Neutral Citation Number: [2008] IEHC 354

**THE HIGH COURT**

**2007 No. 1582 SS**

**IN THE MATTER OF AN APPLICATION FOR A WARRANT UNDER S.52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961 AND IN THE MATTER OF AN APPLICATION FOR A WARRANT UNDER S.62 OF THE HOUSING ACT, 1966, AS AMENDED BY S.13 OF THE HOUSING ACT 1970**

**BETWEEN**

**DUBLIN CITY COUNCIL**

**COMPLAINANT**

**AND**
**LIAM GALLAGHER**

**DEFENDANT**

**Judgment of O'Neill J. delivered the 11th day of November 2008**

1. This case comes before this Court as a consultative case stated pursuant to s. 52(1) of the Courts (Supplemental Provisions) Act 1961, the case having been stated by John Coughlan, a Judge of the District Court at the request of the defendant. The relevant facts as proved or admitted or agreed and as found by the learned District Judge, in summary, are as follows:-

2. The tenancy created by the complainant as housing authority in the premises situate at 11 Adare Road, Coolock, Dublin 17 was in the sole name of Mrs. Nancy Gallagher, the defendant's mother, as of 18th February, 1999. Mrs. Gallagher died on 12th July, 2005. The defendant was removed from the rent account of the said premises after he went to live with his partner in August 1995. The defendant lived with his partner from August 1995 until May/June 1997, when he returned to his live with his mother again. The defendant made an application to the complainant to succeed to his mother's tenancy on 25th August, 2005. The defendant's application was rejected by letter dated 20th September, 2005. The complainant found that the defendant did not fulfill either of the criteria as set down in the complainant's Scheme of Letting Priorities, which is a statement of the rules governing, *inter alia*, succession to tenancies, created by the complainant pursuant to s.60 of the Housing Act, 1966 (the Act of 1966).

3. Those criteria required that a son or daughter be resident at the address in question and be on the rent account for a period of two years prior to the death or departure of the tenant. The complainant did not accept that the defendant resided at his mother's home for the two years prior to his mother's death.

4. The defendant attended, at his request, a meeting with the complainant. He subsequently submitted additional documentation in respect of his application which supported his position of having resided at his mother's house continuously, save for the aforesaid period in the mid nineties when he lived with a partner. The defendant was notified by letter dated 5th January, 2006 that his application had been unsuccessful. A Notice to Quit and Demand for Possession were issued and served on the personal representatives of the late Mrs. Gallagher and a Demand for Possession was then issued and served on the defendant. A Summons was later served by the complainant on the defendant under s.62 of the Act of 1966 to recover possession of the premises.

5. The learned District Judge made a finding of fact that, save for the period when the defendant resided with his partner, he resided with his mother and regarded that dwelling as his permanent residence. This finding was contrary to that made by the complainant which formed the basis of rejecting the applicant's application to succeed to his mother's tenancy.

6. In the District Court the defendant made the case that the entry into force of the European Convention on Human Rights Act 2003 (the Act of 2003) required the District Court to impose an evidentiary and fair procedures requirement on a housing authority seeking a warrant for the possession of a dwelling under s. 62 of the Act of 1966. The learned District Judge expressed concern in the case stated that the hearing of the case would represent little more than a "rubber stamp" of the decision already taken by the complainant, as the procedure outlined in s.62 of the Act of 1966 does not permit the Court to assess the merits of the application nor does not give it any discretion to enquire into the reason why the application is being made by a housing authority.

7. The following four questions were posed for the opinion of this Court by the learned District Judge:

> *"1. Is there an obligation on the District Court by virtue of section 2 of the European Convention on Human Rights Act, 2003, to interpret section 62 of the Housing Act, 1966, as amended by section 13 of the Housing Act, 1970, insofar as is possible in a manner compatible with the State's obligations under the Convention in proceedings issued by the Complainants under section 62 of the Housing Act, 1966 as amended by section 13 of the Housing Act, 1970 subsequent to the coming into operation of the said European Convention on Human Rights Act, 2003?*
>
> *2. If the High Court answers Question (1) above in the affirmative, in appearing to a summons in the District Court issued pursuant to proceedings under section 62 of the Housing Act, 1966 as amended by section 13 of the Housing Act, 1970, does a District Justice have a discretion to explore the merits of the matter, and is he/she then entitled to address the merits of the aforesaid procedures in endeavouring to show cause why a warrant under section 62 of the said Act should not issue for delivery of possession of the relevant dwelling to the Complaints in reliance upon Articles 6, 8 and 13 of the Convention and Article 1 of the First Protocol thereto?*
>
> *3. In appearing to a summons in the District Court issued pursuant to the procedures provided for under section 62 of the Housing Act 1966 is a Defendant entitled to address the merits of the aforesaid procedures in endeavouring to show cause why a warrant under section 62 of the said Act should not issue for delivery of possession of the relevant dwelling to the Complainants in reliance upon Articles 6, 8 and 13 of the Convention and Article 1 of the First Protocol thereto?*
>
> *4. Is the effect of section 2 of the European Convention on Human Rights Act, 2003, that a local authority must adduce evidence in proceedings under section 62 of the Housing Act, 1966, as amended, justifying its decision to terminate a tenancy and/or to seek a warrant for possession?"*

8. The relevant statutory provisions in the case are as follows:

9. Section 2 of the Act of 2003 which states:

> *"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."*

10. Section 5 of Act of 2003 which 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…."*

11. Section 62 of the Act of 1966, as amended, deals with the recovery of possession of dwellings and other than buildings and provides as follows:

*"62. - (1) In case,*

*(a) there is no tenancy in-*

*(i) a dwelling provided by a housing authority under this Act,*

*(ii) any building or part of a building of which the authority are the owner and which is required by them for the purposes of this Act, or*

*(iii) a dwelling of which the National Building Agency Limited is the owner, 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 situate for the issue of a warrant under this section.*

*(2) …*

*(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.*

*(4) The provisions of sections 86, 87, and 88 of the Act of 1860 (subject, in the case of the said section 86, to the substitution of 'of one month' for 'to be therein named, and not less than seven or more than fourteen clear days from the date of such warrant' and the substitution of 'eight in the morning and eight in the afternoon' for 'nine in the morning and four in the afternoon') shall apply in respect of the issue of a warrant under this section subject to the modification that where as respects an application under subsection (1) of this section, the name of the occupier of a dwelling or building or part thereof cannot by reasonable enquiry be ascertained, a summons under the said section 86 may be addressed to 'the occupier' without naming him, and the warrant when so issued shall have the same effect as a warrant under the said section 86…."*

