Neutral Citation Number: [2010] IEHC 270

THE HIGH COURT

JUDICIAL REVIEW

2009 823 JR

BETWEEN

CHRISTINE QUINN

APPLICANT

AND

ATHLONE TOWN COUNCIL, IRELAND,

AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

Judgment of Mr. Justice Hedigan delivered on 8th of July 2010

1. These proceedings concern a challenge to s. 62 of the Housing Act 1966 ("the Act of 1966"), as amended by s. 13 of the Housing Act 1970. The applicant makes the case that the said section is incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and that it is invalid having regard to the provisions of the Constitution. At the hearing of this case on the 20th April, 2010 three preliminary points were raised by the respondents. This judgment deals with these preliminary points.

2. Mr. Collins S.C., counsel for the second and third named respondents, contended that the proceedings before this Court were fundamentally misconceived by reason of the fact that the applicant was challenging the procedure under the Act of 1966 in the District Court and the summons issued by the District Court. He submitted that she should have been challenging the notice to quit upon which those proceedings had been based. Two preliminary issues based upon delay and acquiescence were raised by Ms. McDonagh S.C., for the first named respondent. Her preliminary objections were supported by Mr. Collins. His preliminary objection was supported by her. Ms. McDonagh submitted that the applicant had delayed in instituting these judicial review proceedings and she also argued that the applicant had acquiesced, as she had participated in the proceedings in the District Court, and for this reason the discretionary remedy of judicial review ought not be made available to her.

The Parties

3. The applicant is a local authority tenant and resides at 27 Brawney Square, Athlone with her two children, David (12 years old) and Tyler (9 years old). A notice to quit was served on her on the 25th September, 2008. An ejectment summons issued against her in the District Court on the 7th January, 2009.

4. The first named respondent is a local authority which has, *inter alia*, a housing function, in that it provides housing to persons in need of housing who cannot afford it from their resources.

5. The third and fourth named respondents were joined to this action as a constitutional challenge was being made to s. 62 of the Act of 1966. As a challenge was being made on the basis of the European Convention on Human Rights Act 2003, the notice party was joined to the proceedings, though it was not represented at the hearing.

The Facts

6. A notice to quit was served on the applicant on the 25th September, 2008. Based upon this notice an ejectment summons issued in the District Court on the 7th January, 2009. The case was made returnable in the District Court for the 6th February, 2009. On that date the matter was adjourned until the 18th March, 2009 on which date counsel for the applicant applied to have the matter adjourned pending the outcome of *Dublin City Council v. Gallagher* [2008] I.E.H.C. 254. On the 3rd July, 2009 the District Judge refused the application to adjourn the proceedings. The District Judge proceeded to conduct a hearing on the merits of the case, in contravention of the terms of s. 62 of the Act of 1966, on the 15th July, 2009. Judicial review proceedings were instituted by the first named respondent on the 27th July, 2009 to compel the District Court to hear and determine the matter. An order to this effect resulted. The applicant instituted these judicial review proceedings also on the 27th July, 2009.

The failure to seek judicial review of the notice to quit

7. Mr. Collins submitted that the act which set in motion all the alleged breaches of the Convention was the service of the notice to quit on the 25th September, 2008 and that this is the date from which time should be calculated to run pursuant to O. 84, r. 21(2) of the Rules of the Superior Courts 1986. He contended that this was clear from a reading of the judgment in *Dublin City Council v. Fennell* [2005] 1 I.R. 604 in which the same process was examined by the court. He referred, in particular, to the following passage at pp. 638-639 of the judgment of Kearns J., as he then was:-

> *"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 Mr. Collins' submission, the above comments of Kearns P. formed part of the ratio of the decision, as the Court had to determine at what point rights were engaged in order to determine the retrospectivity issue before the Court. He further submitted that the following passage from the judgment of this Court (Irvine J.) in *Pullen v. Dublin City Council* [2008] I.E.H.C. 379 followed the approach in *Fennell*:-

