Neutral Citation Number: [2010] IEHC 67

THE HIGH COURT

2008 1348 JR

Peter Neville

Applicant

And

South Dublin County Council

Respondent

JUDGMENT of O'Neill J. delivered the 19th day of March 2010.

1. Relief sought

1.1 Leave was granted to the applicant by this Court (MacMenamin J.) on the 1st December, 2008, to apply for, *inter alia*, the following reliefs by way of judicial review:-

> 1. A declaration that the actions of the respondent, its servants or agents as perpetrated against the applicant's domicile on the 26th November, 2008, were irregular and unfair and otherwise than in accordance with law.
>
> 2. An order of *mandamus* requiring the respondent to restore the applicant to the position he had been prior to the intervention of the respondent on the 26th November, 2008, or to provide him and his family with suitable accommodation.

2. The Facts

2.1 Dublin Corporation gave a tenancy to the applicant's parents on the 7th April, 1977, in a dwelling at 90 Killinardan Estate, Tallaght, Dublin 24, when the applicant was sixteen years old. The applicant and his siblings grew up there. In 1993 the respondent became the owner of the house by virtue of the provisions of the Local Government (Dublin) Act 1993. When the applicant's father died, the applicant's mother became the sole tenant. The applicant's mother died on the 28th January, 2003. At that time the applicant's brother, Patrick, was still living in the house. He persuaded the respondent that he was entitled to succeed to the tenancy under the then terms of its Scheme of Letting Priorities, as he established to its satisfaction that he had lived with his mother for five years prior to her death. His tenancy began on the 8th October, 2003, and he resided at 90 Killinardan Estate until he died on the 29th November, 2007.

2.2 In 2004 the applicant fled to the U.K. following an incident in which he discharged an illegally held firearm. Charges were brought against him in respect of this incident. He was returned to Ireland on foot of extradition proceedings. He pleaded guilty in the Dublin Circuit Criminal Court to the offences with which he was charged and was given a three year suspended sentence together with a twelve month probation bond on the 29th July, 2008. In his affidavit sworn on the 1st December, 2008, the applicant avers that he had been living at 90 Killinarden Estate since his return from the U.K. in or about December 2006 with his daughter and her child.

2.3 On the 20th of September 2007, some weeks prior to his brother's death, the applicant made an application for housing to the respondent. His application form indicated that he was single, homeless and sleeping rough. In his application he stated that his last permanent address was Stockport, Manchester and that he left there in July 2007. He gave 90 Killinarden Estate as his contact address. In the section for dependants he made no mention of his daughter or granddaughter. In the Assessment for Rent Form completed by Patrick Neville on the 28th day of November 2007, the day before his death, there is no mention of the applicant or his daughter or granddaughter living at 90 Killinarden Estate. However, at para. 4 of the second affidavit of Yvonne Dervan, Senior Executive Officer of the Housing Department of the respondent, sworn on the 22nd April, 2009, it is accepted that the respondent became aware that the applicant was living in the house with his brother, Patrick, in late September 2007. The applicant's application for housing was later deemed withdrawn, the applicant having failed to respond to a letter of the respondent dated the 19th September, 2008, requesting him to contact the Housing Allocations unit within ten days. Notwithstanding the fact that he was clearly not the tenant, the applicant completed the Rent Assessment Form in September 2008 purporting to be the tenant, but he did not include his daughter or granddaughter as living with him in 90 Killinarden Estate. He explains this omission in para. 6 of his affidavit sworn on the 11th March, 2009, as follows:-

> *"6. … Further to the fact that I did not include my daughter and grand daughter on the form as I was in dispute at the time with Wendy's [the applicant's daughter] mother as to where she should live, I explained this situation orally to the representatives of the Respondent and it was accepted. I reject the insinuation that I did not fully disclose my situation to this Court. Wendy was coming and going from the house from about February and March but moved into the house on a fulltime basis thereafter."*

2.4 Following the death of his brother, the applicant applied to the respondent to succeed to the tenancy. Representations were made to the respondent by public representatives on behalf of the applicant in December 2007 and in January 2008. This application was refused by the respondent by letter dated the 8th February, 2008, and the applicant was requested to hand over possession of the dwelling on the 3rd March, 2008. In Ms. Dervan's, first affidavit sworn on the 28th January, 2009, she stated that the applicant was found to be not eligible to succeed under the terms of the Scheme of Letting Priorities, as adopted by the respondent on the 12th December, 2005 and approved by the Minister for Housing and Urban Renewal on the 20th December, 2006, as he had not established that he had resided in the house and been assessed for rent purposes for a two year period prior to his application to succeed.

