

**THE HIGH COURT****2011 1183 JR****Between:****Mark Kelly****Applicant****And****Dublin City Council****And****The Attorney General****Respondent****Judgment of Mr Justice Michael Peart delivered on the 2nd day of March 2012:**

1. On the 22nd December 2011 I delivered a written judgment in relation to an application by the applicant for injunctive relief whereby the applicant had sought to restrain the first named respondent from continuing to exclude him from what he considers to be his home, in circumstances where that respondent had invoked powers under Section 20 of the Housing (Miscellaneous Provisions) Act, 1997 ("Act of 1997") which resulted in a member of An Garda Síochána directing the applicant to leave the house immediately. The application amounted to one for a mandatory injunction that he be allowed to re-enter the house since following his departure from the house it had been boarded up with steel shuttering which would have to be removed if he was to be permitted to resume its occupation. I refused that application for injunctive relief, and the matter now arising for decision is his application to quash the decision of the first named respondent to invoke those powers on the basis that the applicant was not afforded fair procedures and due process in relation to that decision, and that the decision fails to respect and have due regard to his constitutional right to the protection of his home and/or family and/or private rights, and equivalent rights under the European Convention on Human Rights.

2. In addition, the application seeks an order declaring that Section 20 of the Act of 1997 is unconstitutional having regard to the provisions of Articles 34 and/or 38 and/or 40.1 and/or 40.3 and/or 40.5 and/or 41 and/or 43 of the Constitution, hence the Attorney has been joined as a party to these proceedings. However, it is agreed that the consideration of any such declaration of unconstitutionality should await this Court's determination of the application for reliefs by way of judicial review, and the Attorney General has not participated thus far in the proceedings.

3. The full facts of the case are set forth in my earlier judgment, hence a brief summary suffices for the purposes of this judgment. The applicant is now aged 29 years. He was born in 1982 but his mother due to her own difficult circumstances at that time had apparently decided that he should be adopted, but that did not occur, and from two days after his birth he was reared by his grandmother who he came to regard as his mother, and her eldest daughter who, though in reality his aunt and 21 years older than him, he regarded as his sister. They all lived together in a council house in Ballymun of which his grandmother was the tenant until they moved to the subject premises in Ballymun in 2003 when he was aged 21 years. His grandmother was the tenant of that house until her death in 2006, whereupon his aunt entered into a new tenancy agreement with the Council in succession to her mother. It is relevant to these proceedings that at that time his aunt listed only herself as being resident in the house. Nevertheless the applicant states that he was residing at that house except for two brief periods of time in 2010. He has exhibited letters from neighbours which confirm what he has stated in this regard. It is also a fact that on his children's birth certificates his address is recorded as being this house.

4. The first period of absence from the house was from January 2010 to June 2010 while he was in prison on some driving offences.

5. The second short period of absence from the house was when he went to live with his partner for two to three weeks at the end of January in an attempt to make a home together with her and his children but that was not successful, and he moved out again. After he moved out of his partner's house he moved to the United Kingdom where he lived for a number of weeks with one of his sisters.

6. His aunt had been seriously ill for a couple of years prior to her death on the 9th November 2011. He has stated that before she died he had been informed while he was in the United Kingdom that his aunt had been diagnosed with cancer, and he returned to the subject premises. He was reluctant to tell her that things had not worked out with his partner, and even though it appears that his aunt assured him that he was welcome in the house, he registered himself as homeless with the Council, as he felt that she needed peace and quiet. He applied for and was granted homeless accommodations but he was not happy with those accommodations as they were unsuitable for his children to visit him. He has agreed access arrangements with his partner and he looks after them during afternoons and has overnight access at weekends.

7. It appears that after his aunt's funeral following her death on the 9th November 2011 he was given keys to the house by one of his brothers. He says that this was a symbolic gesture by the family leaving him the house for his own use, and believes that it was always the wish of his grandmother and his aunt that he would in due course have the house. It is not absolutely clear from the evidence that he was actually residing in the house at the date of his aunt's death, but there is no doubt that immediately after his aunt's death he was residing there when the Council invoked the powers under Section 20 of the Act of 1997. However, as I stated in my previous judgment, the house was not the family's to give, as the Council has a procedure by which a family member may apply for a tenancy of the house in succession to the previous tenant, and may be given such a tenancy in the event that certain criteria are met.

