Neutral Citation Number: [2008] IEHC 288

THE HIGH COURT

2005 No. 3513P

BETWEEN

ANTHONY DONEGAN

PLAINTIFF

AND
DUBLIN CITY COUNCIL, IRELAND AND
THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 8th May, 2008

Relief Claimed

1. In these proceedings the plaintiff claims the following reliefs:

> 1. a declaration that s. 62 of the Housing Act, 1966 (the Act of 1966), as amended by s. 13 of the Housing Act, 1970, is incompatible with the obligations of the State under Articles 6, 8 and 13 of the European Convention on Human Rights (the Convention);
>
> 2. a declaration that the first named defendant (the Council) has failed to perform its functions in a manner compatible with the obligations of the State under the said Articles of the Convention; and
>
> 3. damages pursuant to s. 3 of the European Convention on Human Rights Act, 2003 (the Act of 2003).

2. The plaintiff also claims, if necessary, a stay on the proceedings in the District Court to which I will refer later and, if necessary, an injunction restraining the Council from taking any further steps to evict the plaintiff from the premises known as 71 Bridgefoot Street, Dublin.

3. Counsel for the plaintiff argued for a Convention compatible construction of s. 62(3), but did not make that case on the pleadings or seek declaratory relief to that effect.

Section 62

4. In so far as is relevant for present purposes s. 62 provides as follows:

> "(1) In case,
>
> (a) there is no tenancy in –
>
> (i) a dwelling provided by a housing authority under this Act,
>
> (ii) …
>
> (iii) …
>
> whether by reason of the termination of a tenancy or otherwise, and
>
> (b) there is an occupier of the dwelling or building or any part thereof who neglects or refuses to deliver of possession of the dwelling or building or part thereof on the demand being made therefor by the authority …, and
>
> (c) there is a statement in the demand of the intention of the authority or agency to make application under this subsection in the event of the requirements of the demand not being complied with,
>
> the authority … may without prejudice to any other method of recovering possession apply to the justice of the District Court having jurisdiction in the district court area in which the dwelling … is situate for the issue of warrant under this section.
>
> (2) …
>
> (3) On the hearing of an application duly made under subs. (1) of this section, the justice of the District Court hearing the application shall, in case he is satisfied that the demand mentioned in subs. (1) has been duly made, issue the warrant.

5. Subsection (5) contains evidential provisions including the following:

> "… in case there is no tenancy in the premises to which the proceedings relate by reason of the termination of a tenancy by notice to quit and the person to whom such notice was given is the person against whom the proceedings are brought, the following additional provisions shall apply:
>
> (a) any demand or requirement contained in such notice that the person deliver up possession of the said premises to the authority… shall be a sufficient demand for the purposes of para. (b) of the said subs. (1); and
>
> (b) any statement in the said notice of the intention of the authority … to make application under subs. (1) of this section in respect of the premises shall be a sufficient statement for the purposes of para. (c) of the said subs. (1)."

The factual background

6. The plaintiff became the tenant of the Council in a house at 71 Bridgefoot Street, Dublin (the house) by virtue of a tenancy agreement, dated 22nd August, 2002 made between the Council of the one part and the plaintiff of the other part (the tenancy agreement). The plaintiff had been a tenant of the Council for the preceding sixteen or eighteen years in a flat in a building in the

same locality which has since been demolished. His son, who was born in 1980, lived with him in the flat and moved with him to the house. It is common case that the house is a dwelling provided by a housing authority under the Act of 1966.

7. The provisions of the tenancy agreement which are relevant for present purposes are as follows:

> Clause 1 whereby the Council let the premises to the plaintiff for one week commencing 26th August, 2002 and "so from week to week or until the tenancy shall be determined…"
>
> Clause 13 (a), which is in bold print, and provides:
>
> > "Neither the tenant nor any member of his household… shall cause any nuisance, annoyance or disturbance to any neighbours, their children or visitors or to Council staff."
>
> Following paras. (b) and (c) of clause 13, which contain definitions of "neighbours" and "nuisance, annoyance or disturbance", there is a warning in the following terms, also in bold print:
>
> > "A tenant evicted for a breach of this condition or part of it will be deemed for the purpose of rehousing to have deliberately rendered himself homeless within the meaning of s. 11(2)(b) of the Housing Act, 1988 and may not be provided with another home by the Council until such time as the Council is satisfied that the evicted tenant and his family are capable of living and are agreeable to live in the community without causing a further breach of this condition"
>
> Clause 25 which provides that the Council shall have a right to re-enter upon and resume possession of the dwelling for breach, non-performance or non-observance of any of the provisions of the letting conditions.
>
> Clause 26 which provides as follows:
>
> > "The tenancy may be terminated at any time on the giving of four weeks notice by … the Council.
>
> Clause 28 which provides that the tenant shall on termination of the tenancy peacefully and quietly deliver up possession of the premises to the Council.

8. In October, 2004 the tenant was served with notice to quit. The notice to quit was dated 18th October, 2004. It required the plaintiff to deliver up possession of the premises on 7th February, 2005. It contained a demand which complied with para. (b) and a statement which complied with para. (c) of subs. (5) of s. 62. While, on its face, the notice to quit would appear to be a typical notice to quit designed to terminate the tenancy, but giving a more generous period of notice than the four weeks provided for in clause 26 of the tenancy agreement, that was only part of the story.

9. On 20th November, 2003 the Garda Síochána searched the house on foot of a search warrant issued under the Misuse of Drugs Act, 1977/84. No unlawful drugs were found. The matter was reported by a community source to the Council. The Council sought and was furnished with a report by the Garda Síochána under s. 15 of the Housing (Miscellaneous Provisions) Act, 1997. The report, which was dated 9th December, 2003, stated that substantial evidence to show that heroin was prepared and packed for sale on the streets was found in the son's bedroom (para. 6), that other "drugs paraphernalia" was also found in the bedroom and these were itemised as several blood filled syringes, bloodied swabs, dirty needles and needle caps (para. 7), and that the items were brought to the attention of the plaintiff "along with the fact that his son was known to be selling heroin on the streets" (para. 8). On receipt of that report the Council initiated an investigation into alleged "serious anti-social behaviour" which took the following course:

> By letter dated 22nd January, 2004 the plaintiff was offered an opportunity of responding to the complaints and presenting his point of view. He was warned that, if the complaints were confirmed, that might lead to the initiation of legal proceedings by the Council for a repossession of the house.
>
> The plaintiff attended a meeting with Council officials on 2nd February, 2004. The contents of para. 6, 7, and 8 of the Garda Report were read to the plaintiff, who denied the contents of para. 6, contending that only one plastic bag was found and a number of used syringes which were for his son's personal use. The Council officials put the option to the plaintiff of taking out an exclusion order against his son excluding him from the premises as an alternative to the Council seeking to recover possession of the premises.
>
> Following that meeting, on 11th February, 2004 the plaintiff's solicitors wrote to the Council on his behalf indicating that he was most anxious to co-operate with the Council in dealing with their concerns, but that it was his belief that neither he nor members of his household were responsible for any anti-social behaviour. He had requested his son to provide details of urine analysis to the Council to confirm that he was not taking "unprescribed drugs". That letter and a reminder of 29th April, 2004 do not appear to have elicited a response from the Council. A request under the Freedom of Information Act, 1997 from the solicitors was not responded to until after notice to quit was served, on 30th November, 2004. However, direct contact between the Council officials and the plaintiff continued.
>
> By letter dated 31st March, 2004 the plaintiff was invited to another meeting, and was again reminded that legal proceedings for possession might be taken. The meeting took place on 19th April, 2004. Once again the contents of the Garda report were read to the plaintiff, but again he asserted that the syringes found were for his son's personal use. The option of taking out an exclusion order was again put to the plaintiff as an alternative to terminating the tenancy and he was given time to consider that. At the meeting the plaintiff furnished a letter from the clinic his son was attending and also a letter from his son consenting to release of results of analyses carried out at the clinic.
>
> The next meeting took place on 8th June, 2004. In the interim, the Council had obtained further information from the Garda Síochána in a letter dated 18th May, 2004. The Council was informed that during the search on 20th November, 2003 plastic bags with small neat circular holes in them were discovered during the search and it was the Garda's experience that heroin is bagged in small plastic bags similar to what was found during the search. This information was given to the plaintiff at the meeting. The option of obtaining an exclusion order against his son was put to the plaintiff again. His response was that he could not seek an exclusion order against his son because his son was not a drug pusher,

he was an addict who was addressing his addiction. The plaintiff was asked by the Council to furnish information on that. Subsequently the Council was furnished with a letter dated 10th June, 2004 from a doctor offering the plaintiff's son a place in weekly group therapy sessions for cocaine users.

