Twenty years later – assessing the significance of the Human Rights Act 1998 to residential possession proceedings

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Abstract: This paper analyses the significance from several contextual perspectives of the higher courts' application of the provisions of the Human Rights Act 1998 to domestic housing law. The argument made is that a clear answer to that question is elusive; in part because doctrinal developments have been hesitant and incoherent, but also because we have little means to measure what effect doctrinal change has on the formulation and resolution of possession claims in county courts, where most such actions begin and end. A further evaluation difficulty arises because those doctrinal developments have emerged into a fast changing socio-economic context in which rented housing supply has become an increasingly private sector responsibility, presumptively ill-suited to regulation at judicial instigation by human rights norms.

Introduction

The enactment of the Human Rights Act 1998 provoked appreciable excitement among housing law commentators, who saw it (primarily through Article 8) as a means to remedy several perceived inadequacies in domestic law unlikely to be addressed directly by the Blair government through legislative initiatives.[1] Interest focused especially on the scope for increased judicial oversight of local authority management of non-secure tenancies granted to homeless persons under the Housing Act 1996[2] and of the use of 'mandatory' grounds of possession within the assured tenancy regime by housing associations and private sector landlords.[3]

As we approach the Act's twentieth birthday, it is perhaps appropriate to assess how well-founded that excitement has proved. This paper suggests the Act has created a fragmented housing law topography, whose complexities only become apparent when analytical questions are posed from several different contextual perspectives: (in no particular order of

[1] For example J. Alder (1999) 'Housing Law and the Human Rights Act 1998' *Journal of Housing Law* 67: J. Howell, "Land and Human Rights" [1999] *Conv.* 287: N. Madge (2001) 'Possession Proceedings and Human Rights' *Journal of Housing Law* 3.

[2] Secure tenancies make courts the primary decisionmaker on all questions of fact and law in possession proceedings. In most cases, a court determines if it is 'reasonable' to make a possession order and if so on what terms, a jurisdiction which satisfies even the most extravagant readings of Article 8; (see now Housing Act 1983 ss.84-85)

[3] Assured tenancies broadly afford courts the same jurisdiction as secure tenancies (Housing Act 1988 s.9), but two notable exceptions arose in respect of rent arrears when over two months arrears were owed ('ground 8 cases') and a ground of possession ('s.21 proceedings') in which landlords need not offer reasons for seeking possession. In both circumstances the court was obliged to grant a possession order.

importance) the historical reluctance of public lawyers to regard housing law as a proper object of attention; the potential and actual disjunctions between 'law' as doctrinal assertions propounded in statutory provisions or the judgments of the higher courts, and 'law' as the informant or determinant of the content and conduct of relationships between occupants and 'owners' of rented housing;[4] of the failure since 1980 of our various housing 'markets' to match growing demand with a commensurate supply of affordable accommodation; and - in the same period - the preference of all governments to replace local authority 'affordable' housing with tenancies granted by housing associations or private sector landlords.

Back to the future – subjecting local government housing management to orthodox judicial review principles….

Viewed from 2017, both administrative lawyers and housing lawyers would regard with incredulity the House of Lords' judgment in *Shelley v London County Council*[5] (decided contemporaneously with the Court of Appeal's decision in *Wednesbury*).[6] In *Shelley* the court held, upholding the Court of Appeal,[7] that a local authority tenancy was determinable by the council simply by issuing a valid notice to quit, without the need to offer any reason for issuing the notice nor giving the tenant any opportunity to be heard: councils could: "pick and choose their tenants at will".[8]

The case was decided on the question of whether council tenants could be brought within the scope of the Rent Acts. But, that question being answered 'No' – it seemingly did not occur to the parties, their counsel, or either court that the case also raised administrative law questions.

Shelley might be explained as evincing a judicial presumption that executive behaviour was better controlled through political mechanisms of electoral accountability[9] than argument in court; as an early example of green light administrative law theory played out in doctrinal practice.[10] This is nicely illustrated by Lord Greene MR's leading judgment in the Court of Appeal:[11]

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[4] Such impact analysis in the context of housing management in Britain – prompted largely by the seminal work of Michael Lipsky in *Street Level Bureaucracy* (1980) - has now attracted a substantial body of academic investigation from socio-legal scholars. Some such works are discussed below.

[5] [1949] A.C. 56.

[6] *Associated Provincial Pictures House Ltd v Wednesbury Corporation* [1948] 1 K.B. 229. *Wednesbury* was handed down on 10.11.1947: judgment in *Shelley* in the Court of Appeal on 18.11.1947; in the Lords on 09.11.1948.

[7] [1948] 1 K.B. 274.

[8] [1949] A.C. 56 at 66 per Lord Porter.

[9] "[L] local authorities who have wider duties laid on them may well be expected to exercise their powers with discretion" Ibid. Councils were then more numerous (and so smaller) and (thus) presumptively more amenable to voter control than since the radical reorganisation of local government in the 1970s. See Hampson W. (1991 2nd ed) *Local Government and Urban Politics* ch. 2; H. Elcock (1986 2nd ed) *Principles of Local Government* chs 1-2.

[10] See C. Harlow and R. Rawlings (1984) *Law and Administration* ch.2: H. Jones (1958) 'The Welfare State and the Rule of Law' *Columbia LR* 143.

[11] [1948] 1 K.B. 274 at 283.

> Local authorities…stand in a totally different position [to private sector landlords]. They are, socially, much more responsible landlords. They are subject to criticism by members of their own body, and by ratepayers…. They may be trusted, one would have thought, to exercise their powers in a public-spirited and fair way in the general public interest….

A more amorphous rationale may be that the Court of Appeal and the House of Lords saw council tenants as beneficiaries of public largesse, not grantees of legal rights in any then-recognised sense, and so undeserving of judicial protection. That conclusion is perhaps hard to resist when one recalls that just a week before delivering judgment in *Shelley* Lord Greene MR handed down his seminal decision in *Wednesbury*, in which the claimant was a private company looking to make money rather than a council tenant seeking to stay in her home. Lord Greene made no reference in *Shelley* to *Wednesbury*, and neither did the House of Lords.

Both rationales sat increasingly uneasily with emergent 1960s notions that many aspects of welfare state provision ought to be viewed as a species of legal right which required that administrative decisionmaking be overseen by at least a diluted version the rule of law.[12] But it was not until the 1970s that *Shelley* was revisited. Two Court of Appeal decisions, *Bristol DC v Clark* [13] and *Cannock Chase DC v Kelly,*[14] pulled council house management decisions into the *Wednesbury* mainstream of being subject to ordinary administrative law principles, and – innovatively – held that such matters could be pleaded as a defence in county court possession proceedings rather than pursued only through judicial review per Order 53 RSC.

Kelly is an intriguing decision. The Court of Appeal was presumptively bound by *Shelley*, but ignored the judgment and instead classified *Wednesbury* as the "leading authority"[15] and applied *Wednesbury* accordingly. The *Kelly* court overlooked the inconvenient point that Lord Greene MR had authored both judgments contemporaneously, and made no mention of *Wednesbury* principles in *Shelley.*

There is no allusion in *Kelly* or *Clark* to the political fact that the Callaghan Labour government was then promoting the idea of secure tenancies. Nor does either case acknowledge the then huge quantitative social significance of local authority housing. Of the 20,600,000 households in Britain in 1978, some 6,530,000 (30%) lived in council tenancies.[16] One might surmise that the *Shelley* principle that some twenty million plus people occupied their homes on the basis of the immediately revocable whim of council landlords was by then simply perceived as outlandish.

