedy. The importance of this clarity can be seen in both the overriding objective in the Civil Procedure Rules 1998,¹⁵⁶ as well as the Pre-Action Protocols for Mortgage Arrears, Housing Disrepair and Possession Claims by Social Landlords. Similarly, it is necessary for a landlord to be aware of her common law and statutory duties, both in relation to the property itself and her relationship with her tenants. Without this awareness, there is a real risk that a landlord may fail to comply with any regulation or respect her tenants' rights. In turn, that could affect the health of a tenant, as well as her general wellbeing and ontological security.

Turning to a landlord's duty, it should be noted that a private individual is not able to exercise the same coercive powers as the state.¹⁵⁷ She may have little information about her tenant's personal circumstances, and in any event, she is unable to obtain any records held by the relevant authorities about her tenant's health, income or household expenses without consent. In part, this may explain why a person's human rights are protected against the unlawful interference of the state, as opposed to the conduct of private individuals. Notwithstanding this, it has been argued that the distinction between the public sphere and private relationships is necessarily amorphous,

¹⁵¹ *London Borough of Harrow v Qazi* (n 23).

¹⁵² Housing Act 1988, s 21.

¹⁵³ J Howell, 'The Human Rights Act 1998: Land, Private Citizens and the Common Law' (2007) 123 *Law Quarterly Review* 613.

¹⁵⁴ *McDonald v McDonald* (n 5).

¹⁵⁵ For example, see the provisions on revenge eviction in Deregulation Act 2015, s 33.

¹⁵⁶ Civil Procedure Rules 1998, r 1.1.

¹⁵⁷ S Somers, 'Protecting Human Rights in Horizontal Relations by Tort Law or Elaborating Tort Law from a Human Rights Perspective' [2015] *European Human Rights Law Review* 149.

contrived, and outdated.¹⁵⁸ It fails to take account of the fact that a person may still have her human rights infringed by another individual, company, or business.¹⁵⁹ In the context of housing, for example, it could be argued that a tenant's eviction represents a breach of her Article 8 rights. She has been left without a home, and that could lead to real financial hardship.¹⁶⁰ Further, as Hunt has claimed,¹⁶¹ law is a construct of the state, which applies to relationships between private individuals. If it is accepted that the state is responsible for enacting these laws, it follows that the power of individuals, companies, and corporations derives from the action of government. For these reasons, it has been argued that it is artificial to limit claims under the Human Rights Act 1998 to relationships between citizens and the state.¹⁶²

Nevertheless, the definition of a public authority in the Human Rights Act 1998 is not concerned with the power that a company, charity or trust may exert over a private individual. Instead, the courts will examine whether a body is exercising a public function.¹⁶³ Applying this test in *YL v Birmingham City Council*,¹⁶⁴ Lord Bingham noted that this may depend on whether a company has a statutory function or is providing services that should be the responsibility of the state. In addition, the judgment considered the extent to which the state paying for a service meant that it is deemed to be a public function. In his minority opinion, Lord Bingham commented 'the greater the state's involvement in making payment for the function in question, the greater (other things being equal) is its assumption of responsibility'.¹⁶⁵ However, Lord Scott argued that in this case, the local authority had paid the fees of a private care home on 'ordinary commercial terms'.¹⁶⁶ In particular, the care home had not received a public subsidy and further, since the local authority was paying fees on a private basis, it had a remedy against the care home in private law. That placed the local authority in a position that was analogous to a private individual, who is paying for the fees using her own resources.

If the House of Lords had accepted that a private care home was providing a public function by providing accommodation to an elderly resident under a contract with the local authority, that could have had a significant impact on the application of the Human Rights Act 1998 to private individuals. More specifically, it could have led to tenants claiming that their landlords are carrying out a public function, where the rent is paid by them using Local Housing Allowance ('LHA'). To support their claims, tenants could argue that it is the local authority that is paying for their rent and further, it is accommodating them in the private rented sector as part of the duty that it owes to those who have been made unintentionally homeless.¹⁶⁷ However, if the courts had accepted that some private landlords were carrying out a public function, that may have created a system where there was unequal and uneven protection for tenants in the private rented sector. It would mean that individual cases would need to be reviewed to determine whether a landlord was acting in a public or private capacity, creating uncertainty for both landlord and tenant. In turn, that may lead to an increasing number of landlords refusing to let property to tenants claiming benefits, making it more difficult for the most vulnerable individuals to find decent accommodation. If it is accepted that a tenant's rights in her home should be based on values of human dignity, it follows that this position is unsustainable. In effect, it means that a tenant's rights under Article 8 are

¹⁵⁸ D Kennedy, 'The Stages of Decline of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 149.

¹⁵⁹ S Somers, 'Protecting Human Rights in Horizontal Relations by Tort Law or Elaborating Tort Law from a Human Rights Perspective' [2015] *European Human Rights Law Review* 149.

