Neutral Citation Number [2008] IEHC 379

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 delivered by Ms. Justice Irvine on the 12th day of December, 2008

1. The Facts

The first and second named plaintiffs in these proceedings are husband and wife and they married in 2002. The third and fourth named plaintiffs are the children of the second named plaintiff.

The first and second named plaintiffs entered a tenancy agreement with the defendant on 15th December, 2004, whereby they became tenants of the defendant's premises at 40 Cloncarthy Road, Donnycarney, Dublin.

Following receipt of a number of complaints of un-neighbourly conduct on the part of the plaintiffs and the investigation of those complaints by officials employed by the defendant in the form of three separate interviews conducted with the first and second named plaintiffs over an approximate six month period, a notice to quit and demand for possession of the premises was made on 3rd August, 2006, within five months after the last interview.

The plaintiffs did not deliver up possession of the premises and, accordingly, on 28th September, 2006, a summons was issued by the defendant pursuant to s. 62 of the Housing Act 1966 (the Act of 1966), as amended by s. 13 of the Housing Act 1970, whereby the defendant sought from the District Court a warrant for possession. On 30th November, 2006, the District Court, having been satisfied with the formal proofs required by s. 62 of the Act of 1966, granted the warrant for possession. The plaintiffs' subsequent appeal to the Circuit Court was unsuccessful.

The District Court, when hearing an application under s. 62 of the Act of 1966, has no jurisdiction to enter into the merits of the claim for possession and must make the warrant for possession once the formal proofs are complied with. In these circumstances, the plaintiffs claim that there must be an independent judicial or quasi-judicial hearing, wherein the finding of anti-social behaviour made by the defendant and which finding was the justification for the termination of their tenancy, can be challenged by the plaintiffs at some point prior to the warrant for possession being enforced. The absence of such a procedure in the eviction process, the plaintiffs contend, contravenes Article 6(1) of the European Convention on Human Rights (the Convention). They further claim that the decision to terminate their tenancy and to seek to recover possession of their home, in the absence of adequate procedural safeguards, infringes their right to respect for their private and family life and to their home, in breach of the guarantee of these rights under Article 8(1) of the Convention.

As a result of their eviction on the grounds of anti-social behaviour, the plaintiffs contend that they are prejudiced in their chances of obtaining alternative local authority housing and that this has had and will have further adverse consequences on their ability to care for their children and to sustain a normal family life. In particular, the plaintiffs rely upon the provisions of the Housing (Miscellaneous Provisions) Act 1997, which alters the rights of those who have been evicted for anti-social behaviour in many respects. For example, the local authority has the right to refuse those persons a further letting or it may decide to defer such letting. These consequences and many others referable to the physical and mental health of the first and second named plaintiffs were outlined to the court in support of their contention that the eviction process, which is the subject matter of the plaintiffs' claim, has adversely and detrimentally affected many of the rights and benefits which they would otherwise have been entitled to enjoy.

At hearing, the plaintiffs sought the following reliefs:-

1. A declaration that the defendant, in terminating a Housing Act tenancy in a dwelling, is obliged to afford a tenant an opportunity to have the decision to terminate examined or reviewed as to its merits by an independent adjudicator.

2. A declaration that, in the absence of a process allowing for an independent examination or review of the merits, the decision of the defendant to proceed to seek possession by the summary procedure process provided for by s. 62 of the Act of 1966 constitutes a breach of its obligation to perform its functions in a manner compatible with the Convention.

3. A declaration that the defendant, in proceeding to terminate the plaintiffs' tenancy and/or in proceeding to seek to summarily recover possession of the dwelling occupied by the plaintiffs, failed to perform its functions in a manner compatible with the State's obligations under the Convention and breached the plaintiffs' Convention rights.

4. A declaration that the defendant, in seeking to execute any warrant for possession obtained pursuant to s. 62 of the Act of 1966, would be acting in a manner incompatible with the State's obligations under the Convention.

5. In the alternative, a declaration pursuant to s. 5 of the European Convention on Human Rights Act 2003 (the Act of 2003), that s. 62 of the Act of 1966 is incompatible with the State's obligations under the provisions of the Convention.

6. The plaintiffs assert that in the event of the court concluding that the defendant carried out its functions by adopting a legal mechanism which constituted an impermissible interference with the plaintiffs' Article 8 rights that it must follow that the defendant also was in breach of providing for the protection of the plaintiffs' property under Article 1 of the Protocol 1.

7. Finally, the plaintiffs contend that they, as public housing tenants, were discriminated against, insofar as they were exposed to the risk of loss of their home, in circumstances where there may be no independent adjudication on the facts or reasonableness of the decision to evict such tenants and this amounts to invidious discrimination where other housing sectors are afforded protection from such type of interference.

It was agreed by the parties that the defendant, for the purpose of the performance of its functions under the Act of 1966, is "an organ of the State" within the meaning of the Act of 2003 and that, as a result, the defendant is obliged to perform those functions under the Act of 1966 in a manner compatible with the State's obligations under the Convention. It was further agreed that the defendant, in terminating a Housing Act tenancy in a dwelling and/or instituting proceedings for the recovery of possession of such a dwelling is performing a function to which s. 3 of the Act of 2003 applies.

The within proceedings were heard before this Court in a hearing which lasted some nine days, commencing on 15th April, 2008. This Court heard oral evidence introduced on behalf of the plaintiffs and on behalf of the defendant. In addition, the court was ably assisted by the written and oral submissions of all the parties, including the Human Rights Commission, in its capacity as amicus curiae and also on behalf of the Attorney General, who was a notice party to the proceedings. The parties agreed to admit into evidence the tenancy agreement already referred to and a booklet of correspondence and documents which are material to the claim.

Shortly after the hearing of the action, Laffoy J. delivered a judgment in the case of *Donegan v. Dublin City Council and Ors*. (Unreported, High Court, 8th May 2008), a decision which is of real significance to the present claim. Further, the European Court of Human Rights delivered an equally important judgment in the case of M*cCann v. United Kingdom* (Application No. 19009/04) on the 13th August, 2008. In these circumstances the court sought assistance from each of the parties and received further written submissions on a number of matters raised by the court for the party's attention.

2. Relevant Materials
Prior to considering the legal issues which arise for consideration, it is necessary to set out some of the materials which are pertinent to the court's findings and these materials are as follows:-

(i) Relevant extracts from the Tenancy Agreement dated 15th December, 2004.

(ii) Relevant extract from s. 62 of the Housing Act 1966.

(iii) Relevant sections from the Housing (Miscellaneous Provisions) Act 1997.

(iv) Relevant extracts from the leaflet published by Dublin City Council entitled "Anti-Social Behaviour and your area".

(v) Relevant sections from the European Convention on Human Rights Act 2003.

(vi) Relevant provisions from the European Convention on Human Rights.

(vii) Extracts from relevant correspondence.

(i) Relevant extracts from the Tenancy Agreement dated 15th December, 2004
Clause 13 (a) states:-

"Neither the tenant nor any member of his household or any household or any sub-tenant or visitor, shall cause any nuisance, annoyance or disturbance to any neighbours, their children, or visitors or to council staff."

"Nuisance, annoyance or disturbance" is defined in clause 13 (c) as including the following types of behaviour:-

"(i) harassment;

(ii) violence or threats of violence against the person or property;

(iii) threats, abuse or harassment of any kind or any act or omission causing disturbance, discomfort or inconvenience;

(iv) obstructions of any of the common areas, doorways and other exits and entrances in the block and in the estate;

(v) making an unreasonably loud noise by shouting, screaming, playing any musical instrument or sound reproduction equipment (including television, radio and hi-fi) or using machinery;

(vi) any act of omission which creates a danger to the well-being of any neighbour or to his/her belongings;

(vii) The tenant must not, at any time, invite or allow to remain on any part of the dwelling or garden, any persons in respect of whom the Council has notified the tenant that they should not enter or remain on the property."

Clause 13 goes on to provide:-

"A tenant evicted for a breach of this condition or part of it, will be deemed, for the purpose of re-housing, to have deliberately rendered himself homeless within the meaning of Section 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 provides:-

"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 provides:-

"The tenancy may be terminated at any time on the giving of four weeks notice by the tenant or the Council…."

Clause 28 provides:-

"The tenant shall on the termination of the tenancy, peaceably and quietly deliver up possession of the dwelling to the Council."

(ii) Relevant extract from s. 62 of the Housing Act 1966
Section 62(1) of the Act of 1966 applies in the following circumstances:-

"62. -(1) In case,

(a) there is no tenancy in –
(i) a dwelling provided by a housing authority under this Act,
...

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 up possession of the dwelling or building or part thereof on a demand being made therefor by the authority or Agency, as the case may be, 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 or Agency may (without prejudice to any other method of recovering possession) apply to the justice of the District Court having jurisdiction in the district court district in which the dwelling or building is situated, for the issue of a warrant under this section.

…

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

…"

(iii) Relevant sections from the Housing (Miscellaneous Provisions) Act 1997
Section 1(1) states:-

"1.– (1) In this Act, unless the context otherwise requires:-

anti-social behaviour' includes either or both of the following, namely-

…

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

'estate management' includes –

(a) the securing or promotion of the interests of any tenants, lessees, owners or occupiers, whether individually or generally, in the employment of any house, building or land provided by a housing authority, under the Housing Acts, 1966 to 1997,

(b) the avoidance, prevention or abatement of anti-social behaviour in any housing estate in which is situate a house provided by a housing authority under the Housing Acts, 1966 to 1997;

…"

Section 14 (1) states:-

"14.- (1) Notwithstanding anything contained in the Housing Acts, 1966 to 1992, or in a scheme made under section 11 of the Housing Act, 1988, a housing authority may refuse to make or defer the making of a letting of a dwelling to a person where –

(a) the authority considers that the person is or has been engaged in anti-social behaviour or that a letting to that person would not be in the interest of good estate management, or

…"

Section 14(2) states:-

"(2) Notwithstanding anything contained in section 90 of the Housing Act, 1966 (inserted by section 26 of the Housing (Miscellaneous Provisions) Act, 1992), or a purchase scheme under the said section 90, a housing authority may refuse to sell a dwelling to a tenant where the authority considers that the tenant is or has been engaged in anti-social behaviour

or that a sale to that tenant would not be in the interest of good estate management."

Section 15(2) states:-

"(2) A housing authority may, for the purposes of any of their functions under the Housing Acts, 1966 to 1997, request from another housing authority or a specified person, information in relation to any person seeking a house from the authority or residing or proposing to reside at a house provided by the authority or whom the authority considers may be or may have been engaged in anti-social behaviour and, notwithstanding anything contained in any enactment, such other housing authority or specified person may provide the information to the housing authority requesting it."

(iv) Relevant extracts from leaflet published by Dublin City Council entitled "Anti Social Behaviour and your area"
This publication, which was first published in 2004, was sent to all local authority tenants by post after they took up occupation of their accommodation. A more detailed leaflet covering the same issues is available in all local authority offices. The leaflet states as follows:-

"For the purposes of the Housing (Miscellaneous Provisions) Act 1997, as amended … the phrase 'anti social behaviour' is broadly defined and includes the sale and supply of a controlled drug, possession of a controlled drug for sale or supply or distribution and any behaviour which causes or is likely to cause any significant or persistent danger, injury, damage, loss or fear to any person living, working or otherwise lawfully in or near a Dublin City Council tenancy dwelling, or licensed accommodation, including people in group housing schemes and living in official halting sites. Such behaviour includes violence, threats, intimidation, coercion, harassment or serious obstruction of any person.

There is an obligation on you, the tenant, tenant purchaser or licensee, to ensure that neither you, nor any member of your household or family, engage in anti-social behaviour of any kind. Anti-social behaviour can seriously affect you and your tenancy, home or license.

Objectives
Dublin City Council has a duty to manage and control its tenancy dwellings and accommodation let under the Housing Acts and to secure and protect the interests of its tenants, tenant purchasers and licensees, as far as is reasonably possible, in the peaceful occupation of those dwellings. To this end, Dublin City Council is committed to taking action to avoid, prevent or abate anti-social behaviour.

Such action can involve:

- Investigation of complaints
- Interview/challenge/caution of alleged perpetrators (offenders).
- Taking preventative measures
- Pursuit of legal remedies, including court orders for evictions, where necessary.

Policy

- It is the policy of Dublin City Council to address problems of anti-social behaviour in or in the vicinity of its dwellings and accommodation by taking measures to prevent and abate such behaviour.
- Where serious complaints are made, which appear to have foundation and substance, the tenants or licensees, against whom such complaints are made may face eviction, or the persons, including those attached to the tenant purchase dwellings against whom such complaints are received may be excluded from both the dwelling, or accommodation and the vicinity of that dwelling (excluding order) or accommodation (site excluding order), as appropriate.

…"

(v) Relevant sections from the European Convention on Human Rights Act 2003.
Section 2 of the Act of 2003 states as follows:-

"2. - (1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

Section 3(1) of the Act of 2003 provides:-

"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."

Section 5 of the Act of 2003 states:-

"5. - (1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no

other legal remedy is adequate and available, make a declaration (referred to in this Act as 'a declaration of incompatibility') that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.

(2) A declaration of incompatibility-

(a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made, and

(b) shall not prevent a party to the proceedings concerned from making submissions or representations in relation to matters to which the declaration relates in any proceedings before the European Court of Human Rights.

…"

(vi) Relevant provisions of the European Convention on Human Rights

Article 6

Right to a Fair Trial

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

Article 8

Right to Respect for Private and Family Life

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

(vii) Extracts from relevant correspondence

In a letter to the first and second named plaintiffs on 10th February, 2006, regarding the allegations of anti-social behaviour made against them, the plaintiffs were advised by the defendant as follows:-

"Anyone evicted for breach of this clause (i.e. anti-social behaviour) is deemed to have rendered themselves homeless by their own actions and may not be eligible for consideration for re-housing for at least three years."

In a letter from the evictions office to the plaintiffs on 4th September, 2007, they were advised as follows:

"If Dublin City Council is forced to execute the warrant you will make yourself homeless and Dublin City Council will not re-house you."

3. Uncontested evidence

The defendant manages some 26,000 housing units. The majority of these are flats. At any given time, there is a waiting list of over 7,000 applications for housing. Applicants may expect to wait anything from a number of months to a number of years, for accommodation. The defendant deals with housing in twelve separate areas, each of which has a regional office. Complaints of anti-social behaviour, if received, are investigated locally in the regional offices. The vast majority of all complaints received relate to the use or abuse of drugs. The first step of the process is for a housing officer(s) to investigate complaints received, in order to establish whether there is any substance to them. This involves interviewing the complainants and anybody else who might be of assistance. The details of the complaints are then notified to the tenants against whom they have been made, who are invited to come to interview by the housing officer(s) to respond to same. The tenants are entitled to give their account of relevant events, to furnish the names of any parties who might assist the defendant with its inquiries and to produce any documentation in support of their stated position. The defendant may also seek validation for individual complaints from An Garda Síochána or the Health Service Executive, in appropriate cases.

