

Shelter Scotland's Response to the European and External Relations Committee's call for written evidence on the proposal to repeal the Human Rights Act 1998

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Introduction

Shelter Scotland helps over half a million people every year struggling with bad housing or homelessness through our advice, support and legal services. And we campaign to make sure that, one day, no one will have to turn to us for help.

We welcome the opportunity to respond to the European and External Relations Committee's call for evidence on the proposal to repeal the Human Rights Act 1998. In our written evidence we seek to outline how human rights relates to the people that Shelter Scotland helps, setting out examples of where human rights arguments are made in relation to housing and homelessness. While this may not answer the committee's questions directly, we hope it provides a useful outline of human rights legislation and its relation to people who are homeless or badly housed.

How human rights can protect those at risk of losing their home

In Shelter Scotland's role as providers of advice, support and legal services we use human rights arguments in Scottish courts – through the Human Rights Act 1998 – to advocate on behalf of our clients. Article 8 of the European Convention on Human Rights sets out how human rights relate to housing most clearly:

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing 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.

Human rights arguments in the context of housing have been able to change the focus of disputes relating to housing from that of black and white contractual issues to individuals – i.e. tenants – with public law rights. This approach is expressed well in *McCann v UK*:¹ “The loss of one’s home is a most extreme form of interference with the right to respect for the home.” It is this that enables those with limited security of tenure to defend eviction proceedings. In addition, article 8 has also effectively introduced procedural safeguards for tenants throughout the eviction process through case law. For example by ensuring that landlords provide reasons for proceeding with an eviction action, and that landlords have internal review procedures where an eviction action is being considered.² Jurisprudence such as this enables human rights arguments to be used in a variety of situations including: defending eviction actions pursued by social landlords and challenging homelessness decisions by Scottish local authorities.

Challenging eviction actions in the social rented sector

Short Scottish secure tenancies are a type of lease given to social tenants who are deemed to have acted in an antisocial manner. They typically last for six months and can be ended at the end of the fixed term without the landlord needing to provide a reason, or justify why the possession order is reasonable in the circumstances. As social landlords are considered public authorities under the convention any interference with a tenant’s article 8 right to respect for private and family life must be justifiable in the circumstances.

For an eviction order to be justified in human rights terms it must satisfy the following tests: it must be in accordance with the law; have a legitimate aim and be necessary in a democratic society. In other words it must be proportionate for the court to grant the order.³ While this is a lower threshold than the requirement for an order to be reasonable in the circumstances,⁴ it is still a vital backstop which protects social tenants from arbitrary eviction.

Soon to be commenced changes to the law governing social tenancies further underline the need for this protection.⁵ Once in force social landlords will be able to pursue an ‘automatic eviction’ where a tenant has been convicted of a criminal offence with the past twelve months. This means that in these cases the test of reasonableness will not need to be satisfied. However,

¹ (2008) EHRR 40 [2008] HLR 40 ECtHR

² *London Borough of Hounslow v Powell; R (on the applications of ZH and CN) v London Borough of Newham and London Borough of Lewisham* [2014] UKSC 62

³ Article 8 of the European Convention on Human Rights; *Manchester City Council v. Pinnock* [2010] UKSC 45

⁴ For example s.16(2)(a)(ii) of the Housing (Scotland) Act 2001

⁵ s.14 Housing (Scotland) Act 2014

as set out above, the eviction would still need to be proportionate in the circumstances due to the application of the Human Rights Act 1998. In cases such as these defenders are given a final opportunity to show that their behaviour has changes since their conviction and evicting them would be a disproportionate response. This is another example of the important backstop that the Human Rights Act 1998 currently provides.

Challenging changes to social security

The 1998 Act also provides a route for challenging legislation once it has been introduced, for example changes to social security legislation such as the under-occupancy deduction, or 'bedroom tax'.⁶ Again, this is an important avenue for challenging government where its policies have a particular impact on vulnerable groups, and have the potential to interfere with convention rights. Shelter Scotland is strongly of the view that the ability to scrutinise legislation in this way should remain.

The European Convention on Human Rights and the Scotland Act 1998

Human rights protections are hard-wired into devolved areas by the Scotland Act 1998. Any provision which is incompatible with convention rights is outside the scope of the legislative competence of the Scottish Parliament and is not law.⁷ While this would be unaffected by the UK Government's current proposal, it is important to note the significance of this provision. It enables acts of the Scottish Parliament to be challenged in court on the basis that they breach convention rights and are thereby not law.

This was the case in *South Lanarkshire Council v. Ellen McKenna*⁸ where section 36 of the Housing (Scotland) Act 2001 was challenged using article 8 of the convention. The section gives social landlords the power to end a short Scottish secure tenancy without the need to provide a reason, or justify that the granting of an eviction order is reasonable in the circumstances. It was contended that this section could amount to an unjustified interference with the right to private and family life. Here, the court determined that while reasonableness did not need to be considered by the court, proportionality under the convention could.

Again, we see the role that human rights arguments can play in ensuring that a route of appeal remains open to challenge the decisions of public bodies, public landlords and the Scottish Government.

⁶ Shelter, 'Bedroom tax ruling devastating news for disabled families', July 2013
http://england.shelter.org.uk/news/july_2013/bedroom_tax_ruling_devastating_news_for_disabled_familie

⁷ s.29 Scotland Act 1998

⁸ [2012] CSIH 78

Conclusion

For people who are homeless or badly housed these are all crucial avenues for challenging the decision-making of government and public institutions, and should continue to be part of the justice system. Legal routes such as these must, of course, be complemented by adequate financial assistance for legal representation for low income and vulnerable groups. Furthermore, the court system itself and surrounding legal framework must also be easy to access – this is particularly important for vulnerable groups. For example, Shelter Scotland was disappointed to see the introduction of a three month time limit for judicial review actions in Scotland. Additional barriers such as this, alongside a lack of adequate funding for low income and vulnerable groups, can render important convention rights meaningless.

Contact

Debbie King
Public Affairs Officer
Shelter Scotland
0344 515 2447
Email: debbie_king@shelter.org.uk