THE SUPREME COURT

265/08

Murray J.
Hardiman J.
Fennelly J.
Finnegan J.
McKechnie J.

Between

ANTHONY DONEGAN

Plaintiff/Respondent

And

DUBLIN CITY COUNCIL

First Named Defendant

And

IRELAND AND THE ATTORNEY GENERAL

Defendants/Appellants

34/09, 54/09, 65/09

Between

DUBLIN CITY COUNCIL

Complainant

And

LIAM GALLAGHER

Defendant

And

THE ATTORNEY GENERAL

Notice Party/Appellant

JUDGMENT delivered on the 27th day of February, 2012 by McKechnie J.

1. At the direction stage of the appellate process, it was ordered by this Court that the appeals lodged in the actions above described should be heard together. These appeals essentially relate to the impact which Articles 6, 8, 13 and 14, but in particular Article 8, of the European Convention on Human Rights ("the Convention") have on the operation of s. 62(3) of the Housing Act 1966 ("the Act of 1996"). Although heard separately in the High Court by Laffoy and O'Neill JJ. respectively, each judge made a declaration of incompatibility regarding s. 62(3) of the Act of 1966, under s. 5 of the European Convention on Human Rights Act 2003 ("the Act of 2003"). Whilst there is considerable overlap between the two cases as presented, there are however, a number of differences which will have to be considered. Although the facts of the cases are set out fully in the judgments of the High Court (*Donegan v. Dublin City Council, Ireland and the Attorney General* (unreported, High Court, Laffoy J., 8th May, 2008) [2008] IEHC 288 and *Dublin City Council v. Gallagher* (unreported, High Court, O'Neill J., 11th November, 2008) [2008] IEHC 354, nonetheless a summary in relation to each case is necessary, so as to contextualise this judgment, which covers both cases.

2. As will become evident in a moment, the tenancy agreement attaching to the dwelling house in each case, contains identical terms which conveniently can be outlined at this point:-

• Clause 1, whereby the council let the premises to… for one week commencing on the day of … and "…so from week to week or until the tenancy shall be determined …."

• Clause 13(a), which is in bold print and provides:

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

• Following paras. (b) and (c) of clause 13, which contain definitions of "neighbours" and "nuisance, annoyance or disturbance", there is a warning in the following terms, also in bold print:

"A tenant evicted for a breach of this condition or part of it will be deemed for the purposes of re-housing to have deliberately rendered himself homeless within the meaning of Section 11(2)(b) of the Housing Act 1988 and may be not provided with another home by the Council until such time as the Council is satisfied that the evicted tenant and his family are capable of living and are agreeable to live in the community without causing a further breach of this condition".

• Clause 25, which provides that the Council shall have a right to re-enter upon and

resume possession of the dwelling for breach, non- performance or non observance of any of the provisions of the letting conditions,

• Clause 26, which provides that "the tenancy may be terminated at any time on the giving of four weeks notice by the tenant or the Council."

• Clause 28, which provides that on the termination of this tenancy, the tenant shall "peacefully and quietly deliver up possession of the dwelling to the Council".

Donegan v. Dublin City Council, Ireland and the Attorney General:

Facts:-

3. Mr. Donegan had previously been a tenant of a Dublin City Council ("the Council") flat, for some 16 to 18 years, before moving to a house at 71 Bridgefoot Street, Dublin, by virtue of a tenancy agreement dated the 22nd August, 2002. His son, born in 1980, lived with him in the flat and moved with him to the house.

4. On the 20th November, 2003, An Garda Síochána searched the house on foot of a search warrant issued under the Misuse of Drugs Acts 1977/84. No unlawful drugs were found. The search was reported to the Council through a community source. The Council then requested and was furnished with a report by An Garda Síochána under s. 15 of the Housing (Miscellaneous Provisions) Act 1997 ("the Garda Report"). The Garda Report, dated the 9th December, 2003, stated that substantial evidence had been uncovered in the son's bedroom during the search which indicated that heroin was being prepared and packed for sale on the streets. It further stated that other "drug paraphernalia" was found, including several blood filled syringes, bloodied swabs, dirty needles and needle caps, and that such items were brought to Mr. Donegan's attention, along with the fact that "his son was known to be selling heroin on the streets".

