Neutral Citation Number: [2007] IEHC 404

THE HIGH COURT

Record Number: 2007 No. 916 JR

BETWEEN

VICKY LEONARD

APPLICANT

AND

DUBLIN CITY COUNCIL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr Michael Peart delivered on the 3rd day of December 2007:

1. Following the granting of leave to the applicant by order dated 23rd July 2007 to seek certain reliefs by way of judicial review, the respondents issued a Notice of Motion dated 27th July 2007 in which they sought to have that order set aside in its entirety, and/or in the alternative an order lifting the stay which the Court granted in respect of the District Court decision of the 15th February 2007 to issue a warrant for possession against the applicant in respect of the dwelling occupied by her at 17, Robert Emmet Walk, Bridgefoot Street, Dublin 8, and the stay granted in respect of the hearing by the Circuit Court of the applicant's appeal against that decision. Having heard the application, the Court gave its decision on an *ex tempore* basis, and stated that it would deliver a written judgment as to its reasons at a later stage, and now does so.

2. At the outset I should state that I am satisfied that this application comes within the jurisdiction of the Court to set aside leave which has been granted on an *ex parte* basis, as discussed in *Adam and Iordache v. The Minister for Justice, Equality and Law Reform* [2001] 3 IR 53. The Court's inherent jurisdiction to set aside such orders was clearly recognised in an appropriate case, even a case such as the present one where there is no question of mala fides in the manner in which the *ex parte* order was applied for. The jurisdiction should be used sparingly but exists where, having heard the party affected by the *ex parte* order, the Court is satisfied that the applicant's proceedings have disclosed, *inter alia*, no reasonable cause of action and is doomed to fail. In the present case on the present application, the respondents during argument have brought to the attention of the Court a number of decisions of both the High Court and Supreme Court which speak to the question as to whether the applicant's case is stateable or reasonably arguable. That is sufficient in my view to bring the application to set aside within the principles emerging from the *Adam and Iordache* case referred to. This jurisdiction ought not to be confined to cases where *facts* not made known by the applicant on the *ex parte* application are made known on the application to set aside. It is equally applicable where the Court was not referred on the *ex parte* application to relevant case law touching upon the points being put forward as arguable at leave stage.

3. The order of the District Court which has given rise to the present proceedings was made pursuant to the provisions of s. 62 of the Housing Act, 1966 (as amended), in circumstances where the respondent Council had made a decision to serve Notice to Quit on the applicant because of what they contend is a breach by her of the terms of her tenancy agreement with the Council dated 30th November 2005 which provided at Clause 13(a):

> "Neither the tenant nor any member of his household or any sub-tenant or visitor shall cause any nuisance, annoyance or disturbance to any neighbours, their children or visitors or to council staff ",

and at Clause 13(vii):

> "The tenant must not, at any time, invite or allow to remain on any part of the dwelling or garden, any persons in respect of whom the Council has notified the tenant that they should not enter or remain on the property."

4. By letter dated 29th November 2005 the Council had notified the applicant that it was invoking Clause 13(vii) of the Agreement in respect of a person named as Mark Keating, the applicant's partner, and warned her that if that person was found to be in her premises or to have been in her premises, the Council would be entitled to recover possession under the provisions of s. 62 of the said Act. He, according to her grounding affidavit, is a person with whom she has been in a relationship for a number of years, and who she states is a heroin addict, and she has exhibited some medical information which suggests that she also has an addiction problem of the same nature and that each of them is seeking help in that regard.

5. It appears also that when the applicant had been a tenant of the Council in a different dwelling prior to the 30th November 2005, there had been a complaint about this person being in her premises or of illegal substances being found there following a search carried out by members of An Garda Siochana on the 23rd/24th December 2004.

6. Following the service of the Notice to Quit the applicant failed to give up possession, hence the application by the Council to the District Court under s. 62 of the Act for a warrant of possession.

7. I should add perhaps at this stage that there had been several meetings arranged between the applicant and the Council prior to the decision to serve Notice to Quit being made.

8. There is no challenge made by the applicant to the validity of the decision by the Council to issue a Notice to Quit against her, which is a pre-requisite to the service of the Notice to Quit, and nor is there a challenge to the Notice to Quit itself as served. Those are important factors in this case. The challenge is in the first place to the constitutionality of s. 62 of the Act, as well as to its conformity with certain provisions of the European Convention on Human Rights. Secondly, a declaration is sought that the determination by the District Court which led to the issuing of the warrant for possession to the Council is invalid by virtue of non-compliance with the principles of constitutional and natural justice or by reason of the unconstitutionality of s. 62 of the Act.

