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Unpredictable and damaging? A human rights case for the proportionality assessment of evictions in the private rental sector

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ABSTRACT

In the admissibility decision of *FJM v UK* (2018), the European Court of Human Rights ruled that Article 8 ECHR does not require a proportionality test of evictions in the private rental sector, limiting the applicability of the principle of *McCann v UK* (2008) only to the public sector. This article argues that courts should assess the proportionality of evictions also in the private rental sector. The scope of the margin of appreciation requires an analysis of the common ground that may exist in European comparative practice and in light of other international human rights obligations accepted in the continent. The social function of homeownership provides the ground to achieve a better balance between the right to private property, the right to private and family life, and the right to housing.

KEYWORDS

Evictions, Home, Housing, Private and Family Life, Private Property, United Kingdom.

1. Introduction: The proportionality assessment of evictions from *McCann* (2008) to *FJM* (2018)

In *McCann v UK*, from 2008, a case concerning the eviction of a family renting a house from a local authority in England, the European Court of Human Rights established that:

> (T)he 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.[1] (italics added)

The European court would apply this interpretation of the right to home, part of the right to private and family life, multiple times, including *Ćosić v Croatia*,[2] *Paulić v Croatia*,[3] *Kay and Others v UK*,[4] *Buckland v UK*,[5] *Rousk v Sweden*,[6] *Winterstein and Others v France*,[7]

[1] McCann v United Kingdom 19009/04 (ECtHR, 13 May 2008), para 50.
[2] Ćosić v Croatia 28261/06 (ECtHR, 15 January 2009), para 22.
[3] Paulić v Croatia 3572/06 (ECtHR, 22 October 2009), para 43.
[4] Kay and Others v United Kingdom 37341/06 (ECtHR, 21 September 2010), para 68.
[5] Buckland v United Kingdom 40060/08 (ECtHR, 18 September 2012), para 65.
[6] Rousk v Sweden 27183/04 (ECtHR, 25 July 2013), para 137.
[7] Winterstein and Others v France 27013/07 (ECtHR, 17 October 2013), para 148.

Yevgeniy Zakharov v Russia,[8] *Shvidkiye v Russia*,[9] *Panyushkiny v Russia*,[10] *Popov and Others v Russia*,[11] and *Lushkin and Others v Russia*.[12]

However, for a decade, it remained under dispute whether the McCann principle applied indeed to *any person*, or only to *any person* in the conditions the McCann family found themselves in, namely, people living in some sort of public or social housing. The cases that were brought to the attention of the European Court of Human Rights concerned buildings or land owned or run by public authorities.

In one of those cases, *Buckland v UK*, Judge de Gaetano expressed the separate opinion that private landlords should not be worried, because in the case of private rental evictions 'the relevant principles under Article 8 should not come into the equation.'[13] No other judge endorsed de Gaetano's opinion. However, the silence did not necessarily mean that they did not agree with him, as the reason could simply be that the case at hand was about an eviction from a site owned by a local authority, and therefore the opinion was *obiter dictum*.

Whilst it was unclear if the McCann principle would apply in the private sector, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol to ICESCR) entered into force in 2013. In one of its earliest cases, in 2017, the UN Committee on Economic, Social and Cultural Rights established that the right to adequate housing of Article 11 ICESCR requires a proportionality test of evictions in the private residential sector.[14]

In sum, for the UN committee, rental evictions with no proportionality test in the private sector were contrary to the right to adequate housing. But while the European court required such test for evictions from public housing, whether the test was required in the private sector was uncertain.

The uncertainty about the remit of the McCann principle ended with *FJM v UK*, an admissibility decision dated November 2018. In *FJM*, the European Court of Human Rights concluded that Section 21 evictions, in force in England and Wales, do not breach the right to home. Section 21 of the Housing Act 1988 allows private landlords to evict tenants with a short notice with no fault on the part of the tenant and with no need for a reason. The European court went as far as to say that, if tenants were entitled to require national judges to examine the proportionality of an eviction before ordering the possession of their home, 'the resulting impact on the private rental sector would be *wholly unpredictable* and potentially *very damaging*' (italics added).[15]

This article will show that this need not be the case, and that in fact before reaching such conclusion the European court should have examined European comparative practice and national legal orders, as well as other human rights obligations. This article makes the case for a proportionality assessment of all evictions, irrespective of public or private ownership. The

[8] Yevgeniy Zakharov v Russia 66610/10 (ECtHR, 14 March 2017), para 34.
[9] Shvidkiye v Russia 69820/10 (ECtHR, 25 July 2017), para 31.
[10] Panyushkiny v Russia 47056/11 (ECtHR, 21 November 2017), para 52.
[11] Popov and Others v Russia 44560/11 (ECtHR, 27 November 2018), para 43.
[12] Lushkin and Others v Russia 29775/14 and 29967/14 (ECtHR, 15 December 2020), para 45.
[13] Buckland v United Kingdom, n 5 above, separate opinion.
[14] Ben Djazia and Bellili v Spain, Communication No 5/2015 (CESCR), Views of 20 June 2017, E/C.12/61/D/5/2015, para 13.4.
[15] FJM v United Kingdom 76202/16 (ECtHR, dec, 6 November 2018), para 43.

scope of the margin of appreciation requires an analysis of the common ground that may exist in European comparative practice and in light of other international human rights obligations accepted in the continent. The social function of homeownership provides the ground to achieve a better balance between the right to private property, the right to private and family life, and the right to housing.

This is not the first critique of the court's decision in *FJM*. From the perspective of UK law, Nield and Laurie, for example, questioned the court's faith in 'contractualism' in the private rental sector,[16] as did Bernard from the angle of the 'horizontalisation' of the European Convention on Human Rights.[17] The originality of this article, however, lies in the fact that this is the first analysis of *FJM v UK* to interpret European human rights law in light of other international human rights obligations, as well as comparative practice and law.

The relevance of *FJM v UK* far exceeds the housing market and living conditions in the UK. This judgment could lead to a race to the bottom in the protection of security of tenure all over Europe; as warned by Vols, the case 'will probably change the tone and nature of the debate concerning the need of contextual eviction adjudication and the impact of European law on national tenancy laws.'[18] It is therefore essential to assess critically the merits of Strasbourg's interpretation of Article 8 requirements in this case.

The article is structured as follows. Section 2 presents the factual and legal background of *FJM v UK*, and the regulation of tenancies and evictions in England. Section 3 elaborates the meaning of the principle of proportionality in relation to evictions in human rights law. Section 4 paints a comparative picture of the laws on rental evictions in the private sector across the continent. Finally, Section 5 explains why *FJM* could have been ruled differently: Evictions in the public and private sector should require a proportionality test in light of possible common ground in European practice, and having due regard to international human rights law.

2. Fiona McDonald's Case, Assured Shorthold Tenancies and Section 21 Evictions

In *FJM v UK*, the European Court of Human Rights ruled that England's no-fault evictions, of Section 21 of the Housing Act 1988, were not in breach of the right to home, part of the right to private and family life under Article 8 ECHR. The court reached this conclusion, not in a judgment on the merits, but in a decision declaring Fiona McDonald's (FJM) application against the UK inadmissible.

Section 21 of the Housing Act 1988 allows landlords to evict tenants who are not at fault and with no need to provide any reason.[19] In the case of Section 21 evictions, tenants have not necessarily breached any contractual or statutory obligation. The only requirement is that tenants ought to be given a written notification several months in advance,[20] as long as the

[16] S Nield and E Laurie, 'The private-public divide and horizontality in the English rental sector' (2019) 4 Public Law 724.
[17] N Bernard, 'La protection conventionnelle du domicile tombe-t-elle lorsqu'on l'invoque contre un particulier? La longue quête de l'horizontalisation des droits de l'homme' (2019) 120 Revue trimestrielle des droits de l'homme 891.
[18] M Vols, 'European Law and Evictions: Property, Proportionality and Vulnerable People' (2019) 27(4) European Review of Private Law 719, 731.
[19] Section 21 Housing Act 1988, c. 50.
[20] It used to be two months, but under Covid-19 restrictions, in 2020-21 it was three, four or six months.

assured shorthold tenancy has come to an end, which normally happens after six or twelve months in most cases.[21]

Courts dealing with Section 21 notices cannot look into the personal circumstances of tenants, who have no defence to argue that the eviction would be disproportionate or unreasonable in their case. Seeking a proportionality-based defence is precisely what Fiona McDonald tried to do when she was served a Section 21 notice in March 2012. McDonald lived in a house in Abingdon, Oxfordshire, which had been purchased by her parents in 2005 with a mortgage-secured loan. Her parents were her landlords and she claimed housing benefits that allowed her to pay the rent. McDonald's parents, however, fell into arrears and in 2012 the financial entity that was the mortgagee sought possession of the property via Section 21.[22]

McDonald had reported psychiatric and behavioural problems from a very early age. The first instance court, the Oxford County Court, received expert evidence from an experienced psychiatrist who concluded that McDonald had 'an emotionally unstable personality disorder and at times when her mental state has deteriorated she has presented with frank psychotic symptoms,' as a result of all of which she had been unable to work for more than ten years.[23] The expert psychiatrist also reported that, in his view, McDonald 'would have real difficulty in finding alternative rented accommodation that would accept her' as a recipient of housing benefits, 'and in view of her mental health history including at times aggression towards others… there is a significant possibility that she would become homeless.'[24] The medical examiner added that, even if alternative accommodation could be found, the stress associated with the eviction and the move would likely affect her mental health negatively, with the possibility of resulting in serious violence to herself or to others.