12. Section 86 of the Landlord and Tenant Law Amendment Act Ireland 1860 (Deasy's Act), referred to in s. 62(4) of the Act of 1966, provides:

*"In the case the Term or Interest of any tenant in any Cottier Tenement shall have ended, or shall have been duly determined by a Notice to quit, and such Tenant or any Person by whom the Premises or any Part of them shall be then actually occupied shall neglect or refuse to deliver up the Possession of the same, or in case any Person shall have been put or shall be put into possession of any Lands or Premises by Permission of the Owner, as Servant, Herdsman, or Caretaker, and shall refuse or omit to quit and deliver up the Possession of the Premises, on Demand made by the Owner thereof, or his known Agent or Receiver, it shall be lawful for the Landlord or Owner of the said Premises , or his Heirs, Executors or Administrators, or his known Agent or Receiver, to cause the Person so neglecting or refusing to quit or deliver up the Possession to be served with a Summons in Writing, signed by a Justice or Justices not interested in the said Premises, but having Jurisdiction in the Place in which the Premises shall be situate, to appear before Two or more Justices at the Petty Sessions, Town Hall or Divisional Justice Room, or other Place in which such Justices usually meet for the Despatch of public Business of such City, Town, District, or other Place, to show Cause why Possession of the said Premises should not be delivered up to such Landlord or Owner, or his Agent or Receiver as aforesaid; and if the said Tenant or Occupier shall not appear at the Time and Place appointed , or if such Tenant or Occupier shall appear and shall not show to the Satisfaction of such Justices reasonable Cause why possession should not be given, and shall still neglect or refuse to deliver up Possession of the said Premises, or such Part of them as was in his actual Occupation at the Time of Service of such Summons, to the said Landlord or Owner, or his Agent or Receiver, it shall be lawful for such Justices or any Two or more of them, not interested as aforesaid, on Proof being made before them of the Holding or permissive Possessions, as the Case may be, and of its End or Determination, and the Time and Manner thereof, and, where the Title of the Landlord shall have accrued since the letting of the Premises, the Right by which he claims the Possession, to issue a Warrant, under their Hands and Seals, to any Person as a special Bailiff in that Behalf, on the part of the Landlord or Owner, requiring and authorizing him, within a Period to be therein named, and not less than Seven or more than Fourteen clear Days from the Date of such Warrant, to give the Possession of the said Premises to the said Landlord, or his Agent or Receiver; and such Warrant shall be a sufficient Authority to the said Bailiff to enter upon the said Premises, with such Assistants as he shall deem to be necessary, and to give Possession accordingly: Provided, that no Entry shall be made under such Warrant on any Sunday, Good Friday, or Christmas Day, or at any Time except between the Hours of Nine in the Morning and Four in the Afternoon: Provided also, that nothing herein contained shall prejudice or affect the Right of any Owner of Property intrusted to the Care of any Servant or Caretaker peaceably to*

*resume the Possession thereof without Process of law, if he shall so think fit."*

13 The relevant Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1951 (the Convention) are Articles 6 and 8. Article 6 provides as follows:

> *"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…."*

14. Article 8 provides 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 the right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

15. The relevant extract from the Scheme of Letting Priorities, administered by the complainant, reads as follows:

> *"On the death or departure of both parents the tenancy will normally be given to a son or daughter, irrespective of the number in the household, provided that he/she has been living in the dwelling for at least two years immediately prior to the death or departure of the tenant…*
>
> *In all cases of claims for succession to tenancy it will be necessary that the applicant/ applicants have been included in the family household details for rent assessment purposes for the requisite period/ periods as outlined above. Generally no application will be considered where this condition is not complied with."*

**Question 1**

16. The first issue to determine is whether there is an obligation on the District Court, flowing from s.2 of the Act of 2003, to interpret s.62 of the Act of 1966, insofar as possible, in a manner compatible with the Convention. The terms of s. 2(2) of the Act of 2003 expressly provide that existing legislation is to be interpreted in accordance with Convention principles. This would necessarily include the Act of 1966. Therefore, the first question posed in the case stated must be answered in the affirmative.

**Interpretative obligation**

17. The second issue concerns the nature and extent of the interpretative obligation imposed by s.2 of the Act of 2003. In practical terms, does the interpretative obligation give the District Court a discretion to explore the merits of a case brought before it pursuant to s.62 of the Act of 1966? Can the District Court inquire into the reasons why a warrant under s.62 is sought for possession of the relevant dwelling? Is a defendant entitled to raise the merits of his case in the District Court? Should the District Court satisfy itself that the recovery of possession pursuant to a s.62 warrant does not breach any Convention rights of the person from whom possession is demanded? Should the District Court satisfy itself that the procedures adopted by the complainant adequately protected the defendant's rights and, if not, should the District Court hear and determine the merits of the case made by the defendant in resisting the demand for possession?

18. Counsel for the defendant, Mr. O'Reilly S.C., submitted that the Act of 2003 changed the application of the summary procedure under s. 62 of the Act of 1966 so that the District Court is now permitted to examine the circumstances which lead to a decision to issue proceedings under s. 62 of the Act of 1966. He submitted that the District Court was not confined to a purely "*mechanistic*" role once the conditions set out in s.62 of the Act of 1966 were met. He further submitted that the defendant's rights under Articles 6, 8, 13 and Article 1 of the First Protocol of the Convention were engaged and would be breached in this case by the combination of the refusal by the complainants of the defendant's application to succeed to his mother's tenancy and the refusal of the District Court to entertain the merits of the complainants case on the issue of whether he was entitled to succeed to his mother's tenancy or, to put it another way, the restriction of the hearing in the District Court to a purely technical procedure, as submitted by the defendant.

Mr. O'Reilly further submitted that the absence of a statutory procedure governing the complainant's internal scheme for the granting of tenancies and specifically the resolution of contested issues relevant to the entitlement to a tenancy, coupled with the mandatory consequence required by s.62 (3) of the Act of 1966 on an application under s.62, violated the defendant's rights under Article 6 and 8 of the Convention. He submitted that the defendant could not appeal the decision of the complainant on the merits in circumstances where he disputed the factual findings of the complainant. Judicial review proceedings were, he argued, unsuitable where there was a dispute on the facts. The inability of the District Judge to satisfy himself as to underlying factual issues before issuing the warrant for possession fell short, in his submission, of the procedural safeguards required by the Convention. He relied on the judgments of the European Court of Human Rights in the cases of *Connors v. United Kingdom* (2004) 40 E.H.RR.189 and *McCann v. The United Kingdom* (Application 19009/04, Judgment of the European Court of Human Rights, 13th May, 2008) in support of his contention that there was an absence of necessary procedural safeguards in the process followed by the complainant in dealing with the factual dispute as to whether the defendant was entitled to succeed to his mother's tenancy coupled with the inability of the defendant to raise this dispute in the District Court proceedings in which the complainant sought a warrant for possession. The absence of this procedural safeguard violated the defendant's right under Article 8 of the Convention for respect for his home in his submission. He also cited the recent judgment of this Court (Laffoy J.) in *Donegan v. Dublin City Council and Others* [2008] I.E.H.C. 288 in this regard.

