Neutral Citation [2013] IEHC 118

THE HIGH COURT

[2010 No. 958 J.R.]

BETWEEN

Frances Webster and William Webster

Applicants

V.

Dún Laoghaire Rathdown County Council, Ireland and Attorney General

Respondents

Judgment of Mr. Justice Hedigan delivered on the 22nd day of March, 2013.

Application
1. In these proceedings instituted on the 19th July, 2012, the applicants apply by way of judicial review for an order of *certiorari*, quashing the decision of the first named respondent dated the 12th January, 2010 to issue and serve a notice to quit in regard to the dwelling house located at 14, Kilcross Crescent, Sandyford, Dublin, 18.

Parties
2. The applicants reside at the said premise. The first named applicant is a part-time cleaner and the second named applicant is a former production manager and is now unemployed. The first named respondent is the County Council with responsibility for the administrative area of Dún Laoghaire Rathdown.

Factual background
3.1. The first named applicant was allocated a tenancy at 14, Kilcross Crescent, Sandyford, Dublin 18, by the first named respondent on the 8th May, 1985 under a written tenancy agreement of the same date. This agreement provided that the rent payable was to be calculated pursuant to the differential rent scheme operated by the first named respondent. The rent is calculated by reference to the income of the tenants, the number of persons in lawful occupation of the dwelling and by reference to the size of the dwelling. Under the scheme the onus lies on the tenant to inform the council of any change in circumstances which may affect the amount of rent payable.

At that time the first named applicant had three children and a fourth was born in 1986.The second named applicant moved into the premises in February 1988 and the applicants married in June 1988.All children are now non-dependent. Only one child, Robert, who is unemployed, continues to reside in the premises. He is currently serving a prison sentence in Mountjoy prison.

3.2. Following the second named applicant's redundancy in 2006, and other personal problems, significant rent arrears built up. The problem intensified as the applicants failed to provide the first named respondents with the necessary documentation showing a change in their income. Consequently their rent continued to be assessed at a higher rate than should have been the case.

3.3. On the 25th November, 2009, a case conference was held and the first named respondent took the decision to terminate the tenancy. The senior housing officer Mr. Liam O'Donovan recommended action under s.62 of the Housing Act 1966, based on the fact that from 2003-2009 the council had received complaints of anti-social behaviour emanating from the address involving members of the applicants family and some of the allegations were of serious violence and drug dealing, and further that the family had been uncooperative in dealing with the breaches of the tenancy agreement and failed to engage with the council in relation to it. Moreover, the decision was also based on the large rent arrears accrued, which as of the 2nd December 2009, amounted to €19,280(being 192 times the weekly rent). The first named respondent decided to terminate the tenancy due to persistent breaches of the tenancy agreement, the accumulation of rent arrears and in the interest of good estate management.

3.4 The applicants argue that the allegations of anti-social behaviour made were of a general nature and did not specify particular incidents of violence or drug dealing. Following recent judgments of the Supreme Court, the respondents are no longer relying on anti-social behaviour as a ground for termination but do still rely on the fact that there are substantial rent arrears as a reason to terminate.

3.5 On the 12th January, 2010, the first named respondent served a notice to quit on the first named applicant requiring the applicants to quit and to deliver up the property on the 20th February, 2010.On the 22nd February, 2010, the first named respondent issued and served a demand for possession on the applicants threatening to initiate an application under s.62 of the Housing Act 1966 for the issuing of a warrant in the District Court if they failed to deliver up the property.

3.6 On the 3rd June, 2010, the first named respondent applied to Dún Laoghaire District Court under s.62 of the Housing Act 1966 for an order for possession of the house. At this court sitting the applicants indicated their intention to apply by way of judicial review for an order of certiorari quashing the first named applicant's decision to issue proceedings under s.62 of the Housing Act 1966.The matter was listed for hearing on the 7th October, 2010, and for mention only on the 1st July, 2010.On the 12th July, 2010, the applicants sought leave by way of ex-parte application to apply for judicial review which was granted by the court.

Relief Sought
4. 1 The applicants seek the following reliefs:-

(1) A declaration pursuant to s.5 of the European Convention on Human Rights Act 2003 (hereinafter the ECHR Act 2003) that the provisions of s.62 of the Housing Act 1966 are incompatible with article 8 of The European Convention on Human Rights and Fundamental Freedoms and the protocols thereto insofar as they authorise the District Court, or the Circuit Court on appeal, to grant a warrant for possession where there is a factual dispute regarding whether a tenancy has been properly terminated by reason of a breach of the tenancy agreement on the part of the tenant in the absence of any machinery for an independent review of that dispute on the merits being available at law;

(2) If necessary a declaration that the provisions of s.62 are repugnant to the constitution and are invalid;

(3) A declaration that the decision of the first named respondent to issue proceedings for possession of the applicant's property pursuant to s.62 was ultra vires ,arbitrary and unreasonable, contrary to natural and constitutional justice and was against the first named respondent's obligations under the European Convention;

(4) An order for certiorari quashing the decision of the first named respondent to issue the said proceedings under s.62;

(5) A declaration that the actions of the first named respondent in maintaining proceedings to recover possession of the applicant's home under s.62 are *ultra vires*, arbitrary and unreasonable, contrary to natural and constitutional justice and contrary to the first named respondent's obligations under the European Convention;

(6) An order of prohibition preventing the first named respondent, its servants or agents from taking any further step in prosecuting the said proceedings;

(7) The costs of the proceedings.

Applicant's Submissions
5.1 The applicants refute the respondents' allegations of delay as all the decisions they are challenging were made within six months of the day leave to apply for judicial review was sought. Moroever they argue that once served with the Notice to Quit they did not receive the decision on which it was based until the 1st July 2010 and thus they were not in a position to act prior to that date. In *Dekra Éireann Teo. v. Minister for Environment* [2003] 2 I.R. S.C. 270 the Supreme Court held that as an applicant has six months to seek leave it requires something exceptional to punish an applicant for bringing an application within the 6 months albeit near the expiry of that time period. Furthermore, they argue that there has been no prejudice to third parties and they were not in a position to make their application until the 1st July, 2010, when were in receipt of the relevant documentation. They also submit that they were seeking different reliefs, the reasons for which arose at different times and it would not have been good practice or sensible to make multiple applications for judicial review at various intervals in respect of different points.

5.2. Section 62 of the Housing Act 1966 provides a procedure whereby the local authority can apply to the District Court for an order for possession of a property let by it, once the authority has terminated the tenancy in the dwelling by service of a notice to quit. This procedure authorises the District Court (or the Circuit Court on appeal) to grant a warrant for possession even where there is a factual dispute over whether the tenancy has been terminated by reason of breach of the tenancy agreement by the tenant and in the absence of any machinery for an independent review of that dispute on the merits, being available at law, either before the District Court or in another form.

