



FACULTY OF ADVOCATES

Comments

by the Faculty of Advocates

on the Land Reform (Scotland) Bill

1. The Faculty is pleased to respond to the invitation of the Rural Affairs, Climate Change and Environment Committee of the Scottish Parliament to comment on the Land Reform (Scotland) Bill. We understand that our comments are principally sought in relation to the implications for Convention rights and this is the main focus of what follows. The Faculty does not take a position on the issues of social and legal policy which are embodied in this legislation. Its comments are limited to the legal issues which arise.

2. The nature and scope of the Faculty's evidence

The Faculty considers that it should be circumspect in committing itself to a concluded legal view on the issues which arise. This response has been prepared by a committee of advocates with experience of evaluating Convention rights, but alternative and contrary views to those expressed in this response may well be available. If the Committee wishes to seek further legal views, it will no doubt have mechanisms for doing so available to it, or it may call on the Scottish Government to expand on its legal thinking. The

Faculty in its evidence seeks to assist the Committee by identifying areas where Convention rights may be in play, and by offering other comments suggested by the committee which prepared this response.

Introductory comments

3. The Bill's principal potential impact will be in the areas of Articles 6 and 8, and Article 1 of Protocol 1, of the European Convention on Human Rights (“ECHR”). It may therefore be useful briefly to summarise these three provisions before offering substantive comments on particular relevant provisions of the Bill.

4. Article 6(1) ECHR provides:

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

5. Article 6 does not relate to the merits of a decision. Rather, it concerns the ground rules for determining civil rights, such as access to a court, and the procedural rules in place to ensure that that determination is conducted fairly.

6. Article 1 of Protocol 1 ECHR provides:

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

7. The article contains three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest.

8. These rules are not unconnected: the second and third rules are concerned with particular instances of interference with the right to the peaceful enjoyment of possessions and are therefore to be construed in the light of the principle laid down in the first rule¹.

9. Any interference with property must, in addition to being lawful and having a

¹ *James and Others v. the United Kingdom*, 21 February 1986, § 37, Series A no. 98, which partly reiterates the terms of the Court's reasoning in *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 61, Series A no. 52

legitimate aim, also satisfy the requirement of proportionality. A fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be struck where the person concerned bears an individual and excessive burden.

10. The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified under Article 1 of Protocol No. 1. But the article does not guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest" may call for less than reimbursement of the full market value².

11. Article 8 ECHR provides:

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.

12. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. However, article 8 protects the home, a concept to which the Strasbourg Court has given an extended meaning:

² *Lithgow and Others v. the United Kingdom*, 8 July 1986, §§ 50–51, Series A no. 102

“home” is construed as including the registered office of a company run by a private individual, as well as a juristic person's registered office, branches and other business premises.

13. In *Buck v Germany*³ the applicant's son was suspected of speeding in a vehicle belonging to the limited liability company owned and managed by the applicant. To ascertain who was driving the car, the domestic court ordered search and seizure in both the applicant's residential premises and the business premises of the company. The Court concluded that in respect of both premises there was an interference with the applicant's right to respect for his home. It therefore found it unnecessary to determine whether there had also been an interference with the applicant's right to respect for his private life, as it has found in several comparable cases⁴.

14. In assessing the proportionality of any interference with article 8 rights the Court leaves an area of judgment or discretion to the Contracting States⁵. However, the exceptions provided for in paragraph 2 of Article 8 are to be interpreted narrowly, and the need for them in a given case must be convincingly established⁶.

15. Although the article has been extended to “a juristic person's registered office, branches and other business premises” there is not much case law interpreting that beyond the offices of small companies or lawyers'

³ *BUCK v. GERMANY* – 41604/98 [2005] ECHR 267 (28 April 2005) (2006)42 EHRR 21

⁴ *Chappell v UK* – 10461/83 [1989] ECHR 4 (30 March 1989)[1989] 1 FSR 617, (1990) 12 EHRR 1 The applicant operated a business through a limited company which he controlled. The premises raided were also his home.

⁵ The “margin of appreciation”

⁶ *Buck* paragraph 44

premises. In *Bernh Larsen Holding AS*⁷ the size of the company applicants does not seem to have featured.