19. Mr. O' Reilly further submitted that s.86 of Deasy's Act enabled a person in the position of the complainant to challenge the grant of a warrant for possession on more extensive grounds than the formal proofs envisaged in s.62 of the Act of 1966. Specifically, he submitted that showing cause pursuant to s.86 of Deasy's Act permitted the complainant to raise and dispute the factual issue of whether or not the complainant was entitled to succeed to the his mother's tenancy.

20. Counsel for the complainant, Mr. Bradley S.C., submitted that the Act of 2003 could not change the effect of s.62 of the Act of 1966. Referring to the case of *Leonard v. Dublin City Council and Others* [2008] I.E.H.C. 79 (Unreported, High Court, Dunne J., 31st March, 2008) he submitted that the very questions before this Court had already been decided by virtue of the decision reached in that case. He submitted that it was the clear intention of the Oireachtas that the District Court would have no discretion to explore the merits of the matter and that it would have no jurisdiction to address the procedures employed by the complainants in arriving at

a decision and he submitted that this was confirmed by the Supreme Court in *Dublin City Council v. Fennell* [2005] 1 I.R. 604. Mr. Bradley further contended that it was the task of the District Court to decide whether s. 62 of the Act of 1966 had been complied and that this was not a "*rubber stamping*" exercise. He pointed out that there was a remedy open to the defendant in the form of judicial review proceedings which ensured his rights under the Convention were upheld.

21. On behalf of the Notice Party, Mr. McGarry B.L. similarly submitted that the issues raised in the instant case were conclusively determined by Dunne J. in *Leonard v. Dublin City Council and Others* [2008] I.E.H.C. 79 (Unreported, High Court, 31st March, 2008), where the compatibility of s.62 of the Act of 1966 with the Convention was upheld. He noted that s.62 of the Act of 1966 does not provide for a hearing on the merits and that such a hearing could not be "read into" that section. He submitted that the interpretative obligation under s.2 Act of 2003 could not go this far, as the meaning of s.62 of the Act of 1966 is clear.

22. Section 62 of the Act of 1966

23. The purpose of s.62 of the Act of 1966 is to provide for a summary procedure for the recovery of possession of dwellings let by a housing authority. Section 62 of the Act of 1966 sets forth the statutory conditions that must be satisfied in order for the District Court to make an order for possession. Once these statutory requirements are proved to the satisfaction of the District Court, the District Judge must issue the warrant for possession. The statutory conditions were summarised by Kearns J. in *Fennell* at p.612 to be as follows:

> "*(1) that it has been proven that the dwelling was provided by the local authority under the Housing Act 1966;*
>
> *(2) that there was no tenancy in the dwelling;*
>
> *(3) that possession was duly demanded;*
>
> *(4) that the occupier had failed to give up possession;*
>
> *(5) that in the event of non-compliance, the demand made it clear that an application for a warrant would follow."*

24. In the same case Kearns J. reviewed the Irish case law in which s. 62 of the Act of 1966 had been challenged and observed as follows at p.614:

> *"For many years, therefore, it is clear that the statutory process involved in an application for possession by a housing authority under s.62 of the Act of 1966 has survived constitutional and judicial scrutiny, not least because of the obvious need of a housing authority to be able to effectively manage and control its housing stock without being unduly restricted or fettered whilst so doing. Obviously a housing authority must not abuse its powers of discretion when exercising those powers and where it does so the proper remedy is that of a judicial review application to the High Court."*

25. The defendant makes the case that the summary procedure under s.62 should be interpreted in a Convention compatible manner which would involve a hearing on the merits of his case before an independent and impartial tribunal, i.e. the District Court.

26. Section 86 of Deasy's Act

27. The purpose of s.86 of Deasy's Act is to provide a summary procedure for the recovery of possession of premises where the tenant or occupier overholds. The defendant submits that s.86 of Deasy's Act permits him to "show cause" in the District Court as to why he is not to be evicted and specifically to raise and contest the issue as to whether he is entitled to succeed to his mother's tenancy.

28. In my opinion, this submission must fail. The phrase "*show cause*" does no more than to say that the defendant can avail of such defences to the grant of a warrant for possession as are available at law to him. These defences are limited by the clear terms of s.62 of the Act of 1966 and to permit "show cause" the kind of expansive meaning contended for by the defendant would give rise to a conflict with the clearly expressed provisions of s.62 of the Act of 1966. In this regard I would approve of and adopt the reasoning in the judgment of the Circuit Court in the case of *Dublin Corporation v. McDonnell* [1946] Ir. Jur. Rep. 18.

29. This case concerns s.15 of the Summary Jurisdiction (Ir.) Act 1851 (the Act of 1851). In issue was the meaning of showing "*reasonable cause why possession should not be given*" under s.15 (3) of the Act of 1851. The Circuit Court found that the tenants right to show "*reasonable cause why possession should not be given*" is merely a right to plead such defences as are allowable by the law, applicable at the time, and a District Justice has no discretion under this sub-section as to the granting or refusing of an order, based on the reasonableness or unreasonableness of so doing.

30. The facts of this case were that Dublin Corporation applied to the District Court, under s. 15 the Act of 1851 for an order for possession of premises, provided by it under the Housing of the Working Classes Acts and let by it on a weekly tenancy. Proof of the plaintiffs' title and of the service of a notice to quit was given. The District Justice, purporting to exercise a discretion under s. 15 (3) of the Act of 1851 as to the granting or refusing of an order based on the reasonableness or unreasonableness of so doing, refused to make the required order. The Corporation appealed to the Circuit Court.

31. That Court held that the Corporation was entitled to an order for possession; that "*reasonable cause*" within s. 15 (3) of the Act of 1851 means any such defence as is allowable by the law, and which is applicable at the time, and that a District Justice has no discretion under this sub-section, as to the granting or refusing of an order, based on the reasonableness or unreasonableness of so doing.

