High Court of Ireland Decisions

Judgment Title: Edward Lattimore v Dublin City Council

Neutral Citation: [2014] IEHC 233

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Neutral Citation: [2014] IEHC 233

THE HIGH COURT

[2013 No. 530 J.R.]

BETWEEN

EDWARD LATTIMORE

APPLICANT

AND

DUBLIN CITY COUNCIL

RESPONDENT

JUDGMENT of O'Neill J. delivered on the 9th day of May 2014

1. The applicant seeks an order of *certiorari* quashing the decision of the respondent dated 23rd April 2013, to refuse to permit the applicant to succeed to the tenancy of a property at 21, Ennis Grove, Irishtown, Dublin 4. A further order is sought quashing the decision of the respondent of 1st July 2013, to refuse to provide the applicant with an independent review of the proportionality of the decision dated 23rd April 2013. The applicant contends that the respondent has acted in breach of s. 3 of the European Convention on Human Rights Act 2003 ('the Act of 2003'), and that his rights under Article 8 of the European Convention on Human Rights and Article 40.5 of the Constitution have been infringed. The applicant is seeking an independent assessment of the proportionality of the decision to refuse him to continue in the tenancy at 21, Ennis Grove, while the respondent contends that it has no statutory obligation or authority to provide for such a review.

Background

2. The applicant was born on 30th March 1944. He first began residing at 21, Ennis Grove, a 3-bedroom house in Irishtown, Dublin 4, in March 1956. At that time, the tenants of the property were the applicant's parents, and since then, the house has been continuously occupied by the applicant's family. A member of the applicant's immediate family has been the named tenant of the property at all times since 1956. In 1962, the applicant moved to the United Kingdom. In 1989, the applicant's mother died and his sister, Cassandra Lattimore, became the named tenant of the property having been approved to succeed as the sole occupant. In 1991, the applicant returned to Ireland and moved back into the property at 21, Ennis Grove. In his grounding affidavit, the applicant avers that he believed he was made a joint tenant of the property at this time, and only discovered in 2012, that this was not the case and that he had merely been added to the rent account of the property. The applicant avers that he has resided at the house continuously since 1991.

3. The applicant's sister, with whom he resided at the property, suffered from an intellectual disability and spent a considerable amount of time throughout her life in a residential care centre. The applicant avers that he returned to Ireland out of concern for his sister as he believed she would have encountered considerable difficulties living alone and managing her financial and household responsibilities. The applicant states that he was primarily responsible for managing the household finances during the period from his return to Ireland in 1991 to 10th September 2012, when his sister died. An account statement was exhibited which shows that the applicant managed the household finances diligently and rarely allowed the account fall into arrears and never for an amount of more than €50.

4. Following the death of his sister, the applicant completed an application for succession to the tenancy on 5th December 2012. By letter dated 7th March 2013, the applicant was informed that his application had been considered "*having regard to the requirements as set out in the current Allocations Scheme. The Scheme is mandated by Section 22 of the Housing (Miscellaneous Provisions) Act 2009 and is adopted by the elected members of Dublin City Council."* While the applicant satisfied the requirement that he must be resident or on the rent account for a period of five years immediately prior to the death of the tenant, it was decided that "*a three bedroom dwelling is not considered appropriate for the needs of a single person*" and an alternative one bedroom property would be sourced. On 21st March 2013, the applicant replied to this letter informing the respondent that he had always understood that he was a joint tenant of the property and that for the

last number of years he had been responsible for managing the household finances. He sought a review of the decision of 7th March 2013, and also enclosed a letter from his General Practitioner, Dr. John Ryan.

5. Dr. Ryan's letter states that the applicant suffers from "*multiple medical problems including, Prostatic Cancer, Colon Polyps, Impaired Fasting Glycemia, Hypertension, Gout, Chronic Pancreatitis*." He also states that the applicant suffers from anxiety and depression and that "*the news that he is to be removed from his home has caused him acute anxiety and he is unable to sleep or eat."* Dr. Ryan states that the applicant has a strong support network nearby and that he has "*no doubt that if he was moved from the house that his health would seriously decline*." It was submitted that the applicant relies heavily on the support provided by his next door neighbours, his brother who lives approximately 400m away, and other close friends who live nearby.

6. By letter dated 23rd April 2013, the applicant was informed by Ms. Teresa Conlon, Allocations Officer for the respondent, that following a review of his application, having regard to the requirement of the Allocations Scheme, it was decided that the refusal of his application to continue residing at 21, Ennis Grove was "*a correct and valid decision of the Council, and your appeal is therefore unsuccessful".* It was determined that "*a three bedroom dwelling is not appropriate to the needs of a single person*" and that alternative one bedroom accommodation would be sourced. On 8th May 2013, the applicant was informed that "*the Council are prepared to make you an offer of tenancy in accordance with the Allocations Scheme and appropriate to the needs of a single person*". The respondent states that this alternative property is approximately 850 metres away from the house at Ennis Grove and that it is in a complex specifically for older persons where there is support available. The applicant's brother also resides at this complex. However, the applicant says that his brother is also in very poor health and would not be in a position to provide any day-today support. The applicant was advised that failure to accept this offer within two weeks may result in serving a 'Notice to Quit' and 'Demand for Possession' of the property at Ennis Grove.