The potential significance of *Clark* and *Kelly* was rendered largely redundant by the Housing Act 1980 'secure tenancy'. This is perhaps explicable primarily because the secure tenancy –

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[12] Cf. Charles Reich's 'new property' articles in the *Yale Law Journal*; (1963) 'Midnight Welfare Searches and the Social Security Act' *Yale LJ* 1346; (1964) 'The New Property' *Yale LJ* 733; (1965) 'Individual Right and Social Welfare: the Emerging Legal Issues' *Yale LJ* 1244.

[13] [1975] 1 W.L.R. 1443.

[14] [1978] 1 W.L.R. 1.

[15] [1978] 1 W.L.R. 1 per Megaw LJ at 5.

[16] https://www.gov.**uk**/government/uploads/system/uploads/attachment.../LT_102.xls. There were just 2,560,000 council tenancies in 1951. The 1950s and 1960s were an era when both Conservative and Labour governments regarded public sector housebuilding as a desirable social and economic policy.

which borrowed heavily from the private sector protected tenancy regime[17] - was seen as an area of private law in which one party happened to be a government body rather than as a normalisation of merits-based judicial control of local authority decisionmaking.[18] In short terms, a local authority tenancy would be 'secure' so long as the tenant occupied the premises as her only or principal home. In that event, the landlord could not end the tenancy unilaterally. Rather it had to bring possession proceedings on the basis of identified statutory grounds and persuade the court both that the ground was made out, and that it would in the circumstances be reasonable for a possession order to be made. The Act also empowered the court to suspend any possession order on such terms as it might think fit; (such as payment of arrears or cessation of nuisance-causing behaviour).

This blurring of the 'public' and 'private' spheres was briefly compounded by inclusion of many housing association tenancies within the secure tenancy structure.[19] Under the provisions of the Housing Act 1988, all future housing association tenancies would be 'assured' rather than secure, a status which offered rather less security of tenure.[20]

The Housing Act 1980exempted tenancies granted under the Housing Homeless Persons Act 1977 from secure status,[21] but initially such tenancies were of minimal quantitative significance. This was because of an apparently pervasive assumption by legislators, local authorities and courts that that persons entitled to rehousing under the homelessness legislation should (promptly) be granted secure tenancies. Indeed, the bill had been vigorously opposed by the Conservative party on the basis that it would enable homeless people to 'jump the queue' on local authority waiting lists.[22] It was not until the House of Lords decided in 1996 in *R v LB Brent (ex parte Awua)*[23] that the duty arising under the legislation could be discharged by providing temporary accommodation, whether directly by the council or by arranging for such accommodation to be provided by a third party, that non-secure local authority tenancies again became a regular feature of the housing law landscape. The obvious consequence of the decision was that the Human Rights Act came into force when an increasingly large percentage of occupants of council housing did so on a legal basis outside the secure tenancy regime

The other significant group of council property occupants lacking secure status were people living as guests (in strict legal terms bare licencees) of former secure tenants who had died or

[17] M Partington (1980) *Landlord and tenant* pp 510-528.

[18] This dimension of the 'privatisation' of public housing under the 1980 Act has been rather overlooked because of the more overt 'privatisation' made possible by the Act, namely the 'right-to-buy' promoted by the Thatcher government.

[19] The original Act is at http://www.legislation.gov.uk/ukpga/1980/51/pdfs/ukpga_19800051_en.pdf; The relevant provisions are ss. 28 and 49 and schedule 3.

[20] See Luba et al (2010 7th ed) *Defending Possession Proceedings* ch. 1. The 1988 Act was not retrospective; one still occasionally encounters a 'secure tenancy' with a housing association landlord.

[21] Schedule 3 para 5.

[22] See I. Loveland (1995) *Housing Homeless Persons* ch. 3

[23] [1996] A.C. 55. The judgment attracted criticism in terms both of its reasoning and its likely empirical consequences; see for example D. Cowan (1997) 'Doing the government's work' *Modern LR* 276: C. Hunter and J. Miles (1997) 'The unsettling of settled law on "settled accommodation": the House of Lords and the homelessness legislation old and new' *Journal of Social Welfare and Family Law* 267. The conclusion was probably however welcomed by many local authorities, and neither the Major nor Blair governments promoted a legislative reversal.

abandoned the premises. The secure tenancy scheme made limited provision for one succession to a secure tenancy by spouses or other close family members,[24] and in the case of relationship breakdown provision existed within the Matrimonial Causes Act 1973 for tenancies to be transferred between spouses (and subsequently under the Family Law Act 1996 between cohabitees). But if a tenant abandoned her home, or died without an eligible successor, any person who had previously made his/her home there would become a trespasser on expiry of a valid notice to quit served by the council and would have no obvious means of resisting a possession claim.

Local authorities could grant new secure tenancies to such persons. But in terms of public sector housing provision the history of the 1980s and 1990s had been a constant narrative of precipitate decline in the supply of the local authority sector because of the interactive effect of the popularity of the right-to-buy, the virtual moratorium on new construction and – a point often overlooked – the increased size of the population and the increasing socio-cultural trend for household formation to become more and more atomistic.[25] It does not require much imagination to assume that such factors would render local authorities less willing to forgo possession proceedings against non-secure tenant occupiers. And initially, it seemed, the Human Rights Act 1998 would have little effect on that situation.

From London…..to Strasbourg… and back…and forth…

The House of Lords offered its first view on Article 8 in *Harrow LBC v Qazi*.[26] Mr Qazi had been a secure tenant of a Harrow property on a joint tenant basis with his first (ex-wife). When the marriage broke down, Mrs Qazi unbeknown to her husband served a notice to quit on the council which had offered her another property. The effect of the common law principle identified in *LB Hammersmith and Fulham v Monk*[27] was that on the expiry of the notice to quit the joint secure tenancy was determined, and Mr Qazi had become a trespasser.

His case was essentially that Article 8 afforded a trial court a proportionality jurisdiction (rooted in the 'necessary in a democratic society' element of Article 8) closely comparable to the secure tenancy reasonableness test. Although that contention was accepted by two members of the court,[28] the majority rejected the argument in a rather blunt fashion. Mr Qazi's tenancy had been ended by his (ex-)wife's notice to quit, he was a trespasser in property wholly owned by the local authority and had no legal right of any sort which a trial court could protect. Indeed, it was not entirely clear that the majority even accepted that

[24] Ss.78-88; s.113.

[25] 1,499,464 council homes were sold in England between 1980 and 2000. Annual sales are recorded at https://www.gov.uk/government/statistical-data-sets/live-tables-on-social-housing-sales#right-to-buy-sales;. 308,370 new units of local authority accommodation were built; https://www.gov.uk/government/statistical-data-sets/live-tables-on-house-building. England's population increased in that period from 46,787,200 to 49,233,300; https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/timeseries/enpop/pop; . On the trend towards the normalisation of smaller households see N. McDonald and P. Williams, *Understanding Recent changes in Household Formation Rates and Their Implications for Planning for Housing in England* (2014).

