Neutral Citation [2012] IEHC 594

THE HIGH COURT

[2010 No. 1328 J.R.]

BETWEEN

JULIE O'DRISCOLL AND MARY MCCARTHY

APPLICANTS

AND

LIMERICK CITY COUNCIL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice Feeney delivered on 9th day of November, 2012.

1.1 This is an application by the two applicants for judicial review. Leave to apply by way of an application for judicial review was granted by this Court on the 18th October, 2010 wherein a number of reliefs, including an order of *certiorari*, a declaration of incompatibility pursuant to s. 5 of the European Convention on Human Rights Act 2003, a declaration that a section of a statute was unconstitutional and injunctive relief was sought. Subsequent to that order an amended statement required to ground the applicants' application for judicial review was filed on the 27th October, 2010. In paragraph 5, the applicants identified the grounds upon which relief was sought.

1.2 Judicial review is considered by the courts not by reference to a placeless vacuum. Except in the rarest of cases, the Court will only grant relief by way of judicial review to a person aggrieved in respect of an *ultra vires* administrative action. Whilst the Court retains discretion to quash an order at the behest of a person who is "not directly affected by the illegal acts which he attacks", it is recognised that such jurisdiction arises in only rare cases (see judgment of Finlay J. in *de Roiste v. Minister for Defence* [2001] 1 I.R. 190 at p. 200 where he identified that the discretion to quash an order at the behest of an applicant who is not directly affected "are rare").

1.3 The general approach of the Court to the grant of judicial review is that it will grant relief only to a person aggrieved. In the Supreme Court case *of Cahill v. Sutton* [1980] I.R. 269, Henchy J. observed that an applicant must show that the impact of the impugned law on his personal situation discloses an injury or prejudice which he has either suffered or is in imminent danger of suffering. He dealt with the requirement for concrete personal circumstances (at p. 283) in the following terms:

> "While a cogent theoretical argument might be made for allowing any citizen, regardless of personal interest or injury, to bring proceedings to have a particular statutory provision declared unconstitutional, there are countervailing considerations which make such an approach generally undesirable and not in the public interest. To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also the risk that the person whose case has been put forward unsuccessfully by another may be left with the grievance that his claim was wrongly or inadequately presented."

Based upon the approach identified by Henchy J. in *Cahill v. Sutton*, the courts have long recognised that a plaintiff is not entitled to make general assertions of unconstitutionality but may only rely on such arguments as bear on his or her own personal circumstances. As Henchy J. identified in *Cahill v. Sutton* (at p. 285) that where a plaintiff cannot be heard to say that the alleged unconstitutionality has wrought him personally any actual or threatened prejudice, that such person "is wanting in personal *locus standi*".

1.4 In this case the second and third named respondents contend that the applicants do not have *locus standi* as their claim in relation to constitutional rights is grounded upon a claim of lack of fair procedures and/or failure on the part of the Council to give any or any reasons for its decision to issue the impugned notices issued under s. 10 of the Housing (Miscellaneous Provisions) Act 1992, as amended by the Housing (Traveller Accommodation) Act 1998. It was contended on behalf of the second and third named respondents that it is only in a case where the actual exercise of power does not conform to the principles of fair procedures and such exercise is authorised by the Act impugned that the person affected has *locus standi* to challenge the constitutionality of the Act. The respondents contend that even if the applicants' rights could have been adversely affected by the operation of the impugned statutory provision, they were not so affected in practice, since the applicants in this case actually received fair procedures and that it follows that the applicants have no *locus standi* to challenge the impugned provision.

1.5 The challenge to the *locus standi* of the applicants extends not only to the claim which the applicants make in respect of unconstitutionality based upon an alleged breach of constitutional rights, but also to a claim that the applicants lack standing to raise a claim for a declaration of incompatibility pursuant to s. 5 of the European Convention on Human Rights Act 2003. This claim of lack of standing is based upon the second and third named respondents' contention that the applicants cannot demonstrate that they are "victims" within the meaning of established "Strasbourg jurisprudence". Section 4 of the European Convention on Human Rights Act 2003 provides that:

> ". . . a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments."

That section refers to the declarations, decisions, advisory opinions, opinions and judgments of the European Court of Human Rights. It is contended by the respondents that the jurisprudence of the European Court of Human Rights establishes that a challenge under the Convention will not be accepted from a person who is not a "victim" of a Convention violation within the meaning of Article 34 of the European Convention on Human Rights. It is claimed that individuals may not "complain against a law *in abstracto*" simply because they feel that it contravenes the Convention. In principle, "it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment." (*Klass v. Germany* [1978] 2 EHRR 214 at p. 277).

1.6 The respondents rely on the unreported judgment of Ms. Justice Dunne delivered on the 31st March, 2008 in the case of *Vicky Leonard v. Dublin City Council, Ireland and the Attorney General.* In that case the Judge was considering an application for judicial review from the applicant who was a tenant of Dublin City Council and the claim included a declaration of incompatibility in respect of s. 62 of the Housing Act 1966 and Dunne J. held (at p. 80):

> "In this case, the position under s. 62 is that the local authority has the right to seek a warrant for possession in summary proceedings without the tenant being afforded an opportunity to raise any issue on the merits. The scheme of the Housing Act 1966 as amended is designed to provide housing for those who are unable to do so from their own means. As has been noted in many of the decisions referred, the housing stock is finite. Although the procedure provided for in s. 62 does not allow for the decision of the Council in any given case to be challenged on the merits in the course of the summary proceedings, a tenant does have sufficient procedural safeguards which afford the necessary degree of respect for the home by way of the availability of judicial review proceedings. Further, there is nothing pleaded and there is nothing in the facts and circumstances of this case to show that the applicant herein has been deprived of any procedural safeguards such that her rights outweigh the right and duty of the Council to manage it's housing stock. In other words, in the absence of any particular or special circumstances pleaded by the applicant, the procedure provided for under s. 62 coupled with the right to judicially review the decision of the Council to terminate the tenancy is such as to ensure that the rights of the applicant under Article 8 have not been violated."

The approach identified in the judgment of Dunne J. is one which I adopt and follow. It emphasises the importance of a court having regard to the facts and the circumstances of the particular case to ascertain whether or not an applicant has been deprived of any procedural safeguard and also the importance of the fact that a litigant in this jurisdiction can judicially review a decision of a local authority and that such entitlement can, in the absence of any particular or special circumstances pleaded by an applicant, be sufficient to ensure that the rights of an applicant under Article 8 of the European Convention on Human Rights have not been violated.

1.7 The applicants identify in the grounds upon which relief is sought a claim that the absence of any procedural safeguard wherein the reasons for the Council's decision to issue notices to the applicants could be examined as to their merits by an independent tribunal is a breach of the applicants' rights under Article 8 of the European Convention on Human Rights. In considering that claim I have to consider the nature and extent of the applicants' right to judicially review the decision sought to be impugned. In the *Leonard v Dublin City Council* case, Dunne J. held that in the absence of any particular or special circumstances pleaded by the applicant in that case that the procedure provided for under the impugned act, coupled with the right to judicially review the decision of the local authority to terminate the particular tenancy, was such as to ensure that the rights of the applicant under Article 8 had not been violated. The applicants in this case also pursue a related relief based upon a claim that the absence of any procedural safeguard wherein the reasons for the local authority's decision to issue the notices in question could be examined as to their merits by an independent tribunal is a breach of the applicants' right to fair procedures and natural justice and the applicants' rights under the Constitution of Ireland. The applicants therefore make a claim of alleged breaches of their rights to an effective remedy giving rise, they claim, to a breach under Article 8 of the European Convention on Human Rights and also a breach of the applicants' constitutional rights. Central to both of those claims is a claim that there was no independent tribunal that could examine the Council's decision to issue the notices in question on the merits. The applicants therefore claim that there is a breach of their right to an effective remedy.