¹⁶⁰ A Clarke, C Hamilton, M Jones and K Muir, *Poverty, Eviction and Forced Moves* (Joseph Rowntree Foundation 2017) < <https://www.jrf.org.uk/report/poverty-evictions-and-forced-moves> > accessed 1 May 2018.

¹⁶¹ M Hunt, 'The "Horizontal Effect" of the Human Rights Act 1998' [1998] *Public Law* 423.

¹⁶² S Nield, 'Article 8 Respect for the Home: A Human Property Right?' (2013) 24 *Kings Law Journal* 147.

¹⁶³ *Aston Cantlow v Wallbank* [2003] UKHL 37; *R (Weaver) v London & Quadrant Housing Trust* [2008] EWHC 1377 (Admin).

¹⁶⁴ *YL v Birmingham City Council* [2007] UKHL 27.

¹⁶⁵ *YL v Birmingham City Council* [2007] UKHL 27 [10].

¹⁶⁶ *YL v Birmingham City Council* [2007] UKHL 27 [27].

¹⁶⁷ Housing Act 1996, ss 148-149.

dependent on both the nature of her landlord¹⁶⁸ and her relationship with the state. Taking these factors into consideration, it is evident that Article 8 does not adequately protect the rights of all tenants. That can only be addressed by the introduction of domestic legislation that focuses on upholding an individual's dignity through the rights she has in her home.

Defining a Tenant's Rights Under Article 8

Taking this into account, it should be noted that there are difficulties in ascertaining the nature of an Article 8 right and, in turn, that has had an effect on determining any correlative duties that may be imposed on landlords or the state. Firstly, it is unclear what legal effect should be afforded to the words 'respect' and 'home' in Article 8. By way of example, does a right to 'respect' for the home provide an occupier with the opportunity to challenge her eviction, or alternatively impose a requirement that she should be entitled to an effective remedy for any breach? Who has standing to bring a claim under Article 8 and on what basis? To an extent, the jurisprudence may assist in answering those questions: an individual's rights under Article 8 are not based on whether she has an interest in the property through possession, use or control, but rather her relationship with the land.¹⁶⁹ In particular, there is no requirement for her to hold an estate in land¹⁷⁰ and it is even possible for a claim to be made out by a trespasser.¹⁷¹

Moreover, Article 8 is defined by the circumstances in which it is engaged, rather than by the nature of the right itself.¹⁷² Using England and Wales as an example, it has been invoked in challenges to the bedroom tax,¹⁷³ as well as cases where a canal boat was removed from the waterways¹⁷⁴ and long leaseholders sought to challenge a compulsory purchase order.¹⁷⁵ Even so, this is still problematic. Simply put, it means that Article 8 cannot easily be analysed in the context of other property rights in the 'bundle of sticks' metaphor,¹⁷⁶ such as the right to use, the right to charge, or the right to possess. It is a right that is associated with dignity,¹⁷⁷ as well as values such as wellbeing and freedom that are constitutive of ourselves as individuals.¹⁷⁸ As such, it follows that it falls outside the *numerus clausus* principle.¹⁷⁹ Consequently, there is uncertainty as to how it may affect the rights of third parties, strangers, or even those with a direct interest in the property. For instance, in *McDonald*¹⁸⁰ there was a lack of clarity as to the remedy that was sought. More specifically, there was no indication in the judgment of whether Miss McDonald was simply seeking for possession of her home to be deferred, or alternatively, if she was arguing that Capital Homes should not be entitled to sell the property at all. In turn, that created doubt over the duty that Capital Homes owed Miss McDonald, as well as the conduct that was required for it to comply

¹⁶⁸ *Manchester City Council v Pinnock* (n 1).

¹⁶⁹ *Gillow and Gillow v United Kingdom* (n 94).

¹⁷⁰ Law of Property Act 1925, s 1.

¹⁷¹ *Malik v Fassenfelt* [2013] EWCA Civ 798; *R (Plant) v Somerset CC and Taunton Deane Borough Council* [2016] EWHC 1245 (Admin); [2016] HLR 24, 26 May 2016.

¹⁷² *Nield* (n 162).

¹⁷³ *R (on the Application of Cotton) v Secretary of State for Work and Pensions & Ors* [2014] EWHC 3437 (Admin).

¹⁷⁴ *Jones v Canal & River Trust* [2017] EWCA Civ 175.

¹⁷⁵ L Coffey, *CPO Report to the Secretary of State for Communities and Local Government: Application for the Confirmation of the London Borough of Southwark (Aylesbury 1B-1C)*, 29 January 2016, <<https://southwarknotes.files.wordpress.com/2009/12/aylesbury-cpo-inspectors-report.pdf>> accessed on 20 April 2017.