In April 2013, the Oxford County Court authorised the eviction. It did so 'with regret' because the judge considered McDonald's personal circumstances 'exceptional' due to her 'palpable disability and fragility, the fact that the arrears were never very substantial, the fact that the rent was always up to date, and the fact that the applicant had failed to keep two previous tenancies provided by public authorities and would therefore find it very difficult to find alternative accommodation.'[25] However, the court observed that Section 21 of the Housing Act 1988 did not give other choice but to authorise the eviction irrespective of the circumstances, personal or otherwise. The judge went on to say that, if:

> (H)e had been entitled to consider the proportionality of making an order for possession, he would have dismissed the action, because, on balance, he would have taken the view that those circumstances were sufficiently exceptional to justify dismissing the claim for possession on the basis that it was disproportionate.[26]

In July 2014, the Court of Appeal agreed with the county court that Section 21 precluded the application of a proportionality test. The court estimated that even if it were to

[21] Ministry of Housing, Communities & Local Government, English Housing Survey: Private rented sector, 2017-18 (2019) 22.
[22] McDonald v McDonald & Ors [2016] UKSC 28 (15 June 2016), para 3-5.
[23] Ibid para 2.
[24] Ibid para 7.
[25] FJM v United Kingdom, n 15 above, para 8.
[26] McDonald v McDonald & Ors, n 22 above, para 8.

look at personal circumstances, unlike the county court, they would have ordered the eviction anyway.[27]

The case reached the Supreme Court in 2016. The Supreme Court reviewed and summarised the case law of the European Court of Human Rights to conclude that, in the private rental sector, Article 8 ECHR does not require an independent assessment of the proportionality of all evictions. The Supreme Court considered that it was within the UK's margin of appreciation for Parliament to decide whether judges should or should not have a say about the proportionality of private rental evictions on a case-by-case basis. The court went even further in estimating that 'the protection afforded to tenants under assured short tenancies is significant, if limited, and it enables both landlords and tenants to know exactly where they stand;' the law achieves this 'without conferring so much protection as to deter private individuals and companies from making residential properties available for letting.'[28]

The Supreme Court was therefore of the opinion that the proportionality assessment derived from the right to home does not apply in the private rental sector. Having said that, the court appeared open to be persuaded of the opposite:

> *In the absence of any clear and authoritative guidance from the Strasbourg court to the contrary*, we would take the view that, although it may well be that article 8 is engaged when a judge makes an order for possession of a tenant's home at the suit of a private sector landlord, it is not open to the tenant to contend that article 8 could justify a different order from that which is mandated by the contractual relationship (italics added).[29]

The UK judiciary had indeed been persuaded before by authoritative guidance from Strasbourg. In the past, the Appellate Committee of the House of Lords held that the proportionality defence was never applicable in the case of rental evictions, even when the landlord was a public authority.[30] However, as indicated earlier, in *McCann v UK*, the European Court of Human Rights established that: '*any person* at risk of' losing their home 'should *in principle* be able to have the proportionality of the measure determined by an independent tribunal' (italics added).[31]

The Supreme Court, in place since 2009, accepted Strasbourg's interpretation as set out in *McCann*. In *Pinnock*, the Supreme Court concluded that, 'where a court is asked to make an order for possession of a person's home at the suit of a local authority, the court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact.'[32] The principle was confirmed soon afterwards in *Hounslow Borough Council v Powell*,[33] and has remained the standing case law ever since. The Supreme Court, however, added two caveats in *Pinnock*. Firstly, it emphasised that the principle applies to local authorities only: 'nothing which we say is intended to bear on cases where the person seeking the order for possession is a private landowner.'[34] And secondly, the

[27] McDonald v McDonald & Anor (Rev 1) [2014] EWCA Civ 1049 (24 July 2014), para 46-53.
[28] McDonald v McDonald & Ors, n 22 above, para 45.
[29] Ibid para 40.
[30] London Borough of Harrow v Qazi [2003] UKHL 43 (31 July 2003).
[31] McCann v United Kingdom, n 1 above, para 50.
[32] Manchester City Council v Pinnock [2011] UKSC 6 (9 February 2011), para 49.
[33] Hounslow London Borough Council v Powell [2011] UKSC 8 (23 February 2011), para 7.
[34] Manchester City Council v Pinnock, n 32 above, para 50.

court made clear that only in 'very highly exceptional cases' would it be appropriate for a court to suspend an eviction or to introduce any sort of conditionality in application of the proportionality test.[35]

As said earlier, McDonald's case was examined by the European Court of Human Rights in November 2018 as *FJM v UK*. In the decision on admissibility, it became apparent that, despite the wording in *McCann*, the proportionality test would not really apply to *any person*, but only to tenants in the public sector. McDonald argued that her Article 8 rights had been breached because she had not been given the opportunity to resort to the proportionality defence to preserve her right to home. The European Court of Human Rights, however, considered that the two parties, landlord and tenant, had 'entered voluntarily into a contractual relationship,' and that Parliament had struck a reasonable balance between different rights recognised in the ECHR, not only the right to private and family life, but also the right to private property.[36] The First Section of the European Court of Human Rights condescendingly added that McDonald's 'particular circumstances are undoubtedly deserving of sympathy,'[37] but in the court's opinion her right to home had not been breached.

3. Evictions and the Proportionality Test in International Human Rights Law

Part of the right to private and family life (Article 8 ECHR), the right to home is connected to but different from the right to the peaceful enjoyment of one's possessions and the right to adequate housing. The protection of property is recognised in Article 1 Protocol 1 of ECHR, and the right to housing can be found in Article 11 ICESCR.

The right to private and family life is not absolute. Interference with the exercise of this right is permissible when it is:

> (I)n accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[38]

In *Connors v UK,* in 2004, the European Court of Human Rights noted that Article 8 ECHR 'concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community.'[39]

The right to privacy, family life and home is also proclaimed in Article 17 of the International Covenant on Civil and Political Rights (ICCPR), signed and ratified by all European countries.[40] The UN Human Rights Committee interprets that the prohibition of 'arbitrary interference' in the enjoyment of one's home 'is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and

[35] Ibid para 51.
[36] FJM v United Kingdom, n 15 above, para 42 and 46.
[37] Ibid para 45.
[38] Article 8(2) European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) ETS 5.
[39] Connors v United Kingdom 66746/01 (ECtHR, 27 May 2004), para 82.
[40] Article 17 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.'[41]

As mentioned earlier, in *McCann v UK*, in 2008, the European Court of Human Rights expressed the view that 'any person' at risk of losing their home should 'in principle' be entitled to have the proportionality of the eviction assessed by an independent tribunal.[42] The proportionality test or assessment can be defined as the evaluation of the fitting 'between the administration's objectives and the means chosen to pursue them,' aiming 'to identify measures that go too far.'[43] 'Particularly weighty reasons of public interest,' says the European court, are required in cases of serious interference with the right to private and family life.[44] This is so because the loss of one's home in an eviction, even when such eviction is to be carried out in accordance with domestic law, is 'a most extreme form of interference with the right to respect for the home.'[45]

The right to home is closely linked to the right to adequate housing, which is not in the European Convention on Human Rights, but is part of Article 11 ICESCR, an international treaty ratified by all countries in Europe with the exception of Andorra. The adequacy of housing is determined by a set of requirements identified by the UN Committee on Economic, Social and Cultural Rights; it includes availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility to disadvantage groups, geographical location, cultural adequacy, and security of tenure.[46] Irrespective of income, wealth and type of tenure, private or public, ownership or rent, everyone is entitled to 'legal security of tenure,' which includes the legitimate expectation that one should not be arbitrarily evicted.[47] The persistent non-payment of rent is one of the reasons why an eviction can be potentially justifiable, but for an eviction to be actually justified, notes the UN Committee on Economic, Social and Cultural Rights, 'it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality.'[48] This means that the eviction must be 'provided for by law and… carried out as a last resort, and that the persons concerned (must have) prior access to an effective judicial remedy, in order to ascertain that the measure in question is duly justified.'[49] States are required to respect the right to adequate housing and other socio-economic rights, which means that they should refrain from infringing those rights directly; but, on top of that, states also have the obligation to protect the right to adequate housing from transgression by private actors: 'An eviction related to a rental contract between individuals can, therefore, involve Covenant rights.'[50] The principle of proportionality may require that an eviction order is made conditional on the 'requirement that administrative authorities intervene and assist the occupants in order to mitigate the impact of the eviction;' it may also require to