8. About a week after his aunt's death, the Council left a card at the house which asked that he make contact with the Council. He telephoned the Council on the 16th November 2011 but was unable to speak to the named person on the card. He rang back the following day and spoke to a Mr Brennan who asked him when he was giving back the keys to the house. The applicant inquired why

he should do so as the house was his home, and he explained also that his children frequently stay with him there, and that he believed that he should succeed to the tenancy. He says that he was informed at that stage that a person from the Council would be in touch with him.

9. It appears that on the 24th November 2011 he attended at the Ballymun Community Law Centre and made an appointment to speak to a solicitor on the 30th November 2011. On that date he was given advice as to what sort of evidence he would need to gather in order to establish his entitlement to succeed to the tenancy with the Council. He was to return in two weeks time so that he could be assisted with the completion of the necessary application to succeed. He did not understand at this time that there was a particular urgency, as he understood that the Council would be back in touch with him to discuss matters.

10. However, on the 2nd December 2011 he left the house for about half an hour and returned to find persons securing the house by fixing steel shutters to the door and windows, and there were two Gardai present also. He was handed a card with a name on it and contact details, and also a sheet of paper which contained an extract from Section 20 of the Act of 1997. While he was given an opportunity to remove some personal belongings he was escorted from the house by the Gardai. He says that he was given no advance warning that this was going to happen, and he states that the rent was paid up to date, and that he had in fact that morning paid a week's rent. He did not exhibit that receipt but stated in his grounding affidavit that it was in a jar in the house.

11. In the immediate aftermath of his eviction he returned to the Ballymun Community Law Centre where he spoke to Mikayla Sherlock, solicitor, who spoke then had a conversation with Mr Michael Clarke, who is the person named on the card which was given to the applicant earlier that morning. Ms. Sherlock has sworn an affidavit in which she gives an account of that conversation. She was surprised to learn that powers under Section 20 of the Act of 1997 had been invoked. She was told by Mr Clarke that during the previous two weeks the Council had received "a number of complaints of anti-social behaviour from the applicant's address", that these were not from the same source, and that he had satisfied himself that they were valid. The complaints were apparently of "parties, noise, threats and intimidation". No particulars of these incidents has been provided to the applicant. She asked if he would be willing to allow the applicant back into the house while an application by him to succeed to the tenancy was made, but he was not willing to allow that. Mr Clarke went on apparently to state that the Council had no record of the applicant being in the household, and since there was no record of him residing in the house they were treating him as a squatter, and had therefore availed of the provisions of Section 20 of the Act of 1997 to evict him. He agreed that he would facilitate the applicant returning to the house to retrieve his belongings. He stated also that the Council was not obliged to put the allegations of anti-social behaviour to the applicant, and that the only way that the applicant could get back into the house – by court order or by a successful application to succeed to the tenancy, though in relation to the latter expressed the view that he would be unlikely to succeed to the tenancy, since he was not "on the rent", was not recorded as living in the house, and that for a brother of the previous tenant to succeed he would have to have resided in the house for five years prior to the death of the tenant. In support of this position, Mr Clarke referred also to the fact that the applicant had registered as homeless earlier in 2011, was allocated accommodation. It also appears that Mr Clarke expressed the view that if the applicant was not "on the rent" and not recorded as living in the house, he did not believe that there any facility whereby the applicant might produce evidence in order to establish that he was living in the house and that the application would inevitably fail.

12. Ms. Sherlock opines that Mr Clarke is not correct in saying that because the applicant may not fulfil the necessary criteria he cannot succeed, and submits that the Council have a wide discretion under the Scheme of Letting Properties in relation to applications to succeed.

13. The applicant has averred that he was taken by surprise to learn that there had been complaints against him of anti-social behaviour, and that the first occasion on which he learned of these complaints was when Ms. Sherlock informed him of them. He states that he knows all the neighbours well and believes that they would vouch for the fact that no such behaviour occurred at the house. He believes that the Council has acted unlawfully in evicting him under Section 20 of the Act of 1997, and that if they wished to have him evicted the Council ought to have moved under the provisions of Section 62 of the Housing Act, 1966, where certain procedures have to be gone through and where the person whose eviction is being sought has a right to be heard ahead of a decision by the Council to issue a Notice to quit. He complains that the procedure adopted by the Council has denied him any fair procedures because he has not been permitted to make his case that he was living at the premises over many years and up to the date of death of his aunt, except for the two very brief periods to which I have referred, and also that he has been denied any opportunity to be heard in relation to the allegations of anti-social behaviour, which are fundamental to the exercise of the Council's powers under Section 20 of the 1997 Act.