After the investigative process in complete, the area manager responsible for anti-social matters receives the file in relation to the investigation. He carries out a review of the file to satisfy himself that the investigation process has been fully completed. In this respect the area manager may consult and confer with those who carried out the investigation. If, after this review of the investigation file, the area manager believes that a notice to quit or exclusion procedure should be pursued, the tenant will be notified of that fact and offered a review of the investigating officer's recommendation prior to a final decision being made. If, as in the present case, the tenant seeks a review of that recommendation then the file will be reviewed by a manager from a different local authority area. Thereafter, the senior executive responsible for the anti-social behaviour unit, makes a decision whether or not the notice to quit will be served and proceedings instituted to recover possession.

The investigation process and procedure set out in the previous paragraphs is not contained in any legislation or in any statutory instrument or bye law. What is being operated by the defendant is an extra statutory administrative procedure. That procedure is outlined in a leaflet published by the defendant entitled "Anti-social Behaviour and your area". Persons making complaints, according to the defendant's evidence, are often fearful of the repercussions of such action. They worry that they may be targeted by the tenant against whom they have made a complaint. According to the evidence of Dublin City Council Executive Manager, Housing and Residential Services, Mr. Michael Clarke, it might be difficult to get witnesses to give evidence in court if the District Court eviction process was dealt with on the merits rather than under the present summary jurisdiction. He feared that complaints might be

withdrawn and that tenants could feel untouchable if there was not strong legislation permitting the recovery of possession on the present basis. He feared that if s. 62 of the Act of 1966 was not available, that the defendant would lose control over its estates and that residents of council estates would be intimidated. He described the Irish housing legislation as being some of the strongest legislation available in Europe. There were some two thousand five hundred complaints made each year, many of which related to the same individuals or households. There were approximately twelve evictions a year for anti-social behaviour the vast majority of which related to drugs issues.

The plaintiffs, through a number of expert witnesses, established that tenants evicted for anti-social behaviour often spend a considerable period of time in bed and breakfast accommodation post eviction and that such accommodation was not conducive to family life and was particularly damaging to individuals such as the plaintiffs who were vulnerable by reason of physical and mental disability. Such accommodation would be likely to have a serious detrimental effect on the plaintiffs' family life and they would become further distanced from the third and fourth named plaintiffs.

Evidence was led that many persons who are evicted for anti-social behaviour ultimately become homeless. The defendant led evidence to prove that in the event of a tenant being evicted for anti-social behaviour, there was nothing to preclude that tenant being put on the defendant's list for re-housing, with immediate effect. However, it was accepted by the defendant that those tenants would not be re-housed until it was satisfied that the problem that caused them to become homeless had been resolved. In some cases the consequences of a finding of anti-social behaviour meant that entire families were not re-housed for a number of years. Re-housing would not occur until those families could establish that their behaviour had reformed, during which period they would likely spend significant time either in bed and breakfast accommodation, or private rented accommodation. Alternatively, they might simply become the victims of homelessness. Whilst the defendant, in its evidence, was assertive that tenants evicted for anti-social behaviour would be re-housed within a reasonable period once their behaviour had become acceptable, it was not at all clear how tenants, even those using their best endeavours and being proactive whilst, for example, in bed and breakfast accommodation, could establish such facts to the local authority's satisfaction.

There was little dispute between the parties as to the consequences to the plaintiffs of eviction from the premises at Cloncarthy Road on the grounds of anti-social behaviour. In this respect the court heard evidence that prior to being allocated a tenancy in the premises at Cloncarthy Road, the second named plaintiff's children, who were born on 15th November, 1996, and 31st January, 2000, respectively, were being reared by the second named plaintiff's parents in circumstances where the accommodation available to the first and second plaintiffs following their marriage in 2002 was not sufficiently large to accommodate the entire family unit. The premises at Cloncarthy Road had allowed for the establishment of a true family unit. To obtain that premises the first named plaintiff was required to hand back to the defendant the premises formerly occupied by him as a council tenant for many years without complaint. The premises at Cloncarthy Road had been altered to accommodate the first named plaintiff's disability, as he had lost a leg in a road traffic accident in 1995. The second named plaintiff was his full time carer. The loss of the premises at Cloncarthy Road was likely to adversely impact upon the second named plaintiff's psychological welfare, which was described as being vulnerable by reason of her susceptibility to depression, acute anxiety and panic attacks. The undisputed evidence was that the plaintiffs were ill equipped to cope, because of their respective disabilities and social vulnerability, with homelessness and that the same could impact upon their ability to sustain a life as husband and wife in the future.

The defendant led evidence to remind the court of its obligations to all of its tenants and of its need to manage its housing stock, of which there was a shortage, in such a fashion as to protect the health, welfare and rights of those dependent on local authority housing. The court heard evidence that anti-social behaviour on the part of any one tenant impacts upon the health and welfare of their neighbours living in the locality and their rights to enjoy quiet and peaceful possession of their property.

4. The Complaints

A number of complaints were received by the defendant in 2005 regarding alleged anti-social behaviour on the part of the first and second named plaintiffs. Several new complaints were received in 2006. Ms. Ann Smith, Project Estate Officer with Dublin City Council and Mr. John Manning, Executive Housing Officer with Dublin City Council conducted three separate interviews with the first and second named plaintiffs on 27th September, 2005, 6th December, 2005, and 9th March, 2006, and in this respect it cannot be said that the plaintiffs did not fully engage with the investigative process. The second named plaintiff was bound over to the peace in a District Court in relation to one of the incidents forming the subject matter of the first series of complaints. In this regard it is to be noted that the plaintiffs' neighbour, Mrs. Jones, gave evidence in the District Court. There was a dispute between the parties in the present proceedings as to whether the second named defendant had been convicted in the District Court when the second named plaintiff was bound over to the peace with the plaintiffs relying, in the absence of satisfactory oral evidence as to what happened at the hearing, upon Woods, *District Court Practice and Procedure in Criminal Cases* (James Woods, Limerick, 1994) at p. 413 which states:-

> "A complaint for the issue of a summons alleging the use of threatening and abusive language or conduct calculated to lead to a breach of the peace is not a complaint in respect of criminal offence and, consequently, the summons procedure set out in the Courts (No. 3) Act, 1986, is not applicable."

The first named plaintiff, in his evidence, was convinced that his wife and Mrs. Jones were merely told to go home and to try to get on with each other in the future and that she had not been convicted. It is sufficient for the court to note that there was no evidence in the present proceedings that even if there had been a conviction in respect of some incident perpetrated by the second named plaintiff that such incident was one which would have fallen within the definition of anti-social behaviour referred to earlier in this judgment, which is behaviour which causes or is likely to cause any significant or persistent danger, injury, damage, loss or fear to another person.

From September, 2005 the plaintiffs were in receipt of legal advice through the Northside Community Law Centre. At all times the plaintiffs denied anti-social behaviour and alleged that they themselves had been the target of victimisation.

On 8th May, 2006, the plaintiffs were notified of the defendant's intention to terminate the tenancy. In the same letter the plaintiffs were advised that they could seek a review of the file if they so wished. The plaintiffs' solicitors were notified that the review procedure would be conducted by an independent officer of the defendant from a different area office, who would review the file and hear evidence and submissions. The plaintiffs' solicitors sought a review whilst querying the nature of that review and later protested that such a review, in their opinion, could not legitimise what they described as an otherwise fundamentally flawed process. In this respect it is important to note that the plaintiffs' solicitors requested a full statement from the defendant setting out the grounds and facts upon which the decision to recommend the service of a notice to quit was made but this was rejected by the defendant who asserted in a letter of 2nd June, 2006 that the plaintiffs were well aware of the basis upon which the notice to quit was served, they having attended at three interviews with the council's investigators.

The review sought took place without any further submissions being made on the part of the first and second named plaintiffs and this was carried out by Ms. Eileen Martin, South East Area Housing Manager. No report was prepared by Ms. Martin and the evidence to the Court was that a formal report would only issue in rare circumstances. The form of the review carried out appears to have been a review by Ms. Martin of the procedures followed by the investigators in the course of which she satisfied herself that no further investigations were warranted. Ms. Martin upheld the recommendation for termination of the tenancy. Thus, by letter dated 2nd August, 2006 the plaintiffs were served with a notice to quit and a demand for possession. The summary proceedings before the District Court were heard on 30th November 2006 when a warrant for possession was obtained. The plaintiffs' appeal from that order to the Circuit Court was unsuccessful and on 3rd September 2007 the warrant for possession was delivered to the sheriff for execution. The warrant has not as yet been executed by reason of the within proceedings.

The plaintiffs are no longer living in the premises at Cloncarthy Rd. They allege that their neighbours threw stones at their windows, threatened them physically and verbally and that, on one evening when they were out, their house was what can crudely be described as thrashed by vandals with all sanitary fittings pulled out, thus rendering it uninhabitable. The plaintiffs thereafter resided in a car for several weeks and are currently living in bed and breakfast accommodation. Their children have returned to live with the second named plaintiff's parents.

5. Summary of the Plaintiffs' Principal Submissions
The plaintiffs submit that the defendant, as an organ of the State, exercised its statutory functions in a manner which failed to comply with the State's obligations under s. 3 of the European Convention on Human Rights Act 2003.

The plaintiffs claim that the procedure adopted by the defendant in seeking to recover possession of their home at Cloncarthy Road involved a violation of their rights, as provided for under Articles 6, 8 and 14 of the Convention and Article 1 of the First Protocol.

The plaintiffs allege that the defendant, in the exercise of its statutory functions, determined their civil rights otherwise than in accordance with the due process to which they were entitled under Article 6(1) of the Convention. The determination by the defendant that the plaintiffs were guilty of anti-social behaviour was one which gave the defendant a right to deny to the plaintiffs' rights which they otherwise would have enjoyed, namely those provided for in ss. 14, 15 and 16 of the Housing (Miscellaneous Provisions) Act 1997. Further, the plaintiffs contend that the defendant brought about the determination of their tenancy in circumstances where there was an interference with their right to respect for their home and their private and family life, as protected by Article 8(1) of the Convention. The plaintiffs complain that the process selected for their eviction provided no procedural safeguards to protect such a fundamental right. They did not obtain an independent hearing on the merits before an impartial tribunal established by law where they might have been able to dispute the charges of anti-social behaviour or the proportionality of the decision to evict them having regard to the relevant facts. The plaintiffs submitted that the defendant had an alternative procedure available to it whereby it could have sought to terminate their tenancy on the grounds of anti-social behaviour which would have complied with the State's obligations to them under both Article 6 and Article 8 of the Convention. In particular, the plaintiffs relied upon the re-entry clause provided for at clause 25 of the tenancy agreement which, had it been invoked and followed by proceedings under s. 14 of the Conveyancing Act 1881, the same would have led to a merits based hearing which would have complied with the defendant's Convention obligations. It was, according to Mr. Ó'Dúlacháin S.C., counsel for the plaintiffs, the election on the part of the defendant to use a non-independent investigative procedure followed by the summary procedure provided for in s. 62 of the Act of 1966 which contravened the plaintiffs' rights under the Convention, rather than the statutory existence of such a provision per se.

The plaintiffs submitted that council officials, in the exercise of their functions, were at large as to how to conduct their fact finding inquiry. There were no procedural safeguards, no rules or regulations giving directions as to how their function was to be performed and no written record of their conclusions. Much more fundamentally, however, counsel on behalf of the plaintiffs relied upon the fact that, consistently and repeatedly, the plaintiffs had denied anti-social conduct. They alleged victimisation by their own neighbours. The investigating officers had clearly rejected the plaintiffs' credibility in coming to the conclusion that they were guilty of anti-social behaviour. In such circumstances, irrespective of whether or not natural justice or fair procedures had been followed by the defendant in conducting its inquiry, judicial review could not in such circumstances meet the safeguards to which the plaintiffs were entitled under Articles 6 and 8 of the Convention, given that the judge concerned cannot investigate the merits of the finding made by the defendant nor substitute its own finding based on the credibility of the parties.

The plaintiffs submitted that the defendant was only entitled to interfere with their Article 8(1) rights in circumstances where such interference could be shown to be (a) "in accordance with law" was (b) in pursuit of one of the legitimate aims specified at Article 8(2) and also (c) "necessary in a democratic society". The interference was not justified as either proportionate or legitimate to the defendant's obligations as a housing authority. The defendant's statutory obligations, as a housing authority, and its pursuit of those aims specified at Article 8(2) of the Convention were not, according to counsel for the plaintiffs, mutually irreconcilable with its ability to uphold the plaintiffs' Article 6 and Article 8 rights. The defendant could have sought to evict the plaintiffs utilising s. 14 of the Conveyancing Act 1881, which would have provided for an independent hearing on the merits wherein the plaintiffs would have been able to contest their alleged culpability and also the proportionality of the decision to evict them based on those facts. In such circumstances the interference on the part of the defendant could not logically or rationally be regarded as "necessary in a democratic society".

The plaintiff's relied upon the judgment of the Strasbourg Court in *Connors v. United Kingdom* [2004] 40 E.H.R.R. 189. Counsel for the plaintiffs described the main issue that required the determination of the court at para. 14 of his written submissions in the following fashion:-

> "The heart of the dispute between the plaintiffs and Dublin City Council is as to whether or not the *Connors* standard of procedural requirements is what is required in this case, or, whether in effect the Council's investigative and warning process, the summary procedure before the District Court, coupled with an alleged right to seek judicial review of the Council's decision satisfies the procedural requirements of Article 8…"

As a fall-back argument the plaintiffs claimed that s. 62 of the Act of 1966, and ss. 14, 15 and 16 of the Housing (Miscellaneous Provisions) Act 1997, were incompatible with the State's obligations under the Convention. The latter statutory provision amends the Social Welfare (Consolidation) Act 1993. It provides, *inter alia*, that where a person has been required to deliver up a possession of a dwelling by reason of anti-social behaviour that that person's entitlements to a supplement in respect of rent or mortgage interest may, in certain circumstances, be reduced, terminated or suspended.

Finally, the plaintiffs relied upon Article 1 of the First Protocol to the Convention which concerns the protection of property. The plaintiffs claimed that they were entitled to the peaceful enjoyment of their home and entitled to be left in possession thereof, subject to such interference as was permitted by Article 8. The plaintiffs submitted that in the event of the court holding that the s. 62 proceedings and the process leading up to the same, constituted an impermissible interference therewith, then it must follow that

the actions of the defendant constituted an interference with the plaintiffs' right of possession of their home in breach of Article 1 of the First Protocol.