¹⁷⁶ *United States v Craft* (00-1831) 535 U.S. 274 (2002) 233 F.3d 358; SR Munzer, *A Theory of Property* (1st edn, Cambridge University Press 1990).

¹⁷⁷ C McCrudden, 'Human Dignity and the Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655.

¹⁷⁸ M Freeman, 'The Philosophical Foundations of Human Rights' (1994) 16 *Human Rights Quarterly* 491.

¹⁷⁹ S Douglas and B McFarlane, 'Defining Property Rights' in JE Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (1st edn, Oxford University Press 2013).

¹⁸⁰ *McDonald v McDonald* (n 5).

with Article 8. In these circumstances, even if Capital Homes wished to uphold Miss McDonald's right to respect for the home, it would be unable to do so.

Aside from that, Article 8 differs from some proprietary rights in the sense that it is concerned with one particular type of property, being a person's home. For the ECtHR, 'home' is a place where an individual has 'sufficient and continuing links'.¹⁸¹ According to the jurisprudence, it is still possible for a property to be 'home' if an individual has let it to tenants¹⁸² or has been forcibly dispossessed from the land.¹⁸³ It has been found to include a caravan,¹⁸⁴ business premises¹⁸⁵ and may even apply in circumstances where the occupier is not an owner or a tenant.¹⁸⁶ Notably, in the context of English law, it has been pleaded widely to include squatters,¹⁸⁷ as well as those living at a protest camp.¹⁸⁸ From a practical perspective, this definition is necessarily wide: it protects individuals with different interests in land, where their continued occupation may be under threat. As a result, it is often uncontroversial when Article 8 is engaged. Take residential landlord and tenant law as an example, where the purpose of a lease is to provide the tenant with accommodation to use as a home. Nevertheless, with this definition of 'home', there is a risk that an owner may have little control over whether her land becomes the subject of an occupier's claim under Article 8. As such, she may be unable to regulate her behaviour to take account of those interests. In that regard, it is perhaps pertinent to note that our use of land is becoming increasingly complex and fragmented. For instance, can we say that Article 8 now protects the interests of a property guardian,¹⁸⁹ or someone occupying a property on a long-term basis using Airbnb?¹⁹⁰ Buyse has argued that when deciding whether a property is 'home', the courts will consider if an individual has a reasonable expectation of privacy.¹⁹¹ Nonetheless, it remains to be seen how this test would be applied in the context of today's housing crisis or the sharing economy.

Besides the difficulties of defining 'home', it should be noted that the scope of a tenant's rights may depend on a state's implementation of the ECHR. According to the doctrine of the margin of appreciation, a state has a limited ability to derogate from its Convention obligations. As Allen has noted,¹⁹² this doctrine recognises that there are social, economic, and political differences between states that may affect how Convention rights are realised in practice. In this context, it is perhaps pertinent to note that human rights are often understood as being conditional and contingent on the society in which they operate.¹⁹³ With regards to Article 8, the notion of 'respect' can be difficult to define and there is therefore usually a wide margin of appreciation for states in implementing any rules.¹⁹⁴ More specifically, Article 8 is not a right to housing that imposes a positive obligation on states to provide citizens with a place to live,¹⁹⁵ in contrast to other

¹⁸¹ *Gillow and Gillow v United Kingdom* (n 94).

¹⁸² *ibid.*

¹⁸³ *Zavou v Turkey* App no 16654/90 (ECHR, 26 September 2002).

¹⁸⁴ *Buckley v United Kingdom* (1997) 23 EHRR 101.

¹⁸⁵ *Niemetž v Germany* (1992) 16 EHRR 97.

¹⁸⁶ *Menteş and Others v Turkey* App no 58/1996/677/867 (ECHR, 28 November 1997).

¹⁸⁷ *Malik v Fassenfelt* (n 88).

¹⁸⁸ *The Mayor Commonalty and Citizens of London v Samede (St Paul's Churchyard Camp Representative) & Ors* [2012] EWCA Civ 160.

¹⁸⁹ CM Hunter and G Peaker, 'Who Guards the Guardians?' (2013) 16 *Journal of Housing Law* 13.

¹⁹⁰ CM Hunter, A Brookes, G Peaker, 'Airbnb - Issues for Housing Lawyers' (2017) 20 *Journal of Housing Law* 39.

¹⁹¹ AC Buyse 'Strings Attached: The Concept of 'Home' in the Case Law of the European Court of Human Rights' (2006) 3 *European Human Rights Law Review* 294.

¹⁹² T Allen, *Property and the Human Rights Act 1998* (Hart Publishing 2005).

¹⁹³ R Dworkin, *Taking Rights Seriously* (Duckworth, 1978); N Blomley, 'Landscapes of Property' (1998) 32 *Law and Society Review* 567; J Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013).