2.5 The applicant's sister then wrote to the County Manager by letter dated the 26th February, 2008, to seek a

reconsideration of the respondent's refusal on compassionate grounds. The decision was reviewed but it was upheld. The applicant was advised by the respondent on the 31st March, 2008, to hand over possession of the dwelling. Letters containing the same direction were written to the applicant by the respondent dated the 2nd April, 2008, and again on the 9th April, 2008.

2.6 On the 2nd September, 2008, the applicant completed a Rent Assessment Form, as mentioned above. Since the death of his brother, he has continued to pay the weekly rent of €20, which was increased to €25, under the tenancy. The respondent says that this payment was treated by them as mesne rates and that the rent payable had been assessed by reference to the income of the applicant's brother Patrick Neville only.

2.7 Upon receiving the applicant's application for housing the respondent had contacted the gardaí pursuant to s.15 of the Housing (Miscellaneous Provisions) Act 1997 for information of and concerning the applicant. On the 1st October, 2008, the gardaí confirmed to the respondent that the applicant had been convicted on the 29th July, 2008, for possession of firearms and ammunition. Paragraph 13 of Ms. Dervan's first affidavit outlines the course the respondent followed:-

> *"13. The Applicant, as evidenced by his aforementioned conviction, is a person who has engaged in anti-social behaviour and as he is not the tenant of the dwelling but is residing there without the Council's permission, the Council took steps to peaceably recover possession of the premises. The Council requested Superintendent Eamon Dolan of Tallaght Garda Station to direct any person found in occupation of the dwelling to leave the dwelling"*

2.8 On the 26th November, 2008, the respondent's Housing Allocations Support Officer, Mr. Kevin Tallon, accompanied by a member of An Garda Síochána, Garda Ian Sheedy and other employees of the respondent arrived at the 90 Killinarden Estate. There was nobody home at the time. Garda Sheedy removed a panel in the front door to gain access to the house. The group went in and secured the house by removing the front door and downstairs window and replacing them with steel plates. The applicant arrived on the scene and Garda Sheedy informed him that he was being directed to leave the dwelling in accordance with s.20 of the Housing (Miscellaneous Provisions) Act 1997 ("the Act of 1997"). The applicant maintains that downstairs windows in the house were broken when he arrived back, though the respondent denies this.

2.9 At para. 14 of her first affidavit Ms. Dervan says the following:-

> *"14. … I am informed by Kevin Tallon that while the house was in the process of being secured by Council employees the Applicant returned to the dwelling and was advised by Garda Sheedy that he was being directed to leave the dwelling in accordance with the provisions of section 20 of the Housing (Miscellaneous Provisions) Act 1997."*

2.10 The applicant is now staying with his sister. He seeks an order of mandamus requiring the respondent to reinstate him in 90 Killinarden Estate together with declaratory relief.

3. The Issues

3.1 The first issue to be determined is whether this dispute is properly a matter for judicial review? If so, the next question that arises is whether there was a proper application of s. 20 of the Act of 1997, and finally whether the respondents were obliged to have given the applicant a hearing in advance of taking the action they did?

4. Is this properly a matter for judicial review?

Counsels' Submissions

4.1 Counsel for the respondent, Ms. O'Farrell B.L., submitted that these proceedings are not an appropriate matter for judicial review as no issue of public law arises. She contended that the facts disclose that the applicant was a trespasser in the dwelling as he had not been granted permission to reside there and in such circumstances the respondent, as owner of the dwelling, was entitled to recover possession of it. No public law powers were exercised by the respondent, she argued, in excluding the applicant from the dwelling. Ms. Farrell relied on an *ex tempore* judgment of Keane C.J. in *Hunt v. City Council* (Unreported, Supreme Court, 13th May, 2004) which, she submitted, supported the view that these proceedings concerned a private law matter.