[26] [2003] UKHL 43; [2004] 1 A.C. 983.

[27] [1992] 1 A.C. 478.

[28] Lord Steyn and Bingham. Lords Scott, Hope and Millett were the majority.

ordinary administrative law principles could be invoked as a defence in county court proceedings to assess the lawfulness of the council's decision to issue the claim; (rather than forming the subject of an application by the defendant for judicial review under Order 53/Part 54). The gist of the majority judgment was every facet of domestic housing law was obviously compliant with Article 8. So, per Lord Scott: "If the reality of the matter is, as I believe it is, that an article 8 defence can *never* prevail against an owner entitled under the ordinary law to possession, your Lordships should, in my opinion, say so; " and per Lord Hope: "I agree with my noble and learned friends, Lord Millett and Lord Scott of Foscote, that the Strasbourg jurisprudence has shown that contractual and proprietary rights to possession cannot be defeated by a defence based on article 8 …" .

Housing law then provided public lawyers with a protracted saga of 'dialogue'[29] between the House of Lords/Supreme Court and the ECtHR, or – to characterise the process more precisely – as series of cases in which the ECtHR developed its own understanding of Article 8 ECHR in an incremental fashion which led the House of Lords/Supreme Court to redefine Article 8 HRA in a similarly piecemeal way.

The ECtHR had declined to accept Mr Qazi's challenge to the House of Lords' judgment, which might have been taken to indicate that the majority view in *Qazi* was well-founded. However in *Connors v United Kingdom*[30] the ECtHR concluded that the statutory scheme which allowed for the mandatory eviction of occupants of homes on caravan sites owned by local authorities was incompatible with Article 8 even if the council's actions could be challenged by way of judicial view. Compatibility would require that the trial court exercise a merits jurisdiction over disputed questions of fact with a greater intensity than allowed by traditional judicial review principles:

"92…. [T]he local authority was not required to establish any substantive justification for evicting him and on this point judicial review could not provide any opportunity for an examination of the facts in dispute between the parties …

95. In conclusion, the Court finds that the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights …"

The House of Lords appeared unwilling fully to accept this proposition. In *LB Lambeth v Kay*[31] the majority moved only slightly from the position adopted in *Qazi*. In what came to be known as a 'Kay Gateway A' defence, the court accepted that there might indeed be some statutory or common law rules within the housing law field that were incompatible with Article 8, and that such rule could be challenged per se by way of a defence in possession proceedings. The majority also held (the 'Kay Gateway B' defence) that a government body's

[29] United Kingdom lawyers seem to have picked up the idea from P. Hogg et al, 'The Charter Dialogue Between Court and Legislatures…' (1997) *Osgoode Hall* LJ 75 which analysed instances of to-ing and fro-ing between the Canadian Supreme Court and the national and provincial legislatures in respect of statutory provisions which breached the Charter of Rights and Freedoms..

[30] (66746/01) (2005) 40 E.H.R.R. 9.

[31] [2006] UKHL 10; [2006] 2 A.C. 465. Mr Kay' case was triggered by particularly shabby landlord behaviour. He had lived for years in a rundown house which Lambeth, rather than repair, licenced to a housing association so that the housing association could grant licences to occupants (who would have no security of tenure). When Mr Kay and other occupants established that they were (assured) tenants (see *Bruton v London and Quadrant Housing Trust* [2000] 1 A.C. 406), Lambeth terminated the head licence. This made Mr Kay (vis a vis Lambeth) a trespasser.

deployment of a per se compatible law (against a defendant unable to invoke a reasonableness defence under the Housing Acts 1985 and 1988 and the Rent Act 1977) could ask the trial to court to assess if it would be *Wednesbury* unreasonable in the core sense for the court to make an order. It was not accepted that any intensification of irrationality view was required, nor that all facets of the *Wednesbury* doctrine could be invoked to question the lawfulness of the claimant's decisionmaking. The majority also placed the onus for raising an A or B defence on the defendant. If she was unable to show at a first hearing that her HRA defence was 'seriously arguable', the court could grant a possession order summarily.[32] The House of Lords suggested that it would only be in the most unusual of cases that an Article 8 defence would succeed even to the limited extent of requiring a full trial.

This grudging conclusion was patently inconsistent with *Connors.*[33] Shortly after *Kay*, the ECtHR gave judgment in *McCann v United Kingdom.*[34] *McCann* was, like *Qazi*, another *Monk* case, disposed of by the Court of Appeal – following *Qazi* – on the basis that Article 8 was irrelevant in such cases. The ECtHR bluntly reiterated the point made in *Connors*:

"50…. The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this *E.H.R.L.R. 497 magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end….

53. As in Connors, the 'procedural safeguards' required by Article 8 for the assessment of the proportionality of the interference were not met by the possibility for the applicant to apply for judicial review and to obtain a scrutiny by the courts of the lawfulness and reasonableness of the local authority's decisions. Judicial review procedure is not well-adapted for the resolution of sensitive factual questions which are better left to the County Court responsible for ordering possession. In the present case, the judicial review proceedings, like the possession proceedings, did not provide any opportunity for an independent tribunal to examine whether the applicant's loss of his home was proportionate under Article 8 § 2 to the legitimate aims pursued."

Identifying in detail how the House of Lord responded to *McCann* is a challenging task, since in its next significant Article 8 judgment - *Birmingham CC v Doherty*[35] - the court issued a decision containing multiple opinions. The case seemed to be authority for the following propositions. Firstly, The Gateway A defence remained unchanged. Secondly, under Gateway B, a defendant was entitled to raise by way of defence at trial any orthodox ground of judicial review; she was not limited as *Kay* had suggested just to irrationality in the core sense. Thirdly, secondly, there was no requirement that a claimant take pre-emptive steps in its claim to confirm that it had acted lawfully in the orthodox administrative law sense; it was for the defendant to raise that issue. Fourthly, it was still seen as most unlikely that any HRA-derived defence would succeed and most such assertions could be disposed of summarily.

Lord Scott and Hope – holding fast to *Qazi* – offered *McCann* an especially frosty reception, characterising it as based on a misunderstanding of English housing and administrative law

[32] This is permitted per CPR 55.8 if it appears to the court that a party could not argue the case on 'grounds which appear to be substantial'.

[33] S. Bright (2009) 'Article 8 Again in the House of Lords…' *Conveyancer and Property Lawyer* 294.

[34] (19009/04) [2008] 2 F.L.R. 899. Like *Qazi*, another *Monk* case.

[35] [2008] UKHL 57; [2009] 1 A.C. 367. For assessment from a practicioner's perspective see N. Nicol, (2010) "Public Law Defences in Possession Proceedings" (2010) *Judicial Review* 85; A. Arden, "Doherty: How Far Did the Pendulum Swing?" (2008) *Journal of Housing Law* 93.

and offering guidance as to what Article 8 actually required that was so vague as to be: "almost useless".[36] Lords Mance and Walker appeared rather more receptive to the notion of a dialogue with the ECtHR, accepting that Article 8 would require some express adjustment and perhaps intensification of ordinary administrative law scrutiny. Given the fragmented nature of the court's judgment however, it overstates matters to regard this as the ratio of the decision.