9. In her grounding affidavit the applicant averred that while for some time prior to her appearance in the District Court when that order was made she had the services of a solicitor, she was unable to engage a solicitor on the 15th February 2007. She states that when the case was called in the District Court on that occasion she applied for an adjournment to enable her to seek alternative legal representation but that this was refused by the District Judge upon objection by the Council being made. She states that thereafter the Council gave its evidence of the various matters upon which the Court had to be satisfied before making the order of possession. She complains that this all happened very quickly and that she did not follow or understand what was happening. In any event, she found out that the order had been made and on the 28th February 2007 she filed a Notice of Appeal to the Circuit Court. She has subsequently obtained legal advice and assistance from a Law Centre and is apparently in receipt of a certificate from the Legal Aid Board for the purpose of mounting her challenge on the basis that s. 62 contravenes this State's obligations under the European Convention on Human Rights.

10. As I have stated, this Court granted leave to the applicant to seek the reliefs set forth in her Statement of Grounds, and granted a stay on the warrant of possession and on the hearing of the applicant's appeal to the Circuit Court. Upon being served with the application papers, the respondent has sought to have those stays lifted and to have leave set aside, principally on the ground that the constitutionality of s. 62 of the Act has already been upheld, and that it is no longer arguable that the section is unconstitutional. In addition, in so far as the European Convention on Human Rights is called in aid, the respondent submits that even if the Court was to grant leave to seek the declarations sought in that regard, this would not itself justify the granting of any stay on the warrant of possession, since any remedy achieved by the applicant, if ultimately successful at the substantive hearing could result only in an award of damages.

11. The Grounds upon which the applicant seeks the reliefs set forth in her Statement of Grounds include the fact that the Council served her with a summons returnable for the 15th February 2007 and that this summons commanded her to appear at the District Court on that date and "show cause why a warrant under s. 62 of the said Act should not issue for delivery of possession…". She makes the point that without legal representation she was unable to do what she was commanded to do. In their covering letter dated 18th December 2006 serving that summons upon the applicant, the Council made it clear that they would not consent to any adjournment sought for the purpose of seeking legal representation.

12. Mr Michael Clarke of the respondent Council has sworn an affidavit to ground the present application to set aside the order granting leave. In that affidavit he clearly sets out the history of events which led the Council to seek the warrant of possession under s. 62 of the Act. There is no factual dispute between the applicant and the respondent as to the history of events which have led to the Council's decision to serve the Notice to Quit. The applicant has accepted that she committed a breach of Clause 13(vii) of her Tenancy Agreement. Mr Clarke states that on the 30th November 2005, the date on which the agreement was entered into, both the applicant and her partner met with the Council, and that at that meeting she was told about the previous complaint to which I have referred, and that she was told at that meeting that the Council had decided to exclude her partner and that if she permitted him onto her dwelling she would be in breach of her agreement. Mr Clarke goes on to state that on the 8th February 2006 a member of the Council, accompanied by two members of the Garda Siochana, called to the applicant's dwelling and found Mark Keating in the sitting room smoking heroine, and that he admitted that he stayed on occasions in the premises. Following that visit the Council wrote a letter to the applicant drawing attention to the provisions of Clause 13 (vii) of her Agreement and stating that she was in breach thereof. The letter went on to request that she attend a meeting with the Council. That meeting took place a couple of weeks later and she was given a final warning by letter dated 27th April 2006. However, on the 9th May 2006 the Council received a further complaint that Mark Keating was residing there, and on the 12th May 2006 the Council wrote again to the applicant requesting that she attend a further meeting and stating that a recommendation would be made that her tenancy be terminated. It appears that on the 29th May 2006 both the applicant and her partner attended a meeting with the Council at which they admitted that he had been on the premises, and she was informed that a Notice to Quit would be served. A further letter to her dated 26th July 2006 informed her that she could request a review of the decision to serve the Notice to Quit, following which her then solicitor wrote to the Council and sought such a review of that decision. Further representations were made by her solicitors, but following that review the decision was affirmed. The final decision to serve the Notice to Quit was made on the 23rd October 2006, and this Notice was duly served upon her on the 11th December 2006. She failed to comply with same, and the Council proceeded to serve the summons referred to already wherein the applicant was notified of the Council's intention to apply to the District Court for a warrant for possession pursuant to the provisions of s. 62 of the Housing Act, 1966.

13. It is against this factual background that James Connolly SC of the Council has submitted that the case which the applicant seeks to make in seeking the reliefs sought is not arguable given the Court's previous relevant decisions concerning the constitutionality of s. 62 of the Housing Act, 1966.