The applicants argue that the county council is required to have regard to the applicants' article 8 rights under the European Convention on Human Rights Act 2003 and by using s.62 they are in breach of the convention. They refer to the High Court cases of *Donegan v Dublin City Council* (2008) IEHC 288, *Dublin City Council v Gallagher* (2008) IEHC 354 and *Pullen v Dublin City Council* (2008) IEHS 379.

On the 27th February, 2012, the Supreme Court delivered judgment in the cases of *Donegan and Gallagher*. At para.143. Mc Kechnie J. described the applicable principles as follows:-

> "(1)That the District Court, on a s. 62 application, cannot entertain any submission other than that relating to the formal proofs demanded by the section. In particular it has no jurisdiction to hear and determine issues of fact, or mixed issues of fact and law, referable to the preceding decision or the reasons therefore, of the housing authority to terminate the tenancy;
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> (2) This interpretation of s. 62, which had been established prior to the enactment of the Act of 2003, has not been effected by the provisions of s. 2 of the Act. Neither has it been affected by s. 86 of Deasy's Act.
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> (3) Article 8 of the Convention affords to every person the right to respect for his private and family life and, as relevant to this case, his home. This right does not entitle one to a home or to have his housing requirements satisfied by a public authority. "Home" has a meaning special to the Convention, which is not dependent on the legal status of the occupier under domestic law;
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> (4) (i) Under Article 8 there shall be no interference with this right save:-
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> (a) as is in accordance with law,
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> (b) as is necessary in a democratic society, and
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> (c) as in pursuance of a legitimate aim;
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> (ii) The obtaining of a warrant under s. 62 of the Act of 1966, and its execution, is undoubtedly such an interference with the right given by article 8: accordingly, by reason of that fact article 8 is engaged. Whether any preceding step, such as the decision to serve a notice to quit and its actual service also constitute such an interference is a question not necessary for determination;
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> (iii) When a warrant is issued, by virtue of s. 62 of the Act of 1966, it is issued in accordance with law;
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> (iv) The objective of obtaining such a warrant can be regarded as being within the scope of the legitimate aims referred to in para. 2 of article 8, such as, amongst others, in the interest of good estate management, in the protection of the rights of others, including of the landlord and neighbouring tenants;
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> (v) The phrase 'necessary in a democratic society' is understood to mean that such will be satisfied if it answers a 'pressing social need' and if the interference is proportionate to the aim pursued;
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> (5) It is accepted that by reference to the constituent elements in article 8, only those referable to necessity and

proportionality are relevant to the instant cases;

(6) In determining whether an interference is article 8 compliant, the regulatory framework within which the measure has been established and operates will be assessed. Questions such as, (i) is the framework procedure sufficient to afford true respect to the interests safeguarded by the article, (ii) is the decision making process fair in such a way as to respect that right, (iii) has the affected person an opportunity to have any relevant and weighty arguable issues tested before an independent tribunal and, (iv) has that person an opportunity to have such an issue considered against the measure, to determine its proportionality;

(7) Where any one or more of these requirements, when considered collectively and having regard to the margin of appreciation, is absent, it may be considered that the safeguards necessarily attendant on article 8 for the purposes of its vindication have not been satisfied. A violation in such circumstances may follow;

(8) The suggested procedural safeguard as applying in this jurisdiction is the remedy of judicial review; as above-established, s. 62(3) cannot be relied upon in this regard. Whilst, in a great number of cases judicial review will be a sufficient and appropriate remedy, by which issues between public landlords and their tenants, arising out of that relationship, can be resolved, there will undoubtedly be some rare cases in which such remedy will not be suitable. This results from the nature and scope of judicial review and, in particular, from the limitation of its operation relative to the factual dispute;

(9) It is accepted, and I so hold, that on a judicial review application the court cannot substitute, for the facts presented, its own view as to what they should be. Moreover, the court is not fact finding and thus cannot resolve conflicts in this regard. This limitation, applies even if the challenge is one of unreasonableness in the O'Keeffe sense."

The Supreme Court granted a declaration of incompatibility in *Donegan*. In *Gallagher* it was held that the respondent was never a tenant of the council (since it was his mother who occupied the property under a tenancy) thus his article 8 rights were not engaged.

The applicants argue that their situation is analogous to *Donegan* and not to *Gallagher*. They maintain that the first named respondent, in making the decision to issue and maintain proceedings pursuant to s.62 of the Housing Act 1966, has not complied with its obligations under s.3 of the ECHR Act 2003 and has not performed its functions in a manner compatible with the state's obligations under the ECHR.

They maintain they are entitled to a declaration of incompatibility in circumstances where the respondent asserts that the continued use of the section does not amount to a breach of the state's obligations under the convention. The respondent appears to believe that the declaration is applicable in only certain limited circumstances and that in other circumstances e.g. where there is no factual dispute between the parties the s.62 procedure can be pursued.

5.3. The respondents are no longer relying on some of their initial grounds in their decision and the applicants argue this is an attempt to retrospectively alter reasons for their decision. They initially argued that termination was necessary as arrears of rent had accumulated, and anti-social behaviour was occurring. The Council then indicated by letter dated the 28th March, 2012, that it would treat the matter as a rent arrears case only and would not pursue the anti-social behaviour aspect of the matter. The applicants argue that in administrative law a decision maker may not retrospectively add to or alter its reasons for a decision or replace it with new and presumably more convincing reasons. The applicants argue that no notice was served when arrears hit €19,280, therefore the notice to quit was really served due to the anti-social behaviour and this ground is now being withdrawn The reasons for termination of the tenancy are cumulative and the fact that the county council is not now relying on one of them means that the decision is fatally flawed.

The applicants also invoke the *Ermakov* principle in *R v. Westminster City Council ex- parte Ermakov* [1996] 2 All ER 302 ,which holds that if subsequent to a decision being made the decision maker tries to explain it by giving broader reasons than in the decision itself the court will not allow this to happen.

Hutchinson L.J. in R.v.Westminster City Council ex-parte *Ermakov* [1996] 2 All ER 302 at p. 309/312 said:-

"It is well established that an obligation, whether statutory or otherwise, to give reasons for a decision is imposed so that the persons affected by the decisions may know why they have won or lost and in particular, may be able to judge whether the decision is valid and therefore unchallengeable or invalid, and therefore open to challenge.

There are numerous authoritative statements to this effect…. It is possible to state two propositions which the judgments in ex parte Graham support.

(1)If the reasons given are insufficient to enable the court to consider the lawfulness of the decision, the decision itself will be unlawful; and

(2) The court should, at the very least, be circumspect about allowing material gaps to be filled by affidavit evidence or otherwise."