The doctrinal significance of *Kay* and *Doherty* is nonetheless substantial from an orthodox public law perspective. This is not because they broke new ground but because they finally corrected the bizarre *Shelley* anomaly in the reach of administrative law principles. *Kay* and *Doherty* also confirmed – a point raised 30 years earlier in *Clark* and *Kelly* - that those principles should be argued as a defence to possession claims in the county courts. Public law would no longer the preserve of the elite judiciary,[37] but would become a staple part of the caseload of District and Deputy District Judges. That such judges might have – to use a non-legal term – no clue what they were doing when taken into the public law sphere did not seem to trouble (or occur to) the House of Lords. That may well have been because both *Kay* and *Doherty* intimated that there would be very few circumstances where a substantive common law defence would succeed. Such observations rather suggested that the possibly intensified standard of review alluded to in *Doherty* would prove little different from the core notion of *Wednesbury* irrationality, a standard which – if properly applied – would be extremely difficult for any defendant to meet.

This per se was not obviously inconsistent with the ECtHR's views. An apparent curiosity of *McCann* was that it seemed the ECtHR expected that such an innovation would make little difference to the way possession proceedings would be conducted and resolved:

> 54 The court does not accept that the grant of the right to the occupier to raise an issue under Art.8 would have serious consequences for the functioning of the system or for the domestic law of landlord and tenant. As the minority of the House of Lords in Kay observed, it would be only in very exceptional cases that an applicant would succeed in raising an arguable case which would require a court to examine the issue; in the great majority of cases, an order for possession could continue to be made in summary proceedings.

Whether that thought was correct would depend in part on what was envisaged by 'a great majority'? The ECtHR did not engage at all with any evidential issues relating to housing management or possession proceedings. It offered no view, for example, on how many of the possession claims begun in England and Wales by local authorities involved defendants who were not secure tenants. Such statistics are not available. But if that number is unknown, and if 'a great majority' might mean as much as 95% or as little as 60%, then the ECtHR's view could be no more than rank speculation.

We return to this point below. But we might note here that a judicial focus on the impact of a '(slightly?) more intensive' substantive ground of review perhaps missed an important point; namely that for the short term purposes of defeating a possession claim the procedural dimension of *Wednesbury* might be a much more valuable tool. I use 'procedural' here not in the narrow *audi alterem partem* sense, but in relation to the relevant/irrelevant considerations doctrine. *Wednesbury* is so strongly linked with the notion of substantive irrationality that other dimensions of Lord Greene MR's judgment are often overlooked:[38]

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[36] Respectively at paras 82 and 20.

[37] A more extensive of the consequence in 1996 of replacing judicial review of homelessness decisions (conducted in the High Court by High Court judges) with a statutory appeal (per Housing Act 1996 s.204) to the county court.

[38] [1948] 1 K.B. 223 at 229.

'It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider….

While academic lawyers have only rarely made incursions into the empirical reality of decisionmaking processes with local authority housing departments,[39] it would seem safe to conclude that local authority housing management is not and never has been an especially high status or high paid occupation, and can credibly be presented as offering a good example of what has long been referred to as the 'proletarianisation' of white collar employment.[40] It would be rash to assume that such decisionmaking is routinely conducted with explicit reference to the legal principles which notionally control it, or that such principles have been implicitly absorbed into councils' decisionmaking cultures. *Wednesbury* principles generally, and the relevant/irrelevant considerations doctrine in particular, if rigorously applied, are potentially expensive concepts in terms of investigatory and evaluative resources (of both time and money). For a council to meet those standards would require that it employ decisionmakers equipped with a more than rudimentary degree of legal competence and that it limited those decisionmakers' workloads to a level which enabled them to deploy that legal competence carefully and thoroughly.

The decisions in *Kay* and *Doherty* (and there are lots of individual opinions given in those judgments) – and indeed the ECtHR's judgments in *Connors* and *McCann* - do not engage at all with these questions. The judgments promulgate doctrine from a position of complete indifference to/and or ignorance of both the way housing management decisions are taken and how they might be affected by judicial decisions. The courts display perhaps a touching but unwarranted faith in the universally hortatory effect of the law reports on the empirical reality of government activity. But this ostensible shortcoming is partially, perhaps primarily, a consequence of the reactive and micro-nature of the court's role in litigation coupled with the thus far unsurmounted obstacle of figuring out a way get courts to take notice of that empirical reality. One might confidently assert in an academic forum that there is a good deal of empirical evidence exposing the legal shortcomings of housing management decisionmaking and very little such evidence to the contrary. But unless such material deals with the current behaviour of a council that also happens to be the claimant, a court will take no notice of it.

On that latter point, the acceptance that public law points can be raised in what is – procedurally – a private law action is important, as such actions carry with them presumptions as to extensive discovery, the filing of witness statements and the cross-examination of witnesses. In such circumstances, competent counsel is unlikely to have much difficulty in exposing incompetent housing management.

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[39] Most focus on homelessness decisionmaking. Among the notable examples are D. Cowan's (1997) *Homelessness: the Inappropriate Applicant*: D. Cowan and S. Halliday (2003) *The Appeal of Internal Review*: S. Halliday (2004) *Judicial Review and Compliance with Administrative Law* : I. Loveland (1995) op .cit. Initial results from a more extensive study conducted by C. Hunter et al (2016) `Legal Compliance in Street-Level Bureaucracy: a Study of UK Housing Officers' *Law and Policy* 81 promise to shed more light on this rather murky backwater of our contemporary welfare state.

[40] H. Braverman, *Labour and Monopoly Capital* (1974).

The potential relevance in post-*Doherty* possession proceedings of the likely shortcomings in local authority decisionmakers' capacity to recognise and comply with administrative law norms was ostensibly increased by a cluster of decisions issued shortly after *Doherty*, which accepted that defendants could target administrative law challenges at all pertinent stages of a council's decisionmaking process; in deciding to serve a notice to quit for example, and/or in deciding to issue proceedings; and/or in deciding to continue to seek a possession order at trial.[41] Failure to take account of relevant matters at any stage would in principle mean that a claim would be defeated, even if there was nothing per se substantively objectionable about the defendant being evicted.

Whether this presumption was be empirically well-founded is a matter returned to below. The next section addresses a doctrinal innovation which might be thought to have significant implications for the reach of Article 8.

Taking judicial review of housing management decisions beyond the 'government' sector

The relative quantitative significance of the local authority and housing association sectors in providing affordable rented housing had been shifting markedly in favour of the latter in the decade leading up to 1998,[42] and continued apace in the next ten years.[43] As suggested above, assured tenancies and secure tenancies are broadly similar in terms of the reasonableness jurisdiction afforded to courts in possession proceedings, and to that extent were unaffected by Article 8.[44]

The primary Article 8 issue arising in respect of housing associations was the use of the (Housing Act 1988) s.21 procedure. S.21 provides a mechanism for a landlord to regain possession without having to offer any reasons for wishing to do so as long as various procedural formalities have been complied with if the tenancy is what is known as an 'assured shorthold'; (and since 1997 all assured tenancies are presumptively shorthold rather than ordinary assured tenancies).

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[41] *Taylor v Central Bedfordshire Council* [2009] EWCA Civ 613; [2010] 1 W.L.R. 446: *Barber v Croydon BC* [2010] EWCA Civ 51; [2010] HLR 26: *Eastland Homes v White* [2010] EWHC 695 (QB).