6. The Defendant's Principal Submissions
The defendant submits that Article 6(1) of the Convention, which deals with procedural safeguards in relation to certain hearings, does not operate *in vacuo* but only relates to a hearing which is destined to determine a "civil right" of the individual concerned. Counsel for the defendant, Mr. Connolly S.C., submitted that the plaintiffs had no "civil right" to defend in respect of the proceedings brought by the defendant under s. 62 of the Act of 1966. The plaintiffs had a right to challenge the legality of the defendant's administrative decision to terminate their tenancy and their rights were public law rights, as opposed private law rights.

In the alternative Mr. Connolly submitted that if the defendants decision to service a notice to quit and their actions on foot of the same amounted to a determination of the plaintiffs' "civil rights" such as to the afford the plaintiffs the benefit of Article 6 then those rights, particularly the right to a hearing before an independent and impartial tribunal, were adequately met by the availability of judicial review proceedings, particularly having regard to the extent of the court's jurisdiction, as outlined by Clarke J. in *Sweetman v. An Bord Pleanála* [2007] 2 I.L.R.M. 328. Mr. Connolly referred to the extensive jurisprudence of the European Court of Human Rights which showed that compliance with Article 6(1) should be looked at in "the round", taking the entire process from the commencement of the complaints procedure up to and including obtaining a warrant for possession in the District Court together with the right of judicial review. When the procedure adopted was viewed in this way, Mr. Connolly submitted that the defendant had exercised its functions in a manner which was compliant with State's obligations under the Convention.

It was submitted that Article 8(1) did not guarantee a right to a home but only a right to respect for a person's home. Mr. Connolly submitted that the proceedings before the District Court under s. 62 of the Act of 1966 did not constitute an interference with the plaintiffs' Article 8(1) rights, as at the time such proceedings were commenced they had no right to remain in possession of their dwelling, their tenancy having being lawfully terminated.

Alternatively, the defendant submitted that if the plaintiffs' rights under Article 8(1) were engaged, that the defendant's interference with those rights was justified as being "in accordance with the law", the defendant having an unqualified right to possession following proof that the tenancy had been lawfully terminated and a warrant for possession obtained in the District Court without any further need to justify the interference in the context of the provisions of Article 8(2). Counsel for the defendant relied on the House of Lords decision in *Harrow London Borough Council v. Qazi* [2003] W.L.R. 792 which held that Article 8 could not be relied upon by way of defence to defeat a landlord's proprietary or contractual rights. In that case the council's unqualified right to immediate possession was upheld once the notice to quit was proved to have terminated the tenancy and no infringement of the respondent's right to respect for his home under Article 8 was found. He further relied on the later joint decision of the House of Lords in *Kay and Ors. v. Lambeth London Borough Council; Leeds City Council v. Price* [2006] 2 A.C. 465, which was decided in the aftermath of *Connors v. United Kingdom* [2004] 40 E.H.R.R. 189 and *Blecic v. Croatia,* [2004] 41 E.H.R.R. 185, as authority for the proposition that *Connors* is to be distinguished as an exceptional case, principally on the grounds that it related to the special position of gypsies in the United Kingdom.

Alternatively, it was submitted on the defendant's behalf that if the defendant had to justify interference with the plaintiffs' rights to respect for their home beyond their unqualified right to possession "in accordance with law" that the interference could, in any event, be justified in accordance with Article 8(2). Mr. Connolly submitted that any interference with the plaintiffs' rights under Article 8(1) was "necessary in a democratic society" and occurred at a time when the defendant was pursuing its legitimate aim of seeking to prevent disorder or crime and/or for the protection of the rights and freedoms of others.

It was "necessary in a democratic society", according to the defendant, to have a summary procedure for the recovery of possession of local authority dwellings following the termination of a tenancy for anti-social behaviour and the court was advised that it was a matter for the legislature to determine whether the restricted power of the court in applications under s. 62 of the Act of 1966 was legitimate and proportionate. Finally, when looking at any interference with rights guaranteed under Article 8(1), counsel submitted that local authority housing is an area where the court should treat decisions made by the legislature as to what is in the public interest with particular deference. The European Court of Human Rights has acknowledged that a wide margin of appreciation exists in relation to matters such as local authority housing.

Rather belatedly in the course of the proceedings, the defendant submitted that, as a matter of law, the provisions of s. 14 of the Conveyancing Act 1881, did not apply to tenancy agreements. For this reason, counsel for the defendant submitted that the plaintiffs were misguided in their assertion that the defendant had available to it a mechanism, namely re-entry, pursuant to clause 25 of the tenancy agreement followed by forfeiture proceedings under s. 14 of Conveyancing Act 1881, which would have met their needs whilst affording the plaintiffs the rights to which they were entitled under Articles 6 and 8 of the Convention.

7. Submissions on behalf of the Attorney General (Notice party)
Counsel on behalf of the Attorney General, Mr. Bradley S.C., submitted that the facts of the present case were governed by the decision of Dunne J. in L*eonard v. Dublin City Council and Ors.* (Unreported, High Court, 31st March, 2008) wherein she concluded that the process for the rapid recovery of houses provided for by s. 62 of the Act of 1966 and the process leading thereto did not violate the plaintiffs' rights under either Articles 6 or 8 of the Convention. Judicial review, he submitted, met all of the plaintiffs' Convention rights.

The submissions made on behalf of the Attorney General were destined to address the issue of the compatibility of the procedure provided for in s. 62 of the Act of 1966 with the defendant's obligations under the Convention, should the court conclude that the plaintiffs had no other remedy available to them under s. 3 of the Act of 2003.

In relation to Article 8, Mr. Bradley submitted that the defendant had served a notice to quit upon the plaintiffs and that their tenancy had been lawfully terminated in accordance with law. The plaintiffs thereafter had no right to remain in occupation and the defendant had an unqualified right to possession. Accordingly, the requirements of Article 8(2) were met by the defendant. He too relied on *Harrow London Borough Council v. Qazi* [2003] 3 W.L.R. 792.

Without prejudice to the previous submission, counsel for the Attorney General submitted that even if the plaintiffs' right to respect for their private, family life and home was interfered with by the defendant in the process leading up to the order of the court under s. 62 of the Act of 1966, that such interference was permissible within the exceptions provided for in Article 8(2). Counsel of behalf of the Attorney General, in this respect, endorsed the submissions of the defendant regarding the said interference as one which was "necessary in a democratic society" and in pursuance of legitimate aims as provided for in Article 8(2).

Counsel for the Attorney General submitted that Article 1 of Protocol 1 of the Convention had not been infringed in the proceedings.

Eviction of the plaintiffs, insofar as that eviction could be classified as the removal of a possession from the plaintiffs, did not raise any separate issue from those considered under Article 8.

Finally, counsel for the Attorney General submitted that on the basis of the decision of Dunne J., in *Leonard v. Dublin City Council and Ors.* (Unreported, High Court, 31st March, 2008), Article 14 had not been infringed merely because the plaintiffs could point to the fact that local authority tenants might be considered to enjoy a lesser degree of security of tenure than that enjoyed by non-local authority tenants.

8. Submissions on behalf of the Human Rights Commission
Mr. Hogan S.C., counsel for the Human Rights Commission, submitted that before the court considered exercising its jurisdiction in relation to a declaration of incompatibility under s. 5 of the Act of 2003, it first had to satisfy itself that no other potential remedy was available to the plaintiffs. Amongst such other remedies he included a declaration as to the constitutionality of s. 62 of the Act of 1966 or an award of damages.

Mr. Hogan maintained that there had to be built into the s. 62 procedure an opportunity for the tenant to defend the case on the merits in the District Court. Hence, he argued that the District Court judge, on the hearing of summary proceedings under s. 62 of the Act of 1966, had a right to consider the merits of the proceedings. In this respect he relied upon the minority judgment of Bingham L.J. in *Kay and Ors. v. Lambeth London Borough Council; Leeds City Council v. Price* [2006] 2 A.C. 465 in support of his submission. He submitted that s. 62 of the Act of 1966 must now be reinterpreted in the light of the Convention as allowing the defendant raise a merits based defence including one of proportionality.

Mr. Hogan, in addition to the foregoing submissions, also supported the plaintiffs' submission that an eviction process in the course of which the plaintiffs had no opportunity to be heard as to the merits of their eviction or the proportionality of such eviction was, in principle, contrary to the provisions of the Convention. He further supported the plaintiffs' contention that a right to judicially review the decision of the defendant to terminate the plaintiffs' tenancy on the grounds of anti-social behaviour would not comply with the plaintiffs' rights under either Articles 6 or 8 of the Convention.

9. Irish Law
Section 62 of the Act of 1966 sets out the statutory procedure for the recovery of dwellings and other buildings. It provides that the District Court, upon hearing an application duly made, shall issue a warrant for possession. This means that a local authority can secure possession on providing the required proofs of tenancy together with the notice to quit to the District Court. There is no right to have any other evidence considered by the court in relation to the reasonableness or unreasonableness of the action. It was held in the case of *Dublin Corporation v. Hamilton* [1988] 2 I.L.R.M. 542 that the District Court had no discretion once the necessary proofs had been complied with.

Section 62 of the Act of 1966 was also the subject matter of prior consideration, not only in terms of a constitutional challenge in *the State (O'Rourke) v. Kelly* [1983] I.R. 58, but also the subject matter of the court's consideration in *Dublin City Council v. Fennell* [2005] 1 I.R. 604. In the latter case Kearns J., in considering the statutory process provided for in s. 62 of the Act of 1966, observed that the section permitted a housing authority to effectively manage and control its housing stock, without being unduly restricted or unfettered. He went on to advise as follows at p. 614:-

> "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."

The learned Supreme Court judge went on to anticipate precisely the type of claim which has been maintained in the present proceedings, when at p. 614 of his judgment he stated as follows:-

> "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 Restriction 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 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."

10. Article 6
Many of the cases to which I will later refer consider the alleged infringement of rights under both Article 6 and Article 8 of the Convention. The reason that this is so is because the courts, when looking at whether an interference with Article 8 rights can be justified, will seek to assess whether the requisite safeguards have been provided against that interference. In this regard the court often looks to the safeguards provided under Article 6 for guidance. For this reason, I will firstly look at a series of cases which consider the rights guaranteed by Article 6. In so doing I will cover much of the material relevant to the court's considerations as to the circumstances in which an organ of the State can justify interfering with those rights provided for in Article 8.(1).

There are two Irish cases that deal extensively with both Article 6 and Article 8 rights and these are the cases *Leonard v. Dublin City Council & Ors*. (Unreported, High Court, Dunne J., 31st March, 2008) and *Donegan v. Dublin City Council and Ors.* (Unreported, High Court, Laffoy J., 8th May 2008). There are three significant decisions of the Strasbourg Court which review, through an Article 8 prism, the legal framework and manner in which a home occupier can, in a Convention compliant manner, be deprived of that home by an organ of the State. These are the decisions in *Blecic v. Croatia* [2004] 41 E.H.R.R. 185, *Connors v. United Kingdom* [2004] 40 E.H.R.R. 189 and *McCann v. United Kingdom* (Application No. 19009/04, Judgment of the European Court of Human Rights of 13th May, 2008). *Blecic* and *Connors* predate the decision in *Donegan* whilst *McCann* post dates that judgment. In addition, there are two decisions of the House of Lords regarding Article 8 rights which are relevant to the submissions of the defendant and of the Attorney General, namely *Harrow London Borough Council v. Qazi* [2003] W.L.R. 792 and *Kay v. London Borough of Lambeth; Leeds City Council v. Price* [2006] 2 A.C. 465. Both of these decisions, in turn, predate the European Court of Human Rights decision in *McCann*.

Under section 3 of the Act of 2003 the defendant, as an organ of the State, was obliged to carry out its functions in a manner compliant with the State's obligations to the plaintiffs under the Convention. The plaintiffs complain that their civil rights were determined through a process operated by the defendant, which commenced with a determination that they were guilty of anti-social behaviour and culminated in the defendant obtaining a warrant for possession for their home based upon a disputed finding of anti-social behaviour.

The issues that the court needs to resolve in the present case are firstly, whether or not Article 6 is engaged on the facts of the present case and secondly, if it is, whether or not the defendant, in performing its functions as an organ of the State, acted in accordance with the State's obligations. It must be considered whether the decision of the defendants that the plaintiffs are guilty of anti-social behaviour amounts to a decision in respect of a "civil right" which would bring Article 6 into play.

Article 6 does not apply in relation to all rights and obligations that may exist under national law. The concept of a "civil right" is an autonomous one in the jurisprudence of the European Court of Human Rights, as was made clear in *Konig v. Germany (No.1)* (1979-80) 2 E.H.R.R. 170 at para.89:

> "Whether or not a right is to be regarded as civil…must be determined by reference to the substantive contents and effects of the right – and not its legal classification - under the domestic law of the State concerned."

In seeking to classify rights the court looks at the nature, or "character" of the right or obligation concerned, rather than the manner in which it is determined, in order to decide if Article 6 is engaged and the fact that both parties to proceedings are not private persons will not necessarily be determinative of whether or not Article 6 rights arise for consideration. The question is whether or not those proceedings directly and decisively impact upon a private law right.

Recently the European Court of Human Rights has demonstrated an apparently greater willingness to classify a wide spectrum of issues as falling within the ambit of Article 6(1). In *Feldbrugge v. Netherlands* [1986] 8 E.H.R.R. 425 the court held that a decision concerning a claim for sickness benefit engaged Article 6 of the Convention. The cases of *Salesi v. Italy* [1993] 26 E.H.R.R. 187 and *Mennitto v. Italy* [2002] 34 E.H.R.R. 1122 extended Article 6 (1) protection to disputes relating to non-contributory welfare schemes. In *Kurzac v. Poland* (Application no 31382/96, Judgment of the European Court of Human Rights of 22nd February, 2001), Article 6 protection was deemed to apply to the civil right of a family's honour and good name. In that case one of two brothers was convicted by a Warsaw military council of membership of an illegal organisation, which had the aim of subverting the legal system of the State. He was subsequently shot by a militia officer. Many years later his surviving brother applied for the annulment of his brother's conviction. The question arose as to whether that application fell within the type of dispute or issue capable of being a determination of rights or obligations under Article 6. In relation to the applicability of Article 6 the court ruled as follows at para.20:-

> "In its decision on the admissibility of the present application, the court has already held that the result of the rehabilitation proceeding in issue was decisive for the applicant's civil rights, namely his right to enjoy a good reputation and his right to protect the honour of his family and to restore its good name…"

The rights protected by Article 6 of the Convention have been the subject matter of a number of crucial decisions in the European Court of Human Rights. I will briefly refer to a number of these to demonstrate the circumstances in which Article 6 has been held to be applicable and also as to the circumstances in which the rights protected by that Article have been deemed to be satisfied.

