Irish Court of Appeal

Judgment

Title:	McCauley -v- Her Honour Judge Fergus & Anor
Neutral Citation:	[2018] IECA 30
Court of Appeal Record Number:	2016 151
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Composition of Court:	Ryan P., Hogan J., Whelan J.
Judgment by:	Hogan J.
Status:	Approved
Result:	Dismiss

THE COURT OF APPEAL
Neutral Citation Number: [2018] IECA 30

2016 No. 151

Ryan P.
Hogan J.
Whelan J.

BETWEEN/

EAMON McCAULEY

APPELLANT

- AND -

HER HONOUR JUDGE KAREN FERGUS

RESPONDENT

- AND -

THE COUNTY COUNCIL OF THE COUNTY OF DONEGAL

NOTICE PARTY

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 7th day of February 2018

1. This is an appeal from the decision of the High Court delivered on the 21st December 2015 whereby Eager J. dismissed the present application for judicial review in respect of a decision of Her Honour Judge Fergus delivered on the 25th June 2015 whereby she granted an order for possession of certain premises at Ballinacarrick, Ballintra, Co. Donegal in favour of the notice party, Donegal County Council ("the Council"), pursuant to s. 62 of the Housing Act 1966 ("the 1966 Act"): see *McCauley v. Fergus* [2015] IEHC 825. The applicant, Mr. McCauley, now appeals to this Court against that decision.

2. Section 62 of the 1966 Act is a well known provision which provides for a summary method whereby a local authority can recover possession of a tenancy of a dwelling following the commencement of District Court proceedings. Section 66 has, however, been superseded by the provisions of s. 13(8) of the Housing (Miscellaneous Provisions) Act 2014.

3. The applicant's case is, in essence, that the property in question was his home, at least for the purposes of the Article 8 of the European Convention of Human Rights. He maintains that due to the summary nature of the procedure provided for by s. 62 of the 1966 Act his rights under Article 8 ECHR were thereby compromised. Specifically, he contends that he was unable to lead evidence to show the nature of his connections with the premises in question, such that the making of an order for possession in favour of the Council was wholly disproportionate.

4. The background facts would appear to be as follows. It seems that the applicant's mother, Mrs. McCauley, previously lived in a dwelling on the site at Ballinacarrick which was in a dilapidated condition. At some stage she agreed to give the Council the land and that in return the Council agreed to build the present dwelling in 1970. The applicant stated on affidavit that he believed that:

> "in 1970, when the Council built the house, my people were led to believe or were of the belief that the McCauley's could remain in the house, provided the usual conditions were met. An independent assessor might well reject or accept these arguments but in Court I could provide no effective evidence……"

5. The applicant thus maintained that he was entitled to possession of the property qua tenant provided that he paid rent.

6. I should further explain that the applicant had previously owned a house nearby in Bundoran but, following a marital dispute, transferred the property to his daughter. At that stage the tenant of the property at Ballincarrick was his brother, Liam McCauley. He (*i.e.*, Mr. Liam McAuley) had succeeded his mother (who by this stage had died) as tenant of the property and, indeed, he had been in occupation of the property qua tenant in his own right since 2000. While Mr. Liam McCauley contemplated purchasing the property at some stage in 2006, this application did not proceed.

7. In December 2012 the applicant then moved into the property to look after his brother who by this stage was seriously ill. Sadly, however, Liam McCauley died on 24th March 2013. The applicant subsequently applied to the Council in September 2013 for

housing support, but the Council refused to the application by reference to its Allocation Schemes for tenancies of this nature. In particular, the applicant was refused because although he was a brother of the previous now deceased tenant, the Council was not satisfied that he had been in occupation of the premises for the previous two years and nor had his income been taken into account in calculating the rent payable to the Council.

8. In March 2014 s. 62 proceedings were commenced in the District Court by the Council seeking possession of the property. An order for possession was granted by the District Court in January 2015. The applicant then appealed to the Circuit Court where, following a very full argument, Her Honour Judge Fergus affirmed the District Court order.

9. According to the agreed note of the judgment, the Circuit Court judge ruled as follows:

> "The judge said that Article 8 of the European Convention on Human Rights protects the home but does not give a right to a home. The judge said that ECHR dealt with fairness of procedures and she noted that dispute of the appellant was that the property was on family lands and that Mr. McCauley expected to stay in the family home built by the County Council. She noted that Liam could have bought the house in 2006 however he did not do so. Eamon McCauley, the appellant, had not lived in the house since 1990 therefore could not argue that this was an eviction case. Mr. McCauley agrees that he was not in occupation of the family home for a period of two years. Article 8 does not give rights to a home; it protects the home. Social housing was provided for the McCauley family. She confirmed the order of the District Court in both cases."

