

THE HIGH COURT**JUDICIAL REVIEW****KARL ZAMBRA****[2011 No. 893 J.R.]****AND****APPLICANT****DISTRICT JUDGE MARY COLLINS****AND DUBLIN CITY COUNCIL****RESPONDENTS****JUDGMENT of Mr. Justice Michael White delivered on the 3rd day of May, 2012**

1. By order of leave of 23rd September, 2011, the applicant was given liberty to apply for an order of *certiorari* quashing an order of the first named respondent made on the 5th September, 2011, excluding the applicant from his mother's dwelling at 337 St. Teresa's Gardens, Donore Avenue, Dublin 8 pursuant to the provisions of s. 3 of the Housing (Miscellaneous Provisions) Act 1997. Other ancillary relief was sought. A motion was issued for 12th October, 2011. A statement of opposition was filed on behalf of the second named respondent, Dublin City Council, on 29th November, 2011. The matter was at hearing on 16th December, 2011; 26th January and 1st February, 2012 when judgment was reserved.

Legislative provisions

2. Section 3 of the Housing (Miscellaneous Provisions) Act 1997, as substituted by s. 197 of the Residential Tenancies Act 2004 states:-

"(1) A tenant or relevant purchaser may, in respect of a house –

(a) Let to the tenant by a Housing Authority, or

(b) In respect of which he or she is such a purchaser,

apply to the District Court for an order (to be known and referred to in this Act as an 'excluding order') against a person including, in the case of an application by a tenant, a joint tenant (referred to in this Act as 'the respondent') whom the tenant or relevant purchaser making the application believes to be engaging in anti-social behaviour.

(2) A housing authority may, in respect of a house referred to in subsection (1), apply to the District Court for an order (which shall also be known and is in this Act referred to as an 'excluding order') against a person, other than the tenant or relevant purchaser of the house, (in this Act also referred to as the 'respondent') whom the authority believe to be engaging in anti-social behaviour where the authority –

(a) Having consulted the tenant or relevant purchaser and the health board in whose functional area the house is situate, believe that the tenant or relevant purchaser –

(i) May be deterred or prevented by violence, threat or fear from pursuing an application for an excluding order, or

(ii) Does not intend, for whatever other reason, to make such an application,

And

(b) Consider that, in the interest of good estate management, it is appropriate, in all the circumstances, to apply for the excluding order.

(3) Where the court, on application to it, is of the opinion that there are reasonable grounds for believing that the respondent is or has been engaged in anti-social behaviour it may by order –

(a) Direct the respondent, if residing at the house in respect of which the application was made, to leave that house, and

(b) Whether the respondent is or is not residing at the house –

(i) prohibit the respondent for the period during which the order is in force from entering or being in the vicinity of that house or any other specified house or being in or in the vicinity of any specified area, being an area one or more of the houses in which are under the control and management of a housing

authority, or

(ii) Prohibit the respondent, during the said period, from doing all or any of the things referred to in subparagraph (i) save where specified conditions are complied with.

(4) An excluding order may, if the court thinks fit, prohibit the respondent from causing or attempting to cause any intimidation, coercion, harassment or obstruction of, threat to, or interference with the tenant, relevant purchaser or other occupant of any house concerned.

(5) Where an excluding order has been made, the tenant, the relevant purchaser or the housing authority, as appropriate, or the respondent may apply to have it varied, and the court upon hearing the application shall make such order as it considers appropriate in the circumstances.

(6) An excluding order, whether made by the District Court or by the Circuit Court on appeal from the District Court, shall, subject to subsection (7) and section 9, expire three years after the date of its making or on the expiration of such shorter period as the court may provide for in the order.

(7) On or before the expiration of an excluding order to which subsection (6) relates, a further excluding order may be made by the District Court or by the Circuit Court on appeal from the District Court for a period of three years, or such shorter period as the court may provide for in the order, with effect from the date of expiration of the first mentioned order."

3. Anti-social behaviour is defined in s. 11 of the Act as:-

"(1) in this Act, unless the context otherwise requires –

'Anti-social behaviour' includes either or both of the following, namely –

(a) The manufacture, production, preparation, importation, exportation, sale, supply, possession for the purposes of sale or supply, or distribution of a controlled drug (within the meaning of the Misuse of Drugs Acts, 1977 and 1984),

(b) any behaviour which causes or is likely to cause any significant or persistent danger, injury, damage, loss or fear to any person living, working or otherwise lawfully in or in the vicinity of a house provided by a housing authority under the Housing Acts, 1966 to 1997, or a housing estate in which the house is situate and, without prejudice to the foregoing, includes violence, threats, intimidation, coercion, harassment or serious obstruction of any person;

Section 15 of the Act allows for the exchange of information between a member of the Garda Síochána and the Housing Authority in relation to any person whom the Authority considers may be or may have been engaged in anti-social behaviour."