This passage was quoted with approval by Kelly J. in *Mulholland v.An Bord Pleanala* (2005) IEHC 306 and O'Neill J in *Grealish v. An Bord Pleanala* (2006) IEHC 310.

5.4. The applicants assert that the premises is their home for the purposes of article 8 of ECHR.

The respondents attempt to suggest that there is no European Convention of Human Rights issue in relation to the arrears. The applicants argue they are incorrect in this. and submit that there is no forum where allegations made against them can be considered. On this basis they contend that s.62 is incompatible with the ECHR.

A number of recent European Court decisions which post date the *Donegan* and *Gallagher* decisions in relation to proportionality indicate that taking a restrictive view of the extent to which s.62 engages article 8 is at odds with the European Court of Human Rights. In *Yordanova and others v. Bulgaria* (no. 25446/06) 24th April 2012 the ECHR held at para.118:-

" (iv) Since the loss of one's home is a most extreme form of interference with the right under Article 8 to respect for one's home, any person at risk of an interference of this magnitude should in principle be able to have the proportionality

> and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8, notwithstanding that, under domestic law, he has no right of occupation (see *Kay and Others v. the United Kingdom*, no. 37341/06, § 67-8 and 74, 21 September 2010 and *Orliæ v. Croatia*, no. 48833/07, § 65, 21 June 2011). This means, among other things, that where relevant arguments concerning the proportionality of the interference have been raised by the applicant in domestic judicial proceedings, the domestic courts should examine them in detail and provide adequate reasons (*ibid*., §§ 67-69);
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> (v)Where the national authorities, in their decisions ordering and upholding the applicant's eviction, have not given any explanation or put forward any arguments demonstrating that the applicant's eviction was necessary, the Court may draw the inference that the State's legitimate interest in being able to control its property should come second to the applicant's right to respect for his home (*ibid*)."

Furthermore, in the case of *Bjedov v. Croatia* (no. 42150/09) on the 29th May, 2012, the ECHR said at para 66:-

> "66. In this connection the Court reiterates that any person at risk of an interference with her right to home should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, he or she has no right to occupy a flat (see, *mutatis mutandis, McCann v. the United Kingdom*, no. 19009/04, § 50, 13 May 2008).

In the case of *Buckland v.The UK* (no. 40060/08) on the 18th September, 2012, the ECHR held at para 70:-

> "70. In conclusion, the applicant's attempt to contest the making of a possession order failed because it was not possible at that time to challenge the decision to seek a possession order on the basis of the alleged disproportionality of that decision in light of personal circumstances. Accordingly, the Court finds that the procedural safeguards required by Article 8 for the assessment of the proportionality of the interference were not observed. As a result, the applicant was dispossessed of her home without any possibility to have the proportionality of her eviction determined by an independent tribunal. It follows that there has been a violation of Article 8 of the Convention in the present case."

The applicants argue:

a) The first named respondent is an organ of the state;

b) The premises in dispute is the applicants' home;

c) Given (a) and (b) above article 8 applies;

d) Article 8 requires that a court or tribunal before whom such an application for possession is moved, have the legal authority to decline to order such possession where the court or tribunal considers in the circumstances of the case, that the application is not being made in pursuit of the legitimate aims identified in article 8(2) and, or is not necessary in a democratic society;

e) Therefore the court or tribunal has to have jurisdiction to conduct an article 8 assessment, hear evidence relevant to same and be in a position to come to its own independent judgment on the appropriateness of the remedy sought.

The applicants argue that the use of s.62 to interfere with the applicant's rights to respect for their home, where the procedure does not give the applicants the opportunity to dispute the lawfulness or proportionality of the first named respondent's decision to evict are not justified as being necessary and are disproportionate. They argue that they are especially disproportionate in view of the fact that the first named respondent had an alternative procedure open to it -being s.14 of the Conveyancing Act 1881, which would have provided the requisite safeguards for the applicant's rights while meeting the first respondent's aims. The applicants further maintain that the District Court in the instant case does not have jurisdiction to carry out an article 8 assessment of the proportionality of the relief sought under s.62 or have power to refuse an order under s.62 and thus they seek a declaration of incompatibility with the European Convention on Human Rights.

5.5 The applicants argue that the provisions of s.62, by providing for summary recovery of properties by local authorities in circumstances where other landlords are denied such recourse, are inconsistent with the guarantees of fair procedures, personal rights and equality under the constitution.

The applicants argue that s.62 of the Housing Act 1966 is discriminatory and contrary to Article 40.1 and/or 40.3 of the constitution as it provides for a regime of summary eviction in the case of public tenancies. Such eviction, unlike any similar regime available in respect of private law tenancies, does not afford a person whose fundamental rights are at stake, the procedural safeguard of an independent judicial arbiter to require the decision to evict or to continue to seek eviction to be subjected to review on its merits.

The house at 14, Kilcross is the applicants' dwelling for the purposes of Article 40.5 of the constitution. They therefore submit that s.62 offends against the inviolability of the dwelling of the citizen pursuant to Article 40.5 and refer the court to the case of *Damache v. DPP* (2012) IESC 11 where the Supreme Court condemned the practice under the Offences Against the State Act 1939 (as amended) of the issue of search warrants by other than a judicial authority and found that the process fell below constitutional norms of fair procedures.

The applicants submit their case is analogous to dwellings being interfered with by way of a warrant. They maintain that s.62 is unconstitutional and that the procedures under s.62 for depriving someone of their home fall below constitutional norms.

In *Damache v. The DPP* [[2012] IESC 11 Denham J. referring to the presumption of constitutionality at para. 47 stated :-

> "The procedure for obtaining a search warrant should adhere to fundamental principles encapsulating an independent decision maker, in a process which may be reviewed. The process should achieve the proportionate balance between the requirements of the common good and the protection of an individual's rights. To these fundamental principles as to the process there may be exceptions, for example when there is an urgent matter."

Thus, the Applicants argue that the provisions of s. 62 are inconsistent with Article 40.5 of the constitution.

5.6. The applicants seek an order for prohibition as they are at risk of eviction and resulting homelessness unless the first named respondent is restrained by the court from proceeding with its s.62 application. The eviction would amount to a disproportionate

interference with the applicants' rights under Article 41 of the Constitution and article 8 of ECHR. Damages would not be an adequate remedy for breach of their rights. The balance of convenience favours granting the orders sought.

The applicants concede that in *The State (O'Rourke) v.Kelly* [1983] IR 58 the constitutionality of s.62 (3) of the 1966 act was challenged on the basis that its mandatory nature constituted an unwarranted intrusion into the judicial domain. The Supreme Court rejected this. However, the applicants argue that they are making a more wide ranging challenge to the constitutionality of the section. They rely on *Laurentiu v.Minister for Justice* [1999] 4IR 26 where it was held that the upholding of the constitutionality of an enactment against a particular ground of attack did not preclude the court from reconsidering the matter in another case in the light of a quite different form of attack.

