

Housing Team Legal Bulletin

Issue 18. May 2008



Landmark Article 8 decision in housing case.

CASE OF McCANN v THE UNITED KINGDOM
(Application No. 19009/04) > [judgment](#)

This decision, handed down today, will have potentially far reaching consequences for all our clients.

Facts

In summary, the facts of this case are as follows.

Applicant and wife joint secure tenants. A's wife and children move out after allegations of DV. Injunction obtained ousting him with non-molestation order and allowing her to return. W re-housed to another property and A moves back into property. Their relationship improves and she supported his application for a transfer to a smaller home but where contact with children can be maintained. Housing authority visited the same day and asked W to sign a notice to quit without explaining effect of doing so for A. W sought to withdraw notice but it was effective and housing authority issued proceedings for possession. Housing authority then refused A's application for a transfer. At possession hearing A argued claim for possession breached Article 8(2) in particular in light of manner in which NTQ was obtained. County court judge agreed and dismissed claim for possession. Authority appealed to Court of Appeal who allowed the appeal. A then sought permission to judicially review authority's procurement of notice to quit. Application dismissed, as collateral challenge to CA decision and permission to appeal to Court of Appeal was refused. A then evicted from property and case lodged with ECHR.

Decision

In summary, the ECHR decided as follows.

- The dwellinghouse was A's home for the purposes of Art 8(1) despite fact that following service of NTQ by wife he had no right under domestic law to occupy it confirming that whether it was his "home" was question of fact .
- Effect of NTQ was to interfere with A's right to respect for his home.
- This interference was in accordance with the law and pursued the legitimate aim of protecting the rights and freedoms of others in two respects namely right to regain possession and ensuring that the statutory scheme for housing provision was properly applied
- Question was whether interference was proportionate with aim pursued and thus "necessary in a democratic society" –held this is a question of procedure as well as substance
- In disagreeing with the majority of the HL in *Kay* – it was held that *Connors* was not confined to cases involving eviction of gypsies or cases where applicant sought to challenge the law itself rather than its application in a particular case.
- **"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 magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in 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."** [paragraph 50]
- The LA appeared to have failed in the course of seeking to obtain an NTQ from W to give any consideration to the applicant's right to respect for his home

- Judicial review does not provide any opportunity for an independent tribunal to examine whether the applicant's loss of his home was proportionate under Art. 8 to the legitimate aims pursued as (i) it is not well adapted for the resolution of sensitive factual questions and (ii) did not provide any greater opportunity than the county court for an independent tribunal to examine proportionality under Art 8(2)
- That the procedural fairness requirements of Art 8 required the independent tribunal to be allowed to examine the proportionality of the interference with A's home on the facts of his individual case and thus a violation of Art 8 was established – thus the effect of this decision is to find the approach of the majority in both Kay and Qazi not consistent with Art 8.
- The ECHR accepted that it was likely that only in very exceptional cases that an applicant would succeed in raising an arguable case which would require the court to examine the issue and thus there were no policy grounds for finding that it would have serious consequences for the domestic law of landlord and tenant

eviction of entrenched tolerated trespassers without a full consideration of the merits is contrary to Article 8 and that Article 8 both by its procedural and substantive protections requires the standard form of order in the old N28 under Section 85(4) Housing Act 1985 and Section 9(4) Housing Act 1988 to be construed as discharging the order for possession hence the decision in **Porter-v-Shepherds Bush Housing Association** is open to reconsideration.

- That in cases where possession is sought on the basis of a tenant's notice to quit – where an arguable Art 8(2) defence can be made out **Hammersmith LBC-v- Monk** is no longer a complete answer to whether an order for possession should be made.
- It is arguable that it imposes a positive obligation on public authorities to consider Art 8(2) before issuing proceedings for possession (see para 52)

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Garden Court North Chambers
13th May 2008

Potential uses

- Strengthens existing arguments based in public law in county court possession claims. If an arguable Art 8(2) defence arises on the merits the County Court must now consider it – it is not limited to a challenge to the underlying domestic law or that something has happened since the service of the notice to quit, which has fundamentally altered the rights and wrongs of the proposed eviction
- Art 8 arguments may therefore once again be run in cases of limited or no security e.g. introductory, demoted and non-secure Part VII accommodation, occupants not entitled to statutory succession
- The judgment reinforces arguments, still to be considered fully by the appellate courts that the