THE DISTRICT COURT, THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT, 2003 "CAUSE AND EFFECT"

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In 2006, I published a paper entitled, *The Constitution, the European Convention on Human Rights Act 2003, and the District Court*.[1] In that paper I briefly explored the legal framework of the District Court, being a court of limited and local jurisdiction. I also examined briefly the origins of the European Convention of Human Rights Act, 2003,[2] and its incorporation into our domestic law.

Given that the ECHR Act, 2003 is now part of our landscape, I opined that the jurisprudence of the European Court of Human Rights was now available and could be raised in *all* courts. Suffice it to say, I urged caution, that any recourse to its case law should be clear, cogent and above all relevant.

Perhaps, somewhat naively, I thought there would be a plethora of ECHR jurisprudence being liberally quoted in all courts. Alas, this was not to be. It is my experience that despite the many recent domestic decisions involving Convention jurisprudence, there is still a marked reluctance to use Convention case law in the lower courts. This is somewhat puzzling when one thinks of the enormous energy invested by lawyers in quoting High Court decisions, when defending drink-driving cases for example.

Given the way the ECHR Act, 2003 is constructed, it was always clear that the law was going to come from the top down rather than from the bottom up. Indeed all one has to do is a trawl through the BAILII website to realise the number of cases

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[1] O'Donnell, "The Constitution, the European Convention on Human Rights Act 2003, and the District Court" [2007] 1 J.S.I.J. 137.

[2] Hereinafter "the ECHR Act, 2003".

involving Convention points which are mainly brought by way of judicial review proceedings.

No matter what view one takes, it is manifestly clear that the European Convention is playing an increasingly significant role in all courts, but more and more in the District Court.

One area in particular is in the context of disputes involving local authority housing. Over the last number of years, there has been a series of cases coming before the superior courts, in which plaintiffs have contended that the procedure involved in terminating a tenancy under the provisions of section 62 of the Housing Act, 1966 constituted a breach of their rights under the Convention, now that it has been transposed into domestic law.

In short, section 62 of the Housing Act provides a summary procedure for the recovery of possession of a dwelling let by the local authority. Section 62 sets forth a series of conditions, which if the District Judge is satisfied are in order, then he/she shall make an order for possession. In short, he/she has no discretion in the matter if the local authority's proofs were in order. Section 62 requires that the local authority adduce the following evidence:

a) proof that the dwelling in question is one provided by the local authority under the provisions of the 1966 Act,
b) notice to quit has been served,
c) that a demand for possession has been made,
d) that the occupier has failed to give up possession, and
e) evidence that an application for a warrant for possession would follow.

Prior to the ECHR Act, 2003, there were several challenges to the constitutionality of section 62 of the Housing Act, 1966. For example in *The State (O'Rourke) v. Kelly*,[3] the case was made that the provision of section 62 had to be invalid as its provisions constituted an interference with the jurisdiction of the District Court in the administration of justice by depriving the District Judge of any discretion. The Supreme Court held that it was only if the provisions of section 62(1) had been complied with, to the satisfaction of the District Judge, that he must then issue the warrant for possession. The Court took the view that this

[3] *The State (O'Rourke) v. Kelly* [1983] I.R. 58.

was no different to many other statutory provisions which, upon proof of certain matters, makes it mandatory on a court to make specific orders.

In another case, *Dublin Corporation v. Hamilton*,[4] the High Court held that the District Court had no discretion to consider any other factors in deciding whether to issue a warrant for possession once the necessary proof had been established. The Court was further of the view it was reasonable and constitutional that the housing authority have available to it a rapid method of recovering any dwelling house provided by it, without the necessity of having to give reasons.

In the context of the District Court, the matter was effectively regarded as "settled law". There were many cases where the local authority sought to recover possession, for say, non-payment of rent. The more controversial area was in the area of what is called anti-social behaviour cases.

In such cases, once the Court was satisfied that the local authority had satisfied the conditions laid down in section 62(1), the Court had to grant the warrant for possession.

There is no doubt that the advent of the ECHR Act, 2003 has had a seminal effect on this whole area and there are now several decisions which have had a major impact on possession proceedings embarked upon by local authorities under the 1966 Act.

