

THE HIGH COURT

RECORD NO. 2015 383 JR

BETWEEN

EAMON McCAULEY AND ANNE CALLAGHAN

APPLICANTS

AND

HER HONOUR JUDGE KAREN FERGUS

RESPONDENT

AND

THE COUNTY COUNCIL OF THE COUNTY OF DONEGAL

NOTICE PARTY

JUDGMENT of Mr. Justice Eagar delivered on the 21st day of December, 2015

1. This is an application for an order of *certiorari* quashing the judgment and order made by the first named respondent of the 25th June, 2015. On that date the respondent affirmed the decision of District Judge Kilraine awarding an order for possession of a dwelling house at Ballintra, Co. Donegal made on the 16th January, 2015. She granted the application made by the notice party.

2. An *ex-parte* application was made by the applicants on the 6th July, 2015 and Noonan J. granted leave for the applicants to issue a motion and to amend the title of the proceedings to join Donegal County Council as notice party.

3. The affidavit grounding the application had little factual information. The first appellant stated that "the house had been in possession of my people since 1970 and the land upon which it was built since 1950". He conceded that he had a house in Bundoran but due to unhappy differences with his ex-wife and the need to look after his elderly parents and his then ill brother (Liam McCauley) meant that he was frequently in the house. He also stated as follows "I believe that in 1970, when the Council built the house, my people were led to believe or were of the belief that the McCauley's could remain in the house, provided the usual conditions were met. An independent assessor might well reject or accept these arguments but in Court I could provide no effective evidence. I also believe that a decision of the Circuit Court Judge infringed Article 6 rights under the Convention."

4. The statement of opposition of the notice party made the following points:

- a. The applicant submitted to the jurisdiction of the District Court and the Circuit Court and acquiesced in that jurisdiction and waived their rights to challenge the orders,
- b. The applicants had failed to seek judicial review and in particular the relief of prohibition of the notice parties prosecution. The proceedings either prior to the District Court proceedings or given the nature of s. 62 of the Housing Act 1966 (hereinafter referred to as "the Act of 1966") seeks an order of *certiorari* of the District Court proceedings,
- c. The notice party denied that the property constituted a family home for the applicants and that their Article 8 rights were not engaged
- d. Neither applicant gave evidence in the District Court or in the Circuit Court. The respondent Circuit Judge had not failed to allude to the relevant articles of the European Convention of Human Rights.
- e. The Allocation Scheme for approved applicants for social housing permits the succession of tenancy in the place of an existing tenant of a rented dwelling but only on the basis that the family member has been in continuous occupation of the dwelling for at least two years prior to the death of the former tenant and that family member's income was taken into account in determining the amount of rent paid.

5. The affidavit of Bridie McBrearty who is the area manager for housing and corporate affairs for the notice party grounded the statement of opposition. She said she was present at the District Court on the 16th January, 2015 and gave evidence on oath in relation to the formal proofs. The applicants were legally represented but there was no challenge to her evidence. Counsel on behalf of the applicants made a number of points to District Judge Kilraine and at the conclusion Judge Kilraine accepted that the Court had no discretion in relation to s. 6 of the Act of 1966 once the proofs were in order. Ms. McBrearty also stated that she was present at the appeal before the respondent and gave formal evidence which included that Donegal County Council was the full owner of the property at Ballintra since the 17th July, 1970. Exhibited to the affidavit of Ms. Brearty was the letting agreement leasing the cottage to Liam McCauley, the brother of the first named applicant and confirming that for the purpose of a differential rent review his income (a disability allowance) was taken into account in relation to the period from June 2000 to February 2013.

6. The Allocation Scheme made provision in respect of the succession of tenancy as follows:

"in the case of the death or departure of a tenant of an existing rented dwelling, succession to the tenancy by a family member(s) would be allowed but only where the housing authority is satisfied that the member has been in continuous occupation of the dwelling for at least two years prior to the death or departure of the former tenant and their income was taken into account in determining the level of rent paid".

7. On the 20th September, 2013 Mr. McCauley made an application for housing support to the notice party. He gave his address at Ballyshannon and like his brother Liam, he was in receipt of disability allowance.

8. According to Desmond Murphy S.C. counsel for the applicants Liam McCauley died on the 24th March, 2013. In December 2012 the first applicant had moved to the house to look after his brother. At that time he had owned a house with his wife although that averred to in the affidavit of the first applicant that it appears that the house was transferred in 2014. The Council declined to allow the tenancy with the applicants as he had not qualified with the succession of tenancy on the basis that he had not lived there for two years and also that his income had not been taken into account in determining the rent.

9. Donegal County Council then sought possession of the house by way of an application to the District Court under s. 62 of the Act of 1966 and when this order was granted by Judge Kilraine this was appealed by the applicants to the Circuit Court.

10. Mr. Murphy said there was no opportunity to call evidence or get involved in the hearing and he cited the often quoted decision of Kearns J. in *Dublin City Council v. Fennell* [2005] IESC 33. He argued that the decision of the Supreme Court in *Donegan v. Dublin City Council & Ors and Gallagher v. Dublin City Council & Ors* [2012] 3 IR 60 had enabled the courts to have regard to Article 8 rights for the protection of the right to respect for the home. In *Donegan* it is clear that Mr. Donegan, the lawful tenant and the issues which arose related to his son's activities with controlled substances.