1.8 The High Court has recently considered whether common law rules of judicial review are sufficient to provide for constitutional rights and whether or not they are sufficiently extensive to provide an effective remedy for breach of a Convention right pursuant to Article 13 of the European Convention on Human Rights. Those decisions are of assistance to me in having regard to whether or not the common law rules of judicial review provide an effective remedy to vindicate not only constitutional rights but also as to whether the common law rules of judicial review can be regarded as providing an effective remedy for European Court of Human Rights violations.

1.9 Cooke J. addressed the question as to whether or not judicial review is a full or effective remedy as compared with a right of appeal in circumstances where the High Court cannot substitute a new decision for that of the administrative decision under consideration. He did so in the case of *J.B. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 296 (Unreported, High Court, Cooke J., 14th July, 2010). That case, together with many other authorities, was considered in detail and applied *in Efe v. Minister for Justice* [2011] 2 I.R. at p. 798.

1.10 Cooke J. *in J.B. v. Minister for Justice, Equality and Law Reform* dealt with the effectiveness of judicial review as a remedy in the following terms (at para. 9, pp. 5 and 6 of the judgment):

> "If a decision to deport made by the Minister is bad it can be quashed by judicial review. It is sometimes suggested that judicial review is not a full effective remedy as compared with a right of appeal because the High Court cannot substitute a new decision for that of the administrative decision maker. It can only quash the decision for error of law, error fact or manifest unreasonableness including, nowadays, disproportionality. That is, in this Court's judgment, to underestimate the comprehensive and flexible character of the modern judicial review remedy in this jurisdiction. The High Court can annul and set aside a decision by *certiorari* and injunct its implementation by prohibition. It is true, as mentioned, that the Court cannot itself make a new decision but by the judicious and flexible use of declaratory relief it can identify why an impugned decision is mistaken or fails to comply with the obligations arising out of the European Convention of Human Rights Act 2003. By that means it can circumscribe the terms upon which the administrative decision maker is required to make a new decision. In the view of the Court, the jurisdiction of the High Court in the review of administrative decisions including deportation orders is at least as ample by way of effective remedy as that of the administrative courts of continental jurisdictions or, for that matter, the Court of Justice of the European Union under Article 263 of the Treaty on the functioning of the Union. Furthermore, insofar as the concept of "effective remedy" extends to an entitlement to compensation where a right or freedom has been violated, the High Court has jurisdiction in the exercise of its judicial review function to award damages. Thus the scope of the jurisdiction of the High Court in reviewing the legality of a decision made under s. 3 of the 1999 Act clearly fulfils the criteria established by the case law of the Strasbourg Court for the provision of an effective remedy before a national authority in accordance with Article 13. The High Court is independent and its orders in judicial review are binding and enforceable. Furthermore, as is made clear by the judgment of Denham J. in the Supreme Court in the *Oguekwe* case, the High Court in reviewing the validity of a deportation order is not only entitled but obliged to ensure that the order has been validly made in the light of any substantive arguments raised based upon alleged violation of Convention rights and freedoms."

The judgment of Cooke J. dealt with whether or not judicial review could be deemed a full and effective remedy for European Court of Human Rights violations. Hogan J., in the Efe case, considered the nature and effectiveness of the right to judicial review not only as

to whether or not it provided sufficient procedural protection to satisfy the requirements of an effective remedy pursuant to Article 13 of the European Convention on Human Rights, but also as to whether or not judicial review provided an effective remedy for breach of a constitutional right.

1.11 In the *Efe* case, Hogan J. held that the courts were not constrained to apply an artificially restricted test for review of administrative decisions affecting fundamental rights on reasonableness and rationality grounds. The test was broad enough to ensure that the substance and essence of constitutional rights would always be protected against unfair attacks, if necessary, through the application of a proportionality analysis. In *Efe*, Hogan J. considered whether the common law rules of judicial review were:

> (a) unconstitutional on the basis that they were ineffective to secure the protection of fundamental rights; and
>
> (b) whether the rules were incompatible with the European Convention on Human Rights on the grounds that they did not provide an effective remedy for breach of a Convention right pursuant to Article 13 of the European Convention on Human Rights.

In *Efe*, the applicants in that case had claimed that the common law rules of judicial review did not provide an adequate remedy in the context of review of decisions affecting constitutional rights. At paragraph 6 of his judgment, Hogan J. identified that the Constitution guaranteed litigants an effective remedy for breach of constitutional rights and following an extensive review of the authorities concluded (at paras. 28 and 29):

> "(28) At all events, all of the pre-existing case-law must now be reviewed in the light of the seminal decision in *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701. While it is, perhaps, too early to evaluate the precise significance of the decision, two things emerge clearly. First, it is plain that a majority of the Court was prepared to apply a general proportionality test in respect of all decisions affecting fundamental rights.
>
> (29) Second, it is equally clear that the *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 test has been re-interpreted and clarified to take fuller account of the earlier judgment of Henchy J. in The State *(Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642."

Hogan J. ultimately concluded (at para. 34 of his judgment) in relation to the constitutional issue as follows:

> "(34) In summary, therefore, it is clear that, post-*Meadows v. Minister for Justice* [2010] (IESC 3 [2010] 2 I.R. 701) at any rate, it can no longer be said that the courts are constrained to apply some artificially restricted test for review of administrative decisions affecting fundamental rights on reasonableness and rationality grounds. This test is broad enough to ensure that the substance and essence of constitutional rights will always be protected against unfair attack, if necessary through the application of a *Meadows v. Minister for Justice* . . . style proportionality analysis."

1.12 This Court follows and adopts the approach of Hogan J. in the *Efe* case. I am satisfied that where judicial review is available to test the proportionality of an administrative decision interfering with an Article 8 right that such entitlement provides a sufficient procedural protection to ensure that Article 8 of the European Court of Human Rights is vindicated. I am also satisfied that based upon the analysis in *Efe* and the approach identified by Cooke J. in *J.B. v. Minister for Justice, Equality and Law Reform* that the common law rules of judicial review can be regarded as providing an effective remedy to vindicate constitutional rights. The High Court is, as identified by Cooke J. in the *J.B.* case, independent and its orders in judicial review are binding and enforceable. In considering judicial review applications, the High Court is obliged to ensure that the administrative decision under review has been validly made in the light of any substantive arguments raised during a hearing.

1.13 The applicants contend that notwithstanding the decisions in the *J.B.* case and the *Efe* case, that they do not have access to a forum in which they can dispute what they contend in this case is a finding of fact made by the Council that there was a nuisance or the finding that they were causing a nuisance. In making this argument the applicants rely on the judgment of the Supreme Court in the case of *Donegan v. Dublin City Council & Ors*. [2012] 1 ESC 18, heard together with *Dublin City Council v. Gallagher*, judgment delivered on the 27th February, 2012 by McKechnie J. The applicants contend that, based upon the approach and reasoning in the *Donegan and Gallagher* cases that notwithstanding the existence of judicial review, the facts of this case is that judicial review does not facilitate an adequate review of a claimed error of fact.