[41] UN Human Rights Committee, General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, HRI/GEN/1/Rev.1 at 21 (1988), para 4.
[42] McCann v United Kingdom, n 1 above, para 50.
[43] J Mathews, 'Reasonableness and Proportionality', in The Oxford Handbook of Comparative Administrative Law, Peter Cane, H C H Hofmann, E C Ip and P L Lindseth (eds) (Oxford University Press 2020) 925.
[44] Connors v United Kingdom, n 39 above, para 86.
[45] McCann v United Kingdom, n 1 above, para 50.
[46] UN Committee on Economic, Social and Cultural Rights, General Comment No 4: The Right to Adequate Housing, E/1992/23 (1991), para 8.
[47] Ibid para 8.a.
[48] UN Committee on Economic, Social and Cultural Rights, General Comment No 7: The right to adequate housing: forced evictions, E/1998/22 (1997), para 11 and 14.
[49] Ben Djazia and Bellili v Spain, n 14 above, para 15.1.
[50] Ibid para 14.2.

postpone 'an eviction while the competent authorities negotiate with the persons concerned regarding the available alternatives.'[51] The proportionality test 'entails examining not only the consequences of the measures for the evicted persons but also the owner's need to recover possession of the property. This inevitably involves making a distinction between properties belonging to individuals who need them as a home or to provide vital income and properties belonging to financial institutions,' factors that should be borne in mind when ruling on the possible postponement or suspension of an eviction.[52] Furthermore, before an eviction is executed, public authorities must ensure that nobody will be rendered homeless or vulnerable to human rights violations as a result of the eviction.[53]

The European Committee of Social Rights monitors states' compliance with the European Social Charter and its protocols. This committee has established that the legal, social and economic protection of families includes the adequate provision of housing, which extends to security from unlawful evictions where a fair procedure is not followed or where the rights of the persons concerned are not being sufficiently protected.[54]

In sum, according to international human rights law, evictions constitute a serious infringement of a tenant's enjoyment of their home. From the tenant's perspective it is of no relevance whether homeownership belongs to a public authority, a corporation or a private individual. Compliance with the procedure established in the domestic legal framework is a necessary but not sufficient condition to meet the standard of the right to private and family life as recognised in international law. Any interference with one's home must be in accordance with internal law, but it must also be necessary, reasonable and proportionate in the particular circumstances. The assessment of those circumstances includes the consideration of whether that person is likely to be rendered homeless, and/or whether that person may find herself in a particularly vulnerable position as a result of the eviction. The evaluation of the circumstances requires an independent and impartial analysis by an independent actor (judicial or not) on a case-by-case basis. When these requirements are met, an eviction can be legitimate and respect the right to adequate housing and the right to home.

Private rental sector evictions deal with somebody's private property, but they deal with somebody else's home as well. Putting an end to the factual reality that someone is living in a place they do not own requires a legal basis, but also a legitimate goal. The vindication of the landlord's ownership rights is a legitimate aim for the purposes of Article 8 ECHR, but wanting the property back is not enough justification for an eviction. The eviction must be a last resort, serve a legitimate goal, and be necessary and proportionate in the specific circumstances of the case. That is the holistic legal justification required to pursue an eviction that respects the requirements of national law as well as international human rights law.

Against such background, Section 21 of the Housing Act 1988 enforces a blanket exclusion of any assessment of proportionality in England's private rental sector. Judges are

[51] Gómez-Limón Pardo v Spain, Communication 52/2018 (CESCR), Views of 5 March 2020, E/C.12/67/D/52/2018, para 9.6.
[52] López Albán v Spain, Communication 37/2018, Views of 11 October 2019 (CESCR), E/C.12/66/D/37/2018, para 11.5.
[53] UN Committee on Economic, Social and Cultural Rights, n 48 above, para 16.
[54] European Roma Rights Centre v Greece, Collective Complaint No 15/2003 (CESR), Decision on the Merits of 8 December 2004, para 24 and 51.

not allowed to carry out such assessment even if they want to, as was the case of the county court in Fiona McDonald's case.[55]

4. Comparative Law and Practice in Europe

Two major studies in recent years present systematic comparative analyses of homelessness prevention policies and regulation of eviction-related court proceedings across Europe. The first one (Pilot Project) was coordinated by Kenna, Benjaminsen, Busch-Geertsema and Nasarre-Aznar. It examined evictions across the then 28 (now 27) member states of the European Union between 2010 and 2013, including the legal protection of the right to adequate housing, mechanisms to prevent homelessness and early interventions to provide support for people at risk of homelessness.[56] The second study (TENLAW: Tenancy Law and Housing Policy in Multi-level Europe) was led by the University of Bremen, with active involvement of academic institutions from around the continent, and took place between 2013 and 2015: The final deliverable included a systematic analysis of 32 European countries, including all the member states of the European Union and the United Kingdom, as well as cross-country comparisons and an analysis of relevant EU policies.[57] Both of these studies led to a sizeable number of edited volumes, academic articles and book chapters. This section is based on these and other sources cited throughout.

Both the Pilot Project and TENLAW place England as a continental outlier as regards the regulation of evictions and security of tenure. In his introductory chapter to the comparative analysis, Kenna writes that England's assured shorthold tenancies are 'unique' for European standards, and that successive 'legislative and policy changes reduced the protection of private tenants to the lowest level in Europe.'[58] The default assured shorthold tenancy is, in Jordan's words, 'one of the most extreme regulatory models in Europe.'[59] Schmid forecasts that 'the English solution indeed represents an extreme which will become socially less acceptable as the share of social and municipal housing, which still acts as an important compensation mechanism, is declining.'[60]

A third study, separate from the other two and published in 2011, finds that the English housing model is less protective of tenants than Austria, Belgium, Denmark, Germany, the Netherlands, Sweden, Switzerland, Finland, France, Ireland, Norway and Spain, only comparable in its limited approach to security of tenure to Hong Kong and Australia.[61]

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[55] FJM v United Kingdom, n 15 above, para 8.
[56] P Kenna et al, Pilot project – Promoting protection of the right to housing – Homelessness prevention in the context of evictions. Final report (European Commission 2016).
[57] TENLAW reports: https://www.uni-bremen.de/jura/tenlaw-tenancy-law-and-housing-policy-in-multi-level-europe/reports/reports
[58] P Kenna, 'Introduction', in Loss of Homes and Evictions across Europe, Kenna et al (eds), (Edward Elgar 2018) 49 and 16.
[59] M Jordan, 'The British assured shorthold tenancy in a European context: Extremity of tenancy law on the fringes of Europe', in Tenancy Law and Housing Policy in Europe: Towards Regulatory Equilibrium, C Smith (ed.) (Edward Elgar 2018) 239.
[60] C Schmid, 'Introduction', in Tenancy Law and Housing Policy in Europe: Towards Regulatory Equilibrium, C Schmid (ed) (Edward Elgar 2018) 16.
[61] K Scanlon, 'Private renting in other countries', in Towards a sustainable private rented sector: The lessons from other countries, K Scanlon and B Kochan (eds), (LSE 2011) 34-37.

The rest of Europe provides examples of how the legitimate interests of landlords and tenants could be regulated differently, keeping a fairer balance between private property, security of tenure and the right to private and family life.

Scots law, for example, distinguishes between eight mandatory and nine discretionary grounds of eviction.[62] This model is similar to the assured tenancies that used to be the rule in England before shorthold tenancies became the default option in the 1990s. In Scotland, the landlord must explain what ground or grounds apply in the case at hand, providing supporting evidence as necessary. In relation to mandatory grounds (for example, if the landlord intends to sell the property, or live in it), the judge will grant an order of eviction; in the case of discretionary grounds (for example, unpaid rent, delay in payments, or deterioration of the housing conditions), however, the judge will evaluate the evidence presented to them to establish the reasonableness and proportionality of the eviction in light of the specific circumstances. The Private Housing (Tenancies) (Scotland) Act 2016 also introduces a different type of tenancy in Scotland, the private residential property, which is open ended and includes a process by which rents can be increased, as well as the designation of rent pressured areas, where certain controls may apply.[63]

In the Netherlands, infringement of contractual obligations justifies the termination of the tenancy agreement but, if it is part of the tenant's defence, courts must 'check whether the eviction complies with the principle of proportionality in both the termination notice procedure as well as the procedure in which the tenancy agreement is terminated by court.'[64] The general rule in Dutch private law is that tenancies will last for an unlimited time. As a result, courts must intervene if landlord and tenant fail to agree on putting an end to their contractual relationship, and weigh in the interests of both parties before granting the termination, and consequently the eviction.[65] For judges to be able to examine personal circumstances, tenants bear the burden to convince them that the eviction may be disproportionate in their case. Empirical analysis of court proceedings suggests that most tenants do not seem to make use of this defence, and even when they do, in the majority of cases courts do issue the eviction order anyway.[66] The example of the Netherlands shows that the proportionality test is a procedural protection that can be helpful for vulnerable tenants and that can protect tenants against rogue landlords, but it does not end landlords' ability to have their private property rights vindicated.