The case of *Bryan v. United Kingdom* [1995] 21 E.H.R.R. 342 is instructive, not only as to the circumstances in which Article 6(1) may be invoked, but, is also of assistance in clarifying the adequacy of measures adopted to meet the due process it guarantees. In Bryan, the applicant appealed an enforcement notice which required him to demolish certain buildings which he had constructed without planning permission. His appeal was heard by an inspector appointed under the Town and Country Planning Act 1990, following upon which he sought judicial review in the High Court against the decision of the inspector. The European Court of Human Rights held that the appeal to the inspector lacked the independence required under Article 6(1). It then went on to consider whether or not his rights to maintain judicial review proceedings afforded sufficient protection to the applicant in respect of those rights protected under Article 6(1). The court concluded that the hearing required by Article 6 did not necessarily mean a hearing wherein all of the merits of the case could be re-examined but that such a hearing would have to have the jurisdiction to deal with the case as the nature of the decision required. The court, at para. 45, concluded as follows:-

> "…in assessing the sufficiency of the review… it is necessary to have regard to the matters such as the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal."

In *Runa Begum v. Tower Hamlets London Borough Council* [2003] U.K.H.L. 5, the House of Lords was asked to address three issues which are of significance to the present case. In that case the plaintiff had sought housing from her local authority. She was provided with temporary accommodation and later advised that she would be offered a secure tenancy at Balfron Tower in Poplar. The letter offering her accommodation warned that if she refused the offer that she would be required to leave her temporary accommodation and that the council's obligation to house her would be at an end under the Housing Act 1996. The plaintiff, amongst other matters, advised the council that the area in which she had been offered accommodation was dangerous, racist and replete with drug addicts. For these reasons she refused the offer of accommodation. The plaintiff was granted a review of the council's decision and according to the "Allocation of Housing and Homelessness (Review Procedures) Regulations" the reviewing officer was required to be somebody who was not involved in the original decision. This review took place and the plaintiff was afforded an opportunity to state her position and opinion. The housing officer rejected the plaintiff's reasons for refusing the accommodation on a number of grounds, including noted discrepancies in the accounts given by her regarding the relevant facts. Section 204 of the Housing Act 1996, provided that an applicant who was dissatisfied with the decision made by the reviewing officer might appeal that decision to the County Court on "any point of law arising from the decision". The plaintiff accordingly appealed.

In the course of her appeal the plaintiff relied upon Article 6 of the Convention and was successful in having the decision of the reviewing officer quashed. That decision was reversed by the Court of Appeal and the matter proceeded by way of appeal by the plaintiff to the House of Lords. The three main issues which the Court considered were:-

> 1. Was the decision of the housing officer a determination of the plaintiff's "civil rights" within the meaning of Article 6(1) of the Convention?
>
> 2. If so, did the hearing conducted by the reviewing officer constitute an "independent and impartial tribunal" for the purposes of Article 6 of the Convention?
>
> 3. If not, did the County Court, on appeal under s. 204 of the Housing Act 1996, possess "full jurisdiction" so as to satisfy compliance with Article 6(1)?

In relation to the first question the court proceeded on the basis that the duties of the local authority in respect of housing under the Housing Act of 1996 gave co-relative rights to tenants such as the plaintiff and that those rights to accommodation constituted a "civil right" within the meaning given to that expression for the purposes of Article 6 (1). In this regard the case seems to be a

reasonable authority for contending that Article 6 rights arise for consideration on the facts of the present case.

As to the issue of due process required by Article 6, the court, having concluded that the review conducted by the reviewing officer was not independent, went on to hold that the hearing available to the plaintiff in the County Court, its jurisdiction being, in substance, the same as that of the High Court in judicial review, was sufficient to guarantee compliance by the council with the plaintiff's rights under Article 6(1).

Whilst the court's decision seems to be one which favours the view that the availability of judicial review may provide an adequate safeguard for rights secured by Article 6(1) in the absence of a fully independent prior hearing, even where the facts are in dispute, it appears to me that at para.105 of his judgment that Lord Millett qualified his conclusions by identifying the possible need for a full appeal in certain circumstances when he stated as follows:-

> "In the present case the subject matter of the decision was the distribution of welfare benefits in kind, and critically dependent upon local conditions and the quality and extent of available housing stock. The content of the dispute related to the reasonableness of the claimant's behaviour in refusing an offer made to her which, if refused by her, would have to be offered to others on the homeless register. Any factual issue arising the course of the dispute, even if critical to the outcome, would be incidental to the final decision. In my opinion the subject- matter of the decision and the content of the dispute demanded that the decision be made by an administrative officer with experience of local housing conditions, subject to a proper degree of judicial control; and that a right of appeal to the court on law only was sufficient for this purpose."

This statement of Millett L.J. seems to suggest that, critical to his decision that a hearing by way of judicial review sufficed, notwithstanding the lack of independence on the part of the inspector, was the fact that his decision was one based on housing policy issues in respect of which his expertise was crucial and was not a decision based on a simple determination of facts or on the plaintiff's credibility.

In *Tsfayo v. United Kingdom*, (Application No. 60860/00, Judgment of the European Court of Human Rights of 14th November, 2006), the facts were that Ms. Tsfayo was late in making claims for the renewal of certain housing and council tax benefits to which she was entitled. She alleged that her lack of familiarity with the benefit system and her poor English was responsible for this delay. The benefits were reinstated prospectively on her application but her back dated claim for a period of four months was rejected by the council on the grounds that she had failed to show "good cause" why she had not claimed the benefits earlier. Ms. Tsfayo appealed to the council's review board which consisted of three counsellors from the council who, in turn, were advised by a barrister. The review board rejected Ms. Tsfayo's appeal effectively on credibility issues, with the board concluding that she must have received some correspondence from the council during the four month period. Subsequently, Ms. Tsfayo's application to apply for judicial review was dismissed.

Ms. Tsfayo's complaint to the European Court of Human Rights was that the review board who determined her appeal was not an "independent and impartial tribunal", as required by Article 6(1). The court referred to the decision of the House of Lords in Runa Begum v. Tower Hamlets London Borough Council [2003] U.K.H.L. 5 and, in particular, to the conclusion of that court that, whilst that case involved some disputed factual issues, those findings of fact were, according to Lord Bingham, "only staging posts on the way to the much broader judgments" concerning local conditions and the availability of alternative accommodation, which the housing officer had specialist knowledge and experience to make. The court went on to consider that the decision making process in the *Tsfayo* case was entirely different from that in *Bryan v. United Kingdom* [1995] 21 E.H.R.R. 342 and *Runa Begum v. Tower Hamlets London Borough Council* [2003] U.K.H.L. 5. Essentially, the review board had decided upon Ms. Tsfayo's application based solely upon an assessment of her credibility. The court concluded at para. 46:-

> "The HBRB [Housing Benefit Review Board] found her explanation to be unconvincing and rejected her claim for back-payment of benefit essentially on the basis of their assessment of her credibility. No specialist expertise was required to determine this issue, which is, under the new system, determined by a non-specialist tribunal… Nor, unlike the cases referred to, can the factual findings in the present case 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."

The court went on to hold that in the circumstances of the case that judicial review could not secure a guarantee of the applicant's rights under Article 6(1). The court, also at para. 46 of its decision, contrasted the issues in Ms. Tsfayo's case with those which arose in *Bryan* and *Runa Begum* in the following manner follows:-

> "The court considers that the decision-making process in the present case was significantly different. In Bryan, Runa Begum and the other cases cited at paragraph 43 above, 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 HBRB was deciding a simply question of fact, namely whether there was 'good cause' for the applicant's delay in making a claim. On this question, the applicant had given evidence to the HBRB that the first that she knew that anything was amiss with her claim for a housing benefit was the receipt of a notice from her landlord – the housing association – seeking to repossess her flat because her rent was in arrears. The HBRB found her explanation to be unconvincing and rejected her claim for back-payment of benefit essentially on the basis of their assessment of her credibility. No specialist expertise was required to determine this issue, which is, under the new system, determined by a non-specialist tribunal... Nor, unlike the cases referred to, can the factual findings in the present case 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."

In *Leonard v. Dublin City Council and Ors*. (Unreported, High Court, Dunne J., 31st March, 2008), a case in which *Tsfayo* was not opened to the court, the plaintiff was a tenant of the council at certain premises at Bridgefoot Street, Dublin. Her tenancy agreement was the same as that of the plaintiffs in these proceedings. In addition, her tenancy was subject to an undertaking by her to comply with the terms of a letter which stipulated that in the event of her partner, who was a heroin addict, being found on the premises, that the council would be entitled to evict her in the interests of good estate management.

The plaintiff's partner was found on the premises and accordingly the council issued a warning to the plaintiff that she was at risk of being deemed in breach of clause 13 of the tenancy agreement. Following this warning, the council received further complaints that the plaintiff's partner was residing on the premises. The plaintiff was informed that a notice to quit would be served on her for breach of the agreement. She was also advised that she could request a review of her case as the recommendation was in favour of the termination of her tenancy. A notice to quit was served and thereafter proceedings under s. 62 of the Act of 1966 were instigated.

The plaintiff instituted proceedings seeking a declaration that s. 62 of the Act of 1966 was incompatible with the State's obligations under Articles 6, 8, 13 and 14 of the Convention, given the summary nature of those proceedings.

At the heart Ms. Leonard's claim was her complaint that the District Court proceedings afforded her no opportunity to demonstrate that the alleged anti-social behaviour was unreal in circumstances where her partner was on a methadone treatment programme and had never been convicted of drug dealing or drug trafficking. There was no dispute on the facts, however, as the plaintiff accepted at all times that she had been in breach of the terms of her agreement, in that her partner had been on the premises contrary to the provisions of her tenancy agreement. The plaintiff's major complaint was, therefore, that the s. 62 proceedings afforded her no opportunity to make a plea *ad misericordiam*.

On these facts, Dunne J. concluded that the plaintiff's challenge under Articles 6 and 8 of the Convention had to fail. The plaintiff had been provided with the reason for the decision to terminate her tenancy. The facts underlying that decision were never disputed. Hence, judicial review was an adequate remedy for the plaintiff in respect of any legitimate complaint she might have had arising from the council's decision. In such proceedings the court could have quashed the decision of the council had, for example, the plaintiff established that the council had abused its position or behaved oppressively in the conduct of its investigation. In dealing with the s. 62 process as a whole, including the defendants internal investigation procedure and the adequacy of judicial review to meet the rights of the plaintiff to an independent hearing under Article 6, Dunne J. stated at p. 67 as follows:-

> "Having regard to the decisions to which I have referred and in particular the decisions in *Bryan* and *Begum*, the jurisprudence of the European Court of Human Rights recognises that in certain areas for example, when dealing with the issue of professional discipline or in dealing with matters such as the appropriate distribution and supply of local authority housing, a degree of specialised or local knowledge or expertise may be necessary. In such circumstances, there is nothing wrong in principle with a decision being made by an officer of a local authority as in the *Bryan* case. The issue is whether that decision can be reviewed by a court with full jurisdiction. The fact that the administrative decision is enforced by means of a court order in summary proceedings which do not permit a full hearing on the merits does not, in my view, violate article 6(1). The requirement for review by a court exercising full jurisdiction is met by a court exercising the jurisdiction of judicial review in respect of the administrative decision.
>
> Section 62 cannot be looked at in isolation from the process which leads to the application to court under that section for the issue of a warrant for possession. The process which led to the invocation of the s. 62 procedure in this case was subject to the possibility of judicial review. As such I am satisfied that the procedure under s. 62 and the process leading to such an application does not violate the applicant's rights under Article 6(1), given the availability of the procedural safeguards provided by the availability of the remedy of judicial review in respect of the decision to terminate the tenancy."

At p. 65 of her judgment, Dunne J. concluded as follows:-

> "There is no doubt that the rights of the applicant are limited in the course of a hearing before the District Court on foot of an application under section 62 for the issue of a warrant for possession. However, a person in the position of the applicant is entitled to judicially review the decision of the Council to terminate a tenancy. In the present case it does not appear that the applicant herein has any basis upon which she could have challenged the decision in the present case. I accept the submissions of Mr. Connolly, S.C., to the effect that there was sufficient protection for the tenant by way of judicial review of the decision of the Council and that in this way the tenant's rights under the Convention are protected."

It is clear from the aforementioned decision of Dunne J., that critical to her conclusion that the plaintiff's rights under Article 6 had not been violated by reason of the availability of judicial review, was the fact that the breach by the plaintiff of her tenancy agreement had never been put in issue and that the plaintiff, because of the nature of her case, could not have challenged the defendant's decision to terminate the tenancy. It is also clear that the trial judge noted that the plaintiff had not shown any particular circumstances to demonstrate how judicial review was inadequate to protect her Article 6(1) rights.

I do not believe that the decision of Dunne J. in *Leonard* goes so far as to suggest that in every case where a warrant for possession is obtained pursuant to s. 62 of the Act of 1966 that the right of the evicted tenant to seek judicial review of the decision to terminate a tenancy will, of necessity, meet the tenant's Convention rights. I believe that the facts of the present case are distinguishable from those in *Leonard*. Contrary to the written submissions delivered by the defendant, the evidence in the present case simply cannot be construed as being consistent with an admission on the part of the plaintiffs of anti-social behaviour. They admit having argued with their neighbours but the entire tenor of the transcript, particularly the evidence of Mr. Pullen, constitutes a robust denial of behaviour which could be categorised as falling within the definition of anti-social behaviour.

Article 6(1) of the Convention was once again considered by Laffoy J. in the decision of *Donegan* to which I have earlier referred and which was made after the decision of the European Court of Human Rights in *Tsfayo*. In that case the learned trial judge had to consider whether or not the provisions of s. 62 of the Act of 1966, incorporating the process leading thereto, offended the provisions of Articles 6 and 8 of the Convention.

In that case the plaintiff was also a tenant of Dublin City Council at Bridgefoot Street, Dublin. His son lived with him and the tenancy agreement was in the same terms as that of the plaintiffs in the present action. In November, 2003 the plaintiff's house was searched under the Misuse of Drugs Acts 1977 to 1984. The gardaí reported to the council that their search suggested that heroin was being prepared on the premises for sale on the streets and that the plaintiff's son was known to be selling heroin on the streets.

The council accordingly initiated an investigation into alleged anti-social behaviour in the course of which it held several meetings with the plaintiff. The plaintiff was warned of the possibility of a notice to quit being served. At all times, the plaintiff contended that his son was a drug user and not a drug pusher and that he was actively addressing his addiction. The investigation in the *Donegan* case proceeded on much the same lines as that in the instant case. There were several meetings between the council and the plaintiff. The plaintiff was afforded every opportunity to make whatever submissions he wished to make.

