Malik v Fassenfelt [2013] EWCA Civ 798: The Implications for Private Landlords and Landowners

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Introduction

1. Historically it was rare for a judgment in the field of housing law to be greeted with anything other than indifference, if it was greeted at all. Aside from those practising within the field, such judgments were usually as widely reported and discussed as the annual Sauna World Championships (which, I'm sure you'll be saddened to learn, ceased in 2010). In that context it is surprising that this field has produced some of the most contentious and debated decisions of any area of law over the past few years. For starters, the Supreme Court has only recently determined in Manchester City Council v Pinnock [2011] 2 AC 104 that article 8 must be applied when a court is being asked to make an order for possession of a person's home at the suit of a local authority. That is a decision which, even now, is still being digested by district judges and practitioners up and down the country. Nonetheless, the effect of the Court of Appeal's (or should that be Sir Alan Ward's) decision in Malik v Fassenfelt and others [2013] EWCA Civ 798 could potentially be far more wide-ranging. With that in mind, this article is an attempt to explore what the court in Malik did and *did not* say.

The Brief Facts

2. Before exploring the implications of the decision, it is worthwhile briefly setting out the facts of the case itself. In short, Mr Imran Malik purchased a plot of land close to Heathrow Airport in 2003 for £240,000. The land had previously been used as a market garden and plant nursery but those had closed down by the date of purchase. Mr Malik applied for planning permission to develop the land for office use. That application was refused and eventually (by reason of the actions of a subsequent tenant) the land was used as no more than a dumping ground for motor cars and for fly tipping. Trespassers (known collectively as "Grow Heathrow") subsequently obtained access to the land and cleared it. They thereafter restored it to its former attractiveness as a market garden centre and began living there. Upon discovering this Mr Malik issued possession proceedings with a view to evicting the group. He succeeded in the county court and the group, represented by Mr Joseph McGahan, appealed to the Court of Appeal. By the time the case reached that court, the Defendants' defence was one founded on article 8, namely: they enjoyed the protection of article 8 and the eviction interfered with their rights in a disproportionate way.

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The Issues

3. The two most important issues in the case were arguably: (1) whether or not article 8 applied in a claim for possession by a private landowner against trespassers; and (2) whether or not McPhail v Persons, Names Unknown [1973] Ch 447 was still good law.

Does Article 8 apply in a Possession Claim by a Private Landowner against a Trespasser?

4. Let's start with what the Court of Appeal in Malik did not decide. Despite suggestions to the contrary, the Court of Appeal did not decide that article 8 applies to possession claims by private landowners against trespassers. The point was not in fact argued in the Court of Appeal (to the consternation of both Lord Toulson and Lloyd LJ) in an attempt to limit the issues and minimise costs. Nonetheless, whilst Sir Alan Ward himself seemed to accept that *"a private landowner is not a public authority and is, therefore not obliged to respect the trespasser's human rights but section 6(3) of the Act makes it plain that the court is a public authority...[and thus] obliged to act in a way which is compatible with Convention rights"*[2], that view was not shared by Lord Toulson or Lloyd LJ. Both refused to rule on the matter, although both expressed reservations as to whether article 8 would apply. In fact Lord Toulson did go on and add that: *"it would be a considerable expansion of the law to hold that article 8 imposes a positive obligation on the state, through the courts, to prevent or delay a private citizen from recovering possession of land belonging to him which has been unlawfully occupied by another."*

5. For those reasons Sir Alan Ward's comments on this issue cannot in any way be taken as the ratio of the case. All three of the judges agreed that the appeal should be dismissed, but only on the basis that they felt that the first instance judge's decision to make a forthwith possession order was correct.

6. Nonetheless, one cannot ignore the increasingly obstreperous debate in recent years between those ascribing to the "traditional" view of the ECHR in this context (ie. Convention rights should only directly apply where the landowner is a public authority) and those ascribing to the "revisionist" view (ie. that as the court itself is a public authority and therefore cannot act incompatibly with an article of the ECHR, Convention rights are directly applicable between private parties through the back door). In fact, I have, in recent years, been involved in cases where this issue has been raised. In that respect, Sir Alan Ward's judgment in the Court of Appeal and the first instance decision of HHJ Walden-Smith (albeit in the county court) are only likely to strengthen the hand of those who support the revisionist agenda. With that in mind, it is more important than ever to tackle this increasingly popular view and explain why, in this author's opinion, it is misconceived and inappropriate.