[42] Government statistics identified 5,412,000 council sector households and 614,000 housing association households in 1988; a ratio of almost 9:1. By 1998 the figures were 4,140,000 in the council sector and 1,205,000 in the housing association sector; a ratio of less than 4:1; https://www.gov.uk/government/statistical-data-sets/live-tables-on-dwelling-stock-including-vacants#live-tables; (table 1.02: *by tenure*, *Great Britain (historical series*)). The decline in the council sector derived both from right to buy sales, (to a lesser extent) wholesale transfers of local authority stock to the housing association sector, and a virtual moratorium on new construction in the local authority sector; see generally D. Cowan, *Housing Law and Policy* (1999) ch. 11. The Blair and Brown Labour governments were as enthusiastic pursuers of that strategy as their Conservative Thatcher and Major antecedents.

[43] By 2008, the position was some 2,330,000 households in the council sector, which was by then exceeded in scale by the 2,414,000 households in the housing association sector. As of 2014 the figures were 2,075,000 council households and 2,775,00 in the housing association sector; https://www.gov.uk/government/statistical-data-sets/live-tables-on-dwelling-stock-including-vacants Table 102. One might note that the total number of households in the two sectors combined had *fallen* from 5,345,000 in 1988 to 4,850,00 in 2008 (ibid); a point returned to below.

[44] Other than in relation to a very niche situation arising under the homelessness legislation, (Housing Act 1996 s.209) housing associations cannot grant non-secure (or more precisely non-assured) tenancies.

The assured shorthold was purportedly introduced (by the third Thatcher government) as a means to encourage private sector individuals and companies to make housing available for rent; the assumption being that such landlords would be deterred from letting properties on assured tenancies both by the need to prove a 'reasonableness' ground to regain possession and by the prospect that courts might exercise their adjudicative discretion in a (towards the tenant) unduly lenient fashion. Possession proceedings might be protracted, expensive[45] and quite possibly unsuccessful.

However the assured shorthold has also become popular among housing associations as a form of 'probationary tenancy', which converts automatically to assured status after a specified period (usually a year) if the association has not initiated possession proceedings in the interim. Those possession proceedings would obviously be brought under s.21, on the assumption that the association would not have to prove any breach of the agreement at all, let alone that there was both a breach and that it would therefore be reasonable for a possession order to be made.

The Court of Appeal's judgment in *Poplar Housing and Regeneration Community Ltd v Donoghue*[46] rather prefigured *Qazi* [47] in holding that the s.21 procedure was not incompatible with Article 8, on the apparently rather simplistic basis that since Parliament had decided to strike that particular balance between landlords and tenants s.21 simply could not be incompatible. The case is more generally referred to however as an early illustration of the courts' treatment of the vertical/horizontal issue raised by HRA 1998 s.6. The Court of Appeal concluded in *Poplar* that even though the claimant was in formal terms a private sector company, it had come into being through a privatisation of housing stock by the London Borough of Tower Hamlets and as such could be seen a public authority per s.6.

Whether that conclusion would be per se of much significance was doubtful given the High Court's judgment the previous year in *R v Servite Houses and Wandsworth LBC, ex parte Goldsmith and Chatting*.[48] The case concerned a very niche area of housing law arising under the National Assistance Act 1948 s.21, which required councils to provide residential nursing care to certain people unable to fend for themselves. In an emblematic example of the privatisation of the welfare state, the second Major government promoted an amendment to the Act in 1993 which allowed local authorities to contract their s.21 duty out to approved private providers. Servite – a housing association - had such a contract with Wandsworth, but decided to close the facility in which the applicants lived on the basis that it had become unprofitable. The applicants sought to raise an argument that they had a substantive legitimate expectation generated by Servite that they would have a home in the facility 'for life'.[49] Whether that argument was well-grounded evidentially proved beside the point however, as the High Court concluded that Servite specifically – and obiter all housing associations – were not amenable to judicial review.

Given the (at best) lukewarm reaction of the House of Lords up to and including *Doherty* (handed down in July 2008) to any suggestion that Article 8 might have a significantly

[45] If the tenant was eligible for legal aid and had sought legal advice to defend a possession claim then of course the landlord would likely have to pay for his/her/its own legal representation, and even if the claim was successful the landlord would not recoup its own legal costs; while if it was lost the landlord would likely end up paying the tenant's legal costs as well.

[46] [2001] EWCA Civ 595; [2002] QB 48.

[48] (2001) 33 H.L.R. 35.

[49] ie the argument accepted a year earlier by the Court of Appeal in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 13.

transformative effect on housing law, the Court of Appeal judgment a year later in *R (Weaver) v London And Quadrant Housing Trust*[50] might seem distinctly anomalous. *Weaver* was actually a ground 8 case, in which the defendant argued that she had a substantive legitimate expectation that the housing association would not seek possession against her on that ground. Although that submission failed on the facts, the Court of Appeal did accept – contra *Servite Houses* – that Ms Weaver was entitled to raise public law points in her defence.

Ms Weaver did not suggest that Article 8 was horizontally effective per se (ie that the identity of the claimant was irrelevant), but that housing associations were public authorities within HRA 1998 s.6 and so should be treated in just the same way as local authorities in a possession proceeding context: that is their decisions should be – per *Doherty* – challengeable on all orthodox grounds of administrative law. That argument found favour with the High Court.[51] The Court of Appeal, while upholding the result reached below, came to that conclusion on the basis that when seeking to evict a person from her home, a housing association was performing a public function per HRA 1998 s.6; it was not per se a public authority in the core sense.

The importance of *Weaver* is hard to gauge. London and Quadrant might very well have wished to appeal against the court's conclusion, but of course could not do because it had 'won' in the Court of Appeal. It would be easy to suggest the judgment was hugely significant because in 2009 the housing association sector in Great Britain contained some 2,503,0000 tenancies; (many more than the 652,000 twenty years earlier).[52] But that easy suggestion may be ill-founded, because *Weaver* would be irrelevant to assured tenancies save in respect of ground 8 claims, a remedy which many housing associations eschewed entirely; ie there were not many ground 8 claims in that sector. In respect of assured shorthold s.21 claims, *Weaver's* potential quantitative significance would depend in part on how many such claims housing associations were actually bringing.

Weaver's importance in ground 8 and s.21 claims would also depend on trial courts' application of *Doherty*. *Weaver* was concerned only with the 'reach' of Article 8, not its 'content'. Even if one made the not especially well-founded assumption that the *Doherty* variant of administrative law defences was more exacting than traditional *Wednesbury* principles, it would still offer a court a far less intrusive merits jurisdiction than the reasonableness test in the Housing Act 1988 s.9.

But there is another 'but' to consider here. Most housing associations as corporate entities would never have assumed that their decisionmaking behaviour had to conform to general administrative law principles. As normative constraints, those principles would have been far more 'alien' to housing association decisionmakers than to their council counterparts. Quite how alien would have been very difficult to gauge, since while academic lawyers have provided us with some insight into the content and conduct of housing management decisionmaking in local government, there is little of any note replicating such research in the housing association sector.[53] How difficult it might be for the sector to comply with such standards was a matter of pure speculation.

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[50] [2009] EWCA Civ 587; [2010] 1 WLR 363.