¹⁹⁴ U Killkelly, *The Right to Respect for Private and Family Life: A Guide to the Implementation of Article 8 of the European Convention on Human Rights* (2nd edn, Council of Europe 2003) <<https://rm.coe.int/168007ff47>> accessed 10 November 2017. See also the judgment in *DiPalma v United Kingdom* (1986) 10 EHRR 149.

¹⁹⁵ J Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart Publishing 2013).

jurisdictions such as India¹⁹⁶ and South Africa.¹⁹⁷ Of course, it should be noted that there is necessarily a connection between human dignity and respect. After all, if an individual is treated without respect, that means that she has been subject to conduct that undermines her dignity. Likewise, if the conduct towards an individual lacks respect, this may demonstrate that her dignity has been infringed. In the context of housing, an eviction represents a serious interference with an individual's rights under Article 8, entitling an occupier to have the proportionality of this measure determined by an independent tribunal.¹⁹⁸ As such, the margin of appreciation in this area is necessarily narrow, but it still exists in the application of any proportionality test. Nonetheless, it would be within the margin of appreciation for one state to find that an eviction is justified, while another holds it to be unlawful.

Arguably, this uncertainty over the ambit of tenants' rights and a landlord's duty has implications for the rule of law. Here, it is perhaps helpful to refer to Fuller's eight precepts that governed law-making in *The Morality of Law*.¹⁹⁹ According to Fuller, any law should be: (i) general; (ii) public; (iii) prospective; (iv) clear and understandable; (v) not contradictory; (vi) capable of compliance; (vii) stable and not subject to unnecessary change; and (viii) adhered to by the state. In support of his argument, Fuller employed the use of an allegorical king, Rex. Throughout his reign, Rex misused his power with the effect that his subjects did not know what to do or how they should regulate their conduct. In turn, that led to picketing, protests, and disillusionment, while the first act of his successor was to place government in the hands of psychiatrists and experts in public relations. Using Fuller's precepts, it follows that the lack of clarity surrounding Article 8 is problematic, particularly as it raises questions as to whether the law is capable of compliance, as well as being sufficiently public, prospective and comprehensible.

Although Fuller's theory has been subject to much academic criticism,²⁰⁰ it is widely accepted that the eight precepts remain useful criteria for assessing legality, be it from a perspective of efficiency or morality.²⁰¹ In that regard, it has been argued that there is a moral value in adhering to Fuller's precepts because they are necessary for upholding human dignity. Notably, Waldron has claimed that if a government decides to rule through law, it does so on the understanding that its subjects are capable of regulating their behaviour in accordance with legal rules and society's norms.²⁰² As Raz explained 'respecting human dignity entails treating human beings as capable of plotting and planning their future'.²⁰³ At this juncture, it is useful to remember that this article has contended that a tenant's rights under Article 8 may be based on the importance of the home in upholding human dignity. Even so, this creates a conundrum. If a tenant's rights under Article 8 are not protected, that may have a significant effect on her dignity or ability to function as a human being. Yet at the same time, if a landlord cannot ascertain her duties to a tenant, she will be unable to control her behaviour to comply with the law. That too may represent a failure to uphold a landlord's dignity. Therefore, this article will suggest that the only way that both a landlord and tenant's rights can be protected is through the use of legislation, which strikes a proper balance between the interests of the two individuals.

¹⁹⁶ *Olga Tellis v Bombay Municipal Corporation* [1985] 2 Supp SCR 51.

¹⁹⁷ *Government of the Republic of South Africa v Grootboom* (CCT11/00 [2000] ZACC 19).

¹⁹⁸ *McCann v United Kingdom* [1995] ECHR 31; *Kay v United Kingdom* [2010] ECHR 1322.

¹⁹⁹ LL Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969).

²⁰⁰ HLA Hart, 'Book Review: *The Morality of Law* by LL Fuller' (1965) 78 *Harvard Law Review* 128; R Dworkin, 'Philosophy, Morality and Law – Observations Prompted by Professor Fuller's Novel Claim' (1965) 113 *University of Pennsylvania Law Review* 668.

²⁰¹ NJ McBride and S Steel, *Great Debates in Jurisprudence* (Palgrave MacMillan 2014).

²⁰² J Waldron, 'How Law Protects Dignity' (2012) 71 *Cambridge Law Journal* 200.

²⁰³ J Raz, *The Authority of Law* (2nd edn, Oxford University Press 2009).