5. Following receipt of the report, the Council initiated an investigation into alleged "serious anti-social behaviour". On the 22nd January, 2004 the Council wrote to Mr. Donegan offering him an opportunity to respond to the points raised and presenting his view. He was warned that if the complaints were confirmed, the Council might commence proceedings for repossession of the house. On the 2nd February, 2004, Mr. Donegan met with a Council official and he was read portions of the Garda Report, the contents of which have been outlined above. Mr. Donegan denied the allegations and contended that only one plastic bag was found and the used syringes were for his son's personal use. The Council, as an alternative to seeking repossession of the property, gave him the option of taking out an order against his son, excluding him from the premises. On 11th February, 2004, Mr. Donegan's solicitors wrote to the Council indicating that their client was anxious to co-operate, but that neither he nor members of his household were responsible for anti-social behaviour. To this end, he had

requested his son to provide details of urine analyses to the Council, to confirm that he was not taking any "unprescribed drugs". No reply was received from the Council to either that or a reminder letter. In fact a request made under the Freedom of Information Act 1997, was not responded to until the 30th November, 2004 which was after the service of the Notice to Quit.

6. A second meeting took place on the 19th April, 2004. Once more, sections of the Garda Report were read to Mr. Donegan, which he again explained in the manner above stated. The option of obtaining an exclusion order was further raised and he was given time to consider such option. At this meeting, Mr. Donegan furnished the Council with a letter from a clinic which his son was attending, and also with a letter from his son consenting to the release of results of analyses carried out by the clinic.

7. The next meeting took place on the 8th June, 2004, by which time the Council had obtained from the Gardai, further information regarding the search, in a letter dated 18th May, 2004. This letter recorded in particular that plastic bags with small neat circular holes in them were discovered, which in the Garda's experience are used to bag heroin. Again the option of an exclusion order was put to Mr. Donegan: he responded that he could not apply for such as his son was not a drug pusher, but an addict, who was addressing his addiction. The Council requested him to provide information in this regard: this was done by a letter from a doctor dated the 10th June, 2004 offering his son a place in weekly group therapy sessions for cocaine users.

8. The final meeting took place on the 7th September, 2004. Again the option of getting an exclusion order was raised but was responded to as previously. Of some significance is the fact that this by date, s. 197 of the Residential Tenancies Act 2004, amending s. 3 of the Housing (Miscellaneous Provisions) Act 1997, had come into force, which permits the Council to apply for an exclusion order, if the tenant does not intend to do so "for whatever … reason". The Council could therefore have made the application itself if it so wished: however, if it had it would have entailed an examination on the merits of the complaint against the son, and of the son's and Mr. Donegan's response to it.

9. The tenant was served with a Notice to Quit dated 18th October, 2004, which sought possession on 7th February, 2005. Proceedings under s. 62 of the Act of 1966 were initiated in the District Court on the 22nd March, 2005, as by that date possession had not been surrendered. In the events which have occurred, these stand adjourned pending the outcome of these proceedings, which were initiated in the High Court by Plenary Summons on 20th October, 2005.

The High Court decision:

10. In the High Court, oral evidence was given by Mr. Donegan and the Council official

who had conducted all of the interviews with him. The Council also called the Garda Sergeant who wrote the Garda Report, and another Garda involved in the search. Evidence was also adduced that Mr. Donegan's son had pleaded guilty, on the 7th March, 2005 at Kilmainham District Court, to offences under ss. 3 and 15 of the Misuse of Drugs Act 1977: the date of the offences being the 20th May, 2003.

11. Laffoy J. noted that the factual dispute between Mr. Donegan and the Council relates to the status of Mr. Donegan's son as a drug addict, as opposed to a drug dealer. There is otherwise no dispute between the Council and Mr. Donegan, who is an employee of the Council, and who has always paid his rent and otherwise discharged his obligations under the tenancy agreement.