1.14 The contention by the applicants is that judicial review on the facts of this case do not facilitate an adequate review of an error of fact. The second and third named respondents contended that the applicants have no legal standing on the basis that their claim of unconstitutionality and breach of the European Convention on Human Rights do not in fact bear on the applicants' own personal circumstances, and that therefore the applicants have no *locus standi* and are merely relying on putative rights. They claim that neither of the applicants can be categorised as a "victim" of a Convention violation and have therefore failed to demonstrate that they are victims within the meaning of the European Court of Human Rights jurisprudence. The respondents also contend that even if there is an obligation on the first named respondent to provide reasons that the facts demonstrate that reasons were given and that therefore any duty on Limerick City Council to furnish reasons was satisfied. It is clear that when all those claims are taken together that crucial to a consideration of the applicants' case is an identification of the facts and circumstances of the case. They can be identified from the affidavits and exhibits. The central importance of establishing the factual basis for the claims herein is further highlighted by the claim asserted by the applicants at paragraph 4.20 of their written submissions where it is stated:

> "The fact that the Council, an organ of the State, can issue a notice requiring an individual to move their home without the burden of giving reasons liable to be examined on their merits by an independent tribunal clearly fails the test of procedural safeguards laid down in *Donegan, Gallagher and Pullen*."

(The judgment of the Supreme Court in *Donegan v. Dublin City Council* of the 27th February, 2012 also dealt with the case of *Dublin City Council v. Liam Gallagaher & Anor.* which was an appeal from the unreported High Court decision of O'Neill J. of the 11th December, 2008. The reference to Pullen is to *Pullen v. Dublin City Council* [2010] 2 ILRM 61 – judgment of Irvine J.).

2.1 The Court had before it the affidavit of the first applicant, Julie O'Driscoll, sworn on the 16th October, 2010, the affidavit of the second applicant, Mary McCarthy, sworn on the same day, the affidavit of Frieda Quinlan, sworn on behalf of Limerick City Council on the 3rd December, 2010, the affidavit of Deirdre Kearney, sworn on behalf of the second and third named respondents on the 1st April, 2011, an affidavit of Bridget Casey, an accommodation officer with the Irish Traveller Movement, sworn in support of the applicants' application, on the 1st July, 2011, a further affidavit of Frieda Quinlan, entitled "replying affidavit of Frieda Quinlan" sworn on the 15th November, 2011 together with various documents which were exhibited in the affidavits. All of those documents were admitted in evidence without objection and the averments contained in the affidavits together with the exhibited documentation

forms the basis upon which I can establish the facts and circumstances of the applicants' claims.

2.2 Both applicants are members of the Travelling Community and reside off a laneway leading to a halting site known as Bawney's Bridge halting site. The land on which the applicants' caravans are parked is adjacent to the halting site but neither of the applicants' caravans are on the site. The first named applicant resides with two of her sons in a caravan parked off the laneway leading to the halting site. Her daughter has a caravan in the halting site and adjacent to the location where the first applicant's caravan is parked. The first applicant averred in her grounding affidavit that she moved to the area adjacent to her daughter in 2007. However, an examination of the documents and information before me identifies that that date is uncertain as the uncontested averments in response to the applicants' application is that neither of the applicants could have taken up residence on the land off the laneway leading to the halting site where they are now located until in or about August 2008 as it was at that time that the access lane off which the caravans are located was constructed. The Court has a clear averment that road works took place in and about Bawney's Bridge halting site in August and September 2008 which resulted in access being provided by a new laneway and it is off that laneway that the two applicants' caravans are located. The second named applicant in her grounding affidavit avers that she lives in a caravan which is situate beside the roadway which leads to Bawney's Bridge halting site and that that is a site which is managed and controlled by the first named respondent, Limerick City Council. She identifies that her caravan is located immediately beside the wall of the halting site and is therefore adjoining the halting site. She avers that she has been there for seven years apart from a short period away. Neither of the applicants have dealt with the averment contained at paragraph 6 of the first affidavit of Frieda Quinlan where she avers that the two applicants are incorrect in saying that they have been present at their present location from the dates identified in their grounding affidavits. It was averred that the roadway in question was an inaccessible grassed area until about August/September 2008. As a result of a nearby development, a roundabout was built near to the entrance of the halting site and this in turn necessitated the entrance being moved further away from the roundabout for traffic safety reasons. She averred that the new entrance with the new roadway or laneway access was constructed over a previously inaccessible grassed area and that there were no caravans decamped on this grassed area at any time prior to the construction of the new entrance to the halting site. The applicants moved onto this grassed area without permission from the Council in or around the time of the works which took place in August/September 2008. Documents which were available to the Court confirmed those construction works and layout and no replying affidavit was submitted by or on behalf of either of the applicants which contradicted the averment contained at paragraph 6 of Frieda Quinlan's original affidavit. It appears probable from the averment in Frieda Quinlan's affidavit and the documents exhibited before the Court including the applications for housing accommodation that the two applicants moved their caravans onto a grassed area off a laneway adjacent to the halting site after the road works were undertaken in August/September 2008. However, the exact date is not relevant but what is clear is that neither applicant had consent and moved on to the land as trespassers.

2.3 The second named applicant, Mary McCarthy, lives in her caravan with her granddaughter who had her ninth birthday in December 2010. She avers that four of her brothers live on the Bawney's Bridge halting site as do two of her sisters. She states that she is semi-invalid. She avers that she had a flat in Limerick city in or about the year 2005 but she was unhappy in the flat as she was not adjacent to any member of her family and that she moved from that flat to a caravan which was on or near the Bawney's Bridge halting site in August 2008 after Limerick City Council had laid tarmac on the access roadway. She avers that after the works were completed she moved her caravan back to "the correct position" when the tarmac had been laid to where she is presently located.

2.4 After the applicants moved on to the land adjoining the Bawney's Bridge halting site, the local authority, the first named respondent, took measures to provide a temporary supply of water and certain sanitary facilities. That was done after September 2008.

2.5 Bawney's Bridge halting site consists of eight serviced bays with accommodation for eight Traveller families. The affidavit evidence indicates that the site is now overcrowded due to the fact that the eight families have expanded as their children have married. Due to the overcrowding on the halting site, the first named respondent proposed in its Traveller Accommodation Programme 2005/2008, to construct nine group houses to meet the accommodation needs of the families who were living on the halting site. To facilitate the carrying out of that proposal, the Council began the process of acquiring adjoining land. That process came to an end following receipt by the Council of a letter dated 9th January, 2009 from the Health and Safety Authority. The letter advised the Council against the proposed development of the halting site in the context of the major accident hazards policy due to the proximity of a grassland fertiliser plant. In the light of that advice, the Council then drew up a plan that rather than constructing group houses and expanding the site, that they would refurbish the existing halting site using a fund of some half million euro which was made available by the Department of the Environment, Heritage and Local Government to improve the existing accommodation facilities for residents. Those envisaged works included the refurbishment of the service units on each bay and the carrying out of what was deemed essential improvement works to the access lane.

2.6 As I indicated earlier in this judgment, even through there is some conflict in relation to the date on which the applicants took up residence on the land adjoining the halting site, a conclusive determination of the conflicting averments in relation to the dates of original occupancy is of no particular significance to the issues to be considered by me. There is no issue but that the two applicants have located their caravans without permission or consent on lands owned by the Council and that whilst certain minimum services have been provided by the Council, that they have never consented or agreed to either of the applicants' occupation of the land.