Balancing the Rights of Landlord and Tenant

If the Supreme Court had accepted Miss McDonald's claim, it may have read s 21(4) Housing Act 1988 in such a way that it was compliant with the provisions of the ECHR²⁰⁴. That could have involved the implication of a proportionality test into summary possession proceedings against a private landlord, requiring judges to consider whether a tenant's eviction was a proportionate means of achieving a legitimate aim.²⁰⁵ With such a test, the courts would need to address the factual circumstances that should be taken into account when deciding whether a tenant's eviction is proportionate, as well as any remedies that may be available. Further, it would need to consider whether it had struck a fair balance between the respective Convention rights of both landlord and tenant. Therefore, this article will review both aspects of a proportionality test as it may apply to possession proceedings in the private rented sector.

Turning to the factual circumstances of an eviction, the Supreme Court held in *Pinnock*²⁰⁶ that with social housing, there is a rebuttable presumption that the local authority or housing association has a justified reason for seeking possession of a property, being the management of its housing stock. In comparison, a private landlord may exercise her right to evict a tenant for a wider range of reasons. She may be seeking to realise the capital in the property, use it for future rentals, or as a home. Alternatively, there may have been a disagreement between the landlord and tenant over rent, arrears, or the upkeep of the property. Taking that into account, could any of these considerations be a legitimate reason for a private landlord to evict a tenant from her home? In this context, it should be noted that there is no requirement on a private landlord to provide a tenant with a reason for her eviction or demonstrate that she was at fault.²⁰⁷ Consequently, it can be difficult to ascertain why a tenant has been evicted, both for the tenant herself and the court.²⁰⁸ After all, if a tenant is not given a reason for her eviction, she may struggle to demonstrate that the landlord is acting disproportionately or for an improper purpose. That in itself raises a question as to whether the accelerated possession procedure is sufficient to protect a tenant's dignity.

Further, it should be noted that the courts tend to carry out a balancing exercise in the context of existing legislation²⁰⁹ or causes of action.²¹⁰ With claims under Article 8, there is little judicial or statutory guidance as to the relevant factors that the courts should take into account in determining a case, or the weight that they should be given. So, for example, it is unclear how much emphasis a court should place on a tenant's mental health issues,²¹¹ the financial interests of a third-party lender,²¹² or any delay in seeking possession. More specifically, an eviction may be proportionate if it is delayed for a certain number of weeks, as opposed to being carried out at short notice. As Nield has argued,²¹³ this creates difficulties for the uniform application of the law. Without further guidance, there is a risk that certain courts or judges could be perceived as being 'landlord-friendly' or 'tenant-friendly', meaning there is a 'postcode lottery' for litigants in the application of the proportionality test under Article 8.

Despite these difficulties in determining a landlord's reason for a tenant's eviction, the circumstances in which an Article 8 claim may be made out against a private landlord are likely to

²⁰⁴ Human Rights Act 1998, s 3.

²⁰⁵ *Sporrong and Lönnroth v Sweden* [1983] 5 EHRR 35; *De Frietas v The Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing* [1998] UKPC 30.

²⁰⁶ *Manchester City Council v Pinnock* (n 1).

²⁰⁷ Housing Act 1988, s 21.

²⁰⁸ A Jackson, 'Regulating Rachmanism? The Criminalisation of Landlords in England and Wales' in J Sidoli, M Vols and M Kiehl (eds) *Regulating the City: Contemporary Urban Housing Law* (Eleven Publishing 2016)

²⁰⁹ Trusts of Land and Appointment of Trustees Act 1996, s 15.

²¹⁰ See, for example, the development of the tort of breach of confidence in *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 and *Douglas v Hello! Ltd* [2007] UKHL 21.

²¹¹ *Southend-on-Sea Borough Council v Armour* [2014] EWCA Civ 231.

²¹² *McDonald v McDonald* (n 5).

²¹³ Nield (n 162).

be limited and exceptional in nature. In *McDonald*,²¹⁴ the Supreme Court held that Capital Homes was acting for a legitimate purpose in realising its security in the property. According to Lord Neuberger and Lady Hale, Miss McDonald would only have been able to remain in the property if she could demonstrate that her eviction was disproportionate, *and* Capital Homes would be repaid all of the outstanding sums under the mortgage. Put differently, Miss McDonald's occupation of the property at 25 Broadway Close in Witney was always dependent on her ability to pay rent, rather than her attachment to her home or any objective of human dignity. Furthermore, with social housing, most Article 8 claims have only succeeded if a tenant has been able to demonstrate that her landlord's conduct is *Wednesbury*²¹⁵ unreasonable.²¹⁶