14. Michael Clarke of the Council has sworn an affidavit in support of the Council's Statement of Opposition. He had also previously sworn an affidavit when resisting the applicant's application for an injunction which is the subject of the earlier judgment of this Court, and much of the same ground is covered in both. He traces the history of the tenancy by the applicant's grandmother and aunt, and states that at no time was the applicant ever notified as residing at the premises, and refers to some contact by his aunt in 2004 when she is said to have stated that the applicant was not residing there, and that she had not had contact with him at that time for some months, and further that she gave a different address at which he was residing. He goes on to state that the Council became aware of the death of the applicant's aunt's death when her partner called to the Council's offices and provided a death certificate. He does not state on what date that occurred. But he states that it was after this that the Council "began to receive complaints that someone had moved into [the premises] and further complaints regarding anti-social behaviour" and he states that these complaints were of noise, parties and drug taking. These complaints were made in confidence as the complainants apparently said that they were intimidated by and fearful of the applicant. These complaints were investigated according to Mr Clarke, and the complainants were interviewed. He has exhibited memos of two of these complaints, each memo being dated 30th November 2011, which was two days before the applicant was directed to leave the premises. But there is a sequence of emails dated 25th November 2011 between members of the Council staff in which refer to a phone complaint alleging drug dealing and "holding wild parties". The second of these emails states "*I think we should do a Section 20 asap before this guy gets a foothold and won't move on*". The applicant submits that these complaints were so vaguely expressed that they could not form a proper basis for invoking Section 20 powers.

15. But 25th November 2011 is arguably the date on which the decision to invoke the powers under Section 20 was made. Mr Clarke goes on to state that following these complaints the Council made a request to An Garda Síochána for information in relation to the applicant. This information was provided on the Council by replies dated 13th and 14th December 2011 and records certain convictions for offences under the Road Traffic Acts, as well as public order offences, and theft.

16. An important averment by Mr Clarke is that in paragraph 12 of his affidavit wherein he states that it was on foot of the above complaints that a Council staff member, Mr Cagney, called to the premises (presumably referring to the 16th November 2011) but that nobody was there and a card was left with relevant contact details, and which resulted in the applicant telephoning the Council on the 17th November 2011 and when he spoke to a Mr Brennan, because Mr Cagney was not available apparently. But it is apparent

from what Mr Clarke has exhibited that none of the complaints which are alleged to have preceded Mr Cagney's visit to the premises were made until the end of November 2011 as outlined above. At any rate, it is averred that a decision was made to invoke Section 20 and in relation to that the Council wrote to An Garda Síochána on the 30th November 2011, following the requirements of Section 20, stating that it had reason to believe that the applicant has engaged in anti-social behaviour and that it is necessary in the interest of good estate management that the applicant leave the premises forthwith, and it requested that the Gardai arrange to have the applicant removed from the house under Section 20 of the Act.

17. Ms. Sherlock, the applicant's solicitor has sworn a further affidavit on the 12th January 2012 in which she states that on the 11th January 2012 she spoke to a Garda Moran and inquired if there had been any complaints of anti-social behaviour at the house or if the Gardai had any cause to call to the premises during the previous year. She states that Garda Moran phoned her back and stated that there were two incidences during the previous year when the Gardai had called out, and that these occurred firstly on the 2nd December 2011 when the Gardai assisted in the eviction of the applicant, and secondly in relation to a report of a stolen bicycle from the premises.

18. Mr Clarke states that the matter was fully considered before the Gardai were requested to exercise the Section 20 powers. He has in his previous affidavit set forth quite extensively the matters which were considered. It was concluded that the applicant had never been a tenant in the house or ever resident in the house and that he had gone into illegal occupation of the house following his aunt's death, and further that it was clear to the Council that the applicant was engaging in anti-social behaviour.

19. As I set forth in my previous judgment, Mr Clarke disputes the assertions by the applicant that this house was his home and that he resided there, and that this was based partly on the fact that he had never been disclosed by his grandmother or his aunt as being in the household. It was also based on the fact that when the applicant made application to the Council for housing accommodation in May 2011 he completed a Placement Assessment Form he had provided a detailed account of his accommodation history, and while he gave addresses for where he had resided during various periods from 2008 to May 2011 he had never stated the subject premises as his home. In addition when in May 2011 the applicant applied for social housing support he listed his current address as homeless accommodation on the North Circular road, and listed his previous five places of residence none of which were the subject premises, and Mr Clarke exhibited a copy of these documents in his previous affidavit. Indeed, Mr Clarke also examined the register book maintained by the Manager of the North Circular Road premises and noted that during a period from September 2011 to November 2011 that the applicant's signature appeared on the register on 31 occasions. He is completely satisfied accordingly that the applicant is not being truthful when he says that the subject premises was up to the date of his aunt's death his home, and accordingly he was a trespasser in the house on the 2nd December 2011 when the power under Section 20 was exercised. He has also made the point that up to that point in time the applicant had made no application to the Council to succeed to the tenancy, and that his aunt's tenancy had terminated upon her death. Subsequent to the initiation of the within proceedings, the applicant made an application to succeed, and certainly on the date when these proceedings were heard, no decision had been made on foot of that application.