16. In general, article 8 may provide stronger protection than article P1-1. The following points of difference may be noted:

- Article P1-1 applies to a wide range of property whereas article 8 only applies in terms to home and correspondence. Any other effect on property has to be brought within the scope of private or family life if it is to engage Article 8.
- Article 8 has a list of grounds which may justify interference with the rights protected which are to be interpreted narrowly whereas interference with property rights need only be in the “general interest” to satisfy article P1-1.
- The need for the exceptions provided for in paragraph 2 of Article 8 must be convincingly established while all that is required for P1-1 is that the property owner should not bear “an individual and excessive burden”.

17. The requirement of lawfulness expressed in articles 8 and P1-1 demands more than compliance with the relevant provisions of domestic law. The rule of law is inherent in these and other articles of the Convention, and to be lawful an interference with Convention rights must also be compatible with the rule of law. The provisions of the domestic law must therefore be sufficiently precise and foreseeable in effect. There must be a measure of legal protection against arbitrary interference by public authorities with Convention rights. The scope of any discretion must be adequately defined. Measures affecting fundamental rights must be accompanied by appropriate

⁷ *Bernh Larsen Holding AS v. Norway* – 24117/08 – HEJUD [2013] ECHR 220 (14 March 2013) 58 EHRR 8, 35 BHRC 224, (2014)

procedural safeguards⁸.

18. The approach to determining whether a measure is proportionate or not, may – whether the issue arises under Article 8 or P1-1 – be described as follows⁹:

- is the legislative objective sufficiently important to justify limiting a fundamental right?
- are the measures which have been designed to meet it rationally connected to it?
- are they no more than are necessary to accomplish it?
- do they strike a fair balance between the rights of the individual and the interests of the community?

Part 2

TENANT FARMING COMMISSIONER

19. The Faculty has considered the provisions of sections 27 – 34 of the Bill relating to the Tenant Farming Commissioner (“TFC”). There are two separate elements to these provisions: the determinations that may be made

⁸ *Calder v. Her Majesty's Advocate* [2006] ScotHC HCJAC_62 (14 July 2006) 2006 SCCR 487, 2006 SLT 862 paragraph 32

⁹ *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80; *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, para 19; and *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, para 45

by the TFC, and the TFC's power to require the provision of information and to levy penalties. We consider each in turn.

Determinations made by the TFC

20. First, the Bill envisages that the TFC will publish a report setting out the TFC's decision on whether there has been a breach of the Code of Practice (section 31(1)). The Policy Memorandum explains at paragraph 60 that the purpose of the TFC is to help resolve disagreements within the agricultural land sector. At paragraph 62, it explains that tenant farmers and landlords will be able to refer alleged breaches of the Code of Practice to the TFC. At paragraph 71, it distinguishes between the role of the TFC and the role of the Land Court, although acknowledges that there will most likely be an overlap in the matters referred to the TFC and the Land Court. At paragraph 80, the Memorandum notes that the TFC's role is not to adjudicate disputes. We find it difficult to reconcile these statements, which in turn make it difficult to establish what the jurisdiction and purpose of the TFC will be.

21. An adverse determination by the TFC may result in reputational damage to a landlord or tenant farmer. Someone aggrieved by a determination of the TFC cannot seek damages for defamation¹⁰. It is arguable that, as with an Ombudsman or professional regulator, the TFC is therefore "determining civil rights", which engages Article 6, notwithstanding that the TFC does not have the power to provide remedies following a breach of the Code. Separately, reputation is a matter protected by Article 8. In this respect, we offer the following comments:

- It is important that the role of the TFC is properly defined, so that its

¹⁰ section 33

adjudications are “in accordance with law” and proportionate. This is relevant both for Articles 6 and 8. Why are determinations of the TFC to be published? Should those decisions be anonymised? If a purpose of the TFC is to ‘name and shame’ individuals or organisations, this would have Article 8 implications. The Financial Ombudsman Service, for example, publishes the names of the financial institutions complained about (because they are regulated) but not the name of the complainant. The category of person who may be the subject of a complaint to the TFC may be wider than those who may be complained about to the FOS, and so it may be that both the complainant and person complained about should be anonymous. By contrast, if the intention is to name individuals concerned, other protections will have to be greater.