One of the first decisions in this area was in *Dublin County Council v. Fennell*.[5] This was a case stated from the Circuit Court to the Supreme Court. Briefly the facts were that Dublin City Council was granted a decree for possession under the provision of section 62 of the Housing Act, 1966. The Dublin City Council sought possession on account of anti-social behaviour, or what was described as reasons of good estate management. This order for possession was made on the 12th December 2003. The order was appealed to the Circuit Court on the 23rd December 2003 and progressed from there by way of case stated. The ECHR Act, 2003 came into effect on 31st December 2003.

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[4] *Dublin Corporation v. Hamilton* [1999] I.R. 486.
[5] *Dublin County Council v. Fennell* [2005] I.R. 604.

Part of the argument put up on Mrs. Fennell's behalf was that the summary nature of the eviction procedure under the provisions of section 62 was incompatible with the State's obligation under the ECHR Act, 2003, and in particular the guarantees in respect of family life under Article 8 of the Convention.

Mrs Fennell failed in her case, as the Court held that the ECHR Act, 2003 could not be seen to have retrospective effect. For the purpose of this case the starting point was determined once the wheels had been set in motion, once the notice to quit had been served. As this date was prior to the commencement of the ECHR Act, 2003, Mrs Fennell was not entitled to succeed.

It is clear, however that the Supreme Court left the door open for other possible challenges, which proved to the true.

In this case there was an extensive analysis of section 62 applications, the ECHR Act, 2003, the relationship between the European Convention and the Irish Constitution, pre- and post-2003, and the relationship with domestic law.

In the course of his judgment Kearns J. stated:

> 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 the housing authority to be able effectively to manage and control its housing stock without being unduly restricted or fettered whilst doing so. 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.[6]

In the case of *Leonard v. Dublin City Council*,[7] the plaintiff was a tenant of Dublin City Council, and she sought a declaration that section 62 of the Housing Act, 1966 was incompatible with the State's obligation under Articles 6, 8, 13 and 14 of the European Convention, given the summary nature of the proceedings. She had allegedly breached the terms of her tenancy

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[6] *Dublin County Council v. Fennell* [2005] I.R. 604, at 614.
[7] *Leonard v. Dublin City Council* [2008] I.E.H.C. 79.

agreement that if her partner, who was a heroin addict, was found on her premises, that the Council would be entitled to evict her. The plaintiff countered that the proceedings in the District Court afforded her no opportunity to be heard on the merits of the matter. She did however accept that she was in breach of her tenancy. During the course of her judgment, Dunne J. referred to and analysed a number of European Court decisions. The learned Judge alluded to the fact that the plaintiff had been provided with the reason for the termination of her tenancy, and was satisfied that judicial review was an adequate remedy for the plaintiff in respect of any legitimate complaint arising from the Council's decision. Dunne J. also concluded that had the Council abused their position, the plaintiff might have had the decision quashed. Furthermore she concluded that the section 62 process for the recovery of local authority houses did not impinge the plaintiff's rights under the Convention.

In *Donegan v. Dublin City Council*,[8] the plaintiff was served with a notice to quit, following an allegation of anti-social behaviour involving his son. Possession proceedings under section 62 were initiated. The plaintiff argued that the process embodied in section 62, which enabled him to be evicted without the merit being examined by an independent tribunal, violated his rights to respect for his private and family life and home as guaranteed under the provisions of Article 8 of the ECHR. Laffoy J. ruled that section 62 was incompatible with Article 8. In doing so, she distinguished it from the *Leonard* case in that the facts in the *Donegan* case were always in dispute. Further the decision to terminate the tenancy was made by a party who was not independent and the right to challenge the Council's decision by way of judicial review proceeding was not a sufficient procedural safeguard as the High Court could not substitute its own finding of fact for the findings of the decision maker under review. Accordingly she made a finding of incompatibility in accordance with section 5 of the ECHR Act, 2003.