The final meeting took place on 7th September, 2004. Once again the option of taking out an exclusion order against his son was put to the plaintiff, who indicated that he would not adopt that approach. At that stage the amendment of s. 3 of the Housing (Miscellaneous Provisions) Act 1997 contained in s. 197 of the Residential Tenancies Act 2004 (the Act of 2004) had come into operation, the commencement date having been 1st September, 2004. Under the amended provision, which empowers a housing authority to apply for an exclusion order if the tenant does not intend to make such application "for whatever … reason", the Council could have sought an exclusion order against the plaintiff's son, but did not do so. If it had, counsel for the plaintiff submitted, the District Court would have examined on the merits whether there were reasonable grounds for believing that the plaintiff's son was or had been engaged in anti-social behaviour. Instead, the Council took the more draconian step of terminating the tenancy, it was submitted.

The managerial order directing the service of the notice to quit was apparently made on 4th October, 2004 and the notice was subsequently served.

Proceedings for possession were initiated in the District Court on 22nd March, 2005 following the expiration of the notice to quit. I understand that the proceedings stand adjourned pending the outcome of these proceedings, which were initiated by plenary summons which issued on 20th October, 2005. The plaintiff and his son continue to reside in the house.

10. The hearing of this matter, being a plenary hearing, the plaintiff gave evidence, as did the Council official who conducted all of the interviews with the plaintiff. The Council also adduced evidence of the Garda Sergeant who wrote the report date 9th December, 2003 and another Garda who was involved in the search on 20th November, 2003. Evidence was also adduced that the plaintiff's son had pleaded guilty and was convicted on 7th March, 2005 at Kilmainham District Court of offences under s. 3 and 15 of the Misuse of Drugs Act, 1977 the date of the offences being 20th May, 2003.

11. The factual dispute between the plaintiff and the Council is that the plaintiff asserts that his son was a drug addict, not a drug dealer. Apart from the issues arising from the alleged anti-social behaviour of the plaintiff's son, it is common case that the plaintiff, who is an employee of the Council, has always paid his rent and discharged his obligations under the tenancy agreement.

Pre-2003 Act challenges to section 62

12. In *Dublin City Council v. Fennell*, [2005] 1 I.R. 604 Kearns J., in his judgment with which the other four judges of the Supreme Court agreed, summarised the effect of s. 62 as follows at p. 612:-

> "The statutory requirements where an application is made to the District Court for possession are, therefore, that the District Court must be satisfied only that the following conditions have been met:-
>
> (1) that it has been proven that the dwelling was provided by the local authority under the Housing Act, 1966;
>
> (2) that there was no tenancy in the dwelling;
>
> (3) that possession has been duly demanded;
>
> (4) that the occupier has failed to give up possession;
>
> (5) that in the event of non-compliance, the demand made it clear that an application for a warrant would follow.

13. Once these matters are proved to the satisfaction of the District Judge, neither he nor she (nor the Circuit Court Judge on appeal) has any discretion but must issue the warrant without enquiring into other matters."

14. Kearns J. then went on to refer to some previous challenges to s. 62, including *The State (O'Rourke) v. Kelly [*1983] I.R. 58, in which the Supreme Court rejected a challenge to the constitutionality of s. 62 on the ground that it constituted an unwarranted interference in the judicial domain. He summarised the effect of the authorities as follows (at p. 614):

> "For many years, therefore, it is clear that the statutory process involved in an application for possession by a housing authority under section 62 of the Act of 1966 has survived constitutional and judicial scrutiny, not least because of the obvious need of a housing authority to be able effectively to manage and control its housing stock without being unduly restricted or unfettered while so doing. Obviously a housing authority must not abuse its powers of discretion when exercising those powers and where it does so the proper remedy is that of a judicial review application to the High Court.
>
> It goes without saying therefore that the position of the tenant of a housing authority compares unfavourably with that of private law tenant under contract or under the Landlord and Tenant Acts, the Rent Restrictions Acts or a variety of other statutes. It may also be seen that the summary method whereby possession of such dwellings may be recovered, notably in circumstances where the tenant is regarded as having through misbehaviour brought about the termination of his own tenancy and thus forfeited the right to any alternative accommodation, may arguably infringe certain Articles of the Convention, and in particular, Articles 6, 8 and 13 thereof, and also Article 1 of protocol 1 (protection of property) of the Convention."

The plaintiff's Convention challenge

15. The plaintiff makes the case which was anticipated in the last sentence of the passage from the judgment in *Fennell* last quoted. His principal contention is that the process embodied in s. 62, which enables him to be evicted by an organ of the State without the burden of giving reasons liable to be examined on the merits by an independent tribunal, does not contain the requisite procedural safeguards so as to afford to him the right to respect for his private and family life and his home guaranteed by Article 8 of the Convention. In support of that contention, the plaintiff relies on the judgment of the European Court of Human Rights (ECtHR) in *Connors v. U.K.* (2004) 40 E.H.R.R. 189. He does so to the extent that the decision is referred to in his statement of claim, and, indeed, it is not an exaggeration to suggest, as counsel for the second and third defendants (the State parties) suggested, that the statement of claim is "wrapped around" it, at any rate as regards the Article 8 challenge.

16. The plaintiff makes subsidiary points in support of his assertion that s. 62 is incompatible with the Convention. First, he invokes Article 6 and contends that s. 62 infringes his right to have his civil rights and obligations determined by a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Secondly, referring to Article 13 (perhaps intending to refer to Article 14), he contends that, by virtue of s. 62, a tenant who is subject to summary eviction on foot of a s. 62 warrant for possession is discriminated against, given that private tenants have rights to be heard on the merits under various statutory provisions, for example, the dispute resolution mechanisms contained in the Act of 2004. He also invokes –

> (a) Article 13, his counsel arguing that his right to an effective domestic remedy for violation of Convention rights is significant and favours a Convention compliant interpretation of s. 62(3), rather than a declaration of incompatibility, and
>
> (b) Article 1 of the First Protocol, contending that his right to peaceful enjoyment of his possessions is infringed by s. 62.

17. Essentially, as I will demonstrate, the plaintiff's case falls to be determined primarily by reference to the rights and protections afforded by Article 8.

Submissions

18. The court has had the benefit of very comprehensive and helpful submissions from counsel for all of the parties, which I do not propose to outline. A considerable body of jurisprudence from the ECtHR and the courts in the United Kingdom derived from Article 8 was opened by counsel for the parties. I propose considering two decisions of the ECtHR, in addition to *Connors*, on Article 8, and the post-*Connors U.K.* authorities on Article 8, a decision of the ECtHR on Article 6 and the recent decision of this Court (Dunne J.) on a Convention challenge to s. 62, before setting out my conclusions.

Decisions of the ECtHR on Article 8

19. The only successful invocation of Article 8 in a landlord and tenant context before *Connors* was the decision of the ECtHR in *Larkos v. Cyprus* [1999] 30 E.H.R.R. 597. In that case, the ECtHR was considering an alleged violation of Article 14 of the Convention, which provides that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground, in conjunction with Article 8, where the applicant maintained that, as a tenant of the State, he had been unlawfully discriminated against in the enjoyment of his right to respect for his home on account of the fact that he, unlike a private tenant renting from a private landlord, was not protected from eviction on the expiry of his lease. The court found for the applicant stating (at para. 31):

> "The court would also note that the legislation was intended as a measure of social protection for tenants living in particular areas of Cyprus. A decision not to extend that protection to tenants in State-owned dwellings living side by side with tenants in privately owned dwellings requires specific justification, more so since the State is itself protected by the legislation when renting property from private individuals…However, the Government have not adduced any reasonable and objective justification for the distinction which meets the requirements of Article 14 of the Convention, even having regard to the margin of appreciation in the area of control of property."

20. On that basis, the court concluded that there had been a violation of Article 14 in conjunction with Article 8.

21. As I will illustrate, the discrimination alleged by the plaintiff in this case is centred on the absence of proper procedural safeguards for tenants of housing authorities, not on the absence of security of tenure. Therefore, the *Larkos* decision is of limited relevance.