4. Section 21 of the Act states:-

"Where, in any proceedings under section 62 of the Housing Act, 1966, or section 3, 4 or 9, a member of the Garda Síochána or an officer of a housing authority or a health board states that he or she believes that a person is or has been engaged in anti-social behaviour, then, if the Court is satisfied that there are reasonable grounds for such belief and that another person would be deterred or prevented by violence, threat or fear from providing evidence in that regard, the statement shall be evidence of such anti-social behaviour."

Factual position prior to the issue of District Court proceedings

5. By tenancy agreement the second named respondent the Housing Authority let the property 337 St. Teresa's Gardens, Donore Avenue, Dublin 8 on 15th February, 1989, to Emily Zambra. It is one of the oldest residential areas of Dublin City and is a community made up of both local authority housing and privately owned and rented dwellings. The following persons are noted as residing with the tenant at the premises: Graham Zambra, Leah Zambra a minor and the applicant, Karl Zambra.

6. In or around 28th September, 2010, the Housing Authority's St. Teresa's project office received complaints that the applicant had engaged and was engaging in serious anti-social behaviour namely the sale and supply of drugs in the St. Teresa's Gardens and Donore Avenue area. On 17th December, 2010, a request was made by the Housing Authority pursuant to s. 15 of the Act seeking information relating to the applicant. On 30th March, 2011, a report was received by the Housing Authority from Sergeant Paul Kealy, An Garda Síochána Kevin Street.

7. On 6th April, 2011, Michael Clarke, the area housing manager, wrote to the tenant Emily Zambra and arranged an interview with her on 18th April, 2011. Mr. Clarke's note of the meeting stated that Ms. Zambra had told him that she knew nothing about the applicant dealing or selling drugs but admitted that she was aware that he had been in and out of court recently but did not know why. She stated that she would prefer Dublin City Council to take an exclusion order application as she would not be in a position to represent herself legally and felt it would be too stressful taking such action against her own son. In a subsequent affidavit sworn on 13th December, 2011, she denied making some of these comments.

8. The Report from Sergeant Paul Kealy of 30th March, 2011, noted that the applicant was arrested and charged with offences that he allegedly on 13th and 23rd July, 2010, at St. Teresa's Gardens sold heroin and crack cocaine to undercover gardaí.

District Court proceedings

9. On 1st June, 2011, an order was signed by Kieran Dunne, executive manager of the Housing Authority, directing an application to be made to the District Court for an exclusion order against the applicant on the grounds of anti-social behaviour. An application

pursuant to s. 3 of the Act was posted to the applicant by prepaid registered post on 10th August, 2011, returnable for the 5th September, 2011, Court 23 Four Courts at 10.30 a.m. The covering letter was dated 19th July, 2011 and stated that the City Council would not consent to any adjournment on that date to enable the applicant to seek legal representation.

10. According to the applicant his solicitor was on vacation for a period of time during August 2011 and he did not give his solicitor the application until the first week of September.

11. Prior to the court case, on 1st September, 2011, the second named respondent, the Housing Authority, received a fax from Garda Sean M. McBride setting out further allegations in respect of the applicant. He outlined again the allegations referred to in Sergeant Kealy's report but in addition alleged that the applicant had threatened the life of an undercover garda during the same incident and referred to three further incidents. The letter stated that on 16th November, 2010, it was alleged the applicant had cannabis in his possession for sale or supply with a street value of €500 and is alleged to have had 15 small packets for use for bagging cannabis into street deals. He was also suspected of involvement in an incident on the 8th March, 2011, at Rutledge Terrace, Dublin 8 whereby crack cocaine valued at €20,000 was thrown into a garden by two males and that the applicant was suspected of being involved in the seizure of heroin and crack cocaine valued at €80,000 seized in St. Teresa's Gardens on 24th February, 2011, which was found in derelict land to the rear of the flats

12. In respect of the hearing on 5th September 2011, while the court is concerned that it does not have a transcript of the evidence and notes that the learned District Judge has not filed a statement of opposition, the court has been assured that the following events which transpired at the court hearing are uncontested.