20. The applicant has sworn a further affidavit in which he again addresses the issue about the various addresses which he notified on various forms as averred by Mr Clarke. He states in that regard that he has admitted previously to having used different addresses for social welfare purposes because he did not want to cause difficulty for his aunt in that regard. With regard to his signing the register in one of the homeless accommodations as averred to by Mr Clarke he states that he signed in on more occasions that he actually stayed there. He also says that for social welfare purposes he was required to produce photo identification in order to collect payments. He says "for social welfare purposes I was residing in homeless accommodation" and that when the Gardai verified that photo the Garda in question wrote on the card "for social welfare purposes". That averment is in response to an averment in Mr Clarke's first affidavit filed in response to the applicant's injunction application at paragraph 11 thereof where Mr Clarke referred to and exhibited the applicant's Certificate of Identity on the 24th August 2011 where he declared that he was residing at an address on the North Circular Road. Mr Clarke had also referred to a note on the applicant's Placement assessment Form in which the applicant had given details of various addresses at which he resided between June 2008 and February 2011 and there is a note made by a Council staff member for 18th May 2011 which notes under the heading 'Action' that the applicant was "*booked to 258/260 NCR for one week. If gets on okay during the week make the booking indefinite*". That entry is followed by another for the 7th June 2011 which states "*all ok in 258/260, re-booked until further notice*". Mr Clarke had referred to these notes in answer to the applicant's assertion in his first grounding affidavit at paragraph 18 that homeless accommodation was not suitable for him as he needed to have somewhere to which he could bring his children so that he could enjoy a family life with them. At any rate, in his final affidavit the applicant states in that regard that it is not true that he advised the Council on the 7th June 2011 that he would be residing at the premises on the North Circular Road "until further notice" and that Mr Clarke has simply inaccurately interpreted the note and has made his own assumption in that regard. The applicant has also taken issue or tried to explain the reasons why on various occasions he gave addresses other than the subject premises. Essentially he is saying that while he did in fact give these various addresses he did it for particular purposes but that as a matter of true fact he was at all times residing at the subject premises.

#### **Legal Submissions:**

21. I should state at the outset that while the applicant as part of his claim in these proceedings claims certain declaratory reliefs as to the constitutionality of Section 20 of the Act of 1997 and as to its compatibility with the European Convention on Human Rights, those issues are not pursued for the moment, and indeed the State did not participate in the present application. Their relevance depends upon this Court's determination in relation to the other issues as to whether the Council exceeded its powers in invoking Section 20 of the Act in the circumstances of this case, and whether, even if it was entitled to do so, it failed to observe fair procedures and failed to have regard to the applicant's constitutional and Convention rights in the manner in which its decision was made.

22. Siobhán Phelan BL for the applicant submits that the exercise by the Council of its powers under Section 20 of the Act of 1997 amounted to a pre-emptive strike against the applicant in circumstances where he was given no notice of the action that the Council was going to take, and therefore deprived of any opportunity to make submissions or to be in any way heard in relation to his being resident there or in relation to the alleged allegations of anti-social behaviour which are said to have been the basis for the Council proceeding under Section 20, rather than under the more usual procedures under Section 62 of the Housing Act, 1966 when the applicant would have to have been afforded an opportunity to be heard before any decision to serve a Notice to Quit was served. The Council, of course, take the position that since the applicant clearly did not have a tenancy of the premises the procedures under Section 62 of the Act of 1966 would have been entirely inappropriate. That has to be correct in my view. But the question remains whether the applicant was entitled to be heard in relation to the complaints which it says it received and in relation to his assertions that in fact this premises was his home since 2003 as he states, before any swift action was taken without any notice to him under Section 20 of the Act of 1997. The Act is silent in that regard.