22. Mr. Connors, the applicant in Connors, was a gypsy who occupied a plot in a caravan site under a contractual licence from Leeds City Council. The Council served notice to quit on him but gave no written or detailed reasons. The notice to quit was followed by proceedings for summary possession in the County Court. The grounds for possession stated that the applicant was in occupation without licence or consent and a witness statement asserted that the applicant had breached a "no nuisance" clause in the licence agreement and had been given notice to quit, although no particulars of the breach were given. The applicant disputed the breach of the "no nuisance" clause. Before the summary proceedings were determined, the applicant applied to the High Court for judicial review of the Council's decision to determine the licence, but that application was refused. The Council dropped the allegations of breach of the licence and asserted a right to summary possession on the basis that the applicant and his family were trespassers, as permission to occupy the land had been withdrawn. The County Court granted the possession order and subsequently obtained a warrant for possession and forcibly evicted Mr. Connors and his family.

23. At the time of the *Connors* eviction, occupiers of gypsy caravan sites run by local authorities in the United Kingdom had limited security of tenure pursuant to an Act of 1968: the occupier's contractual right could be determined by four weeks notice and he might only be evicted by court order. However, such occupiers were treated less favourably than other occupiers in a number of respects. First, a provision of the 1968 Act, s. 4, empowered the court to suspend an order for possession for up to twelve months, but, crucially, subsection of s. 4 excluded local authority caravan sites from the ambit of the power to suspend. Secondly, an Act of 1983 conferred protection upon a person living in a caravan or mobile home as his own or main residence, in that such a person might not be evicted save by court order and on the site owner having established one of the stated grounds, *inter alia*, that the court was satisfied that the occupier was in breach of the licence agreement and had failed to remedy the breach within a reasonable time and that it was reasonable for the agreement to be terminated. However, caravan sites run by local authorities for gypsies were expressly excluded from that protection. Thirdly, secure tenants of conventional flats or houses provided or managed by local authorities enjoyed a similar regime of security of tenure to that conferred upon occupiers of a residential caravan site by the 1983 Act.

24. Article 8 of the Convention as relevant to the Connors decision and to this case provides as follows:

> "1. Every one has the right to respect for his private and family life, his home…
>
> 2. There shall be no interference by a public authority with the exercise of this 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, and for the protection of the rights and freedoms of others."

25. The *Connors* case proceeded on the basis of the agreement of the parties that Article 8 was applicable and that the eviction of the applicant disclosed an interference with his right to respect for his private life, family life and home and also that the interference was "in accordance with the law" and pursued a legitimate aim, namely, the protection of the rights of other occupiers of the site and the Council, as owner and manager of the site. Therefore, the question which remained for examination by the court was whether the interference was "necessary in a democratic society" in pursuit of that aim.

26. Addressing that issue the court reiterated certain general principles starting (at para. 81) with the following:

> "An interference will be considered 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention…"

27. The court then went on to state that "a margin of appreciation" must, inevitably, be left to national authorities and gave examples of the range of the margin of appreciation, stating (at para. 82) that, in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide and continuing:

> "The Court has also stated that in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation. … Where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant…"

28. The court then went on to deal with two specific matters, the first being of particular relevance to this case, but not the second (the vulnerable position of gypsies as a minority). On the first, the court stated (at para. 83):

> "The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8…"

29. In applying the general principles to the facts in relation to Mr. Connors, the court identified the central issue as whether, in the circumstances, the legal framework applicable to the occupation of pitches on local authority gypsy sites provided the applicant with sufficient protection of his rights. The court stated (at para. 86) that the serious interference with the applicant's rights under Article 8 required particular weighty reasons of public interest by way of justification and the margin of appreciation to be afforded to the national authorities must be regarded as correspondingly narrowed, observing that the case was not concerned with matters of general planning or economic policy but with the much narrower issue of the policy of protection for a particular category of persons.

30. The court then examined the arguments advanced by the Government of the United Kingdom in its justification of the summary eviction regime but was not persuaded by them. Later (at para. 92) the court stated that the existence of other procedural safeguards was a crucial consideration in the assessment of the proportionality of the interference. The United Kingdom Government had relied on the possibility for the applicant to apply for judicial review to obtain a scrutiny by the courts of the lawfulness and reasonableness of the Council's decisions. The court pointed out that the applicant's complaint was that he could not be held responsible for the nuisance caused by others who visited the site and on this a factual dispute existed. The court commented that the Council was not required to establish any substantive justification for evicting Mr. Connors and on this point judicial review could not provide any opportunity for an examination of the facts in dispute between the parties. The court continued (at para. 92):

> "While therefore the existence of judicial review may provide a valuable safeguard against abuse or oppressive conduct by local authorities in some areas, the Court does not consider that it can be regarded as assisting the applicant, or other gypsies, in circumstances where the local authority terminates licences in accordance with the applicable law."

31. The court concluded on the Article 8 allegation as follows (at para. 95):

> "In conclusion, the Court finds that the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely, the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a 'pressing social need' or proportionate to the legitimate aim being pursued. There has, accordingly, been a violation of Article 8 of the Convention."

32. The final decision of the ECtHR in which Article 8 was invoked in the landlord and tenant context to which I propose referring is the decision of the First Section in *Blecic v. Croatia* [2004] 41 E.H.R.R. 13. The applicant in that case had been a protected tenant of a publicly owned flat for almost 40 years when, in July, 1991, she went to visit her daughter who lived in Rome. A month later the armed conflict in Dalmatia escalated and she decided to remain in Rome. In February, 1992, the municipality brought a civil action against her for termination of her tenancy on the basis of her absence from the flat for more than six months without justified reasons. The applicant's case was that she had been forced to stay with her daughter in Rome until May 1992, she had not been able to return home because she had no means of subsistence and no medical insurance and was in poor health. After a prolonged judicial process at three levels, the Supreme Court held that the reasons submitted by her for her absence from the flat were not justified.

33. The ECtHR held that the flat could be reasonably regarded as the applicant's home at the material time for the purposes of Article 8 of the Convention and that the termination of her specially protected tenancy by the domestic courts constituted an interference with her right to respect for her home. On the question whether the interference was justified, the court examined three questions: whether it was "in accordance with the law"; whether it had an aim that was legitimate under para. 2 of Article 8; and whether it was "necessary in a democratic society" for the aforesaid aim.

34. It was not disputed that the interference, which was based on a statutory provision, was "in accordance with the law" and it was accepted that the court had no reason to hold otherwise. The court held that the legislation pursued a legitimate aim, namely, the satisfaction of the housing needs of the citizens, and that it was thus intended to promote the economic well being of the country and the protection of the rights of others. On the question of whether the impugned measure was "necessary in a democratic society", the broad question which the court addressed was whether the manner in which the domestic courts exercised their discretion in the applicant's case corresponded to a pressing social need and, in particular, was proportionate to the legitimate aim pursued. It was held that it was. Having stated that it considered that the State enjoys a wide margin of appreciation as regards respect for the home in circumstances such as those prevailing in the Blecic case in the context of Article 8, it found that the contested decisions were based on reasons which were not only relevant but also sufficient for the purposes of Article 8.2. It could not be argued, it found, that the Croatian courts' decisions were arbitrary or unreasonable, or that the solution they reached in seeking a fair balance between the demands of the general interest of the community and the requirement of protecting the applicant's right to respect for her home was manifestly disproportionate to the legitimate aim pursued (para. 66).

35. The court dealt with the specific issue of procedural requirements in para. 68, positing the following test for compatibility:

> "… while Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8. The Court must therefore determine whether, having regard to the circumstances of the case and notably the importance of the decisions to be taken, the applicant has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her with the requisite protection of her interests."

36. The court noted that in the proceedings at first instance the applicant, assisted by counsel, had the opportunity to present her arguments both orally and in writing. Although in the appellate proceedings the County Court and the Supreme Court had based their decisions on the first instance case file, the applicant was given the opportunity to put forward in writing any views which in her opinion were decisive for the outcome of the proceedings. Consequently, a hearing before the appellate courts was not necessary.

37. The court concluded that there had been no violation of Article 8, having stated (at para. 70):

> "In these circumstances the court is satisfied that the procedural requirements implicit in Article 8 of the Convention were complied with and that the applicant was involved in the decision-making process to a degree sufficient to provide her with the requisite protection of her interests."

Post Connors UK Authorities

38. In *Kay v. Lambeth LBC* [2006] 2 A.C. 465, the House of Lords decided two conjoined appeals which dealt with the scope and application of Article 8.