A managerial order was ultimately made, directing service of the notice to quit. Possession proceedings were then initiated under s.62 of the Act of 1966. Thereafter, the District Court proceedings were adjourned pending the hearing of the decision of the High Court proceedings.

In reaching her conclusions, Laffoy J. distinguished the facts in *Donegan* from those in *Leonard*. She concluded that the only claim made by Ms. Leonard was that she was provided with no forum wherein she could advance what Laffoy J. described as an *ad*

misericordiam plea against a decision that her tenancy be terminated. Laffoy J. referred to the fact that, at all stages, the plaintiff had conceded that she was in breach of the terms of her tenancy agreement.

Laffoy J., in *Donegan*, did not disagree with the conclusion of Dunne J. in Leonard, that in an individual case where facts were not in issue, that a right to judicial review of the decision of a non-independent administrative body might suffice to meet an individual's rights under Article 6. However, *Donegan* involved the service of a notice to quit based upon a finding of alleged anti-social behaviour in circumstances where the facts supporting that finding were at all times disputed by the plaintiff. The council had concluded that the plaintiff's son was dealing drugs from the property the subject matter of the tenancy agreement, whereas the plaintiff maintained that his son was a drug addict and that he was not dealing drugs from the premises such that he was not guilty of anti-social behaviour. Laffoy J., whilst not making any specific declaration as to the plaintiff's Article 6 rights, concluded in respect of the interference with the plaintiff's Article 8 rights that where a determination was made in the face of disputed facts by a party who was not independent, that a right to challenge that decision in judicial review proceedings was not a sufficient procedural safeguard.

Leonard, accordingly, must be distinguished from the facts in the present case given Ms. Leonard's acceptance of her breach of the tenancy agreement. In such circumstances I can readily understand the court's conclusions that the procedure as a whole, when viewed in conjunction with the plaintiff's right to seek judicial review of the council's decision, was sufficient to safeguard the plaintiff's Article 6 rights. A forum for a full merits based hearing can hardly be demanded by way of due process under Article 6 where there is an admitted breach of the terms of the tenancy agreement. By way of contrast the present case is really on all fours with the facts in *Tsfayo*, a decision to which this Court must have regard, under s.4 of the Act of 2003. The cases are similar both in respect of the character of the civil rights in issue and the nature of the determination to be made. The determination was to be made in respect of disputed facts and involved a determination as to the credibility of the plaintiffs.

Whilst the defendant in the present case has predicated certain elements of its legal submissions based upon an acceptance by the Pullens that they were guilty of anti-social behaviour, a reading of the first volume of the transcript in this case does not support such a submission. The transcript is littered with denials by Mr. and Mrs. Pullen that they were guilty of any behaviour which could meet with the definition of anti-social behaviour in their tenancy agreement. Further, the transcript is replete with assertions on their part that they were subjected to ongoing victimisation by their neighbours from the time they took up residence in their home at Cloncarthy Road, Dublin.

It is undoubtedly the case that the Strasbourg jurisprudence has shown a degree of flexibility in its search to provide for a just and workmanlike solution for administrative bodies forced to deal with issues such as those which arise in the present case. It may overlook the lack of independence at the first stage of a process but it may only do so where, on the facts of the individual case, judicial review can be deemed to amount to a full hearing. To my mind, the nature of the issues in the present case, having regard to the lack of independence at the first stage of the process, required a right to an independent merits based hearing.

Having heard the evidence as to the nature of the council's investigation which lead to its decision to terminate the plaintiff's tenancy, I believe that neither the investigation nor the subsequent decision involved, other than in the remotest way, broader issues of housing policy where the requirement of some degree of particular professional expertise might have justified a less than independent hearing. In this regard the court notes the evidence of those individuals who carried out the investigation, their interview notes and also the evidence given to the court that of its housing stock comprising some 26,000 units, as few as a dozen homes are repossessed each year on the grounds of anti-social behaviour. What the Defendant did in the present case was to make findings of fact in relation to disputed events and this involved making judgments as to the credibility of the plaintiffs and their neighbours. This they did in the teeth of the plaintiffs' assertions that they were being victimised by their neighbours and their further complaint that the investigation process had been prejudged by those who were charged with that task.

11. Alleged violation of Article 6 in the present case: Summary.
The decision to terminate the plaintiffs' tenancy was not solely or exclusively concerned with the immediate repossession of property, thus confining the effects of that decision to potential Article 8 violation, but it also determined the rights of the plaintiffs in other respects, such as their rights to a number of statutory entitlements which are referred to at p.18 of the statement of claim. The decisions in *Bryan, Begum, Tsfayo* and *Leonard* together with those in *Salesi, Mennitto* and *Kurzac* all are suggestive of the facts of the within case engaging those rights provided for in Article 6.

The civil rights and obligations of the plaintiffs flowed from the tenancy agreement they enjoyed with the defendant. The determination made by the defendant that the plaintiffs were guilty of anti-social behaviour, even without the defendant obtaining an order for possession, was one which altered or potentially altered the plaintiffs' future entitlements referable to housing and also to certain social welfare benefits as identified at ss. 14 – 16 inclusive of the Housing (Miscellaneous Provisions) Act 1997. Further, their eviction for breach of the covenant against anti-social behaviour has resulted in the plaintiffs being deemed to have rendered themselves deliberately homeless, within the meaning of s. 11(2)(b) of the Housing Act 1988. In addition, the plaintiffs' right to their good name and reputation was impugned. Neither in the course of the process leading up to the decision that the plaintiffs were guilty of anti-social behaviour nor in the process of the eviction procedure were the plaintiffs afforded "an independent and impartial" hearing before a "tribunal established by law", in which they could protect their civil rights by disputing such finding or the proportionality of the decision to obtain a warrant for possession.

In this case the defendant, exercising its functions as an organ of the State, conducted an "in house" investigation which concluded that the plaintiffs were guilty of anti-social behaviour and as part of that decision determined that it would evict the plaintiffs from their home by obtaining a warrant for possession of that property using the summary procedure provided in s. 62 of the Act of 1966. This process denied the plaintiffs the opportunity of a fair hearing by an independent tribunal in respect of the wrongdoing upon which their eviction was procured and notwithstanding the plaintiffs' denial of anti-social behaviour and their assertions that they were being victimised by their neighbours. The decision made was not one which required the decision maker to have any particular degree of specialist or professional knowledge such as might justify a lack of independence at what I might describe as the first stage of the process. Even if it was, the independent hearing required by Article 6(1) could not be met by the hearing in the District Court under s.62 of the Act of 1966 or by the right to pursue judicial review proceedings. The District Court was not entitled to consider the merits of any finding upon which the tenancy was terminated but was mandated to grant the warrant for possession on proof of those matters referred to in s.62 of the Act of 1966. Further, whilst judicial review provides for an independent hearing, which in certain circumstances may be considered as providing a full and fair independent hearing so as to comply with Article 6(1) rights, as occurred in *Leonard* and *Begum*, this is not such a case. Judicial review would be a wholly ineffective remedy where the facts upon which the decision of the defendant was based were hotly disputed. Neither was the decision of the defendant one which can be classified as involving wider issues of housing policy, such that the findings of fact were so subsidiary to the policy issues so as to justify a conclusion that a right to judicial review could be deemed sufficient to meet the plaintiffs' Article 6(1) rights.

Having regard to the similarity between the facts of the present case and those in *Tsfayo*, when taken in conjunction with the court's

pronouncements regarding Article 8 safeguards in *Donegan*, I reject the defendant's argument that on the facts of this particular case that the availability of judicial review proceedings would have complied with the obligations of the defendant under Article 6(1) of the Convention. The lack of a merits based hearing before a judicial or *quasi* judicial body where there are disputed fact and credibility issues cannot be squared by the right to maintain judicial review proceedings.

I conclude that, in performing its functions in the manner in which it did, the defendant brought about the determination of the plaintiffs' civil rights by a procedure that offended the provisions of Article 6(1) of the Convention

12. Article 8
What is at the heart of the plaintiffs' argument regarding Article 8 of the Convention is whether or not the procedural requirements, as identified by the European Court of Human Rights in *Connors* and more recently in *McCann* have been satisfied by the defendant's investigative and warning process, the summary procedure before the District Court and the right of the plaintiffs to seek judicial review of the defendant's decision to repossess their home.

As already stated, Laffoy J. in *Donegan* declared that on the facts of that case that s. 62 of the Act of 1966 was incompatible with the State's obligations under Article 8. It seems to follow that if the defendant, in circumstances equivalent to those in *Donegan*, has two ways of performing a particular function, one of which would comply with the State's obligations under the Convention, namely, re-entry and forfeiture and one which would not, namely summary eviction under s. 62 of the Act of 1966, that if it elects to use the latter that it is in breach of its obligations under s. 3 of the Act of 2003.

The decisions of Parke J. in *Irish Trust Bank Ltd v. Central Bank* [1976-7] I.L.R.M. 50 and of Finlay Geoghegan J. in *Metock and Ors. v. Minister for Justice* (Unreported, High Court, 14th March, 2008) are instructive as to the circumstances in which a judge of a court of equal jurisdiction may depart from a previous judgment of another judge of the same court. Having regard to those decisions, I believe that this Court is obliged to follow the decision of Laffoy J. in *Donegan*, it being much closer to the facts of the present case than *Leonard*, unless I am satisfied that it was wrongly decided or that the facts in that case are so significantly different from those in this case that the doctrine of *stare decisis* is not applicable.

Before considering the judgment in *Donegan*, I will briefly refer to Article 8 itself for the purposes of reviewing the matters to which the court must have regard, assuming that Article 8(1) is engaged, when considering whether or not the defendant unjustifiably interfered with the plaintiffs' Article 8(1) rights.

Article 8 of the Convention states as follows:-

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

Article 8(1) protects the right of an individual to "respect" for his or her private life, family life and home. It is well established that "home", for the purposes of the Convention, does not depend upon the legal status of the owner or the lawfulness of the occupation under domestic law. The right to respect for the home can be viewed as an extension of the right to respect for private life. It encompasses the enjoyment of one's private life and family life in the home setting but does not extend to a right to an actual dwelling.

The right to respect for private and family life and home under Article 8(1) is not absolute. Assuming the court is satisfied in this case that Article 8(1) is engaged, then the court must consider whether or not the defendant's interference with those rights was "in accordance with law", was in pursuit of one of the legitimate aims as provided for in Article 8(2) and that the restriction was "necessary in a democratic society".

(a) Is Article 8.1 engaged?
I have no doubt that the plaintiffs' Article 8(1) rights were engaged by the actions of the defendant in instituting proceedings under the provisions of s. 62 of the Act of 1966, notwithstanding the expiry of the period specified in the notice to quit. The decisions in *Leonard, Donegan, Connors* and *McCann* are all authorities in favour of such a finding. This issue was dealt with in simple terms by Lord Hope of Craighead in *Harrow London Borough Council v. Qazi* [2003] W.L.R. 792.

Qazi involved an order for possession made in respect of a council house held by a husband and wife under a joint tenancy. The marriage broke down and the joint tenancy came to an end when Mrs. Qazi served a notice to quit on her husband. Mr. Qazi was refused a sole tenancy by the local authority in the house. He remained in possession and sought to challenge summary possession proceedings brought by the council several years later at which time he had re-married and had two children. Mr. Qazi claimed that the council's proceedings constituted an unlawful interference with his right to respect for his home under Article 8. The House of Lords held unanimously that Article 8 was engaged as the house continued to be Mr. Qazi's home despite the fact that the tenancy had come to an end. Lord Hope, in answering the question as to whether the proceedings engaged Mr. Qazi's Article 8(1) rights, stated as follows at para. 70:

> "Is Article 8(1) 'engaged'?
>
> I mention this question merely to say that I consider that it can receive only one answer in the circumstances. The effect of an order for possession will be to require the respondent to leave the premises which are his 'home' for the purposes of art 8(1). Regarding the question of respect for his home as one which is directed in essence to his right to be respected by the public authorities in the enjoyment of his privacy, his removal from his home is bound to interfere with his enjoyment of that right at least to some extent."

(b) Is the interference in accordance with law?
The next question to be considered by the court is whether or not the defendant's interference with the plaintiffs' Article 8(1) rights was "in accordance with law". The basis upon which the defendant has interfered with the plaintiffs' Article 8(1) rights in the present case is to be found in domestic law i.e. the provisions set out in s. 62 of the Act of 1966 which permit a local authority, in specified circumstances, to seek a warrant for possession in the District Court following the termination of a tenancy. It seems difficult to

reach any conclusion other than that the interference by the defendant with the plaintiff's rights under Article 8 were accordingly "in accordance with law", having regard to the provisions of the tenancy agreement and the provisions of s. 62 of the Act of 1966.

(c) Is the interference "necessary in a democratic society"?
The court must next decide whether or not the defendant, having terminated the plaintiffs' right to possession of their home "in accordance with law", is required to further justify that interference as being in pursuit of one of the legitimate aims provided for in Article 8(2) and establish that the interference is "necessary in a democratic society". In this regard the defendant relied upon the decisions in *Qazi* and *Kay* to which I will refer later to contend that no further justification was required under Article 8(2).

Assuming for the moment that the defendant must establish that its interference was such as was "necessary in a democratic society", it is important to consider how the European Court of Human Rights has interpreted the word "necessary" in the context of Article 8(2). In *Handyside v. United Kingdom* [1979-80] 1 E.H.R.R. 737, the court had to decide whether the forfeiture of a particular book on obscenity grounds breached Article 10(2) of the Convention. It was held that whilst the adjective "necessary", within the meaning of Article 8(2), was not synonymous with "indispensable" and that it did not have the flexibility of an expression such as "admissible", "ordinary", "useful", "reasonable" or "desirable". It is, therefore, not sufficient for a public authority, such as the defendant in the present case, to establish that summary possession as provided for in s. 62 of the 1966 Act is a useful tool for the purposes of dealing with anti-social behaviour and maintaining good estate management. The onus upon the public authority seems to be significantly higher.

In assessing whether or not an interference is "necessary in democratic society", the courts must apply the principle of proportionality to assess whether a particular measure can be justified. A public authority seeking to show that an interference is proportionate must, on the authorities, satisfy the court regarding four matters namely:-

> (a) That the objective of restricting the right is so pressing and substantial that it is sufficiently important to justify interfering with a fundamental right;
>
> (b) That the restriction is suitable: it must be rationally connected to the objective in mind so that the limitation is not arbitrary, unfair or based on irrational considerations;
>
> (c) That the restriction is necessary to accomplish the objective intended. In this respect the public authority must adopt the least drastic means of attaining the objective in mind, provided the means suggested are not fanciful; and
>
> (d) That the restriction is not disproportionate. The restriction must not impose burdens or cause harm which is excessive when compared to the importance of the objective to be achieved.

