Neutral Citation: [2014] IEHC 604

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 206 J.R.]

BETWEEN

JASMINE TENIOLA

APPLICANT

AND

FRANK BRADY, PRIVATE RESIDENTIAL TENANCIES BOARD, IRELAND,

AND

THE ATTORNEY GENERAL

RESPONDENTS

AND

COLLETTE CONNOLLY

AND

JACINTA HESLIN

NOTICE PARTIES

JUDGMENT of Ms. Justice Baker delivered on the 11th day of December, 2014

1. The applicant was at all material times the tenant of a residential dwelling at 24 Hampton Green, Navan Road in the City of Dublin and the notice parties were her landlords. The landlords made application for dispute resolution pursuant to s. 78 of the Private Residential Tenancies Act 2004 ("the Act of 2004") to the Private Residential Tenancies Board (the "Board") and their complaints were that the applicant was in arrears of rent, and was overholding following the service of a notice of termination arising from such arrears. This judicial review relates to the conduct of the hearing on the 6th March, 2014 before the first respondent, Frank Brady, the adjudicator. The two landlords and the applicant herself attended the hearing, and neither side to the dispute had legal representation at the hearing.

2. The applicant obtained leave to apply for judicial review in the form of an order of *certiorari* quashing the order of the first respondent made on the 6th March, 2014, and for declaratory relief that certain of the orders made by him, in particular the order refusing to adjourn the adjudication hearing, were *ultra vires* and reached in breach of fair procedures. The applicant also claims that she was denied the opportunity of presenting her case fully at the adjudication hearing because in particular some documentation which she had gathered for that purpose was in the possession of her solicitor who was unable to attend on that day.

The statutory framework

3. The Act of 2004 was established with the aim *inter alia* of facilitating the speedy and cost effective resolution of disputes between landlords and tenants of residential dwellings. Denham J. in *Canty v Attorney General & Ors* [2011] I.E.S.C 23 addressed the object of the Act of 2004, and quoted with approval the judgment of McKechnie J. in the High Court delivered *ex tempore* on 17th December, 2007 as follows:

> *"the legislature, by virtue of the 2004 Act, established a framework by which disputes between landlords and tenants could be resolved, with the intention of that being done informally, expeditiously and as cheaply as possible. Bodies with particular expertise were set up within this framework to discharge the functions assigned to them."*

4. The Board established by the legislation has an almost exclusive jurisdiction to determine disputes between landlords and tenants of residential tenancies. The applicant held the subject premises under a fixed term letting described in the letting agreement as a "minimum of 12 months" from the 1st March, 2013, at a monthly rent. The circumstances in which a tenancy governed by the legislation may be terminated are set out in Chapter 3 of the Act and include *inter alia* the relevant ground which is alleged to have arisen in this case, namely where the landlord serves a notice of termination grounded on an alleged failure of the tenant to pay the agreed rent.

5. Part 6 of the Act created a machinery of dispute resolution in respect of "disagreements", defined in s. 75(3) as including any issue between the parties with regard to the compliance by either party with his or her obligations as landlord or tenant under the tenancy, and any matter with regard to the legal relations between the parties, including whether the tenancy has been validly terminated.

6. The landlords sought to avail of the adjudication process provided under the Act and Mr Brady was appointed adjudicator pursuant to s. 164(2). Adjudication is the first part of the dispute resolution process, and is intended to be a speedy and cost effective means of resolution, the second stage involving a more formal type of hearing before the Tribunal itself.

Failure to exhaust remedies

7. Counsel for the respondent makes a preliminary objection that the applicant has failed to exhaust all remedies available to her and that in the circumstances judicial review does not lie. The applicant argues, correctly in my view, that there is no absolute rule of law that mandates an aggrieved party in all cases to appeal in lieu of making application for judicial review. The case law is well established. As O'Higgins C.J. observed in *State (Abbenglen Properties Ltd) v. Dublin Corporation* [1984] I.R. 381 the court may grant

judicial review even in circumstances when the appellate mechanism has not been exhausted if that is necessary in the interests of justice. The central proposition was stated by him as follows:-

> *"The court ought to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alterative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief."*

8. The test so stated by the Supreme Court is whether the appeal is adequate to deal with the complaint. Hedigan J. in *O'Connor v. PRTB* [2008] I.E.H.C. 205 addressed this question with regard to the specific statutory appeals mechanism provided under the Act of 2004, and held that the entirety of the case made by the applicant could have been made by way of an appeal under the statutory scheme, what he described as "*a procedure specifically designed for that purpose for the legislature and, in this particular case, capable of dealing with each and every one of his complaints*".