In Germany, tenants can challenge the termination of a tenancy agreement if the termination would cause an 'unjustifiable hardship;' in such case the court is expected to balance the interests of both parties against the reasons given by the landlord to put an end to the lease.[67] Unlike in England, in Germany landlords are therefore required to state their reason. In application of this principle, known as 'social provision' (*Sozialklausel*) in the German civil code BGB, judges often interpret that an eviction would put the tenant in 'unjustifiable hardship' in the case of severe illness, including mental health concerns, old age or advanced pregnancy, for example.[68] The German Constitutional Court has interpreted the right to private property, in Article 14 of the Basic Law, to protect security of tenure in the private sector in

[62] Schedule 3 Private Housing (Tenancies) (Scotland) Act 2016, asp 19.
[63] Ibid Sections 18-43.
[64] M Vols and M Kiehl, 'Balancing tenants' rights while addressing neighbour nuisance in Switzerland, Germany and the Netherlands', (2015) 4(2) European Property Law Journal 85, 105.
[65] M Haffner et al, 'National report for the Netherlands' (2014) TENLAW 131.
[66] M Vols, n 18 above, 750.
[67] M Vols and M Kiehl, n 64 above, 101 and 111.
[68] J Cornelius and J Rzeznik, 'National report for Germany' (2014) TENLAW 205-206.

light of the centre stage of the home in every person's existence and development, irrespective of whether the home is owned or rented by the occupant.[69] As a consequence, 'the tenant's right to enjoyment of the rented property must be considered equal as the right to property *per se* as laid down in Article 14 of the German Constitution.'[70] Like in the Netherlands, residential leases are considered open ended in Germany; a landlord must prove a 'legitimate interest' to evict a tenant by reference to the contractual obligations voluntarily subscribed by both parties, and a prior warning is generally required before a landlord can take further action in court, making it 'impossible to evict a tenant in order to get another who pays a higher rent.'[71]

In both Germany and the Netherlands, the proportionality test applies in the private rental sector, exceeding the narrow interpretation of Article 8 in *FJM*. In *FJM*, the European Court of Human Rights said that the impact of not excluding evictions in the private sector from meeting the requirement of proportionality 'would be wholly unpredictable and potentially very damaging.'[72] However, in these two countries 'there seem to be no major problems in technically complying with the European minimum level of protection because of the already built-in proportionality checks in Dutch and German tenancy law.'[73]

In Switzerland, as a matter of good faith and prevention of abuse of rights, landlords are required to state a legitimate, 'clear, valid and complete' reason for a termination; otherwise the intended eviction would be considered abusive and subject to challenge in court.[74] For example, rent arrears are potentially an adequate reason to initiate proceedings that may eventually result in an eviction, but if the arrears are only marginal, a termination can be considered disproportionate.[75]

Germany and Switzerland are the two European countries with the highest proportions of households living in privately rented accommodation. At the same time, together with the Netherlands, the three countries include a mechanism to assess the proportionality of all terminations and evictions, showing that security of tenure can coexist with a large and strong rental sector.[76]

Spain's civil procedure code does not give judges the power and the responsibility to assess the proportionality of rental evictions on a case-by-case basis. That is why, in 2018, the UN Committee on Economic, Social and Cultural Rights called on the state 'to adopt a legislative framework that establishes appropriate requirements and procedures to be followed for conducting evictions or forced evictions, (and) incorporates principles of reasonableness and proportionality.'[77] Having said that, since a 2019 legal change, Spanish judges must look at the personal circumstances when fixing a date for the execution of the eviction order, with the purpose of giving tenants and, if applicable, social services of local authorities, more time

[69] M Kolocek, 'Housing Satisfaction in Germany: Why Germany's Housing Policy Will Not Make People Happier', in Houses, Homes and the Law, M Vols and C Schmid (eds), (Eleven 2019) 319.
[70] M Vols, M Kiehl and J Sidoli del Ceno, 'Human Rights and Protection against Eviction in Anti-social Behaviour Cases in the Netherlands and Germany', (2015) 2(2) European Journal of Comparative Law and Governance 156, 167.
[71] P Westerheide, 'The private rented sector in Germany', in Towards a sustainable private rented sector: The lessons from other countries, K Scanlon and B Kochan (eds), (LSE 2011) 53-54.
[72] FJM v United Kingdom, n 15 above, para 43.
[73] M Vols, M Kiehl and J Sidoli del Ceno, n 70 above, 180.
[74] M Vols and M Kiehl, n 64 above, 95.
[75] A Wehrmülle, 'National report for Switzerland' (2014) TENLAW 128.
[76] M Vols, n 18 above, 731.
[77] UN Committee on Economic, Social and Cultural Rights, Concluding Observations regarding Spain, E/C.12/ESP/CO/6 (2018), para 38.

to look for possible alternative accommodation.[78] On two occasions in early 2021, *El Goumari v Spain*,[79] and *El Ayoubi v Spain*,[80] the UN Committee on Economic, Social and Cultural Rights expressed the view that the 2019 reform could potentially provide an effective remedy and a mechanism to assess the proportionality of evictions. Even before 2019, judges sometimes considered the personal circumstances of the people affected by an eviction. In a case concerning an apartment that had been occupied illegally and was owned by the public housing authority of the Region of Madrid, in 2017, Spain's Supreme Court established that, even in the case of squatting, before authorising an eviction when minors are involved, the judge must take into account the principle of proportionality, and, as a consequence, must adopt the necessary and precise caution to ensure the full and effective protection of the rights and interests of children.[81] The court concluded that the rights to private and family life, and to a fair trial, had been breached, as well as the UN Convention on the Rights of the Child. Having due regard to the best interests of the child is in fact a key requirement of the proportionality test. In a case concerning the eviction of a family with children, including a child with a severe disability, Spain's Constitutional Court ruled in May 2021 that a proportionality test was a requirement of the right to a fair trial.[82] In 2013, In a case concerning a scheduled eviction in an informal settlement near the city of Madrid, the European Court of Human Rights requested the Spanish government to provide information about the housing and social care arrangements envisioned by the authorities in light of the vulnerability of the children involved; the court considered such information necessary to determine whether a violation of Article 3 (torture and inhuman or degrading treatment) or 8 (private and family life) ECHR was likely to occur.[83]

Article 23 of the Belgian Constitution proclaims the right to lead a life with human dignity, as well as economic, social and cultural rights, including the right to decent accommodation. To be admissible, in case of dispute between landlord and tenant, evictions require a court order, and the mentioned constitutional provision has been used in court proceedings to contest the appropriateness and proportionality of an eviction,[84] and to underpin the interests of tenants.[85] In the spirit of conciliation, the judge may, among other measures, grant a postponement of the rent payment; 'a contractual clause which states that the tenancy contract may be terminated by the landlord if the tenant does not pay the rent due is null and void.'[86] If the landlord's attempt to terminate the lease is disputed by the tenant, the eviction will need to be authorised independently, 'looking at the merit of the claim and the defence, the legitimacy of the claim, and necessity and proportionality of the eviction.'[87]

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[78] Article 441(5) Civil Procedure Code (Ley de Enjuiciamiento Civil) 1/2000, as modified by Royal Decree-law 7/2019.
[79] El Goumari and Tidli v Spain, Communication No 85/2018 (CESCR), Views of 18 February 2021, E/C.12/69/D/85/2018, para 10.4.
[80] El Ayoubi and El Azouan Azouz v Spain, Communication 54/2018 (CESCR), Views of 19 February 2021, E/C.12/69/D/54/2018, para 14.7.
[81] Supreme Court of Spain, Judgment 1797/2017, of 23 November 2017, Administrative Appeal Chamber (Sala Contencioso-Administrativa), Legal Foundation No 2.
[82] Constitutional Court of Spain, Judgment 113/2021, of 31 May 2021, Legal Foundations No 2 and 3.
[83] Ceesay and others v Spain 62788/13 (ECtHR, Communication to State Party under Rule 54(2)(a) of the Rules of the Court, 15 October 2013).
[84] N Bernard, 'L'article 23 de la Constitution: pas une botte secrète, mais pas non plus dénué de tout effectivité (judiciaire)' (2015) 23 Revue de jurisprudence de Liège 1080.
[85] J Verstraete, P De Becker and D Vermeir, 'Evictions in Belgium, a neglected yet pressing issue', in Loss of Homes and Evictions across Europe, Kenna et al (eds), (Edward Elgar 2018) 69.
[86] M Haffner and H Bounjouh, 'National report for Belgium' (2014) TENLAW 111.
[87] J Verstraete, P De Becker and D Vermeir, n 85 above, 73.