7. On 15th May 2013, the applicant's solicitor replied to Ms Conlon's letter stating that pursuant to s. 3 of the 2003 Act, the respondent is required to act in a manner compatible with the European Convention on Human Rights and that the applicant's rights under Article 8 would be infringed by compelling him to move from his home. It was further stated that this decision should be made by an independent decision maker and an independent review of the proportionality of the respondent's decision was sought. Mr Terence O'Keeffe, Law Agent for the respondent, replied on 1st July 2013, stating that such a procedure is arguably *ultra vires*. He reiterated that it was the respondent's view that the house at Ennis Grove is "*greatly in excess of [the applicant's] housing needs*" and that it is "*grossly unfair to other applicants who have complied with the statutory requirements*". Following the respondent's failure to arrange for an independent review of the decision, judicial review proceedings were commenced and leave was granted by Peart J. on 15th July 2013.

Statutory Framework

8. Section 2 of the European Convention on Human Rights Act 2003 ('the 2003 Act') provides that -

> *"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".*

Section 3 of the 2003 Act refers to the obligation on organs of the State to act in a manner compatible with the Convention -

> *"Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible*

with the State's obligations under the Convention provisions".

9. Article 8 of the European Convention on Human Rights outlines a person's right to respect for private and family life:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

Article 13 of the Convention guarantees a persons right to an effective remedy -

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

10. Pursuant to s. 60 of the Housing Act 1966, as amended by the Housing Act 1988, a local authority is required to have a Scheme of Letting Priorities. Section 22 (3) of the Housing (Miscellaneous Provisions Act) 2009 states:

> *"A housing authority shall, not later than one year after the coming into operation of this section, in accordance with this section and any regulations made thereunder, make a scheme (in this Act referred to as an 'allocation scheme')) determining the order of priority to be accorded in the allocation of dwellings to—*
>
> > *(a) households assessed under section 20 as being qualified for social housing support, and*
> >
> > *(b) (b) households, in receipt of social housing support, that have applied to the housing authority to transfer to another dwelling or to purchase a dwelling under Part 3 and the housing authority consents to the transfer, or purchase, as the case may be.*

11. The respondent adopted its Allocations Scheme on 9th May 2011, paragraph 1.7 of which relates to 'Succession to Tenancy' and states as follows :

> *"Where death or departure of a tenant takes place, the tenancy will normally be given to a surviving spouse/partner, provided that such spouse/partner has been resident in the dwelling for a continuous period of at least two years immediately prior to the death / departure of the tenant.*
>
> *On the death or departure of both parents the tenancy will normally be given to a son or daughter, irrespective of 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. However, departure of the tenant by way of purchasing or providing own accommodation will not, generally, be grounds for a child over 18 years to remain in the dwelling and apply for succession.*
>
> *Each case will be examined on its merits and where there is more than one member of the household remaining in the dwelling, the tenancy will normally be given to the member who, in the opinion of the Manager, is most likely to keep the household harmoniously together.*
>
> *A person other than a spouse, partner, son or daughter who has resided in the dwelling for at least five years immediately prior to the death or*

departure of the tenant may be allowed to succeed where there is no spouse, partner, son or daughter eligible to succeed and where the dwelling size is appropriate to his/her needs.

A spouse, partner, son or daughter who was residing at the date of death / departure of the tenant and who has not resided for the full two years prior to the death or departure of the tenant but has a total of ten years aggregate residence in the dwelling in the previous fifteen years and is in need of housing accommodation and is unable to provide accommodation from his/her own resources may be considered to succeed to the tenancy where the dwelling size is appropriate to his/her needs.

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."

Applicant's Submissions

12. The applicant submits that the decision of the respondent dated 23rd April 2013, was irrational, unreasonable, and disproportionate having regard to the applicant's right to respect for private life and family life as guaranteed by Article 8 of the European Convention on Human Rights. It was submitted that the respondent failed to act in accordance with its obligations under s. 3 of the 2003 Act, to act in a manner compatible with the Convention. It was further submitted that the said decision was disproportionate, having regard to the applicant's right to inviolability of the dwelling under Article 40.5 of the Constitution. It was argued that in arriving at its decision, the respondent applied a fixed and inflexible policy which prevented the respondent from giving full consideration to the particular facts and merits of the applicant's case and therefore unnecessarily fettered the respondent's discretion.

13. It was submitted that a long line of jurisprudence from the European Court of Human Rights supports the proposition that the property in question in these proceedings is undoubtedly the applicant's home, and as such, his rights under Article 8 are engaged. In *Orlic v Croatia* (Application No. 48833/07), the court considered whether or not the residence in question came within the concept of a 'home' under the convention:

"54. The Convention organs' case-law is clear on the point that the concept of "home" within the meaning of Article 8 is not limited to those premises which are lawfully occupied or which have been lawfully established. "Home" is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular premises constitutes a "home" which attracts the protection of Article 8 § 1 will depend on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place . . .

55. As to the present case, it is undisputed that the applicant and his family had lived in the flat in question between November 1991 and 28 October 2004 when they were evicted. Thus, at the time when the interference with the applicant's right to respect for his home occurred, he had lived in the flat in question with his family. Having regard to the factual circumstances outlined above, the Court finds that the applicant had sufficient and continuing links with the flat at issue for it to be considered his "home" for the purposes of Article 8 of the Convention, despite the fact that according to the national courts' findings he had no legal basis for occupying it."