[2] At [8]

(i) The revisionist view arises, it seems, from a lack of clarity in the Human Rights Act 1998. That piece of legislation was intended to avoid the need for those complaining of human rights infringements in the UK to apply direct to the European Court of Human Rights in Strasbourg. Unfortunately (or fortunately for the revisionists), whilst rendering any infringement of Convention rights by public authorities in the UK unlawful, the courts (under s.6(3)) were cast as "public authorities" without any further explanation. Accordingly, revisionists have sought to use this to justify their assertion that the court *itself* can never act incompatibly with the Convention, and, therefore, must apply Convention rights directly between even private parties. At first glance, the sheer opportunism and ingenuity of the approach instinctively suggests that this was clearly not something intended by Parliament. That initial view is supported by the absence of any references to private individuals or organisations in the Act or in the Parliamentary debates preceding its enactment. Further, Parliament's view is perhaps summarised in the later (2004) report of the House of Lords/House of Commons Joint Committee on Human Rights, in which the Committee concluded that:

"The extent of the "horizontal" application of the Human Rights Act as between private parties has been the subject of extended academic debate, but it is generally accepted that these provisions fall far short of full horizontal effect, which would apply the obligation to comply with Convention rights to both private and public persons on an equal basis."

The Committee felt that the housing legislation already in place (plus the need to interpret that legislation as far as possible in accordance with the Convention – s.3) was sufficient to protect private individuals in that sector. In short, the revisionists are seeking to engineer an outcome that was never intended by Parliament.

(ii) Importantly, there are currently no reported decisions (bar the odd obiter comment) in this jurisdiction supporting the extension of article 8 to the private landowner. In fact, Lord Neuberger and the Supreme Court in Pinnock (at [50]) were at pains to indicate that their ruling did not apply to private landlord cases, adding that: *"no doubt, in such cases Article 1 of the First Protocol to the Convention will have a part to play, but it is preferable for this Court to express no view on the issue until it arises and has to be determined."* Furthermore, in Harrow London Borough Council v Qazi [2004] 1 AC 983,[3] Lord Walker (Lord Bingham[4] and Lord Scott[5] gave similar judgments) emphatically stated:

[3] Subsequently approved in Birmingham City Council v Doherty [2008] UKHL 57 at [23] per Lord Hope, [69] per Lord Scott, and [92] per Lord Walker
[4] At paragraph [23]
[5] At paragraph [26]

"I...disassociate myself from the dictum of Waller LJ[6]...that, even in a case where a private landlord is seeking possession, the court, as a public authority, must consider whether the order is justified under article 8(2) before making an order. The fact that a person cannot be evicted without a court order does not mean that the court, as a public authority, is bound in each case to consider whether an order for possession would be disproportionate and infringe article 8 rights."

(iii) The traditional view has previously been upheld in the Commission/the European Court of Human Rights. For example, as long ago as Di Palma v UK, the Commission rejected the relevance of the court itself to this debate, stating:

"It is true that the landlord issued proceedings in the domestic courts in order to forfeit the applicant's lease. This fact alone is not however sufficient to engage State responsibility in respect of the applicant's rights to property, since the public authority in the shape of the County Court merely provided a forum for the determination of the civil right in dispute between the parties."[7]

Nonetheless, even this author concedes that more recent decisions of the Strasbourg court suggest a possible change of attitude (see in particular Belchikova v Russia App No 2408/06, Zehentner v Austria (2011) 52 EHRR 22, Buckland v UK App No 40060/08, Sept 2012, Pelipenko v Russia App No 69037/10, October 2012). Although it should also be emphasised that, at least in respect of Zehentner and Pelipenko, the Strasbourg court was concerned more with judicial procedures and procedural guarantees rather than the interpretation and application of substantive domestic law. In any event, English courts are not bound by a decision of the Strasbourg court (see s.2 of the 1998 Act and Pinnock at [48]). That does not, of course, prevent individuals from complaining directly to the European court or the courts in England and Wales (or Northern Ireland – see for example the apparent adoption of the revisionist approach by the High Court of NI in Official Receiver for Northern Ireland v O'Brien [2012] NICh 12) from being influenced by that court's decisions.