10. In any consideration of the issues raised on this appeal, the first thing to bear in mind is that neither the decision of the District Court nor the Circuit Court could be quashed in judicial review proceedings for a failure to apply the European Convention of Human Rights ("ECHR") *as such*. The ECHR has not been made part of the domestic law of the State for the purposes of Article 29.6 of the Constitution. Nor are the individual provisions of the ECHR directly effective in our domestic law: see *McD. v. L.* [2009] IESC 81, [2010] 2 IR 199.

11. What the Oireachtas has instead done is to provide for a particular form of sub-constitutional incorporation of the ECHR via the European Convention of Human Rights Act 2003 ("the 2003 Act"). Three sections of that Act have a direct relevance so far as this issue is concerned. Section 2 of the 2003 Act imposes a duty upon a court in "interpreting and applying" any statutory provision or rule of law:

> "…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."

12. Section 3 provides that "subject to any statutory provision…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." It is important to note, however, that courts performing part of the judicial powers of the State are among the bodies excluded from the definition of "organ of the State" contained in the definition of that term which is found in s. 1(1) of the 2003 Act.

13. Section 5(1) of the 2003 enables the High Court to grant a declaration of incompatibility subject to certain conditions. Section 5(2) provides that any such declaration shall not "affect the validity, continuing operation or enforcement of the

statutory provision or rule of law in respect of which it is made."

Did the Circuit Court order breach the provisions of the 2003 Act?
14. If, therefore, the Circuit Court order was invalid, it could only have been by reason of a breach of the provisions of either ss. 2, 3 or 5 of the 2003 Act. It may be convenient first to examine the provisions of s. 3 and s. 5 before returning to the question of s. 2.

15. It is plain that there could have been no breach of s. 3 in this case by the Circuit Court judge for the simple reason that the courts are excluded from the definition of "organ of the State" contained in s. 1(1) of the 2003 Act. If, of course, the courts were so defined, it would mean that they too would be obliged to give a form of direct effect to the individual provisions of the ECHR and thus treat these provisions as if they were directly applicable law, even though the Oireachtas had never determined that these provisions were to be regarded as part of the law of the State.

16. The position is, of course, otherwise so far as the Council is concerned which, as a State authority not otherwise excluded from this definition, is an "organ of the State". It is, perhaps, possible to envisage circumstances where it might be held that the failure on the part of a housing authority such as the Council to take steps to evict a tenant amounted to a failure on its part to exercise its statutory functions in an ECHR-compatible manner as required by s. 3 of the 2003 Act. But since this argument was never advanced in the present case, it simply does not arise for consideration

17. No issue arises in respect of s. 5 of the 1966 Act, because no declaration of incompatibility has been sought in respect of s. 66 of the 1966 Act. Counsel for the applicant, Mr. Murphy S.C., explained that this was because his client did not wish to be exposed to the additional costs entailed by such claim, with, *e.g.*, the joinder of the Attorney General to the proceedings in the manner now required by Ord. 60A, r. 1. But even if such a claim had in fact been advanced and even if such relief had been granted, it would not affected the validity of either order made by the Circuit Court in the slightest, since as s. 5(2) of the 2003 Act makes clear, s. 66 of the 1966 Act would still have remained effective and enforceable as part of the law of the State.

18. That leaves the question of whether there has been a breach of s. 2 of the 2003 Act. It is clear from the language of the section that the interpretative obligation to render an interpretation of the domestic statute which is ECHR compatible is "subject to the rules of law relating to such interpretation and application." In effect, the court is called upon to apply a form of double construction test to the domestic statute in order to render it ECHR compatible, provided, of course, such an interpretation is, to adapt the words of Walsh J. in *McDonald v. Bord na gCon* [1965] I.R. 70, "reasonably open."

19. In the present case the applicant contended that in order to be ECHR compatible, s. 66 of the 1966 Act should be read as requiring an independent adjudication of whether the dwelling was, in fact, the applicant's home within the meaning of Article 8 ECHR and, if so, that an order for possession should only then be made in the Council's favour where this was proportionate. All of this, however, pre-supposes that two interpretation of the section are, indeed, "reasonably open", so that the domestic court can opt for that interpretation which is ECHR compatible in preference to that interpretation which is not so ECHR compatible.

20. The real question, therefore, is whether such an interpretation is reasonably open in respect of s. 66 of the 1966 Act? Before any examination of this issue, it is next necessary to consider the text of s. 66 itself.

Whether the proper interpretation of s. 66 of the 1966 Act should be modified

by reference to s. 2 of the 2003 Act?

