

THE HIGH COURT

2006 5888 P

IN THE MATTER OF SECTION 3(1) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003

BETWEEN

LAURENCE PULLEN, CAROL PULLEN, EMMA LOUISE DOUGLAS (A MINOR) SUING BY HER MOTHER AND NEXT FRIEND, CAROL PULLEN, BRENDAN DANIEL DOUGLAS (A MINOR) SUING BY HIS MOTHER AND NEXT FRIEND, CAROL PULLEN
PLAINTIFFS

AND

DUBLIN CITY COUNCIL

DEFENDANT

AND BY ORDER

THE HUMAN RIGHTS COMMISSION

AMICUS CURIAE

AND

ATTORNEY GENERAL

NOTICE PARTY

JUDGMENT of Ms. Justice Mary Irvine delivered on the 12th day of October, 2009

1. The present application

1.1 The plaintiffs make an application pursuant to s. 3(2) of the European Convention on Human Rights Act 2003 ("the Act of 2003") seeking damages for the loss, injury or damage they suffered based on the breach of their rights under the European Convention on Human Rights ("the Convention") occasioned by the defendant's failure to perform its functions in a manner compatible with the State's obligations under the Convention. Section 3 of the Act of 2003 provides as follows:-

"3.-(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

(2) A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.

(3) The damages recoverable under this section in the Circuit Court shall not exceed the amount standing prescribed, for the time being by law, as the limit of that Court's jurisdiction in tort.

(4) Nothing in this section shall be construed as creating a criminal offence.

(5) (a) Proceedings in this section shall not be brought in respect of any contravention of subsection (1) which arose more than 1 year before the commencement of the proceedings.

(b) The period referred to in paragraph (a) may be extended by order made by the Court if it considers it appropriate to do so in the interests of justice."

2. Background

2.1 On 12th December, 2008, this Court found that the procedure employed by the defendant to evict the plaintiff tenants upon a finding of anti-social behaviour violated the plaintiffs' rights under Article 6(1) and Article 8 (1) of the Convention. The relevant procedure comprised of an internal investigation as to whether or not the plaintiffs, whilst tenants of the defendant, had been guilty of anti-social behaviour and a subsequent decision on the part of the defendant, upon finding that there was, to obtain a warrant for possession using the summary procedure provided for in s. 62 of the Housing Act 1966 ("the Act of 1966"), as amended, by s. 13 of the Housing Act 1970. In the instant case complaints of anti-social behaviour against the plaintiffs were made to the defendant in 2005 and more complaints were received in 2006. The defendant commenced its investigation into those complaints in 2005, which resulted in the defendant deciding to terminate the tenancy. An internal review of the file was then offered to the plaintiffs, which they agreed to and this was carried out. It resulted in the upholding of the prior recommendation that the plaintiff's tenancy be terminated. By letter dated 2nd August, 2006, the plaintiffs were served with a notice to quit and a demand for possession. A warrant for possession was obtained in the District Court on 30th November, 2006. The plaintiffs appealed the order to the Circuit Court but were unsuccessful and the warrant for possession was delivered to the sheriff for execution on 3rd September, 2007. It has not, as of yet, been executed.

2.2 In its consideration of whether there had been a breach of Article 6 this Court held that the aforementioned procedure denied the plaintiffs an opportunity of a fair hearing by an independent tribunal in respect of the wrongdoing upon which their eviction order was obtained. It was further held that the District Court hearing under s. 62 of the Act of

1966 did not satisfy the requirement under Article 6 for an independent hearing, given that a warrant for possession is granted on the proof of specified matters and the District Court is not permitted to entertain the merits of an application. Judicial review was held not to satisfy the requirements of Article 6(1) as it did not encapsulate cases where the facts were in dispute and where credibility issues arose.

2.3 As to Article 8 this Court found that the defendant's action in obtaining a warrant for possession and forwarding it to the sheriff for execution interfered with the plaintiffs' Article 8(1) rights. The court found that the interference was "in accordance with the law", having regard to the statutory framework and the tenancy agreement between the plaintiffs and the defendant. The interference was found not to, however, be justified as being necessary in a democratic society and was found to be disproportionate to the defendant's stated aims, as the defendant had available to it an alternative procedure under s.14 of the Conveyancing Act 1881, which if used, would have safeguarded the plaintiffs' rights and at the same time would have satisfied the defendant's legitimate aims.