2.7 The averments before the Court identify that the Council has for some period of time been in a position to commence the refurbishment works on the halting site. However, those works cannot commence for health and safety reasons due to the applicants' presence immediately adjacent to the access roadway. The averments before the Court also demonstrate that there is a potential risk to the funding due to delay as the tender process for carrying out the refurbishment works was completed in 2010. That has the potential to derail the tender process as the obligation on the successful tenderer is to maintain the tender for a period of ninety days.

2.8 As a result of the advice which the Council received against the proposed residential development and the necessity to re-direct its efforts in the direction of refurbishment and due to the need to have the applicants vacate prior to the commencement of the refurbishment, each of the applicants was written to by the Director of Housing Services by letter dated 4th May, 2010. Those letters were in identical terms and stated:

> "Following the construction of the new entrance to Bawney's Bridge scheme a number of caravans moved into the area at the front at the front of the site. It should be noted that prior to this no caravans were parked in this area. These caravans parked in an area without permission from Limerick City Council. As a short term measure to alleviate the hardship experienced by these families three blue service units were provided to supply basic water and sanitary facilities.
>
> We have been advised that these dwellings along with service units are in contravention of planning bylaws and as such should be removed as soon as possible. Moreover, the Health and Safety Authority has advised that new units should not be constructed in this area due to its proximity to the fertiliser plant. Limerick City Council is left with no option but to

remove the three service units and take action to remove the caravans and vehicles from this area. Furthermore, no refurbishment of the existing site can commence until this area has been fully cleared.

We are requesting that the occupants of the caravans attend the Housing Department to discuss their future options. The social worker and the Travellers' Services Coordinator can be contacted on 061/407351 for an appointment."

Following those letters, Ms. Frieda Quinlan, the social worker of the Housing Department of Limerick City Council, met with the first named applicant to explain the contents of the letter of the 4th May, 2010 and, in particular, the reason why the Council had to have clear access to the lane. Ms. Quinlan's affidavit avers that she explained to the first named applicant that the Council had been advised against the redevelopment of Bawney's Bridge and that there was no prospect of the first applicant being accommodated on that site. Ms. Quinlan also avers that various accommodation options were put forward for her consideration but that all those options were rejected.

2.9 On the 24th June, 2010, the Chief Executive Engineer of the Council wrote to each of the applicants. Each letter was identical and stated:

"Further to the correspondence dated 4th May, 2010 and your follow-up appointment on 6th May, 2010 with Frieda Quinlan, Housing Social

Worker.

Please be advised that construction work is due to commence on the site very soon. Therefore, it will be necessary for all those staying in the laneway to vacate the area without delay.

We are requesting that the occupants of the caravans attend the Housing Department to discuss their future housing options. The social worker and the Travellers' Services Coordinator can be contacted on 061/407351 for an appointment."

The letters requested the applicants to attend for a meeting but the affidavit evidence establishes that neither applicant attended at the Council's Housing Department. That caused the Council to write once more to each of the applicants on the 10th August, 2010 and again it did so in almost identical terms where it was stated:

"Further to the correspondence dated 4th May, 2010 and the 24th June, 2010.

Can you please attend the Housing Department on Tuesday, 17th August, 2010 at 12pm for an interview with Frieda Quinlan, social worker, to discuss your housing options.

It is extremely important that you attend for this appointment. If you cannot attend please contact Frieda Quinlan on 061/407351."

(The one difference between the two letters was that the first named applicant was requested to attend on the 17th August, 2010 and the second named applicant was requested to attend on the 18th August, 2010.)

On the 17th August, 2010, Frieda Quinlan met with the first named applicant and she avers that she discussed with her the housing options which were available. Frieda Quinlan avers at paragraph 17 of her first affidavit that "the first named applicant was adamant at this meeting that she would not move to Traveller specific accommodation at the Ennis Road halting site and that she would not consider any Traveller specific accommodation within the city limits including the Long Pavement halting site". In relation to private housing accommodation, the first applicant stated that "she had never lived in a house and would never do so". Ms. Quinlan explained to her that the Council could not provide her with accommodation at Bawney's Bridge due to overcrowding. The first named applicant remained adamant that she would not consider any of the accommodation options and stated that she did not accept that the Council is prevented from constructing new accommodation units at Bawney's Bridge.

2.10 The Council's social worker in the Housing Department, Frieda Quinlan, avers that two days after the letter of the 4th May, 2010 was sent to the second named applicant, she met with her, and outlined to her the Council's plan to refurbish the halting site and a need for her to consider other accommodation options. A number of options were identified but the second named applicant indicated that she had no interest in any of those options. The letter of the 24th June, 2010 was then sent to the second named applicant and shortly after the date of that letter, an undated handwritten letter was received from her which, in effect, reiterated her desire to stay where she was. Frieda Quinlan called out to the location where the second named applicant was residing on three occasions between the 1st July, 2010 and the 1st September, 2010 but failed to meet her.

2.11 On the 9th September, 2010, the Council served a notice under s. 10 of the Housing (Miscellaneous Provisions) Act 1992 as amended on both the applicants. That notice indicated that it appeared to the Council that each of the applicants without lawful authority were occupying or otherwise retaining a temporary dwelling being a caravan at a public place, which said public place was within a distance of one mile from Bawney's Bridge halting site, a site which was managed and controlled by the Council, and that the first named respondent Council was of the opinion that the temporary dwellings were causing a nuisance and thereby required both applicants to remove their temporary dwellings from that public place within twenty four hours. The notice also included a statement to the effect that the applicants were being notified that if they failed to comply with the request, that they would be guilty of an offence and liable on summary conviction to a fine or imprisonment. Prior to the notice being served on the second named applicant, she had sent to the Council's social worker, Frieda Quinlan, a letter thanking her for the offer of rented accommodation, or alternatively, private rented accommodation or permanent Traveller specific accommodation or temporary Traveller specific accommodation that had been made on the 6th May, 2010, but declining all of those offers on the ground that they were unsuitable as it would isolate her from her family. The second named applicant later purported to accept what she identified as a previous offer of a three bay unit close to Bawney's Bridge and Ms. Quinlan wrote back by letter dated 30th August, 2010 indicating that no such offer had been made.

2.12 After the service of the s. 10 notices on the applicants on the 9th September, 2010 and following correspondence from the Irish Traveller Movement, Ms. Quinlan had a further meeting with the first named applicant on 21st September, 2010 and meetings with the second named applicant on 1st October, 2010 and 9th November, 2010. Both applicants continued to insist that they would not consider living at any location other than at Bawney's Bridge.

2.13 Documents from Limerick City Council indicate that the first named applicant applied for housing accommodation on the 3rd June, 2009, indicating that she lived in Omagh, County Tyrone, from 1992 to 2008 and in that application she applied for Traveller group

housing or a bay in a residential caravan park. The records also indicate that the second named applicant applied for housing accommodation in 2006 when she was living in an apartment in Limerick and gave her previous address as Bay 6/7, Bawney's Bridge and indicated that she had left due to arguments on site between family groupings. The second named applicant indicated at that time that she was applying for older person's accommodation, that is, accommodation for people aged over 55 years, or, alternatively, Traveller group housing accommodation. In both applications the applicants indicated that they desired to be accommodated as near as possible to Bawney's Bridge halting site. Following those application, the applicants were both interviewed and were deemed eligible for the provision of housing accommodation.

2.14 The evidence before the Court establishes that each of the applicants has received various offers of accommodation including both temporary, permanent, and Traveller specific accommodation at a number of different locations and sites but all those offers have been refused and both applicants have maintained that they will only reside at Bawney's Bridge.