9. The Supreme Court recently considered the appropriateness of judicial review in the case of *EMI Records (Ireland Ltd) and Others v. Data Protection Commissioner and Another* [2014] 1 I.L.R.M. 225 ("EMI"). The Court referred to the decision of Hedigan J in *O'Connor v. PTRB* and also to a judgment of Hogan J. in *Koczan v. Financial Services Ombudsman* [2010] I.E.H.C. 407 where Hogan J. identified a spectrum of cases in respect of which judicial review might be more or less appropriate. Judicial review was identified as appropriate where the complaint relates to the integrity or basic fairness of a decision making process, or where arguments relating to what he described as a "*total lack of subject matter jurisdiction*" arise. Hogan J. however stressed that where an administrative scheme provided a statutory appeal mechanism judicial review must be regarded as "*the exception rather than the rule*", and when the legislature created a right of statutory appeal from an administrative decision that the Oireachtas must have intended :-

> *"That the statutory appeal would form the vehicle whereby the entirety of an appellant's arguments could be ventilated in such an appeal without any need to commence a further set of proceedings, at least to the extent that it was procedurally possible to do so".*

10. The Supreme Court described the "*default position*" as being that a party should pursue a statutory appeal rather than initiate judicial review, and said that the reason for this is as pointed out by Hogan J in *Koczan v. Financial Services Ombudsman*:-

> *"that it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned."*

11. The first question I must ask is whether the circumstances of this case fall within the category of exceptional cases, the language used by the Supreme Court in *EMI*, where judicial review is available to a party in lieu of engaging with the statutory appeal mechanism. From *EMI* it is clear that the set of circumstances is not necessarily closed, but the rationale or defining criteria could be said to be whether the appeal will permit an aggrieved person to adequately ventilate a complaint, or whether, as said by Hogan J. in *Koczan v Financial Services Ombudsman*, the issues sought to be raised by judicial review cannot properly be raised by way of appeal at all. With that in mind, and having regard to what must be seen as a high bar, I examine whether the complaints made by the applicant are more properly characterised as coming within the exceptional category of cases where judicial review lies.

12. The complaints of Ms Teniola with regard to the process of the adjudication are threefold: That she was refused an adjournment to ensure the availability of her solicitor; that she was denied the opportunity to submit factual matters regarding the condition of the premises, because as she put it she could not "meaningfully engage" with the question without her documentation, or probably without her solicitor; and that the adjudicator was biased in his dealing with the matter. Counsel for the applicant also argues that to deny Ms Teniola judicial review would be to deny her the two hearings the legislation envisages, and that accordingly appeal does not offer her a sufficient remedy, and furthermore that there is what was described as a "grave risk" that unfairness contaminating the first hearing will also tarnish the second. I will first examine the latter argument as it goes to the nature of the statutory appeal mechanism established by the Act of 2004, before considering the specific complaints made as to the conduct of the hearing and whether a statutory appeal would offer Ms Teniola an adequate remedy.

The appellate structure

13. Section 100 of the Act provides that one or more of the parties to a dispute may appeal the determination of an adjudicator to the Tribunal, with an appeal to the High Court on a point of law. Briefly the procedure is as follows: the adjudicator prepares a report which is served by the Board on each of the parties to the dispute, and the Board is directed by the legislation to include a statement in terms of s. 99(4) which I will quote in full:

> *"That statement is one to the effect that the Board will follow the procedures under section 121 (which concerns the making of determination orders) in relation to the determination of the adjudicator unless, in the case of a determination under section 97 (4) (a) an appeal is made under, and in accordance with section 100 against the determination and that appeal is not subsequently abandoned".*

14. Section 21 provides that the report of an adjudicator shall be the subject of a written record, referred to in the Act as "a determination order" which shall contain *inter alia* the terms of the determination, the nature of the evidence, disputed and agreed facts, a summary of the reasons for the determination, and of particular importance in this case, relevant particulars in relation to the conduct of the adjudication, including particulars in relation to the number and duration of the hearings heard by the adjudicator, the persons who attended any such hearing and any documents submitted to the adjudicator.