In *Donegan and Gallagher v Dublin City Council*, resolved in 2012, the Irish Supreme Court found the country's law on evictions from public housing contrary to Article 8 ECHR. For an eviction to be legitimate and proportionate in the public sector, the law must provide a 'framework procedure sufficient to afford true respect to the interests safeguarded' by the right to private and family life, the decision-making process must be 'fair in such a way as to respect that right,' the tenant must be given 'an opportunity to have any relevant and weighty arguable issues tested before an independent tribunal and,' the tenant must have the 'opportunity to have such an issue considered against the measure, to determine its proportionality.'[88] In the private sector, landlord's termination notice must be sent in writing, and the notice period will depend on the duration of the tenancy, and the type of grievance, among other factors. The Residential Tenancies Board, a public body that deals with disputes between landlords and tenants through a dispute resolution service, may not consider the proportionality of a decision to terminate a tenancy.[89] A tenant may oppose the eviction in court, in which case the court may look into the circumstances and the procedure followed; the court may grant remedies, particularly if it is the first time the tenant has been in breach of contract.[90]

Like in other European countries, rent arrears are the primary cause of evictions in the Swedish private rental sector.[91] Swedish courts have referred to European human rights law, Article 8 ECHR specifically, to explain their responsibility to assess the proportionality of evictions on a case-by-case basis.[92] However, courts appear to be generally unwilling to make use of the proportionality test to limit excessively landlords' private property; that is why it has been said that courts have taken 'a conservative stance towards introducing a human rights paradigm within the context of tenure security.'[93] If in the process of the judicial proceedings of an eviction, local social services notify the court and the landlord that they will assist the tenant in paying rent, the eviction is likely to be suspended; in the assessment of the personal situation, an eviction may also be suspended if rent arrears are the result of sudden illness or similarly unforeseeable circumstances.[94]

Danish judges also have the power to prevent the termination of a lease, even in the case of tenant's failure to meet their contractual obligations, if the judge is persuaded that the infringement was not sufficiently serious, and therefore does not justify the termination and the subsequent eviction.[95] The Danish Supreme Court has established that 'the assessment of whether the tenant's removal is required must be made on the basis of the nature of the violation and taking into account the tenant's circumstances at the time of termination.'[96] This is consistent with the proportionality test of the right to home of Article 8 ECHR.

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[88] Donegan v Dublin City Council & anor and Dublin City Council v Gallagher [2012] IESC 18 (27 February 2012), para 143.6.
[89] Residential Tenancies Board, McCabe v Co-operative Housing Ireland, Case Ref 0816-28423, Determination of 28 January 2017, 19.
[90] M Jordan, 'National report for the Republic of Ireland' (2014) TENLAW 170.
[91] S-A Stenberg, L van Doorn and S Gerull, 'Locked Out in Europe: A Comparative Analysis of Evictions due to Rent Arrears in Germany, the Netherlands and Sweden' (2011) 5(2) European Journal of Homelessness 39.
[92] M Vols, n 18 above, 733.
[93] H Baheru, 'Tenant's Right to Respect for Home: A Challenge for Swedish Tenancy Courts?', in People and Buildings: Comparative Housing Law, M Vols and J Sidoli (eds), (Eleven 2017) 14.
[94] O Bååth, 'National Report for Sweden' (2014) TENLAW 103-104.
[95] J Juul-Sandberg, 'Evictions on Grounds of 'Anti-Social Behaviour' in Denmark – Aspects on Tenancy Law Regulations and the Protection of Human Rights', in Houses, Homes and the Law, M Vols and C Schmid (eds), (Eleven 2019) 185.
[96] Ibid 191.

The above is admittedly a selection of nine jurisdictions, when there are 47 member states in the Council of Europe. However, comparative law and practice appears to suggest that the regulation of evictions in the private rental sector in England may be largely at odds with the much of the rest of the continent. Countries with strong residential rental sectors, and where a large number of households rent the apartment where they live, have found ways to keep a more reasonable balance between tenants' security and landlords' private property. Giving judges the power and the responsibility to assess the proportionality of all eviction requests on a case-by-case basis is key to ensure a fair balance between legitimate interests of both parties. Next section argues that, in weighing the scope of the proportionality test of Article 8, the European Court of Human Rights should consider whether there is some common ground in comparative law and practice, having due regard to other international human rights obligations as well.

5. The Case for a Proportionality Test of Evictions in the Private Rental Sector: Common Ground, Comparative Practice and International Law

In *FJM*, the extension of the proportionality test from the public sector to the private sector was swiftly declined with an admissibility decision, not with a judgment on the merits. For Graham, *FJM* is one of the recent cases in which the European Court of Human Rights has shown to become 'unduly deferential' to the UK at the admissibility stage in an attempt to moderate the tension with Eurosceptic authorities and commentators in England.[97]

In *FJM*, the European Court of Human Rights dismissed the relevance of a prior case, *Brežec v Croatia,* where it had applied the proportionality test for private rented accommodation.[98] The court considered that *Brežec* had been an exception because of 'the specific circumstances which existed in the former Yugoslavia.'[99] In that particular case, such circumstances where those of an employee who had lived in a publicly owned building that was later privatised. The court claimed that the circumstances were entirely different in England, and that *Brežec* was not replicable.[100]

Instead, the European Court of Human Rights relied essentially on one other case, *Vrzić v Croatia*, to discard the application of the proportionality assessment to cases concerning private landlords and tenants.[101] Based predominantly on that one case, in *FJM* Strasbourg concluded that a proportionality test is not part of the right to home when private interests are at stake, adding that Parliament has a margin of appreciation to strike a balance between tenants and landlords by legislation, and Section 21 would fit within the UK's margin of appreciation.[102]

The analogy between *Vrzić* and *FJM*, however, is far-fetched. The Croatian case was one where a residential property had been used as collateral for a loan for the applicant's business. It was a foreclosure where parties disagreed about the fair price of the property in a public auction.[103] The right to private property was of the essence for the applicant in *Vrzić*.[104]

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[97] L Graham, 'Strategic Admissibility Decisions in the European Court of Human Rights' (2020) 69(1) International and Comparative Law Quarterly 79, 89.
[98] Brežec v Croatia 7177/10 (ECtHR, 18 July 2013), para 48.
[99] FJM v United Kingdom, n 15 above, para 38.
[100] Ibid para 39.
[101] Vrzić v Croatia 43777/13 (ECtHR, 12 July 2016), para 66 and 101.
[102] FJM v United Kingdom, n 15 above, para 41-46.
[103] Vrzić v Croatia, n 101 above, para 18-23.
[104] Ibid para 74.

However, Article 1 of Protocol 1 was not raised in *FJM*, although it was understandably a consideration as far as the mortgagee was concerned.[105] In *Vrzić*, the two parties had signed a contract,[106] and it is to be assumed that both were aware of the possible consequences in case of breach. In *FJM*, on the other hand, the company entered into an agreement with the applicant's parents, who bought the property, and not with the applicant herself, a tenant who had a serious mental health disability. When the parents fell into arrears on the mortgage repayment, the finance company served notice under Section 21 to liquidate the asset and collect the debt.[107] McDonald's presence in the property, the fact that the property was her home, was an inconvenience for the company.

In *FJM*, the European Court of Human Rights seems to hold that, in the private rental sector, unlike the public sector, there is a 'clashing rights' situation,[108] a conflict between landlord's right to property and tenant's right to home. Such conflict, the court contends, would justify a different treatment of evictions and the corresponding proportionality test in application of the margin of appreciation. In the following paragraphs I will argue that such contention is problematic: It goes against the foundation of the proportionality test, and it ignores the need to consider whether there is some sort of basic consensus in tenancy law in Europe.

The European Court of Human Rights has indeed given states an ample margin of appreciation when legislating about human rights. The margin is particularly wide 'in spheres involving the application of social or economic policies, including housing.'[109] At the same time, however, the court declared in *Yordanova v Bulgaria* that 'the margin of appreciation left to the authorities will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights,' and that 'the procedural safeguards available to the individual will be especially material in determining whether the respondent State has remained within its margin of appreciation.'[110] Under Article 8 ECHR, an eviction needs to be 'necessary in a democratic society,' which means that it must have a legitimate aim, but it must also be 'proportionate to the legitimate aim pursued.'[111] The vindication of the landlord's property right is a legitimate aim, and private property is a right proclaimed in Protocol 1. But the proportionality of an eviction requires an assessment of the specific circumstances of the case.