2.15 Each of the applicants have averred that they have not caused a nuisance or obstruction or any difficulty and have claimed that they have been advised that there is no place they can go to challenge the assertion of nuisance made by Limerick City Council in the s. 10 notice. They also contend that the notice that they have received indicates that if they fail to comply with the notice, that they will be guilty of an offence and can be punished with imprisonment or a fine. Both also aver that they wish to continue to live on the laneway at Bawney's Bridge and that they consider that location to be their home.

3.1 The legislation relevant to this judicial review application is the Housing (Miscellaneous Provisions) Act 1992, as amended by s. 32 of the Housing (Traveller Accommodation) Act 1998 and, in particular, s. 10. Section 10 of the 1992 Act provides:

> "(1) Where, without lawful authority, a person erects, places, occupies or otherwise retains a temporary dwelling in a public place and such temporary dwelling – . . . (c) is within a one mile radius of any site provided, managed or controlled by a housing authority under section 13 of the Act of 1988 (as amended by the Housing (Traveller Accommodation) Act 1998), or any other Traveller accommodation provided, managed or controlled by a housing authority under the Housing Acts 1966 – 2002 or any Traveller housing accommodation provided or managed under s. 6 and the housing authority within whose functional area such temporary dwelling has been erected, placed, occupied or otherwise retained is of the opinion that, whether by reason of its use or occupancy or by reason of its being one of a number of such temporary dwellings or otherwise, such temporary dwelling or any occupant of the temporary dwelling –
>
> > (i) is causing a nuisance or obstruction to the occupants of that site or Traveller accommodation or to the occupants of any other dwelling or dwellings within a one mile radius of that site or that Traveller accommodation . . . . the housing authority concerned may serve a notice on that person requiring the person, within a specified period, to remove the said temporary dwelling . . .
> >
> > (iv) any person on whom a notice under subs. (1) is served who fails in any respect to comply with the requirement of the notice shall be guilty of an offence;
> >
> > (v) where, in the opinion of the housing authority, the requirements of a notice under subs. (1) have not been complied with in all or any respects, then, without prejudice to any other provisions of this section, the authority may, without further notice, remove or procure the removal of the temporary dwelling – (a) to a site specified in a notice or where a notice is served under subs. (1)(c), to a location that is not less than one mile from the site referred to in that subsection, or (b) where they are for any reason prevented from so doing, to another location for storage by or on behalf of the authority.
> >
> > (vi) Any person who obstructs or impedes or assists a person to obstruct or impede a housing authority in exercising their functions under this section shall be guilty of an offence . . . (12) any person guilty of an offence under subs. (4) or (6) shall be liable on summary conviction to a fine not exceeding €1,269.74 (£1,000) or, at the discretion of the Court, to imprisonment to a term not exceeding one month or to both such fine and imprisonment."

The terms of s. 10 of the 1992 Act provides a housing authority, such as the Council, with an entitlement, but does not place an obligation, on that authority to issue a s. 10 notice. The housing authority may issue and serve a notice if the housing authority has formed the opinion that a nuisance has arisen. The entitlement to serve a notice under the section arises in circumstances not where a nuisance has occurred but where the housing authority has formed an opinion that a nuisance has arisen.

4.1 The first ground upon which the applicants seek relief is that the essential rationale for the Council's decision to issue notices under s. 10 is not discernible from the s. 10 notices and it is also claimed that the Council failed to give adequate or any reasons for its decision to issue the s. 10 notices.

4.2 It is claimed that the failure to give reasons or to provide a rationale within the s. 10 notices is in breach of the applicants' constitutional rights. The second and third named respondents contend that there is no obligation, constitutional or otherwise, on the first named respondent to give reasons. This is an issue which I do not have to decide as it is apparent from the subsequent paragraphs that I am satisfied that adequate reasons were given. It follows that even if there was an obligation on the Council and a duty to give reasons, the facts and circumstances in this case are such that adequate and sufficient reasons were given. I am satisfied that it is also clear that the essential rationale for Council's decision is manifest from the correspondence directed by the Council to the applicants.

4.3 In dealing with the right to be heard, McCarthy J. in the Supreme Court in *International Fishing Vessels Ltd. v. Minister for Marine* (No. 2) [1991] 2 I.R. 93 (at p. 102) stated in relation to natural justice and constitutional justice that neither:

> ". . .requires perfect or the best possible justice; it requires reasonable fairness in all the circumstances; often it is a matter of impression as to whether or not there was unfairness."

That judgment is one of many that illustrates that constitutional justice is and remains a fluid concept and confirms that when approaching the issue of fair procedures, the concept of what is to be deemed fair is dependent upon a number of factors. The rationale behind a party claiming to have the right to be given reasons for an administrative decision is grounded on the fact that the decision in respect of which reasons are required is either reviewable or subject to appeal. The form in which reasons may be given was considered by Costello P. in *McCormack v. Garda Complaints Board* [1997] 2 ILRM 321 (at p. 332) where Costello P. stated:

> "There may also be circumstances in which (a) no unfairness arose by a failure to give reasons when the decision was made but (b) the concept of fair procedures might require that reasons should subsequently be given in response to a

bona fide request for them."

Reasons do not necessarily have to be given at a particular time or in one document unless required by statute. Consistent with that approach, there has been a recognition by the courts that reasons do not have to be provided in a single document or in a discrete form. The reasons for such approach can be deduced from a number of cases. This approach was applied and confirmed in the Supreme Court in the statement of Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 (at p. 76) where he stated:

> "Firstly, I am satisfied that there is no substance in the contention made on behalf of the plaintiff that the Board should be prohibited from relying on a combination of the reason given for the decision and the reasons given for the conditions, together with the terms of the conditions. There is nothing in the statute which would justify such a rigid approach and it would be contrary to commonsense and to fairness."

Central to a consideration of the nature and extent of reasons given for an administrative decision is an approach based upon whether or not the person or persons affected by the decision had disclosed to him or them the essential rationale on foot of which the decision was taken. In the case of *Deerland Constuction v. Aquaculture Licences Appeals Board* [2009] 1 I.R. 673, Kelly J. considered an application for *certiorari* in relation to a decision to grant an aquaculture licence to the notice party in those proceedings and as part of the claim in that case, the applicant submitted that the decision failed to give any reasons and was in breach of constitutional justice and fair procedures. Under the heading "Absence of reasons", Kelly J. quoted with approval from two English authorities (at p. 690):

> "*In South Bucks D.C. v. Porter* (No. 2) [2004] UKHL 33, [2004] 1 W.L.R. 1953, Lord Brown summarised the law in relation to the obligation to provide reasons as follows at p. 1964:-
>
> > '[36] The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.'
>
> [67] Finally, in *R. v. Westminster City Council* [1996] 2 All E.R. 302, Hutchinson L.J. said at p. 309:-
>
> > 'It is well established that an obligation, whether statutory or otherwise, to give reasons for a decision is imposed so that the persons affected by the decision may know why they have won or lost and, in particular, may be able to judge whether the decision is valid and therefore unchallengeable, or invalid and therefore open to challenge. There are numerous authoritative statements to this effect …'
>
> [68] Hutchinson L.J. further stated at p. 312:-
>
> > 'It is possible to state two propositions which the judgments in *R. v. Croydon London Borough ex parte Graham* (1993) 26 H.L.R. 286 support. (1) If the reasons given are insufficient to enable the court to consider the lawfulness of the decision, the decision itself will be unlawful; and (2) the court should, at the very least, be circumspect about allowing material gaps to be filled by affidavit evidence or otherwise'."