4.2 Mr. Kelly B.L., for the applicant, rejected the applicant's characterisation of these proceedings as a private law matter. He submitted that the decision of the respondent was amenable to judicial review in circumstances where it had acted pursuant to s.20 of the Act of 1997.

Decision

4.3 In *Hunt v. Dublin City Council* (Unreported, Supreme Court, 13th May, 2004) the applicant sought leave for a declaration that she had been unlawfully excluded from her house and an order of mandamus seeking re-instatement in her dwelling. Keane C.J. found that the facts disclosed that the local authority was, at all times, the owner of the house and that the applicant, a niece of the tenant who lived in the dwelling up until his death, did not enjoy a right to reside at the dwelling following his death. Keane J. concluded as follows:-

> *"In this case, the housing authority were dealing with a particular property, making it safe against intrusion and*

the claim made against them is that there was somebody who was lawfully entitled to be there. That is, in my view, purely a matter of private law as between the owner of the property concerned and the person whom the owner says has no right to be on the property, who is a trespasser and who never had any legal right to be in the property. That is, in my view, entirely a matter of private law and apart from the other considerations to which I have referred, make it clear that the applicant has not reached the threshold for judicial review in this case."

4.4 Clearly, in cases where a local authority is simply taking possession of property that they own against a trespasser there is no public law dispute. In such circumstances the local authority is not exercising a statutory function but merely exercising its rights as a landowner. In this case, however, the evidence adduced by way of affidavit makes it clear that the approach adopted by the respondent in this case was to evict the applicant pursuant to s.20 of the Act of 1997, on the grounds of anti-social behaviour on his part. In opting to exercise powers under this provision, the matter entered the public law realm.

5. Was there a proper application of s.20 of the Act of 1997?

5.1 Section 20 of the Act of 1997 provides for the removal of a person due to anti-social behaviour and states as follows:-

"20. – (1) Where-

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

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

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

(2) A person who does not comply with a direction under subsection (1) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500 or, at the discretion of the court, to imprisonment for a term not exceeding 12 months or to both.

(3) Where a person does not comply with a direction under subsection (1) a member of the Garda Síochána may arrest the person without warrant.

(4) For the purpose of arresting a person under subsection (3), a member of the Garda Síochána may enter (if need be by use of reasonable force) and search any place (including a dwelling) where a person is or where the member, with reasonable cause, suspects that person to be.

(5) This section shall not prejudice any power of arrest conferred by law apart from this section."

5.2 Section 1(1) of the Act of 1997 defines anti-social behaviour as either or both of the following types of behaviour:-

"(a) the manufacture, production, preparation, importation, exportation, sale, supply, possession for the purposes of sale or supply, or distribution of a controlled drug (within the meaning of the Misuse of Drugs Acts, 1977 and 1984),

(b) any behaviour which causes or is likely to cause any significant or persistent danger, injury, damage, loss or fear to any person living, working or otherwise lawfully in or in the vicinity of a house provided by a housing authority under the Housing Acts, 1966 to 1997, or a housing estate in which the house is situate and, without prejudice to the foregoing, includes violence, threats, intimidation, coercion, harassment or serious obstruction of any person;"

Counsels' Submissions

5.3 Mr. Kelly submitted that s.20 of the Act of 1997 does not authorise what the respondent has purported to do under its authority in this case. He submitted that the section may only be invoked where a person has actually been engaged in anti-social behaviour and where the gardaí have been approached to remove a person for this reason. He submitted that this case reveals a complete misapplication of this section as no evidence was put forward by the respondent which supported the proposition that his client was engaged in anti-social behaviour. He noted that in *Pullen v. Dublin City Council* [2008] I.E.H.C. 379 (Unreported, High Court, 12th December, 2008) this Court (Irvine J.) had outlined the grave effects of an eviction on the grounds anti-social behaviour on the person evicted. He contended that there was a requirement under Article 8 of the E.C.H.R, for a hearing before an independent tribunal to adjudicate on a person's eviction, as *per Connors v. United Kingdom* (2004) 40 E.H.R.R. 189; *McCann v. United Kingdom* (2008) 47 E.H.R.R. 40 and *Dublin City Council v. Gallagher* [2008] I.E.H.C. 354 (Unreported, High Court, O'Neill J., 11th November, 2008).