14. He includes in his submissions one that the applicant has not moved promptly in moving her application for leave to seek the reliefs, as she is required to do under the provisions of O.84 of the Rules of the Superior Courts, and in this regard points to the fact that the Order for possession was obtained on the 15th February 2007 and yet the application for leave was not moved until the 23rd July 2007. Just to deal with this delay point first, I would not be satisfied that in circumstances where it was necessary for the applicant to seek a certificate for representation through the Legal Aid Board that she should be refused leave on that ground alone. That process inevitably takes some time to complete. It is true that she was represented by solicitors for some period prior to the making of the order of the District Court, but that relationship ended prior to that date, and it was reasonable that the applicant should pursue alternative representation for the purpose of seeking to impugn that order. In these circumstances I am satisfied that she proceeded as promptly as she could be expected to do.

15. In relation to her challenge to the constitutionality of s. 62 of the Housing Act, 1966 Mr Connolly has referred the Court to a number of decisions of the courts which have found that section to be constitutional. These are cases to which the Court was not referred when the application for leave was moved on the 23rd July 2007. In *The State (Litzouw) v. District Justice Johnson* [1981] ILRM 273, the prosecutrix claimed, *inter alia*, that while the Dublin Corporation had given evidence to the District Court that complaints had been made about the prosecutrix she had never been given information as to the nature of those complaints and accordingly she was unable to mount any defence to the application for an order of possession. It was contended that in such circumstances that the principles of natural justice had been infringed since she had no opportunity to make representations or take any steps which may have been advised as open to her in relation to her defence of her personal and property rights. Gannon J. in his judgment stated that her sense of injustice seemed to him to derive from the failure by the Corporation to give any justification to the District Court for her eviction, rather than the way in which the District Court hearing actually proceeded. The learned judge concluded that in such cases the tenant did not have the protections involving the investigation of the 'merits', afforded to other tenants under the Landlord and Tenant Acts or the Rent Restrictions, and concluded that the prosecutrix was not entitled to an order of certiorari on that ground.

16. That case is of course different to the present case in which the applicant's case does not involve any complaint based upon her lack of knowledge as to why exactly the Council had made its decision to serve the Notice to Quit. She was told what the reason was, and when given an opportunity to respond to the complaints she admitted the facts giving rise to the complaints and the decision. But she complains that the absence of legal representation in the District Court meant that she was unable to show cause as to why the order should not be made by the District Judge. However, it is important to note that on the present application she has not given any details of what case she would have been able to put had she had legal representation available to her.

17. Mr Connolly has also referred the Court to the decision in *The State (O'Rourke) v. Kelly* [1983] IR 58. In that case the prosecutor obtained a conditional order of certiorari on the ground that the order for possession made pursuant to s. 62 of the Housing Act, 1966 was made contrary to the principles of natural justice on the basis that the provisions of s. 62(3) of the Act were invalid having regard to the provisions of the Constitution because they constituted an interference with the function of the District Court in the administration of justice by depriving the District Justice of any real discretion in determining the application. The Supreme Court determined that the mandatory issue of the warrant of possession by the District Judge is dependent only on the proof of the

circumstances specified in the section, and that accordingly the section was not invalid. Chief Justice O'Higgins in his judgment held that there was no substance in the ground put forward by the prosecutor and that the legislative provisions in question were within the competence of the Oireachtas. This case is certainly relevant to the point put forward in the present application that the decision to serve the Notice to Quit and demand for possession arises from a policy on the part of the Council to terminate tenancies of all persons suspected of involvement with the use or sale of illegal drugs irrespective of the level of involvement by the tenant in such activity, and that by the adoption of such a policy the Council has fettered its discretion and taken irrelevant considerations into account.

18. Mr Connolly referred also to the judgment of Geoghegan J. *in Lord Mayor, Aldermen and Burgesses of the City of Dublin v. Hamilton* [1999] 2 IR 486. In that case, a consultative Case Stated from the District Court, the opinion of the High Court was sought, firstly, as to whether the District Judge has a discretion to consider any other factors when deciding whether to make an order under s. 62 of the Housing Act, 1966 once he/she was satisfied that the necessary proofs required by the section had been complied with, and secondly, whether the District Judge, having been satisfied that these proofs had been complied with, should consider rights under Article 40.1 of the Constitution, the right to fairness of procedures in the decision-making, and the right to bodily integrity. In each of these matters the learned judge answered the questions in the negative, placing considerable emphasis on the need for a local authority to have available to it a rapid method of recovering possession of a dwelling without having to give reasons for so doing, and that such a power was both reasonable and constitutional. He held at page 494 that "it would be inconsistent with the intent of the legislation to interpret the section in any other way than that formal proofs that the matters set out in this section alone are required and that the District Judge is not entitled to inquire into anything else."

