

McCann v UK [2008] ECHR 385

Court: European Court of Human Rights

Relevant to: B8.3.2(iii)

Related cases: *Connors v UK* (2004) 40 EHRR 189; *Kay v Lambeth LBC* [2006] 2 AC 465; *Doherty v Birmingham City Council* [2008] UKHL 57 (see the update on this website)

Importance: **

The background: In 1998, Mr McCann (B1) and his wife (B2) took, as joint tenants, a periodic tenancy of a three-bedroom family home in Birmingham, owned by Birmingham City Council (A). They were secure tenants under the Housing Act 1985 and so the grounds on which A could remove them were limited by statute. Early in 2001, the marriage broke down and B2, with two children, moved out of the home. Having obtained a court order forcing B1 to leave the home, B2 returned to live there. It was claimed that B1 returned to the home and assaulted B2. B2 then applied to A and was re-housed, in line with A's policy on domestic violence. B1 returned to the house. As it was too large for him, B1 applied for an exchange of accommodation with another tenant of A. B2 supported that application. A asked B2 to terminate B1 and B2's existing joint tenancy by giving notice to quit. B2 did so, not realising that, as a result of B1 and B2's tenancy ending, B1 would thereby lose both the right to live in his existing house and the chance to exchange that accommodation.

A brought possession proceedings against B1. As B2's notice had ended the periodic tenancy, B1 had no direct right, or pre-existing right, that he could assert against A. B1 attempted to resist A's application by relying on Art 8 of the ECHR. The county court judge dismissed A's application, but the Court of Appeal, applying the House of Lords' decision in *Harrow LBC v Qazi* [2004] 1 AC 983, upheld A's appeal. B1 applied for judicial review of A's decisions to ask B2 for a notice to quit and to evict B1 from the house; that application was refused. B1 then applied to the European Court of Human Rights (ECtHR). The House of Lords' decision in *Kay v Lambeth LBC* [2006] 2 AC 465 was delivered after B1's application to the ECtHR, but before the ECtHR's judgment.

The questions: The question for the ECtHR was whether, given B1's inability to resist the possession proceedings, the UK had given insufficient protection to B1's Art 8 right and was therefore in breach of its duties under the Convention. The UK contended that any interference with B's right was justified within the meaning of Art 8(2). It argued that the case was different from *Connors v UK* [2004] 40 EHRR 189, as there was no question of discrimination against a vulnerable group; there was no positive obligation on the UK to facilitate B1's way of life; and adequate procedural safeguards had been in place to protect B1's Art 8 right. The UK also pointed to the decision in *Kay* – it made clear that a public law challenge to A's decision to ask B2 for the notice to quit could now be made in direct response to A's application for possession (under Gateway (b) of the *Kay* exceptions, as later explained in *Doherty v Birmingham CC* [2008] UKHL 57).

The decision: The European Court of Human Rights found that the UK was in breach of its duties to B1 under Art 8. The interference with B1's right was pursuant to a legitimate aim – it protected A's property right and enabled A to comply with its statutory duty to arrange adequate housing provision for those in need. However, it was held that the interference was not proportionate to those aims and so was not “necessary in a democratic society”. The central problem, as in *Connors*, was a procedural one: domestic law had not given B1 the chance to have the proportionality of his eviction considered by an independent tribunal. Such procedural safeguards are necessary not only for particularly vulnerable members of society (such as the gypsies in *Connors*) but wherever a party is faced with the loss of his home.

The ECtHR indicated that the procedure for ending a secure tenancy under the Housing Act 1985 does provide adequate procedural safeguards. However, in this case, A had bypassed those procedures as a result of B2's serving the notice to quit. The court held that the possibility, taken up by B1, of applying for judicial review of A's decisions to ask B2 to determine the tenancy and to evict B1 did *not* provide an adequate procedural safeguard. It noted (at [53]) that

“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.”

Further, the judicial review proceedings did not give a court the chance to decide if B1's loss of his home was proportionate.

As a result, the UK was ordered to pay 2,000 Euro to B1 as compensation (as well as paying B1's costs and expenses). The calculation of the sum took into account the fact that Art 8 was “violated in its procedural aspect only”. If a court had been given the chance to consider the proportionality of A's action, it may well have found in A's favour given, for example, the allegations of domestic violence; the shortage of housing; and the fact that B1 was a single man occupying a three-bedroom house.