15. The report becomes the subject of a determination or decision by the Board unless the decision or determination of the adjudicator is appealed. The statutory scheme gives a peculiar degree of control to the parties to the process, in that either or both of them may by lodging an appeal under s. 100 of the Act against the determination of the adjudicator, prevent the adjudicator's decision having legal effect, and the report of the adjudicator does not crystallise into a decision if an appeal is lodged. This appellate structure is somewhat different from that operating in the civil courts, and it is not so much that an appeal acts as a stay, rather the appeal prevents the adjudicator's report having legal effect. This it seems to me offers considerable protection to a person dissatisfied with a decision of the adjudicator, and there is no requirement to seek a stay on the decision, nor could it be said that the existence of an unfavourable determination creates any form of imperative towards the decision at first instance.

16. On the lodging of an appeal the Tribunal itself hears the dispute and is entitled under s. 104(2) to hold one or more hearings for that purpose. Pursuant to s. 102(6) each of the parties shall be entitled to be heard at the hearing, to be represented and to present

evidence and witnesses. The Tribunal may require evidence to be given under oath, and witnesses may be cross examined. The hearing is in public and has many of the indices of a hearing before a court of law.

17. Should the Tribunal enter upon a hearing of a dispute by way of a reference under s. 94 it engages upon what might be described as a *de novo* hearing. I consider this to be clear from the provisions of s. 104(7) which provide that the Tribunal may have regard to the report of the adjudicator, and the absence of a statutory mandate means that it may disregard it entirely. Thus in no sense could it be said that an appeal to the Tribunal is, or takes the form of, a review or a limited appeal on a point of law or fact, and an appeal is a full rehearing. The Tribunal is not bound by the contents of the report of the adjudicator, and I further note that the Tribunal hearing an appeal would have had the full report and not merely the decision, or the determination, and it will be aware for example whether the parties were legally represented, whether certain matters were omitted from the hearing that might later have come to seem relevant, that documentation was not produced, and as a result the Tribunal has available to it the means of entering upon a hearing that can deal with any complaints as to the conduct of the adjudication hearing.

18. Accordingly I consider that the appellate structure offers a robust and transparent means by which a person dissatisfied with a determination by an adjudicator may seek redress, and that the appeal can be utilised to deal with many types of complaints, including those more traditionally dealt with on review relating to the conduct of a hearing, or the nature of the remedy.

19. Ms Teniola argues that the statutory mechanism gives the parties the advantage of a two stage process, and that two hearings are envisaged. It cannot be doubted that there has already been one hearing, and that on appeal the statutory process of a full oral hearing before the Tribunal will fall into place. The process it seems to me gives the parties the opportunity to attend two hearings, and Ms Teniola did have the opportunity to attend and did in fact attend at the first hearing before the adjudicator. The right is a right to an opportunity to be heard, and Ms Teniola was not denied that right. What she seeks in essence is more than the law permits, an opportunity to have a fresh hearing when she chose not to engage with the first hearing notwithstanding that she had opportunity to do so. At the hearing before the adjudicator Ms Teniola had an opportunity to but chose not to adduce any documentation, and I take the view that, while the documents might as she said have been left with her solicitor, she must have been aware that she needed more than one copy of documents for the hearing, and it strikes me as unlikely that she would not have kept copies. I return later to this question.

20. There would have been available for the Tribunal on an appeal the full report of the adjudicator and I have considered the contents of the report in the light of the concern articulated by counsel that the appeal would be tainted by the report. The report identifies the claim of arrears of rent, that the tenant fell into arrears shortly after the commencement of the tenancy, that an indulgence in the arrears was agreed, and the stated amount of the arrears at the date of the hearing. Ms Teniola says she felt obliged to attend the hearing, but that she had no "comments" to make as her solicitor was unavailable. When asked by the adjudicator she said she did not have any details of the rent paid and she said any material was with her solicitor. Thus it seems to me that the reasons given by Mr Brady for his determination, namely that the rent had fallen into arrears, that the tenant had been advised of this, and on previous occasions time had been allowed to the tenant to deal with the arrears, and that a valid notice of termination had been served, are all clearly set out in the report, and each could fully and adequately have been dealt with by the Tribunal on an appeal. Documentation could have been adduced with regard to arrears of rent, the applicant could have been legally represented, and calculations could have been redone. There is in those circumstances no risk that, as was put by counsel for the applicant, the decision of the Tribunal would be tainted by an error or frailty in the decision of the adjudicator, if such there be. The errors identified for the purpose of this argument are not errors of jurisdiction, nor errors of process, but of factual matters each of which could have been corrected on appeal.