23. Ms. Phelan has submitted that Section 20 is a section intended to be availed of in what can be loosely called a "squatter" situation, where trespassers simply occupy a premises owned by the Council with no history of previous residence there. She submits

that the present case is not one whereby the applicant was a "squatter", but rather is a case where there can be no real doubt that he resided there as home with his grandmother and his aunt, even though there may have been brief periods, which the applicant accepts, when he lived for brief periods at other addresses. She submits that such temporary absences could not be reasonably considered to have altered the fact, as attested to by neighbours too, that this premises was the applicant's home. She submits that upon his aunt's death he would have been entitled to make application to succeed to his aunt's tenancy, and that it was unlawful for the Council to pre-empt such an application by him by evicting him from the premises without notice under Section 20 of the Act of 1997, and without giving him any opportunity to make his case that this is his home. She has referred to the provisions of Section 20 (1) thereof which provide as follows:

"20. – (1) Where –

*(a) a house provided by a housing authority or any part thereof is occupied, whether continuously or otherwise, by a person (**other than the tenant or a person who has failed to vacate a house on termination of a tenancy**), and*

*(a) a member of the Garda Síochána has received notification from the housing authority that the authority believe that the person is or has been engaged in anti-social behaviour and that it is necessary in the interest of good estate management that the said person be required to leave the house,*

*a member of the Garda Síochána may direct the person to leave the house immediately in a peaceable and orderly manner and that person shall comply with the direction."*

In particular she refers to the sentence in parenthesis above which is underlined, and she submits that the applicant could reasonably be considered to be "a person who has failed to vacate a house on termination of a tenancy", since if he is believed, he was living there at the time of his aunt's death, and therefore was someone against whom these powers may not be exercised, and that even if the Council did not believe that he was residing there on the termination of the tenancy (i.e. on the date his aunt died) he was at least entitled to be heard in relation to that controversy if there be such. But she emphasises that the sentence in parenthesis makes it abundantly clear that the section is one designed to enable the Council to take swift action against a "squatter" as opposed to a person such as the applicant who may well have been resident there prior to the termination of the tenancy, and certainly someone who would be entitled to at least make an application to succeed to the tenancy and to have that application considered before any such action was taken, even if the Council was of the view that he was not so entitled. She submits that the fact that the applicant had not in the immediate aftermath of his aunt's death made such an application prior to the 2nd December 2011, and did so only after the eviction had occurred should not exclude him from doing so thereafter, and should not be held against him.

24. It is submitted that by acting as it did, the Council has failed to have regard to the applicant's right to fair procedures and that the manner in which the Council has acted has denied to the applicant any of the procedural safeguards required by law when interfering with his family rights under the Constitution and the Convention.

25. It is submitted that in the light of the definition of "anti-social behaviour" contained in section 1 of the Act of 1997, the evidence of such behaviour by the applicant which the Council had before deciding to exercise its powers under Section 20 falls short of being properly or reasonably considered to be anti-social behaviour such that it was necessary in the interests of good estate management that he be required to leave the house, especially since he was never given any opportunity to respond to the allegations and was not even made aware of them. This alone, it is submitted, is sufficient to have declared *ultra vires* the decision made by the Council. Section 1 (1) as amended by Part v of the Housing (Miscellaneous Provisions) Act, 2009 provides the following definition:

" 1. (1) ....

*"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, alarm, 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*

*(i) violence, threats, intimidation, coercion, harassment or serious obstruction of any person,*

*(ii) behaviour which causes any significant or impairment of a person's use or enjoyment of his or her home, or*

*(iii) damage to or defacement by writing or other marks of any property, including a person's home."*

26. A number of inconsistencies in the Council's evidence is referred to. It is submitted that there is a lack of coherence and clarity about the allegations and when they were made. Ms. Phelan refers to the fact that there appears to have been just one complaint noted, namely to the effect that neighbours had informed the Council that the applicant and his partner had moved into the house and that there were allegations of drug taking. She submits that there is no first hand evidence provided in relation to any complaints, and that no evidence has been adduced as to if and how they were investigated, other than Mr Clarke's statement that the complainants were interviewed. She also emphasises that the nature of the anti-social behaviour has not been stated with any specificity. It has been suggested that the allegations were made after the 22nd November 2011 whereas Mr Clarke's affidavit suggests that Mr Cagney called to the premises on the 16th November 2011, which was before the complaints were made. She refers also to the fact, already referred to, that Mr Clarke has stated that it was not until the 22nd November 2011 that the Council became aware that the applicant's aunt had died, whereas it is clear that the applicant telephoned the Council on the 17th November 2011 following the visit by Mr Cagney on the 16th November 2011 when he left a card. It is submitted that there is no actual record of any complaint that the applicant was dealing with drugs or otherwise engaged in anti-social behaviour as defined.