12. Having referred to the Supreme Court's rejection of the constitutional challenge to s. 62(3) of the Act of 1966, in *State (O'Rourke) v. Kelly* [1983] I.R. 58 (para. 94 infra), - holding that its provisions did not constitute an unwarranted interference in the judicial domain - Laffoy J. noted, by reference to the dicta of Kearns J. in *Dublin City Council v. Fennell* [2005] 1 I.R. 604 (para. 97 infra), that the challenge of Mr. Donegan was somewhat anticipated. In essence the plaintiff contended that the process embodied in s. 62 of the Act of 1966 does not contain the requisite procedural safeguards so as to afford him the right to respect for his private and family life and his home, as guaranteed by Article 8 of the Convention. Whilst Articles 6, 13 and 14 and Article 1 of the First Protocol (peaceful enjoyment of possession) were also relied upon, this in substance is an Article 8 case. In this regard the decision of the European Court of Human Rights ("ECtHR") in *Connors v. United Kingdom* [2004] 40 E.H.R.R. 189 was heavily relied upon.

13. The decisions of the ECtHR on Article 8 of the Convention, which include *Larkos v. Cyprus* [1999] 30 E.H.R.R. 597, and the aforementioned Connors were then considered. The consideration of Connors preceded on the basis that since a "home" was involved, Article 8 was engaged, that the interference was "in accordance with law" and pursued a legitimate aim; therefore the only question was whether the interference was "necessary in a democratic society". In this regard Laffoy J. quoted from para. 81 (necessity and proportionality) and para. 83 (procedural safeguards) of the judgment. She then referred to the court's conclusion which was to the effect that the procedural safeguards in place, including the possibility of judicial review, were insufficient to justify the serious interference with the complainant's rights and thus, such interference "cannot be regarded as justified by a pressing social need or proportionate to the legitimate aim being pursued" (para. 95).

14. The learned judge also referred to the decision of the ECtHR in *Blecic v. Croatia* [2004] 41 E.H.R.R. 13. The court in that case rejected the argument that the procedures involved breached Article 8 of the Convention on the basis that, inter alia,

the applicant had an opportunity at first instance, aided by counsel, to fully present her case, and whilst the appeal process was of a review nature only, nonetheless she had further opportunities at each stage to make her views known. It was for these reasons that the ECtHR was satisfied that there had been no violation of Article 8.

15. Laffoy J. continued by considering the post-Connors United Kingdom ("U.K.") authorities *(Harrow LBC v. Qazi* [2004] 1 A.C. 983; Kay v. Lambeth LBC [2006] 2 A.C. 465; *Leeds City Council v. Price* [2006] EWCA Civ. 1739; *Doherty v. Birmingham City Council* [2006] EWCA Civ. 1739; *Hughie Smith v. Buckland* [2007] EWCA Civ. 1318). It is not necessary to outline in detail how the learned judge analysed these cases, save for the manner in which she dealt with one point: she did so, having regard to the conclusions reached in Hughie Smith, by stating:-

"[I]t is the act of eviction, rather than the act of making a possession order, which interferes with a person's right to respect for his home … [T]hroughout the judgment in Connors the emphasis is on eviction rather than on the possession order, citing by way of example paras. 68, 85, 89, 92, 94 and 95. I think that a distinction exists. In the plaintiff's case it was not the decision to serve the notice to quit, or the service of the notice to quit which interfered with his Article 8 rights. Rather, the application for a warrant for possession under s. 62 is an anticipatory interference with his rights under Article 8, because of the inevitability that the application will be successful."