14. Counsel for the applicant submits that in light of this decision, it is irrelevant that the applicant has never held a tenancy in his own right. He has resided at 21, Ennis Grove and been named on the rent book continuously since 1991, and it has been his family's residence since 1956. It was submitted that this is more than sufficient to establish the property as his home under the Convention.

15. It was contended that any interference with this right requires an independent determination of the proportionality of such interference and that the Council have failed to provide this to the applicant, thereby violating Article 8. In *McCann v. United Kingdom* [2008] 47 EHRR 40, it was held that:

> *"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."*

16. In *Yordanova and others v. Bulgaria* (Application No. 25446/06), the Court first considered the lawfulness of the removal order made by the national authority. Having found that there was a valid legal basis in domestic law, the Court considered whether or not the domestic legal framework and procedures met the Convention requirements. The Court stated that any interference must be based on a 'legitimate aim' and must be 'necessary in a democratic society'. Interference will be considered necessary in a democratic society if it answers "*a pressing social need, and, in particular, if it is proportionate to the legitimate aim pursued*". The Court noted that in assessing this criterion "*a margin of appreciation must be left to national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate needs and conditions*." The Court stated that "*in spheres involving the application of social or economic policies, including as regards housing, there is authority that the margin of appreciation is wide*." However, the court also held that the margin of authority:

> *"…will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. Since Article 8 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."*

17. In relation to assessing the proportionality of any decision to interfere with a person's rights under Article 8, the Court followed and repeated the above quoted passage from the *McCann v. United Kingdom* case.

18. This view was reiterated in *Buckland v. The United Kingdom* [2013] 56 EHRR, which also repeated that in order for interference to be necessary in a democratic society, the decision must answer a "pressing social need" and be "*proportionate to the legitimate aim pursued*". The Court in that case went on to state that the procedural safeguards required by Article 8 had not been met in circumstances where "*it was not possible to challenge the decision to seek a possession Order on the basis of the alleged disproportionality of that decision in light of personal circumstances."* The United Kingdom Supreme Court expressed a similar view of the requisite procedural safeguards for compliance with Article 8 in *Manchester City Council v Pinnock* [2011] 2 AC 104, where it was held that:

> *"Any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of proportionality of the measure, and to have it determined by an*

independent tribunal in the light of article 8, even if his right of occupation under domestic law has come to an end."

19. Counsel for the applicant submits that the facts of *Bjedov v. Croatia* (Application no. 42150/09) are similar to the applicant's case, and that it is clearly indicated that the denial of an independent assessment of proportionality constitutes a violation of Article 8. In *Bjedov*, an elderly lady with a number of medical problems was the subject of an eviction order in respect of a property at which she had resided for a number of years. She had been offered alternative accommodation at a home for the elderly but there had not been an assessment of the proportionality of her eviction by an independent body. The Court held:

> *"The Court notes that when it comes to the decisions of the domestic authorities in the present case, their findings were restricted to the conclusion that under applicable national laws the applicant had no right to continue to occupy the flat at issue on the ground that between August 1991 and July 2001 she had been absent from the flat without a good reason. The national courts made no further analysis as to the proportionality of the measure to be applied against the applicant, namely her eviction from a State-owned flat. However, the guarantees of the Convention require that the interference with an applicant's right to respect for her home be not only based on the law but also be proportionate under paragraph 2 of Article 8 to the legitimate aim pursued, regard being had to the particular circumstances of the case. Furthermore, no legal provision of domestic law should be interpreted and applied in a manner incompatible with Croatia's obligations under the Convention . . .*
>
> *In this connection the Court reiterates that any person at risk of an interference with her right to home should in principle be able to have the proportionality and reasonableness 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, he or she has no right to occupy a flat."*

20. In the case of *Pullen v. Dublin City Council & Ors* [2008] IEHC 379, Irvine J. considered whether or not the process for repossession of a local authority home pursuant to s. 62 of the housing Act 1966, was in conformity with the Convention. It was held that the council is an organ of state under s3 of the 2003 Act and that the decision to evict the plaintiffs would interfere with Article 8 rights. Irvine J. stated that:

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

21. In relation to the need for an assessment of proportionality, Irvine J. concluded that:

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

22. The Court later went on to consider the remedies available to the Court and Irvine J. determined that the Court was confined to making an award of damages. Counsel for the applicant in this case, however submits that the present case is distinguishable as in *Pullen* there was already a warrant for possession issued pursuant to the Housing Act 1966. The plaintiffs had sought a permanent injunction restraining council acting on this order. Irvine J. held that the legislature did not intend to provide any remedy that would have the effect of displacing or curtailing the operation or enforcement of any constitutionally valid provision of nation law. The applicant argues that this is not what is

sought in the present case, as a valid warrant for possession has not been granted. It was argued that *Pullen* was a plenary hearing, while the case of *O'Donnell v. South Dublin County Council* [2008] IEHC 454 indicates that there is no such constraint on remedies in judicial review proceedings. O'Donnell involved a travelling family including one applicant who suffered from a disability. The standard of accommodation provided was at issue. Edwards J. found that the respondent had not complied with its obligations under s.3 of the 2003 Act and contrasted the remedies available in a judicial review with those available in a plenary action in the following terms:

> *"Unlike the situation in this case, the O'Donnell case heard by Laffoy J. was brought by Plenary Summons and the only remedy available to the Court was an award of damages. The present case involves a judicial review and the Court has a much wider range of remedies available to it, including damages."*