2.4 As a result of these breaches of the plaintiffs' rights it was held that the defendant had not complied with its duty under s. 3 of the Act of 2003 to perform its functions in a manner compatible with the State's obligations under the Convention.

2.5 The plaintiffs then made an application for a permanent injunction "restraining the defendant from taking any further steps to recover possession from the defendant on foot of any order made pursuant to s. 62 of the Housing Act 1966." The defendant had obtained a warrant for possession from the District Court on 30th November, 2006. Therefore, the injunction, if granted would restrain the execution of the warrant. This Court considered the following issue: "Does the court have jurisdiction to grant an injunction when it has found that an organ of the State has acted in a manner which is incompatible with its Convention obligations?" Having regard to the long title and the scheme of the Act of 2003, the express provision in s. 5(2)(a) of the Act of 2003 that a declaration of incompatibility would not affect the validity, continuing operation or enforcement of the statutory provision declared incompatible, the separation of powers and the applicable rules of statutory construction, this Court concluded, in its judgment delivered on 28th May, 2009, that the legislature intended the remedy of damages provided for in s. 3(2) of the Act of 2003 to be the exclusive remedy for the breach of the statutory duty concerned, thereby depriving the Court of jurisdiction to grant any relief other than an award of damages.

3. Counsels' Submissions

3.1 Counsel for the plaintiffs, Angela Ward, B.L. made the case that the plaintiffs had suffered damage, in the sense that their status and standing had been adversely affected by virtue of the defendant acting in contravention of its obligations under s. 3(1) of the Act of 2003. In this regard she noted that a finding of anti-social behaviour was made against the plaintiffs during the course of the Convention incompatible procedure used by it. The practical result, in her submissions, was that the plaintiffs' rights and privileges as tenants under the Housing Acts and their future entitlement to access public housing and/or housing support payments were diminished and that the plaintiffs would, as a matter of probability, be dealt with as homeless persons. On their behalf she claimed that the plaintiffs were entitled to general damages pursuant to s. 3(2) of the Act of 2003.

3.2 Ms. Ward further submitted that the Act of 2003 must be operated so as to provide an effective deterrent to a body, such as the defendant, from acting upon a notice to quit obtained in a manner which breached the plaintiff's human rights. She urged the court to look to the law of defamation and to the law in relation to damages arising in respect of a breach of constitutional rights for guidance as to the type of compensation that should be awarded. The right to damages emanated, she submitted, from the service of the notice to quit on 2nd August, 2006 and that it was for the court to make an assessment of the actual and potential loss to the plaintiffs from that date when considering the damages to be awarded.

3.3 Counsel for the plaintiffs relied on the cases of *Connors v. United Kingdom* and *Dulaurans v. France* (Judgment of the European Court of Human Rights, 21st March, 2000) to illustrate the support of the European Court of Human Rights for an award of damages in respect of non pecuniary loss where convention rights had been breached. As to the level of the award that must be made she referred to the case of *Von Colson and Kammen v. Land Nordrhein-Westfalen* [1984] E.C.R. 1891 where the European Court of Justice found that in order for compensation to be effective and for it to have a deterrent effect, that it must amount to more than purely nominal compensation.

3.4 Counsel for the plaintiffs submitted that this claim for damages was not premature merely because the plaintiffs had not yet been evicted. She maintained that the plaintiffs did not have to await their fate in terms of actual eviction to obtain damages. There would always be uncertainty as to their future in terms of housing in the light of the relevant housing legislation and the finding made against them in respect of antisocial behaviour. The plaintiffs had already been involved in a lengthy legal process to establish the wrongdoing of the first named defendant. She observed that the Act of 2003 must be construed in light of the Convention and in particular Article 13 thereof which requires that the remedy to be provided by the Court must be effective. For the plaintiffs to have to bring further applications to this Court at a later date in order to obtain a remedy would not, in her submission, particularly in light of the fact that the plaintiff's future housing situation would always remain precarious, satisfy the requirements of Article 13.