39. The appellants in the *Lambeth* appeal where occupiers of accommodation for homeless people whom the House of Lords had held in 1999 were secure tenants, not licensees, of a housing trust. The housing trust held under head leases granted 1995 by Lambeth LBC in substitution for a written licence which had been in place in since 1986. The head leases granted terms of ten years terminable on six months notice by either party in respect of each of the properties to the housing trust. In response to the House of Lords decision in 1999, the local authority terminated the head leases in accordance with their terms and commenced possession proceedings in the County Court against the appellants on the ground that they occupied the properties as trespassers. It was held in a preliminary ruling in the County Court that the local authority was not bound by the secure tenancies. The appellants' defences based on an alleged infringement of Article 8 were struck out. The Court of Appeal affirmed that decision. The starting point in the House of Lords was that under the domestic law the appellants had no right to retain possession of their respective properties when the head leases were determined in accordance with the termination provisions contained therein.

40. In the second appeal, *Leeds City Council v. Price*, the appellants, who were gypsies, moved their caravans on to recreation ground owned by Leeds City Council without its consent and remained there as trespassers. They resisted a claim for possession by Leeds City Council in reliance on Article 8 of the Convention. This defence was unsuccessful at first instance and an order for possession was made. An appeal to the Court of Appeal was unsuccessful. The starting point in the House of Lords was that, as a matter of domestic law, the appellants had never been anything more than trespassers.

41. An aspect of the appeals was that in the Leeds appeal there was an issue of precedence as between the House of Lords and the European Court of Human Rights in Strasbourg, because in the Leeds case the Court of Appeal had perceived incompatibility between an earlier decision of the House of Lords, *Harrow LBC v. Qazi* [2004] 1 A.C. 983, and the decision of the ECtHR in Connors. While that aspect is not significant for present purposes, it did lead to an incisive analysis of the Connors decision.

42. Both appeals were dismissed, the House of Lords holding, as was summarised in the head note, as follows:

> (1) that the right of a public authority landlord to enforce a claim for possession under domestic law would, in most cases, automatically supply the justification required by Article 8(2) for an interference with the occupiers' right to respect for his home;
>
> (2) that the public authority was not required to plead or prove justification in every case and the courts were to assume that domestic law struck the proper balance of the competing interests and was compatible with Article 8;
>
> (3) that a challenge to the making of an order could be raised in the possession proceedings in the County Court, so far as its jurisdictional limits permitted, if the defendant could, exceptionally, show a seriously arguable case that the relevant domestic law was incompatible with the Convention;
>
> (4) but (by a majority) that, where the requirement of the law had been satisfied and the right to recover possession was unqualified, no challenge based only on a defendant's individual circumstances was permissible.

43. In relation to the third proposition, that an Article 8 challenge could be made in the possession proceedings in the County Court, that was based on a provision of the Human Rights Act, 1998 for which there is no parallel in the Act of 2003, which provides that a person who claims that a public authority has acted in a way which is incompatible with a Convention right may rely on the Convention right in any legal proceedings if he is a victim of the unlawful act.

44. The divergence of opinion between the majority and the minority in relation to the last proposition is addressed in the speech of Lord Bingham, representing the minority view, at para. 39, and in the speech of Lord Hope, representing the majority view, at para. 110. The issue which led to the divergence of views related to a question of substance: when is an interference with a defendant's right to respect for his home permitted by Article 8.2? It was answered in terms of how the County Court should act in relation to a defence raising the issue of incompatibility with Article 8. The majority view, as stated in para. 110, was that a defence which does not challenge the law under which the possession order is sought as being incompatible with Article 8 but is based only on the occupier's personal circumstances should be struck out. If the requirements of the law have been established and the right to recover possession is unqualified, the County Court may refrain from giving summary judgment and an order for possession only in the following situations:

> (a) where a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with Article 8, either by –
>
> > (i) giving effect to the law, so far as it is possible to do so, under the statutory provision in the United Kingdom which, as regards legislation, is somewhat analogous to s. 2 of the Act of 2003 or

(i) by adjourning the proceedings to enable the compatibility issue to be dealt with in the High Court; or

(b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable, he should be permitted to do this provided again the point is seriously arguable.

45. As I understand it, the remedy envisaged at (b) is conventional judicial review, either in the High Court or by way of defence in the County Court in accordance with the principle enunciated in *Wandsworth London Borough Council v. Winder* [1985] A.C. 461.

46. How those conclusions dovetail with the decisions of the ECtHR in *Connors* and *Blecic* was explained by Lord Hope earlier in para. 108:

"There will be some cases of a special and unusual kind, of which Connors is an example, where the interference with the right to respect for the home which results from the making of a possession order will require to be justified by a decision-making process that ensures that 'some special consideration' (the words used in *Connors*, para. 84) is given to the interests safeguarded by Article 8. If there is such a defect the law will need to be amended to provide the necessary safeguards. But there will be many other cases where there are no special circumstances – where the person's right to occupy the premises as his home has simply been brought to an end by the operation of law and his eviction is necessary to protect the rights under the law of the landowners. In these cases it is enough that the eviction is in accordance with what the law itself requires as the case of *Blecic*, in which it was held that the requirements of the law had been satisfied, demonstrates."

47. Each of the appeals in Kay was dismissed because in each case the local authority had an unqualified right to possession and neither of the appellants had a right under domestic law to continue in occupation and, therefore, their claims under Article 8 were unsustainable. Further, it was held there were no grounds for concluding that the similar outcome in the *Qazi* case, on it own facts, was unsound (*per* Lord Hope at para 111). In that case also, the local authority had an unqualified right of possession because the joint tenancy of Mr. and Mrs. Qazi had effectively been terminated by notice to quit served by Mrs. Qazi. But the majority recognised that the reasoning of the majority in *Qazi* required to be clarified in the light of the subsequent Strasbourg cases, in that it was necessary to provide a remedy in the special cases of a kind not considered in *Qazi,* where it is seriously arguable that the right to possession which is afforded by domestic law violates the Convention right (*per* Lord Hope at para. 113).

48. The core issue in the plaintiff's case is one of substance: whether s. 62 which prevents an inquiry on the merits by an independent tribunal is incompatible with Article 8. The opinions of the Law Lords in the Kay appeal are instructive to the extent that they analyse the relevant jurisprudence of the ECtHR. In particular, the commentary contained in the speech of Lord Scott at paras. 157 to 168 is helpful. Lord Scott identified three features of *Connors* that contributed to the conclusion of the ECtHR that the eviction of the family from the local authority caravan site constituted a breach of their Article 8 right to respect for their home, namely:

1. that the security of tenure given by the 1983 Act, in relation to privately owned caravan sites was not extended to local authority owned sites, being an issue of the same nature as the issue raised in *Larkos*, the discrimination factor;

2. that the Strasbourg jurisprudence in relation to Article 8 and gypsies had established that contracting states have a positive obligation "to facilitate the gypsy way of life"; and

3. the importance placed by the court on "procedural safeguards", and, in particular, the fact that Mr. Connor's denial of the allegation of nuisance was never judicially tested.

49. Lord Scott found that none of those features were present on the facts of the appeals or on the facts of the *Qazi* case.

50. Lord Scott compared what the ECtHR said in *Blecic* with what had been said nine months earlier in *Connors* stating (at para. 165):

"Where interference with gypsies' Article 8 rights had happened, the court said that 'particularly weighty reasons of public interest by way of justification' were required and that the margin of appreciation to be afforded to the national authorities 'must be regarded as correspondingly narrowed' (para 86 of *Connors*).

Accordingly, the court was not persuaded that 'the necessity for a statutory scheme which permitted the summary eviction of the applicant and his family [had] been sufficiently demonstrated' (para 94) of *Connors*. But in *Blecic*, a housing case, the margin of appreciation was held to be wide and the judgment of the domestic authorities was to be accepted unless manifestly ill founded."

51. Lord Scott continued (at para. 166):

"In both *Connors* and *Blecic* the Strasbourg court reviewed with Article 8 spectacles, first, the legal framework under which the home occupier had been deprived of his home. In *Blecic* that framework passed muster. In *Connors* it did not. Second, the court reviewed the manner in which the legal framework had been applied. In *Blecic* that too, passed muster. In *Connors* the review was of the local authority's decision to seek a court order to evict the Connors family. The only domestic law review of that decision consisted of the adverse ruling on the application for permission to seek judicial review of the decision. That review was held to be inadequate."