13. The applicant was represented by counsel, Ronan Guckian, B.L., instructed by Niall O'Connor, Solicitor. The 5th September, 2011, was the first return date for the summons and the applicant through counsel applied to the learned judge for an adjournment to facilitate the applicant's legal advisors procuring details of the allegations being made against the applicant, that such details in the possession of the legal advisors was procured informally and that no documentation had been furnished in advance other than the summons and the covering letter of 19th July, 2011. The learned judge refused to grant an adjournment and further stated that if any matter arose an adjournment could be granted at a later stage. During the course of the hearing further applications were made to the learned judge to adjourn the matter including an application on behalf of the applicant for an adjournment so that he could call his mother Emily Zambra as a witness. These applications were refused.

14. The only witness called on behalf of the second named respondent was the area housing manager, Michael Clarke, who referred in his evidence to both the report received from Sergeant Paul Kealy of 30th March, 2011 and the fax received from Garda Sean M. McBride on 1st September, 2011 and read out the contents of these reports to the learned judge the first named respondent. The applicant through counsel objected to the admissibility of these reports, but the learned judge decided to admit the content of the reports. In respect of the request by the applicant for an adjournment to call Emily Zambra as a witness the learned judge stated that an adjournment would not be permitted for Emily Zambra to attend court because it was likely that this lady would renege upon what she had stated in the interview with Michael Clarke. The court granted the excluding order pursuant to the provisions of the legislation ordering him to leave the dwelling 337 St. Teresa's Gardens, Donore Avenue, Dublin 8 and prohibited him from entering into the vicinity of the flats complex as highlighted in a map attached to the order. The order was to remain in force for three years and was to commence from 26th September, 2011. The applicant was further prohibited from causing or attempting to cause any intimidation, coercion, harassment or obstruction of, threat to or interference with the tenant or other occupant of any dwelling concerned. The second named respondent the applicant in the exclusion proceedings did not apply for this specific provision.

Alternative remedies, variation discharge and appeal

15. Pursuant to the provisions of s. 3(5) of the Act it was open to the applicant to have the excluding order varied. Pursuant to s. 9 of the Act the applicant can apply to the court to have the order discharged. The applicant also had a right of appeal to the Circuit Court and s. 8 of the Act together with rule 11 of Statutory Instrument No. 217/1999 District Court Housing & Miscellaneous Provisions Act 1997, Rules 1999 had the effect of staying an exclusion order only if the District Court that made the order or the Circuit Court on appeal so determined but not otherwise.

16. The second named respondent has argued that because of the availability of these various reliefs, variation, discharge, and appeal with a stay subject to the consent of the court, that the applicant has not exhausted his legal rights and has improperly and unfairly brought judicial review proceedings, where there are alternative remedies in place.

Grounds relied on by the applicant and respondents

17. The grounds relied on by the applicant to ground an application for *certiorari* are based on the contention that fair procedures were not followed in the course of the proceedings before the District Court and that there was not a fair and constitutional hearing of the proceedings in accordance with law.

18. The complaints of the applicant in respect of the conduct of the District Court proceedings are:-

(i) No advance notice was furnished of the allegations of anti-social behaviour. The first time these were brought to his attention was at the District Court hearing on 5th September, 2011.

(ii) The second named respondent objected to any adjournment and the first named respondent refused to accede to the application for an adjournment, in a situation where he was clearly unprepared to mount a proper defence to the proceedings.

(iii) The court relied on hearsay evidence namely the reports from An Garda Síochána, without the members of the Garda Síochána referred to, being amenable to the applicant for the purposes of cross examination.

(iv) The applicant was refused an adjournment to call a relevant witness his mother Emily Zambra, although the second named respondent through the witness Michael Clarke had referred to a letter to her and a meeting with her.

(v) The learned trial judge had pre-empted the evidence that may have been given by Emily Zambra.

(vi) The only way that the evidence of the reports could be led was pursuant to the provisions of s. 21 of the Act and this related to a situation where a person was in fear of giving evidence.

(vii) No evidence was adduced of any intimidation, coercion or harassment or obstruction or threat to the tenant Emily Zambra, but this nonetheless was included in the excluding order.

19. The second named respondent argues that:-

(i) The section allows the Housing Authority to manage its responsibilities to other tenants and residents and helps to eliminate a serious problem of anti-social behaviour.

(ii) the applicant received the appropriate notice as set out in the legislation and rules made hereunder and no unfairness occurred when the case proceeded on 5th September, 2011.

(iii) the second named respondents had not made any application in respect of the disposition of the applicant to the tenant and the fact that this was included in the exclusion order is irrelevant.