- Is the TFC an ‘independent tribunal’ for the purposes of Article 6? We note at paragraph 80 of the Memorandum that it is recorded that the Scottish Government considers that it is not necessary for the Land Commission (including the TFC) to be an independent commission, because it will not be adjudicating disputes. For the reasons outlined, we consider that the contrary may be arguable. This is not to say that the TFC would not be considered insufficiently independent if it is constituted in the manner proposed by the Bill. Rather, we consider that it is arguable that the reasons given in the Memorandum for proposing that it be a non-departmental public body may be incorrect.
- There is no right of appeal from a determination of the TFC. An aggrieved person could seek a judicial review of the TFC’s determination, although Parliament may wish to consider whether a statutory appeal would be preferable such as is available from determinations of inadequate professional service by the Scottish Legal Complaints Commission in section 21 of the Legal Profession and Legal Aid (Scotland) Act 2007.

- The Bill gives the TFC the power to compel a person with an interest in a tenancy to respond to a complaint to the TFC¹¹. If they do not respond, that person could be subject to a fine¹². It is one thing to be required to produce documents or other information relevant to the TFC’s functions, but another to force it to participate in the process. In a court action or arbitration, for example, a party can choose not to become involved in the process. The consequence may be an adverse finding because the court or arbitrator only hears one version of events, but the lack of participation does not result in a fine. There is a risk that compelling people to take part in the process could render the determination unfair.
- No provision is made for the procedure before the TFC. The procedure will have to comply with the rules of natural justice.

Provision of Information

22. Secondly, the Bill gives the TFC wide powers to require information to be disclosed by parties to the tenancy and third parties¹³. Failure to comply can result in a fine. A requirement to provide information may raise issues under Article 8¹⁴, and the imposition of fines raises issues under Article 6. The Faculty has the following comments:

- Whilst the TFC’s power to impose a fine is discretionary, that discretion is not currently circumscribed in any way. By way of contrast, in section 40A of the Competition Act 1998, the Competition and Markets Authority (“CMA”) must be satisfied that the failure to produce documents is without “reasonable excuse” before it can impose a fine. Although there

¹¹ section 28(4)

¹² section 29(2)

¹³ section 29(1)

¹⁴ eg *Office of Fair Trading v X* [2003] EWHC 1042 (Comm)

is provision for a fine to be appealed if it is “unfair or unreasonable”¹⁵, consideration should be given by the TFC at the outset as to whether it is reasonable in the circumstances to impose a fine.

- The Faculty considers that provision should be made for dealing with confidential documents – and, in particular privileged information (including material subject to legal professional privilege).

Part 3

INFORMATION

23. The Faculty has considered sections 35 and 36, relating to the right of access to information. The Faculty doubts whether any Convention Rights, including under Article 8, are infringed, as such, by the provisions of these clauses of the Bill. Such rights will, however, require to be borne in mind when any such Regulations as the Clauses provide for are promulgated, as the detail will be in those Regulations. For the reasons summarised already, the provision of information engages Article 8, and so it is necessary to consider the proportionality of requiring information to be provided in all cases. The Faculty questions the appropriateness of enacting primary legislation which permits the entire substance, or a significant part, of the substance, to be introduced by Regulations, as there is a risk that these Regulations will not have the benefit of the same level of Parliamentary scrutiny as the Bill itself.

¹⁵ section 30(2)

Part 5

RIGHT TO BUY LAND TO FURTHER SUSTAINABLE DEVELOPMENT

24. The Faculty has considered Part 5 of the Bill, which makes provision for the right to buy to further sustainable development. These powers may engage both Article 8 and P1-1. The compatibility of the interference in any given case would depend on whether the justification for the exercise of the powers pursues a legitimate aim and satisfies the requirement of proportionality as we have explained them above. The cumulative requirements of section 47(2), the entitlement to market value compensation¹⁶ and the independent appeal provisions¹⁷ provide substantial safeguards which would be relevant in determining whether or not, assuming an adequate justification, the interference is compatible with Convention rights.