> *"The decision to terminate the plaintiffs' tenancy was not solely or exclusively concerned with the immediate repossession of property, thus confining the effects of that decision to potential Article 8 violation, but it also determined the rights of the plaintiffs in other respects, such as their rights to a number of statutory entitlements which are referred to at p. 18 of the statement of claim. The decisions in Bryan, Begum, Tsfayo and Leonard together with those in Salesi, Mennitto and Kurzac all are suggestive of the facts of the within case engaging those rights provided for in Article 6.*
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> *The civil rights and obligations of the plaintiffs flowed from the tenancy agreement they enjoyed with the defendant. The determination made by the defendant that the plaintiffs were guilty of anti-social behaviour, even without the defendant obtaining an order for possession, was one which altered or potentially altered the plaintiffs' future entitlements referable to housing and also to certain social welfare benefits as identified at ss. 14 – 16 inclusive of the Housing (Miscellaneous Provisions) Act 1997. Further, their eviction for breach of the covenant against anti-social behaviour has resulted in the plaintiffs being deemed to have rendered themselves deliberately homeless, within the meaning of s. 11(2)(b) of the Housing Act 1988. In addition, the plaintiffs' right to their good name and reputation was impugned. Neither in the course of the process leading up to the decision that the plaintiffs were guilty of anti-social behaviour nor in the process of the eviction procedure were the plaintiffs afforded 'an independent and impartial' hearing before a 'tribunal established by law', in which they could protect their civil rights by disputing such finding or the proportionality of the decision to obtain a warrant for possession."*

8. Mr. Collins noted that the judgment of Laffoy J. in *Donegan v. Dublin City Council* [2008] I.E.H.C. 288, upon which the applicant relied, was under appeal and he argued that it did not enjoy the same status as the *Fennell* judgment, which was a binding authority on this Court. In any event he submitted that the approach adopted by Laffoy J. in Donegan was incorrect. By not challenging the notice to quit, he argued that the applicant was asking the Court to treat of matters that it should not and which would be inconsistent with the Supreme Court judgment in *Carmody v. Minister for Justice* [2009] I.E.S.C. 71. The applicant, he submitted, should have attacked the decision of the local authority but chose not to do so.

9. Mr. Simons submitted that the Convention issue was raised by the applicant at an early stage of the proceedings in the District Court. He noted that her counsel had applied for an adjournment of the case in the District Court on the 18th March, 2009, pending the judgment of this Court in *Dublin City Council v. Gallagher* [2008] I.E.H.C. 354 and that this application was ultimately refused in the District Court in a ruling of the 3rd July, 2009. Time should run from this date, he submitted or from the 15th July, 2009, the date upon which the hearing on the merits was embarked upon by the District Court.

10. Mr. Simons sought to distinguish *Fennell* on the basis that the issue before the Court in that case was one of statutory interpretation of national legislation *i.e.* did the European Convention on Human Rights Act 2003 ("the Act of 2003") have retrospective effect? On the facts of that case, he noted that proceedings had been instituted in the District Court and had been appealed to the Circuit Court and that in the interim the Act of 2003 came into force. It was held that the Circuit Court was not obliged to apply the Convention. Therefore, in his submission, the Supreme Court was not tasked with deciding when the point of engagement of Convention rights arose, only whether the Act of 2003 applied to the proceedings in being. Strictly speaking, he submitted, the comments of Kearns J. regarding the question of when rights were engaged were *obiter dicta*. Mr. Simons pointed out to the Court that Mr. Collins' argument, based on the notice to quit, was not raised in any of the previous cases which challenged s. 62 of the Act of 1966.

11. Mr. Simons relied on the approach of Laffoy J. in *Donegan v. Dublin City Council* [2008] I.E.H.C. 288 who determined, expressly following *Connors v. United Kingdom* (2005) 40 E.H.R.R. 9, that the act of eviction was the time at which the interference with a person's rights under Article 8 occurred. This supported the view, he contended, that the notice to quit is not the act which engages Article 8 rights. He further argued that the Irish and Strasbourg jurisprudence established that an applicant was entitled to bring a challenge prior to the time the actual interference with his or her rights occurred.