They argue that support for the proposition that the High Court may grant an injunction restraining a perceived breach of constitutional rights by the state in to be found in *Byrne v. DCC* (2009) IEHC 122 where Murphy J. granted an interlocutory injunction prohibiting the prosecution of district court proceedings pending the hearing of an application for a declaration pursuant to s.5 of the ECHR Act 2003.

Respondents' Submissions
6.1 The respondents argue that the applicants are out of time to bring judicial review proceedings. It was an express term of the applicants' tenancy that they would pay the rent weekly in accordance with the tenancy agreement. It was also an express term of the tenancy that the housing authority could terminate the tenancy for breach or non-performance of any of the terms of the agreement including non-payment of rent. The applicants were in substantial arrears of rent prior to service of the notice to quit on the 12th January, 2010, which sought possession on the 20th February, 2010. Possession of the premises was not delivered up to the housing authority and a demand for possession was served on the applicants on the 22nd February, 2010.On the 3rd June, 2010, the housing authority brought District Court proceedings pursuant to s.62 of the Housing Act 1966 for possession of the premises. Leave to apply for judicial review was not sought by the applicants until the 12th July, 2010.Section 62 (as amended) provides that where:-

"(a) there is no tenancy in—

> (i) a dwelling provided by a housing authority under this Act,
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> (ii) any building or part of a building of which the authority are the owner and which is required by them for the purposes of this Act, or
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> (iii) a dwelling of which the National Building Agency Limited is the owner, whether by reason of the termination of a tenancy or otherwise, and

(b) there is an occupier of the dwelling or building or any part thereof who neglects or refuses to deliver up possession of the dwelling or building or part thereof on a demand being made therefor by the authority or Agency, as the case may be, and

> (c) there is a statement in the demand of the intention of the authority or Agency to make application under this subsection in the event of the requirements of the demand not being complied with,

the authority or Agency may (without prejudice to any other method of recovering possession) apply to the justice of the District Court having jurisdiction in the district court district in which the dwelling or building is situate for the issue of a warrant under this section……..

> (3) Upon the hearing of an application duly made under subsection (1) of this section, the justice of the District Court hearing the application shall, in case he is satisfied that the demand mentioned in the said subsection (1) has been duly made, issue the warrant."

Order 84 Rule 21 of the Rules of the Superior Courts has been amended but this amendment only applies to proceedings brought after January 2012 and therefore its former version applies in this case. The order as it then was provides:-

> "(1)An application for leave to apply for judicial review should be made promptly and in any event within 3 months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made.
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> (2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding."

The courts have interpreted the requirements laid down in Order 84, rule 21 as meaning that the primary requirement is that an application for judicial review must be made "promptly" and it is only a secondary requirement that in any event it must be made at the outside within the stated time, depending on the nature of the application.

The respondents submit the grounds for challenge first arose, and the time for bringing the proceedings ran, from the date of the service of the notice to quit and demand for possession on the 12th January, 2010.

Kearns J. stated in *Dublin City Council v. Fennell* (2005)1 IR 604 at pages 638 and 639:-

> "The parties' legal rights and obligations were, in my view, fixed and determined once the wheel was set in motion by the service of a notice to quit, an act which triggered the provisions, requirements and consequences of s.62 of the Housing Act 1966.That is the moment when the invocation of legal rights determined the applicable law and the position of the parties."

In this case the application to seek leave to apply for judicial review was only brought on the last day of the six month period measured from the 12th January, 2010,

The court is referred to a number of cases; In *Quinn v. Athlone Town Council & Ors* [2010] IEHC 270 the failure of the applicant to challenge the notice to quit was deemed to be fatal to the applicant's proceedings. This court refused the applicant's application for judicial review finding that the applicant ought to have challenged the notice to quit. See para. 22 :-

> "The notice to quit was served on the applicant on the 25th September, 2008.This is the relevant date from which time should run. The within proceedings were not instituted until the 27th July, 2009, almost ten months later. For this reason the applicant is out of time. When the local authority reaches a decision to serve a notice to quit, this is the time at which a person's article 8 rights are engaged and is the point in time where an applicant should move to challenge the decision of the local authority."

In Robinson v Dublin City Council & Ors. (unreported HC 24th October 2012) this Court also reviewed the cases of *Dublin City Council v. Fennell, Rock v. Dublin Corporation (unreported 8th February 2006)* and *Quinn v. Athlone Town Council* and held that the onus is on someone challenging a notice to quit to move with alacrity i.e. within days if not weeks.

In *De Roiste v. Minister for Defence* [2001] 1 IR at page 216 Fennelly J. discussed O84 R 21 stating:-

> "The rule requires, in the first instance, that leave be sought 'promptly'. In State (Cussen) v.Brennan [1981] I.R 181 at p. 196, Henchy J. approved the following passage from the judgment of Lord Denning M.R. *in R v. Herrod* [1976] Q.B. 540 at p.557:-
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> 'If a person comes to the High Court seeking certiorari to quash the decision of the Crown Court –or any other tribunal for that matter-he should act promptly and before the other party has taken any step on the faith of the decision. Else he may find that the High Court will refuse him a remedy. If he has been guilty of any delay at all, it is for him to get over it and not for the other side'."

The respondents argue that as the applicants did not seek judicial review after the notice to quit was served on the 12th January, 2010, but waited until the 12th July, 2010, they failed to move within time or promptly and gave no reasonable excuse for delay in bringing proceedings. The applicants allege they could not move to challenge the notice to quit until they had in their possession the index of proofs. The respondents argue that there is no foundation for this submission since the applicants were aware that no rent had been paid for 4 years. They were also aware that they had been interviewed on a regular basis by the county council regarding their conduct. Therefore the factual circumstances surrounding the Notice to Quit were known to the applicants before the notice to quit was served and the applicants cannot assert they were confused. There was no attempt by the applicant to move more promptly.

Where an applicant has failed to act promptly the onus is on the applicant to explain the circumstances of the delay and seek to produce a satisfactory explanation for it. In *Dekra Eireann Teoranta v. Minister for Environment* [2003] 2 IR 270 Fennelly J. stated at p.304:-

> "An applicant who is unable to furnish good reason for his own failure to issue proceedings for judicial review 'at the earliest opportunity and in any event within three months from the date when grounds for the application first arose' will not normally be able to show good reason for an extension of time."