The European Court of Human Rights says in *FJM* that 'the balance between the interests of the private individual or enterprise and the residential occupier could be struck by legislation.'[112] However, one cannot assume that a legislative chamber can carry out this sort of evaluation ex ante and for all imaginable cases. This is something the European Court of Human Rights has borne in mind when dealing with other housing-related cases from the UK. In the so-called bedroom tax case, the majority of the court concluded that only because the reformed regulation of the housing benefit allowed local authorities to make individualised

[105] FJM v United Kingdom, n 15 above, para 43.
[106] Vrzić v Croatia, n 101 above, para 7.
[107] FJM v United Kingdom, n 15 above, para 3-5.
[108] S Smet, 'When Human Rights Clash in "The Age of Subsidiarity": What Role for the Margin of Appreciation?', in Human Rights Between Law and Politics: The Margin of Appreciation in Post-National Contexts, P Agha (ed), (Hart 2017) 55.
[109] Yordanova and Others v Bulgaria 25446/06 (ECtHR, 24 April 2012), para 118.
[110] Ibid.
[111] Ibid para 123.
[112] FJM v United Kingdom, n 15 above, para 41.

decisions the legislation could be considered reasonable and proportionate in principle.[113] On the contrary, unlike the bedroom tax scheme, Section 21 does not allow any sort of individualised proportionality assessment.

The rationale of the margin of appreciation doctrine is that national authorities should be given some latitude because they are in a better position, closer to the ground than the European court, to weight rights and other public interests. However, in the spirit of the principles of the Convention, such assessment ought to be carried out giving priority to rights in terms of procedure and evidence.[114] If there was some sort of consensus within the continent, such consensus would pose a limit to the margin of appreciation.[115] Therefore, whether consensus is emerging in the application of a proportionality test in rental evictions should be part of the assessment of the remit of the right to private and family life.

As a general rule of interpretation, according to the 1969 Vienna Convention on the Law of Treaties, international courts and other bodies shall consider 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,' as well as 'any relevant rules of international law applicable in the relations between the parties.'[116] On a number of occasions has the European court echoed the need to interpret the ECHR 'in harmony' with other human rights principles and legal standards, including *Al-Adsani v UK*,[117] *Bosphorus v Ireland,*[118] and *Saadi v UK*.[119] In this spirit, the European Court of Human Rights declared in *Demir and Baykara v Turkey* that:

> (B)eing made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision.[120]

Using Article 31(3) of the Vienna Convention on the Law of Treaties, in *Demir* the European court accepted the responsibility to take 'into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European states reflecting their common values,' as well as 'the consensus emerging from specialised international instruments and from the practice of Contracting States.'[121] In *Demir*, the European Court of Human Rights relied on standards from the European Social Charter and from the International Labour Organization to establish that collective bargaining is an essential element of the right to freedom of association of Article 11 ECHR.[122]

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[113] JD and A. v UK 32949/17 and 34614/17 (ECtHR, 24 October 2019), para 102.
[114] S Greer, The European Convention on Human Rights: Achievements, Problems and Prospects (Cambridge University Press 2006) 203-213.
[115] G Letsas, 'Two Concepts o the Margin of Appreciation' (2006) 26(4) Oxford Journal of Legal Studies 705.
[116] Article 31(3)(b) and (c) Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[117] Al-Adsani v United Kingdom [GC] 35763/97 (ECtHR, 21 November 2001), para 55.
[118] Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland [GC] 45036/98 (ECtHR, 30 June 2005), para 150.
[119] Saadi v United Kingdom [GC] 13229/03 (ECtHR, 29 January 2008), para 62.
[120] Demir and Baykara v Turkey [GC] 34503/97 (ECtHR, 12 November 2008), para 76.
[121] Ibid para 85-86.
[122] KD Ewing and J Hendy, 'The Dramatic Implications of Demir and Baykara' (2010) 39(1) Industrial Law Journal 2.

The 'common ground' criterion has been applied in relation to a variety of law and policy issues, such as taxation on men unfit for military service because of physical disability (*Glor v Switzerland*),[123] the significance of the UN Convention for the Elimination of Discrimination Against Women in relation to discrimination and violence against women (*Opuz v Turkey*),[124] the interpretive value of the Palermo Protocol on Trafficking and international standards on transnational organised crime (*Rantsev v Cyprus and Russia*),[125] and to interrogate whether the right to freedom of association could encompass the right to strike (*National Union of Rail, Maritime and Transport Workers v UK*).[126]

This hermeneutic principle has also trickled down from Strasbourg to national courts. In *Urgenda*, in December 2019, the Dutch Supreme Court maintained that there was an international consensus among states to aim to reduce between 25 per cent and 40 per cent of their greenhouse gas emissions by 2020 compared with 1990 levels, and that such consensus had to be regarded as 'common ground' when interpreting the meaning and requirements imposed by the rights contained in ECHR, particularly the right to life (Article 2) and the right to private and family life.[127]

The social right to adequate housing and the civil right to home are, as observed by Remiche, 'two sides of the same coin.'[128] However, the right to housing is not in the European Convention on Human Rights. Therefore, unlike national courts, there is a limit to what the European court could possibly order states to do, for example, in terms of providing alternative accommodation.[129] Nonetheless, in application of the common ground principle, the court should take into account the fact that all European countries but one, Andorra, have signed and ratified the International Covenant on Economic, Social and Cultural Rights, whose Article 11 proclaims the right to adequate housing. As shown earlier, in General Comment No 7,[130] and in *Ben Djazia v Spain*,[131] for all cases, the UN Committee on Economic, Social and Cultural Rights established that the right to adequate housing requires that there must be an independent assessment of the proportionality of all evictions on a case-by-case basis. In other words, Section 21 of the Housing Act 1988 is in breach of Article 11 ICESCR.

In fact, having due regard to international and European standards of social rights would not be unusual in Strasbourg's practice.[132] In the mentioned *National Union of Rail* case, the European court observed that 'the interpretative value of the (European Committee of Social Rights) appears to be generally accepted by States and by the Committee of Ministers. It is certainly accepted by the Court, which has repeatedly had regard to the ECSR's interpretation

[123] Glor v Switzerland 13444/04 (ECtHR, 30 April 2009), para 75.
[124] Opuz v Turkey 33401/02 (ECtHR, 9 June 2009), para 164.
[125] Rantsev v Cyprus and Russia 25965/04 (ECtHR, 7 January 2010), para 273-275.
[126] National Union of Rail, Maritime and Transport Workers v UK 31045/10 (ECtHR, 8 April 2014), para 86-98.
[127] J Spier, 'The "Strongest" Climate Ruling Yet: The Dutch Supreme Court's Urgenda Judgment' (2020) 67(2) Netherlands International Law Review 319, 329.
[128] A Remiche, 'Yordanova and Others v Bulgaria: The Influence of the Social Right to Adequate Housing on the Interpretation of the Civil Right to Respect for One's Home' (2012) 12(4) Human Rights Law Review 787, 794.
[129] S Fick and M Vols, 'Best Protection Against Eviction? A Comparative Analysis of Protection Against Evictions in the European Convention on Human Rights and the South African Constitution' (2016) 3(1) European Journal of Comparative Law and Governance 40, 66.
[130] UN Committee on Economic, Social and Cultural Rights, n 48 above, para 11 and 14.
[131] Ben Djazia and Bellili v Spain, n 14 above, para 15.1.
[132] IE Koch, 'Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective' (2006) 10(4) International Journal of Human Rights 405.

of the (European Social Charter) and its assessment of State compliance with its various provisions'.[133] Furthermore, the European court increasingly references ICESCR, which alongside other relevant international treaties performs, as noted by Boyle, 'at the very least, an important interpretive role.'[134]

International human rights standards widely accepted in the continent should be part of the evaluation of the scope of states' margin of appreciation. Similarly, whether there is some basic consensus among European legal orders in relation to tenancies and eviction proceedings should also shape the interpretation of the remit of the proportionality test. Comparative analysis presented in Section 4 suggests that England might be an outlier in the European context. More research would be required to assert this point conclusively, but the European court should consider this possibility as part of the interpretation of Article 8 ECHR. Unfortunately, such question was not dealt with in the Admissibility Decision of *FJM v UK*. Instead, the court simply assumed that assessing the proportionality of evictions in the private rental sector would be 'wholly unpredictable and potentially very damaging.'[135]

International and European law unfold effects horizontally,[136] which means that under certain circumstances human rights also apply in disputes between private individuals.[137] In *Larkos v Cyprus*, the European Court of Human Rights looked at the differences in treatment between tenants in the private and public sectors, a case in which those in the public sector enjoyed lesser security of tenure than people renting privately.[138] As a general principle, the court has accepted the responsibility of ensuring that public authorities uphold human rights when regulating interactions between private actors.

> Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention.[139]

In *FJM v UK*, the European Court of Human Rights argued that in the private rental sector 'two private individuals or entities have entered voluntarily into a contractual relationship.'[140] But that is simply not always the case. As critiqued by Nield and Laurie, in *FJM*, as in *McDonald* before, 'human rights protection has been side-lined by adopting a simplistic conception of the private, consensual nature of the rental agreement which ignores the complex reality of housing provision.'[141] It is not only that in practice there is no negotiation between the two sides in an assured shorthold tenancy. Theoretically, a landlord could choose to grant an assured tenancy, which provides stronger security of tenure than the shorthold

[133] National Union of Rail, Maritime and Transport Workers v UK, n 126 above, para 94.
[134] K Boyle, Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication (Routledge 2020) 82.
[135] FJM v United Kingdom, n 15 above, para 43.
[136] A Young, 'Mapping Horizontal Effect', in The Impact of the UK Human Rights Act on Private Law, D Hoffman (ed), (Cambridge University Press 2011) chapter 2.
[137] B McFarlane and S Nield, Land Law: Test, Cases & Materials (4th ed, Oxford University Press 2018) 107.
[138] Larkos v Cyprus [GC] 29515/95 (ECtHR, 18 February 1999), para 30-31.
[139] Khurshid Mustafa and Tarzibachi v Sweden 23883/06 (ECtHR, 16 December 2008) para 33.
[140] FJM v United Kingdom, n 15 above, para 42.
[141] S Nield and E Laurie, n 16 above, 725.

tenancy.[142] However, assured shorthold tenancies are the default option since 1996,[143] and they are the overwhelmingly preponderant option today. According to the Government's figures, 4.5 million households (19 per cent of all) lived in private accommodation in England in 2017-18, with 80 per cent of tenancies being of the assured shorthold type.[144] Most initial tenancy agreements were for six months (32 per cent) or twelve months (50 per cent).[145] Even if landlord and tenant could agree to exclude the threat of Section 21, as one could imagine to be possible between parents and daughter, it is unlikely the lender would authorise it in the case of buy-to-let mortgages. And it is important to stress that in *FJM* the tenant did not sign a contract with the mortgagee. Fiona McDonald did not enter into a contractual relationship with the company that sought her eviction.

Furthermore, whilst there were no minors involved in *FJM*, children's right to home and right to housing are generally compromised in an eviction. Legally, children do not have full capacity to act and to bind themselves contractually, but when parents are evicted, children have to follow them out of the home. The European Court of Human Rights said in *FJM* that, in the private rental sector, landlord and tenant enter 'voluntarily into a contractual relationship,'[146] including the acceptance of a national law that may exclude any proportionality assessment in case of eviction. Yet, even in application of Strasbourg's logic, there does not seem to be a valid reason to exclude the assessment of proportionality when children are involved, because there is no way for them to enter into a contractual relationship voluntarily.

In *FJM* the European Court of Human Rights unjustifiably applied an expansive interpretation of the remit of the right to private property. This right, one should recall from Article 1 of Protocol 1, consists of 'the right to the peaceful enjoyment of (one's) possessions.' The provision contains three distinct but interconnected rules, the mentioned formulation of the right being the first one; the second rule makes the 'deprivation of possessions' subject to certain conditions of public interest; the third rule recognises the right of public authorities, 'amongst other things, to control the use of property in accordance with the general interest.'[147] The second paragraph is applicable in cases of highly intrusive forms of state intervention when there is a legitimate public interest, particularly expropriations. However, in the proportionality test of evictions on a case-by-case basis the third rule applies, but not the second one. In other words, it is a form of moderate and time-limited control, not a deprivation of possessions. And yet, in estimating the compatibility between the right to private property and a proportionality test in the private sector, in *FJM* the European court did not engage in such type of analysis. The proportionality test is a form of moderate control of the use of property, but it is not a deprivation of possessions, while an eviction, on the other hand, is 'a most extreme form of interference with the right to respect for the home.'[148] In its case law, the European Court of Human Rights has established that:

> (I)n assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective"… That

[142] Section 8 Housing Act 1988, n 19 above.
[143] Ibid Section 19A.
[144] Ministry of Housing, Communities & Local Government, n 21 above, 3 and 22.
[145] Ibid 22.
[146] FJM v United Kingdom, n 15 above, para 42.
[147] James and Others v United Kingdom [Plenary] 8793/79 (ECtHR, 21 February 1986), para 37.
[148] McCann v United Kingdom, n 1 above, para 50.

assessment may involve not only the relevant compensation terms –if the situation is akin to the taking of property– but also the conduct of the parties, including the means employed by the State and their implementation.[149]

The margin of appreciation when applying Article 8 in relation to particularly severe forms of interference, like an eviction, should be narrower than the interpretation of the general or public interest to control the use of property.[150] The disproportionately expansive interpretation of the right to property in relation to evictions is even more striking considering that when the court applies Article 1 of Protocol 1 to social security benefits, whether the individual receives a 'subsistence minimum' is the key factor in determining if a restriction in benefits can be justified as proportionate.[151] The court would do well to explain why it chooses to interpret the right to property expansively when it clashes with somebody else's right to home, but interprets the right narrowly in the case of social benefits, when there is no apparent conflict of rights.

In *FJM*, the European Court of Human Rights concluded that only people renting in the public sector should be entitled to have the circumstances of their case independently assessed. A key factor in the court's reasoning was, as has been indicated earlier, that in the private rental sector the interests of a private landlord are at stake. A delay or condition on the landlord's ability to possess or repossess the property would constitute a limitation of their right under Article 1 of Protocol 1, limitation that the court considers excessive.

Drawing a line in the level of protection of security of tenure based on public or private ownership results, in practice, in a significant reduction in the number of vulnerable tenants allowed to seek the protection of their home via Article 8. In the 1980s, UK's housing policy began to shift from a system based on social or council housing towards a system based primarily on housing benefits, whenever available. Between 1950 and 1980, local authorities in England completed 3.78 million new houses, more than the number of houses built by private companies, 3.26 million; however, between 1981 and 2020, private initiative completed 5.24 million units, for only 286,370 by local authorities and 811,730 more by housing associations.[152] The share of homes rented from local authorities or housing associations went down from 31 per cent in 1979 to 17 per cent in 2019.[153] According to the professional body in the housing sector, the Chartered Institute of Housing, the supply of social rented homes, including both council houses and housing associations, fell by nearly 210,000 in England between 2012 and 2020.[154] Some tenants in the private rental sector, as was the case for Fiona McDonald, receive state support to pay their rent in the form of housing benefits that go straight to the landlord. In 2018, the Office for Budget Responsibility estimated that the overall spending on housing benefits for the following fiscal year was going to be £23.4 billion, with 4.6 million recipients of an average of £5,035 each, representing 2.9 per cent of total public

[149] Broniowski v Poland [GC] 31443/96 (ECtHR, 22 June 2004), para 151.
[150] B McFarlane and S Nield, n 137 above, 95.
[151] I Leijten, 'The right to minimum subsistence and property protection under the ECHR: Never the twain shall meet?' (2019) 21(4) European Journal of Social Security 307.
[152] Ministry of Housing, Communities and Local Government, 'Live tables on housing supply: indicators of new supply' (Table 244: permanent dwellings started and completed by tenure, England, historical calendar). https://www.gov.uk/government/statistical-data-sets/live-tables-on-house-building
[153] Ministry of Housing, Communities and Local Government, 'Live tables on dwellings stock (including vacants)' (Table 104: by tenure, historical series). https://www.gov.uk/government/statistical-data-sets/live-tables-on-dwelling-stock-including-vacants
[154] M Stephens et al, UK Housing Review 2021 (Chartered Institute of Housing 2021).

spending that year, or 1.1 per cent of national income.[155] In a 2016 report on causes and responses to homelessness, the House of Commons communities and local government select committee concluded that, 'in light of the shortage of social housing… the private rented sector is an essential means to help people escape and avoid homelessness. However for many the financial barriers and instability of tenancies are too great.'[156]

One might feel tempted to argue that ensuring access to housing should be the main concern, and that whether the property is public or private would be a formality of secondary importance. However, *FJM* revealed that security of tenure is made dependent on public or private ownership. People who live in a council house can resort to the *McCann* (Strasbourg) / *Pinnock* (Supreme Court) protection and have the proportionality of a hypothetical eviction independently assessed by a judge. People like McDonald, who receive housing benefits and rely on the private rental sector, are being denied that possibility.