By way of contrast, there has been little academic consideration as to how the courts will assess a private landlord's decision to evict in any proportionality assessment. This article will contend that this matter is best addressed by legislation, but in any event, it must follow that an eviction is more likely to be disproportionate if it is for an arbitrary or vexatious reason. Take the example of a landlord who issued possession proceedings against a tenant for wearing a green hat every day.²¹⁷ That cannot be regarded as being discriminatory under the Equality Act 2010. Rather it is an arbitrary reason based on a landlord's personal prejudice, which may represent a breach of the tenant's right to freedom of expression under Article 10. So, to draw out a principle for a proportionality assessment for the private rented sector: a court is more likely to find that a tenant's eviction was disproportionate, if other Convention rights have been infringed,²¹⁸ or the conduct is contrary to equality legislation.²¹⁹ Further, it could be argued that this conduct is contrary to a tenant's dignity. By way of explanation, if a tenant was being evicted by the landlord as a result of a personal feud, that may mean her eviction is disproportionate given the harm that she would suffer. By way of contrast, if a tenant is evicted because the landlord is planning to use the property as a home, that may be justifiable. Put differently, an eviction may be disproportionate if it is for a reason that significantly undermines a tenant's dignity.

Usually, a tenant will claim that her eviction is a breach of Article 8, while a landlord may rely on her rights under Article 1, Protocol 1. As Lord Neuberger and Lady Hale explained:

a private sector landlord can claim that any delay in giving him possession of the property to which he is entitled would be an interference with his rights under Article 1, Protocol 1 of the Convention.²²⁰

Notwithstanding this, that is not an exhaustive list of all the Convention rights that may be relevant to a proportionality test in a possession claim. In certain circumstances, a tenant may allege that her eviction is contrary to Article 10 or Article 14, breaching her right to freedom of expression²²¹ or being discriminatory.²²² More recently, Pascoe²²³ has claimed that eviction may represent a breach of a tenant's potential Article 1, Protocol rights, using the claim in *Pye v United*

²¹⁴ *McDonald v McDonald* (n 5).

²¹⁵ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (n 28).

²¹⁶ I Loveland, 'Public Law and Article 8 Defences in Possession Proceedings' [2014] *Conveyancer and Property Lawyer* 262.

²¹⁷ A further example of arbitrary or unreasonable conduct is Fergus Wilson's decision not to let any of his rental properties to plumbers. See L Wilgrass, 'Britain's biggest landlord has banned 'battered wives' and plumbers from his properties' *The Telegraph* (London, 6 January 2017) <<http://www.telegraph.co.uk/news/2017/01/06/britains-biggest-landlord-has-banned-battered-wives-plumbers/>> accessed 20 November 2017.

²¹⁸ *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

²¹⁹ *Kurshid Mustafa v Sweden* [2011] ECHR 1277.

²²⁰ *McDonald v McDonald* (n 5).

²²¹ *Kurshid Mustafa v Sweden* (n 145).

²²² *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15.

²²³ S Pascoe, 'The end of the road for human rights in private landowners' disputes?' [2017] *Conveyancer and Property Lawyer* 269.

*Kingdom*²²⁴ as an analogy. Here, it is difficult to predict how a court would protect a tenant's Article 1, Protocol 1 rights under a periodic tenancy, where a new tenancy is created at the start of each period.²²⁵ Would these rights be deemed to be ongoing from the date on which the tenant started to occupy the property, or alternatively, would a court find that each period both created and extinguished Article 8 rights for the tenant?

Outside of Article 1, Protocol 1, there has been little analysis of a landlord's human rights. Nevertheless, a landlord may be able to rely on Article 8 if she can demonstrate that like the tenant, she has 'sufficient and continuing links' to the property.²²⁶ For example, in *Gillow v United Kingdom*²²⁷, the ECtHR accepted that Article 8 was engaged in circumstances where the owners had let the property to tenants for a number of years. The property was deemed to be the couple's home as it contained their furniture and they intended to return on Mr Gillow's retirement. More recently, the ECtHR held that it was possible for an individual to have Article 8 rights in respect of two properties,²²⁸ while in *EP v Italy*,²²⁹ the appellant landlord claimed that his Article 8 rights had been breached by the state's failure to evict his tenant in a timely manner. As Lees has noted,²³⁰ there is no hierarchy of Convention rights. As such, if the courts were asked to balance the competing Article 8 rights of a landlord and a tenant, there is a real risk that those interests may be diminished. In this case, the tenant's dignity in remaining in her home would be at issue and further, it would need to be balanced against the landlord's rights in using the property freely. Any judgment may simply be based on existing case law or the legislative balance struck by Parliament,²³¹ with the landlord's ownership of the property taking priority over the tenant's interests. Likewise, there is a lack of clarity as to how the courts would strike this balance in practice. Would they examine an individual's attachment to the property, or look at the parties' respective concerns?