In *De Roiste at p. 208* Denham J. laid out grounds where an extension of time may be appropriate as being:-

> "a) The nature of the order or actions the subject of the application;
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> b) The conduct of the applicant;
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> c) The conduct of the respondents;
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> d) The effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed;
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> e) Any effect, which may have taken place on third parties by the order to be reviewed;
>
> f) Public policy that proceedings relating to public law domain take place promptly except where good reason is furnished."

The respondents argue that applying these criteria to the case herein, the applicants fail on every ground to satisfy the grounds needed to extend time.

6.2 The applicants argue that any tenant should have a right, protected by article 8 of the European Convention on Human Rights to a merits based, independent hearing in order to determine whether a warrant for possession should be granted.

In this case the applicants owe €19,280 in rent arrears. The applicants accept that these arrears exist. In order to ensure that the differential rents scheme continues to function the respondents submit the s.62 mechanism is a necessary, legitimate and proportionate solution to serious breach of covenants to a tenancy agreement.Thus, the second and third named respondents submit that s.62 is compatible with the constitution and the first named respondent further submits that the granting of any declaration of incompatibility with same is a discretionary remedy.

In *State (O'Rourke) v. Kelly* [1983] IR 58 the constitutionality of s.62 was challenged on the grounds that subsection (3) thereof was an unwarranted interference in the judicial domain and constituted an interference with the function of the District Court judge in the administration of justice by depriving him of any real discretion in determining an application under S.62 (1) as it imposed on him a mandatory obligation to issue a warrant. This was rejected by the Supreme Court who considered that s.62 was no different from many statutory provisions which make it mandatory for a court, on proof of certain matters, to make a specified order.

The first named respondent relies on the case of *Leonard v. Dublin City Council & Ors* [2008] IEHC 79 in submitting that the state in making decisions is afforded a wide margin of appreciation in matters concerning social policy e.g. the provision of affordable housing and the regulation of same. In that case Dunne J. noted at p 79-80:-

> "Although the procedure provided for in s.62 does not allow for the decision of the council in any given case to be challenged on the merits in the course of the summary proceedings, a tenant does have sufficient procedural safeguards which afford the necessary degree of respect for the home by way of the availability of judicial review proceedings."

The first named respondent also relies on *Chapman v. UK* (application no. 27238/95) where the ECHR found at paras. 90 and 91:-

> ”An interference will be considered ‘necessary in a democratic society’ (if it is) for a legitimate aim and if it answers a ‘pressing social need’ and, in particular, if it is proportionate to the legitimate aim pursued….In this regard a margin of appreciation must, inevitably, be left to the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions”.

The applicants argue that the first named respondent did not act proportionately in evicting them under s.62 of the Housing Act 1966.It is obvious from the order that the quantum of arrears was large. Thus there was a rational and proportionate basis to terminate the tenancy on that ground. The first respondent submits that in determining the applicant’s tenancy by reason of their systematic failure to discharge rent and in seeking to recover possession of the premises it acted in accordance with the applicant’s rights under article 8 of the European Convention on Human Rights. The first named respondent on a number of occasions sought to engage with the applicants in relation to difficulties in payment of rent, but the applicants failed to make any real attempt to reach an arrangement with the respondents. Therefore, the applicants cannot plausibly allege that the first named respondent failed to act reasonably, proportionately and in accordance with its statutory obligations as a Housing Authority in seeking to recover possession of the premises.

The case of *Yordanova & Ors. v. Bulgaria (No 25446/04 24th April 2012)* places considerable emphasis on the requirement for reasons for infringement of article 8 rights to be furnished to a tenant. The respondents submit that there is no reason for the determination of the applicant’s tenancy other than the unquestionable fact of their considerable rent arrears of which the applicants were fully aware. They needed no reasons. The only remedy available to the respondent in this instance was to serve a notice to quit and the respondents contend that this was proportionate.

In *Leonard v. Dublin City Council & Ors.* [2008]IEHC 79 Dunne J reflected on the impact of the decision in *Connors v. UK (Application no.66746/01):-*

> “It seems to be clear that in considering the issues that arise in the present case in the light of the decision in Connors, a procedure which provides for summary eviction such as that contained in s.62 will not necessarily fall foul of article 8 provided that there are sufficient safeguards available to the individual concerned. It is also clear from that decision that the availability of judicial review may provide the necessary protection to the individual under article 8.Unlike the Connors case, the applicant in the present case was provided with the reason for the decision to terminate her tenancy. She could have availed of the remedy of judicial review had the council abused its position or behaved oppressively towards her.”

The applicants are required to be informed of the basis upon which the tenancy is being determined and the respondent contends that no criticism of the order can be made in this regard. There is no way in which the applicants could have been confused as to why they were evicted. They were aware of the reasons grounding the decision by the first named respondent before, during and after the fact in that no rent was being paid by them and they were being interviewed by the county council in relation to allegations of anti-social behaviour. Therefore, their argument in this regard is unsustainable.

The issue which the court must deal with is whether the respondents can pursue an eviction under s.62 where the facts of the matter are undisputed i.e. the tenants are in breach of a condition of the tenancy agreement in that they have failed to pay rent. The affidavits of the applicants do, in fact, disclose that there are some disputes of fact regarding anti-social behaviour but the respondents are no longer pursuing this therefore what remains is the undisputed fact of rent arrears.

The law in such a situation appears clear following the cases of *Donegan v. Dublin City Council* [2012] IESC 18 and *Dublin City Council v. Gallagher* [2009] IESC 354. In *Donegan* Mc Kechnie J. found that where no conflict of fact existed the requirement for procedural safeguards was not triggered. At para.140 of the judgment he noted:-

> “In most cases there will be little dispute of facts which are central to the issue. Where no such dispute arises, the decision to terminate a tenancy will not give rise to a requirement of procedural safeguards, necessitating independent review….”.

The applicants argue that the instant case resembles *Donegan*. The respondents, however, submit it resembles *Gallagher*. In *Gallagher* two issues arose 1) if the respondent had resided at the address for two years immediately prior to his mother’s death and 2) if he was on the rent account for the premises during the same two year period. The first element was disputed and the High Court said in view of this the s.62 procedure would be an inappropriate vehicle under article 8 had it been determined on that ground. It pointed out that the second ground was not in dispute and therefore the s.62 procedure could be used in relation to same.

These cases demonstrate that there must be some dispute as to the facts before procedural safeguards in relation to rights such as those found under article 8 of the ECHR are required. Similar to *Gallagher* in this instance the fact of arrears is not in dispute thus the respondents submit the s.62 procedure is valid.

6.3 The applicant submits that the so called severability challenge raised on the basis that the respondents intend to proceed now only on the grounds of arrears of rent was not raised in the grounds upon which leave was sought. Once they were notified of this, they should have amended their grounds. In fact the point was first raised during oral submissions at the hearing. It is thus not properly before the court and should not be addressed.