21. Accordingly I reject the argument made by the applicant that the statutory appellate structure was likely to result in unfairness at the appeal stage, arising from a taint of the appeal by the process and determination at first instance. I turn now to consider the complaints of unfairness in the conduct of the hearing, and whether these can be adequately dealt with on appeal, or whether judicial review is a more appropriate remedy.

The complaints

22. The applicant makes two classes of objections with regard to the course of the hearing. She says that she did not obtain a fair hearing, primarily because her solicitor was not present and that she sought an adjournment to a date which would facilitate his attendance. She also states that she had wished to present to the adjudicator certain matters with regard to the condition of the premises, presumably as she considered that the condition of the premises offered her a defence or partial defence to the claim of her landlords.

Application for the adjournment

23. The applicant does not deny that she received the letter of the 5th February, 2014 notifying her of the hearing date of 6th March, 2014. What she says rather is that her chosen solicitor was not in a position to appear for her on that date due to prior engagements, and that the failure to adjourn in those circumstances amounted to a denial of fair procedures. It seems that her solicitor, Mr Byrne, did make contact by phone with the Board on 4th March, 2014 and requested an adjournment, but was advised that ten days' notice was required if the matter was to be adjourned, and that this rule of practice would be departed from only in exceptional circumstances. Ms Teniola says she was unaware of the ten day period, but was aware that an application for an adjournment was required to be in writing. Neither Mr Byrne, nor Ms Teniola herself, sought an adjournment in writing but Ms Teniola attended at the hearing and in her grounding affidavit she says that she stated on three occasions at least that as her solicitor was not present, and as her solicitor had all relevant documentation which she wished to present at the adjudication hearing, that she felt that she could not "advance any meaningful response". She avers that she attended at the hearing as a matter of courtesy only, and that she did not feel that she was "given any adequate opportunity" to engage with the process.

24. Ms Teniola does not deny that she knew that her applications for an adjournment were required to be made in writing and offers no satisfactory explanation as to why she did not seek an adjournment in writing after she became aware on the 3rd March, 2014 that her solicitor would not be able to attend the hearing on the 6th March, 2014. The question of whether to grant an adjournment was not entirely a matter within the remit of Mr Brady, and this is clear from the notice sent out by the Board, and it is the Board itself through its secretariat that deals with the administration of the adjudicative process. Mr Brady avers to the fact that Ms Teniola did not make an application for an adjournment during the hearing and Ms Teniola does not say that she did. It seems to me, and without having to resolve any issue of disputed fact, that Ms Teniola did not apply for an adjournment at the hearing, and she does not now state on affidavit that she did, and she did not apply for an adjournment in writing at any time before the hearing. Her complaint is rather, that the hearing was not satisfactory as she could not fully engage.

25. I turn now to consider whether the refusal of Mr Brady to adjourn the matter to enable Ms Teniola to be legally represented was a denial of her rights to a fair procedure. The adjudicator has considerable flexibility in approach as is evident from s. 97 of the Act which enables him or her to offer assistance to the parties at stages in the process, and the legislation envisages that the

adjudicator would govern his or her process. I note also from the provisions of s. 97(5) that the adjudicator may look to whether certain procedural decisions by him would be of "practical benefit" to the parties and in respect to which he may offer assistance. This points to a legislative intent that the adjudication process be informal, and the adjudicator is given wide discretion with a view to achieving a degree of informality consistent with his obligation to arrive at an impartial result. The legislation must in my view be interpreted in such a way that the court ought not to require the degree of formality or process at the adjudication stage that would be afforded at the Tribunal appeal, or in a court. The discretion of the adjudicator on an application to adjourn the hearing must be seen in this context.