19. Mr Connolly submits that the arguments put forward by the applicant to impugn the hearing of the application for the warrant for possession in the District Court on the ground that she was not legally represented at that hearing and on the ground that the Council has fettered its discretion in the matter of deciding to serve a Notice to Quit in a case such as this by having a fixed policy in that regard are no longer points that pass the threshold of arguability for the purpose of obtaining leave to seek judicial review, and that in these circumstances the Court should exercise its inherent jurisdiction to set aside the leave order already granted, and the stays granted.

20. Frank Callanan SC for the applicant has submitted that the case being made by the present applicant is one that has not been the subject of the decisions to which Mr Connolly has referred, and that those cases must be viewed on their own facts and that the case made by the applicant is different. He also submits that in none of those cases was the case argued on the basis that the section in question infringes the provisions of the European Convention on Human Rights, and that this is now something which falls to be considered in the present case following the passing of the European Convention on Human Rights Act, 2003 which came into effect here on the 31st December 2003. He has referred to an obiter comment by Smyth J. in his judgment in M*cConnell v. Dublin City Council*, unreported, High Court, 18th January 2005 to the effect that this Act imposes new obligations on housing authorities and that it may operate to change the interpretation and effect of section 62 of the Housing Act, 1966. Mr Connolly in response has submitted that even if the applicant can argue her case for a declaration of incompatibility with the Convention, which he does not accept, such an argument, even if it was to be ultimately successful could not result in a stay on the order made by the District Court, since the applicant's remedy would be confined to an award of damages.

21. While not confining himself to the Convention argument, Mr Callanan has called in aid the judgment of the European Court of Human Rights in *Connors v. The United Kingdom*, 27th May 2004 where that Court concluded that in the circumstances of that case, which were very different to the facts and circumstances of the present case, the eviction of the applicant under powers similar to those contained in s. 62 of the Housing Act, 1966 constituted a violation of rights protected by Article 8 of the Convention, since the necessity for a statutory scheme which permitted the summary eviction of the applicant and his family for anti-social behaviour reasons had not been sufficiently demonstrated. Of considerable importance in the facts of that case was the fact that the applicant and his family disputed the complaints being made, and the Council relied upon its powers to give 28 days notice to obtain summary possession without proving any breach of the licence under which the applicant had lived on the caravan site in question for between fourteen and fifteen years.

22. In my view that case is very different on its facts to the present case where the breach of clause 13 (vii) of the applicant's tenancy agreement was admitted by the applicant and she was afforded several opportunities to make representations in relation thereto.

23. I am satisfied that the complaint by the applicant that fair procedures were breached by the District Court proceeding to make the order in circumstances where the applicant sought an adjournment so that she could be legally represented is one that does not surpass the threshold of arguability given the decisions to which I have referred. It has been clearly stated on a number of occasions that the District Judge is required by the legislation to make the order sought as soon as the Court is satisfied that the required proofs are in order. In the present case the applicant has not sought to dispute those necessary proofs. She has admitted the breach of her tenancy agreement which gave the Council the power to decide to serve Notice to Quit. She makes no challenge to that decision or to the service of the Notice to Quit itself. It is true that the summons served upon her commanded her to appear in order to show cause why such an order should not be made, but even now on the present application she has not sought to show that there was any ground she may have put forward if she had had the benefit of being legally represented. That would, in my view, be a pre-requisite to argue before this Court that her rights under the Constitution or the Convention to a fair hearing have been infringed. The right to be legally represented is not an absolute right, and the fact that on this occasion she had no solicitor or Counsel to represent her was not a bar to the District Court receiving proof of the matters required to be proved before this order for possession was made.

24. Similarly I am satisfied that in the face of the decisions to which the Court has now been referred on this application to set aside the leave granted and for the stays placed on the order for possession and the Circuit Court appeal to be lifted, it is no longer open to the applicant to argue or make a reasonable case that the policy of the Council to make a decision to serve Notice to Quit on tenants who are in breach of this clause 13(vii) of the Tenancy Agreement constitutes an unconstitutional fettering of the Council's discretion in such cases.

25. I am satisfied that had the cases to which the Court has now been referred been opened to the Court and considered on the *ex parte* application for leave, leave would not have been granted in respect of the reliefs relating to the challenge to the constitutionality of s. 62. I have referred at the outset to the judgment in the Supreme Court in *Adam and Iordache v. The Minister for Justice, Equality and Law Reform* I am satisfied that the present application to set aside leave is one covered by the principles to be derived therefrom.

26. I will therefore order that the leave to seek the declarations of unconstitutionality of s. 62 of the Act be set aside, and that the stays granted by my earlier order be lifted, and the remainder of the said order to stand.