5.4 Ms. O'Farrell submitted that the respondent had requested the applicant to vacate the dwelling on numerous occasions prior to the 26th November, 2008, and that it was entitled to take steps to recover possession of its property by exercising its right to peaceful re-entry, which occurred on that date. Insofar as the applicant contended that he was categorised as having engaged in anti-social behaviour, it was submitted that the eviction was not on that basis.

Decision
5.5 Turning to the events as they unfolded on the 26th November, 2008, the question arises as to whether what was done by the respondent was an exercise by it of its rights as landowner *simpliciter* or were powers under s.20 of the Act of 1997 exercised? I am satisfied that the evidence establishes that the respondent's officials and the gardaí arrived at 90 Killinarden Estate on the relevant date with the intention of proceeding under s.20 of the Act of 1997. The applicant was not home at the time they arrived. The door was broken to enter the house and the respondent's officials set about securing the property. When the applicant arrived on the scene Garda Sheedy did give a direction under s.20 of the Act of 1997 to the applicant in advance of the respondent taking possession of the house. Bearing in mind that the respondent knew the applicant was living in the house and that they came prepared and armed to evict the applicant under s.20 of the Act of 1997 and Garda Sheedy did tell the applicant that he was being evicted under s.20 of the Act of 1997, thereby putting him in jeopardy of the penalties which would have ensued had he attempted to enter the house, in my judgement, the conclusion that the eviction was effected under s.20 of the Act of 1997 and was not a peaceful re-entry by the respondent as landowner, is unavoidable. It seems to me to be immaterial that the respondent could have exercised their rights as landowner and could have effected a peaceful re-entry. This is not what they intended to do nor is it what was done and cannot now *ex post facto* be deemed to establish the legal character of what happened.

5.6 No evidence has been adduced to the effect that the applicant was engaged in anti-social behaviour of the type described in s. 1(1) of the Act of 1997. Apart from an incident involving the discharge of an illegally held firearm which took place in 2004, there was no reference made to any anti-social behaviour on the applicant's part. On the contrary, the uncontradicted evidence on affidavit was that the applicant got on well with his neighbours and was a trusted key holder for his neighbours. It could not be said, nor indeed was it urged, that a conviction for an offence of a type different to that contemplated in s.1(1)(a), of itself, could amount to anti-social behaviour within the statutory definition of that term. Therefore, I am satisfied that the legal basis upon which the respondents purported to evict the applicant was invalid and *ultra vires* the Act of 1997 *simpliciter.* There was, as was submitted by Mr Kelly, a misapplication of the power given in s. 20 of the Act of 1997.

5.7 As it was the case that the respondent intended to proceed under s.20 of the Act of 1997, which necessarily involves a belief on the part of the local authority that a person is engaged in anti-social behaviour and that it was necessary in the interest of good estate management that this person be directed to leave the premises in question, an issue arises as to whether the respondent was obliged to notify such a person and provide them with an opportunity to be heard to challenge this belief, by virtue of the Constitution and the E.C.H.R.?

6. Was the respondent obliged to give the applicant a hearing?

Counsels' Submissions
6.1 Mr. Kelly submitted that the occupation of the house by the applicant attracted the right to respect for a person's home under Article 8 of the E.C.H.R., which encompassed the procedural right to be heard in respect of any purported eviction.

6.2 Ms. O'Farrell relied on the decision of the European Court of Human Rights in *Chapman v. United Kingdom* (2001) 33 E.H.R.R. 18 which established, in her submission, that when an individual is illegally occupying property that any rights that person has under Article 8 are weak. The rationale for this, she contended, was that if it were otherwise illegal behaviour would be encouraged. She submitted that the applicant must have been aware that he was in the house illegally as he was asked to hand over possession on several occasions. She further contended that the respondent had given the applicant a hearing at the time he made his application to succeed to the tenancy and that initial decision was reviewed at the request of the applicant's sister, but upheld. She argued that in such circumstances there was ample opportunity for him to be heard.