6.4 The applicants claim that the different treatment between public and private law tenants is in violation of their constitutional guarantee of equality for all citizens. The respondents argue that the object of the guarantee of equality under the constitution is to forbid arbitrary, unreasonable or unjust discrimination-this does not however mean that all people must be treated equally in all circumstances.

In *Quinn’s Supermarket v. AG* [1972] IR 1 Walsh J. stated at p.13:-

> “..this provision is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and … is a guarantee related to their dignity as human beings…”.

In *Dillane v. AG* [1980] ILRM 167 Henchy J. said at p.169:-

> “When the state …makes a discrimination in favour of, or against, a person or a category of persons, on the express or implied ground of a difference in social function, the courts will not condemn such discrimination as being in breach of

> Article 40.1 if it is not arbitrary, or capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of."

So far as s.62 of the 1966 act can be said to treat housing authority tenants differently from private tenants the respondents submit this distinction is not arbitrary or unreasonable when viewed in the context of the legitimate legislative purpose of providing the local authority with a summary mechanism for allowing them to effectively and efficiently manage available resources in respect of public housing and to provide such housing in accordance with their statutory duty to the most in need.

In the *Donegan* and *Gallagher* cases Mc Kechnie J. indicated such difference in treatment between local authority and private tenants was justifiable and held it could not be considered discriminatory and contrary to article 14 of the European Convention on Human Rights as it was found to be in *Connors* and *Mc Cann v. the United Kingdom (no.19009/04).* He stated at para.137:-

> "Their difference in treatment arises not by virtue of any particular individual characteristic. Even should Article 14 of the Convention arguably be engaged, I would nonetheless conclude that any such difference in treatment is readily justifiable by virtue of the particular circumstantial differences between housing authority and private tenants, and in addition, as referable to a legitimate aim."

The mechanism introduced by s.62 is to enable the housing authority to take back houses expeditiously to ensure they can be reallocated to someone else in need of housing and cannot be deemed to be unjust, unreasonable or arbitrary in light of this legislative objective.

6.5 With regard to the applicants' claim that the respondents' action herein is not in conformity with their personal and property rights under the constitution. The respondents refer the court to *Central Dublin Development Association v. Ag* [1975]108 ILTR 69 where Kenny J. in respect of the constitutional guarantee of protection of property rights held at p.85:-

> "(5) The exercise of these rights ought to be regulated by the principles of social justice and the State accordingly may by law restrict their exercise with a view to reconciling this with the demands of the common good.
>
> (6) The courts have jurisdiction to inquire whether the restriction is in accordance with the principles of social justice and whether the legislation is necessary to reconcile this exercise with the demands of the common good."

The respondents also refer to case law concerning unjust attack on property rights which have established that articles 40.3 and 43 of the constitution must be considered together. In *Dreher v. Irish Land Commission* [1984] ILRM 94 Walsh J. at p.96 stated:-

> "I think it is clear that any state action that is authorised by Article 43 of the Constitution and conforms to that Article cannot by definition be unjust for the purpose of Article 40.3.2."

Thus a piece of legislation which is authorised by article 43 cannot fall foul of article 40.3.

In *Finlay v Laois County Council* (unreported High Court 20th December 2002) Peart J. refused an injunction to the plaintiff preventing the county council from entering onto the plaintiff's lands on foot of a warrant issued pursuant to s.78 (4) of the Road Act 1993, holding that the plaintiff had to establish a fair case that her property rights had been infringed. Peart J. noted:-

"Any contention by the plaintiff that the defendants are not entitled to enter their property because to do so is a breach of their constitutional rights, ignores the fact that the constitution provides a limitation of that and other rights where the exigencies of the common good so demand."

In this case the exigencies of the common good mean the housing authority needs to be able to manage the limited housing and resources available in an efficient manner and ensure that houses unlawfully occupied are vacated efficiently so they can be allocated to others. This means that the procedure set down by s.62 is necessary, is proportionate to what it seeks to achieve and is in accordance with the applicant's rights under Articles 40.3.2 and Article 43 of the constitution.

6.6 The applicants have also referred the court to the decisions of the European Court of Human Rights in *Yordanova & Ors v Bulgaria* (application no.25446/06), *Bjedov v. Croatia (application no.42150/09* and *Buckland v. UK (application no.40060/08.* The respondent argues that none of these cases are analogous to the present situation in that none of them involved an accepted breach of a fundamental term of the tenancy agreement, in this case being the non-payment of rent. All three cases had something in common which does not feature in this case i.e. each applicant had a point to make which they could not make in their own country as the mechanism for challenge in their respective countries did not permit a merits based determination and therefore they were denied their article 8 rights.

Mc Kechnie J. in *Donegan* and *Gallagher* reviewed the European Court of Human Rights case law and at para.135 concluded :-

> "Thus where a conflict of facts arises…it is necessary that there be some independence between the decision maker and those, on either side, who make, support or seek to rely on the allegations in question. It is clear that any review undertaken in this regard must be performed by a person who is rationally unconnected to those whom I have mentioned. This however should not be interpreted as requiring that a court must be the body to determine upon the matter. This could not be so; once there is access to an independent decision maker acting within a process which is otherwise safeguarded, such will suffice. This requirement will only arise where the factual dispute is genuine, and where it is materially central and related to the Convention rights at issue."

In this case the applicants also have no material conflict of fact and do not dispute being in arrears of rent. There is therefore no requirement for a hearing before an independent decision maker. No additional procedural element could assist the applicants as it is not in dispute that they were and are in arrears of rent. Therefore the entitlement of the housing authority to terminate the tenancy cannot be disputed and the procedural safeguards mandated by the convention are not engaged at all.

The applicants have no point to make in relation to the arrears save for accepting that they exist. Here irrespective of the outcome of the case the applicants will still be left owing €19, 280 in rent arrears.

Decision of the Court

7. The issues raised in this case are;

(i) delay by the applicants in seeking judicial review;

(ii) alleged retrospective alteration of the respondents' reasons for instituting s. 62 procedure;

(iii) the s. 62 procedure discriminates between public housing tenants and private law tenancies;

(iv) the constitutional protection of the home ; and

(v) the s. 62 procedure is not in accordance with Article 8 of the European Convention on Human Rights as set out in the recent case law of the European Court of Human Rights.