27. It is submitted that there is no evidential basis for a conclusion by the Council that the applicant was involved in anti-social behaviour, and that he was certainly not afforded any opportunity to respond to them in any manner whatsoever.

28. Ms. Phelan has submitted that it is noteworthy that in most of the reported cases involving persons who have applied unsuccessfully to succeed to a tenancy, the housing authority in question have dealt with the situation by means of powers under Section 62 of the Housing Act, 1966, and has referred to the case of *Neville v. South Dublin County Council* [2010] 4 IR 309, where in such a situation Section 20 was availed of, but was held to be invalid basis for evicting that applicant, not, however on the basis that the section had no application to a person who failed to succeed to a tenancy, but rather on the basis that there was no sufficient evidence of anti-social behaviour. The facts in *Neville* bear some similarities to the present case. That applicant had failed in his application to succeed to his late brother's tenancy because he had not satisfied the requirement that he have resided there for a period of two years up to the termination of the tenancy. The Council exercised the power under Section 20 of the Act of 1997, and as far as anti-social behaviour was concerned, the Council relied on the fact that the person had been convicted of an offence of unlawfully discharging a fire-arm. One issue in that case was whether the Council was obliged as a matter of fair procedures to give the person an opportunity to be heard in order to challenge the belief formed by the Council that he had engaged in anti-social behaviour.

29. Having concluded as a matter of fact that the premises were not that applicant's home for the purpose of engagement of Article 8 rights under the Convention, and having also concluded that the firearms conviction did not amount to anti-social behaviour for the purposes of the Act of 1997 and that the removal of the person from the premises was unlawful for that reason, O'Neill J. went on to consider for the sake of completeness whether, if Section 20 had been properly invoked, the person had a right to be heard. In concluding this issue the learned judge stated at page 325:

*"Had the respondent a valid case to make under s. 20 of the Act of 1997 it would of course have been necessary for them to have given the applicant an opportunity to be heard, firstly to challenge that case and secondly to have the proportionality of the decision considered. Clearly they did not afford the applicant any opportunity to be heard in this regard before deciding to exercise the power to evict given in s. 20 of the Act of 1997, this failure would have resulted in a breach of article 8 if the applicant's rights under article 8 had been engaged."*

30. Applying this statement to the present case, it is submitted that even if the Court is satisfied that it was reasonable for the Council to consider that the applicant had no lawful entitlement to be in the house or to succeed to the tenancy, and intended to invoke the power under Section 20 of the Act of 1997, it was obliged to give the applicant an opportunity to respond to the allegations and to have the proportionality of the decision to evict considered in the light of anything which the applicant might have said.

31. In so far as the Council concluded and relied upon the fact in their view that the applicant's presence in the house was illegal and that he was a trespasser, Ms. Phelan submits that it is by now well settled by case law here and in the European Court of Human Rights that the question as to whether a premises is considered a person's home for the purpose of the engagement of Article 8 rights is not dependent upon the lawfulness of the occupation of the house. In that regard she has referred to the decision in *McCann v. UK* [2008] 47 E.H.R.R. 40, to the judgment of O'Neill J. in *Gallagher v. Dublin City Council* [2008] IEHC 354, also to the judgment of Fennelly J. in *DPP v. Lynch* [2010] 1 I.R. 543. It is submitted that the Council in the present case were not entitled to refuse to consider and weigh the constitutional rights of the applicant and his family when deciding to act as they did on the basis that he had no lawful authority to be present in the house, and she refers to the undoubted fact that when considering family rights, those rights are not dependent upon a family based on marriage, and apply with equal force to the circumstances of the applicant where he has two children with his partner. It is submitted that these rights had to be considered by the Council when considering whether or not to exercise powers to exclude the applicant from the house, and that since it did not, the decision is bad in law.

32. In conclusion, it was submitted that the Council's decision to and action in evicting the applicant from the premises should be declared as ultra vires and unlawful because, firstly, the applicant was not advised that complaints of anti-social behaviour had been made against him; secondly, he was not afforded an opportunity to respond to them; thirdly, he was not advised of an intention to evict him under Section 20 of the Act of 1997 and was thereby deprived of any opportunity to make submissions in that regard; and fourthly, no consideration was given to the fact that the applicant intended to make an application to succeed to the tenancy as informed to it by Ms. Sherlock before the eviction took place, and a conclusion was reached prematurely that in any event it was bound to fail and would be refused. All these matters are submitted to have reached fair procedures and to have rendered the Council's decision and actions unlawful.