52. Lord Scott summarised the effect of the decisions in *Connors* and *Blecic* as follows (at para 168):

"It is right to notice, however, that *Connors* and *Blecic* do show that in two types of cases where an owner is seeking to recover possession of his property the absence of any contractual or proprietary right of the home occupier to remain in possession may not be conclusive. The first type of case is where an arguable Article 8 objection can be taken to some aspect of the statutory and common law rules that entitle the owner to possession. *Connors* was such a case. So was *Larkos*. So, too, was *Blecic* although the argument in the end failed. The second type of case is where the procedural means available to the home occupier for challenging the decision by the owner of the property to evict him are inadequate. Connors was thought by the Strasbourg court to be such a case."

53. Before leaving the House of Lords decision on the *Kay* appeals, I think it useful to quote Lord Hope's analysis of the outcome of

Connors (at para. 67) which is as follows:

> "*Connors* is the only case where the Strasbourg court has held that the making of a possession order against an occupier in favour of a public authority in accordance with the requirements of domestic property law has failed to meet the third requirement in Article 8(2). It failed to do so in that case because the making of the order was not attended by the procedural safeguards that were required to establish that there was a proper justification for the interference with the applicant's right to respect for his private and family life and his home. So it could not be regarded as justified by a pressing social need or as proportionate to the aim being pursued: para 95. The point of that case, however, was that the law enabled the public authority to evict the applicant from the site which he had been given a licence to occupy without giving reasons which could be examined on their merits by an independent tribunal. There were exceptional circumstances, but it was the law itself that was defective. The margin of appreciation within which in spheres such as housing the judgment of the legislature will be respected did not save it from this criticism: para 82."

54. In *Doherty v. Birmingham City Council* [2006] E.W.C.A. Civ. 1739, the Court of Appeal was faced with the task of applying the decision of the House of Lords on the Kay appeals to circumstances in which the County Court had given summary judgment and made an order for possession against Mr. Doherty before the House of Lords gave its decision. Mr. Doherty was a traveller who, with his family, had occupied a site as their home under a licence agreement with Birmingham City Council. The City Council was the owner of the site and wished to use it for public purposes, the provision of temporary accommodation for travellers. Mr. Doherty had been on the site since 1987. The appeal was unsuccessful, the Court of Appeal concluding unanimously that the County Court judge had been right to make the order for possession and the result was consistent with both domestic and Convention law.

55. What is interesting about the judgment of the court delivered by Carnwath L.J. is the analysis of the speeches of the Law Lords in *Kay* and, in particular, of the Law Lords' perception of the decision of the ECtHR in *Connors*.

56. The Court of Appeal's synthesis of the Law Lords' perception of *Connors* was set out in para. 22(iv) as follows:

> "*Connors* itself was an exceptional case, depending on a combination of three factors: unjustified discrimination between occupiers of local authority sites and those of private caravan sites; the 'special consideration' required by Strasbourg law for gypsies; and lack of suitable procedural means to resolve the factual issues which lay behind the authority's action; the latter was the 'central' issue (paras. 41-45)."

57. The Court of Appeal based that proposition on the speech of Lord Scott, stating that in the other majority speeches there had been differences of emphasis, but not of substance. In relation to Lord Scott's third feature, the Court of Appeal observed (at para. 42):

> "His third feature was the importance placed by the Strasbourg Court on 'procedural safeguards'. The court itself had described the case as concerned, not with general policy issues, but 'with the much narrower issue of procedural protection for a particular category of person' (*Connors* para. 86); and had described that as 'a crucial consideration in this Court's consideration of the proportionality of the interference' (para. 92)."

58. The Court of Appeal also recorded that the "central issue", as Lord Hope understood it, was whether the legal framework provided Mr. Connors with sufficient procedural protection of his rights (paras. 97 – 98), and expressed agreement with that interpretation in the following passage (at para. 43):

> "We respectfully agree with that interpretation of *Connors* … In the view of the Strasbourg Court, the authority was misusing its privileged position under the statute to by-pass the ordinary procedures for alleging and proving breach of licence conditions. The case was thus analogous to a private law claim for breach of covenant, rather than a public law exercise of administrative discretion. It may be open to debate whether the Strasbourg Court's assessment of the procedural safeguards was correct, as Lord Scott thought (para. 172). However, viewed in that way, its effect is relatively narrow."

59. The Court of Appeal saw that approach as being in line with the approach adopted by the Strasbourg Court to the adequacy of procedural safeguards under Article 6, and by United Kingdom domestic authorities, and referred to the fact that the distinction had been summarised in *Tsfayo v. U.K.* (Application 60860/00) in which the ECtHR had given judgment on 14th November, 2006. In that case, among other defects, the internal review procedures of a housing authority were held incompatible with Article 6 in relation to factual issues. The Court of Appeal quoted the following passage from the judgment of the ECtHR in *Tsfayo* at para. 46:

> "… In *Bryan, Runa Begum* and other cases cited … , the issues to be determined required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims. In contrast, in the instant case, the [Review Board] was deciding a simple question of fact, namely whether there was 'good cause' for the applicant's delay in making a claim."

60. The Court of Appeal emphasised that the contrast is between decisions based on "administrative discretion", on the one hand, and those based on "a simple question of fact", on the other hand. Although the division may not always be clear cut, B*ryan* being cited as an example of that, *Connors* "can readily be explained as falling on the factual side of the divide".

61. The Court of Appeal went on to consider whether Mr. Connors, on the facts of his case, could have successfully defended the possession proceedings against him on the basis that he came within situation (a) (referred to by the Court of Appeal as "gateway (a)") in the speech of Lord Hope at para. 110, to which I have referred earlier. The conclusion of the Court of Appeal was set out at para. 22(v)(a) as follows:

> "Gateway (a) would have remained closed, because of the inflexibility of the statutory scheme (the only potential remedy being a declaration of incompatibility, which would not have saved the Connors family, but might have helped others in the future) (paras. 46 – 54)."

62. The argument advanced on behalf of Mr. Doherty (cf. para. 47), which was rejected by the Court of Appeal, in my view, has no relevance to the arguments in this case because it was based on the proposition that, while there was a statutory framework which governed Mr. Connors' situation and Mr. Doherty's situation, it merely exempted those cases from the restrictions of the statute, thereby leaving the way free for the operation of the common law and empowering the County Court, underway gateway (a), to modify the law so far as necessary to ensure that it was compliant with Article 8. In rejecting that argument, the Court of Appeal referred to a passage in the judgment of Lord Hope (at para. 75) to the effect that the absence of statutory protection in a case

such as *Connors* was the result of a deliberate decision by Parliament, the Court of Appeal observing that Lord Hope was simply recognising that Parliament may express its policy intentions in a particular statutory scheme equally by means of exclusion or by inclusion (para. 53). While, in essence, the plaintiff's case here is that s. 62, as enacted by the Oireachtas, is incompatible with Article 8 because it expressly precludes the District Court from adjudicating on the merits, it was not, and could not be, argued on his behalf that this Court could "modify" the law. The argument was that s. 62 should be interpreted and applied in a manner compatible with the State's obligations under the Convention provisions (s. 2 of the Act of 2003) or declared to be incompatible with those obligations (s. 5 of the Act of 2003).

63. On the question whether Mr. Connors, on the facts of his case, could have successfully defended the possession proceedings against him on the basis that he came within situation (b) (referred to by the Court of Appeal as gateway (b)) in Lord Hope's speech (para.110)), the conventional judicial review route, the Court of Appeal suggested that gateway (b) might have been open for a defence based on broader judicial review grounds that those actually advanced (para. 22(v)(b)). In the analysis which led to that suggestion (paras. 55 to 60), the Court of Appeal recognised that the availability of judicial review was not regarded by the Strasbourg court as sufficient to secure compliance with Article 8. However, the Court of Appeal distinguished *Doherty* from *Connors,* because the decision of the local authority in the former depended, not on a factual allegation of nuisance or misconduct, but on an administrative judgment about the appropriate use of its land in the public interest. Counsel for the plaintiff emphasised that the issue in this case is whether, having regard to the criteria for and standards of judicial review in this jurisdiction, the availability of judicial review constitutes a sufficient procedural safeguard to constitute compatibility with Article 8, suggesting that *Connors* should be exactingly applied.