6.3 Ms. O'Farrell pointed out that Article 8 rights were not absolute and that the respondents were under a duty to manage their housing stock in accordance with their scheme of priority. She argued that the respondent could not allow people to take possession of any property they wished as this would result in unfairness to others waiting on the housing list. She submitted that if the applicant was correct that the respondent could be precluded from taking possession of the house by virtue of Article 8 rights, it would not be in a position to exercise its function as a housing authority. The height of the applicant's right under Article 8, she argued, was a right to be consulted and this was subject to the principle of proportionality. There is an obligation on the respondent to evict trespassers, in her submission.

Decision
6.4 Article 8 of the Convention protects the right of individuals to respect for their private life, family life and home. It states:-

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of the right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

6.5 Since July 2007 the applicant has probably been residing at 90 Killinarden Estate without the permission of the respondent though it had been aware of the applicant's presence there since the death of his brother. Whether a property can be regarded as a person's home for the purposes of Article 8 is a question of fact and does not depend on the lawfulness of the occupation of the person under national law. A recent example of this is the case of *McCann v. United Kingdom* (2008) 47 E.H.R.R. 40. Although the applicant's tenancy in that case in a house owned by Birmingham City Council had come to an end and he had been served with a notice to quit the property (his wife having signed a

notice to quit at the request of the Council) the case proceeded on the basis that the house continued to be his home within the meaning of Article 8 and the Court accepted this:-

> *"46 The Court has noted on a number of occasions that whether a property is to be classified as a 'home' is a question of fact and does not depend on the lawfulness of the occupation under domestic law (See, for example, Buckley v. United Kingdom (1997) 23 E.H.R.R. 101 at [54], in which the applicant had lived on her own land without planning permission for a period of some eight years). In the present case, it was found by the national courts and accepted by the parties that the local authority house which the applicant formerly occupied as a joint tenant with his wife and where he lived on his own from November 2001 continued to be his 'home', within the meaning of Art. 8(1), despite the fact that following service by the wife of notice to quit he had no right under domestic law to continue in occupation. The Court agrees with this analysis."*

6.6 It is to be observed that this approach is consistent with a recent judgement of the Supreme Court concerning the concept of the inviolability of a *"dwelling"* under Article 40.5 of the Constitution. At para 11. of his judgment, delivered on behalf of the Court, in the recent case of *The People (at the suit of the Director of Public Prosecutions) v. David Lynch* [2009] IECCA 31 Fennelly J. stated as follows:-

> *"In the Irish language version, the expression corresponding to 'dwelling' is 'ionad cónaithe'. The Court is satisfied that the question of whether a place is the 'dwelling' of a person for the purpose of this provision, at least in the context of the criminal law, is one of fact, a view reinforced by the Irish language version. It is at least quite obvious that the constitutional protection would extend to a wide variety of people with dubious legal titles, such as an overholding tenant, the widow of a deceased legal owner, or a person in bona fide possession on foot of an invalid title."*

6.7 In *McCann* the European Court of Human Rights went on to find that the interference with the applicant's Article 8 rights was in accordance with the law and it identified two legitimate aims which protected the rights and freedoms of others, that is, the right of the local authority to regain possession of its property against a person who had no right in contract or otherwise to be there and the duty of the local authority to ensure that the statutory scheme for housing was properly applied, thereby protecting the rights of intended beneficiaries under that scheme.

6.8 In assessing whether the interference was "*necessary in a democratic society*" that is, whether the interference answered a pressing social need and whether it was proportionate to the legitimate aim pursued, that Court noted that loss of a person's home was "*a most extreme form of interference with the right to respect for the home*" and that a person at risk of losing their home should, in principle, be entitled to have the proportionality of the measure assessed by an independent tribunal. It held that the respondent, in choosing to by-pass the statutory scheme which would have afforded the applicant an opportunity to make representations to the Court, by instead asking the applicant's wife to sign a notice to quit which had the effect of terminating the applicant's right to live in the house immediately, breached the applicant's rights and constituted a breach of procedural safeguards:-

> *"55 It is, for present purposes, immaterial whether or not Mrs McCann understood or intended the effects of the notice to quit. Under the summary procedure available to a landlord where one joint tenant serves notice to quit, the applicant was dispossessed of his home without any possibility to have the proportionality of the measure determined by an independent tribunal. It follows that, because of the lack of adequate procedural safeguards, there has been a violation of Art.8 of the Convention in the instant case."*