Those authorities which were considered and applied by Kelly J. in the *Deerland Construction* identify that a reasons challenge will only succeed if the party aggrieved can satisfy the Court that he is genuinely being substantially prejudiced by the failure to provide an adequate reasoned decision. The Court should also consider whether the reasons which can be identified for the decision are sufficient to enable the Court to consider the lawfulness of the decision. The reasons for a decision do not have to be deduced from a single or discrete document. The issue of how and where reasons must be stated was addressed in the *Textbook Administrative Law in Ireland* (4th Ed. – Hogan & Gwynn Morgan at para. 14/155) where the text stated:

> "A consensus appears to be building up to the effect that reasons do not have to be given in a single, direct, discrete form: the message, to generalise from a number of cases seems to be that it suffices if the reasons may be deduced from whatever (presumably reliable) source or sources are available."

That approach is one which I will follow and apply. The Council in this case is and cannot be prevented from relying on the combination of reasons given by it for its decision to issue a s. 10 notice as can be deduced from a number of documents. To adopt a rigid approach where the Court would only have regard to the section 10 notices and ignore the earlier correspondence prior to that notice would be to impose an inflexible approach contrary to commonsense and fairness. In this case the applicants are not required to collect information as to the reasons from disparate sources or required to deduce information by putting two and two together but rather they can glean the reasons from correspondence addressed to both of them on the 4th May, 2010 and the 24th June, 2010 which both predated the issue and service of the s.10 notices on the 9th September, 2010. From that correspondence both applicants knew the following,

(a) that their caravans were parked in an area without permission;

(b) that they were therefore trespassing;

(c) that such measures as the local authority had provided were temporary measures to alleviate hardship;

(d) that the use and location of the caravans was in contravention of planning byelaws;

(e) that they should be removed as soon as possible;

(f) that the Health and Safety authority had advised the local authority that new units could not be constructed where the applicants' caravans were located due to the proximity of a fertiliser plant;

(g) that the planned refurbishment of the adjoining halting site could not commence until the area where the applicants' caravans were located was fully cleared:

(h) that the advice of the Health and Safety Authority left the local authority with what it considered to be no option but to remove the applicants' caravans from the area where they were located.

The two letters of the 24th June, 2010 referred to the earlier letters of the 4th May, 2010 and added an additional reason for the requirement for the removal of the applicants' caravans by stating that the local authority had been advised that construction work was due to commence on the site "very soon" and therefore it would be necessary for those persons staying on the laneway, that is the applicants, to vacate the area without delay. Over and above the correspondence it is apparent from the history of the dealings between the parties that there were numerous meetings between the applicants and the local authority and that various alternative accommodation was offered. The s. 10 notice stated that the applicants occupied or otherwise retained a temporary dwelling being a caravan at a public place without lawful authority, reconfirming the previous statement contained in the letter of the 4th May, 2010. That notice also identified that such public place was within a distance of one mile from the Bawney's Bridge halting site and confirmed that it was Limerick City Council's opinion that the temporary dwellings were causing a nuisance. The reasons for the formation of such an opinion were set out in the two letters together with the s. 10 notices and disclosed the rationale behind the issue of the s. 10 notices. The information necessary to ensure that the applicants were aware of the rationale for the s. 10 notice could be plainly deduced from the correspondence and notices and did not require to be deduced from disparate sources.

4.4 I am satisfied on the facts of this case that the reasons given were adequate and known to the applicants at the time that the s. 10 notices were issued and served. The basis upon which the local authority had arrived at the opinion that the applicants' caravans were causing a nuisance had been stated to the applicants and were well known by them and the reasons for the issue and service of the s. 10 notices were both intelligible and adequate. On the basis of that finding, the applicants have no claim based upon an alleged failure to give adequate reasons as I am satisfied that the facts of this case demonstrate that adequate reasons were given. I am satisfied that in looking at the issue of the adequacy of the reasons that it is not correct that I should only have regard to the s. 10 notices. From the s. 10 notices and the earlier correspondence, I am satisfied that the essential rationale for the Council's decision to issue the notices is discernible and that adequate reasons were given for the decision to issue such notices. It follows that the first two grounds set out at paragraph 5 of the amended statement required to ground the application for judicial review are not made out. As the applicants did receive fair procedures there was no breach of their constitutional rights nor can they be said to be victims within the meaning established in the Strasbourg jurisprudence.

5.1 The third ground upon which the applicants rely is "the absence of any procedural safeguard wherein the reasons for the Council's decision to issue notices to the applicants could be examined as to their merits by an independent tribunal is a breach of the applicants' rights under Article 10 of the European Convention on Human Rights". First, I am satisfied that reasons for the Council's decision were known, intelligible and adequate. The applicants rely on a claim that there is an absence of procedural safeguards whereby those reasons could be examined as to their merits by an independent tribunal and that is claimed to be both a breach under Article 8 of the European Convention on Human Rights and a breach of the applicants' constitutional rights. The applicants complain that they do not have access to a forum in which they can dispute what they characterise as the Council's finding of fact that there is a nuisance. The second and third named respondents contend that there was no finding of fact that there was a nuisance but rather that the local authority had formed an opinion and that therefore there was not a finding that a nuisance had arisen but rather that it was the opinion of the Council that there was such a nuisance.

5.2 As part of the applicants' contention that the availability of judicial review does not facilitate an adequate review of error of fact, they rely on the judgment of the Supreme Court in *Donegan and Gallagher v. Dublin City Council* [2012] IESC 18 (Unreported judgment of the Supreme Court judgment of McKechnie J. delivered on the 27th February, 2012). That case dealt with the compatibility of s. 62 of the Housing Act 1966 with Article 8 of the European Convention on Human Rights and McKechnie J., giving the judgment of the Court, held that Mr. Donegan was entitled to a declaration of incompatibility pursuant to s. 5 of the European Convention on Human Rights Act 2003. Relief was refused in relation to Mr. Gallagher. Section 62 of the 1966 Act provides, *inter alia*, that a housing authority may apply to the District Court for the issue of a warrant for possession where there is no tenancy in a dwelling provided by a housing authority under the 1966 Act, and there is an occupier who neglects or refuses to deliver up possession on demand by the housing authority and there is a statement in the demand of the intention of the authority to make an application pursuant to s. 62(1) in the event of the requirement of the demand not being complied with. Section 62(3) of the 1966 Act provides:

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

In *Donegan & Gallagher*, McKechnie J. held in Mr. Donegan's case that the Supreme Court was not satisfied that judicial review provided sufficient procedural protections to satisfy Article 8 of the European Convention on Human Rights in circumstances, as identified in his judgment (at paragraph 124):

"What has been lost sight of in this submission is the very simple and straightforward conflict which requires resolution. Was Mr. Donegan's son a drug addict or a drug pusher? It is purely a question of fact, simple, I even dare say to resolve. Was Mr. Gallagher residing with his mother for the period in question or was he not? Again, a rather straightforward matter. It is therefore difficult to see how a remedy like judicial review, modelled in the manner in which it is, could in any way make a decision or reach a conclusion on these issues. At most, it could set aside a decision unlawfully made but such would leave quite unresolved the basic dispute. It could never, of itself, substitute its own findings of fact for those made by a decision-maker. Therefore, judicial review is not, in any meaningful sense, a forum to which recourse can be had in the presenting circumstances."