(iv) Perhaps the strongest reason to suggest that the traditional view should be preferred is that, put simply, the raison d'etre of the ECHR was always (and remains) to uphold and protect the rights of the individual when faced with action or inaction by *state* institutions; not to apply Convention principles directly in disputes between individuals: see Qazi, per Lord Walker at [108] (approved in Doherty [2008] UKHL 57). The revisionist view is completely at odds with that statement. As Lord Walker said, in the context of the possession claim in Qazi:

"The court is merely the forum for the determination of the civil right in dispute between the parties: see Di Palma v United Kingdom[8]. Its task is to resolve the dispute according to the law. In doing so it would, of course, have to consider whether the landlord is entitled to possession as a matter of our ordinary domestic law (ie.

[6] R (McLellan) v Bracknell Forest Borough Council [2002] QB 1129
[7] (1986) ECHR 19 at 210
[8] (1986) ECHR 19

apart from the Human Rights Act 1998), taking into account the various statutory provisions which operate in this field. But once it concludes that the landlord is entitled to an order for possession, there is nothing further to investigate."

7. Unfortunately the court in Strasbourg does not appear likely to change its approach any time soon. In this author's view, only Parliament's involvement is likely to stem the rising tide. Any such intervention would of course have seismic consequences in terms of the UK's relationship with the European court and the ECHR.

Is McPhail still good law?

8. Once more, despite suggestions to the contrary, the answer has to be: yes. The judgment of Sir Alan Ward (in the minority) is the only one that suggests a different answer. After a "long trawl" through the authorities which, he himself recognised, dealt with claims for possession made by public authorities, he reiterated his view that article 8 applies to possession claims by private landlords, before adding:

"...So the court will have to consider whether the making of a possession order is proportionate if the issue has been raised by the occupier and it has crossed the high threshold of being seriously arguable. The question will then be whether making an order for the occupiers' eviction is a proportionate means of achieving a legitimate aim."[9]

9. As Sir Alan Ward then (correctly) pointed out, if proportionality is indeed in issue, then, as the rule in McPhail necessarily precludes the extension of time to vacate even if the requirement of proportionality were to demand that, the rule can no longer be considered to be good law. Despite that, Sir Alan Ward determined that on the facts of the case it had still been proportionate for the judge at first instance to make a forthwith order for possession.

10. Nonetheless, as foreshadowed above, the majority (Lord Toulson and Lloyd LJ) refused to accept that McPhail should be discarded. As Lord Toulson recognised, the determination of whether or not McPhail remains good law in a claim by a private landowner against trespassers is inextricably connected with the question of whether or not article 8 extends to such a case. As that issue had not been argued in the Court of Appeal, he wished to reserve his opinion on the matter and refused to accept that McPhail had ceased to represent the law in cases of trespass to privately owned land. Nonetheless, he was willing (as set out already above) to add:

"It would be a considerable expansion of the law to hold that article 8 imposes a positive obligation on the state, through the courts, to prevent or delay a private citizen from recovering possession of land belonging to him which has been unlawfully occupied by another. There would also be a weighty argument that for the state to interfere in that way with a private owner's right to possession of his property would be contrary to a long standing principle of common law, which finds echo in article 1 to protocol 1."

[9] At [26]

11. Despite that apparent support for McPhail, he (somehow) reasoned that he was required to "assume" that article 8 did apply in the case before him, but, even then, he dismissed the appeal. Lloyd LJ similarly reserved the right to question whether or not McPhail was good law. He also "assumed" that article 8 did apply, but dismissed the appeal.

Conclusions

12. Malik is a case which to some promised so much and yet delivered so little. It's fair to say that neither side can confidently claim a victory. As such, we await further decisions to determine the direction that the law is now travelling in.

13. Unfortunately for traditionalists, the court in Strasbourg seems to have already set the law on a certain path and it may well be just a matter of time before the courts in England and Wales follow suit. Nonetheless, whatever the Court of Appeal or Supreme Court eventually decide, it is unlikely that the day in day out decisions in the county courts up and down this country will change dramatically. For even Sir Alan Ward accepted that: *"...if the [individuals] have established a home on the land but...otherwise [have] no legal right to remain there, it is difficult to imagine circumstances which would give the defendant an unlimited and unconditional right to remain. The circumstances would have to be exceptional."* [10] That, perhaps, will provide at least some consolation to private landlords and landowners out there.

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[10] Malik at [28]

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