6.9 In the earlier case of *Chapman v. United Kingdom* (2001) 33 E.H.R.R. 18, upon which the respondent relies, the applicant, a Gypsy, had applied for planning permission to station caravans on lands she owned. Her application was refused and enforcement notices were then issued against her. The Court accepted that the decisions of the planning authorities and the enforcement measures taken against her constituted an interference with her Article 8 rights and that they were in accordance with the law and that they pursued the legitimate aim of protecting the rights of others by the preservation of the environment. In considering whether the interference with the applicant's rights was "*necessary in a democratic society*", the Court first noted the wide margin of appreciation the U.K. enjoyed in planning policy, in principle, and it then sought to determine whether the particular circumstances of the applicant's case disclosed a violation of her Article 8 rights. The Court identified the following as being a relevant consideration in determining whether the expulsion of the applicant from her home was necessary in a democratic society:-

> *"102 Where a dwelling has been established without the planning permission which is needed under the national law, there is a conflict of interest between the right of the individual under Article 8 of the Convention to respect for his or her home and the right of others in the community to environmental protection (See para.81). When considering whether a requirement that the individual leave his or her home is proportionate to the legitimate aim pursued, it is highly relevant whether or not the home was established unlawfully. If the home was lawfully established, this factor would self-evidently be something which would weigh against the legitimacy of requiring the individual to move. Conversely, if the establishment of a home in a particular place was unlawful, the position of the individual objecting to an order to move is less strong. The Court will be slow to grant protection to those, who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site. For the Court to do otherwise would be to encourage illegal action to the detriment of the protection of the environmental rights of other people in the community."*

6.10 The above passage illustrates but one of the matters the Court took into account in its consideration of whether there was a violation of Article 8, which it ultimately concluded that there was not. The issue in *Chapman* was whether the actual establishment, in the physical sense, by the applicant of her home on lands that were not considered to be suitable for that purpose was a violation of her Article 8 rights. It necessitated a balancing exercise to be undertaken between those rights and the rights of others to environmental protection. Similarly, in the earlier case of *Buckley v. United Kingdom* (1997) 23 E.H.R.R. 101, referred to by the Court in *Chapman*, the applicant gypsy had established her

home on her land without planning permission. There, the Court determined that national authorities were best positioned to evaluate local planning needs and that in that case the decisions taken by the planning inspectors to refuse planning permission to the applicant were taken by reference to proper and sufficient reasons. In both those cases the Court expressly stated that the regulatory framework in place contained adequate procedural safeguards, serving to protect the respective applicants' interests.

6.11 The evidence in this case establishes to my satisfaction that 90 Killinarden Estate was where the applicant's parents lived and where he lived with his parents and siblings. In 2004 the applicant fled to the UK and remained there until July 2007. There is no evidence of where the applicant lived and had his home prior to 2004. There is evidence that when the applicant's father died his mother succeeded to the tenancy and when his mother died in 2003 his brother succeeded to that tenancy on the basis that he had been living with his mother in the house for the requisite period of time. Implicit in all this is that the applicant was not living in the house in the years before he went to the U.K. The applicant, in his application for housing stated his date of birth as the 8th of December 1960. Thus, when he went to the U.K. he was 43 or 44 years of age and was 16 or 17 when his parents first went into occupation of this house. When the applicant's mother died the tenancy went to his brother Patrick with no mention of the applicant in that context. At no time since then was the applicant recorded as living in the house for rent assessment purposes. Shortly after the applicant was brought back to this jurisdiction in July 2007, i.e. in September 2007 he made his application to the respondent for housing on the basis that he was homeless and sleeping rough, although he did give 90 Killinarden Estate as his contact address. Implicit in this is the fact that he was not living in that house then. The only other inference that could be drawn from this is that his application for housing was made on a basis that was false. As noted earlier on the day before he died Patrick did not include the applicant or his daughter or granddaughter as living in the house on the Rent Assessment Form.

