**Chapter 2**

**Question 1: When is an interference with the qualified human rights in A1-P1 and Article 8 proportionate?**

The general approach to role of proportionality within the justification of interference with a qualified right before the ECtHR is considered in paragraphs 2.11-2.23, with further consideration of its application under Art 1 Protocol 1, considered in paragraphs 2.57-2.65 and under Art 8 in paragraphs 2.74-2.94.

An interference with a qualified right must be in accordance with domestic law and serve a legitimate aim which falls with a State’s margin of appreciation and is proportionate in striking a fair balance between the effect upon the victim and the interference. The legitimate aims under Art 1 Protocol 1 and Art 8 differ. Under Art 1 Protocol 1 a legitimate aim must serve the general or public interest. Under Art 8 the legitimate aim must address a pressing social need within the qualifications set out in Art 8(2): for instance as is necessary in the economic well-being of the country or for the protection of the rights and freedoms of others. Even though an infringement of a Convention right may be in pursuit of a legitimate aim, it must also be proportionate. Proportionality is a concept which is well developed in European human rights jurisprudence and that approach in essence has been applied by the domestic courts who have identified 4 limbs. First, the legitimate aim must be sufficiently important to justify limiting the human right, secondly the measure adopted to limit the right must be sufficiently connected to that legitimate aim. These limbs are usually relatively straightforward to meet. Thirdly, the measure adopted should be least intrusive to achieve the legitimate aim and lastly, and perhaps most significantly, a fair balance must be struck between the legitimate aim and the measured used to achieve it, on the one hand, and the severity of interference with the victim’s human rights on the other – see *Bank Mellat v HM Treasury (No 2)*.

Where an infringement with a qualified human right is at issue before a domestic court, the constitutional balance between Parliament and the courts needs to be taken into account. The domestic courts in matters of socio-economic policy have demonstrate deference or, as the court would prefer, due weight to the policy decisions of Parliament and the administrative decisions of those responsible for the implementation of such policy. This deference is evident within the domestic courts approach to the interference with Art. 8 rights in possession proceedings of the home particularly where a private party is seeking possession (see *McDonald v McDonald*.

**Question 2: What do we mean by vertical and horizontal effect?**

The ECHR is a treaty which binds signatory States including the UK, and a victim can bring action in the Strasbourg Courts against a defaulting state. The HRA 1998, with effect from 2nd October 2000, incorporates the ECHR into the law of this country. The means by which the HRA 1998 does so is considered in paragraphs 2.6-2.10.

Vertical effect signifies the obligation of public authorities to observe Convention rights. So, for instance, section 6 of the HRA 1998 requires public authorities to act in a manner which is compatible with the ECHR and a victim may bring direct action against a public authority that breaches its obligations to do so – see section 7. It is thus important to be able to determine which bodies and organisations fall within the definition of a public authority for the purposes of section 6. The definition encompasses both public and quasi-public authorities. Vertical effect and the definition of a public authority is considered in paragraphs 2.24-2.29.

The ECHR may also affect the relations between private landowners, although the precise ambit of this affect is still uncertain. This is known as the horizontal effect of the HRA 1998 and is considered in paragraphs 2.30-2.41. There are a number of ways in which the ECHR may have horizontal effect. For instance, by section 3 of the HRA 1998 legislation must be interpreted as far as possible in a manner which is compatible with the ECHR. Where it is not possible to so interpret legislation, the courts are able to issue a declaration of incompatibility whereupon the Government may amend the offending provision. Thus, where legislation governs relations between private landowners the ECHR will have an impact – see *Ghaidan v Godin-Mendoza*. It is argued that the courts, as public authorities, must act in a manner which is compatible with the ECHR under section 6. Thus, when applying common law and equitable principles in determining the litigants’ rights and obligations the courts should also act in a compliant manner. Furthermore, it is argued that the courts may be obliged to develop the common law and equitable principles to accommodate Convention rights. In addition, the Strasbourg Court has emphasised that States have positive duties to protect Convention rights even in disputes between private individuals, for example see *Connors v UK* and *Zehentner v Austria*. Such positive duties appear to be particularly potent in requiring States to provide adequate procedural safeguards or to protect vulnerable victims, for instance because the victim suffers from some incapacity or because they are a member of a minority cultural group.