The delay of the applicants in bringing these judicial review proceedings
7.1 The application for leave was made on the 12th July, 2010. The applicants challenge the s. 62 procedure invoked by the respondents herein. The applicants do not challenge the notice to quit. That notice served on the 12th January, 2010 thus is now beyond challenge. The consequence of this is that the applicants no longer have a valid tenancy in the house in question and remain there as a trespasser. The applicants have lived in the house since 1985 and it has been their home since this time. The applicants first became aware of the possible use of the s. 62 procedure on the 22nd February, 2010 when the respondents issued and served a demand for possession of the premises and indicated their intention to initiate proceedings under s. 62. The respondents did not do so, however, until the 3rd June, 2010 when they applied under the section to Dun Laoghaire District Court. The applicants brought their application five weeks later. In all the circumstances it seems to me that their challenge to the s. 62 procedure was made not only within the time allowed, but promptly as well. This case differs from *Quinn* and *Robinson* (cited above) in that it is not the notice to quit that is challenged but the use of the s. 62 procedure. It was not clear the respondents were removing under this statutory provision until they actually did so.

Alleged retrospective alternation of the respondents' reasons
7.2 This ground was raised for the first time at the hearing in oral argument. It does not appear in the grounds upon which judicial review was sought. From the start of these proceedings the respondents made clear they were proceeding on the basis of non-payment of rent and anti-social behaviour. The case was adjourned to await the *Gallagher* and *Donegan* cases. Following the judgment therein of the Supreme Court, the respondents by letter of the 28th March, 2012 indicated that they intended to pursue the case on the grounds of arrears of rent only. There was no reply and no query by the applicants to this letter. This put the applicants on notice that the respondents would not put the anti-social behaviour matter before the Court and would rely only on the non-payment of rent and the admitted arrears of €19,280. It must be noted this put the applicants in a somewhat more favourable position. It also created a situation where no factual dispute lay at the base of the application to be made under s. 62. If the applicant wished to raise this severability of reasons point, it should have done so by amending the grounds at the time they were told in March 2012. They did not do so, the point is not one upon which they obtained leave and consequently this Court has no jurisdiction to deal with it.

Section 62 proceedings discriminate between public housing tenants and private tenants
7.3 The second and third respondents refer the Court to a long line of authority which establishes that the object of the guarantee of equality in the law is to prevent arbitrary, unreasonable or unjust discrimination. See *O'Brien v. Manufacturing Engineering Co. Ltd.* [1973] I.R. 334. There is no guarantee of absolute equality for all citizens in all circumstances. See *Quinn's Supermarket v. Attorney General* [1972] I.R. 1. The State may discriminate between persons but the courts will not condemn such discrimination if it is not arbitrary, capricious or unreasonable. See *Dillane v. Attorney General* [1980] ILRM 167. In dealing with legislation in controversial economic or social matters intended to reconcile conflicting rights of different sections of society, there is a particularly strong presumption that such legislation is constitutional. See Ryan v. Attorney General [1965] I.R. 294. The difference in treatment between local authority tenants and private tenants is readily justifiable by virtue of the particular circumstantial differences between them. See *Donegan v. Dublin City Council* and *Dublin City Council v. Gallagher* [2012] IESC 18. The s. 62 statutory process has survived constitutional and judicial scrutiny because, *inter alia*, of the needs of housing authorities to be able to effectively manage and control its housing stock. See *Dublin City Council v. Fennell* [2005] IESC.

The justification for difference in treatment lies in the duty which the housing authorities bear to provide housing free or at very low cost to those in need. It is an onerous duty and a very important one. No such duty lies on the owners of private property. In meeting that obligation, the housing authorities will have to manage limited resources, *i.e.* its stock of housing. If tenants such as here are not paying rent, this obviously deprives the housing authority of the revenue needed to meet its obligations. This also in turn impacts upon those whose needs cannot be met due to the limited financial resources of the housing authority. There cannot therefore be any arbitrariness, unreasonableness, caprice or unjust discrimination found in this different treatment of citizens. It is a legitimate process to achieve a balance between the rights of those enjoying the benefit of public housing and those whose need for housing cannot be met or adequately met. There is a strong presumption of constitutionality in regard to the s. 62 procedire which is central to the management by the housing authority of its housing stock. It seems to me that this presumption has not been overturned. Thus, there appear acceptable and fair reasons for the distinction that it made in providing the summary procedure herein. This ground, therefore, fails.

The constitutional protection of property rights
7.4 In *Central Dublin Development Corporation v. Attorney General* [1975], Kenny J. summarised the constitutional provisions in regard to this right:

"In my view analyses of the text of the Constitution and of the decisions on it lead to these conclusions:

(1) the right of private property is a personal right;

(2) in virtue of his rational being, man has a natural right to individual or private ownership of worldly wealth;

(3) this constitutional right consists of a bundle of rights most of which are founded in contracts;

(4) the State cannot pass any law which abolishes all the bundle of rights which we call ownership or the general right to transfer, bequeath and inherit property;

(5) the exercise of these rights ought to be regulated by the principles of social justice and the State accordingly may by law restrict their exercise with a view to reconciling this with the demands of the common good;

(6) the courts have jurisdiction to inquire whether the restriction is in accordance with the principles of social justice and whether the legislation is necessary to reconcile this exercise with the demands of the common good;

(7) if any of the rights which together constitute our conception of ownership or abolish or restrict it (as distinct from the abolition of all the rights), the absence of compensation for this restriction or abolition will make the act which does this invalid if it is an unjust attack on the property rights."

The question for the Court, therefore, is whether the provisions of s. 62 are in accord with the principles of social justice and are to serve the demand of the common good. For the reasons set out at 7.3 above, I am satisfied that both requirements are met in the summary procedure provided by s. 62.

7.5 The s. 62 procedure is not in accordance with the provisions of Article 8 of the European Convention on Human Rights
The applicants at (d)(1) of the grounding statement seek a declaration that the provisions of s. 62 of the Housing Act 1966 are incompatible with Article 8 of the European Convention on Human Rights insofar as;

"They authorise the District Court or the Circuit Court on appeal, to grant a warrant for possession where there is a factual dispute as to whether the tenancy has been properly terminated by reason of a breach of the tenancy agreement on the part of the tenant in the absence of any machinery for an independent review of that dispute on the merits being available at law."

It is clear that such a declaration has already been made by the Supreme Court in the case of *Donegan v. Dublin City Council* [2012] IESC 18, where it held that there was a dispute as to the factual situation. The Court held that the applicant in such circumstances was entitled under Article 8 to have that dispute determined by an independent body. The factual dispute there was whether the son of the tenant was a drug dealer. McKechnie J. stated:

"Apart from such interview process, Mr. Donegan has had no opportunity of having his argument as to his son's condition aired or determined before an independent body. The issue is one of extreme simplicity but requires a mechanism to determine factual conflicts. If determined in his favour it must be that the Council could not pursue the eviction order which it presently seeks. It would be entirely contrary to their reasoning justifying such a move, were they to do so. Therefore, a resolution of this matter is of the highest importance to Mr. Donegan. Given the enormous significance which this interference, by way of eviction, would have on his right to have due respect shown for his home, it follows, that the existing process by which such eviction may be sought, constitutes an inadequate safeguard in that respect and therefore, his Article 8 rights have not been respected."