Another important judgment is the decision in *Dublin City Council v. Gallagher*,[9] which again had its origins by way of a

[8] *Donegan v. Dublin City Council* [2008] I.E.H.C. 288.
[9] *Dublin City Council v. Gallagher* [2008] I.E.H.C. 354.

case stated from the District Court. In this case the defendant argued that because of the entry into force of the ECHR Act, 2003, the District Court was now required to impose an evidentiary and fair procedures requirement on a Housing Authority in cases where they were seeking a warrant for possession under the provisions of section 62 of the Housing Act, 1966.

In that case O'Neill J. stated the following:

> [T]he 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.

The Court held that there was/is an obligation on the District Court to interpret section 62 in so far as possible in a manner compatible with the Convention. The Court was satisfied that on a true reading of section 62, a District Judge does not have jurisdiction to explore the merits of the mater or indeed the merits of the procedure followed by the local authority.

The Court was also satisfied that it was important to respect the boundaries between "amending legislation" and "interpreting legislation".

The Court was also satisfied that section 2 of the ECHR Act, 2003, did not impose an obligation on the housing authority that it must adduce evidence in the District Court, justifying its decision to terminate a tenancy.

In *Pullen and Others v. Dublin City Council*[10] the plaintiffs were evicted pursuant to an order for possession under the provision section 62 on grounds of anti-social behaviour.

[10] *Pullen and others v. Dublin City Council* [2008] I.E.H.C. 379.

The case was appealed to the Circuit Court, and this was unsuccessful. They then proceeded by way of judicial review contending that the absence of an independent or quasi-judicial hearing wherein the Council's finding of anti-social behaviour could be challenged prior to the warrant for possession being enforced constituted a breach of Article 6(1) of the ECHR. Furthermore the plaintiffs argued that the decision to terminate their tenancy and to seek to recover possession of their home, in the absence of procedural safeguards, infringed their rights under Article 8 of the Convention.

Irvine J. reviewed the case law of the Irish, U.K. and European Courts in the course of her judgment. She distinguished this case from the *Leonard* case. She also drew on the many similarities in the *Donegan* case. She was of the view that while the aim of swiftly recovering possession from those engaged in anti-social behaviour is laudable, it does not justify the interference with the plaintiff's rights, absence of presence or real procedural safeguards.

Accordingly a declaration of incompatibility was made in respect of section 62. Furthermore in the very recent past Irvine J. awarded the Pullen family €40,000 in damages in accordance with the provision of section 3(2) of the ECHR Act, 2003. It was interesting to note that the plaintiff was extremely disappointed with the level of damages. This is possibly the first case whereby damages have been awarded under the ECHR Act.

In another recent case, *Byrne v. Dublin City Council*,[11] the applicant sought an interlocutory injunction restraining the respondents from evicting her from her residence. This was another anti-social behaviour case. An issue arose as to whether an agreement had been reached between the parties whereby the Council would not seek to evict if she applied for a barring order against her two sons. The Council denied any such agreement existed, and advised that they intended to proceed to enforce their warrant. The applicant countered that she was given no opportunity to confront her accusers and that this constituted a breach of Article 6 of the Convention. It was further contended

[11] *Byrne v. Dublin City Council* [2009] I.E.H.C. 122.

that the procedure under the Housing Act, 1966, also violated her rights under Articles 8, 13 and 14 of the Convention.

The Court concluded that the case raised two distinct questions of law. Firstly, whether it was possible to obtain a perpetual injunction to restrain a breach of the duty under section 3 of the ECHR Act, 2003, which obliges every organ of State to perform its duties in a manner that is Convention compatible. Secondly, as to whether allowing the Council to implement their order for possession would amount to a breach of the plaintiff's Convention rights. Murphy J. was satisfied that the balance of convenience favoured the granting of an interlocutory injunction.

There is no doubt that the ECHR Act, 2003 is now having a very profound effect on the judicial landscape, and judges in all courts but especially in the District Court, are left in the position of trying to cope with the day-to-day implementation of the decisions of the higher courts.

It is also extremely difficult to know how to approach section 62 cases in the light of the myriad of decisions that are being handed down with such regularity.