Having found that the applicant's rights under Article 8 had not been vindicated, Edwards J. stated:

> *"I am therefore prepared to make a declaration to that effect and I am prepared to order the first named respondent to exercise its statutory powers under the Housing Acts 1966-2004 requiring it to provide the applicants…with adequate temporary accommodation pending their placement in permanent accommodation under the Traveller Accommodation Programme 2005-2008".*

23. Counsel for the applicant argued that the Supreme Court in *Donegan and Gallagher v. Dublin City Council* [2012] IESC 18, conclusively determined that it is not possible to use s. 2 of the 2003 Act to interpret the Housing Act 1966, as amended, so as to permit the District Court to consider the proportionality of issuing a warrant for possession. McKechnie J. outlined the factors to be considered when determining if a decision by the Housing Authority is Article 8 compliant:

> *"In determining whether an interference is Article 8 compliant, the regulatory framework within which the measure has been established and operates will be assessed. Questions such as, (i) is the framework procedure sufficient to afford true respect to the interests safeguarded by the Article, (ii) is the decision making process fair in such a way as to respect that right, (iii) has the affected person an opportunity to have any relevant and weighty arguable issues tested before an independent tribunal and, (iv) has that person an opportunity to have such an issue considered against the measure, to determine its proportionality.*
>
> *Where any one or more of these requirements, when considered collectively and having regard to the margin of appreciation, is absent, it may be considered that the safeguards necessarily attendant on Article 8 for the purposes of its vindication have not been satisfied. A violation in such circumstances may follow.*
>
> *The suggested procedural safeguard as applying in this jurisdiction is the remedy of judicial review; as above-established, s. 62(3) cannot be relied upon in this regard. Whilst, in a great number of cases judicial review will be a sufficient and appropriate remedy, by which issues between public landlords and their tenants, arising out of that relationship, can be resolved, there will undoubtedly be some rare cases in which such remedy will not be suitable. This results from the nature and scope of judicial review and, in particular, from the limitation of its operation relative to the factual dispute."*

24. The applicant submits that the Supreme Court explicitly recognised in Donegan that an assessment of proportionality of a decision to deprive a person of their home is a necessary requirement of Article 8. The applicant contends that this requirement has not been met in the present case, and cannot be met in eviction proceedings under s. 2 of the Housing Act. It was submitted that a landlord cannot be permitted to conduct such an

assessment and that the post-*Donegan* European case law supports the proposition that an independent body must consider proportionality.

25. Counsel for the applicant states that in *Webster v. Dun Laoghaire Rathdown County Council [*2013] IEHC 119, Hedigan J. sought to synthesise the decision in Donegan with more recent European jurisprudence as outlined above. Hedigan J. found that there was no issue of proportionality in Webster but stated:

> *"It may well be that in the light of Bjedov and Buckland, the Irish courts may eventually find that the absence of an independent tribunal to determine the proportionality of an eviction from a home may give grounds for a declaration of incompatibility even where there is no factual dispute. The circumstances here, however, do not support such a finding"*

26. It was further submitted by the applicant that there is no evidence that the respondent considered the proportionality of the decision to refuse to allow the applicant to remain at 21, Ennis Grove at all, either by an independent body or otherwise, rendering the decision unlawful and in breach of s. 3 of the 2003 Act. The applicant rejects any suggestion by the respondent that providing for an independent review is not permitted by statute and any such provision would be *ultra vires*. It was submitted that the respondent is given a wide statutory discretion which it unnecessarily fettered in this case and that there is no prohibition or bar of any kind to the respondent providing for an independent review.

27. Counsel for the applicant submits that the most appropriate resolution in these proceedings would be to grant the relief sought and allow the respondent to provide for an independent assessment of proportionality. It was submitted that if there is some statutory bar to such a course of action being adopted by the respondent, which is not accepted, then there is authority which suggests that this Court can carry out an assessment of proportionality, going beyond the more traditional constraints in judicial review proceedings. In *McSorley v The Minister for Education and Skills* [2012] IEHC 201, Hedigan J. reiterated the role of this Court in judicial review proceedings as set out by Denham J. in *Meadows v. Minister for Justice Equality and Law Reform* [2010] IESC 3 as follows:

> *"(i) In judicial review the decision-making process is reviewed.*
>
> *(ii) It is not an appeal on the merits.*
>
> *(iii) The onus of proof rests upon the applicant at all times.*
>
> *(iv) In considering the test for reasonableness, the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense.*
>
> *(v) The nature of the decision and the decision maker being reviewed is relevant to the application of the test.*
>
> *(vi) Where the legislature has placed decisions requiring special knowledge, skill, or competence, for example as under the Planning Acts, with a skilled decision maker, the Court should be slow to intervene in the technical area.*
>
> *(vii) The Court should have regard to what Henchy J. in The State (Keegan) v. Stardust Victims Compensation Tribunal, referred to as the 'implied constitutional limitation of jurisdiction' in all decision-making which affects rights. Any effect on rights should be within constitutional limitations and should be proportionate to the objective to be achieved. If the effect is*

disproportionate it would justify the court setting aside the decision."