(iv) That the provisions of ss. 15 and 21 of the Act had no application to the hearing of the proceedings.

(v) The applicant has not applied to vary, discharge or appeal the order, so judicial review is inappropriate.

Fair procedures and a hearing in accordance with law

20. The District Court proceedings were civil and not criminal proceedings, the normal standard of proof in civil proceedings is proof on the balance of probabilities.

21. Section 3(3) of the Housing (Miscellaneous Provisions) Act 1997, as substituted by s. 197 of the Residential Tenancies Act 2004, allows an excluding order to be made where the court is of the opinion that there are reasonable grounds for believing that the respondent is or has been engaged in anti-social behaviour. The court must form that opinion independently and it cannot rely on the belief or the opinion of the Housing Authority

22. The order of leave granted on 23rd September, 2011, does not include a ground seeking to impugn the section due to unconstitutional infirmity. The section enjoys the presumption of constitutionality. A court can act on an opinion based on reasonable grounds of belief that a respondent was engaging in anti-social behaviour, and does not need to establish proof on the balance of probabilities, that the respondent was actually engaged in anti social behaviour.

23. The fact that a court can rely on reasonable grounds of belief, does not mean that the normal rules of evidence are suspended, or that the normal procedures to ensure a fair hearing are diluted.

24. Section 21 of the Act deals with a situation, where a person is deterred or prevented by violence, threat or fear from providing evidence that a respondent is or has engaged in anti-social behaviour. A statement to that effect, tendered by a member of An Garda Síochána, an Officer of the Housing Authority or an Officer of the Health Board now an Officer of the HSE shall be evidence. One can envisage a situation where residents in a housing estate who witness anti-social behaviour and make a complaint but wish to remain anonymous because of fear of violence, or the threat of violence or simple fear. This section permits evidence of the complaint to be given to the court. The weight to be placed on this evidence is a matter for the court. No such evidence was given in this case.

25. Section 15 of the Act permits a Housing Authority, to request from another Housing Authority or a specified person who includes a member of the Garda Síochána information in relation to any person whom the authority considers may be or may have been engaged in anti-social behaviour. There is no provision in s. 15 of the Act which allows this information so obtained to be given as a matter of right to a respondent against whom an application for an excluding order has been made.

26. Hearsay evidence is classically defined by Kingsmill-Moore J. in *Cullen v. Clarke* [1963] I.R. 368 at 378.

"In view of some of the arguments addressed to the court, it is necessary to emphasise that there is *no* general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There *is* a general rule, subject to many exceptions, that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert; the reasons being that the truth of the words cannot be tested by cross-examination and has not the sanctity of an oath. This is the rule known as the rule against hearsay."

Fennell the Law of Evidence in Ireland, Chapter 9 Page 217 original edition states:-

"The reason behind this exclusionary rule affecting otherwise relevant and probative evidence, is that if the maker of the statement does not testify he is not available for cross examination nor can his demeanour be observed or credibility tested. It is moreover, desirable that the best evidence be available to the court; and that the danger of inaccuracy through repetition be avoided. Hence the Rule is located in the faith in the power of cross examination."

27. The original report of 30th March, 2011, from Sergeant Paul Kealy was the documentation relied on by the second named respondent to issue the summons together with the complaint to the project office at St. Teresa's Gardens in September 2010.

28. The subsequent fax from Garda Sean M. McBride was received after the issue and service of the District Court summons.

29. The first report referred to specific incidents, where the applicant had been charged with a criminal offence.

30. In respect of the fax of 1st September 2011, that referred to two incidents of suspicion only and another incident of allegation where charges had been brought. Mere suspicion could not objectively ground an opinion of reasonable belief.

31. The second named respondent has argued that the applicant is conflating the difference between criminal and civil proceedings and the standards demanded only relate to criminal proceedings. There is a more onerous responsibility on a prosecutor and a court in the conduct of criminal proceedings, where an accused person's liberty is at risk; however the Superior Courts have applied similar broad standards to the conduct of civil proceedings.

32. In *The State (Irish Pharmaceutical Union) v. Employment Appeals Tribunal* [1987] ILRM 36 it was held by the Supreme Court:-

"Whether it be identified as a principle of natural justice derived from the common law and known as *audi alteram partem* or, preferably, as the right to fair procedures under the Constitution in all judicial or quasi-judicial proceedings, it is a fundamental requirement of justice that person or property should not be at risk without the party charged being given an adequate opportunity of meeting the claim, as identified and pursued.