The effect of the decision: The first, narrower question, relates to the impact of *McCann* on the rule of English law, discussed in [G1B:5.3.4](#), that the giving of notice by one joint tenant can prevent the renewal of a periodic tenancy. That rule is explained and defended on [pp.702-703](#) as the product of an inherent feature of a periodic tenancy and, by itself, it should not be seen as a breach of an occupier's Art 8 right. It is therefore not surprising that an attempt to use *McCann* to challenge the rule was rejected by the High Court in *Wandsworth LBC v Dixon* [2009] EWHC 27 (Admin). The problem in *McCann* was seen to be A's decision to ask B2 to serve a notice to quit, not the rule itself.

The second, wider question is whether the *McCann* decision necessitates a change to English law on the question of B's ability to resist a possession order on human rights grounds. In *Doherty v Birmingham CC* [2008] UKHL 57 (see the update on this website), the House of Lords considered that question. It was held that *McCann* did *not* force the House of Lords to re-consider the approach adopted in *Kay*. There was a procedural aspect to this: as noted by Lord Scott at [61] and Lord Walker at [115], it would have been very strange for the five

Lords in *Doherty* to revise a decision reached by seven Lords in *Kay*; Lord Hope at [19] suggested that only a panel of nine Lords could reverse the decision in *Kay*. Lord Mance at [126] suggested that it was “perhaps unfortunate that *McCann* was decided too late for consideration of whether the present appeal should come on before a constitution of more than five members of the House.”

Lord Hope (at [19]) took the view that the approach applied in *Doherty* (see the update on this website) was “as consistent as domestic law allows us to be with what in both *Connors* and *McCann* the court held was required to avoid a violation of article 8 of the Convention.” Lord Walker (at [117]-[119]) also considered the different positions of the ECtHR and a domestic court. This may suggest that, as revealed by *Connors*, there may be cases in which a statutory scheme cannot be interpreted in such a way as to be compatible with Art 8. If so, the UK will be in breach of its Convention duties; but the most an English court can do is to make a declaration of incompatibility. After all, as discussed in *Doherty*, domestic law as laid down in section 6(2)(b) of the Human Rights Act 1998 means that a public body acting so as to “give effect to or enforce” primary legislation is not acting unlawfully as a matter of domestic law, even if it breaches a Convention right.

Evaluating the decision: In *Doherty*, perhaps unusually, each of Lord Hope and Lord Scott challenged the reasoning of the ECtHR in *McCann*. Lord Hope (at [20]) raised the fear, noted by the majority of the House of Lords in *Kay*, that, if B is always allowed to challenge the proportionality of a public body’s decision to evict B, then real practical problems could arise as very few possession proceedings would ever be straightforward. The ECtHR attempted to deal with this (at [54]) by claiming that “only in very exceptional cases” would B be able to raise an arguable case on proportionality. However, as Lord Hope pointed out, the problem is that the ECtHR provided no “firm objective criterion by which a judgment can be made as to which cases will achieve this standard and which will not”. The approach adopted in *Doherty* is therefore an attempt to provide such guidelines; and it seems that the House of Lords was therefore willing to take the risk that such an approach may not comply with the ECtHR’s interpretation of Art 8.

Lord Scott was particularly robust in his attack on *McCann*, stating (at [82]) that the judgment was based on a mistaken understanding of both the procedure applying when a local authority applies for a possession order and of the various factors a court can take into account when considering such an application. Lord Scott’s view is that the *Kay* approach *does* provide adequate procedural safeguards to B. In particular, if B wishes to challenge A’s decision to seek B’s eviction, B can do so directly, under Gateway (b), without having to make an application for judicial review. At that point, the “proportionality” of A’s decision can be determined by a court, as part of its task in determining if A’s decision was “outside the range of decisions that a responsible local authority could take”. On the facts of *McCann*, it was clear that there was no arguable basis on which B1 could claim that A had acted unlawfully, and so there should be no objection to the summary grant of a possession order.

It should be noted, however, that *McCann* may provide an important impetus in developing the approach of domestic courts to Gateway (b). As discussed in the *Doherty* update on this

website, there is a question as to how far human rights principles, and in particular the notion of proportionality, will be relevant in deciding if a public body has acted wholly unreasonably. Lord Scott's opposition to *McCann* seems to be based, in part, on his view that such principles can come into play under Gateway (b). At [121]-[122], Lord Walker's implied acceptance of *McCann* seems to be based on the view that it will not cause English courts additional problems, as such courts can already take into account proportionality in deciding if "the [local authority's] decision-making process leading up to the commencement of proceedings" is Convention-compliant.