In that context, Hedigan J. went on to decide the case as follows:

> *"Clearly the circumstances under which the Court can intervene with a decision maker involved in an administrative function such as herein are limited. However as stated above the Court must have regard to the implied constitutional limitation of jurisdiction in all decision-making which affects rights. Any effect on rights should be within constitutional limitations and should be proportionate to the objective to be achieved. If the effect is disproportionate this justifies the court setting aside the decision. Clearly the Ministers decision has a profound effect upon the applicant's rights. Thus the Court must ask was the decision reached in this case disproportionate? . . . It seems to me that bearing in mind the inordinate length of time since the events in question and balancing that with her apparently very satisfactory performance of her duties as principal in the time between, there is in the decision to now remove her from her post, a manifest disproportionality that requires the Court to intervene"*

28. The applicant also contends that his constitutional right to inviolability of the dwelling has been breached. Counsel refers to the case of *Wicklow County Council v Fortune* [2012] IEHC 406, which considered the parameters of this right in civil matters. Hogan J. held that:

> *"Article 40.5 affords a real protection which the courts must safeguard by word and deed. Insofar as the Article 40.5 speaks of "inviolability", the drafters must be taken to have intended to convey through the use of rhetorical and philosophically inspired language drawn (as Hardiman J. pointed out in Cunningham) from the European constitutional tradition so that the dwelling should enjoy the highest possible level of legal protection which might realistically be afforded in a modern society. In the planning context, this does not mean that the courts cannot order the demolition of an unauthorised dwelling because it is 'inviolable'. It rather means that the courts should not exercise the s. 160 jurisdiction in such a manner so as to require the demolition of such a dwelling unless the necessity for this step is objectively justified and, adapting the language of the European Court of Human Rights (in an admittedly different context) in Goodwin v. United Kingdom (1996) 22 EHRR 123, the case for such a drastic step is convincingly established"*

It is submitted that the need to remove the applicant from his home has not been objectively justified. The decision of the respondent does not take account of the fact that the applicant has resided at this property for many years and that he is not simply a new applicant seeking an allocation.

Respondent's Submissions

29. The respondent submits that the Housing Authority has at all times acted in accordance with its statutory obligations and the provisions of the Allocations Scheme established pursuant to the Housing Act 1966, as amended. It was submitted that the fact that the applicant resided at the property and paid rent there since 1991, does not entitle him to succeed to the tenancy at 21, Ennis Grove. However, it was submitted that having considered the merits of his application, the respondent decided, in the circumstances, to source a new allocation of more suitable alternative accommodation close by. It was submitted that the respondent is an independent and impartial body which has a statutory duty to consider all of the factors before it, one of which is size and suitability of the accommodation. The respondent denies that a fixed and inflexible policy was applied when determining the applicant's application to succeed to the tenancy at 21, Ennis Grove or that the respondent fettered its discretion in any way. Rather, it was submitted that the respondent is required to engage in a multi-factorial consideration and to balance the various rights and interests of different persons on its housing waiting list in arriving at its decision. The Court was told that at the time of these proceedings, there were 1431 applicants seeking accommodation from the respondent, and 134 of these were seeking

3-bedroom accommodation in the relevant area. It was submitted that the impugned decisions did include a consideration of proportionality. In the decision of 23rd April 2013, Ms. Conlon states that:

> *"I have taken into account your application form, the information contained therein and the further submissions made by you in your correspondence . . .*
>
> *Having taken your application and all of the forgoing circumstances into consideration and having regard to the requirements of the Allocations Scheme, I must inform you that the refusal of your application for succession of 21 Ennis Grove and the approval of your succession to a dwelling appropriate to your needs was a correct and valid decision of the Council . . . "*

30. Counsel for the respondent contends that a consideration of proportionality includes a consideration of all matters and, in light of the applicant's personal circumstances, he was not put to the end of the waiting list and was provided with accommodation close by. In the case of *Rock v. Dublin City Council & Ors.* [Unreported, Supreme Court, 8th February 2006], Geoghegan J. stated that:

> *"In these housing cases, it is very important for the reasons which I have indicated that the management of the housing pool be conducted in an orderly and speedy manner by the Council, whose duty, as pointed out by Mr. Connolly, is to the general body of people in need of housing and not to any particular individual, at least in this particular context."*

31. The respondent submitted that there is a presumption of validity of the public body's decision and that the onus of proving that the respondent failed to assess proportionality lies with the applicant. Counsel for the respondent relied on the following passage from the judgement of Charleton J. in *Weston v An Bord Pleanála* as authority for this:

> *"In Lancefort Limited v. An Bord Pleanála (Unreported, High Court, McGuinness J., 12th March, 1998), the following passage on the burden of proof, at pp. 21-22, which applies as much to a planning authority as to An Bord Pleanála appears:-*
>
> *'Counsel for the Notice Party also submitted that where the evidence as to whether a statutory body entrusted by the legislator with a particular function did not exercise its statutory duties, there is presumption of validity in favour of the decision under attack … Finlay P. … in re Comhltas Ceolteorí Éireann (High Court unreported 14th December, 1977)… said (at pages. 3-4 of the transcript of his Judgment):*
>
> *'A planning authority is a public authority with a decision making capacity acting in accordance with statutory powers and duties. In my view, there is rebuttable presumption that its acts are valid'.*
>
> *It appears to me that this submission… is well-founded. The onus of prove [sic] in establishing that An Bord Pleanála did not consider the question of environmental impact assessment… and thereby rebutting the presumption of validity of the Bord's decision, lies squarely on the Applicant. That burden of proof, it seems to me, has not been fully discharged.*
>
> *In addition, the Court has discretion in regard to Orders sought by way of judicial review. In this case, the Bord had before it ample material on which to make its decision. The report of the inspector raises and refers to many of the matters which would also be covered in a environmental impact assessment. Finally, no participant in the oral hearing suggested that an environmental impact assessment was required. … Bearing all these*

matters in mind I would be reluctant to exercise my discretion in favour of the Applicant on this point'."