[51] [2008] EWHC 1377 (Admin); [2009] 1 All E.R. 17.

[52] https://www.gov.uk/government/statistical-data-sets/live-tables-on-dwelling-stock-including-vacants#live-tables;

[53] There is an informative study by Pawson et al (2010) *Rent Arrears Housing Management Practices in the Housing Association Sector*:

It is perhaps helpful here to make explicit the implicit moral values advanced by the ECtHR and the House of Lords and Court of Appeal in these Article 8 cases. Article 8 does not create a 'right' to a home: it creates a (rebuttable presumption of a) right to 'respect' for the home one already has. That 'respect' is found by granting *some* adjudicative power to a decisionmaker independent of the parties to assess the moral/political merits of the question of whether the right-bearer should lose her home. This entails application of orthodox rule of law principles; the pertinent question being where on what Harlow and Rawlings usefully term the 'green light/red light'[54] spectrum of intensity that adjudicative power should rest.

The secure tenancy is a profoundly red light moral creature – accorded a very high level of 'respect' - since the court exercises an extremely intensive jurisdiction as primary decisionmaker on all questions of fact and law. The local authority tenancy conceived by the Court of Appeal in *Shelley* was the palest of green light phenomena: the tenant's occupancy did require any respect – beyond a valid notice to quit having been served - at all.

The *Doherty* test sits somewhere, perhaps at many places, between those two extremes. What then are we to make of the House of Lords' apparent assertion in *Doherty* (and the extended reach given to *Doherty* in *Weaver*) that the 'new' public law defence in possession proceedings would rarely succeed? That assumption could be 'correct' in several alternate circumstances; ie if;

(a) Almost all council and housing association decisionmaking already adhered to orthodox administrative law standards; or if there was no widespread adherence then

(b) Almost all council and housing association decisionmaking could – and would – soon be brought into conformity with orthodox administrative law standards; or, assuming that such volition and capacity was not forthcoming then

(c) Very few defendants would ever file a defence which put councils and housing associations to proof of that conformity; or assuming that many defendants did file such defences

(d) Trial courts adopted a housing-specific notion of administrative law standards so lacking in rigour that very few such defences would be made out.

Unhappily we cannot reach an informed conclusion in any macro-sense about how significant *Doherty* and its progeny have been empirically. We do not know how many possession claims brought by local authorities or housing associations against non-secure occupiers are not defended at all. In such claims the administrative law competence of council and housing association decisionmaking is simply never tested. Similarly, we have no data regarding how many such cases which are defended settle – and if so on what terms - before trial. And since the overwhelming majority of possession claims are heard in the county courts, those which do go to trial on public law issues go unreported and remain unknown to anyone other than the participants save for the very small number which are appealed.

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ebarchive.nationalarchives.gov.uk/20120514075635/http:/www.tenantservicesauthority.org/upload/pdf/Rent_arrears_management_practices.pdf;

[54] C. Harlow and R. Rawlings, *Law and Administration* ch.s 1-2 (1984).

This is all what we might call 'invisible law'. One can certainly point to anecdotal evidence (primarily in 'professional' legal journals),[55] relating how housing litigation before the lower courts has been resolved, and there is some dissemination of such information along the practicioner grapevine, but anecdote and gossip do not provide a sound evidential base on which to premise generalised assumptions. The importance of that evidential gap was perhaps reduced however by new doctrinal developments.

Empowering (or requiring courts) to produce proportionate outcomes

If Lords Scott and Hope had assumed that dialogue' with the ECtHR about the impact of Article 8 would lead the ECtHR to backtrack from its position in *MCann*, they would have been disappointed when Mr Kay's case eventually reached Strasbourg.[14] The ECtHR reiterated its view that *Kay* (House of Lords) did not satisfy Article 8, but also held that the step taken in *Doherty* might do so:

"73. The Court welcomes the increasing tendency of the domestic courts to develop and expand conventional judicial review grounds in the light of Article 8. A number of their Lordships in *Doherty* alluded to the possibility for challenges on conventional judicial review grounds in cases such as the applicants' to encompass more than just traditional *Wednesbury* grounds."

If one continues to invoke the 'dialogue' metaphor, *Kay* (ECtHR) can be seen as the ECtHR suggesting that the House of Lords was heading in the right direction but had not quite reached the desired destination.

Kay (House of Lords), *Doherty* and *Weaver* are examples of the HRA 1998 triggering shifts in the content of the common law – a form of 'indirect effect' for Article 8. After *Kay* (ECtHR) the Supreme Court took a further step in *Manchester CC v Pinnock*[56] by accepting that Article 8 provided occupants with a free standing statutory defence – a form of 'direct effect'. The Supreme Court – unanimous as to its judgment and which limited itself to one opinion authored by Lord Neuberger – indicated that it had been nudged to this conclusion by the presumption that the ECtHR did not regard *Doherty* as a sufficiently expansive response to Article 8.

The new defence would however be one of limited utility. Its required a court, if the point was taken by the defence, to assess if it would be substantively proportionate for the court itself to make a possession order and if so on what terms.[57] Its utility was restricted by the assertion that it would only be in very rare circumstances that such defence could succeed. This might suggest the innovation was one more of form than function; the new defence derived directly from Article 8, but to what extent Article 8 proportionality gave trial courts a more intensive merits jurisdiction than *Doherty's* 'a-bit-more-intensive-than-orthodox-

[55] Fort example the regular 'Housing Law Update' compiled by HHJ Luba QC and HHJ Madge for *Legal Action* and the website *Nearly Legal.*

[56] [2010] UK SC 45*;* [2011] 2 A.C. 104

[57] Cf. at para 62: "Fourthly, if domestic law justifies an outright order for possession, the effect of article 8 may, albeit in exceptional cases, justify (in ascending order of effect) granting an extended period for possession, suspending the order for possession on the happening of an event, or even refusing an order altogether".

Wednesbury' was left wholly unexplored and unexplained.[58] In a striking abdication of judicial responsibility, the Supreme Court offered this 'guidance':

> 57 …[T]the court's obligation under article 8(2), to consider the proportionality of making the order sought, does represent a potential new obstacle to the making of an order for possession. The wide implications of this obligation will have to be worked out. As in many situations, that is best left to the good sense and experience of judges sitting in the county court.

More significant is what the Supreme Court made clear the newly minted Article 8 defence would *not* do. The newly recognised statutory defence did not entail intensification of judicial scrutiny of the claimant's decisionmaking processes; ie what was referred to above as the 'procedural' element of *Wednesbury.*

Whether the HRA would have that effect as a general principle had by this point been quite fiercely argued. The Court of Appeal's judgment in *R (SB) v Governors of Denbigh High School* [59] had held that government bodies would be acting unlawfully per HRA 1998 s.6 if they made a decision affecting a Convention Right – irrespective of the substantive defensibility of that decision – without going through a carefully structured decisionmaking process, in which they sequentially asked themselves: are we interfering with a Convention Right; are we doing so for a legitimate reason; is our preferred outcome necessary in a democratic society. That conclusion was promptly reversed by the House of Lords[60] on the basis that – and here the court did pay attention to the empirical question of what level of rigour one might properly expect in administrative decisionmaking – such a requirement imposed unrealistic obligations on executive decisionmakers.