26. The applicant is a foreign national and English is not her first language. She does not state, however, in her grounding affidavit that she did not understand the procedures, evidence, arguments or submissions that were heard by the adjudicator, and indeed there is no reference in her grounding affidavit to any language or comprehension difficulty that she had, and the sole reference to her current personal circumstances are that she has been resident in Ireland since 2001 when she sought refugee status in the State as an unaccompanied minor. There is nothing before me then to suggest that Ms Teniola had difficulty in comprehending what was happening at the adjudication hearing, nor indeed the purpose and intent of the hearing. What she says rather was that she was not able to offer any "meaningful response" partly because her solicitor was not present, and also because her solicitor had all the relevant documentation. She offers no explanation as to why she did not have copies of the documentation, why she did not take the originals of the documentation from her solicitor when she knew he would not be in a position to assist her at the hearing, or why she did not seek to offer any evidence herself or any submissions with regard to the condition of the house, whether her rent was in arrears or whether the notice of termination was valid. Some of the questions that might have been raised at the adjudication involved legal analysis and some knowledge of the rights and obligations of the parties to the letting agreement, but most of them were matters of common sense in respect of which it is to be expected that Ms Teniola herself as the sole tenant of the premises had personal knowledge. Evidence from her for example with regard to the condition of the house, or that she was not in fact in arrears of rent, would of necessity have been evidence from her personally, whether through the production of documents, photographs or oral evidence of facts and circumstances.

27. In the letter dated the 5th February, 2014 which notified the hearing date, there was a considerable amount of assistance offered to the parties to a dispute as to how documentation might be submitted, including a facility for photographs to be submitted in hard copy or digital format, and it was indicated that the documentation would be copied to the adjudicator and to both parties. There was in bold print a direction to the parties not to submit original documents to the Board and a request that originals be brought to the hearing. From this it must have been clear to Ms Teniola that she would need at least two copies of any documents that she required to submit to the adjudicator for the purposes of the determination, and while she says that she left the documentation with her solicitor, it is unsatisfactory that she did not have available for the hearing copies and the originals of the documents which might have supported her case. She does not identify which documents were not available to her and for that reason I cannot ascertain whether these could have been necessary for the proper conduct of the hearing. Furthermore, Ms. Teniola attended her solicitor on 3rd March, 2014 only three days before the hearing, and after the ten day period for the lodging of documents had passed. It is clear from this fact that the unavailability of documents at the hearing arose from Ms Teniola's own failure to submit documentation to the Board in accordance with its requirements, and this failure did not arise as a result of her having left the documentation with her solicitor. The adjournment of the proceedings to enable the solicitor to attend would not have cured this defect and no explanation is offered by Ms Teniola for her failure to lodge the documentation, the absence of which she now avers was prejudicial to her defence.

28. I regard it therefore as significant that Ms Teniola did not lodge any documentation with the Board within the ten day time limit clearly set out in the notice. I also regard it as significant that she brought neither originals nor copies of any documents or photographs to the hearing, and her explanation that the documentation or evidence was with her solicitor is unconvincing. Of more significance is the fact that Mr Brady swears that Ms Teniola did not seek to have documents admitted into evidence at the date of the hearing, and this averment on his part is not contested.

29. I consider further that no document or class of document has been identified to me which might have been available at the adjudication hearing and the submission as to the absence of documentation is made in a generalised way. Accordingly I have not been able to identify a specific prejudice or unfairness from the failure to adjourn the adjudication hearing to allow for the production of documentation.

30. Ms Teniola does not argue that all parties to every type of dispute resolution are entitled to be legally represented, and such a proposition would have far reaching consequences. What she says rather is that she chose to be legally represented and that in such context the hearing was flawed. There was no inequality of arms, and the landlords were not legally represented. I am not persuaded that she has shown any prejudice from her lack of legal representation and she has identified no factual matrix which might have raised issues requiring legal argument or even cross examination.

31. The matter, however, goes further than that, and Ms Teniola in her grounding affidavit made it clear that she was prepared to deliver up vacant possession, but that she wished to have her deposit refunded before or at the time she vacated the premises so that she could fund a deposit on alternative premises. This is precisely what she achieved by the determination, and Mr Brady made an order for the delivery of possession and directed the refund by the landlords of the security deposit "on gaining vacant possession of the above dwelling". I can find no merit in the complaint of unfairness in these circumstances where Ms Teniola has achieved precisely what she sought, and I fail to see how the presence of her solicitor could have achieved more than that desired result.