Finally, in relation to the doctrine of proportionality, significant reliance has been placed by the defendant on the doctrine of the "margin of appreciation", which the European Court of Human Rights affords to national authorities when exercising its supervisory jurisdiction over the conduct of individual States. In doing so that court recognises that the Convention, as a living instrument, cannot be applied uniformly to all States and that its application may have to vary depending upon local needs and conditions and it presupposes that the relevant governments know what is necessary in their own countries. However, there is a significant body of legal opinion that suggests that the doctrine of the "margin of appreciation" has no role to play when a domestic court is considering the doctrine of proportionality for the purpose of deciding whether or not an organ of the State has complied with its obligations under the Convention. I believe this is a correct statement of the law and that the doctrine of the "margin of appreciation" is, principally, a tool which assists an international court in exercising a supervisory jurisdiction over a number of States who may have different pressures and different social needs and that it is not a technique which is available to this Court, it being a domestic court, to in some way ameliorate the obligations of an organ of the State from compliance with its Convention obligations. The role of the European Court of Human Rights, in this respect, can be seen, by way of example, in the decision of that court in *Connors* where in considering the meaning of the words "necessary in a democratic society" it concluded as follows at para. 81:-

> "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 ..."

I do, nonetheless, accept the defendant's submission that the court should defer to the views of public authorities in many cases where they are exercising their discretionary judgment in areas relating to policy issues and where the legislature and the public body concerned are undoubtedly better placed than the judiciary to decide on such matters. This, however, is not such a case.

The European Court of Human Rights has also made it clear that Article 8 contains implicit procedural requirements and that these are of relevance when determining the proportionality of the interference with Article 8 rights. In *McMichael v. United Kingdom* (Application No. 16424/90, Judgment of the European Court of Human Rights of 24th February, 1995) the court held at para. 87:-

> "Whilst Article 8…contains no explicit procedural requirements, the decision-making process involving measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8".

13. Recent Case Law
The present case was argued on many grounds but the crux of the case concerns whether or not the procedure adopted by the defendant which led to an interference with the plaintiffs' Article 8(1) rights occurred in the course of a process which was fair and afforded due respect to the plaintiffs' rights through the availability of adequate procedural safeguards. In this context I will now proceed to consider the cases which are of most significance to the facts in the present case, namely those in *Donegan*, *Connors*, *McCann* and *Blecic*.

Given that the decision of Laffoy J. in *Donegan* was one which concluded that the procedure under s. 62 of the Act of 1966, did not provide Mr. Donegan with the type of procedural safeguards to which he was entitled having regard to the nature of his Article 8(1) rights, I feel it is important at the outset to record the most recent pronouncement by the European Court on Human Rights as to the significance it attaches to the infringement of that right, to the extent that an individual may lose their home. In *McCann*, the court described the magnitude of the interference and how it might be safeguarded in the following manner at para 50:-

> "The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by

an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end."

This decision is particularly pertinent to this Court's view that *Donegan* was correctly decided as it post-dates the decision of the House of Lords in *Kay* and seems to establish without doubt that *Connors* is not, as urged by the defendant, a decision which is only of relevance to cases regarding the rights of gypsies, but is one which relates to the procedural fairness and the safeguards required when a local authority seeks to invoke domestic legislation in aid of interfering with the occupant's right to respect for that home under Article 8(1).

The decision of Laffoy J. in *Donegan* was very much guided by the approach taken by the European Court of Human Rights in *Connors*, as the facts of the two cases were very similar. Mindful of the court's obligations to be guided by the decisions of the European Court of Human Rights under s. 4 of the Act of 2003 and in circumstances where the plaintiffs in the present case base so much of their argument on the decision in *Connors*, it is necessary to set out fully the facts of that case and also the facts in *McCann* to demonstrate that *Donegan* was correctly decided. The exercise is also valuable for the purpose of assessing whether there is anything which distinguishes *Donegan* from the present case such as would justify this Court coming to a different legal conclusion.

14. *Connors v.United Kingdom* [2004] 40 E.H.R.R. 189
In *Connors*, the applicant and his family were gypsies who moved to a site under the control of Leeds City Council in 1998. They occupied that site on the foot of a licence which included a clause prohibiting nuisance on the part of the occupier, his guests or family members. The applicant's daughter was granted a licence to occupy the adjacent plot where she lived with a Mr. Michael Moloney. The council's Traveller Services Manager, based at the site, was aware of many incidents of nuisance caused by the applicant's children and visitors. He visited the applicant and his daughter on a number of occasions to report alleged misbehaviour and nuisance, and in December 1998, gave the applicant a written warning that further incidents of anti-social behaviour, including that on the part of his children, would lead to the revocation of his licence. Subsequently, a notice to quit was served on the family requiring them to vacate the site. The notice contained no written details of the council's reasons. The council subsequently issued proceedings seeking summary possession on the basis that they were in occupation after the termination of their licence. Witness statements delivered contended for a breach of clause 18 of the licence agreement, being a clause which prohibited anti-social behaviour. The applicant disputed that he or his family were in breach of clause 18.

The judgment of the court reveals that the applicant's family consisted of four children, the youngest of whom had serious physical problems and that his wife was a significant asthmatic. He himself suffered from recurrent chest pain. A number of the children were receiving assistance with their education at home.

In relation to the alleged nuisance, the council subsequently served further witness statements containing particulars of the allegations of nuisance and these related largely to the plaintiff's daughter and her husband.

The applicant applied to the High Court for leave to apply for judicial review. This was refused, with the learned trial judge noting that Mr. Connors accepted that the council had carried out the investigations required of it under guidelines set out by the Department of the Environment and that he could not argue, as regarding procedural fairness, that he had not been given prior warning of the threat of eviction.

Following the applicant's unsuccessful application for leave to apply for judicial review, the council duly obtained summary possession and evicted Mr. Connor and his family.

The applicant contended that his eviction from the site interfered unjustifiably with his rights under Article 8, as being unnecessary and disproportionate. In particular, he complained that he was not given the opportunity to challenge in a court the allegations made against him and his family. Further, given that there was no opportunity for the submission of evidence, there was no meaningful assessment as to whether the measures were proportionate or justified in pursuit of any legitimate aim. The applicant relied upon the fact that legislation in relation to privately run gypsy sites and local authority housing estates required proof of allegations of anti-social behaviour prior to the owner being able to retake possession from the occupant. He saw no reason why the same approach would not be workable in respect of local authority run gypsy sites. Finally, the applicant submitted that the interference by the council was with a right which would render his family homeless and affect his children's access to education and health services and that accordingly the margin of appreciation to be afforded on the facts should be narrow rather than wide.

The Government submitted that the interference was justified and necessary in a democratic society and was proportionate to its objectives. It relied upon the fact that the applicant had agreed to occupy the plot on the terms provided for in the licence. It relied on the fact that the High Court on the applicant's application for judicial review had found no evidence of a lack of procedural fairness. Whilst accepting that better statutory protection was available for gypsies occupying sites other than those provided by the local authority, the Government emphasised that statutory regulation of housing was a matter of complexity and within the area in which the courts should defer to the decision of the democratically elected legislature. The Government also relied upon the fact that local authorities use their power of eviction sparingly and as a sanction of last resort but that such power was a necessary management tool. It was submitted that to require local authorities to justify in court their management decisions in relation to individual occupiers would be unworkable. A summary procedure which avoided the need to produce witnesses where, in their experience, they had noted a reported reluctance for other occupiers to get involved or "inform" on rule breakers, was necessary.

The European Court of Human Rights, in its judgment, notes that the parties were agreed that Article 8 of the Convention was applicable in the circumstances of the case and that the interference with the plaintiff's home was "in accordance with law" and pursued a legitimate aim of the council, namely the protection of the rights of other occupiers of the site. Accordingly, the question that remained for the court's decision was whether the interference by the council was "necessary in a democratic society" in pursuit of that aim.

The court rejected what appears to have been a somewhat flimsy argument made by counsel on behalf of the Government that the council required flexibility in terms of the management of local authority campsites due to the nomadic lifestyle of gypsies. The more significant argument, which was mirrored in *Donegan* and in the present case, was that the council required the power to evict summarily as a vital management tool in coping with anti-social behaviour in that it allowed for the speedy removal of troublemakers and relieved the council of the need to seek assistance from informants. The third argument made by the Government was that the additional costs of court procedures, wherein the merits of the eviction would be determined, would act to the detriment of the gypsy population as a whole, as those costs would lead to an increase in respect of the fees pertaining to the sites.

The judgment of the court reports that summary eviction was used as a tool in controlling anti-social behaviour in only a tiny percentage of local authority cases and that the use of the summary power of eviction to deal with anti-social behaviour did not

therefore seem to be justifiable. The court was not persuaded that the council's estate management would have been unworkable if they were required to establish reasons for eviction in the course of court proceedings.

The court, in dealing with the proportionality of the council's interference, went on to consider the extent of the procedural safeguards within the whole process. It rejected the usefulness of judicial review proceedings wherein the lawfulness and reasonableness of a decision to evict might be made in circumstances where the tenant's principal objection was based not on any lack of compliance by the council with its duties or on any failure to act lawfully but on the fact that he denied that he or the members of his family living with him were responsible for any nuisance on the site.

The European Court of Human Rights in *Connors*, in concluding that there was a violation of the applicant's Article 8(1) rights, stated 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."

Finally, the court concluded that having regard to its findings in relation to the alleged violation under Article 8 that the violation alleged in respect of both Article 1 of the First Protocol and Article 6(1) had been absorbed in their earlier finding.

15. *Donegan v. Dublin City Council and Ors*. (Unreported, High Court, Laffoy J., 8th May, 2008)
The decision of Laffoy J. in *Donegan* post-dates the decision of the European Court of Human Rights in *Connors* and its facts are set out earlier in this judgment. In *Donegan* the primary relief which the plaintiff sought in respect of the alleged violation of his rights under Article 8 of the Convention was a declaration that s. 62 of the Act of 1966 was incompatible with the Convention under s. 5 of the Act of 2003. This is to be contrasted with the approach of the plaintiffs in the instant proceedings whose central challenge rests on s. 3 of the Act of 2003, in that the defendant is alleged to have carried out its functions in a manner which has led to a warrant for possession being issued by the District Court in a process which does not comply with the State's obligations under Article 8 of the Convention.

Having considered fully the facts in *Donegan* and having compared them with those in *Connors*, I agree fully with Laffoy J. that the two cases were "uncannily similar". She referred to the fact that the complaint of anti-social behaviour was common to both cases. A similar "in-house" investigation was carried out followed by the issue of summary eviction proceedings which, in neither case, permitted the tenant the opportunity to have an independent examination of the facts on their merits or the reasonableness of the decision to evict. She referred in each case to the genuine dispute as to whether or not the applicant was in breach of the provisions of the tenancy agreement.

Having heard evidence which sought to justify the use of summary eviction for the purposes of dealing with anti-social behaviour in pursuit of the council's good estate management, Laffoy J., as in *Connors*, concluded that the central issue in the case was whether the interference with the plaintiff's right was "necessary in a democratic society, namely, whether it answers a pressing social need and is proportionate to the legitimate aim". At pp.46-48 of her judgment, Laffoy J. concluded:-

> "If one examines the crucial question [whether the interference is necessary in a democratic society] 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 the 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.
>
> …There is no procedural safeguard built into s. 62, under which the plaintiff's contention that he is not in breach of his tenancy agreement can be adjudicated upon 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."

Whilst the trial judge referred to the significance of the evidence furnished to the council by the gardaí regarding drugs paraphernalia found in the plaintiff's son's room, such as to convince them that he was dealing in drugs, she considered that there was clearly a genuine dispute on the facts as to whether the plaintiff was in breach of clause 13 (a) of the tenancy agreement. Laffoy J. thereby concluded that the safeguards required in *Donegan*, where the underlying facts were genuinely disputed, unlike in Leonard where they were not, could not be satisfied by a hearing by way of judicial review in an independent forum. At p. 43 she illustrated the limitations of judicial review in the following manner:-

> "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."

At p. 48 she concluded as follows:-

> "…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."

Given that Laffoy J. was also influenced by the decision of the European Court of Human Rights in *Blecic v. Croatia* [2004] 41 E.H.R.R. 185, I will briefly refer to its facts. The applicant, who had been a protected tenant of a local authority for almost forty years, decided in 1991 to go to visit her daughter in Rome. She returned home the following year having extended her stay with her

daughter due to armed conflict in her home country. On her return she was evicted from her property by the State authorities on the basis that she had been absent from her home without justification for in excess of six months. She challenged the decision of the authorities to evict her, relying strongly on her forty years in occupation. In the Court of First Instance and thereafter in two subsequent appellate courts, culminating in the Supreme Court, the domestic courts concluded that her absence was not justified.

The decision of the European Court of Human Rights was concerned with whether the applicant's Article 8 rights had been infringed. The court held that the interference was in accordance with law, as it was prescribed in legislation and that the housing authority had the legitimate aim of ensuring that the property was not left vacant. The court further held that the applicant's rights had not been infringed. Laffoy J., whilst adopting *Blecic* as authority for the proposition that the court in looking at safeguards for the purposes of Article 8 must view the process as a whole and also the applicant's involvement in that process, went on to distinguish the facts in *Donegan* from those in *Blecic* where the applicant received an independent hearing in the judicial process at three levels including the Supreme Court. Accordingly, the applicant had been given the opportunity to argue the merits of the termination of her tenancy unlike in *Donegan* where the plaintiff received no independent hearing on the merits in any judicial or quasi judicial forum.

Having fully considered the decision of Laffoy J. in *Donegan*, I am satisfied that her conclusions were correct, particularly having regard to the clear guidance given by the court in *Connors* on precisely the same issues and to which she was obliged to have regard by reason of s. 4 of the Act of 2003. The assertion made by the defendant in the present case that the decision in *Connors* was one confined to the rights of gypsies and was not of general applicability to the actions of public authorities seeking to recover possession of property from their tenants by a summary procedure is simply incorrect. *Connors* was a case which involved the consideration of procedural safeguards where there was an interference with Article 8(1) rights, as was confirmed by the European Court of Human Rights in *McCann*, where at para. 50 of the court's judgment, it stated:-

> "The court is unable to accept the Government's arguments that the reasoning in *Connors* was to be confined only to cases involving the eviction of gypsies or cases where the applicant sought to challenge the law itself rather than its application in his particular case."

In relation to the extent of the safeguards required where there is an interference by a local authority with a right under Article 8(1), Laffoy J. made it clear that on the facts of *Donegan* that what was required by way of safeguards to ensure the interference could be justified was the type of due process required by Article 6 and which is referred to earlier in this judgment. No such safeguards accompanied the s. 62 procedure or the process leading up to its invocation.