Denbigh not a housing case.[61] Its ratio as to the meaning of Convention Right proportionality as being simply an outcome rather than process value sat uncomfortably with the judgment in *Huang v Secretary of State for the Home Department,* [62] an immigration case in which the Supreme Court embraced a much more exacting understanding of proportionality as a process value. [63] In short terms, in *Denbigh* and *Huang* the Supreme Court clearly identified a

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[58] For a more detailed discussion see R. Walsh (2015) 'Stability and Predictability in English Property Law - the Impact of Article 8 of the European Convention on Human Rights Reassessed' (2015) Law Quarterly Review 585: S. Nield, 'Article 8 Respect for the Home: A Human Property Right?' (2013) 24 *Kings Law Journal. 147:* D. Cowan and C. Hunter (2012) '"Yeah But, No But" - Pinnock and Powell in the Supreme Court*'* (2012) *Modern Law Review 78.*

[59] [2005] EWCA Civ 199; [2005] 1 W.L.R. 3372.

[60] [2006] UKHL 15; 2007 1 A.C. 100.

[61] The empirical issue was the extent to which state schools' uniform policies were required to accommodate pupils' religious beliefs.

[62] [2007] UKHL 11; [2007] 2 A.C. 167. See the discussion in R. Clayton and K. Ghaly, 'Shifting Standards of Review' (2007) *Judicial Review* 210: A. Young, 'In Defence of Due Deference' (2009) *Modern Law Review* 554.

[63] The Court drew on authority from several Commonwealth jurisdictions, and approved [at para 19] the following test as to the way in which primary decisionmakers should consider proportionality: "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective." The Court also considered that this formulation should be supplemented by a final question which asked if a fair balance was being struck;

hierarchy of Convention rights in terms of the procedural protection such rights should be afforded.

Pinnock did not squarely address this issue. That bridge was crossed shortly afterwards in *Hounslow LBC v Powell*.[64] Counsel for the defendants (Jan Luba QC) urged the court to apply the *Huang* test to possession proceedings, but the submission was rejected:

> 41 A structured approach of the kind that Mr Luba was suggesting may be appropriate, and indeed desirable, in some contexts such as that of immigration….. But in the context of a statutory regime that has been deliberately designed by Parliament, for sound reasons of social policy, so as not to provide the occupier with a secure tenancy it would be wholly inappropriate. I agree with Mr Stilitz for the Secretary of State that to require the local authority to plead its case in this way would largely collapse the distinction between secured and non-secure tenancies. It would give rise to the risk of prolonged and expensive litigation, which would divert funds from the uses to which they should be put to promote social housing in the area.

Powell plonked respect for the home very firmly at the green light end of the spectrum. Thus while a defendant could properly (per *Doherty*) plead, for example, that a claimant had wholly failed to address a relevant consideration, or had completely misunderstood its own policies, she could not argue that the claimant had failed to attach sufficient weight to a particular matter, or that it policies were insufficiently sensitive to her particular circumstances.

There is an obvious temptation to see *Pinnock/Powell'*s Article 8 proportionality in the possession proceedings context as little more than dressing up orthodox understandings of *Wednesbury* substantive unreasonableness in differently labelled juridic clothes, and thus as being a mere symbolic initiative intendedly devoid of any practical effect. It certainly appears that there is little reported authority in which such a defence has succeeded;[65] and there is a great deal of authority in which it has not.[66] But – with apologies for repetition – restricting one's data set to the law reports may be contextually ill-informed. We face just the same evidential black hole in respect of *Pinnock's* notion of substantive proportionality that we faced in respect of *Doherty's* enhanced (?) variant of *Wednesbury*. It may well be that in some cases such defences succeed in the county court and are not appealed; or that a claimant accepts the cogency of a defendant's proposed defence and does not press the claim to trial; or that claimants eschew proceedings because they themselves have formed a view on the proportionality of eviction favourable to the defendant. Conversely, of course, it may be that some local authority and housing association landlords have – informedly – taken the view that *Pinnock* applies such a light touch to their decisionmaking autonomy that they need not trouble themselves to take account of it at all.

"between the rights of the individual and the interests of the community which is inherent in the whole of the Convention".

[64] [2011] UKSC 8; [2011] 2 A.C. 186.

[65] There appears to be only one – *Southend on Sea v Armour* .[2012] EWHC 3361; [2014] EWCA Civ 231; [2014] H.L.R. 23.

[66] For example *Corby Borough Council v Scott; West Kent Housing Association Ltd v Haycraft*; [2012] EWCA Civ 276; [2012] H.L.R. 23: *Holmes v Westminster City Council* [2011] EWHC 2857 (QB): *Birmingham City Council v Lloyd* [2012] EWCA Civ 969; [2012] HLR 44: *Thurrock BC v West* [2012] EWCA Civ 1435; [2013] H.L.R. 5: *Fareham BC v Miller* [2013] EWCA Civ 159 [2013] H.L.R. 22. The high water mark of *Pinnock* proportionality as a useless defence is perhaps offered in *R* (*Plant) v Somerset CC* [2016] EWHC 1245 (admin) [2016] HLR 24, when the High Court considered that a well-evidenced averral that the defendant would likely kill himself if evicted did not make eviction disproportionate.

Pinnock's light touch contrasts with the Supreme Court's 2015 interpretation in *Aster Communities v Akerman-Livingston*[67] of the relevance of the Equality Act 2010 to both the conduct and outcome of possession claims. The scheme of the Equality Act provides, inter (many) alia, that a claimant seeking to evict a person from residential premises for reasons which may be the consequence of a disability must persuade the court that bringing possession proceedings is a proportionate response.[68] In this statutory context, 'proportionality' bears a *Huang* rather than *Denbigh* (and *Pinnock*) meaning. An Equality Act defence is potentially therefore much more valuable than Article 8 for a defendant who faces possession proceedings in respect on non-secure/assured accommodation if the underlying 'reason' for the claim is, for example, mental health problems which have a causative effect on a person accumulating rent arrears or engaging in anti-social behaviour.

The Supreme Court's reasoning rests in large part on the premise that Parliament has chosen to afford proportionality a more rigorous meaning in this Act than it enjoys under Article 8. There is however no textual basis in the Act (ie a statutory definition of 'proportionality) for that distinction; the matter is left entirely at large. Nor are we offered any parliamentary records sustaining that assumption. It is difficult to resist the conclusion that the Supreme Court has simply decided that 'disabled' residents merit more procedural protection of their interests in their home than non-disabled persons on the basis of a modern and covert reiteration of the old deserving and undeserving poor dichotomy.

It is not however just the content of Equality Act proportionality which is more expansive than its Article 8 counterpart. Equality Act proportionality also has a much broader reach than Article 8, because the Act does not differentiate between council, housing association and private sector landlords. *Akerman-Livingston* thus inserts an unusually rigorous public law paradigm into what are formally purely private relationships. But at much the same time, the Supreme Court finally confirmed that Article 8 does not reach into private sector possession proceedings.

On 'horizontal effect'

The question of which if any Convention Rights should have horizontal effect (and if so why they should do so) generated much controversy prior to the Act coming into force[69] and thereafter. *Weaver* blunted the significance of that question in the housing context by drawing many tenancies in which the landlord was not strictu sensu a government body within Article 8. By dint of a Court of Appeal decision, the 'public sector' within the housing market had in one (purely juridic) sense suddenly become much larger. In practical terms however, the 'public sector' had been growing consistently smaller since 1998, while private rented housing was becoming a more significant component of the rented sector.