Furthermore, the following important points should be remembered:

i. The Housing Act, 1966 is still on the statute books and remains constitutionally sound.
ii. Under the provisions of section 5 of the ECHR Act, 2003 even if the High Court grants a "declaration of incompatibility" it does not affect the validity or continuing operation or enforcement of the statutory provision or rule of law of which it is made.
iii. As the 1966 Act remains on the stature books, a District Judge is still not entitled to enter a hearing on the merits of the Housing Authority to proceed with a section 62 application.
iv. It follows still that if the Housing Authority's proofs are in order, the judge has no discretion but to grant to order for possession.
v. In accordance with the *Gallagher* decision, a District Judge is obliged to interpret the statutory provisions in a

matter that's compatible with the Convention, but is not allowed amend the legislation.

vi. While it is clear that the ECHR Act, 2003 obliges the Taoiseach to lay a copy of the declaration of incompatibility before the houses of the Oireachtas within 21 days, it appears that many of the declarations of incompatibility have been appealed to the Supreme Court and as a result it could be years before there is a final decision.

vii. Not only does this cause difficulties for the District Court, but the Housing Authorities are also faced with the serious dilemma that they are unable to repossess their housing stock, even in the most serious of situations, quickly under the provisions of section 62 of the Housing Act. Needless to say this had led to a certain amount of legal paralysis in this whole area.

viii. Another problem is the whole question of legal aid for tenants, which is outside the remit of this contribution. It is however appropriate to say that the delays in being granted civil legal aid can effectively delay a case for a protracted period of time. Furthermore, given the current financial climate, it may not be possible to get legal aid in every case.

However, it is important to suggest that if asked to advise a client who is faced with a demand for possession, that his or her solicitor should be up-to-speed on the current case law and should be able to put forward a reasoned and informed argument on behalf of their client.

I want to briefly mention some other important decisions which are not housing decisions, but again emphasise the enormous impact that the European Convention is having on our case law.

In *McCann v. The Judges of Monaghan District Court and Others*,[12] the plaintiff challenged the constitutionality of the Enforcement of Court Orders Act, 1940. There was also a

[12] *McCann v. The Judges of Monaghan District Court and Others* [2009] I.E.H.C. 276.

challenge under the provisions of the ECHR Act, whereby a declaration of incompatibility was sought in respect of the same section.

In a long and lengthy judgment Laffoy J. found that section 6 of the Enforcement of Court Orders Act, 1940 was unconstitutional and accordingly she did not have to make a finding in so far the Convention points were concerned. It is a very important decision and on reading the judgment it is extremely interesting to see how the Convention points are woven into the case. This decision was not appealed to the Supreme Court.

As a result of this decision the legislature speedily rushed through the Dáil amending legislation, entitled, the Enforcement of Court Order Amendment Act, 2009. In short, there is now a new mechanism in place for the enforcement of court orders leading to possible committal of a defaulter which is for the most part completely unworkable.

Briefly the facts of the case were, a lady by the name of McCann, owed money to her Credit Union and an order was made against her in 2003 at Monaghan Circuit Court for €18,000. Subsequently the Credit Union applied for an instalment order and this was granted in January 2004. There was no appearance by her at any stage. The District Court made an order for weekly instalments of €82. She failed to pay and the Credit Union issued a committal order under the provision of section 6 of the 1940 Act. At the time of the hearing of the committal application, the debtor owed a sum in excess of €5,000. In November 2005 a committal order was made directing that she be arrested and imprisoned for one month in default of payment of the arrears. Again she was not present. She was however unaware of the court order until the Gardaí arrived to arrest her in early 2006.

Ms McCann turned out to be a woman in her mid-thirties with two children and some very serious personal issues. She was at the time unemployed and was in receipt of state welfare benefit. She also had literacy problems. It also transpired during the course of the hearing that she set fire to any correspondence she received. Having failed in her request to gain an extension of time to lodge an appeal to the Circuit Court, she, with the

assistance of the Northside Community Law Centre, launched a legal challenge in the High Court.

In broad terms, there were two major planks to the challenge. Firstly, a direct challenge to the order of committal itself and secondly that the order for committal was invalid having regard to the provisions of the Constitution and that it was incompatible with the European Convention on Human Rights.