16. *McCann v. United Kingdom* Application No. 19009/04, Judgment of the European Court of Human Rights of 13th May, 2008)

The decision of Laffoy J. in *Donegan*, I believe, gains further support from the recent decision of the European Court of Human Rights in *McCann*. In that case the applicant's marriage broke down and his wife obtained alternative council accommodation. Mr. *McCann*, having earlier moved out, moved back into the house vacated by his wife and children. The house was too big for him. His wife supported his application for re-housing by the council. Mrs. McCann, at the council's request, served a notice to quit on Mr. McCann. She did so not understanding it would terminate his rights to reside in the house. The local authority later applied for summary possession, something they would not have been able to do had she not served the notice to quit. Had she not done so, the council would have had to embark on a procedure under the Housing Act 1985, which would have given Mr. McCann an opportunity to contest the reasonableness of the order sought. The County Court judge concluded that the tenant's Article 8 rights were infringed and he refused the order for possession. His decision was appealed to the Court of Appeal, who awaited the decision in *Qazi* before concluding, as reproduced in para.15 of the European Court of Human Rights judgment, as follows:

> "…Article 8 is not available as a defence to the possession proceedings, even though the premises in question was the 'home' of the occupant for the purposes of the article. The council acted lawfully and within its powers in obtaining the notice to quit, which had the effect of terminating the secure tenancy. There was no dispute but that the tenancy had been brought to an end by [the applicant's wife's] notice to quit. Under ordinary domestic law the council had an unqualified right to immediate possession on proof that the tenancy had been brought to an end. The statutory procedure in Section 82 of the 1985 Act, which is available to the local authority landlord for terminating a secure tenancy, does not apply to a case where the secure tenancy has been terminated by the tenant's notice to quit. That notice to quit was effective, even though the notice was signed without appreciating the consequences for the occupier of the premises."

The applicant was refused leave to appeal and his earlier application for judicial review failed because he could not establish that the local authority had acted unlawfully.

Mr. McCann argued, amongst other matters, that the local authority, in procuring a notice to quit from his wife, had by-passed the statutory scheme which parliament had created to protect tenants such as himself and, had they been obliged to use that procedure, he would have had an opportunity to have the court examine all the issues of fact and the local authority would have been obliged to show that the possession sought was reasonable.

The Government, in its submission, appears to have conceded that it was necessary, in seeking to justify an interference with a right under Article 8(1) as being in "accordance with law", to demonstrate that the law which permitted of this interference pursued those aims set out in Article 8(2). In this respect, the Government relied upon (a) the rights of the local authority as the owner of the property with responsibility for the management of its social housing stock, (b) the protection of others on its waiting list and (c) the promotion of economic wellbeing. It further relied on the need for clear and certain rules governing property rights and their right under the tenancy agreement to recover possession. Based on all of the above, the Government submitted that the interference "was necessary in a democratic society".

What is of particular significance about *McCann* is that not only does it support the Court's own earlier decision in *Connors* but it does so in the face of the decisions of the House of Lords in *Qazi* and *Kay* which are heavily relied by the defendant in the present case.

The court, in *McCann*, concluded that the effect of the notice to quit together with the possession proceedings amounted to an interference with the right to respect for the applicant's home. It further held that the interference was in "accordance with law" and that the interference was in pursuit of the legitimate aim of protecting the rights and freedoms of others in (a) recovering possession from someone who had no contractual or other right to be there and (b) ensuring that the statutory scheme for housing provision was properly applied. At para. 49 the court summarised the question it had to determine as follows:-

> "The central question in this case is, therefore, whether the interference was proportionate to the aim pursued and thus 'necessary in a democratic society'. It must be recalled that this requirement under paragraph 2 of Article 8 raises a question of procedure as well as one of substance."

The court set out the relevant principles to be applied for the purposes of assessing whether the inference with the right to the "home" by means of an application for summary possession could be justified and it did so by reference to the decision in *Connors* and in particular to paras. 81, 82 and 83 of the court's judgment.

Whilst the court was critical of the local authority for by-passing the statutory scheme, which was meant to protect secure tenants, this fact, to my mind, does not in anyway undermine the most significant statement of the court already set out earlier in this judgment that the loss of an individual's home was the most extreme form of interference with the right to respect for the home. In those circumstances, irrespective of domestic law, the court at para. 50 of its judgment concluded as follows:-

> "Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end."

As regards the procedural safeguards available to Mr. McCann in respect of the council's application for summary possession, the Court concluded as follows at paras. 53 and 54:-

> "As in *Connors*, the 'procedural safeguards' required by Article 8 for the assessment of the proportionality of the interference were not met by the possibility for the applicant to apply for judicial review and to obtain a scrutiny by the courts of the lawfulness and reasonableness of the local authority's decisions. Judicial review procedure is not well-adapted for the resolution of sensitive factual questions which are better left to the County Court responsible for ordering possession. In the present case, the judicial review proceedings, like the possession proceedings, did not provide any opportunity for an independent tribunal to examine whether the applicant's loss of his home was proportionate under Article 8(2) to the legitimate aims pursued.
>
> The court does not accept that the grant of the right to the occupier to raise an issue under Article 8 would have serious consequences for the functioning of the system or for the domestic law of landlord and tenant. As the minority of the House of Lords in *Kay* observed (see paragraph 28 above), it would be only in very exceptional cases that an applicant would succeed in raising an arguable case which would require a court to examine the issue; in the great majority of cases, an order for possession could continue to be made in summary proceedings."

Based on the aforementioned decision, I believe that Laffoy J. was correct in her conclusion that the local authority's interference with Mr. Donegan's Article 8(1) rights, whilst being carried out in accordance with the domestic law, was not demonstrated to have been necessary in a democratic society in circumstances where there were no procedural safeguards in place in the process adopted by the local authority which allowed him to challenge the validity or the proportionality of that interference.

What is interesting about *McCann*, *Qazi* and *Kay* is that in none of those cases was there any dispute but that the event which permitted of the termination of the tenancy had occurred. For example, in the case of *McCann*, the service by Mrs. McCann of the notice to quit on her husband terminated the tenancy in accordance with its terms and what the court was principally dealing with was Mr. McCann's complaint that he did not get an opportunity to dispute the reasonableness of the council's decision to evict him. It is reasonable to infer that in cases where there is an interference with an Article 8(1) right, allegedly justified on the basis of an alleged breach of a contractual provision and the tenant disputes such breach that the balancing procedural safeguards must be such as to afford for that tenant the due process required by the safeguards set forth in Article 6(1).

The defendant argues that even if the eviction amounts to an interference with the plaintiffs' Article 8(1) rights that such interference is justified as being in accordance with law as it is in conformity with the terms of the lease. Consequently, the defendant denies any need to further justify its interference by reference to the requirements of Article 8(2).

This is an argument which I believe is unsustainable in the light of the decisions of the European Court of Human Rights in both *Connors* and *McCann* which, in terms of their facts and the legal issues concerned are very much on all fours with the present case.

17. House of Lords Decisions

The central question before the court in *Qazi* was clearly stated in the judgement of Hope L.J. at para. 36 on p.806 where he states:-

> "The question which lies at the heart of the case is whether, having regard to the provisions of article 8(1) of the Convention, it is unlawful for a public authority to recover possession from a former tenant by a procedure which leads to possession being granted automatically, or whether the court must always be given an opportunity to consider whether the making of an order for possession would be proportionate. If the answer to that question is that the court must always be given the opportunity, it will be in the discretion of the court in all cases to decide whether or not an order for possession should be made. This will be so not only in those cases where there are statutory safeguards that must be satisfied. The court will have a discretion to exercise even in those cases where the tenancy has come to an end by the operation of law, there is an absolute right to possession and there are no statutory safeguards other than the basic rule that possession cannot be taken without an order from the court..."

In that case the parties signed up to a contract which provided for the circumstances in which the tenancy might be terminated. These events occurred and a notice to quit was served. Mr. Qazi did not dispute that the events which gave rise to the notice to quit had occurred. Neither did he dispute that the tenancy agreement permitted the termination of the tenancy in such circumstances. The respect for his home was not to be interfered with based upon any allegation of wrongdoing on his part and in these circumstances there was no determination that he was guilty of any such wrongdoing. Whilst he was potentially at the risk of needing re-housing because of the termination of his tenancy, he was not to be subject to the adverse consequences of a finding of anti-social behaviour such as flow from those findings in the case of *Donegan* and in the present case.

What was being considered by the court, both in *Qazi* and in *Kay*, was whether or not every tenant, following the termination of their tenancy and notwithstanding their acceptance of the occurrence of the events which permit of the termination of the tenancy, is permitted to invoke Article 8(2) so as to potentially have their tenancy extended beyond the period provided for in the agreement and in circumstances where the governing legislation provided for no such extension or safeguard. This is clearly different to the circumstances which arose for the court's consideration in *Connors*, *Donegan* and in the present case where each tenant disputed the occurrence of the events which were relied upon by the local authority to terminate the tenancy. Having regard to the decisions in those cases and also to that in *McCann*, I cannot see how the principles which have evolved from those cases can be in any way affected by the decision of the House of Lords in *Kay*.

18. Similarities between *Donegan* and the instant case

In circumstances where this Court is obliged to apply the doctrine of state decisis and is convinced of the correctness of the legal reasoning of the court in *Donegan* it is important to be sure that there is nothing so significantly different between the facts of that case and the present one such as would justify the court departing from the reasoning in that decision. I will accordingly briefly consider the facts of both cases.

The following similarities are to be found in both *Donegan* and in the present case, namely:-

a. In both cases the tenancies enjoyed were from week to week.

Each had a re-entry clause i.e. clause 25 and each a provision for termination on 4 weeks notice i.e. clause 26.

b. In each case the tenants were the subject matter of complaints of anti- social behaviour and in both cases the tenants were fully engaged in the investigation of these complaints by the defendant. The investigation process itself could not be described as independent as it was carried out in both cases by officers of the defendant.

c. In both cases the tenants denied anti-social behaviour. In *Donegan* the plaintiff disputed the opinion of the gardaí which was to the effect that his son was dealing in drugs notwithstanding evidence recovered from the premises in the course of a garda investigation which convinced the gardaí that he was dealing in drugs from that premises. In the present case the plaintiffs deny they were guilty of anti-social behaviour and at all times claim that they were victimised by their neighbours. They also allege that the defendant prejudged the outcome of such investigation.

d. In both cases the defendant resolved to terminate the tenancies on the grounds of a finding that the tenants were guilty of anti-social behaviour under the terms of the agreement, thus resulting in the tenants being deemed to have rendered themselves homeless, for the purposes of the Housing Acts, following conclusion of the proceedings under s. 62 of the Act of 1966.

e. Each tenancy agreement had a re-entry clause which, had it been operated by the defendant and proceedings subsequently issued under s. 14 of the Conveyancing Act 1881, would have provided to each tenant an independent hearing on the merits wherein they might have disputed the allegations of anti-social behaviour and in the course of which the court could have tested the proportionality of the sanction i.e. eviction in all of the circumstances of the case.

f. In neither case could judicial review be considered to be an adequate remedy for the tenants in question given the disputed facts, as the court in such proceedings cannot substitute its own findings of fact for the findings of the decision-maker.

g. In both cases the council sought to argue that the summary procedure under s. 62 of the Act of 1966 was a vital management tool to enable the local authority deal with anti-social behaviour. It argued that the use of the s. 62 proceedings was justified in pursuit of its aim of good estate management so as to provide quiet and peaceful enjoyment to other tenants who were living in local authority housing adjacent to the plaintiffs. The defendant further justified its interference with the plaintiffs' rights by the use of this procedure as it permitted them to recover possession without the need to have the complainants give evidence in court, something which the defendant believed would deter neighbours from making complaints regarding anti-social behaviour.

h. In both cases the defendant argued that the speed of the process provided by the s. 62 procedure justified the interference with the plaintiffs' rights as being proportionate to its legitimate aim of relocating its housing stock following the eviction of a previous tenant.

Having regard to the similarities between the present case and the facts and legal issues which arose for the court's consideration in *Donegan*, I can see no basis for failing to apply the conclusions of Laffoy J. to the facts in the present case.

In all of the aforementioned circumstances the final matter that the court must therefore consider is whether or not the defendant's interference with the plaintiffs' rights in the circumstances of the present case have been justified as "necessary in a democratic society".

There is no doubt that the defendant, when it elected to utilise the s. 62 procedure, was pursuing legitimate aims as prescribed in Article 8(2) of the Convention. The defendant cannot be faulted for wanting to control its housing stock in a manner consistent with good estate management or for its endeavours to provide for its other tenants a right to the quiet and peaceful enjoyment of their homes. Whilst the defendants aim of swiftly recovering possession from those engaged in anti-social behaviour is laudable, having regard to the shortage of housing stock, such aims do not, in my view, justify the interference with the plaintiffs' rights, as occurred in the present case, absent the presence of real procedural safeguards.

The defendant has not justified to the satisfaction of this Court that any of its aforementioned objectives, even if taken together as a whole, could possibly amount to a pressing social need such as to render it proportionate to evict the plaintiffs, using a procedure which failed to afford them an opportunity to dispute, before an independent body, the lawfulness and reasonableness of that decision.

I agree with the defendant that a housing authority clearly requires a rapid and flexible method of recovering possession of its stock when it has lawfully evicted a tenant. I do not accept however that such an objective cannot be achieved in a manner which nonetheless provides safeguards for tenants who deny allegations of wrongdoing made against them and wherein they can be afforded an independent hearing where they can contest the lawfulness or reasonableness of the decision to evict them. Where there is such a contest the procedure provided by s.62 of the Act of 1966 simply cannot be described as fair nor one which is necessarily rationally connected to the council's objectives.

The evidence in the present case was that the defendant receives approximately 2,500 complaints of anti social behaviour each year. Most of these complaints are resolved without the need to resort to litigation. Some ten to twelve tenants are evicted by the defendant using the procedure provided for by s. 62 of the Act of 1966. In these circumstances I find it difficult to accept that this procedure is the vital tool that it was made out to be in the course of evidence. Further, whilst the defendant in evidence contended that, in the absence of a procedure such as that provided for in s. 62 of the Act of 1966, it might have difficulty in retaking possession from tenants guilty of anti-social behaviour due to the reluctance of those who made the complaints to give evidence, it is noteworthy that in the District Court civil proceedings brought against the plaintiffs by their next door neighbours that those neighbours voluntarily gave evidence against Mrs. Pullen. Also, the defendant has available to it the benefits of the provisions of s. 21

of the Housing (Miscellaneous Provisions) Act 1997.

Finally, whilst an assertion has been made that the use of the s. 62 procedure is essential in the context of providing an effective method for the speedy recovery of possession of premises where anti-social conduct has allegedly occurred, the court notes the duration of the defendant's investigation in the present case and does not accept that the use of the alternative re-entry procedure would have thwarted the defendant in achieving its aforementioned legitimate aims.