The condition of the premises

32. The argument that Ms Teniola makes on the merits of the case, namely that the condition of the dwelling was unsatisfactory, and not in compliance with the covenants on the part of her landlord, were arguments that she could have advanced personally as they were matters particularly within her own knowledge, and she was in a position at the hearing to either make argument or adduce oral evidence with regard to such complaint. I conclude that Ms Teniola chose not to adduce any such evidence or to make any argument with regard to the condition of the premises, and to borrow her own words she did not "advance any meaningful response". Whatever argument might have been made by any lawyer acting for Ms Teniola at the hearing of the adjudication with regard to the condition of the premises, she herself would have to have given evidence and her evidence would have been critical for the determination of the issue. The matters of which she complained might well have arisen from an alleged breach of covenant by the landlords, and whether this offered her a remedy or a defence to the claim for possession is a question of law, but the factual basis on which such an allegation could be made are matters of no great difficulty and also within her direct and personal knowledge.

33. Ms Teniola complains that the adjudicator's report makes no reference to the difficulties she was having with the condition of the house but nowhere in her affidavit does she say she mentioned a complaint at the adjudication with regard to the condition of the house, nor that she gave any evidence or produced any documentation with regard to such complaint. The combined effect of what Ms Teniola says is that she attended at the hearing, she did not engage with the process, she tendered no evidence, made no submissions and made no compliant with regard to the calculation of the rent, the state of the premises, or with regard to any matter

before the adjudicator save for one critical and central question which was before the adjudicator, namely the question of the termination of the tenancy. I turn now to consider the importance of the adjudicator's decision on this critical question.

The termination of the tenancy
34. Ms Teniola accepts in her affidavit that would leave the premises but that she wanted a refund of her security deposit. Indeed she says:

> *"I say that if they wanted me out, of course I would leave, I just wanted my deposit back in order to secure new accommodation. Both the notice parties and the first named respondent indicated a view that his was not possible."*

35. The matters before the adjudicator were the question of arrears of rent and the termination of the tenancy, which of itself would include a question of the return of the security deposit. The adjudicator determined that the tenancy had been properly terminated, and the tenant offered no evidence with regard to the payment of rent. Thus it seems to me that any argument that is made by her counsel with regard to a failure of the first respondent to engage with the question of the arrears of rent is unsustainable. Furthermore I consider that any frailty in the decision of the first respondent with regard to the calculation of rent, could have been fully dealt with on appeal.

36. The decision of the adjudicator was that Ms Teniola would receive a refund of her security deposit on giving vacant possession, and the premises were directed to be delivered up by the tenant within 14 days of the date of issue of the determination order by the Board. I return later to the practical effect of such a determination, but I note, however, that the arrears of rent as calculated by the adjudicator were directed to be paid by instalments on the 28th day of each month until such time as the amount calculated was paid in full. The adjudicator did not permit the landlords to set off the amount of the deposit against the arrears, and the payment of the arrears was deferred over a period of four months, payment to be made by three equal instalments, with the final payment on the 28th day of the month immediately succeeding the last of such three monthly equal payments. The adjudicator it seems to me dealt fully with the matters put before him by Ms Teniola, namely her desire for a refund of her deposit in exchange for vacant possession, and although Ms Teniola did not have a solicitor present she was not prejudiced in regard to this question, as she herself made clear submissions to what she wished to achieve, her willingness to leave the premises, and her request for the refund of her security deposit. The matter not resolved, it seems, to her satisfaction was a matter not raised by her in correspondence before the hearing, nor at the hearing itself, namely the question with regard to the condition of the premises, and the precise quantum of the arrears of rent.

37. An applicant for judicial review must show that the statutory appeal mechanism would not have cured an identified defect, and in this case not only was no defect identified to me in the final determination, but the sole matter stated not to have been resolved was one not canvassed at all before the hearing, or in pre-hearing documentation or submissions, namely the condition of the premises. The purpose of the statutory scheme is to enable a cost effective, relatively informal and speedy resolution of disputes with regard to residential lettings, and were I to grant review of the determination made in this case on the grounds that the adjudicator failed to have regard to the condition of the premises, I would be ignoring not merely the statutory scheme, which has the benefit of what I have already described as a robust appellate remedy, but also the rights of the notice parties to be heard on all matters in dispute. Such a result would be wrong and untenable.