Once the court has considered the Convention rights that may be relevant to a proportionality assessment of a tenant's eviction, it will then need to address whether or not they are engaged. Occasionally, this process may be straightforward. For Article 1, Protocol 1, however, the analysis is much more complicated. As Goymour has argued,²³² there is a 'inherent limitation' in Article 1, Protocol 1 in that some property rights fall outside its scope. This is because Article 1, Protocol 1 does not apply if an individual is deprived of her possessions in the public interest or under the conditions provided for by domestic or international law. Generally, this means that there is no breach of Article 1, Protocol 1 where an interference with an individual's possessions involves an existing right or claim affecting land. After all, the individual took possession of the property, knowing her right was subject to those legal provisions. So, to use an example from *Aston Cantlow v Wallbank*,²³³ there was no breach of Article 1, Protocol 1 in respect of the Wallbanks' use of land: it had *always* been subject to a liability to repair the chancel in the local parish church. Had the state introduced a *new* obligation that required the Wallbanks to contribute to the repair of the chancel, Article 1, Protocol would have been engaged. Instead, Article 1, Protocol 1 is only engaged:

²²⁴ *Pye v United Kingdom* (2008) 46 EHRR 45

²²⁵ Housing Act 1988, s 5. Further, see the Court of Appeal's analysis of periodic tenancies in *Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669.

²²⁶ *Gillow and Gillow v United Kingdom* (n 94).

²²⁷ *Gillow and Gillow v United Kingdom* (n 94).

²²⁸ *Demades v Turkey*, Application no. 16219/90 (Fourth Section, 22 April 2008).

²²⁹ *E.P. v Italy*, Application no. 34558/97 (Second Section, 16 November 1997).

²³⁰ Lees (n 144).

²³¹ *In the Matter of W (A Child)* [2017] EWHC 829 (Fam).

²³² A Goymour, 'Proprietary claims and human rights – a "reservoir of entitlement"?' (2006) 65 Cambridge Law Journal 696.

²³³ *Aston Cantlow v Wallbank* [2003] UKHL 37.

where there is a shift in the beneficial entitlement away from the person alleging the P1-1 infringement; it has no part to play where someone's property rights are inherently delimited from the start. P1-1 protects existing entitlements; it does not confer new ones.²³⁴

To support this argument, Goymour gives the example of a tenant whose lease has been terminated.²³⁵ She claims that while the tenant may have a complaint under Article 8 or the provisions of the domestic law, she cannot rely on Article 1, Protocol 1 to challenge her eviction. There has been no shift in the proprietary entitlement, since the lease has expired. Meanwhile, Lees has developed Goymour's reasoning, claiming that a landlord will not usually be entitled to rely on her rights under Article 1, Protocol 1.²³⁶ A lease will always be granted subject to a tenant's Article 8 rights. Assuming that Lees' argument is correct²³⁷ and relying on the judgments in *Pinnock*²³⁸ and *Powell*,²³⁹ it is likely that a tenant's Article 8 rights will be limited to the ability to have the proportionality of any eviction determined by an independent tribunal. Where the proportionality of tenant's eviction is determined within a reasonable timescale, there will be no breach of a landlord's Article 1, Protocol 1 rights. The eviction has taken place in accordance with the provisions of law and that may include an assessment of the proportionality of the measure. On the other hand, if there is a delay in ownership reverting to the landlord, this might constitute deprivation or control of use,²⁴⁰ as well as a breach of Article 1, Protocol 1.²⁴¹ In that regard, it is notable that Lord Neuberger claimed that it is the delay in recovering possession that may give rise to a landlord's Article 1, Protocol 1 claim,²⁴² rather than the fact of a tenant's occupation or the court's assessment of the proportionality of the eviction.

CONCLUDING REMARKS

The judgment in *McDonald*²⁴³ has been criticised because of its perceived unfairness in reinforcing the anomaly that social renters have more rights than private tenants under Article 8.²⁴⁴ Indeed, even in cases where a social renter was occupying her home under an assured shorthold tenancy agreement,²⁴⁵ the courts have found that Article 8 was engaged, and the tenant had a right to challenge the proportionality of her eviction. However, using the language of Hohfeld,²⁴⁶ a tenant's Article 8 rights are defined by the nature and characteristics of her landlord, as well as the correlative duties that she is owed. They do not arise as a consequence of the protection that the

²³⁴ A Goymour, 'Property and Housing' in D Hoffmann (ed) *The Impact of the Human Rights Act 1998 in Private Law in England and Wales* (Cambridge University Press 2009).

²³⁵ A Goymour, 'Proprietary claims and human rights – a "reservoir of entitlement"?' (2006) 65 Cambridge Law Journal 696.

²³⁶ Lees (n 144).

²³⁷ *ibid.*

²³⁸ *Manchester City Council v Pinnock* (n 1).

²³⁹ *London Borough of Hounslow v Powell* (n 17).

²⁴⁰ *Sporrong and Lönnroth v Sweden* (n 135).

²⁴¹ See, for example, *Amato Gauci v Malta*, Application no. 47045/06 (ECHR, 15 September 2009). GLH Griffiths, 'A Maltese Landmark? Human Rights, Security of Tenure and Rent Control' [2010] Conveyancer and Property Lawyer 488.