There appears nothing further to be gained by making another such declaration. It was unnecessary for the applicants to seek another.

7.6 The applicants go further, however, in their grounds and seek thereby to justify their case for a declaration of incompatibility on the ground at (e)(iv) that the use of the s. 62 procedure did not afford the applicants the opportunity to dispute the lawfulness or the proportionality of the decision to evict them. In argument at the hearing, the applicants, accepting that there was no longer a factual dispute, argued that more recent case law of the European Court of Human Rights had gone further. That Court has decided recently that even where a tenant had no legal right to occupy a flat which was her home, she was still entitled to have the benefit of an independent tribunal to determine the proportionality or reasonableness of evicting her from her home. See *Bjedov v. Croatia* (Application 42150/09), 29th May, 2012 and *Buckland v. United Kingdom* (application No. 40060/08, 18th September, 2012). These case were decided in Strasbourg after the Supreme Court judgment in *Donegan*. The applicants argue, relying upon those judgments, that a person in her position as the unlawful occupant of a local authority flat who does not argue that there exists any factual dispute, is still entitled to have the benefit of an independent tribunal to determine whether it was disproportionate to evict her from her home.

7.7. In *Bjedov* the applicant, following protracted and complex litigation in Croatia was eventually, finally determined to be unlawfully resident in a local authority flat. The central question for the Court was whether the undoubted interference with her Article 8 right to her home was proportionate to the aim pursued and thus "necessary in a democratic society". It was accepted she had no legal right to remain in her home. The question was whether in all the circumstances it was proportionate to evict her. The national courts had decided the highly complex question as to her legal status but had not made any analysis as to the proportionality of evicting her. Dealing with this at para. 68, the Court of Human Rights found;

"68. In the present case the applicant raised the issue of her right to respect for her home, which was not taken up by the national courts. They ordered the eviction of the applicant from her home without having determined the proportionality of the measure. In this connection the Court notes that in his opinion of 19 June 2009, Dr I.M. stated that, in view of the applicant's poor health, it was necessary to spare her from any relocation. Moreover, in its decision of 28 October 2010 postponing enforcement, the Zadar Municipal Court, taking into account the applicant's age and her state of health, found that her eviction would probably cause her irreparable harm. In this connection, the Court is mindful of the applicant's advanced age - she is now seventy-eight years old - and of her poor health, as well as the fact that she has been living in the flat in question for many years. At the same time, the Zadar Municipal Court held that the postponement of enforcement would not cause any damage to the local authorities because the applicant regularly paid the rent for the flat."

69. The Court also takes note of the Government's argument that the social services expressed their readiness to accommodate the applicant in a foster family or in the Home for the Elderly and Infirm in Zadar, if she were to be evicted, and to cover the difference between the cost of such accommodation and the applicant's income, as well as to institute relevant proceedings in that respect of their own motion. However, the Court also notes that, even though the applicant's case was brought to their attention a long time ago, and the applicant's eviction became imminent after the Zadar Municipal Court decided on 11 May 2011 to continue with enforcement, those authorities have not to date instituted the relevant administrative proceedings with a view to granting her the promised accommodation.

70. Another element of importance is the following. In circumstances where the national authorities, in their decisions ordering and upholding the applicant's eviction, have not given any explanation or put forward any arguments demonstrating that the applicant's eviction was necessary, the State's legitimate interest in being able to control its property comes second to the applicant's right to respect for her home. Moreover, where the State has not shown the necessity of the applicant's eviction in order to protect its own property rights, the Court places a strong emphasis on the fact that no interests of other private parties are likewise at stake."

7.8 In this case, the first named applicant has lived in her house for a long time. I do not think it has been seriously disputed that in autonomous convention terms it is her home. It has not been argued that she is of the same advanced years or in poor health and likely to suffer irreparable harm to her health from her eviction. She has very large arrears of rent. The respondents in this case have put forward arguments demonstrating that the applicants' eviction was necessary in order to protect its own property rights and to manage its housing stock efficiently. In *Buckland* the Court again reiterated that even where a person's right to occupation has come to an end, there exists in principle a right to have the proportionality of the eviction determined by an independent tribunal. See paragraph 65. In that case it was open to Mrs. Buckland to seek from the Court a suspension of the order for up to twelve months on the grounds of personal circumstances. She did so and the Court granted her the full twelve months. It could not, however, refuse to grant the order for eviction on foot of those same circumstances. At paragraph 68, the Court held as follows ;

> « However, the fact remains that the applicant was not able to argue that no possession order ought to have been made at all. The possibility of suspension for up to twelve months of the possession order is inadequate, by itself, to provide the necessary procedural guarantees under Article 8. Although further suspensions may be granted, suspension merely delays, and does not remove, the threat of eviction. The Court cannot accept that the fact that an individual may effectively be able to remain in her home in the longterm by making repeated applications to extend suspension of a possession order removes any incompatibility of the procedure with Article 8. It is further significant that in the present case the County Court Judge considers the applicant's personal circumstances to be such that suspension was justified and he granted a suspension for the full period sought. In the circumstances it is not possible for the Court to predict what decision he might have reached on the granting of the possession order had he considered it open to him to refuse the grant on the basis of personal circumstances. »

Thus the Strasbourg court took into account the decision of the domestic court to grant the maximum possible suspension or stay on the order. It seemed to consider that this gave at least grounds to believe that the applicant in that case might have been able to advance grounds which could sucessfuly challenge the proportionality of her eviction. The Court further noted that since the events involved, the law in England had changed. Now a court considering making such a possession order could examine the reasonableness of making the order. The Court considered that such examination by the domestic courts would fulfil the requirements of Article 8.

7.9 I do not think that the facts of this case, had they been present in *Bjedov* or *Buckland*, would have led to a finding of a violation. On the facts herein, I consider it is possible to predict what decision would have been reached by the District Court had it been able to consider the proportionality of the order to evict. I do not think, therefore, that in this case an eviction order could give rise to a finding of incompatibility on the grounds of non-consideration of the proportionality of the eviction measure. There is, to put it quite simply, no proportionality case to argue here. It may well be that in the light of *Bjedov* and *Buckland*, the Irish courts may eventually find that the absence of an independent tribunal to determine the proportionality of an eviction from a home may give grounds for a declaration of incompatibility even where there is no factual dispute. The circumstances here, however, do not support such a finding.

7.10 For the reasons outlined above, the reliefs sought by the applicants in this case are refused.