Delay

12. Ms. McDonagh submitted that the applicant was aware from at least the date upon which the notice to quit was served on the 25th September, 2008, that the first named respondent intended to invoke s. 62 of the Act of 1966 and she referred to the precise terms of the notice to quit in this regard. However, she noted that the applicant did not seek leave to institute judicial review proceedings until the 27th July, 2009. She submitted that O. 84 of the Rules of the Superior Courts 1986 provided that declaratory relief must be sought within 3 months and that *certiorari* must be sought within 6 months of the grounds for the application first arising.

13. Ms. McDonagh submitted that no grounds had been advanced by the applicant supporting an application for an extension of time and this Court should not exercise its discretion to do so as a result. It was clear from the decision of the Supreme Court in *De Róiste v. Minister for Defence* [2001] 1 I.R. 190, she submitted, that matters which should be taken into account by the Court when exercising its discretion to extend time include: (i) the nature of the order sought; (ii) the conduct of the parties; (iii) the effect of the order under review on other parties; and (iv) public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished. She contended that her client had been prejudiced by the delay, in that her client had been compromised in fulfilling its statutory duty to manage its housing stock and to make arrangements for the accommodation of a large number of applicants. She also submitted that third parties had been prejudiced by the delay as continuing allegations of intimidation by the applicant in the area had been made as late as March of this year.

14. Mr. Simons argued that the approach his client took in seeking an adjournment pending the outcome of the case in *Dublin City Council v. Gallagher* [2008] I.E.H.C. 354 was correct. Time did not run against his client until that application to adjourn was refused on the 3rd July, 2009. Even if the date was taken to be the 15th July, 2009, the date on which the District Judge proceeded to

conduct some type of hearing on the merits, the applicant was, in his submission, still within time. As judicial review is a remedy of last resort it would be harsh to impose a technical approach on this issue, he submitted. The issue of delay, he contended, was inextricably linked with the substantive issues which arose in the case concerning the compatibility and/or invalidity of s. 62 of the Act of 1966. He characterised the wrong in the instant case as being an ongoing one, to which the usual time limits in O. 84 of the Rules of the Superior Courts 1986 did not apply. He relied on the judgment of the Supreme Court in *B.T.F. v. Director of Public Prosecutions* [2005] I.E.S.C. 37 in support of the contention that the issue of delay cannot be separated from the substantive issues which arose in the case.

15. Should the Court find that the applicant was out of time, however, Mr. Simons indicated that he would apply for an extension of time. In this regard he highlighted the following factors that should be taken into account by the Court when exercising its discretion: the fact that this is an ongoing matter; the importance of the matter for the applicant; the absence of prejudice on the part of the local authority by the delay and that if the correct date from which time runs is the issuance of the summons then only a short delay arises, meaning that it would be unduly harsh to throw the applicant's claim out on the ground of delay.

16. As to the applicant's reliance on the case of *B.T.F. v. Director of Public Prosecutions* [2005] I.E.S.C. 37 Mr. Collins submitted that the circumstances of that case, involving a motion from the D.P.P. alleging applicant delay in a sexual abuse case, were wholly different, the Supreme Court being reluctant to rule on the issue of delay in isolation. In this case, he submitted, the matter had come on as a full trial with all relevant evidence before the Court.

Acquiescence

17. Ms. McDonagh made the case that the applicant had acquiesced in participating in the District Court proceedings on the 15th May, 2009 and that judicial review should be refused on this basis. The applicant had, she stated, taken the stand and given evidence in the District Court that she was involved in acts of anti-social behaviour but now wished to challenge that procedure. She submitted that the applicant could have opted to bring judicial review procedures and then sought a stay on the proceedings in the District Court but she did not do so, instead the applicant chose to continually adjourn the matter. Ms. McDonagh relied on the decision of McKechnie J. in *MQ v. Judges of the Northern Circuit* 2001 13 J.R. wherein he decided not to exercise his discretion to grant judicial review by reason of the applicant's acquiescence.

18. Mr. Simons made the case that acquiescence implied that there must be a knowing waiver of a right. He submitted that he could not identify such a waiver on the part of the applicant. In contrast, the applicant was, in his submission, asserting her rights. He contended that the Convention point was raised as early as the 18th July, 2009 and that any suggestion that his client waived her rights because she participated in the District Court process was incorrect as she had not acted in an unequivocal manner, as was required to demonstrate acquiescence. The District Court had never made a binding determination. He submitted that acquiescence could only arise where such a determination.