11. *Gallagher* however had other facts. As in this case the rent payable was differentially calculated to the income of those living on the premises. *Gallagher* did not reside with his mother who was a tenant for the years 1997 to 2005 when his mother died. McKechnie J. giving judgment for the Supreme Court said, at para. 157:-

"[157] The position with regard to Mr. Gallagher, in one respect pretty identical to that of Mr. Donegan, but in another fundamentally different. It will be recalled that in accordance with the Council's scheme of letting priorities, for a son or daughter to succeed to their parent's tenancy, that person has to be resident in the house and have been on the rent account for the period of two years immediately preceding, as in this case, the death of the tenant. Mr. Gallagher claims that he has complied with the first requirement. Following a number of meetings with the Council, during which he submitted supporting documentation, the Council came to the view, that he did not come within requirement number one. In the District Court, on the s. 62 application, the District Judge, so as to facilitate the case stated, embarked upon a fact finding mission on this issue. Having heard various witnesses he concluded that Mr. Gallagher had been so resident as he had claimed. Thus, there is a clear conflict between the Council's view and the finding of the District Court. To that extent, he becomes the beneficiary of the same views as I have expressed in the case of Mr. Donegan.

[158] However, there is no conflict with regard to the second requirement in that Mr. Gallagher does not dispute the fact that he was removed from the rent account in August, 1995, when he went to live with his partner, and that at no time thereafter was his name re-entered on the account, or was he otherwise assessed for rent in respect of the dwelling house in question. Therefore, this requirement is conflict free and its existence as a condition of succession is not disputed. It would therefore seem entirely superfluous to have such an issue further explored. The position is as stated by the Council, and accepted by Mr. Gallagher.

[159] There can be no doubt but that the Council are entitled to have such requirements, as conditions of succession. They are justified in so doing so that individuals will not obtain accommodation free of contribution, to the detriment of others, who are both willing and obliged to pay. Moreover, an obvious effect of acting in breach of this requirement is that the rent actually paid by Mr. Gallagher's mother has been less than what it should have been. Therefore there can be no doubt, but that such a requirement is a legitimate part of the Council's estate management regime so as to efficiently and effectively discharge their public duties.

[160] In addition, the position of Mr. Gallagher is further unlike that of Mr. Donegan in this most material way: the former was never a tenant of the Council and his occupancy of the house, such as it was, was in breach of clause 8 of the tenancy agreement. In addition, he never had any proprietary estate or interest in the property, and had no legal right to reside there. Therefore, at best, his situation is analogous to Ms. Leonard, in whose case as previously stated, article 8 rights were not engaged. In Mr. Gallagher's situation, noting the circumstances which I have described, his optimum position is to plead with the Council to have requirement number two disregarded for the purposes of succession. I do not think that article 8 rights can be invoked for this purpose. That being the situation, and notwithstanding the residency conflict, I do not believe that the safeguards required have been substandard so as to violate his article 8 rights. Consequently, I would refuse to grant any relief in his case."

12. Mr. Murphy also referred to *Edward Lattimore v. Dublin City Council* [2014] IEHC 233 where O'Neill J. said:-

"48. The Supreme Court, in the cases of Donegan and Gallagher v. Dublin City Council, whilst, in those cases, dealing with disputed questions of facts, nonetheless per the judgment of McKechnie J. in summarising the requisites of compliance with Article 8, included having the issue considered against the measure to determine its proportionality."

In *Lattimore*, the Applicant was living in the house for eleven years and his income had been added to the rent account. O'Neill J. stated:-

"55. In light of the judgments of the Supreme Court in Meadows, it now falls to me to determine the issue of proportionality as that was discussed in the judgment in the Meadows case and also by Hedigan J. in McSorley v. The Minister for Education and Skills [2012] IEHC 201."

And he stated,

"I am quite satisfied that the decision that was made by Ms. Conlon, as reflected in her letter of 23rd April 2013, was not in any sense disproportionate. I am also satisfied that the correct application of the proportionality principle in this case also means that there has been no breach of the applicant's rights under Article 40.5 of Bunreacht na hÉireann."

13. Mr. McHugh B.L., on behalf of the notice party also alluded to the judgment of the respondent in the Circuit Court where he stated that it was clear that the Circuit Judge had considered Article 8 of the European Convention on Human Rights. In that court the Respondent stated that Article 8 of the Convention "protects the home but does not give a right to a home." She noted that Liam McCauley could have bought the house in 2006 but he did not do so. The applicant had not lived in the house since 1990. Therefore he could not argue that this was an eviction case. Mr. McCauley agrees that he was not in occupation of the family home for a period of two years. Article 8 does not give rights to a home, it protects the home.

14. Counsel for the notice party also argued that even if the Court felt that an order of *certiorari* would lie, the matter would then

have to be considered by the notice party and the notice party, even applying an independent assessment could come to the same conclusion as they had done before and as the Supreme Court in *Gallagher* had found, that this was not the purpose of judicial review. Judicial review is a discretionary remedy which should be refused where the effect of it was that the issue could not be resolved. This Court is satisfied that as in *Flanagan*, the applicants Article 8 rights were not engaged. In these circumstances I refuse to grant an order of *certiorari*. Also as judicial review is a discretionary remedy the court also refuses the order of *certiorari* having regard to the effect of the grant of *certiorari* in this case. It was open to the applicants to seek to prohibit the counsel from taking the s. 62 proceedings in the District Court and also to seek to apply for a *certiorari* of the District Court proceedings on the basis that s. 62 of the Act of 1996 was not in compliance with the European Convention.