The applicants in this case submit that s. 10 of the Housing (Miscellaneous Provisions) Act 1992 has an analogous effect to s. 62 in that it makes no provision for an adequate hearing or a determination on the factual dispute. The applicants therefore claim that I should apply the approach and reasoning in the Supreme Court in the *Donegan & Gallagher* case and hold that there was an absence of a procedural safeguard wherein the reasons for the Council's decision could be examined by an independent tribunal and that therefore there was a breach of Article 8 of the European Convention on Human Rights. The applicants also contend that the applicants in this case can be distinguished from the position of Mr. Gallagher in the Supreme Court case of *Donegan and Gallagher* in that it is disputed by the applicants that they are causing a nuisance and no evidence has been offered by the Council that they are.

5.3 At paragraph 128 of the Court's judgment in *Donegan and Gallagher*, it was held:

> "When considering the adequacy of judicial review as a sufficient safeguard in this context it must therefore be done with reference to the s. 62 application; the question is whether judicial review will provide a sufficient safeguard against an interference, by virtue of the provisions of that section."

Central to the decision in favour of Mr. Donegan in the Supreme Court was that a breach of Article 8 had been established because there was a dispute of fact between him and the Council regarding whether or not Mr. Donegan's son was a drug addict or a drug pusher. In deciding whether judicial review provided an adequate basis for dealing with that dispute of fact, the Court addressed the question as to whether judicial review could be considered a mechanism sufficient to determine that factual conflict. In the words of the judgment (at paragraph 149):

> "Apart from such interview process, Mr. Donegan has had no opportunity of having his argument as to his son's condition aired or determined before an independent body. The issue is one of extreme simplicity but requires a mechanism to determine factual conflicts."

The Court held that judicial review did not provide an adequate safeguard or remedy and that therefore Mr. Donegan's Article 8 rights had not been respected. A different conclusion was arrived in relation to Mr. Gallagher. This was considered at paragraph 153 of the judgment in the following terms:

> "The position with regard to Mr. Gallagher is, in one respect pretty identical to that of Mr. Donegan, but in another fundamentally different. It will be recalled that in accordance with the Council's Scheme of Letting Priorities, for a son or daughter to succeed to their parent's tenancy, that person has to be resident in the house and have been on the rent account for the period of two years immediately preceding, as in this case, the death of the tenant. Mr. Gallagher claims that he has complied with the first requirement. Following a number of meetings with the Council, during which he submitted supporting documentation, the Council came to the view, that he did not come within requirement number one."

The judgment went on in the following paragraph (paragraph 154) to state:

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

5.4 From the judgment of the Supreme Court in *Donegan and Gallagher* and the different conclusions arrived at in relation to Mr. Gallagher and Mr. Donegan, it is possible to identify a number of factors which I require to consider in relation to these applicants. First, when considering the compatibility of a statutory scheme with Article 8 of the European Convention on Human Rights it is necessary to look at the precise nature and extent of such scheme. Secondly, that where the dispute in issue is solely a question of fact between the parties, that judicial review will not suffice to satisfy the procedural obligations of Article 8. Thirdly, that where a dispute between parties relates to the exercise of judgment or a discretion, as in Mr. Gallagher's case, and where there is no dispute that the fact or facts which would permit the exercise of such discretion is or are present that a mechanism to resolve such disputes of fact is not required because there is no dispute of fact as between the parties.

5.5 The nature and requirements for a s. 10 notice are set out in statute. The facts in this case confirm and identify that there is no dispute of fact as between the applicants and the Council. The matters relied upon by the Council to cause them to form its opinion referred to in the second paragraph of the s. 10 notices are not in dispute. All the matters identified in the correspondence prior to the s. 10 notices are not in dispute on the affidavits sworn in this case. It is upon those facts and matters that the local authority was of the opinion that the applicants' caravans were causing a nuisance. The nature and scope of judicial review is sufficient on the facts of this case to provide an adequate remedy in relation to the forming of the opinion by the local authority given that the facts are not in dispute. The proportionality of the decision of the Council to issue s. 10 notices can be considered in judicial review proceedings. The facts of this case demonstrate a different situation from that which was present in Mr. Donegan's case and this is not a case where it is necessary to make available a mechanism to determine factual conflicts. The procedural safeguards provided for by judicial review are sufficient to satisfy the requirements of Article 8.

5.6 The matters and facts on which the Council relied on in forming the opinion referred to in the s. 10 notices were plainly set out in advance and were well known to the applicants and none of those matters and facts are in dispute. What is in dispute is the formation of an opinion and the real essence of the applicants' complaint is that such opinion should not have been made or formed. As the matters and facts grounding such opinion are known and not in dispute, judicial review provides a sufficient mechanism to independently review the Council's decision and an effective means of vindicating the applicants' constitutional rights and also provides an effective remedy for any claimed breach of a Convention right. Judicial review in this case, is as Hogan J. held in the *Efe* case, "broad enough to ensure that the substance and essence" of the applicants' claim can be reviewed on a proportionality basis by an independent court. In considering the nature and scope of judicial review at sub. (8) of paragraph 143 in the paragraph headed "In Conclusion", the Supreme Court held in the *Donegan and Gallagher* cases as follows:

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

In this case I am satisfied that this is not one of the rare cases where judicial review is not an adequate remedy. As indicated above, I arrive at this conclusion based upon my determination that the scope of judicial review is sufficient to deal with any issue which the applicants seek to raise in relation to the circumstances surrounding the issue and service of the s. 10 notices. The limitation of judicial review and of its operation relative to factual disputes does not arise in this case and I am satisfied that the position as existed in relation Mr. Gallagher's case equally applies in this case. In relation to Mr. Gallagher, the Supreme Court held that the procedural safeguards provided to him by the Council were satisfactory. In this case, the procedural steps taken by the Council include the s. 10 notices but also in the letters sent on the 4th May, 2010 and the 24th June, 2010 together with the holding of

numerous meetings between the Council's representative and the applicants. Those steps are sufficient to satisfy the requirements of Article 8, particularly when accompanied by the availability of judicial review.

5.7 I indicated earlier in this judgment that in considering the applicants' claim for judicial review based upon a claim of lack of procedural safeguards sufficient to satisfy Article 8 of the European Convention on Human Rights or sufficient to comply with the applicants' constitutional rights (at para. 1.14 of this judgment) that the identification of the facts and circumstances of this case would be of crucial importance. The facts confirm that when the Council issued and served the s. 10 notices that the facts and material upon which they were relying and the reasons upon which the opinion, referred to in the s. 10 notices, had been arrived at were identified and known to the applicants. It is apparent that the facts upon which the Council relied upon in forming its opinion, referred to in the s. 10 notices, are not in dispute in this case and there are no material errors of fact identified by the applicants. The facts of this case do not establish that the Council made any material error of fact. Judicial review is an adequate and sufficient remedy and this is not one of the rare cases where such remedy would not be suitable. This is not a case where factual disputes require to be resolved and that therefore the limitation of the nature and scope of judicial review would result in it being an inadequate remedy.

6.1 In the applicants' submissions it was contended that the procedures before the District Court in relation to s. 10 is on all fours with s. 62 as examined by the Supreme Court in the *Donegan and Gallagher* cases. The applicants argue that it is the failure of the applicants to move on, on foot of the serving of the s. 10 notices, that is the offence and that the District Court Judge would therefore have no jurisdiction to examine the reason for the serving of the notices in the first place. They base that argument on the contention that "the conflict of fact, in this case whether or not the applicants are causing a nuisance could not be resolved by judicial review". I am satisfied that that is not a correct argument as there is no identified conflict of fact and the facts identified by the Council leading to it forming its opinion that there was a nuisance are not in dispute and whether it was proportionate to form an opinion on such facts is capable of review. I am therefore satisfied that judicial review is an effective procedural safeguard to review the basis upon which such opinion was formed where no facts are in dispute. Judicial review on the facts of this case provides an effective procedural safeguard to fulfil the requirements of Article 8 and it provides a remedy which would meet the procedural requirements of Article 6(1) of the European Convention on Human Rights and also is sufficient to protect the applicants' constitutional rights. This is not a rare case where it can be said that judicial review is inadequate due to the necessity of resolving an underlying dispute of fact. It follows that I am satisfied that the applicants have not made out either of the grounds set forth at 3 and 4 of paragraph 5 of the grounds upon which relief is sought.