21. Section 66 of the 1966 Act provides in relevant part as follows:

> "(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 subs. (1) of this section, the justice of the District Court hearing the application shall, in case he is satisfied that the demand mentioned in the said subs. (1) has been duly made, issue the warrant.
>
> (4) The provisions of ss. 86, 87, and 88 of the Act of 1860 shall apply in respect of the issue of a warrant under this section subject to the modification that where as respects an application under subs. (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 s. 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 s. 86.
>
> (5) In any proceedings for the recovery of possession of a dwelling or building or part thereof mentioned in subs. (1) of this section, a document purporting to be the relevant tenancy agreement produced by the body by whom the proceedings are brought shall be prima facie evidence of the

agreement and it shall not be necessary to prove any signature on the document and in case there is no tenancy in the premises to which the proceedings relate by reason of the termination of a tenancy by notice to quit and the person to whom such notice was given is the person against whom the proceedings are brought, the following additional provisions shall apply:

> (a) any demand or requirement contained in such notice that the person deliver up possession of the said premises to the authority or the Agency, shall be a sufficient demand for the purposes of para. (b) of the said subs. (1); and
>
> (b) any statement in the said notice of the intention of the authority or the Agency to make application under subs. (1) of this section in respect of the premises shall be a sufficient statement for the purposes of para. (c) of the said subs. (1).

(6) …."

22. The effect of s. 2 of the 2003 Act was examined by McKechnie J. in *Donegan v. Dublin City Council* [2012] IESC 18, [2012] 3 IR 600. This was itself a case where the Supreme Court granted a declaration of incompatibility pursuant to s. 5(1) of the 2003 Act in respect of s. 62 of the 1962 Act. (As it happens, s. 62(3) of the 1966 Act has subsequently been superseded by the provisions of s. 13(8) of the Housing (Miscellaneous Provisions) Act 2014 ("the 2014 Act") which now requires the District Court to be satisfied that "recovery of possession by the housing authority is a proportionate response to the occupation of the dwelling by the person concerned." It is agreed, however, that the present appeal is governed by the 1966 Act, because s. 13(8) of the 2014 Act was not commenced until13th April 2015: see Article 2 of the Housing (Miscellaneous Provisions) Act 2014 (Commencement of Certain Provisions) Order 2015 (S.I. No. 121 of 2015)).

23. Returning now to the interpretative obligations contained in s. 2 of the 2003, McKechnie J. went on to say ([2013] 3 I.R. 600, 645):

> "It is quite clear that the Oireachtas has directed that every statutory provision or rule of law should be given a Convention construction if possible; that is a construction compatible with the State's obligations under the Convention. Therefore if such a construction is reasonably open it should prevail over any other construction, which although also reasonably open, is not Convention compliant. Even in cases of doubt, an interpretation in conformity with the Convention should be preferred over one incompatible with it. However, this task must be performed by reference to the rules of law regarding interpretation. These rules, have been variously described in many cases over the years such as *McGrath v. McDermott* [1988] I.R. 258 and *Howard v. Commission of Public Works* [1994] 1 I.R. 101.
>
> The reason why it is not necessary to further explore the relationship between the provisions of s. 2 of the Act of 2003 and the rules of interpretation and application referred to in this section, is that if a violation of Article 8 should be found to exist, the only manner of rendering s. 62(3) of the Act of 1966 compatible with the Convention is to read into it a facility, accompanied by attendant supports, which has the capacity to deal with the applicants' complaints, as described at para. 98

supra. Such result could not be achieved by any manner of permissible interpretation. Therefore, at least for the purposes of this case, s. 2 of the Act of 2003 has no affect on s. 62(3) of the Act of 1966. Consequently, in accordance with cases such as *State (O'Rourke) v. Kelly, Hamilton and Fennell*, it remains the position that, on a s. 62 application, any challenge, intra-provision which can be made, is restricted to the conditions specified in subs (1) thereof. Therefore, neither the position of Mr. Donegan nor that of Mr. Gallagher is enhanced by reason of the Act of 2003."

24. The "attendant supports" in question were those which McKechnie J. had previously set out at para. 102 of his judgment in the following terms ([2012] 3 IR 600, 643):

> "…..it is submitted that by virtue of s. 2 of the Act of 2003 the interpretation of the housing provision at issue, can be varied; in particular varied so that the District Court on hearing a possession application, could adjudicate on issues, including those of fact, which are extraneous to the specified requirements of the section, and depending on its findings, could as a result, refuse to make the order as sought. In other words, in the case of Mr. Donegan, to have the factual conflict resolved, and if decided in his favour, to have a discretion to refuse the order on that ground; in the case of Mr. Gallagher to resolve the residency dispute, and again if decided in his favour, to have the same discretion, despite the agreed position on the rent issue."