As of 2014, in England there were some 23.2 million dwellings. Of these, the majority (14.7 million; 63%) were owner-occupied; the council sector contained 1.7 million (7.3 %); housing associations provided 2.33 million (10%); and the rest, 4.2 million dwellings (18%)

[67] [2015] UKSC 15; [2015] A.C. 1399.

[68] The relevant provisions being s.6 (protected characteristics); s.15 (prohibition discrimination ant requirement of proportionality); and s.35 (management of premises).

[69] Cf. M. Hunt, 'The Horizontal Effect of the Human Rights Act' (1998) *Public Law* 423: N. Bamforth, 'The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies" (1999) *Cambridge L.J.* 159: Buxton L.J. 'The Human Rights Act and Private Law' (2000) *Law Quarterly Review* 48: H. Wade, 'Horizons of Horizontality' (2000) *Law Quarterly Review* 217.

were let by private landlords.[70] Of that 4.2 million, it seem likely that a substantial majority (ie any post February1997 tenancy) were assured shorthold tenancies, and so subject to the (presumptively) mandatory Housing Act 1988 s.21 possession procedure.

[Insert table 1]

The Supreme Court in *Pinnock* had expressly declined to indicate if the statutory Article 8 proportionality defence could be invoked against a private claimant.[71] Such reticence obviously invited the assumption that the argument was credible. That assumption was reinforced by several ECtHR decisions which applied Article 8 in respect of possession litigation between (in the member state) private parties,[72] and by the fact that the privacy limb of Article 8 had been held horizontally effective by the House of Lords as long ago as 2004 in *Campbell v Mirror Group Newspapers.*[73] Given the many private sector landlords who bring s.21 or ground 8 claims, it is surprising that it was not until 2016 that the Supreme Court dealt squarely with the question of whether Article 8 impacted upon possession proceedings brought by private individuals.

The Supreme Court's unanimous conclusion in *McDonald v McDonald* [74] was that Article 8 was not horizontally effective in the possession proceedings context:

41 To hold otherwise would involve the Convention effectively being directly enforceable as between private citizens so as to alter their contractual rights and obligations, whereas the purpose of the Convention is, as we have mentioned, to protect citizens from having their rights infringed by the state.

That presumption was especially forceful when, as with assured shorthold tenancies, those contractual rights have been considered by Parliament and subject to statutory regulation. There was no need for Parliament actually to have considered expressly whether s.21 was compatible with Article 8; Parliament had apparently 'effectively confirmed' s.21's acceptability by not altering it to require proportionality review in the private sector on the various occasions since 2000 when the 1988 Act had been revisited.

The Court also saw no proper analogy between the horizontality of Article 8 in the privacy context, as confirmed in *Campbell v Mirror Group Newspapers*[75] and its status in possession proceedings. In *McDonald* the Supreme Court observed that that the *Campbell* rationale applied only in circumstances where there was no legislative provision and so courts could

[70] Department for Communities and Local Government (2014) *Dwelling stock estimates 2103: England;* available at*:* *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/285001/Dwelling_Stock_Estimates_2013_England.pdf*; For figures in relation to Britain see *https://www.gov.uk/government/statistical-data-sets/live-tables-on-dwelling-stock-including-vacants Table 102*

[71] [2010] UKSC 45; [2011] 2 A.C. 104 at para 4.

[72] Among them *Zehentner v Austria* (2011) 52 EHRR 22; *Belchikova v Russia* (App. No.2408/06; 25th March 2010); *Zrilic v Croatia* App. No 46726/11 (3rd October 2103); and *Brežec v Croatia* [2014] HLR 3). The ECtHR had not expressly stated in any of these cases that Article 8 had horizontal effect.

[73] [2004] UKHL 22; [2004] 2 A.C. 457.

[74] [2016] UKLSC 28; [2016] 3 W.L.R. 45.

[75] [2004] UKHL 22; [2004] 2 AC 457.

properly assume that Parliament had impliedly authorised them to alter the common law. In contrast, s.21 proceedings were part of an elaborate statutory scheme, one central policy concern of which was to encourage private landlords back into the market by reassuring them they could easily regain possession of their properties. At a stroke, *McDonald* has resolved the uncertainty of the horizontal effect of Article 8 and lifted more than 50% of the rented housing sector beyond Article 8 protection.

It seem unlikely that the ECtHR will disapprove that conclusion. Shortly after *McDonald*, the ECtHR indicated in *Vrzic v Croatia*,[76] that Article 8 never applies horizontally in the possession proceeding context to the extent of requiring proportionality analysis before a possession order is granted.

Conclusion

It would seem hard to doubt that most people facing possession proceedings who might derive benefit from Article 8 will be poor, and that their capacity effectively to pursue that benefit will be substantially contingent on having competent legal assistance. The notion that many such defendants qua litigants in person could identify, plead and argue public law and/or HRA points is risible. *McDonald* makes such shortcomings irrelevant for the (growing) majority of people who rent their homes, and so in a perverse sense spares us the unhappy prospect of there being a 'gap' in respect of Article 8 between 'law as doctrine' and 'law in practice'.

For those people for whom Article 8 is doctrinally relevant however, access to competent legal advice is a vitally important contextual consideration. For that reason, the 'advice deserts' campaign launched by the Law Society in the autumn of 2016 is hugely significant. The thrust of the campaign is blunt:[77]

> Provision of legal aid advice for housing is disappearing in large areas of England and Wales, creating legal aid deserts….
> Almost one third of legal aid areas have just one and – in some cases – zero law firms who provide housing advice which is available through legal aid….
> The shortage in legal aid advice for housing means that people on low incomes facing homelessness and eviction are struggling to get the local face-to-face advice they desperately need and are entitled to by law.
> In the last quarter of 2015-16, 17 per cent fewer people got legal aid help for a housing matter than in the same period in the previous year.

The Law Society has produced an interactive map[78] charting the provision of legal aid provisions for housing across the country, which records that there are no providers at all in Suffolk or Shropshire, and only one in such areas as Cornwall, Somerset and Dorset. The paucity is presumably largely attributable to the slashing of legal aid rates for all aspects of housing work that were introduced in 2014, and it is very difficult to see the present government deciding that such reductions should be reversed. When placed in that empirical context, any doctrinal advances (from a defendant's perspective) that Article 8 might have offered in possession proceedings must surely be regarded as substantially attenuated.

But assuming we can invoke the 'advice desert' metaphor to betoken an uninhabited region of icy waste rather than sand and burning sun, perhaps the most apt label to apply to an

[76] (Application no. 43777/13); 12th July 2106; paras 68-73.

[77] http://www.lawsociety.org.uk/Policy-campaigns/Campaigns/Access-to-justice/end-legal-aid-deserts/

[78] Ibid.

analysis of the impact of Article 8 on possession proceedings would be a form of 'iceberg theory'. We can see a little bit of firm ground ahead of us, and while it is not especially hospitable it is a more attractive prospect than continuing to bob around in a freezing sea. But just what is to be found in the great mass of the iceberg beneath the surface: well that we do not really know.