6.2 The applicants contend that the summary nature of the proceedings envisaged by s. 10 is such that the applicants are effectively denied fair procedures as they are not entitled to advance any arguments as to the impact which the removal of their caravans will have on them and that in addition there is no opportunity to respond to any allegations against them which formed the basis for a finding that they had committed a criminal offence.

6.3 O'Neill J. in the case of *McDonagh & Ors. v. Kilkenny County Council & Ors.* (Unreported judgment of the High Court of 23rd October, 2007 [2007] IEHC 350) considered a similar point to that raised by the applicants in this case and as set out in the previous paragraph of this judgment. In the *McDonagh* case, O'Neill J. was considering notices under s. 19 of the Criminal Justice (Public Order) Act 1994. In that case the applicants had argued that the prosecutions should be prevented on the basis that the offence created by s. 19 was one of strict liability and that it followed that certain defences were thereby excluded. The case made by the applicants in the McDonagh case was identified by O'Neill J. (at p. 21) in the following terms:

> "The applicants seek to illustrate the procedural deficiency of which they complain by comparing the absence of the procedure they contend for, namely of some kind of hearing before the invoking of the s. 19 powers, to the situation which appertained prior to the enactment of s. 19, namely where aggrieved landowners sought injunctive relief from the courts to restrain trespass. In this situation it was submitted that the trespasser had a hearing which was required by article 6(1). What was entirely overlooked in the applicants' submission in this regard is that the circumstances now relied upon by the applicants as justifying their illegal entry would have been no defence and would have gained them no relief or concession from the court, where there was no dispute but that the entry on land was unlawful."

In the *McDonagh* case the applicants had sought upon rely on Article 8 of the European Convention on Human Rights which protects the right to respect for private and family life. The respondents objected to that relief on the basis that Article 8 is not among the grounds in respect of which leave had been granted and O'Neill J. upheld that objection. In his judgment (at p. 19) he held:

> "Similarly, the protection afforded by article 8 of the European Convention on Human Rights cannot be invoked simply to shield from scrutiny and redress an illegal invasion of another person's property rights. In all of the E.C.H.R. cases above mentioned relied upon by the applicants, the applicants in each case either owned the land in respect of which the dispute arose or had enjoyed a lawful occupation of it and hence, in my view, are clearly distinguishable from the circumstances in this case."

I adopt that approach and in applying such approach to this case, I am satisfied that any claim based on Article 6 has no foundation. The applicants in this case are seeking to assert that they have a legal right to camp unlawfully their caravans adjacent to the roadway and there is no such civil right or obligation within the meaning of Article 6 of the European Convention on Human Rights. The applicants sought to rely on the case *of Connors v. The United Kingdom* [2005] 40 EHRR 9 to support the contention that Article 6 is engaged. However, consideration of that authority identifies that that case was dealing with the eviction of a claimant from their home by a public authority which would come within Article 6. In *Connors*, having decided in favour of the applicant on the basis of Article 8, the Court found it unnecessary to consider Article 6 as any claim was absorbed by Article 8 and no separate issue arose for determination (see paragraph 101 of the judgment). Following the approach identified by O'Neill J. in the *McDonagh* case, and the distinction drawn therein in relation to the difference between lawful occupation and unlawful occupation, I am satisfied that Article 6 of the European Convention on Human Rights is not engaged. O'Neill J. went on in the *McDonagh* case to deal with the respondents' assertion of the rights of ownership by requiring trespassers to leave by evoking the power given to it in the terms as set out in paragraph 6.5:

> "The fact that this illegal entry exposes applicants to a criminal liability under s. 19 is immaterial. The addition of criminal culpability or liability by this statutory provision could not enhance the position of the applicants so as to cloak the undoubted illegality of their conduct with the protection of either constitutional or Convention rights."

6.4 An examination of the facts in this case identifies that neither of the applicants can avail of a defence of necessity as justification for an illegal entry and occupation of lands. The evidence clearly establishes that both applicants chose to go on to the lands and occupy those lands as a matter of choice rather than necessity and this fact further reinforces the fact that there has not been an infringement of Article 6 of the Convention on the basis contended for by the applicants.

6.5 Insofar as the applicants raise an issue based upon the alleged breach of their right to inviolability of their dwellings, I apply the words of O'Neill J. in *McDonagh* (at pp. 19/20):

> "In essence, that exercise, so far as the assertion by the first named respondents of the rights as landowners is concerned, is in principle no different from applying to the court for injunctive relief to compel the applicants to leave and remove their caravans or simply requesting the applicants to leave without any further step. All they were doing was asserting their rights of ownership by requiring the trespasser to leave, failing which there could be invoked the common law procedure of applying to the court for equitable relief or the statutory procedure of requesting An Garda Síochána to use the powers conferred on them under s. 19. The assertion of their rights of ownership by any of these three methods, in my opinion, could not amount to an interference or infringement of the applicants' rights under Article 40.5 of the Constitution or article 8 of the European Convention on Human Rights."

Neither of these applicants were ever lawfully on the lands where their caravans are located. The applicants cannot evoke Article 40.5 or Article 8 to protect their unlawful conduct.

6.6 Insofar as the applicants contend that they are deemed to have committed an offence notwithstanding having no opportunity to challenge the Council's case against them as a result of the service of the s. 10 notices, a similar position exists in this case as was present in the *McDonagh* case. O'Neill J. identified that judicial review jurisdiction could not be used as an advisory or consultative jurisdiction in advance of criminal proceedings and that whether or not there was merit in the applicants' submission in relation to the conclusion that they had committed an offence would first have to be tested in a criminal hearing.

6.7 There have been no criminal prosecutions in respect of either of the applicants arising out of their failure to comply with s. 10 notices and if there had been, the applicants would have had the opportunity to contest such charges in court. It is also the case that an offence under s. 10(4) of the Housing (Miscellaneous Provisions) Act 1992 of failing in any respect to comply with any requirement of the s. 10 notice was complete once twenty four hours had elapsed from the time of the receipt of the s. 10 notices if the applicants had not fully complied with the requirements of the s. 10 notices. The offence in question is a summary offence with time limits for prosecution. Whilst it is the case that the applicants were liable to be prosecuted for such an offence at the time that these judicial review commenced, that is no longer the case as the time for bringing any prosecution has expired and the issue raised at ground 5 of the grounds upon which relief is sought is moot.

7.1 In the light of the findings that I have made in this case it follows that I am satisfied that the applicants have failed to succeed on any of the five grounds identified in paragraph 5 of the amended statement required to ground application for judicial review. As they have failed to succeed in relation to any of those matters, it follows that the applicants are not entitled to any declaration under s. 5 of the European Convention on Human Rights Act 2003 nor does the issue of damages arise as I am satisfied that there has been no breach of the applicants' rights under the European Convention on Human Rights nor has there been any breach of the applicants' constitutional rights. I am satisfied that the applicants are not entitled to any of the reliefs sought.