3.5 Mr. Connelly, S.C., for the defendant, submitted that a finding of a contravention on the part of an organ of the State under s. 3(1) of the Act of 2003 did not of itself give rise to an entitlement to damages. Proof of injury, loss or damage was required and the plaintiffs had failed, in his contention, to adduce any such evidence as the defendant had yet to recover possession of the dwelling. He argued that this Court had not found in its judgment of 13th December, 2008, that the plaintiffs had suffered any injury, loss or damage and that a claim for anticipated injury, loss or damage could not be made.

3.6 Mr. Connelly indicated that it was highly probable that the local authority would proceed to evict the plaintiffs on foot of the eviction order it obtained in the District Court, notwithstanding the finding by this Court that the procedure which led to that eviction order being made was incompatible with the plaintiffs' Convention rights. This would not necessarily mean that the plaintiffs would become homeless, in his submission, as the defendant had discretionary powers together with the Health Service Executive to provide alternative accommodation and social welfare benefits notwithstanding an eviction on the grounds of antisocial behaviour. He further submitted that the plaintiffs' case ought to be confined to the declaratory relief they sought and did not create a new cause of action for damages.

4. Issue

4.1 A finding of a contravention of s. 3(1) of 2003 was made against the defendant on 12th December, 2008, based on a breach of the plaintiffs' Convention rights. The question now arises as to whether the plaintiffs are entitled to an award of damages pursuant to s. 3(2) of the Act of 2003 and if so what type of damages. This will involve a consideration of the "injury, loss or damage" suffered by them.

5. Decision

5.1 In this case the plaintiffs do not seek special damages i.e. quantifiable monetary losses. Rather they seek general damages or damages of a non-pecuniary nature for the breach of their rights under the Convention. They point to distress, inconvenience, loss of opportunity, loss of legal status, loss of legal standing and loss of reputation.

5.2 It is to be observed that the language of s. 3(2) of the Act of 2003 does not specify a particular type of award of damages that may be made. I am satisfied that the ordinary meaning of the term "damages", in the context of an Act to enable effect to be given, albeit at a sub-constitutional level, to the provisions of a Convention guaranteeing human rights, must encompass both special and general damages. The approach of the European Court of Human Rights is clear in this regard. In *Connors v. United Kingdom* (Judgment of the European Court of Human Rights, 27th August, 2004) the Strasbourg Court found that non-pecuniary damage may be suffered by a person whose rights under the Convention are breached and that it is appropriate to award damages in such instances. In *Connors*, the court found that the eviction of the applicant and his family from a local authority site was not attended by the requisite procedural safeguards and that there had been a violation of Article 8 of the Convention. The court went on to assess whether the applicant should be awarded damages pursuant to Article 41 which provides:-

"If the court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

The court went on to hold that the applicant was denied the opportunity to obtain a ruling on the merits of his claims that the eviction was unreasonable or unjustified and that non-pecuniary damage in the form of feelings of frustration and injustice existed. This non-pecuniary damage was held by the court not to be sufficiently compensated by a finding of a violation of the Convention and it awarded the applicant €14,000.

5.3 On 12th December, 2008 findings of breaches of the plaintiffs' rights under Articles 6 and 8 of the Convention were made. These findings were premised on the fact that the defendant's procedure to investigate complaints of anti-social behaviour coupled with the summary procedure under s. 62 of the Act of 1966 lacked adequate procedural safeguards to protect the plaintiffs' rights under Articles 6 and 8. A finding of anti-social behaviour was made against the plaintiffs within the framework of this Convention incompatible procedure and this finding led to an order for possession being granted in the District Court.