64. The final United Kingdom authority to which I propose referring is the decision of the Court of Appeal delivered on 28th November, 2007 in *Hughie Smith v. Buckland* [2007] E.W.C.A. Civ. 1318, in which judgment was delivered on 28th November, 2007. It was an appeal by Ms. Buckland, a Gypsy, against an order for possession granted against her in Swansea County Court in relation to a pitch at a Gypsy caravan site in Wales. The circumstances differed from both *Connors* and *Doherty* because, in response to the decision of the ECtHR in *Connors*, the exclusion of local authority caravan sites from the ambit of the power to suspend orders for possession contained in the 1968 Act was removed with effect from 18th January, 2005 in respect of proceedings begun on or after that date. So Ms. Buckland had the benefit of that amendment, whereas Mr. Doherty did not. In Ms. Buckland's case the County Court judge delivered a second judgment three days after his judgment that there should be an order for possession. In the second judgment he decided that the order should be suspended for approximately four months on certain conditions, although he had jurisdiction to suspend the enforcement of the order for possession for up to twelve months. It also emerges from the judgment of the Court of Appeal that at the time the judgment was given there was a Bill before Parliament to remove the exclusion from the definition of a "protected site" in the 1983 Act of land occupied by a local authority as a caravan site providing accommodation for Gypsies. However, the core issue on Ms. Buckland's appeal was whether the decision to provide the procedural safeguards introduced by the amendment of the 1968 Act was within the margin of appreciation available to the United Kingdom. The Court of Appeal held that it was. Dyson L.J. stated (at para. 63):

> "More generous safeguards could have been introduced (and they will be when the 1983 Act is amended). But the amendment goes far enough to meet the real thrust of the criticisms made in *Connors*."

65. The features of the amendment of the 1968 Act which led the Court of Appeal to that conclusion are set out as follows (in para. 61):

> "The amendment has introduced procedural protections which ensure that the role of the court is no longer a mechanistic one even when a local authority seeks to evict a licensee from a caravan site. Summary eviction has been replaced by judicial examination. Section 4(1) now provides that the enforcement of a possession order may be suspended for such period up to 12 months 'as the court thinks reasonable'. The court has a wide discretion under subsection (2) to impose conditions when making an order for suspension. By subsection (3), the court may extend the suspension of the possession order for up to 12 months at a time. Subsection (4) requires the court to have regard to "all the circumstances" in deciding whether to exercise its power to suspend. The court is, therefore, required to conduct an examination of all the circumstances of the case. Moreover, as a public authority, the court is bound by section 6(1) of the 1998 Act to act in a manner which is compatible with occupiers' Convention rights. This means that it must exercise the discretion given by section 4 of the 1968 Act in that way."

66. The Court of Appeal made what I consider to be an interesting distinction in the next paragraph (para. 62), in stating that it could no longer be said that the domestic law does not afford Gypsies who occupy local authority sites procedural safeguards against eviction. It recognised that such Gypsies still did not enjoy procedural safeguards against the making of possession orders. But it also recognised that it is the act of eviction, rather than the act of making a possession order, which interferes with a person's right to respect for his home, pointing out that throughout the judgment in Connors the emphasis is on the eviction rather than on the possession order, citing by way of example paras. 68, 85, 89, 92, 94 and 95. I think that a distinction exists. In the plaintiff's case it was not the decision to serve the notice to quit, or the service of the notice to quit which interfered with his Article 8 rights. Rather, the application for a warrant for possession under s. 62 is an anticipatory interference with his rights under Article 8, because of the inevitability that the application will be successful.

Decision of the ECtHR on Article 6

67. In considering the decision of the Court of Appeal in *Doherty*, I have already quoted from para. 46 of the judgment of the ECtHR in T*sfayo*. The factual context of that case was that Ms. Tsfayo, an asylum seeker from Ethiopia, who had been in receipt of housing and council tax benefit from Hammersmith and Fulham Council was late in making her claim for renewal of both benefits at the end of the year, as required by law, because of her lack of familiarity with the benefit system and her poor English. Both benefits were reinstated prospectively but her back-dated claim for a period of approximately four months was rejected by the Council on the ground that she had failed to show "good cause" why she had not claimed the benefits earlier. Her legal advisers requested the Council to reconsider their refusal, but the Council upheld their initial decision to refuse the benefits. Ms. Tsfayo appealed to the Council's Review Board. The Review Board which heard her appeal consisted of three councillors from the Council, who were advised by a barrister from the Council's legal department. The Review Board rejected her appeal, finding that she must have received some correspondence from the Council during the four month period. Ms. Tsfayo sought to judicially review the decision of the Review Board on the ground that it had acted unlawfully because it failed to make adequate findings of fact or provide sufficient reasons for its decision and on the grounds that it was not an "independent and impartial" tribunal under Article 6(1) of the Convention. Her application for leave to apply for judicial review was dismissed.

68. Ms. Tsfayo's complaint to the ECtHR was that the Review Board was not an independent and impartial tribunal as required by Article 6(1) of the Convention. The court reviewed its own jurisprudence and also the jurisprudence of the domestic courts of the United Kingdom, including *Bryan v. United Kingdom* [1995] 21 E.H.R.R. 342 and the decision of the House of Lords in *Runa Begum v.*

London Borough of Tower Hamlets [2003] U.K.H.L. 5, referred to in para. 46 and drew on the distinction between them and the *Tsfayo* case set out in the passage in para. 46 which I have quoted earlier. The court concluded that the Review Board had rejected Ms. Tsfayo's claim for back payment essentially on the basis of their assessment of her credibility. It found that no specialist expertise was required to determine the issue nor, unlike the other cases referred to, could the factual findings be said to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take. Secondly, the court held that the Review Board was not merely lacking in independence from the Executive, but was directly connected to one of the parties to the dispute. It considered that such connection to the party resisting Mrs. Tsfayo's entitlement to housing benefit might affect the independence of judgment in relation to the finding of primary fact in a manner which could not be adequately scrutinised or rectified by judicial review. The safeguards built in to the Review Board procedure were not adequate to overcome this fundamental lack of objective impartiality (para 47).

69. The court found that there had been a violation of Article 6(1), having stated (at para. 48):

> "The applicant had her claim refused because the [Review Board] did not find her a credible witness. Whilst the High Court had power to quash the decision if it considered, *inter alia*, that there was no evidence to support the [Review Board's] factual findings, or that its findings were plainly untenable, or that the [Review Board] had misunderstood or been ignorant of an established and relevant fact …, it did not have jurisdiction to re-hear the evidence or substitute its own views as to the applicant's credibility. Thus, in this case, there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute."

Leonard v. Dublin City Council & Ors.

70. In those judicial review proceedings the applicant sought against the Council and the State parties a declaration that s. 62 is incompatible with the State's obligations under the Convention and a declaration that a determination by the District Court made against her was in breach of the Convention and, in particular, Articles 3, 6, 8, 13 and 14 thereof. In her judgment delivered on 31st March, 2008 Ms. Justice Dunne refused the reliefs sought.

71. In some respects the circumstances in those proceedings are similar to the circumstances in this case. In other respects, which in my view are crucial, the circumstances are different.

72. The similarities are that Ms. Leonard was a tenant of the Council in premises at Bridgefoot Street, Dublin and previously had been a tenant in other premises which had been the subject of redevelopment. Her tenancy agreement, which was dated 30th November, 2005, was obviously in the same terms as the plaintiff's tenancy agreement.

73. The differences are that, when Ms. Leonard entered into her tenancy agreement on 30th November, 2005, she was required to give an undertaking to abide by the terms and conditions of a letter which stipulated that, if at any time in the future a certain individual was found to be on or have been in the premises, she would be in breach of the terms of her tenancy and the Council would be entitled to bring proceedings to recover possession of the premises under s. 62 in the interests of good estate management. The individual was her partner, who was a heroin addict. Subsequently the individual was found in the premises. Following a meeting with Council officials, Ms. Leonard was issued with a final warning that the Council would consider terminating her tenancy if she breached clause 13 of the tenancy agreement. Some months later, the Council received complaints that the individual was residing in the premises. Ms. Leonard was called to a further meeting with Council officials and at that meeting admitted that the individual had been on the premises. She was informed that notice to quit would be served on her for breach of the tenancy agreement. Subsequently, in August, 2006, she was advised by the Council that she could request a review of her case within a period of ten days, as it was intended to terminate her tenancy. (It may be remarked parenthetically that no such option was given to the plaintiff in September, 2004.) Ms. Leonard's solicitors entered into correspondence with the Council on her behalf. Notwithstanding the representations, a decision was made by the Council to terminate Ms. Leonard's tenancy. Notice to quit was served, proceedings were initiated in the District Court under s. 62 and a warrant for possession was granted. An appeal to the Circuit Court was unsuccessful.