32. The respondent also submitted that domestic legislation does not provide for the establishment of an independent Tribunal or body, as sought by the applicant, and that there was no requirement on the respondent to provide this. It was submitted that what the applicant seeks is something which would be outside the scope of the respondent's statutory powers and that no delegation of power is envisaged in the statute. Counsel relies on a number of authorities which outline the statutory duties of the respondent. In *Doherty v South Dublin County Council and others* [2007] IEHC 4, Charleton J. considered whether or not the respondent had failed to fulfil its legislative duty and stated that:

"The housing authority, however, has obligations only in accordance with its resources and according to the scheme of priorities set out by it."

33. The case of *Ward v. South Dublin County Council* [1996] 3 I.R. 195, related to whether or not the housing authority had a duty to provide permanent halting sites for families from the travelling community who were assessed as homeless. Laffoy J. stated that:

"It is not the function of this Court to direct a local authority as to how it should deploy its resources or as to the manner in which it should prioritise the performance of its statutory functions".

34. In *White Maple Developments Limited & Anor. v. Dublin City Council & Anor*. [2013] IEHC 83, Hogan J. criticised the respondent for adopting an indifferent attitude towards its statutory duties under the Planning and Development Act 2000 and emphasised the importance of the local authority acting in accordance with law -

". . . I am entitled to draw the inference that the Council found the statutory scheme to be an inconvenient one and it is unwilling to operate it unless it is actually compelled to do so, whether by legal proceedings or other force of circumstances. . .

The taxpaying public are entitled to suppose that their applications will be dealt with by the Council in accordance with law and not by reference to non-statutory schemes which the Council has itself been pleased to create."

35. In the Supreme Court, decision of *Donegan and Gallagher v. Dublin City Council* as discussed above, McKechnie J. considered the respondents role under the Housing Act 1966:

". . . a housing authority is obliged to provide housing accommodation for several categories of persons who, for whatever reason, are unable to provide accommodation for themselves. To perform this function it is entrusted with the responsibility of establishing and maintaining a housing stock and where necessary to improve, increase and upgrade that, when required. It has many other powers, either mandatory or discretionary, to supplement this core function.

89. An integral requirement in the performance of this responsibility is the establishment of what is termed, a "Scheme of Letting Priorities", as required by s. 60 of the Act of 1966. Under this provision, such a Scheme, which must be regularly reviewed, contains the rules by which the housing needs of all persons within its functional area, to whom it owes a responsibility, are assessed and prioritised. Having completed this exercise, its housing stock is then distributed and allocated according to the Scheme. . . "

36. It is submitted that when the Supreme Court in *Donegan* referred to a necessity *"that there be some independence between the decision-maker and those, on either side, who make, support or seek to rely on the allegations in question*", this was in the context of a case where there is a conflict as to facts, which is distinguishable from the present

proceedings. Counsel also pointed out that the it was stated in *Donegan* that:

> *"Article 8 of the Convention affords to every person the right to respect for his private and family life and, as relevant to this case, his home. This right does not entitle one to a home or to have his housing requirements satisfied by a public authority. . . ."*

37. It was submitted that the respondent has established that in reaching its decision, it satisfied all of the requirements of Article 8, as set out in the authorities relied upon by the applicant, and acted in accordance with law and in a manner necessary in a democratic society. It was submitted that the respondent has answered the pressing social need of accommodating families according to the circumstances of each case and by considering each application in a fair, impartial and proportionate way. The respondent argued that it must act in accordance with statute so that the procedure for the allocation of houses will not be haphazard or unfair and in order to promote transparency and accountability.

38. Counsel for the respondent submitted that much of the European Court's jurisprudence as relied upon by the applicant is irrelevant, because in cases such as *Yordanova, Bjedov, and Buckland*, the applicants were to be deprived of their home, whereas in this case, the applicant is simply being moved to alternative, more suitable accommodation, as opposed to being deprived of his home. It was submitted that the applicant has conflated eviction with the concept of allocation. In *Orlic*, the Court stated that:

> *"Moreover, where the State has not shown the necessity of the applicant's eviction in order to protect its own property rights, the Court places a strong emphasis on the fact that no interests of other parties are likewise at stake."*

The respondent submitted that in this case other parties' interests are at stake and the respondent has given reasons for the necessity to have the applicant moved to alternative accommodation.

39. The respondent contended that they have not fallen foul of the requirements of Article 8 as the decision in this case was made by an impartial body and because that decision is subject to judicial review proceedings. In *Bryan v. United Kingdom* it was held that:

> *". . . even where an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with Article 6(1) in some respect, no violation of the Convention can be found if the proceedings before that body are 'subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1)'."*

It was submitted that since the decision in Meadows this Court can consider proportionality in judicial review proceedings and there is therefore no breach of Article 8 as adequate procedural safeguards are in place.