32. In Keane, *The Law of Local Government in the Republic of Ireland* (Dublin, 1982) the learned author refers to this case at p.131. At footnote 8 it is stated as follows:

> *"This case was decided on s.15 (3) of the Summary Jurisdiction (Ir.) Act, 1851, but its reasons appear to be applicable to s.86 of Deasy's Act and s.62 of the Housing Act 1966. See Deale on the Law of Landlord and Tenant in the Republic of Ireland, 1968, at p.78"*

33. I agree with the learned author and conclude that the reasoning in Dublin Corporation v. McDonnell [1946] Ir. Jur. Rep. 18 applies with equal force to s. 86 of Deasy's Act insofar as it is integrated with s. 62 of the Act of 1966.

**Applying S.2 of the Act of 2003**
34. Section 2 of the Act of 2003 requires that this Court must approach the construction of s.62 of the Act of 1966 *"subject to the rules of law relating to such interpretation*". If I am to consider the correct construction of this section within these legal limits, it seems clear to me that the starting point in attempting to construe this section in a Convention compatible way is to first determine the correct construction without regard to the Convention and having done that to then see whether it is possible to impose or intertwine a different meaning where that is necessary to avoid incompatibility with the Convention. Where it is not possible to achieve this without breaching the rules of law relating to interpretation, and where there is an evident breach of a Convention right resulting from what is a correct interpretation of the law in question, the proper solution to that problem is a declaration of incompatibility under s.5 of the Act of 2003.

35. In the United Kingdom, the interpretative obligation under s.3 of the Human Rights Act 1998 (which resembles s.2 of the Act of 2003) involves an examination of whether, absent s.3, there would be any breach of the Convention. If there was, it would be necessary to limit the extent of the modified meaning to that which was required to achieve compatibility. This was the approach advocated by Woolf C.J. in *Poplar Housing and Regeneration Community Association Ltd v. Donoghue* [2001] 3 W.L.R. 183 at p.204 where he states:

> *"(a) Unless the legislation would otherwise be in breach of the Convention section 3 can be ignored (so courts should always first ascertain whether, absent section 3, there would be any breach of the Convention).*
>
> *(b) If the court has to rely on section 3 it should limit the extent of the modified meaning to that which is necessary to achieve compatibility.*
>
> *(c) Section 3 does not entitle the court to legislate (its task is still one of interpretation, but interpretation in accordance with the direction contained in section 3).*
>
> *(d) The views of the parties and of the Crown as to whether a 'constructive' interpretation should be adopted cannot be modify the task of the court (if section 3 applies the court is required to adopt the section 3 approach to interpretation).*
>
> *(e) Where, despite the strong language of section 3, it is not possible to achieve a result which is compatible with the convention, the court is not required to grant a declaration and presumably in exercising its discretion as to whether to grant a declaration or not it will be influenced by the usual considerations which apply to the grant of declarations."*

36. In *O'Donnell v. South Dublin County Council* [2007] I.E.H.C. 204 (Unreported, High Court, 22nd May, 2007) this Court (Laffoy J.) declined to engage in what she saw as an amendment of s.13 (2) of the Housing Act 1998 by attributing to the section a meaning beyond the intention of the Oireachtas. The Court had regard to United Kingdom authorities in relation to the operation s. 3 of the Human Rights Act 1998 and the importance of respecting the boundary between amending and interpreting. A propos respecting the boundary between interpretation and legislation the approach adopted by the English Courts is further illustrated in the following passage from the judgment of Lord Hope in *R v. A* [2001] 3 All E.R. 1 at p.35:

> *"The rule of construction which s. 3 [of the Human Rights Act 1998] lays down is quite unlike any previous rule of statutory interpretation. There is no need to identify an ambiguity or absurdity. Compatibility with convention rights is the sole guiding principle. That is the paramount object which the rule seeks to achieve. But the rule is only a rule of interpretation. It does not entitle the judges to act as legislators. As Lord Woolf C.J. said in Poplar Housing and Regeneration Community Association Ltd. v. Donoghue …s. 3 of the 1998 Act does not entitled the court to legislate; its task is still one of interpretation. The compatibility is to be achieved only so far as this is possible. Plainly this will not be possible if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible. It seems to me that the same result must follow if they do so by necessary implication, as this too is a means of identifying the plain intention of Parliament…"*

37. That case concerned the meaning of s.41 of the Youth Justice and Criminal Evidence Act 1999 which prohibited the giving of evidence and cross-examination about the complainant's sexual history except with the leave of the court. Such leave could be given, *inter alia*, where consent was an issue and where the sexual behaviour in question was alleged to have taken place "*at or about the same time as the offence*". In that case the sexual history spanned a number of months before the incident in question. Leave was refused to lead evidence or cross-examine the complainant about her sexual relationship with the accused. The complainant contended that this refusal was in breach of his right to a fair trial under Article 6. Lord Steyn considered that the interpretative obligation went further than literal, purposive and contextual interpretation at where he says at p.17:

> *"It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it…Section 3 of the 1998 Act qualifies this general principle because it requires a court to find an interpretation compatible with convention rights if it is possible to do so…In accordance with the will of Parliament as reflected in s. 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort."*

38. As is apparent from the foregoing, there is a significant difference between s.2 of the Act of 2003 and s.3 of the U.K. Human Rights Act 1998. The difference is the inclusion in s.2 of the Act of 2003 of the phrase "*subject to the rules of law relating to such interpretation*". A similar provision is not included in the s.3 (1) of the U.K. Act, which reads as follows;

> *"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights"*

39. The consequences of this difference are important, because it means that in this jurisdiction a Court, when attempting to construe a law in a Convention compatible way, is still bound by the rules of law which heretofore have governed such interpretation, whereas in the U.K. no such restriction is imposed by Parliament. The range of manoeuvre available to a U.K. court, as illustrated in the above passages from the opinions of Lord Hope and Lord Steyn, is not available to an Irish Court. The practical consequence of this is that, whereas in the U.K. it would appear that a Court can impose a Convention compatible meaning unless that meaning clearly conflicts with the express terms, or the necessary implication of such terms of the law in question, in this jurisdiction, a Court is required by the Oireachtas to adhere to existing rules of interpretation which means that the dominant rule of statutory construction must still prevail i.e. that effect must be given to the will of Parliament, such intent being derived from the natural and ordinary meaning of the language used in the law concerned. Other rules of interpretation may have an equally or indeed more

restrictive effect depending on the law under consideration. In effect, the kind of creative interpretation permitted under s.3 (1) of the U.K. Act may not be permissible under s.2 of the Act of 2003 unless the creation envisage could be said to have been intended by Parliament.