74. The principal ground on which Ms. Leonard sought the relief she claimed was that at the hearing in the District Court she had not been afforded an opportunity of being heard or to take any part in the proceedings. As a result, she was unable to show what steps she had taken to cease any alleged anti-social behaviour, she was unable to point out that the individual had never been convicted of drug trafficking or drug dealing, nor could she give any undertaking to the court to ensure that she and her partner would continue on the methadone treatment programmes they had embarked on. The essence of the ground was that there was no opportunity for the applicant to advance any relevant considerations, excuses or extenuating circumstances either in person or on by a representative on her behalf. In short, it may be characterised as a complaint that she had no opportunity to make a plea *ad misericordiam*.

75. Ms. Leonard's challenge to s. 62 focused on the procedure before the District Court. The complaint was not that the Council was not entitled to terminate the tenancy agreement for the reasons stated. As is clear from the judgment, Ms. Leonard admitted that she was in breach of s. 13. Unlike the situation which prevailed in *Connors* and the situation which prevails in this case, there was no factual dispute concerning the reason for terminating the tenancy and the Council's entitlement to do so.

76. In concluding that the challenge under Article 8 must fail, Dunne J. stated:

> "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 its 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."

Infringement of Article 8: Conclusions

77. Unlike the *Leonard* case, the plaintiff's case, in my view, falls squarely within the core principle established by the judgments of the ECtHR in the *Connors* and *Blecic* cases for recognition of an Article 8 violation. By virtue of s. 4 of the Act of 2003 this Court is required, when interpreting and applying the Convention provisions, to take due account of the principles laid down in judgments of the ECtHR. Before outlining how the judgment in *Connors* and *Blecic* govern the outcome of this case, I have some preliminary observations to make.

78. First, in my view, what transpired between the Council officials and the plaintiff in the period from late January, 2004 until the making of the managerial decision on 4th October, 2004 to issue the notice to quit cannot be viewed as a procedural safeguard, nor can it be regarded as a process of review of the Council's decision-making process. It was an investigation, albeit one in which the plaintiff's point of view was elicited, and in which warnings were given to him, but it was an investigation carried out by officials on whose recommendation the decision to issue the notice to quit would be made. The information gathering process gave rise to a conflict between the Garda Síochána, on the one hand, and the plaintiff, on the other hand, as to the significance of the material found in the house in the course of the search in November, 2003. I do not think it is necessary for the court in these proceedings to resolve that conflict on the basis of the evidence adduced at the hearing. Counsel for the plaintiff submitted that what was in the report of 9th December, 2003 perhaps exaggerated what was actually found. The evidence is open to that construction and, in my view, that is all that is necessary to give rise to a genuine dispute on the facts as to whether the plaintiff was in breach of clause 13 of the tenancy agreement.

79. Secondly, in commenting on the decision of the Court of Appeal in the *Hughie Smith* case, I expressed the view that it is the enforcement of an order for possession, the eviction, not the termination of the tenancy, which infringes a tenant's Article 8 rights. I do not accept the proposition that it is the decision to serve the notice to quit which constitutes the eviction and that, in the absence of a challenge to that decision by way of judicial review, it was not open to the plaintiff to seek a declaration of incompatibility under s. 5 because he is not in a position to establish that "no other legal remedy is adequate and available", as required by s. 5(1). It is true that, in his judgment in the *Fennell* case, Kearns J. stated (at p. 638) as follows:

> "The parties' legal rights and obligations were, in my view, fixed and determined once the wheel was set in motion by the service of a notice to quit, an act which triggered the provisions, requirements and consequences of section 62 … That is the moment when the invocation of legal rights determined the applicable law and the position of the parties."

80. In that passage, Kearns J. was applying s. 62 on its proper construction to the landlord and tenant relationship of the Council and Mrs. Fennell in a pre-2003 Act context. It is the outcome of such application of s. 62 which gives rise to the interference with the tenant's Article 8 rights, because once the notice to quit has expired, the matter inexorably moves to a warrant for possession issuing, provided the formal proofs are in order in the District Court, and the eviction of the tenant, if the warrant is executed. That outcome may or may not give rise to an infringement of the tenant's Article 8 rights. In the *Leonard* case it was held that it did not. In the plaintiff's case the issue, it seems to me, is whether the law provides a means whereby the decision to serve, and the service of, the notice to quit may be reviewed on the merits in a Convention compliant manner at any time up to the point of eviction.

81. The third point can be posed as a question: what would have been the plaintiff's prospect of success if immediately following the service of the notice to quit on him he had applied for leave to bring an application for an order of certiorari quashing the decision of the Council to serve the notice to quit on the grounds that, because the Council officials should have preferred the information he gave them that his son was not a drug dealer to the information they obtained from the Garda Síochána, their finding that he was in breach of clause 13 of the tenancy agreement was erroneous? It was acknowledged on behalf of the Council that, on an application for judicial review, the High Court cannot substitute its own findings of fact for the findings of the decision maker under review. That answers the question. The plaintiff's application would have had no prospect of success. In this jurisdiction, judicial review does not constitute a proper procedural safeguard where the tenant's contention that the Council was not entitled to terminate his tenancy is based on a dispute as to the facts. That goes to the core of the matter. A subsidiary consideration was adverted to by counsel for the plaintiff: the difficulty a person in the plaintiff's position would be likely to encounter in prosecuting a judicial review application, for example, in obtaining discovery, as illustrated by the decision of this Court (Ó Caoimh J.) in *Shortt v. Dublin County Council* [2003] 2 I.R. 69. Moreover, lurking in the background is the bigger question of the wisdom of public authorities seeming to promote judicial review, a remedy which can only be obtained in the High Court, as an answer to the procedural safeguard deficit argument.

82. Fourthly, I cannot see how s. 3 of the Act of 2003 is an answer to the plaintiff's contention that Article 13 is infringed on the ground that the plaintiff does not have an effective remedy under domestic law. For the entitlement to damages under s. 3(2) to come into play, the plaintiff would have to establish that either the Council or the District Court has contravened s. 3(1) by not performing its functions in a manner compatible with the State's obligations under the Convention. As I understand it, these proceedings are being defended on the basis that neither of those organs of the State is acting in a manner which is not consistent with the State's obligations under the Convention. In fairness to each, it must be acknowledged that each is acting in accordance with domestic law as interpreted prior to the Act of 2003 and as it will continue to be enforced notwithstanding a declaration of incompatibility (s. 5(2)(a) of the Act of 2003), unless amended. If the application of s. 62 to the plaintiff's case by the District Court would contravene the Convention, it is because the law is defective.

83. Turning to why I consider that the plaintiff's case falls squarely within the *Connors* and *Blecic* principles, the differences and similarities between those cases and the plaintiff's case must be identified.

84. There is an obvious difference between this case and the *Connors* case in that the plaintiff, unlike Mr. Connors, is not a Gypsy. Therefore, one of the features present in the *Connors* case to which the ECtHR had regard, the State's positive obligation to the Gypsy community, is not present here. In my view, that is material only to the extent that, on the authority of the court's decision in *Blecic*, in the sphere of regulating standard housing, public authorities have a wider margin of appreciation than in relation to regulating gypsy or traveller accommodation.

85. Insofar as the plaintiff alleges that he is being discriminated against, the allegation centres on the difference of treatment of tenants of housing authorities to whom the summary eviction procedures provided for in s. 62 apply, on the one hand, and private tenants, on the other hand. As I understand the plaintiff's case in this regard, it focused on the lack of procedural safeguards for housing authority tenants and does not have the scope of the discrimination factor in the *Connors* case, which related to the absence of security of tenure for occupiers such as Mr. Connors.

86. This case is uncannily similar to *Connors* in that, while the Council's reason for terminating the plaintiff's tenancy was on the ground that he was in breach of clause 13(a), his tenancy was terminated on notice as provided for in clause 26. So, like the situation which prevailed when Mr. Connors was before the County Court after Leeds City Council had dropped its breach of licence allegations, the plaintiff is before the District Court on the basis that his tenancy has terminated and his proprietary interest in the house has come to an end. In particularising the grounds on which his Article 8 rights are infringed, the plaintiff has pleaded that he would be in peril of not being offered any housing by reason of the warning in clause 13, thereby implicitly accepting that he is liable to be evicted for breach of clause 13 if a warrant for possession issues against him and is enforced.