25. In the present context, Mr. Murphy S.C. urged that it ought to be possible to construe s. 66 of the 1966 Act in the light of the interpretative rules contained in s. 2 of the 2003 Act in order to provide for an independent external mechanism which would determine (i) whether the property at Ballynaccarrick was, in fact, the applicant's "home" within the meaning of Article 8 ECHR and (ii) whether the making of a possession order would amount to be a disproportionate interference with such rights.

26. For my part, however, I cannot agree that it would be open to this Court to construe s. 62 of the 1966 Act in this manner. As McKechnie J. pointed out in *Donegan*, such a construction would be at odds with all established case-law on the construction of this section. In *The State (O'Rourke) v. Kelly* [1983] IESC 1, [1983] IR 58 the Supreme Court concluded that the operation of the section was mandatory, provided that the essential proofs set out in s. 62(1) of the 1966 Act had been proved to the satisfaction of the District Court. As O'Higgins C.J. observed ([1983] IR 58, 61) the applicant had challenged:

> "….the constitutionality of s. 62 of the Housing Act 1966 on the grounds that sub-s. 3 thereof has the effect of imposing on the District Justice a mandatory obligation to issue the warrant mentioned in the section, and thereby constitutes an invasion of the judicial domain by depriving the District Justice of any real judicial discretion. The Court does not feel that there is any substance in this submission. Sub-s. 3 of s. 62 states:-
>
> > "(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."
>
> It will be seen that it is only when the provisions of sub-s. 1 of s. 62 have been complied with and the demand duly made to the satisfaction of the District Justice that he must issue the warrant. In other words, it is only following the establishment of specified matters that the sub-section operates. This is no different to many of the statutory provisions which,

> on proof of certain matters, make it mandatory on a court to make a specified order. Such legislative provisions are within the competence of the Oireachtas. The Court, therefore, rejects the complaint that the section is invalid having regard to the provisions of the Constitution on the ground alleged."

27. This point was further emphasised by Geoghegan J. in *Dublin Corporation v. Hamilton* [1999] 2 IR 486. Here the argument was that the reference in s. 62(3) to the application under s. 62(1) having been "duly" made to the District Court had the effect of bringing into play "not just the formal proofs but the entire question of whether the plaintiff is carrying out its statutory obligations of housing towards the defendant both in a substantive sense and in the sense of affording the defendant fair procedures": see [1998] 2 I.R. 486, 492. Geoghegan J. rejected the argument that a panoply of constitutional and other guarantees must thereby be considered by the District Court by reason of the reference to the application having been "duly" made, saying that he did not think "that there is any reason for importing into s. 62 requirements which were never intended to be there": [1999] 2 IR 486, 494. He also thought that it was "obvious" that in *The State (O'Rourke) v. Kelly* "the Supreme Court was considering the constitutionality of the section on the assumption (nor argued against) that only formal proofs were required under s. 62": [1999] 2 IR 486, 491.

28. It is true that the constitutional challenge in *The State (O'Rourke) v. Kelly* was one which was based on rather narrow grounds. No argument at all was, for example, advanced in relation to Article 40.5 (inviolability of the dwelling) or Article 41 (protection of family rights) or general principles of fair procedures as guaranteed by Article 40.3.1. These are, in essence, the domestic constitutional law counterparts of the Article 6 ECHR and Article 8 ECHR arguments which have largely prevailed in Strasbourg in broadly comparable housing cases involving housing authorities such as *Connors v. United Kingdom* (2005) 40 E.H.R.R. 189 and *McCann v. United Kingdom* [2008] ECHR 385, (2008) 47 EHRR 40.

29. One way or the other, however, the fact is that O'Rourke proceeded on the basis that s. 62(3) of the 1966 Act was mandatory in nature once the formal proofs had been established. There is nothing in *Donegan* to suggest that this particular interpretation of s. 62(3) of the 1966 Act was incorrect. One must conclude in such circumstances that it is simply not open to this Court to give s. 62 any wider interpretation in order to render it compliant with the ECHR. Putting this matter another way, there are not two interpretations of s. 62(3) of the 1966 Act which can be said to be reasonably open such as might otherwise have brought the s. 2 interpretative obligation provided for in the 2003 Act into play.

Conclusions

30. In conclusion it cannot therefore be said that Judge Fergus erred in the manner in which she construed s. 62(3) of the 1966 Act. While I understand the applicant's reluctance to embark upon complex litigation raising either the constitutionality of s. 66 of the 1966 Act or seeking a declaration that such was incompatible with the ECHR pursuant to s. 5 of the 2003 Act, that was, in fact, the substance of what the claim in the present proceedings amounted.

31. In these circumstances, I consider that the appeal should be dismissed.