40. The correct construction of s.62 was established by the Supreme Court in the *Fennell* case. In that case there was no consideration of the impact of the Convention on the section, though it was alluded to at the end of the judgement. Now that the issue has arisen, it must be said that the restrictive nature of interpretation pursuant to s.2 of the Act of 2003 does not, for the reasons discussed above, create the opportunity for a departure from the view previously taken by the Supreme Court in the *Fennell* case.

41. What I have to consider is whether it is possible to construe s.62 in combination with s.86 of Deasy's Act, as submitted by Mr O'Reilly, as obliging the District Court to hear and determine the s.62 application on the basis of the merits of the defendant's case on the issue of whether he is entitled to succeed to his mother's tenancy.

42. To reach that conclusion, it would in my opinion be necessary to firstly, treat as null the clear provision of s.62(3) of the Act of 1966 and then to create a provision whereby the jurisdiction of the District Court on an application under s.62(1) of the Act of 1966 is extended to a full hearing of the case on the merits. The latter would be necessary, because as a statutory jurisdiction, in the absence of s.62 (3) there would be no jurisdiction at all to grant a warrant, unless a new basis for the exercise of the jurisdiction was created or, to be more precise, legislated. Manifestly, either of these exercises or the combination of them would cross the boundary between interpretation and legislation and under longstanding rules of law governing statutory interpretation would be impermissible. Section 86 of Deasy's Act does not rescue the matter. As said above, correctly construed, it could not achieve that which Mr. O' Reilly had hoped for it, because that would create a direct conflict with s. 62(3).

43. It would have to be said that even if the more expansive interpretative regime available under s.3 (1) of the U.K. Act was available, it would not assist the defendant on this issue. Even that approach could not permit the destruction or elimination in practical effect of s. 62(3), although its absence might permit a "*reading up*" of the jurisdiction as contended for by Mr. O'Reilly.

44. In these circumstances, the case must proceed on the basis that any violation of the defendant's Convention rights resulting from the conduct of the District Court proceedings in the manner prescribed, cannot be corrected under s.2 of the Act of 2003 and could only be dealt with under s.5 of that Act.

**Alleged violation of the defendant's rights under the Convention**
45. The defendant makes the case that his right to respect for his private and family life and home under Article 8 of the Convention has been infringed by the absence of procedural safeguards in the process operated by the complainant to determine succession to tenancies coupled with the summary proceedings in the District Court.

46. The defendant also argues that the absence of a clear procedure, preferably on a statutory footing, governing the allocation of tenancies by the complainant together with his inability to challenge on the merits in the proceedings under s.62 of the Act of 1966 due to the summary nature of these proceedings, breaches his right under Article 6 of the Convention to fair procedures.

**Article 8 of the Convention**
47. Article 8 protects the right of individuals to "*respect*" for their private life, family life and home. There is a right to access to, occupation of and peaceful enjoyment of the home. The right to respect for private and family life and home under Article 8 is not absolute. The second paragraph of Article 8 provides for justification for interference with the right so long as it is "*in accordance with the law*" and "*necessary in a democratic society*" and proportionate to the legitimate aim sought to be achieved.

48. The European Court of Human Rights has held that whether a property is to be classified as a "*home*" is a question of fact and does not depend on the lawfulness of the occupation under national law. For example, in *Buckley v. United Kingdom* (1996) 23 E.H.R.R. 101 the applicant lived on land in a dwelling without planning permission for a period of some eight years and her Article 8 right to respect for her home was found to be engaged despite the unlawfulness of the dwelling. Similarly, in *McCann v. United Kingdom* (Application 19009/04, Judgment of the European Court of Human Rights of 13th May, 2008), the European Court of Human Rights approved the conclusion of the national court, that although the applicant did not have a right under domestic law to reside in the house he used to occupy with his wife, the house in question continued to be his home for the purposes of his Article 8 rights. Therefore, it is clear that the question of whether a premises or dwelling is a "*home*" within the meaning of the Convention is not dependent on a person's status as legal owner or the lawfulness of the use of the premises as a home. The right to respect for one's home is to be viewed as an extension of the right to respect for one's private life. It involves the enjoyment of a person's private life and family life in the home, but it does not guarantee a right to an actual dwelling.

49. The premises at 11 Adare Road, Coolock, Dublin is, clearly in my opinion, the "home" of the defendant, within the meaning of Article 8, if he is correct in his contention that he has resided there with his mother for many years prior to her death. Thus the grant of a warrant under s 62 would in that circumstance be a gross interference with the defendant's right to respect for his home, and clearly, in my view, in the context of the dispute between him and the complainant his rights under Article 8 are engaged. It must then be considered whether that interference can be justified in accordance with the terms outlined in para. 2 of Article 8.

50. Necessarily the first step in this exercise is to establish the true facts pertaining to the defendant's occupation of 11 Adare Road. Should it transpire that the defendant did not reside there with his mother, as he claims, then it would necessarily follow that the seeking of and the grant of a warrant for possession of these premises would not breach his rights under Article 8 insofar as these premises are concerned. If on the other hand it is established that he did reside there as he claims then the seeking of the warrant for possession by the complainant engages his rights under Article 8 and, in my view, any court or tribunal which had the jurisdiction to deprive the defendant of possession of this dwelling would have to be satisfied that the grant of the warrant was justified in the terms set out in para. 2 of Article 8. In reality, if it is established that the defendant was residing with his mother, as he claims, justification for a warrant for possession would inevitably be confined to a consideration of the terms of the complainant's Scheme of Letting Priorities. It would require very unusual circumstances indeed to justify a warrant for possession where the complainant wished to depart from the application of that scheme.

51. The purported interference with the applicant's rights under Article 8 by the application under s.62 for a warrant for possession was in accordance with the law as it emanated from a provision of national law, i.e., s.62 of the Act of 1966. The decision of the complainant to institute proceedings under s.62 of the Act of 1966 could be said to be in pursuit of a legitimate aim, in that it is charged with regulating a limited housing stock and must allocate it in accordance with its Scheme of Letting Priorities.

52. In the case of *Connors v. United Kingdom* (2004) 40 E.H.R.R. 189 the meaning of what is necessary in a democratic society was

said to be whether a measure answers a pressing social need and is proportionate to the legitimate aim pursued. In the same case the European Court of Human Rights also acknowledged that the national authorities enjoy a margin of appreciation in adopting a particular measure.