33. Aedan McGovern SC for the Council has submitted that there was sufficient evidence available to the Council and to this Court to be satisfied that the applicant had no lawful basis to be present in the premises after the death of his aunt, and the termination of that tenancy. He refers also to the evidence of Mr Clarke who has exhibited various documents completed by the applicant and information provided by him which demonstrate that even after the death of his aunt he was resident elsewhere. He submits accordingly that the Council was entitled to conclude that he was not resident in the house at the date of her death. Mr McGovern accepts that there has emerged some controversy subsequently but that at the time the Council was making relevant decisions it was entitled to rely upon the records generated by the applicant as to his accommodation, and to conclude that he was not residing at the subject premises. He submits that this Court should be equally satisfied in this regard.

34. It is submitted that the applicant has been shown to lack any credibility, given his history of giving false information to the Council and other bodies in relation to his addresses and accommodation, even, if he is to be believed, if that was in order not to cause any problems for his grandmother and aunt who had not notified the Council of his presence in the household. It is suggested that this Court should be slow to place any reliance on what he now says.

35. It is submitted that when exercising its powers under Section 20 of the Act of 1997 the Council fulfilled all the requirements of the section to the letter. It was entitled to and did obtain information from An Garda Síochána which was adverse to the applicant in as much as it disclosed a number of criminal convictions. It had received complaints which it investigated and was satisfied that there were valid and genuine complaints. It was entitled to write a letter to Superintendent Moran on the 30th November 2011 requesting that the applicant be removed. It is submitted that the letter meets the precise requirements of the section, and that the Council was entitled to have regard to its obligations as to good estate management so that the subject premises could be made available for occupation by some person or persons for whom as a housing authority the Council has obligations to provide accommodation. In that regard, it is submitted that in any event that the subject premises being a two bed-roomed house is not appropriate and suitable for the applicant's needs, being a single man.

36. It is submitted that the complaints which were received by the Council as to anti-social behaviour were properly considered by the Council to be within the definition of "anti-social behaviour" since they included a reference to drug-taking and to intimidation, and that when added to by the subsequent information obtained from An Garda Síochána could reasonably be the basis for a belief that the applicant was engaged in anti-social behaviour.

37. Mr McGovern has submitted also that it is not in fact the Council which removed the applicant from the premises, but rather the Gardai, and accordingly the applicant's remedy if any should be directed against An Garda Síochána.

**Conclusions:**

38. There can be no doubt that the applicant's engagement with the Council and other State bodies has been less than truthful and satisfactory, if what he says is to be believed. By that I mean that if as he says he was in fact residing in the subject premises as his home, he has given different information to the Council and other bodies as to his address for the entirely improper motive of ensuring that his presence in the subject premises did not cause difficulties for his aunt and grandmother in relation to their benefits. Without putting a tooth in it, he has deceived these bodies and has been untruthful for his own ends. I have no doubt that any averments in his affidavits should be regarded sceptically and critically, and that he may be a person in whom reliance ought to be placed very cautiously. He has only himself to blame for this given his conduct in this regard. He certainly has displayed a capacity to deceive and manipulate the system for his own ends. That is not to his credit, particularly in circumstances where judicial review is a discretionary remedy and where the utmost candour and good faith must be shown on the application.

39. That said, however, there is a serious issue in this case. While there is no doubt that the tenancy as such had terminated upon the death of his aunt. Even though Mr Clarke has said that the Council became aware of her death only on the 22nd November 2011 there is room to doubt that given the visit by Mr Cagney to the house on the 16th November 2011, and his telephone conversation with a Council staff member, Mr Brennan, on the 17th November 2011 when the applicant was asked when he would be handing in the keys of the premises. There is also considerable doubt as to whether the Council had received the complaints of anti-social behaviour before deciding that it would invoke powers under section 20 of the Act of 1997 around the 25th November 2011. The internal email dated 25th November 2011 is relevant as far as the date on which that decision was made is concerned. There can be no doubt that the Council considered the applicant to be a trespasser because the tenancy had terminated and he was not listed anywhere as having resided there.