5.4 It is clear that the consequences of such a finding of anti-social behaviour have significant practical repercussions for the plaintiffs. The finding of anti-social behaviour by the defendant led to the making of an order for possession in the District Court and its confirmation in the Circuit Court. Quite apart from the issue of the plaintiffs' actual eviction, the finding of anti-social behaviour is likely to have serious adverse consequences for the plaintiffs. This is especially so as once the finding of anti-social behaviour is made it is maintained by the defendant as a matter of record. As noted in the court's judgment of 12th December, 2008, s. 14(1) of the Housing (Miscellaneous Provisions) Act 1997, allows a housing authority to refuse to make or defer the making of a letting of a dwelling to a person where the authority considers that person is or has been engaged in anti-social behaviour. Section 14(2) of the same Act allows a housing authority to refuse to sell a dwelling to a tenant for the same reason. Section 15(2) of the same Act provides for information sharing with other housing authorities or specified persons (including the Criminal Assets Bureau, a member of An Garda Síochána, the Minister for Social Welfare and a health board) regarding persons whom the authority considers may be or may have been engaged with anti-social behaviour. The damage to the plaintiffs' reputation is obvious.

5.5 The defendant disputes that "damage" has been suffered by the plaintiffs to date as an eviction has not yet taken place. This Court has been left in little doubt, however, from the submissions of the defendant that it is the clear intention of the first named defendant to act on foot of the warrant for possession even though the Court has held that the Order for possession was obtained by a procedure which breached the plaintiff's Convention rights. Mr. Connelly, S.C., advised the court that it is not the intention of the defendant to give the plaintiffs a new hearing regarding the complaints of anti social behaviour made against them and that the court should proceed on the basis that the plaintiffs will be evicted notwithstanding the court's decision that the eviction was obtained through a process which breached the plaintiff's Convention rights. Accordingly, there is no merit in the defendant's submission that the plaintiff's claim for damages is premature. The plaintiffs have already been denied the opportunity of availing of a convention compliant investigation into the complaints against them of antisocial behaviour which has led to an eviction order with all of the potential ramifications which flow therefrom. The plaintiffs have suffered distress, anxiety, loss of reputation and as a matter of probability will experience even greater upset loss and damage in the future having regard to the fact that they are to be evicted from their present home and their future housing rights thereby irreparably damaged.

5.6 At the main hearing of these proceedings expert evidence was adduced on the part of the plaintiffs that persons evicted for anti-social behaviour often spend considerable periods in bed and breakfast accommodation after their eviction and that many persons evicted for anti-social behaviour ultimately become homeless. This was uncontested. In addition, clause 13 of the tenancy agreement between the plaintiffs and the defendants of 15th December, 2004, provides that a tenant evicted for breach of the condition in clause 13(a) (which prohibits nuisance, annoyance or disturbance to neighbours) will be deemed for the purposes of re-housing 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". When, how or indeed whether or not the local authority will ever seek to investigate the plaintiffs circumstances so as to consider their entitlement to be treated as other than parties who had deliberately, by their antisocial behaviour, rendered themselves homeless is entirely at the discretion of the defendant. Indeed, given that the finding of antisocial behaviour and the warrant for possession were obtained in breach of the plaintiffs' Convention rights the plaintiffs should not now find themselves in the position of having to satisfy the defendants that they are capable of living in the community without engaging in further antisocial behaviour. The starting point for the operation of this procedure which is entirely within the defendant's discretion is a valid finding that the tenant concerned was guilty of antisocial behaviour, something that does not exist in the present case. For all of this

potential uncertainty, loss and disturbance, the plaintiffs must be compensated.

5.7 Article 13 of the Convention provides as follows:-

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The specific remedy provided by the legislature for a breach of s. 3(1) of the Act of 2003 lies in its neighbouring provision, s. 3(2) of the Act of 2003. As s. 2 of the Act of 2003 imposes an obligation on the courts to interpret Irish Law in accordance with the Convention, the remedy provided for in s. 3(2) must be an effective one, within the meaning of the Convention.

5.8 By reason of the provisions of s. 4 of the Act of 2003, this Court, when considering its approach to the issue of damages, should have regard to the principles emerging from the decisions of the Strasbourg Court as to the damages to be awarded in respect of any breach of Convention rights. The approach of the Strasbourg Court is dealt with in some detail in a substantial and helpful report published by the Law Commission and Scottish Law Commission entitled *Damages under the Human Rights Act 1998, 2000 (Law Commission No 180, cm 4853)*.