53. The European Court of Human Rights has recognised in a series of judgments that Article 8 encompasses implicit procedural requirements and that these must be considered when assessing the proportionality of the interference with Article 8 rights. The case of *Connors v. United Kingdom* (2004) 40 E.H.R.R. 189 concerned a summary eviction process in the United Kingdom and the issue in that case was whether that summary process satisfied the procedural requirements necessary for compliance with Article 8. The local housing authority in that case had evicted the applicant and his family from their caravan site after obtaining a warrant for possession pursuant to a summary procedure. Addressing the interplay between the margin of appreciation the State enjoys and the Article 8 rights of individuals the Court said:

> *"82… The Court has also stated that in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation… It may be noted however that this was in the context of Article 1 of Protocol No.1, not Art. 8 which concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community… Where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant…*
>
> *83. The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to the measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8."*

54. The European Court of Human Rights ultimately found that the eviction process in question did not include adequate procedural safeguards, which it identified as being a hearing before an independent tribunal, a forum where the merits of the case could be examined. It further held that where there was a dispute as to the facts that judicial review was not a sufficient procedural safeguard.

55. In *McCann v. United Kingdom* (Application 19009/04, Judgment of the European Court of Human Rights of 13th May, 2008) the European Court of Human Rights held that as there was no opportunity to have the proportionality of the measure to dispossess the applicant of his home determined by an independent tribunal that there was a lack of procedural safeguards in violation of Article 8 of the Convention.

56. The European Court of Human Rights echoed the finding in *Connors* that the remedy of judicial review was not an adequate procedural safeguard when there was a factual dispute. It stated as follows:

> *"53. 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."*

57. This requirement for procedural safeguards is comparable to the Constitutional guarantee of fair procedures in decision making by public bodies which flows from the unenumerated rights provision of Article 40.3.1 of the Constitution which states:

> *"The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."*

58. In *re Haughey* [1971] I.R. 217 established that where a procedure affected the Constitutional rights of an individual, then certain safeguards must apply. However, there is no set formula as to what is required to ensure compliance with fair procedures. What is required will vary in accordance with the particular circumstances of the case. In *Flanagan v. University College Dublin* [1988] 1 I.R. 724 at p.730 to 731 Barron J. summarised the position as follows:

> *"…procedures which might afford a sufficient protection to the person concerned in one case, and so be acceptable, might not be acceptable in a more serious case…Matters to be considered are the form in which the complaint should be made, the time to be allowed to the person concerned to prepare a defence, and the nature of the hearing at which that defence may be presented. In addition depending upon the gravity of the matter the person concerned may be entitled to be represented and may also be entitled to be informed of their rights. Clearly, matters of a criminal nature must be treated more seriously than matters of a civil nature, but ultimately the criterion must be the consequences for the person concerned of an adverse verdict."*

59. The jurisprudence of the European Court of Human Rights suggests that in the realm of eviction proceedings there should, in principle, be an opportunity for an independent tribunal to adjudicate on the proportionality of the decision to dispossess. In *McCann* the Court stated as follows:

> *"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."*

**Article 6**

60. The defendant complains that the lack of a transparent, statutory procedure dealing with applications to the complainant, to succeed to a tenancy violates his right under Article 6 of the Convention to fair procedures. Article 6 provides for procedural guarantees in the determination of civil rights and obligations.

61. The rights and obligations at issue in the present case arise out of the defendant's claim to have occupied the premises at 11 Adare Road, during his mothers lifetime, with the consequent right to succeed to the tenancy in these premises. These rights were potentially determined by the combination of the process conducted internally by the complainant leading to its decision to seek a warrant under s.62 of the Act of 1966 and then by the District Court within the context of proceedings taken under s.62 of the Act of 1966.

62. It was recently stated by the European Court of Human Rights in the *McCann* case that complaints relating to the fairness of proceedings may only relate to the actual determination of the rights and obligations. In McCann, the European Court of Human Rights held that the complaint of the applicant in that case, that his local authority was not an independent and impartial tribunal when it brought about the termination of his tenancy to the property in violation of Article 6, was inadmissible. The Strasbourg Court noted that the determination of the applicant's civil rights and obligations did not take place before the local authority but rather before the courts and thus the applicant's submission on this point was considered to be manifestly ill-founded.

63. In this case the defendant did not press the point that the determination of the issue of whether the defendant was entitled to succeed to the tenancy had to be done by a tribunal that was separate from and independent of the complainants. In my opinion, unlike the *Mc Cann* case, there was a determination of the defendant's rights by the complainant, insofar as it made the decision that the defendant was not entitled to succeed to the tenancy. There was no appeal from this decision within the decision making structures of the complainant and the issue could not be opened up again in the s.62 proceedings as discussed above. Thus I am satisfied that I should adopt a different approach in this regard to the *Mc Cann* case and am inclined to conclude that the defendants complaint about the procedures followed by the complainant to determine his claim to succeed to his mother's tenancy engaged his Article 6 rights.

64. This restricted application of Article 6 as evinced in the *Mc Cann* case is to be contrasted with the wide-reaching implicit guarantee of fair procedures in decision making by public bodies under our own Constitution, as highlighted above. In this case, no complaint was made as to the fairness of the conduct of proceedings before the District Court. Thus any allegation of a breach of the defendant's rights under Article 6 is necessarily confined to the process carried out internally by the complainant.

65. The absence of any opportunity to defend summary possession proceedings in relation to the home was examined in *Connors v. United Kingdom* (2004) 40 E.H.RR.189. The European Court of Human Rights concluded that no separate issue arose under Article 6 and that the essence of the applicant's complaint in this regard fell to be determined under Article 8:

> *"102. The applicant complained under Article 6 that he was unable in the summary possession proceedings to challenge the Council's allegations of nuisance whether by giving evidence himself or calling witnesses. The applicant was at a substantial disadvantage given the terms of the licence, in respect of which he had not been in a free bargaining position. There was no equality of arms and he was denied any effective access to court against this very serious interference with his home and family.*
>
> *103. The Court considers that the essence of this complaint, that his eviction was not attended by sufficient procedural safeguards, has been examined under Article 8 above and may be regarded, in the present case, as absorbed by the latter provision. No separate issue therefore arises for determination."*

66. In my view, the restriction of the s.62 proceeding to exclude a hearing on the merits does not raise fair procedure grounds. That restricted jurisdiction undoubtedly does give rise to Article 8 grounds of complaint, as these proceedings result in the final legal instrument which deprives the defendant of his home, in circumstances where he did have a hearing of his case on the merits, thereby depriving him of the kind of procedural safeguards which the European Court of Human Rights have consistently held to be essential before such a drastic legal step is taken.