6.12 From all of this I infer that it is probable that the applicant was not living in this house before he went to the U.K. and on his return did not initially reside there but did take up occupation sometime late in 2007 probably in or around the time of Patrick's death. The position of the applicant's daughter and granddaughter is is equally problematic. The applicant avers that they were at all times material living with him notwithstanding the no mention of them was made in his housing application. He seeks to explain this by averring, as quoted above, that because of disputes with the mother of Wendy over where she should reside, that she was coming and going up to February or March and that she resided fulltime in the house thereafter. This averment makes all the more inexplicable the failure of the applicant to include his daughter and granddaughter on the Rent Assessment form which he completed in September 2007, representing himself as the tenant in the house.

6.13 All of this is relevant to the basis on which the applicant seeks to have engaged rights under Article 8 of the E.C.H.R. Prior to his brother's death the applicant may have had a short period of lawful occupation of the house, i.e. with his brother's permission. Subsequent to the death of Patrick his continued occupation could be said to be lawful up to the time that the respondent demanded possession of the house. Thereafter there can be no doubt but that he was a trespasser. I am not at all convinced that his daughter and granddaughter were ever *bona fide* resident in the house in the sense of it being their home. In all, the applicant was in the house for one year, approximately most of which was unlawful occupation.

6.14 As is said in the above cited cases from the European Court of Human Rights, whether a particular place is a home for the purpose of attracting Article 8 rights is a question of fact and is not determined by the legality of the occupation in question, though illegal occupation greatly weakens the basis for reliance on Article 8. In my judgement the nature and extent of the applicant's occupation of this house falls beneath the threshold for asserting that this house was his home for the purpose of engaging his Article 8 rights.

6.15 This conclusion alone would be sufficient to dispose of any claims made by the by the applicant in reliance on Article 8. Lest I am wrong in this and for the sake of completeness, I would express the following opinion on this claim.

6.16 Article 8 does not create an absolute right. Its second paragraph provides for interference with it in certain circumstances, as set out in Article 8.2 quoted above.

6.17 The eviction of the applicant in the first place was not in accordance with the law, as the respondent misapplied s.20 of the Act of 1997 and acted *ultra vires* in so doing. That being so, the first condition to justify an interference with an Article 8 right is not met. Furthermore, it could never be said that attempting to evict a person under s.20 of the Act of 1997 when there was not a proper legal basis for so doing served any legitimate aim or in a democratic society addressed any pressing social need, far less could it be seen as a proportionate action in these circumstances or necessary to protect the rights of others. The recovery of possession of the house in question so that it could be made available to those persons on the housing waiting list who were entitled to have it, is of course a legitimate aim and one which undoubtedly addressed a pressing social need and was calculated to protect the rights of others, but all of this is to no avail if the means chosen, as in this case, was unlawful.

6.18 Had the respondent chosen simply to exercise its rights as landowner and peaceably re-entered, and if the applicant's rights under Article 8 were engaged, it would have been necessary for the respondent to have adhered to the procedural safeguards required by Article 8 and to have afforded the applicant an adequate opportunity to be heard on the proportionality of the eviction. In this case, if it could have been said that the respondent sought to recover possession as landowner against the applicant as trespasser, the applicant was afforded an adequate opportunity to be heard. His application to succeed to the tenancy was considered. Representations were heard from local representatives on the applicant's behalf before the decision to refuse the application was made. Thereafter, a request by the applicant's sister to review the decision was entertained, but the decision was upheld. Manifestly, on the known facts, even those put forward by the applicant and most favourable to him, he was not entitled to succeed to the tenancy under the terms of the respondent's scheme of letting priorities. Hence, in my view, there was no breach in this context of Article 8 by the respondent in failing to have given the applicant an adequate hearing.

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

7. Conclusion

7.1 I am satisfied that the eviction of the applicant under s.20 of the Act of 1997 was unlawful and ultra vires the respondent's powers under s.20 of the Act of 1997 and the applicant is entitled to a declaration to that effect. I am also satisfied that the applicant was not entitled to succeed to the tenancy in 90 Killinarden Estate and after possession of the house was demanded from him, he was a trespasser and the respondent was entitled to recover possession of the house from him. That being so the applicant is not entitled to any relief as sought, to put him back into possession of the house. No basis has been demonstrated upon which this Court could order the respondent to provide some other accommodation to the applicant. Hence, there will be no mandamus order, as claimed.