5.9 The aforementioned report points to the lack of clear principles emerging from the Strasbourg Court as to when damages should be awarded and how they should be measured. This difficulty is partly ascribed to the diverse traditions within Europe as to how damages are calculated and also to the fact that the court itself is composed of judges from the Member States who represent these varied legal systems.

5.10 The approach of the Strasbourg Court to awarding damages under Article 41 is not significantly different to the rules applied by the courts in this jurisdiction when assessing damages at common law. The basic principles urged by the Strasbourg Court can perhaps be summarised in the following manner, namely:-

- (i) that a successful claimant should as far as possible be placed in the same position as if his Convention rights had not been infringed;
- (ii) that the court should be disinclined to award damages for what can be considered to be solely a procedural error;
- (iii) that the court's approach should be an equitable having regard to the particular facts of the individual case and where appropriate should have regard to the seriousness of the violation;
- (iv) that the court would award, where appropriate, damages under three heads: pecuniary loss, non-pecuniary loss and costs and expenses. Within the non-pecuniary loss, damages have been awarded for pain, suffering, psychological harm, distress, frustration, inconvenience, humiliation, anxiety and loss of reputation; and
- (v) that punitive damages are not awarded as a matter of practice.

6. Conclusion

6.1 The court must proceed on the assumption that the plaintiffs in this action were not guilty of antisocial behaviour due to the fact that this finding was made in breach of their Convention rights and the defendant, notwithstanding the court's judgment, has rejected the possibility of reconsidering those complaints in a convention compliant manner.

6.2 In its earlier judgment, this Court has already determined that the only remedy available to the plaintiffs is that provided for in s. 3(2) of the Act of 2003. The court has not been in a position to meet the plaintiff's claim seeking an injunction restraining the defendants from evicting them from their home by virtue of the aforementioned provision. Accordingly, the court must ensure, in making its award of damages, that the remedy provided is appropriate to the wrong committed by the defendant. Further, that award must compensate the plaintiffs for all of the adverse consequences which can be causally connected to that wrong.

6.3 Apart from the jurisdiction emerging from the Strasbourg Court, the court has had regard to how the courts in this jurisdiction have approached the issue of damages in cases involving a breach of constitutional rights. Invariably the court in such circumstances has dealt with the calculation of damages in accordance with common law principles.

6.4 The claim before this Court is not one which is maintained in respect of what may conveniently be described as a technical or procedural breach. The relevant violation is substantial in nature. The plaintiffs will be evicted from their present home on the basis of the warrant for possession which was obtained by the defendant in breach of their Convention rights. They are now experiencing the awful and unenviable wait for the day upon which they will be evicted. Thereafter, the plaintiff's prospects of returning to live in the type of secure accommodation which they previously enjoyed are uncertain and perhaps remote by reason of the statutory provisions referred to earlier in this judgment. On the uncontested evidence given to the court, once evicted, the plaintiffs will be at risk of becoming homeless with all of the attendant dire consequences attaching to such status.

6.5 In reaching its conclusions the court has taken into account the evidence in the original proceedings relating to the physical disabilities of the first named plaintiff. It has further had regard to the evidence regarding the second named plaintiff's susceptibility to depression, acute anxiety and panic attacks and the undisputed evidence to the effect that the plaintiffs are ill equipped, by reason of their respective disabilities and social vulnerability, to deal with homelessness. The evidence was that if the plaintiffs were to become homeless such circumstances would jeopardise their ability to sustain life together as husband and wife. Even if the plaintiffs do not become homeless in the future they may have to live for lengthy periods in bed and breakfast accommodation which again will, for the reasons already described to the court in the course of the original proceedings, significantly curtail their enjoyment of life.

6.6 In all of the circumstances the court will award a sum of €20,000 to both the first and second named plaintiffs by way of compensatory damages to recompense them for all of the effects of the wrongful breach by the defendant of their Convention rights.