40. It is also denied that the respondent's decision making process failed to have regard to the applicant's fundamental rights. In *Rawson v. the Minister for Defence* [2012] IESC 26, Clarke J. set out the guidelines which must be met to ensure that a decision made by a public body was lawful and it is submitted that the respondent meets these criteria:

> *"While the circumstances in which a decision made by a public person or body may be found to be unlawful are varied, it is possible to give a non-exhaustive account of the principal bases by reference to which such a finding might be made. First, the decision must be within the power of the person or body concerned. Second, the process leading to the decision must comply both with fair procedures and with whatever procedural rules may be laid down by law for the making of the decision concerned. Third, the decision maker must address the correct question or questions which need*

to be answered in order to exercise the relevant power and in so doing must have regard to any necessary factors properly taken into account and must also exclude any considerations not permitted. Fourth, in answering the proper questions raised and in assessing all matters properly taken into account the decision maker must come to a rational decision in the sense in which that term is used in the jurisprudence."

Decision

41. In these proceedings, the applicant seeks to have quashed two decisions of the respondent, the first being the decision communicated by the letter of 23rd April 2013, which, after a review, upheld the earlier decision of 7th March 2013, to refuse the applicant succession to the tenancy in 21, Ennis Grove, but which allowed him, or allocated to him, a tenancy in a one-bedroom dwelling. The second decision impugned is that communicated by a letter of 7th July 2013, refusing an independent review of the foregoing decision made on 23rd April 2013. Before proceeding into the merits of this dispute, I should deal with the preliminary objection of the respondent on the grounds of delay. I am quite satisfied that the applicant, having been disappointed by the decision of 23rd April 2013, was entitled, having regard to his rights under Article 8 of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights discussed above, to have sought from the respondent an independent review of the proportionality of the decision made on 23rd April 2013. That request was finally refused by the letter of 7th July 2013, and these judicial review proceedings were launched on 15th July 2013, expeditiously and within three months of the refusal of 7th July 2013. I am quite satisfied that, therefore, there was no delay on the part of the applicant in initiating these proceedings and that objection by the respondent fails.

42. An aspect of this case which presents no difficulty are the relevant facts which are not in dispute. The applicant has had a long history of association with 21, Ennis Grove, going back to 1956, when he was 12 years of age and his family took occupation of this 3-bedroomed house, in which his parents were the tenants. In due course, after the death of his father, his mother became the tenant until her death in 1989. In the meantime, the applicant had been in the United Kingdom from 1962. After the death of his mother, his sister, Cassandra, succeeded to the tenancy in 1990, and continued to be the tenant until her death in 2012. The applicant returned from the United Kingdom and took up occupation in 1991, and from then on, was entered on the rent account as an occupant of the dwelling. Over those years, the uncontested evidence in these proceedings and in the process before the Allocations Officer, Ms. Conlon, was to the effect that the applicant's sister was a person with disabilities and it fell to the applicant to look after the tenancy, including ensuring the payment of the rent from 1991 onwards.

43. The applicant is now approaching 70 years of age, and according to the evidence from his GP supplied in the process before the Allocations Officer and exhibited in these proceedings, he is in poor health, suffering from a variety of significant ailments. The opinion of his GP is that his mental and physical health will be seriously affected if he is compelled to leave his home at 21, Ennis Grove.

44. On the other hand, there are the undisputed facts put forward by the respondent, namely, that within the area where this house is located, there are in excess of 1,400 persons eligible for and seeking accommodation from the respondent as the local housing authority, of whom 134 are seeking a 3-bedroomed house.

45. There can be no doubt that the officials of the respondent, namely, Mr. Bregazzi, in the first instance, and Ms. Conlon, who conducted the review, resulting in her decision of 23rd April 2013, had a difficult decision to make. On the one hand, there were powerful factors underpinning the applicant's claim to remain on in this 3-bedroomed house. On the other hand, in staying on in this house, which had more accommodation than he needed, a family needing 3-bedroom accommodation would have to be denied that

opportunity for as long as the applicant remained in occupation of this house.

46. Notwithstanding the fact that the respondent offered the applicant a one-bedroom flat in Shepherd's Bush Court, which is in reasonably close proximity to 21, Ennis Grove, I have no doubt that 21, Ennis Grove has been, at all material times, the applicant's "home" within the meaning of Article 8 of the European Convention on Human Rights. Indeed, there was no serious contest on this issue in the proceedings. Again, notwithstanding the offer of new and suitable accommodation to the applicant, the refusal of the tenancy in 21, Ennis Grove to him, because of the fact that this house was his home for such a long time, that refusal was, in my opinion, an "interference" with the applicant's rights in respect of 21, Ennis Grove as his home, as envisaged by Article 8 of the Convention and the jurisprudence deriving therefrom.

47. What this has meant was that the applicant was entitled, by virtue of the judgments of the ECHR in the cases of McCann v. the United Kingdom, *Yordanova v. Bulgaria, Buckland v. the United Kingdom* and Djedov v. Croatia, to have the proportionality of that decision determined by an independent Tribunal in light of the relevant principles under Article 8. The United Kingdom Supreme Court, in the case of *Manchester City Council v. Pinnock* [2011] 2 A.C. 104, having reviewed the jurisprudence of the ECHR, concluded that the ECHR case law established that "*any person at risk of being dispossessed of his home at the suit of a local authority should, in principle, have the right to raise the question of the proportionality of the measure and to have it determined by an independent Tribunal in light of Article 8, even if his right of occupation under domestic law has come to an end*".