***Leonard v. Dublin City Council and Others*** **[2008] I.E.H.C. 79 (Unreported, High Court, Dunne J., 31st March, 2008.)**
67. In this case the absence of a hearing on the merits under s.62 of the Act of 1966 was held not to breach Article 6.1 of the Convention, given the availability of the remedy of judicial review, which was deemed to provide a sufficient procedural safeguard to the applicant in the case who had challenged the decision of the respondent local authority to bring proceedings to recover possession of her dwelling pursuant to s.62 of the Act of 1966. The applicant, a heroin addict, had signed an agreement and undertaking not to allow her partner, also a heroin addict, to stay at her dwelling. When the applicant's partner was subsequently discovered at her dwelling, the local authority decided she was in breach of her tenancy agreement and brought proceedings under s.62 of the Act of 1966. In the judicial review proceedings she sought, *inter alia*, a declaration pursuant to s.5 of the Act of 2003 that s.62 of the Act of 1966 was incompatible with Ireland's obligations under the Convention. That relief was refused. The Court held that if an abuse of power occurs in relation to the exercise by a housing authority of its statutory obligations that it is subject to the remedy of judicial review and that this was enough to protect the applicant's rights under the Convention. In answer to the question of whether the absence of a hearing under s.62 of the Act of 1966 infringes the requirements of Article 6 of the Convention, Dunne J. held that the availability of judicial review was a sufficient procedural safeguard for a person whose tenancy was terminated by the complainant, saying:

> *"There is no doubt that the rights of the applicant are limited in the course of a hearing before a District Court on foot of an application under s.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…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 seems to me that on the basis of the decision of the European Court of Human Rights in Bryan that the availability of judicial review proceedings meets the requirements of Article 6 (1)."*

68. Dunne J. also held that the applicant's rights under Article 8 were not violated for the same reason:

> *"It seems to be clear that in considering the issues that arise in the present case in the light of the decision in Connors, a procedure which provides for summary eviction such as that contained in s.62 will not necessarily fall foul of Article 8 provided that there are sufficient safeguards available to the individual concerned. It is also clear from that decision that the availability of judicial review may provide the necessary protection to an individual under Article 8."*

69. *Donegan v. Dublin City Council and Others* [2008] I.E.H.C. 288 (Unreported, High Court, Laffoy J., 8th May, 2008)

70. In the recent case of *Donegan*, Laffoy J., in the context of evaluating a potential infringement of the plaintiff's rights under Article

8 by the defendant Council in instituting proceedings under s.62 of the Act of 1966, identified the shortcomings of the remedy of judicial review in cases involving a dispute as to the facts:-

> *"It was acknowledged on behalf of the Council that, on an application for judicial review, the High Court cannot substitute its own findings of fact for the findings of the decision maker under review. That answers the question. The plaintiff's application would have had no prospect of success. In this jurisdiction, judicial review does not constitute a proper procedural safeguard where the tenant's contention that the Council was not entitled to terminate his tenancy is based on a dispute as to the facts. That goes to the core of the matter. A subsidiary consideration was adverted to by counsel for the plaintiff: the difficulty a person in the plaintiff's position would be likely to encounter in prosecuting a judicial review application, for example, in obtaining discovery, as illustrated by the decision of this Court (Ó'Caoimh J.) in Shortt v. Dublin County Council [2003] 2 I.R. 69. Moreover, lurking in the background is the bigger question of the wisdom of public authorities seeming to promote judicial review, a remedy which can only be obtained in the High Court, as an answer to the procedural safeguard deficit argument."*

71. Laffoy J distinguished the *Donegan* case from the *Leonard* case on the following basis:

> *"The essence of the ground was that there was no opportunity for the applicant to advance any relevant considerations, excuses or extenuating circumstances either in person or by a representative on her behalf. In short, it may be characterised as a complaint thqt she had no opportunity to make a plea ad misericordiam.*
>
> *Ms Leonard's challenge to s.62 focused on the procedure before the District Court. The complaint was not that the Council was not entitled to terminate the tenancy agreement for the reasons stated. As is clear from the judgment, Ms Leonard admitted that she was in breach of s.13. Unlike the situation that prevailed in Conners and the situation which prevails in this case, there was no factual dispute concerning the reason for terminating the tenancy and the Council's entitlement to do so."*

72. At p. 41 of her judgment in *Donegan*, Laffoy J. addressed the question of procedural safeguards, as required under Article 8, in the context of the process employed by the local authority in reaching the decision to evict Mr. Donegan:

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

73. From the above, it is clear that the Court found that there was no adequate procedural safeguard built into s.62 of the Act of 1966 to allow a person to make a case on the merits before an independent tribunal that he or she was not in breach of the tenancy agreement. Accordingly, a declaration of incompatibility was made under s.5 of the Act of 2003 that s.62 of the Act of 1966 violated Article 8 of the Convention.

74. There is a dispute on the facts in the present case, analogous to that in the *Donegan* case. The defendant asserts that he was at all times resident in his mother's house apart from the two and a half years he resided with his partner. The complainant does not accept this and for this reason, but not this reason alone, the defendant failed in his application to succeed to his mother's tenancy. The fact that the scheme governing the succession to tenancies operated by the complainant is *ad hoc* cannot in itself amount to a violation of the defendant's rights. However, the procedure that was followed by the complainant was unstructured, unregulated and specifically failed to give the defendant an opportunity to answer the concerns which the complainant had on being furnished with certain documents at its request and it failed to give the defendant an opportunity to challenge and test the view being formed by the complainant, which was adverse to his case.

75. The investigative process conducted by the complainant involved an initial conclusion that the defendant was not resident in his mother's house for the relevant period. This conclusion was communicated to the defendant by letter of the 20th September 2005. At the request of the defendant, following receipt of this letter, Mr. Bregazzi, an official of the complainant, met the defendant on 29th September, 2005. The defendant was then furnished with a document entitled "Proof of Residency" which listed documents which the complainant would consider in support of an application to succeed to a tenancy. The defendant furnished a variety of these documents, but by letter of 5th January, 2006 Mr. Bregazzi rejected the application on the grounds that other records conflicted with the information in the documents supplied by the applicant.

76. In my opinion, the failure to have given the applicant the opportunity to address that conflict and offer an explanation of his position deprived the defendant of a hearing of his case in which the issue of whether he was entitled to succeed to his mother's tenancy was adequately heard and adjudicated. This is what the defendant was entitled to under Article 6 and also by virtue of his right to fair procedures as guaranteed to him in the Constitution.