**Question 3: How do A1-P1 and Article 8 respectively define ‘possessions’ and ‘home’?**

The meaning of possessions is considered in paragraphs 2.44-2.48. It has an autonomous meaning which the Strasbourg Courts have interpreted widely beyond our domestic understanding of property rights. A particular issue for land lawyers is how appurtenant rights and burdens upon an estate or interest in land are considered. Existing appurtenant rights are not generally considered a separate possession nor an existing burden an infringement. Rather they define the proprietary estate or interest. It is the imposition of new burdens by the operation of external legal rules that may constitute an interference with the victim’s possessions.

The meaning of home is considered in paragraphs 2.68-2.70. It is also has an autonomous meaning which again has been interpreted widely by the Strasbourg Courts. It is clear that home is not restricted to property rights in a residence – thus a squatter may have a home. Instead home is defined by ‘sufficient and continuing links’ with a residence even if that residence is temporary or periodic. The nature of ‘sufficient and continuing links’ is not straightforward to describe. They relate to an emotional and psychological attachment to a physical space. In *Connors v UK* (2005) the Strasbourg Court described the links as: ‘Rights of central importance to the individual’s identity, self-determination, physical and mental integrity, maintenance of relationships and a settled place within the community.’

**Question 4: Why are mandatory rights to possession problematic in human rights terms?**

The compatibility with Art 8 of the exercise of rights to possession in social housing proceedings is considered in paragraphs 2.76-2.89.

Mandatory rights to possession are problematic because they fail to meet the procedural safeguards necessary to consider the proportionality of the infringement with respect for the home that is demanded by human rights adjudication. The court, as an independent tribunal, should be able to consider the proportionality of the right to possession in the light of the occupier’s personal circumstances and not just their legal status – see *Connors v UK, McCann v UK, Kay v UK* as approved in *Manchester CC v Pinnock.* Accordingly, domestic courts have re-interpreted statutory and common law rights to possession to confer this discretion – see *Manchester CC v Pinnock, Hounslow LBC v Powell, Sims v Dacorum DC*.

The compatibility with Art 8 of the exercise of a private landlord’s mandatory right to possession was accepted by the Supreme Court in *McDonald v McDonald*. This important case is consideredin paragraphs 2.90-2.94 together with the criticisms that have been levelled at the Supreme Court’s approach.

It should be noted that similar procedural concerns surround Art 1 Protocol 1 – see *Zehentner v Austria*.

**Question 5: Is there such a concept as a human property right?**

This is a difficult question to which there is no clear answer. Some commentators have argued that rights may arise based upon the protections enshrined in the ECHR even though the claimant may have no recognized proprietary right. This protection has been dubbed a human property right. It should perhaps more accurately be described as a human right based protection since it is clearly not attached to the property but flows, on the one hand, from a public authority’s duty to act in a human rights compliant manner and, on the other hand, from the victim’s right to have their Convention rights observed.

One example of this possibility is found in a series of cases where a local authority has brought possession proceedings against a former tenant or licensee who has lost his or her legal right to remain in possession of their home. We consider these cases in paragraphs 2.76-2.89 and touch on the wider question in our concluding comments in paragraphs 2.100-2.104.

It is clear that the meaning of home for the purpose of Article 8 does not depend upon the occupier holding a proprietary interest in the property. A home is a place of residence with which the claimant has sufficient and continuing links – 3 above. A squatter, former tenant or licensee, who has no legal right to remain in possession, may thus look to the protection of Article 8 where a local authority seeks possession. This has happened in a number of cases where a local authority has sought possession following their revocation of an occupational licence or non-secure tenancy – see *Connors v UK, Hounslow LBC v Powell, Buckland v UK,* following the termination of a joint tenancy by a notice given by one joint tenant – see *Harrow v Qazi, McCann v UK* and *Sims v Dacorum DC* and pursuant to one of the statutory regimes intended to combat anti-social behaviour see *Manchester cc v Pinnock and Hounslow LBC v Powell*. In these cases, the occupier of their home had no legal right to remain in possession upon the entirely legal revocation of their licence or termination of their tenancy. Nevertheless, they have argued, that the respect for their home has been unjustifiably infringed where the local authority has taken possession proceedings to remove them from their home.