Error on the face of the report and determination?
38. Counsel for the applicant identifies what he says is an error in the determination, namely that the direction for the refund of the deposit is not unconditional in that the landlords were permitted to deduct "any amounts properly withheld in accordance with the provisions of the Act". It is argued that this phraseology is ambivalent or uncertain. Ms Teniola was given an opportunity to pay the arrears of rent found to be due by the making of three consecutive payments commencing on the month after the issue of a determination order by the Board, with the balancing payment to be made on the fourth consecutive month, and I consider that on no reasonable interpretation of the determination could it be said that the landlords were entitled to withhold the security deposit pending the discharge of these arrears, as the direction clearly required them to repay the security deposit on the gaining of possession which was clearly anticipated as being a date several months before the final instalment of the arrears is paid. Thus the sums that could be deducted must be those identified in s. 12, such sums as are found to be due on an inspection at the time possession is delivered, in itself an amount not capable of being ascertained before that date.

39. Furthermore, if there is a lack of clarity in the determination with regard to what amounts, if any, could be deducted from the security deposit by the landlords, such could readily have been rectified by an appeal to the Board or by an appeal confined to that issue. I also consider that Ms Teniola could have availed of the provisions of s. 21(3) which permits the Board to remove any ambiguity in a determination, and Ms Teniola might have availed of this procedure to seek clarity as to the amount, if any, that could lawfully be set off by the landlords from the security deposit.

Criminal sanction
40. Counsel for the applicant also makes the point that judicial review is more apposite in a case where a criminal sanction can lie for breach. The availability of a criminal sanction for breach of an order by the Board is clear in s. 126 but it is equally clear that any criminal sanction arising from breach of an order would lie against the landlords for failure to return the security deposit or against Ms Teniola for failure to deliver up possession. Given that she has indicated in her affidavit that she was prepared to deliver up vacant possession in exchange for the security deposit, I do not consider that Ms Teniola was at any risk of imprisonment for breach of the order for delivery up of possession. I also consider that even if Ms Teniola did face criminal sanction for failure to pay the arrears of rent as calculated, this is a matter well within her control, and nowhere has she stated on affidavit or before the adjudication hearing that the rent arrears were not due by her.

Bias
41. The applicant also claims that Mr Brady exhibited a degree of bias in that he engaged in conversation with the notice parties/landlords at a time when the applicant was not present in the room. I can deal shortly with the plea of bias. There is nothing before me that could lead me to a view that there was any degree of objective bias in this case. The law is well established, and the person who argues bias must show that a deciding body had a proprietary or personal interest in the case or some external factor is identified that gives rise to a perceived bias. The bias that is contended for by counsel for the applicant is governed by law as stated in U*SK and District Residents Association Ltd v. An Bord Pleanala and Ors* [2009] I.E.H.C. 346 by MacMenamin J. at para. 22 as follows:-

> *"Objective basis is to be distinguished from subjective bias. To establish the former, it must be shown that there existed some factor, extraneous to the decision-making process, which could give rise to a reasonable apprehension that the decision-maker might have been biased."*

42. What the applicant alleges is that there was a conversation between the adjudicator and the notice parties at the end of the hearing. It is asserted by her counsel that this conversation gave the appearance of the absence of fair procedure and that justice was not seen to be done. No factor has been identified by Ms Teniola in her affidavit which would suggest any extraneous factor operating or likely to be operating in the mind of Mr Brady, nor was she in a position to point to any particular association or involvement of Mr Brady with the matter that might have influenced his decision. At best, and taking the case of the applicant at its height, she has identified that a conversation may have taken place between Mr Brady and the notice parties for a short period of time after the hearing before he gave his determination. She can identify no factor which would suggest that objective bias in the sense identified by the court in *USK and District Residents Association Ltd v. An Bord Pleanala and Ors* could be said to exist.

43. Accordingly the claim of bias must fail.

Decision

44. For the reasons stated it seems to me that the application must fail at the first hurdle and that the applicant is not entitled to seek judicial review of the decision of the adjudicator in this case, she having failed to establish any basis on which any such appeal might not have dealt fully with her stated defence to the overholding proceedings and/or her stated complaint that she was refused an adjournment and required to conduct the hearing without the presence of her chosen solicitor. The complaints made were to some extent complaints of absence of jurisdiction or fairness, classic judicial review complaints, but each of them were capable of being adequately dealt with at an oral hearing before the Tribunal in the course of a statutory appeal under s. 100, and the applicant has not established to my satisfaction that any of her complaints were of such a fundamental nature that they could not have been addressed and if necessary rectified on appeal.

45. Therefore I refuse the relief sought.