25. The Faculty notes the absence from the Bill of a definition of what sustainable development is and what standard of sustainable development should be the minimum achieved by all land owners to avoid compulsory purchase. We note the definition between paragraphs 143 and 144 of the Policy Memorandum. We do not consider this to be a satisfactory method of legislating.

26. Moreover, it may mean that the legislation fails to identify what the objective is that justifies the interference with Convention rights, particularly the right to respect for the home under Article 8. If that were to be correct, it may be that the interference could be regarded as not having been “prescribed by law” such as to satisfy Convention law.

¹⁶ section 56

¹⁷ sections 60 and 61

Part 8

DEER MANAGEMENT

27. The Faculty has considered sections 69 to 71 of the Bill, which relate to Deer Management. The compulsory powers in relation to deer management plans would appear to engage P1-1. In principle, measures directed at the control and management of deer on land in Scotland, directed at preventing or minimising damage to property or danger to persons, or at promoting the welfare of the deer, may be regarded as being in the general interest. The question of whether any particular deer management plan (and any particular control imposed) is compatible with Convention rights would depend on the particular circumstances and the justification advanced for it.

Part 9

ACCESS RIGHTS

28. The Faculty has considered Part 9 of the Bill concerning access rights. The provisions seek to amend the Land Reform (Scotland) Act 2003. Whilst the provisions involve some interference with property, there are no new interferences. The Bill includes notification obligations and includes the opportunity for representation. In light of this, the Faculty considers that it is unlikely that there are any new Convention Rights issues which arise from these provisions distinct from those which relate to the 2003 Act more generally.

Part 10

AGRICULTURAL HOLDINGS

29. The Faculty has considered Part 10 of the Bill, which relates to Agricultural

Holdings. The Faculty has identified a number of specific provisions which require further comment.

Chapter 3: Section 81 – Sale where landlord in breach

30. An order for sale of the agricultural holding clearly constitutes an interference with the landlord’s right to peaceful enjoyment of his possessions in terms of Article 1 of Protocol 1. Any such interference must be proportionate, applying the tests summarised in the introductory section of this response.

31. The Explanatory Memorandum¹⁸ suggests that the ability to apply to the Land Court to withhold rent, where a landlord is failing to meet his obligations, might not provide an effective remedy if the value of the rent paid can be substantially less than the replacement costs of the defective fixed equipment required to farm efficiently on the holding. However, it is questionable whether the ability to apply to the Land Court to order the sale of the agricultural holding can be said to be no more than is necessary to accomplish the stated aim of providing an effective remedy in situations where a landlord’s failure to fulfil his obligations is adversely affecting the tenant’s ability to fulfil his obligations or to farm the holding in accordance with rules of good husbandry¹⁹. Arguably the stated aim could be achieved by less intrusive means – for example, an order requiring the landlord to pay the tenant the costs of remedying the landlord’s failings – whether prospectively or retrospectively. This is arguably within the power of the Land Court in terms of section 84(1) of the Agricultural Holdings (Scotland)

¹⁸ at paragraph 352

¹⁹ see paragraph 351

Act 2003. Such a remedy could presumably ensure the land is brought back into productive use.

32. It is true that, as Lord Drummond Young said in *Main v Scottish Ministers*²⁰:

[48] it will nearly always be possible to suggest a somewhat less intrusive measure, and the critical question is whether the measure selected by the legislature or the executive is within the range of measures that can reasonably be considered as required to fulfil the policy objective...

33. The Government's concern appears to be that, as things currently stand, the tenant faces the choice of paying potential costs of litigation or having the funds to remedy the landlord's failing, necessary for the holding. However, the tenant would also face paying the costs of any application for an order to sell the agricultural holding. Moreover, if the tenant cannot find the funds to remedy the landlord's failings whilst withholding the rent, it is difficult to see how he or she would be better placed to do so, after he or she has paid the purchase price for the agricultural holding (including repayment of any sum due to secured creditors under clause 38J(7)).