The insufficiency of social housing leads to unaffordability, resulting in situations of rent arrears for low-income households, one of the primary causes of evictions in England and around Europe.[157] In 2019, 11.8 per cent of the EU urban population lived in households where total housing costs represented more than 40 per cent of disposable income, the benchmark that the European Union uses as the 'housing cost overburden rate.'[158] The share of households with arrears on mortgage, rent or utility bills in the UK was 8.8 per cent in 2018.[159] Termination of assured shorthold tenancies is recorded to be one of the primary direct causes of homelessness in England, 'the biggest single driver' according to the independent National Audit Office.[160] In 2018/19 and 2019/20, local authorities in England assessed the circumstances and needs of 19,380 and 18,190 households at risk of homelessness after a Section 21 notice.[161]

The UN Committee on Economic, Social and Cultural Rights has expressed concerns 'about the persistent critical situation in terms of the availability, affordability and accessibility of adequate housing in the State party, in part as a result of cuts in State benefits,' adding that 'the lack of social housing has forced households to move into the private rental sector, which is not adequate in terms of affordability, habitability, accessibility and security of tenure.'[162] In his 2019 report on the UK, former UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, also criticised that targeted support has been restricted and 'housing benefit has been decimated amidst a real crisis in affordable housing.'[163]

As indicated earlier, the number of social housing units declined remarkably between 1979 (31 per cent of all houses) and 2019 (17 per cent).[164] Even considering state-funded

[155] Office for Budget Responsibility, 'Welfare spending: housing benefit'. https://obr.uk/forecasts-in-depth/tax-by-tax-spend-by-spend/welfare-spending-housing-benefit/
[156] House of Commons Communities and Local Government Select Committee, 'Homelessness: Third Report of Session 2016-17' (2016) 38.
[157] P Kenna, n 58 above, 13.
[158] Eurostat, 'Is Housing Affordable?' https://ec.europa.eu/eurostat/cache/digpub/housing/bloc-2b.html?lang=en
[159] Ibid.
[160] National Audit Office, Homelessness (HC 308, Session 2017-19, September 2017) 6.
[161] Ministry of Housing, Communities and Local Government, 'Live tables on homelessness' (Table A1: statutory homelessness live tables, April to June 2020). https://www.gov.uk/government/statistical-data-sets/live-tables-on-homelessness
[162] UN Committee on Economic, Social and Cultural Rights, Concluding Observations regarding UK, E/C.12/GBR/CO/6 (2016), para 49.
[163] UN Special Rapporteur on extreme poverty and human rights, Report on the UK A/HRC/41/39/Add.1 (2019), para 36.
[164] Ministry of Housing, Communities and Local Government, n 153 above.

housing benefits, the private rental sector has proved unable to provide an alternative housing option for many families. In 2019, it was estimated that in 94 per cent of areas of Great Britain, 'one in five or less privately rented homes were affordable within Local Housing Allowance rates to single people, couples, or families with one or two children.'[165] Six in ten UK families in destitution, and five in ten in severe poverty, live in the social rented sector; but three in ten families in destitution, and four in ten in severe poverty, rent privately.[166] They are just as socioeconomically vulnerable, but their security of tenure is substantially lower in the private sector.

In a context in which the satisfaction of rights like home and housing increasingly depends on the behaviour of private actors, the proportionality test could help achieve greater equilibrium between the landlord's interest in the profitability of their investment and the tenant's interest in the affordability and stability of their housing situation.[167] The proportionality test in rental evictions would be consistent with the observation that homeownership is unlike any other form of private property. Homeownership is property over a good that exists to serve a public function that is at least as important as its private function: Apart from satisfying an investor's legitimate interest, a house exists to give people a place to live.

6. Concluding remarks

Section 21 of the Housing Act 1988 allows landlords to evict tenants with no fault and with no reason with the only requirement of giving a short notice in writing. Denying tenants in the private rental sector the possibility of using a proportionality defence is a breach of the right to adequate housing of Article 11 ICESCR.

The ECHR is incorporated into UK law via Human Rights Act 1998,[168] but the ICESCR has not yet been brought into the UK's legal system. Having said that, the UK is still bound by ICESCR as a matter of international law.[169] As stated by the UN Committee on Economic, Social and Cultural Rights, the norms of ICESCR 'must be recognized in appropriate ways within the domestic legal order,' ensuring suitable means of redress and accountability.[170] The UN committee has explicitly called for the full incorporation of ICESCR into UK law.[171]

This article has argued that the European Court of Human Rights should reconsider the position expressed in *FJM v UK*, and establish that Section 21 evictions are also contrary to the right to home of Article 8 ECHR. The European court could reach this conclusion within the limits of its own case law, having due regard to states' practice and other international human rights legal obligations.

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[165] J Basran, Cover the Cost: Restoring Local Housing Allowance rates to prevent homelessness (Crisis 2019) 9.
[166] S Fitzpatrick et al, Destitution in the UK 2020 (JRF 2020) 17. Joseph Rowntree Foundation uses the word 'destitution' for the inability to afford the absolute essentials needed to eat, stay warm and dry, and keep clean. 'Severe poverty' is defined as lacking a third of key material essentials, having less than 40 per cent of national median income, and experiencing other financial difficulties (benchmarks and more details in the cited study).
[167] S Nasarre-Aznar, 'Leases as an Alternative to Homeownership in Europe. Some Key Legal Aspects' (2014) 22(6) European Review of Private Law 815.
[168] Human Rights Act 1998, c 42.
[169] Articles 26 and 27 Vienna Convention on the Law of Treaties, n 116 above.
[170] UN Committee on Economic, Social and Cultural Rights, General Comment No 9: The domestic application of the Covenant, E/C.12/1998/24 (1998), para 2.
[171] UN Committee on Economic, Social and Cultural Rights, n 162 above, para 5-6.

Extending the proportionality assessment to the private rental sector would not render evictions impossible. It should be noted that the proportionality of an eviction is already being considered in the UK's public sector, where resources are limited and insufficient to face the demand. Fiona McDonald herself had lost two public sector tenancies 'owing to her behaviour' prior to the eviction that led to the case we have discussed in this article.[172] In her case, the Supreme Court expressed the view that:

> (I)t is difficult to see how the appellant's circumstances, most unfortunate though they undoubtedly are, could justify postponing indefinitely the lenders' right to be repaid… On the evidence available to the judge, it seems likely that the most the appellant could hope for on a proportionality assessment would be an order for possession in six weeks' time.[173]

In other European countries, the evaluation of the circumstances can be carried out at a pre-judicial stage, during the trial itself or before the eviction is actually executed.[174] The proportionality can sometimes lead to a suspension or postponement of the eviction to give the evictee and/or public authorities more time to look for an alternative housing solution. In effect, whether alternative accommodation would be available, publicly or privately, could be part of the judges' determination of whether the eviction would be reasonable and proportionate in the specific circumstances. Often judges in other countries are unwilling to set a high threshold and interfere in a relation between two private parties when one of them infringes a contractual agreement. The situation would probably not be different in England, though this would need to be tested on the ground.

In *McDonald*, the Supreme Court suggested that, 'were a proportionality defence to be available in section 21 claims, it is not easy to imagine circumstances in which the occupier's article 8 rights would be so strong as to preclude the making, as opposed to the short postponement, of a possession order.'[175] However, comparative law shows that the possibility of using the proportionality defence may have an influence on 'property owners' litigation strategies, and as a result, have an impact in the stages before and after the court procedure too.'[176] For example, landlords may decide to wait to collect more evidence, document better the level of seriousness of the breach of contract, refrain from seeking to evict a household where children are involved, or make an effort to ensure that tenants are supported by local social services, all to persuade the judge that an eviction really is the last resort after exhausting less intrusive options.

As part of the emergency measures adopted in response to Covid-19, the Section 21 notice period was extended from two to initially three months (until August 2020),[177] then six months (until May 2021), and later four months (since June 2021).[178] In its 2019 manifesto, the Conservative Party pledged to abolish Section 21 evictions, and the Queen's Speech 2019 included the plan for a Renters' Reform Bill, which included 'abolishing the use "no fault" evictions by removing section 21 of the Housing Act 1988 and reforming the grounds for

[172] McDonald v McDonald & Ors, n 22 above, para 2.
[173] Ibid para 74-75.
[174] Kenna et al, n 56 above, 22.
[175] McDonald v McDonald & Ors, n 22 above, para 73.
[176] M Vols, n 18 above, 719.
[177] Schedule 29 Coronavirus Act 2020, c. 7.
[178] Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2021, No 284; Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) (No. 2) Regulations 2021, No 564.

possession.'[179] However, in the midst of the Covid-19 pandemic, in September 2020, the UK Government announced they would wait for the 'appropriate time, when there is a sensible and stable economic and social terrain on which to do it.'[180] In the 2021 Queen's Speech, in May 2021, the Government announced that, by the end of the year, they would publish their 'consultation response on reforming tenancy law to abolish Section 21 "no fault" evictions' and improve security for tenants in the private rented sector.'[181]

With housing increasingly unaffordable in big cities, the UK has become a country of reluctant renters, with a growing wealth gap between them and property owners. The existing stock of social housing is dramatically insufficient to face a very real and serious need, with 93,000 households living in homelessness in temporary accommodation in England in 2020, almost double the number of ten years before.[182]

Neither Article 11 ICESCR nor Article 8 ECHR would give tenants a blank check to stop paying their rent or to break the lease in any other way. And giving judges the power to assess the proportionality of an eviction in the private rental sector would not fix all the housing problems. But it would be an important first step towards a more balanced relationship between landlords and tenants.

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[179] Prime Minister's Office, 'The Queen's Speech 2019' (December 2019) 46.
[180] HC Deb vol 680 col 950, 23 September 2020.
[181] Prime Minister's Office, 'The Queen's Speech 2021' (May 2021) 113.
[182] Shelter, 'Building Our Way Out' (2020) 18.