In so far as the Convention point was concerned the plaintiff sought a declaration that section 6 of the 1940 Act was incompatible with the State's obligations under the provisions of the Convention and argued that there had been a violation of her rights under Article 6 and 7, and Article 1 of Protocol 4. As already stated the case was won on the constitutional point.

Again it is important to illustrate that the 1940 Act had been in place and was deemed to be settled law until this decision was handed down. As a result, as already stated, emergency legislation had to be rushed through. The standard of proof has been changed and in any enforcement proceeding, the creditor will now be obliged to prove beyond reasonable doubt that there has been a wilful and culpable neglect on the part of the debtor, before imprisonment can be considered. There is also an entitlement on the debtors' part to apply for and be granted legal aid.

It is worth noting also that the Irish Human Rights Commission was added to the proceeding as an amicus curiae and made valuable submissions and observations to the debate.

There is no doubt that based of the facts of the case, that the shortcomings identified by the Judge in the committal procedures are correct. It is also clear that the emergency legislation introduced has effectively tried to cover all the deficiencies identified by the Judge without much thought been given to the practical aspects of its implementation. Given the emergency legislation that has been introduced, there will now have to be a seismic shift in the way a District Court approaches committal proceedings.

Furthermore, given the knock-on effect that this judgment has had on the area of maintenance payments under the provisions of the Family Law (Maintenance of Spouses) Act,

1976, it will now be almost impossible to have a defaulting debtor sanctioned for the non-payment of maintenance.

Again in another recent case which will have an enormous impact for the District Court, is the decision by the Supreme Court entitled *Carmody v. The Minister of Justice Equality and Law Reform, Ireland and the Attorney General*.[13] In short, Mr. Carmody was charged with several offences under the Diseases of Animals Acts. The charges were to be dealt with in the District Court and Mr. Carmody was assigned a solicitor, but not counsel, under the criminal legal aid scheme. The prosecution had, as was their practice, instructed counsel to prosecute the case in the District Court. Mr. Carmody sought a declaration of incompatibility in respect of the Criminal Justice (Legal Aid) Act, 1962 on the grounds principally that the legal aid arrangements did not provide effective representation as required by Article 6 ECHR. A constitutional challenge was also pursued.

This case came before the High Court in 2005. As the challenge raised both a constitutional question as well as the Convention issues, Laffoy J. decided to deal with the Convention points first and the constitutional issue second. She found that the 1962 Act was not incompatible with either the Convention or the Constitution. The case was then appealed to the Supreme Court.

It is interesting to note in the Supreme Court that there was broad agreement between all sides that it was more appropriate to determine the constitutional issue first and the Convention issues secondly. The Court decided that Mr. Carmody had a constitutional right, as he was a defendant in a criminal prosecution, to apply for, and have determined by the court or other appropriate body whether he should be granted legal aid, to include representation by counsel as well as by a solicitor in the District Court.

The Court was further satisfied that the constitutional remedy being afforded to Mr. Carmody was a sufficient remedy and that it did not need to go on to consider whether the 1962 Act was compatible with the Convention.

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[13] *Carmody v. The Minister for Justice Equality and Law Reform Ireland and the Attorney General* [2009] I.E.S.C. 71; *Carmody v. The Minister of Justice Equality and Law Reform and others* [2005] I.E.H.C. 10.

In considering this case, it is an extremely worthwhile exercise to read the High Court decision also as it provides a very interesting insight into the approach of the higher courts. Again by coincidence, this was another judgment of Laffoy J. Firstly, it was a case which was started by way of plenary summons in December 2000, and the matter then came before the High Court in 2005. Secondly, while the proceedings were initiated prior to the advent of the ECHR Act in 2003, despite this the Judge allowed the proceedings to be amended to include the Convention arguments, despite the issue of retrospectivity being raised. It is interesting to contrast this with *Fennell* decision which was also decided in 2005.

Indeed in the course of her judgment the Judge adopted the approach of dealing with the Convention issues first and the constitutional argument second. In any case the plaintiff failed on both the Convention point and the constitutional point.

Following the decision in the Supreme Court the Department of Justice, Equality and Law Reform have now introduced a non-statutory scheme whereby a judge can assign counsel in the District Court if the circumstances are appropriate.