40. The decision to invoke Section 20 powers is a decision which would inevitably result in the applicant's exclusion from the house. There is no doubt about that once the requirements of the section were fulfilled. If the premises might be considered to constitute his home, even though his occupation there had no lawful basis as far as the Council was concerned, his removal was undoubtedly an interference with a fundamental right, albeit not an absolute right. But any such interference with any such right must be proportionate, and consideration must be given to the question of proportionality, and also to his right to be heard in relation to the basis on which the Council considers it justified to interfere with that right and to evict him under Section 20 of the Act of 1997. In my view, even though the section is silent as to any requirement to hear the applicant in response to allegations of anti-social behaviour, it cannot mean that the applicant has no right to be heard where his rights are being interfered with in such a fundamental way. If the Council had proceeded under section 62 of the Housing Act 1966, it would have been obliged to provide an opportunity to him to be heard in answer to any such allegations of anti-social behaviour before any decision was made to serve a Notice to Quit. I do not believe that the exercise of powers under Section 20 should be considered any differently, even though that section is to be invoked where no tenancy exists. The question of proportionality cannot be decided in the absence of the person affected being afforded an opportunity to be heard, and I consider that such a question is relevant to any decision to exclude a person from a place he/she calls home.

41. But even if the applicant had not been living there for such a continuous period up to the date of his aunt's death, and was in truth a trespasser after her death, the Section 20 powers could not be invoked lawfully unless the Council was satisfied that the applicant had engaged in anti-social behaviour. Such complaints as have been evidenced, and regardless for the moment of the dates on which the Council may have become aware of those, there can be no doubt that as matter of fair procedure and constitutional justice the Council was obliged to at least put these allegations to the applicant in sufficient time before proceeding to evict him so as to allow him to be heard in answer to them. He was given no such opportunity. The evidence given has been largely unspecific. I cannot be satisfied on this application that they were sufficient to constitute irrefutable evidence that the applicant was involved in such behaviour. The applicant ought to have been given an opportunity to address them. It may well be that having heard the applicant the Council may well have maintained its belief that the applicant was the person referred to in the allegations and that he had engaged in such behaviour as to fit the statutory definition, but he never even got the opportunity to make his case. Instead, the Council simply formed its view, both as to his lack of any entitlement to be in the premises, his entitlement to succeed to the tenancy, and to his anti-social behaviour.

42. I fully appreciate the obligation upon the Council to manage its estate of properties in a proper manner and for the benefit of other persons who may be entitled to be provided with accommodation within its functional area, and in that regard, the need to act swiftly in circumstances where a trespasser takes up illegal occupation of a premises in its ownership. But the applicant might not reasonably be characterised as a "squatter" in the normal sense of that word. He may well have an entitlement to succeed to the tenancy. They may even have considered that the applicant might be about to make such an application given their knowledge that he was a family member of the previous tenant. One way or another, the swift action taken, while understandable in one sense, was nevertheless taken without due regard to the applicant's right to be given an opportunity to be heard, both as to his history in the house, but more particularly in relation to the allegations of anti-social behaviour, given the centrality and importance of the latter to the invocation of the power to have him removed under Section 20 of the Act of 1997, and also failed to respect and have reasonable regard to the applicant's right to protection of his home and private/family life.

43. For these reasons I will make an order quashing the decision to invoke powers under Section 20 of the Act of 1997 in order to direct the applicant to leave his home. By so ordering I am not to be taken as finding as a fact that the premises was his home or in any way prejudicing the Council's decision on the applicant's right to succeed to the tenancy.

44. I will also grant a declaration that the decision made by the Council was ultra vires in the circumstances in which it was made, and also that the Council failed to duly consider the rights of the applicant to procedural fairness and due process by denying him an opportunity to respond and make submissions in relation to the alleged complaints of anti-social behaviour referred to, prior to directing his removal from the premises.

45. I refused an interlocutory injunction which would have permitted the applicant to resume occupation of the premises for the reasons appearing in my earlier judgment. I am not satisfied that the applicant should be granted a mandatory injunction as sought in these proceedings at final hearing. His application to succeed is still pending and must be fairly and objectively considered in accordance with normal procedures and criteria, and it will be a matter for the Council to determine whether or not he has established such an entitlement. But absent that favourable decision, the applicant has no lawful entitlement to reside in the premises, and no injunction should be granted to him in that regard.

46. For completeness I should add that I reject the Council's submission that, because it was not the Council which carried out the eviction but rather the Gardai, any remedy should be directed only to the Gardai. The decision to invoke Section 20 was that of the

Council, and it is that decision which is impugned in these proceedings.

47. I will hear the parties in relation to the precise terms of the Court's order.