The Decision of the Court

19. As to the first preliminary point raised regarding the failure of the applicant to challenge the notice to quit, I am satisfied that I am bound by the decision of the Supreme Court in *Dublin City Council v. Fennell* [2005] 1 I.R. 604. In my view, the passage from the judgment of Kearns P. at pp. 638-639, as set out at paragraph 7 above, forms part of the *ratio* of that decision by reason of the fact that the Court, in that case, had to establish the point in time when the legal rights of the applicant were engaged for the purposes of determining the retrospectivity issue which was the main issue with which the Court was grappling.

20. It is to be noted that the decision to serve a notice to quit is made by the local authority only after it has concluded that the tenant has breached the terms of his or her tenancy *e.g.* has been guilty of anti-social behaviour. The tenancy is then terminated by a series of almost automatic steps during which no provision exists for any form of inquiry into the merits of this decision by the local authority.

21. In the context of possible eviction from one's home it is clear from the jurisprudence of the European Court of Human Rights that a person should be afforded certain procedural guarantees. In particular, a person should be given an opportunity to confront the case against him or her and be given an opportunity to answer that case. Such a hearing ought to be before an independent and impartial tribunal which accords to the person affected a fair hearing, replete with all appropriate safeguards of fair procedures. In the case of *McCann v. United Kingdom* (2008) 47 E.H.R.R. 40 at paragraph 50 the Court stated as follows:-

> *"The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Art.8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end."*

In the more recent case of *Cosic v. Croatia* (Application No.28261/06) (Judgment of the European Court of Human Rights of the 15th January, 2009) the Court reiterated this point as follows:-

> *"21 …the guarantees of the Convention require that the interference with an applicant's right to respect for her home be not only based on the law but also be proportionate under paragraph 2 of Article 8 to the legitimate aim pursued, regard being had to the particular circumstances of the case. Furthermore, no legal provision of domestic law should be interpreted and applied in a manner incompatible with Croatia's obligations under the Convention (see Stanková v. Slovakia, cited above, § 24).*
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> *22. In this connection the Court reiterates that the loss of one's home is a most extreme form of interference with the right to respect for the 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 of the Convention, notwithstanding that, under domestic law, his or her right of occupation has come to an end (see McCann v. the United Kingdom, no. 19009/04, § 50, 13 May 2008)."*

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. This view of events

is in accordance with the judgment of Irvine J. in *Pullen v. Dublin City Council (No. 1)* [2008] I.E.H.C. 379 and in *Fennell* (above). The applicant in this case did not move to challenge the decision taken by the local authority. Instead she waited until the 27th July 2009 to challenge the procedure under s. 62 of the Act of 1966. She did not challenge, in the words of Kearns J as he then was, the act which "*triggered the provisions, requirements and consequences of s. 62 of the Housing Act 1966* … [and] *determined the applicable law and the position of the parties*."

23. As to the application on the applicant's part to have time extended, no convincing reasons have been advanced by the applicant in support of this application. The applicant chose to go to the District Court, to participate in those proceedings and await the result thereof. It is incumbent on local authorities to deal with allegations of anti-social behaviour very quickly, albeit in accordance with fair procedures. The lives of neighbouring people, if there is truth in allegations of anti-social behaviour, are profoundly affected. The tensions and stress generated by various forms of anti-social behaviour can make life a misery for those neighbours. The local authority owes a duty to those persons also. There must be no delay in dealing with these matters either on the part of the local authority or those persons in the position of the applicant herein. In the light of this conduct of delay by the applicant and the issue at stake here, which is linked closely with the interests of third parties, the court cannot extend the time limited to bring these proceedings.

24. Moreover, in relation to the claim of acquiescence, it is clear on the evidence that the applicant fully participated in the District Court proceedings. On this ground also it would not be appropriate to grant the reliefs sought in the within proceedings.

Conclusion

25. In summary, I find that the applicant ought to have challenged the notice to quit, that she delayed in instituting the within judicial review proceedings, that she has not demonstrated adequate reasons for the relevant time limits to be extended and she acquiesced in the proceedings adopted by the first named respondent by participating in the District Court hearing. The application is refused.