48. The Supreme Court, in the cases of *Donegan and Gallagher v. Dublin City Council*, whilst, in those cases, dealing with disputed questions of facts, nonetheless per the judgment of McKechnie J. in summarising the requisites of compliance with Article 8, included having the issue considered against the measure to determine its proportionality.

49. I am quite satisfied that the overwhelming weight of the jurisprudence emanating from the ECHR and from the United Kingdom Supreme Court and our Supreme Court, albeit, on an *obiter* basis, requires that where a person is to be deprived of their home, within the meaning of Article 8, they are entitled to have the proportionality of that decision determined by an independent Tribunal. In the case of *Webster v. Dun Laoghaire Rathdown County Council* [2013] IEHC 190, Hedigan J. anticipated the establishment of such a proposition where he said:

> *"It may well be that in the light of Bjedov and Buckland, the Irish courts may eventually find that the absence of an independent tribunal to determine the proportionality of an eviction from a home may give grounds for a declaration of incompatibility even where there is no factual dispute."*

50. The question which arises here is whether the review carried out by Ms. Conlon could be considered to have about it the necessary character of impartiality and independence to satisfy the procedural safeguards required by Article 8. Before going on to consider that question, I would observe that for the purposes of making her decision, there can be no doubt, and there is no complaint in this regard but that the applicant was given an ample opportunity to place before the decision maker *i.e*. Ms. Conlon, all relevant material which he wished to have considered, and this he did in the form of a well-written, lengthy letter to which he attached a letter from his GP, Dr. Ryan. Thus, Ms. Conlon had before her all of the relevant material so far as the applicant's side of the story was concerned. In addition, she was obliged, not just to consider it, but to formulate her decision within the confines of the relevant paragraph of the Allocations Scheme which applied to the applicant's circumstances and which required her to consider whether the dwelling size was appropriate to the applicant's needs.

51. Thus, Ms. Conlon had before her all of the relevant material for the purposes of

making a reasonable and proportionate decision and there is no evidence of her decision being in way contaminated by any irrelevant or impermissible material.

52. Having regard to the weighty factors favouring either potential choice, and having regard to the necessity to balance these and to then make the difficult decision to either allow or refuse succession to the tenancy in 21, Ennis Grove to the applicant, it cannot, in my view, be said that in making the choice that she made, that Ms. Conlon did anything other than scrupulously observe the principle of proportionality.

53. That, notwithstanding, does not answer the question of whether or not the exercise that she undertook in reviewing the decision made by Mr. Bregazzi, could be said to have about it the necessary character of independence required as a safeguard by Article 8. In my view, the clear thrust of all of the jurisprudence establishes that a housing authority, in these circumstances, cannot be the "independent Tribunal" for the purpose of making a determination on the proportionality issue in these circumstances. Thus, while, in my opinion, Ms. Conlon carried out her task well, the simple reality is that she did not have or should not have had jurisdiction in the first place to embark upon this task. That should have been left to another body, independent of the respondent.

54. Against this, the respondent says that the Housing Acts, construed in accordance with s. 2 of the Act of 2003, do not permit the respondent to delegate to any Tribunal, independent of it, the function of determining any question with regard to the allocation of housing in accordance with the Allocation Scheme. If the respondent was correct in this submission, it might be said that this could lead to a declaration of incompatibility between relevant parts of the Housing Acts and Article 8 of the Convention. However, in light of the decision of the Supreme Court in the *Meadows* case, in circumstances where no other independent Tribunal has the jurisdiction to determine the issue of proportionality in these kind of circumstances, this Court, on a judicial review application, must undertake that exercise. The necessary consequence of this Court exercising that jurisdiction is that, without any doubt, the procedural safeguards required under Article 8 of the Convention are in place and there cannot be said to be a breach of Article 8 on that ground, or, furthermore, on the ground specifically raised in these proceedings that the review carried out by Ms. Conlon was not an independent review, nor did the refusal by the respondent in the letter of 7th July 2013, of an independent review, breach Article 8.

55. In light of the judgments of the Supreme Court in *Meadows*, it now falls to me to determine the issue of proportionality as that was discussed in the judgment in the *Meadows* case and also by Hedigan J. in *McSorley v. The Minister for Education and Skills* [2012] IEHC 201.

56. In that context, it would seem to me that what I have to do, having regard to what has been described in the words of Henchy J. as the "*implied constitutional limitation of jurisdiction*", is to consider whether or not the decision made in this case by Ms. Conlon was proportionate to the objective to be achieved, and if disproportionate, to set it aside.

57. All of the relevant material was before Ms. Conlon and, I am satisfied, considered by her, and in the balancing exercise she was required to do, she had to make a decision which was either favourable to the applicant or adverse to him. There was no middle ground, although in this context, the fact that a one-bedroom apartment was offered to the applicant, in close proximity to 21, Ennis Grove, ensured that in the decisions that were made, the respondent was fulfilling its obligation to the applicant to provide him with suitable housing, whilst at the same time, accommodating the needs of a family requiring a 3-bedroomed house. I am quite satisfied that the decision that was made by Ms. Conlon, as reflected in her letter of 23rd April 2013, was not in any sense disproportionate. I am also satisfied that the correct application of the proportionality principle in this case also means that there has been no breach of the applicant's rights

under Article 40.5 of Bunreacht na hÉireann.

58. In these circumstances, therefore, I will not interfere with Ms. Conlon's decision and I must refuse the relief which is sought in these judicial review proceedings.