34. Of course, this objection does not arise if an order is made for sale to a third party in terms of clause 38L. However, it is questionable whether the provision for sale of the agricultural holding on the open market²¹ by public roup²² potentially, to a complete stranger, can, without more, be said to meet the government's stated aim of ensuring that the land is brought back into

²⁰ [2015] CSIH 41

²¹ Section 38M(1)

²² Section 38M(2)(c)

productive use. Hence, it might be open to argument that the measure selected for the Bill is not within the range of measures that can reasonably be considered as required to fulfil the policy objective

35.The Land Court is a public authority for the purposes of section 6 of the Human Rights Act 1998 and cannot lawfully act in a way that is incompatible with the landlord's Convention rights. It would therefore seek to interpret the proposed legislation in a manner that was compatible with those rights. Clause 38B sets out the conditions under which the Land Court can make an order for sale. These include the following:

- (c) greater hardship would be caused by not making the order than by making it, and
- (d) in all the circumstances it is appropriate.

It is open to question whether these provisions enable the Land Court to act in a way that is compatible with the landlord's Convention rights in terms of Article 1 of Protocol 1. For example, it is unclear whether they would empower the Land Court to refuse an order where the landlord had sufficient assets to remedy his failings, albeit he had failed or refused to do so. Sub-paragraphs (c) and (d) must, after all, be interpreted in light of the rest of the section, and indeed, the Act as a whole.

36.The provisions do not provide the Land Court with an effective mechanism for ensuring that sale to a third party is necessary to meet the Government's stated aims of ensuring that the land is brought back into efficient production, since it provides no mechanism for the Land Court to determine in advance of sale, the suitability of the third party, or the likelihood that he will comply with his obligations. Although the Explanatory Memorandum

describes the power of sale as “the last resort”, and only available where there has been “persistent” failure to comply with the landlord’s obligations, this is not reflected in the provisions of Clause 38B.

Chapter 5: Sections 84 to 89 – Assignment of and succession to agricultural tenancies

37. The restriction on the landlord’s right to withhold consent to an assignment of the tenancy in clause 84(5), arguably constitutes an interference with the landlord’s right to peaceful possession, in terms of Article 1 of Protocol 1.

38. The provision for objection on the grounds that the person does not have sufficient resources to enable the person to farm the holding with reasonable efficiency; and that the person has neither sufficient training in agriculture nor sufficient experience in the farming of land to enable the person to farm the holding with reasonable efficiency, provide a significant measure of protection to the landlord’s interests.

39. However, the restriction of the objections, where those grounds do not arise, to lack of good character is more problematic.

40. Suppose the landlord has good reason to believe that, notwithstanding that the proposed assignee has sufficient resources and expertise, he is not in good faith or is unwilling to farm the holding with reasonable efficiency. Albeit the phrase “not of good character” in the proposed new section 10A(3A)(a) of the Agricultural Holdings (Scotland) Act 1991, is elastic, it must be doubtful whether it is sufficiently elastic to allow for an objection in such a situation.

41. The Government’s stated aim of ensuring that older tenants should be

encouraged to retire with dignity and confidence so as to release land to younger tenant farmers, must be weighed against the interference with the landlord's right to peaceful enjoyment, constituted by the restrictions proposed in Clause 84(5). In the absence of provision for objection in circumstances where there is good reason to think that the proposed assignee is not in good faith or is unlikely to be willing to farm the land with reasonable efficiency, it is open to argument whether the measure adopted by the Government strikes a fair balance between the rights of the individual and the interests of the community. These observations are limited to the categories of assignee proposed in clause 84(3). Different considerations apply in the case of the limited categories of assignee currently permitted by law, which might well make the lack of provision in such circumstances proportionate. Accordingly, the Faculty suggests that consideration should be given to providing, in the subsection (3A) to be inserted by the proposed section 84(5), the following additional ground of objection:

(d) that there exist other reasonable grounds to believe that the person will not farm the land with reasonable efficiency.

42. A similar concern arises in connection with the abolition of the landlord's ability to serve a Notice to Quit, subject to Land Court consent, on a person acquiring a tenancy by succession, on the grounds that that the agricultural holding is not a viable unit, effected by the wholesale repeal by the proposed section 89(5) and paragraph 13(5) of the schedule, of section 25 and schedule 2 of the 1991 Act²³.

²³ see paragraph 380 of the Explanatory Memorandum