For the aforementioned reasons, I must conclude that the interference by the defendant with the plaintiffs' rights under Article 8(1) has not been justified as necessary in a democratic society. This is particularly so where the aims of the defendant under Article 8(2) could have been met by the use of the re-entry clause in the tenancy agreement followed by proceedings under s. 14 of the Conveyancing Act 1881. In this regard it is appropriate to note that the jurisprudence of the ECtHR suggests that when a defendant seeks to assert that its interference with a particular right was proportionate in all of the circumstances it must be in a position to demonstrate that it adopted the least drastic means of attaining its objective. This is something the defendant has failed to demonstrate in the present case.

19. Miscellaneous
At the end of the case the defendant made a late submission that the provisions of s. 14 of the Conveyancing Act 1881, (the Act of 1881) do not apply to a tenancy agreement. Reliance was placed on an extract from Deale on The Law of Landlord and Tenant in the Republic of Ireland (Incorporated Council of Law Reporting for Ireland, 1968) at p. 262 :-

> "Lease is not defined in section 14 of the 1881 Act, it is doubtful if the section applies to a tenancy agreement."

The logic behind the defendant's argument seemed to be that it was highly likely that the periodic tenancy would, by virtue of its own terms, have lapsed by the time a landlord, wishing to invoke s. 14 of the Act of 1881, would be able to bring the re-entry proceedings before the court. Counsel for the defendant submitted that in such circumstances a judge dealing with re-entry proceedings might not understand why the tenancy was not terminated as provided for in the agreement, for example at the end of a particular week or month where the tenancy was from week to week or month to month.

Just because a landlord may be able to lawfully regain possession of his property more quickly by bringing the same to an end in accordance with the period fixed for the tenancy does not, in my view, render s. 14 of the Act of 1881 inapplicable to tenancy agreements. Take, for example, the tenancy from year to year. If a tenant was in breach of one of the conditions in that tenancy in the second month of the tenancy, the landlord could seek to recover the residue of the period by instituting forfeiture proceedings. If the provisions of s. 14 of the Act of 1881 can be applied to a tenancy agreement from year to year there seems to be no legal reason to suggest that its use would be invalid merely because it was operated in the case of a tenancy from week to week. I cannot accept that merely because the period of the tenancy is shorter in the present case that this somehow alters the applicability of s. 14 proceedings.

If the defendant is correct that s. 14 of the Act of 1881 cannot be used by the defendant then, it appears to me, on the basis of *Donegan*, that the existing legal framework does not provide a manner in which the defendants can comply with their obligations under the Convention whilst seeking to recover possession based upon a finding of anti-social behaviour. Accordingly, if I agree with the defendant's submission that s. 14 of the Act of 1881 does not apply to a tenancy agreement such as that enjoyed by the plaintiffs, then it must inevitably follow that a declaration would have to be made that s. 62 of the Act of 1966 was incompatible with the plaintiffs' rights under the Convention in this case.

With regard to the submission of Mr. Hogan that the District Judge, when dealing with an application for possession under s. 62 of the Act of 1966, can embark upon a consideration of the merits of the claim, I am satisfied that having regard to the terms of that provision and the following passage from the judgment of Kearns J. in *Fennell v. Dublin City Council* [2005] 1 I.R. 604 at pp. 611-612 that this is manifestly not the case:

> "…the section [s.62 of the Act of 1966] provides a simplified method whereby a housing authority can recover possession of a dwelling, the subject matter of a tenancy. There is no requirement for cause to be shown before the housing authority can recover possession of a dwelling, nor is there any provision in the legislation for the sort of hearing before a court which normally attends, at least when it is opposed, the termination of a private letting agreement.
>
> 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. (1) that it has been proven that the dwelling was provided by the local authority under the Housing Act 1966;
> 2. (2) that there was no tenancy in the dwelling;
> 3. (3) that possession had been duly demanded;
> 4. (4) that the occupier had failed to give up possession;
> 5. (5) that in the event of non-compliance, the demand made it clear that an application for a warrant would follow.
>
> Once these matters are proved to the satisfaction of the District Judge, neither he or she (nor the Circuit Judge on appeal) has any discretion but must issue the warrant without inquiring into other matters."

20. Conclusion on Article 8
In September of 2005 the defendant received complaints of anti-social behaviour on the part of the plaintiffs. The defendant embarked upon an investigative procedure in which the plaintiffs were fully involved and following upon which the defendant concluded that the plaintiffs should be evicted by reason of such anti-social behaviour. Such a determination on the part of the defendant adversely altered the plaintiffs' rights as provided for at ss. 14, 15 and 16 of the Housing (Miscellaneous Provisions) Act 1997.

In August, 2006 the defendant served a notice to quit on the plaintiffs demanding that they deliver up possession of their home at

Cloncarthy Road, Dublin. Thereafter the defendant sought a warrant for possession pursuant to s. 62 of the Act of 1966. By the time the defendant's application came before the District Court, the plaintiffs' tenancy had already been terminated and their propriety interest in their home had been brought to an end. On the 30th November, 2006 the District Court made an order issuing a warrant for possession. By virtue of the provisions of clause 13 of the tenancy agreement, the plaintiffs, having been evicted for anti-social behaviour, were deemed for the purposes of re-housing, to have deliberately rendered themselves homeless within the meaning of s. 11(2)(b) of the Housing Act 1988.

Notwithstanding the fact that the plaintiffs' proprietary interest in their home was brought to an end at the conclusion of the period set forth in the notice to quit, the said property at Cloncarthy Road nonetheless remained their "home" for the purposes of Article 8(1) of the European Convention on Human Rights. The defendant's finding that the plaintiffs were guilty of anti-social behaviour such that their tenancy ought to be terminated was a determination detrimental to their civil rights such as to engage Article 6(1). The defendant's action of obtaining a warrant for possession and forwarding the same to the sheriff for execution was one destined to interfere with the plaintiffs' rights to respect for their home as provided for in Article 8(1).

The court has considered whether or not the defendant, in carrying out its statutory functions did so in a manner which complied with the State's obligations in respect of the provisions of Article 6(1) and 8(1). I have already concluded in the earlier section of this judgment that the defendant was in breach of Article 6(1) in failing to provide for the plaintiffs the independent hearing therein specified, having regard to the nature of the dispute between the parties.

The next matter for the courts determination was whether the defendant's interference with the plaintiffs' Article 8(1) rights could be justified by reference to Article 8(2). In this regard the court was advised that the defendant had embarked upon an investigative procedure to verify the complaints of anti-social behaviour made against the plaintiffs. This step, when viewed against the backdrop of the defendant's statutory duty to manage and control its tenancies and to protect the interests of its tenants by taking steps to avoid, prevent or abate anti-social behaviour, cannot be criticised. Having reached an adverse conclusion the defendant then sought to invoke the summary procedure provided for by s. 62 of the Act of 1966 to recover possession. By reason of the relevant statutory provisions and the terms of the tenancy agreement the defendant's actions in this regard cannot be deemed to have been otherwise than in "accordance with the law". The quality of that law and whether it provided adequate procedural safeguards are a separate matter.

Having concluded that the defendant's interference with the plaintiffs' right to respect for their home was "in accordance with the law", it remained the defendant's obligation to satisfy the court that such interference was in pursuit of those aims provided for in Article 8(2) of the Convention and that such interference was "necessary in a democratic society".

The court has concluded that, in seeking a warrant for possession utilising the provisions of s. 62 of the Act of 1966, that the defendant was pursuing the legitimate aims as set forth in Article 8(2) of the Convention. The court accepts unreservedly the evidence tendered on behalf of the defendant that, in opting for this procedure, it was seeking to prevent disorder in the locality in which the plaintiffs were residing and that it was endeavouring to protect the rights of other tenants of the local authority in the Cloncarthy Road estate. In this regard the defendant stressed its obligations to protect the rights of other tenants to the quiet and peaceful enjoyment of their property by pursing policies to promote good estate management.

Irrespective of the defendant's motivation for utilising the summary procedure provided for in s. 62 of the Act of 1966, the court is not satisfied that the interference by the defendant with the plaintiffs' right to respect for their home brought about in such a manner has been demonstrated to have been necessary in a democratic society.

The court has considered the safeguards which exist within the law which has been operated by the defendant, insofar as that law has impacted on the plaintiffs' Article 8 rights. It can undoubtedly be stated that the plaintiffs fall within the most vulnerable sector of society i.e. those individuals and families who, for whatever reason, are not in a position to provide accommodation for themselves from their own resources. They are dependent upon the State. If they are evicted from their home by reason of anti-social behaviour, unlike the private tenant, they are not so to speak back to square one where they can, from their own resources, obtain alternative accommodation without further penalty. The plaintiffs in the present case are deemed to have rendered themselves homeless for the purposes of s. 11(2)(b) of the Housing Act 1988. Their rights are decisively and fundamentally altered to their detriment by reason of the finding of the defendant made against them and the election of the defendant to evict them.

On the evidence before this Court the plaintiffs have every chance of becoming homeless at worst or at best spending a significant period of time living in bed and breakfast accommodation, thus jeopardising personal and family relationships. The plaintiffs, having regard to their physical and mental disabilities, according to the evidence, have been placed in an extraordinarily vulnerable position.

Having regard to the magnitude of the interference with the plaintiffs' Article 8 rights, the plaintiffs' constant denials of the allegations of anti-social behaviour and their own assertion as to their victimisation at the hands of their neighbours, I reject the defendant's submissions that the procedure adopted by it was one which can be stated to have been proportionate to its legitimate aims as a housing authority.

The court rejects the defendant's assertion that the procedure under s. 62 of the Act of 1966, when considered against the backdrop of the prior investigative process and when viewed in conjunction with the plaintiffs' rights to judicial review, operates "fairly in the round" so as to satisfy the procedural safeguards mandated in light of its interference with the plaintiffs' Article 8(1) rights. A procedure which affords no independent hearing to the plaintiffs throughout the entire process wherein they might dispute the lawfulness or reasonableness of the defendant's decision to evict them is not fair. Further, a right to pursue judicial review proceedings is an illusory safeguard where there is a dispute on the facts and the credibility of the parties are an issue, as the court may not substitute its own findings for those of the decision maker.

The court concludes that the defendant has failed to establish that its use of the s. 62 procedure in the present case can be considered to have been "necessary in a democratic society", particularly in circumstances where it had available to it within its legal framework an alternative procedure namely the re-entry procedure provided for at clause 25 of the agreement which, if implemented, through the issue of proceedings under s. 14 of the Conveyancing Act 1881, would have met with the defendant's legitimate aims, whilst preserving the requisite procedural safeguards for the plaintiffs' Article 8(1) rights.

Undoubtedly, the procedure adopted by the defendant was one which was convenient, expedient and less costly than the pursuit of forfeiture proceedings. In this regard the court has already commented upon the assertions of the defendant as to the unwillingness of tenants who make complaints against their neighbours to give evidence against them in subsequent proceedings. It cannot be stated that the plaintiff's neighbour, Mrs Jones, would not have involved herself in a merits based hearing had the defendant pursued re-entry proceedings under clause 25 of the tenancy agreement.

As to the general assertion that the use of the s. 62 procedure is necessary in a democratic society and proportionate to the interference with tenant's rights, the evidence as to the number of evictions obtained by the local authority every year using the provisions of s. 62 of the Act of 1966 does not convince me that the interference concerned is "necessary in a democratic society". I, therefore, conclude that, in the absence of the council seeking to justify the eviction before an independent tribunal on the grounds of a breach of the tenancy agreement, that the interference was not justified by any pressing social need or necessary in a democratic society.

I am not persuaded that the defendant has demonstrated any basis which would justify my departure from the legal principals outlined by Laffoy J. in *Donegan*, particularly having regard to the most recent decision of the European Court of Human Rights in *McCann* which, to my mind, puts to rest any lingering concerns that I might otherwise have had arising from the post-*Connors* decision of the House of Lords in *Kay*.

21. Conclusions

1. Having regard to provisions of s. 4 of the Act of 2003, I must pay particular regard to the most recent pronouncements of the European Court of Human Rights in relation to Article 6 and Article 8. In this regard the decisions of that Court in *Connors*, *McCann* and *Tsfayo* are the most apt in respect of the present claim, which relates principally to the plaintiffs' rights under Articles 6 and 8.

2. I conclude that *Donegan* was correctly decided on its facts and that that decision is not necessarily inconsistent with the court's conclusions in Leonard.

3. The facts in *Donegan* are, for all practical purposes, the same as those in the present case. Notwithstanding the fact that the present claim has been formulated under s. 3 rather than s. 5 of the Act of 2003, the legal issues in both cases are fundamentally the same. Accordingly, *Donegan* is a case to which the doctrine of *stare decisis* applies.

4. Applying the doctrine of *stare decisis*, I conclude on the facts of the present case that:

(i) The defendant is an organ of the State for the purposes of s. 3 of the Act of 2003 and must, therefore, perform its functions in accordance with the State's obligations under the Convention.

(ii) The house at Cloncarthy Road, Dublin, was the plaintiffs' home for the purposes of Article 8 of the Convention.

(iii) The defendant, in its decision to evict the plaintiffs based upon a finding of anti-social behaviour, was destined to interfere with the plaintiffs' rights under Article 8 of the Convention. In this regard the Act of 2003 placed new obligations on the defendant as to the circumstances in which it might, in a Convention compliant manner, avail of the procedure for eviction provided for in s. 62 of the Act of 1966.

(iv) Having regard to the magnitude of the right with which the defendant intended to interfere and the consequences of such interference, the defendant was obliged to justify such interference as being not only in pursuit of the legitimate aims identified in Article 8(2) but also as being necessary in a democratic society.

(v) The use of s. 62 of the Act of 1966 to interfere with the plaintiffs' right to respect for their home following an in-house investigation, in circumstances where such a procedure did not afford the plaintiffs any opportunity to dispute the lawfulness or the proportionality of the defendant's decision to evict them, was not justified as being necessary in a democratic society and was disproportionate to the defendant's stated aims having regard to the significance of the rights interfered with.

(vi) The interference was disproportionate, particularly in circumstances where the defendant had available to it, within its legal framework, an alternative procedure namely, that provided for in s. 14 of the Conveyancing Act 1881, which, if implemented, would have provided the requisite safeguards for the plaintiffs' rights whilst meeting the defendant's legitimate aims.

(vii) The defendant did not comply with its obligations under s. 3 of the Act of 2003 and did not perform its functions in a manner compatible with the State's obligations under the Convention.

(viii) The defendant, in performing its functions as an organ of the State, failed to have regard to the plaintiffs' rights under Article 6(1) of the Convention.

(ix) Article 1 of the First Protocol is subsumed by the primary breach under Article 8.