²⁴² *McDonald v McDonald* (n 5).

²⁴³ *McDonald v McDonald* (n 5).

²⁴⁴ S Nield, 'Article 8 Respect for the Home: A Human Property Right?' (2013) 24 Kings Law Journal 147.

²⁴⁵ *West Kent Housing Association v Haycraft* [2012] EWCA Civ 276; *The Riverside Group v Thomas* [2012] EWHC 169.

²⁴⁶ WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning' (1913) 23 Yale Law Journal 1.

state thinks should be afforded to a tenant, but rather they are determined by whether her landlord is a private individual or is exercising a public function.²⁴⁷ From the perspective of the landlord, this is a way of protecting her dignity. It means that she is not subject to any duties that are unreasonably burdensome, or with which she cannot comply. In that regard, it is perhaps pertinent to note that the original purpose of the ECHR was to protect individuals against the state, after the serious violations during World War Two. After all, the state is able to exercise powers that are not afforded to the largest corporations or the most influential individuals. It may coerce, violate or imprison citizens if it is in accordance with the law and there is a public interest in doing so.²⁴⁸ So, although there is inequality in the relationship between landlord and tenant, there remains a question as to whether that in itself is sufficient to impose the same duties on a private individual. In comparison with the state, a private landlord is likely to have little information on the vulnerability or personal circumstances of her tenant. That must be correct for the purpose of Article 10, Article 14 and other aspects of Article 8, but it does make it difficult (if not impossible) for a landlord to consider the reasonableness of an eviction without starting possession proceedings.

Nevertheless, by protecting a landlord's rights, the law has failed to address the dignity that a private tenant has in her home, or the role that it may play in ensuring her wellbeing. Further, for the reasons described in this article, it is not open to private tenants to use Article 8 to challenge a possession claim, and therefore, it follows that domestic housing legislation is required to safeguard their interests. This will provide certainty for both landlords and tenants. More specifically, it will allow a tenant to enforce her rights effectively and ensure that a landlord is able to regulate her behaviour accordingly. Legislation will also ensure that certain considerations are given sufficient weight in any assessment of the reasonableness or proportionality of an eviction, be it the vulnerability of the tenant, the level of rent arrears or the length of the tenancy. As Lord Hope explained in *Kay v London Borough of Lambeth*:

unless parameters and guidelines are set down, the judgment in each case will be a subjective one. Every solicitor who is asked to advise an occupier will have to consider whether it is arguable that the decision to seek eviction was not proportionate. If he decides to raise the issue, the court will have to examine the issue.²⁴⁹

If Lord Hope's argument is accepted, it follows that with legislation, there is more likely to be coherency and consistency in the application of the law, compared to a tenant's Article 8 rights being developed on a piecemeal basis through the case law. Moreover, although the concept of dignity remains contested, this should be the primary consideration for determining a landlord and a tenant's respective rights in relation to a rental property in any domestic legislation. In particular, it may provide a justification for allowing all tenants to challenge the reason for their eviction in court, regardless of whether their landlord is a private individual, housing association, or a local authority. Yet, in addition to this procedural protection, the concept of dignity implies that tenants should benefit from certain substantive rights. These may relate to the condition of the property²⁵⁰ or a tenant's ability to contest an order for possession. Of course, it could be said that these rights are too uncertain and undermine a landlord's interest in her property, but if the courts interpret the concept of dignity using a subjective-objective approach, that would ensure that a tenant's

²⁴⁷ *YL v Birmingham City Council* [2007] UKHL 27.

²⁴⁸ S Somers, 'Protecting Human Rights in Horizontal Relationships by Tort Law or Elaborating Tort Law from a Human Rights Perspective' [2015] *European Human Rights Law Review* 149.

²⁴⁹ *Kay v London Borough of Lambeth* [2006] 2 AC 465.

²⁵⁰ See, for example, s11 Landlord and Tenant Act 1985, as well as Homes (Fitness for Human Habitation and Liability for Housing Standards) Bill 2017-19.

wellbeing could be assessed according to a list of agreed criteria, as well as the personal difficulties that she is facing.

Needless to say, by introducing the judicial mechanism of declarations of incompatibility in the Human Rights Act 1998, Parliament itself has accepted that domestic law may be incompatible with the ECHR and that should be addressed through legislation. However, to date, the British Government has been reluctant to introduce legislation that significantly alters the relationship between landlords and tenants, or extends the ambit of the ECHR to the private rented sector. As the judgment in *McDonald*²⁵¹ is the subject of an ongoing appeal to the ECtHR it remains to be seen whether the law will be amended in response, or if objections to legal reform will continue to be raised.

²⁵¹ *McDonald v McDonald* (n 5).