77. In the absence of a hearing by the complainant prior to the decision to seek the defendants eviction, in which the defendant's claim to be entitled to succeed to the tenancy could have been adequately ventilated and properly adjudicated on, the rights of the defendant under Article 6 of the Convention were engaged because the decision of the complainant was one which effectively determined the issue of whether he was entitled to succeed to the tenancy. That decision could not be appealed and the issue could not be revisited in the s.62 proceedings. Hence, in my view, the defendant's rights and obligations were determined by the complainant in that manner. As a result, in my view, the absence of an adequate hearing by the complainants breached the defendant's rights under Article 6.

78. The combination of that failure and the limited nature of the procedure in the District Court under the application pursuant to s.62 meant that the defendant did not have a determination of the issue of whether he was entitled to succeed to the tenancy, on the merits, at all. The restrictive nature of the s.62 proceedings resulting in a warrant for possession of his home deprived him of the procedural safeguards required by Article 8.

**The Availability of Judicial Review**

79. The question necessarily arises at to whether judicial review is an adequate alternative remedy where the dispute is solely or mainly one of fact. In this case there is undoubtedly a factual dispute as to whether the defendant was residing with his mother for a number of years prior to her death. The resolution of that dispute, however, does not dispose of all the issues which necessarily arise before it can be said that there has been a hearing by an independent tribunal such as to satisfy the "*procedural safeguard*" requirement under Article 8. In addition, there would have to be a hearing and determination on the issues arising from the second paragraph of Article 8, namely to ascertain whether the grant of a warrant for possession was a proportionate response even though it was established to the satisfaction of the tribunal that the defendant had resided with his mother as he claims. For the purpose of this latter exercise, a tribunal or court contemplating the grant of a warrant would be have to consider compliance with other aspects of the Scheme of Priorities for Lettings and the weight to be attached to any defaults on the part of the defendant. For example, it was said that the defendant was not recorded on the rent account in respect of this property. Was this a significant factor indicating that the defendant was not genuinely reliant on this property as his home, or was it merely a bureaucratic oversight or mishap to which little weight should be attached in the context of the extreme measure contemplated? Notwithstanding the absence of any real dispute of facts relating to these latter proportionality issues, they are of crucial importance to the outcome of the overall dispute. Excuses and explanations of extenuating circumstances and pleas *ad misericordiam*, based on the personal circumstances of the person concerned, in this case the defendant, are important as factors which are relevant to the issue of proportionality and could heavily influence the decision maker and, in my view, are an integral part of the decision making process engaged in by the complainant for the purpose of determining whether the defendant was entitled to succeed to his mother's tenancy.

80. The process conducted internally by the complainant was neither an adequate hearing or determination on the factual dispute, nor was there any adequate consideration of the proportionality issue. In the s.62 proceedings in the District Court, a correct construction of s.62 excludes a hearing on these matters. I am satisfied that the defendant's rights under Articles 6 and 8 of the Convention and his right to fair procedures under Article 40 of the Constitution have not been adequately protected in this entire process.

81. Could the remedy of judicial review have provided such protection? The defendant did not seek judicial review of the decision of the complainant to refuse his application to succeed to his mother's tenancy. Even if successful in such an application, the process of judicial review would not have given him a hearing on the merits of his case against the complainant. It would, in all probability, have led to a decision by this Court to remit the matter back to the complainant so that a proper hearing on the relevant issues could be conducted.

82. In light of the established jurisprudence on the correct construction of s.62, there is no avoiding the fact the complainant should have had procedures which deal with the kind of issues relating to eviction which have cropped up in this case and also in the *Leonard* and *Donegan* cases, so as to ensure that the Constitutional and Convention rights of persons in similar situations are adequately protected. Without such procedures, it could not be said that recourse to judicial review would assure to the defendant a full and proper hearing by the complainant on the overall merits of his case. In addition, and in this respect I echo the opinion expressed by Laffoy J. in *Donegan*; recourse to High Court judicial review proceedings should not be the means by which persons in the position of the defendant in this case, obtain the "procedural safeguards" required by Article 8 of the Convention.

83. The failure to devise such procedures must lead to a conclusion by this Court that s.62 violates the defendant's rights under Article 8 because of the absence of the necessary procedural safeguards. Had the complainants had in place the kind of internal procedures for dealing with eviction disputes such as have arisen in these cases, as discussed above, this conclusion would have been avoidable.

84. The answers to questions 2, 3 and 4 in the case stated must therefore be as follows:

> Q.2 On a true construction of s.62 a District Judge does not have a jurisdiction to explore the merits of the matter. Furthermore, apart from the foregoing, a District Judge does not have any jurisdiction to consider the merits of the procedure followed by the complainant as that jurisdiction is reserved to the High Court on judicial review. Insofar as the procedure in the District Court on a s.62 application is concerned, a District Court Judge cannot in a consideration of that procedure embark upon a consideration of the merits of the underlying dispute between a complainant and defendant.
>
> Q.3 In appearing to a summons under s.62 of the Act of 1966, a defendant is not entitled to address the merits of the procedure either in the District Court or the procedure followed by the complainant in deciding to seek a warrant for possession under s.62. or the merits of the underlying dispute between the complainant and defendant for the purpose of showing cause why a warrant for possession should not be granted, either in reliance on Articles 6, 8, and 13 of the Convention or Article 1 of the First Protocol or otherwise.
>
> Q.4 The effect of s.2 of the Act of 2003 is not that a housing authority must adduce evidence justifying its decision to terminate a tenancy.

85. A residual question remains as to whether, in light of the above conclusion to the effect that s.62 infringes the defendants rights under Article 8 of the Convention, it is appropriate on a consultative case stated to grant a declaration persuant to s.5 of the Act of 2003 that s.62 of the Act of 1966 is incompatible with the Convention.

86. I am satisfied that the phrase "*in any proceedings*" in s.5 of the Act of 2003 clearly envisages that a declaration can be made in a case stated procedure. It could not reasonably be expected that the defendant should initiate separate High Court proceedings claiming a declaration of incompatibility, having fully litigated the issue in these proceedings.

87. The final matter to be considered is whether a s.5 declaration should be made where that has already been done in relation to s.62 by Laffoy J. in the *Donegan* case. It would seem to me that, notwithstanding the apparent superfluity of a second s.5 declaration on the same matter, it is necessary for this court to do this as otherwise an injustice may be done to the defendant, insofar as his prospect of an award of compensation or an *ex-gratia* payment pursuant to s. 5(4) (b) or (c) of the Act of 2003 would be defeated, in circumstances where his case merits a declaration.