87. On the authority of *Connors* and *Blecic*, the following conclusions are justified:

> (a) the house is the plaintiff's home for the purposes of Article 8;

(b) there will be an interference with the plaintiff's right to respect for his home under Article 8 if a warrant for possession is obtained by the Council in the proceedings pending in the District Court under s. 62 and that warrant is executed;

(c) under Irish law, applying s. 62, there is no defence to the Council's claim for possession and, accordingly, the interference will be in accordance with law;

(d) the interference has a legitimate aim, which the Council has asserted as being the requirement of good estate management, including the necessity of taking steps to avoid, prevent or abate anti-social behaviour within its administrative area, and the due discharge by the Council as housing authority of its statutory obligation to provide accommodation for qualifying persons.

88. The crux, as Lord Bingham put it in the Kay case in reference to *Connors* and *Blecic* (para. 22), is whether the interference is necessary in a democratic society, namely, whether it answers a pressing social need and is proportionate to the legitimate aim. In my view, on the authority of *Connors* and *Blecic*, it is not.

89. If one examines the crucial question by reference to the general principle stated by the ECtHR in *Connors*, it is necessary to assess whether the decision-making process leading to the measures of interference is fair and such as to afford due respect to the interests safeguarded by Article 8. A statutory regime under which possession of the home of an occupier, whether a licensee or tenant, can be recovered by a public authority which does not embody procedural safeguards whereby the occupier can have the decision which will inevitably result in his eviction from his home reviewed in accordance with Convention recognised fair procedures (as illustrated by the decision of the court in *Tsfayo*), in my view, cannot fulfil the *Connors* test of being fair and affording due respect to the rights protected by Article 8.

90. It may, however, be more pertinent to examine the crucial question in this case, which involves standard housing, by reference to the test articulated by the ECtHR in *Blecic.* In doing so, first it is necessary to assess the importance of the decision to terminate the plaintiff's tenancy for alleged breach of clause 13 and to proceed by way of s. 62 to obtain a warrant for possession of the house with a view to evicting the plaintiff. Aside from the issue of anti-social behaviour which was the catalyst for the Council seeking to resume possession of the house and the consequences which flow from it, the plaintiff is a person to whom the Council owes a statutory duty to provide accommodation under the Housing Act, 1966 to 2002. The termination of his tenancy and his eviction from accommodation provided under those provisions in circumstances where he has been the occupier of such accommodation on a long-term basis, but is at risk of not being provided with alternative accommodation, in my view, are matters of the highest importance in the context of his right to respect for his home under Article 8. Next it is necessary to assess what has been the extent of the plaintiff's involvement in the decision-making process, seen as a whole, which will eventually lead to his eviction from his home, if the District Court applies s. 62, as it is entitled to do, in accordance with the traditional pre-2003 Act construction of that section. Other than his participation in the investigation by the Council officials of the allegations of the breach of his tenancy agreement, the plaintiff has had no involvement. If the decision of the Council officials, following the investigation, to recommend service of a notice to quit on the plaintiff was not justified on the true facts, the law provides no mechanism whatsoever for the plaintiff to obtain redress. When that lacuna in the law, which is reinforced by the mandatory nature of s. 62, is weighed in the balance against the importance of the decision, in my view, the only reasonable conclusion is that the law does not provide the plaintiff with the required protection of his interest under Article 8.

91. Accordingly, in the light of the decisions of the ECtHR in *Connors* and *Blecic* the procedure provided for in s. 62, under which a warrant for possession is issued by the District Court against the tenant of a housing authority on the grounds of breach of the tenant's tenancy agreement, without affording the tenant an opportunity where there is a dispute as to the underlying facts on which the allegation is based to have the decision to terminate reviewed on the merits, by the District Court or some other independent tribunal, cannot be regarded as proportionate to the need of the housing authority to manage and regulate its housing stock in accordance with its statutory duties and the principles of good estate management.

92. A similar conclusion is reached if one adopts the approach of the United Kingdom courts post-*Connors* in assessing whether a public authority is in breach of Article 8. In my view, it is reasonable to conclude that, like *Connors*, this is an exceptional case. There is no procedural safeguard built in to s. 62 under which the plaintiff's contention that he is not in breach of his tenancy agreement can be adjudicated on independently on the merits nor is there any other means available to him under Irish law by which he can achieve that objective and, if his contention that he is not in breach is correct, stave off eviction from his home. In short, it is the law that is defective vis-à-vis Article 8.

93. Accordingly, the possibility signposted by Kearns J. in the *Fennell* case has been established. Section 62 infringes Article 8 in the manner indicated above.

The plaintiff's remedy

94. I stated at the outset that counsel for the plaintiff argued for a Convention compatible construction of s. 62(3), but did not make that case on the pleadings or seek any declaratory relief to that effect. Later, I pointed out that counsel for the plaintiff argued that Article 13 favoured a Convention compliant interpretation of s. 62(3), rather than a declaration of incompatibility under s. 5 of the Act of 2003. Again, however, that point was not pleaded, nor was relief in such terms claimed.

95. I have found that s. 62, according to its traditional pre-2003 Act construction, is in breach of Article 8. Counsel for the Council, in their written submission, having noted that the plaintiff had not sought to contend that s. 62 can be interpreted in a manner that is compatible with the State's obligations under the Convention, debated whether, applying the interpretative obligation imposed by s. 2 of the Act of 2003, s. 62(3) is open to the construction that the District Court, or the Circuit Court on appeal, may hear evidence of matters other than those prescribed in s. 62. It was pointed out that the interpretative obligation is not absolute, in that the court is required to interpret a statutory provision in a manner compatible with the State's obligations under the Convention provisions "insofar as is possible" and "subject to the rules of law relating to such interpretation and application" (s. 2(1)). It was submitted that, were the court to interpret s. 62 in the manner suggested, the court would be re-writing the legislation. In my view, that submission is correct. The incompatibility with the Convention provision to which s. 62 gives rise cannot be circumvented by resorting to s. 2.

96. The question which remains is whether the court should make a declaration of incompatibility under s. 5 of the Act of 2003, which, in reality, is the primary relief which the plaintiff has sought. Subsection (2) of s. 5 provides that a declaration of incompatibility shall not affect the validity, continuing operation or enforcement of any statutory provision or rule of law in respect of which it is made. Therefore, in many cases, a declaration of incompatibility will not avail the person seeking such a declaration, because the harm will have been done. *Connors* was such a case, because Mr. Connors had been evicted. In this case, however, the plaintiff is still in possession of the house and, provided the Council does not take any precipitous action against him, a declaration of incompatibility may benefit him if the Oireachtas sees fit to enact legislation to amend s. 62 to render it compatible with the State's

obligation under the Convention.

97. The court has a discretion as to whether to grant a declaration of incompatibility under s. 5(1). In my view, this is a proper case in which to grant a declaration that s. 62 is incompatible with Article 8 insofar as it authorises the District Court, or the Circuit Court on appeal, to grant a warrant for possession where there is a factual dispute as to whether the tenancy has been properly terminated by reason of a breach of the tenancy agreement on the part of the tenant in the absence of any machinery for an independent review of that dispute on the merits being available at law. However, in the light of the decision in the *Leonard* case, and with a view to ensuring that the terms of the declaration are limited to the particular exceptional circumstances which give rise to the breach in this case, I will hear further submissions as to the precise form of the declaration.

98. As regards the other reliefs claimed by the plaintiff:

> (1) The plaintiff is not entitled to a declaration that the Council has failed to perform its functions in a manner incompatible with the obligations of the State under the Articles of the Convention invoked by him.
>
> (2) I have already addressed the issue of the plaintiff's entitlement to damages under s. 3(2) of the Act of 2003 as an answer to the Article 13 challenge. Thus far, on its own case and as a matter of fact, the Council has acted in accordance with the law. Aside from that, as the plaintiff has remained in possession of the house, he cannot show that he has suffered any injury, loss or damage, so that no entitlement to damages arises at this juncture.
>
> (3) The plaintiff is not entitled to a stay on the District Court proceedings or an injunction in the terms sought.

99. The plaintiff may have a remedy under s. 5(4) of the Act of 2003, which provides for payment by the Government of a discretionary *ex gratia* payment of compensation, in the future, but that does not arise at this juncture and is for another forum.