If the proceedings derive from statute, then in the absence of any set or fixed procedure and if the set of fixed procedure is not comprehensive, the authority must supplement it in such a fashion as to ensure compliance with constitutional justice."

33. The admissibility of evidence is a matter for the trial judge. In proceedings pursuant to s. 3 of the Housing (Miscellaneous Provisions) Act 1997, where a Housing Officer is relying on reports from other agencies in respect of reported matters of anti social behaviour, a trial judge would have the right to accept evidence from a Housing Authority referring to information received from An Garda Síochána, that a person had been charged with specific offences, without the need to call the relevant officers of An Garda Síochána.

34. The two matters of suspicion referred to in the fax of 1st September, 2011, from Garda Sean M. McBride should not have been admitted in evidence.

35. The Housing Officer was entitled to give evidence in respect of the alleged incident on 16th November, 2010, when it was alleged that Karl Zambra had cannabis in his possession for sale or supply with a street value of €500 and also 15 small packets used for bagging cannabis, as that matter was before the court by way of charge.

36. The Housing Authority is not entitled to have hearsay evidence introduced as of right.

37. This Court is not placing any onus on the Housing Authority to make available any report of alleged anti social behaviour in advance of the hearing or to call garda officers. However a respondent in civil proceedings should have the right, to call those witnesses, provided they are amenable to the court.

38. The trial judge was entitled to admit the evidence of the interview with Emily Zambra, however, the applicant should have been afforded the facility to call her as a witness. It was incorrect to express a view on the credibility of that witness prior to her being heard.

39. A fair hearing could have been afforded the applicant by a number of different methods:-

(1) The second named respondent could have sent in advance details of the allegations of anti social behaviour.

(2) The second named respondent could have consented to an adjournment to enable the applicant to call garda witnesses or his mother Emily Zambra.

(3) The trial judge could have afforded the applicant an adjournment to facilitate the presence of witnesses, or in the alternative completed the second named respondent's evidence in respect of the allegations of anti social behaviour, and adjourn the respondent's case to enable him to deal with the allegations and call whatever witnesses he wished either by agreement or by subpoena.

40. The focus of the second named respondent in the judicial review hearing has been a concern that the court would regard the provisions of the section as unfair, or be unnecessarily prescriptive in respect of procedures. That is not the case.

41. It is the conduct of the hearing itself, by both the first and second named respondent that has led to a situation where the applicant received a hearing, which fell considerably short of the standards expected.

42. Notice of the allegations to the tenant Emily Zambra at the interview of the 18th of April 2011, was not notice to the applicant.

43. If an applicant does not wish to facilitate any adjournments when a matter is first listed in court in respect of these types of applications, it would be advisable that detailed particulars of the anti social allegations are put to the respondent either by way of letter or report. This is not an obligation imposed on an applicant but would facilitate the early hearing of the matter without the necessity of an adjournment.

44. In the alternative it is open to an applicant in these type of proceedings, if a respondent wishes to adduce evidence to facilitate that, by consenting to an adjournment.

45. If a party is not afforded a hearing either in the criminal or civil courts which does not meet the standard required to afford fair procedures to all the parties to the proceedings, then judicial review is an appropriate remedy. In exercising judicial discretion a court must examine the alternatives available, in the context of well settled principals. An appeal, or right to apply to vary or discharge an order, does not necessarily cure a defective hearing at first instance.

46. In a judgment of the Supreme Court in *Petrea Stefan v. The Minister for Justice Equality & Ors* [2001] 4 I.R. 203 at 218 Denham J. stated:-

"The original decision was made in circumstances which were in breach of fair procedures and which resulted in a decision against the appellant on information which was incomplete. The appeals authority process would not be appropriate or adequate so as to withhold *certiorari*. The applicant is entitled to a primary decision in accordance with fair procedures and an appeal from that decision. A fair appeal does not cure an unfair hearing."

47. There are circumstances based on particular facts when a court will not grant judicial review when it was open to a party to vary or discharge or appeal an order. This is not one of those cases. Very fundamental fair procedures were not followed in this case, an appeal, variation or discharge would not remedy the injustice of the original hearing,

48. If a trial judge having conducted a hearing according to fair procedures decides to add to the order, a condition that the respondent shall not harass the tenant, it is within the judge's discretion to do so, even if it has not been applied for by the Housing Authority.

49. The court hearing on the 5th of September 2011 was not a fair hearing in accordance with constitutional justice. I will grant an order of *certiorari* quashing the excluding order of the 5th of September, 2011.

Approved: White J.