16. The trial judge also undertook a consideration of the High Court decision of Dunne J. in Leonard v. Dublin City Council & Ors. (unreported, High Court, Dunne J., 31st March, 2008) [2008] IEHC 79. Again it is not necessary to set out in detail this analysis. However, in summing up the differences between Leonard and the present case, Laffoy J. noted that:-

"Ms. Leonard's challenge to s. 62 focussed on the procedure before the District Court. The complaint was not that the Council was not entitled to terminate the tenancy agreement for the reasons stated. As is clear from the judgment, Ms. Leonard admitted that she was in breach of s. 13. Unlike the situation which prevailed in Connors and the situation which prevails in this case, there was no factual dispute concerning the reason for terminating the tenancy and the Council's entitlement to do so."

The reference to "s. 13" was clearly intended to refer to clause 13 of the Tenancy Agreement (para. 2 supra).

17. In concluding on whether there had been an infringement of Article 8 of the Convention, having noted that she was satisfied that Mr. Donegan's case fell squarely within the core principles established by the judgments in *Connors* and *Blecic*, Laffoy J. made a number of preliminary observations before outlining how those judgments applied to the case at hand:

i) What transpired between the Council officials and Mr. Donegan, from late January,

2004 until 4th October, 2004, the date of the managerial order directing the service of the Notice to Quit, cannot be viewed as a procedural safeguard or as a method of review of the Council's decision-making process, it was an investigation;

ii) In line with the decision in *Hughie Smith v. Buckland* [2007] EWCA Civ. 1318, it was the outcome of the s. 62 application which gives rise to an interference with the tenant's rights under Article 8 of the Convention, not the service of the Notice to Quit;

iii) Had judicial review been sought by Mr. Donegan immediately after the issuance of the Notice to Quit, his application "would have had no prospect of success" and judicial review does not constitute a proper procedural safeguard where this is a dispute of facts (notwithstanding the actual wisdom of the Council in advocating judicial review as an answer to the question of procedural safeguards); and

iv) Section 3 of the Act of 2003 is not an effective remedy under domestic law for the purposes of Article 13 of the Convention.

18. On foot of Connors and Blecic, Laffoy J.'s disposition of the case was:

i) the house is Mr. Donegan's home for the purposes of Article 8;

ii) if a warrant for possession is obtained under s. 62 of the Act of 1966 and executed, it will interfere with his rights under Article 8 of the Convention;

iii) under Irish law, applying s. 62, there is no defence to the Council's claim for possession and, accordingly, the interference will be in accordance with law, and;

iv) the interference has a legitimate aim, namely good estate management by the Council, including the necessity to take steps to avoid or prevent anti-social behaviour, and the due discharge of its statutory obligations to provide accommodation for qualifying persons.

19. The only question which remained was whether the interference is necessary in a democratic society. In this regard Laffoy J. noted that one must ask whether the interference answers a pressing social need and is proportionate, and in light of Connors and Blecic, it is not. In particular, in assessing the proportionality of the interference "it is necessary to assess whether the decision-making process leading to the measures of interference is fair and such as to afford due respect for the interest safeguarded by Article 8." Ultimately she concludes, in light of her previous findings, that s. 62 therefore infringes Article 8 of the Convention.

20. Having found that s. 62 was not capable of a Convention compatible interpretation applying s. 2 of the Act of 2003, Laffoy J. was satisfied that this was an appropriate case in which to grant a declaration of incompatibility under s. 5(1) of the Act of 2003:

"[I]nsofar as it authorises the District Court, or the Circuit Court on appeal, to grant a warrant for possession where there is a factual dispute as to whether the tenancy has been properly terminated by reason of a breach of the tenancy agreement on the part of

the tenant in the absence of any independent machinery for an independent review of that dispute on the merit being available at law."

21. A Notice of Appeal was lodged on the 29th July, 2009 by Ireland and the Attorney General, which was later supported by extensive written submissions.

Dublin City Council v. Gallagher:

Facts:-

22. The mother of Mr. Gallagher occupied, under a tenancy created by the Council, No. 11 Adare Road in Dublin 17, for several years prior to her death. The essential terms of the letting agreement, were those as set out at para. 2 supra. In addition and what is relevant to this case is the fact that the rent payable was differentially calculated, the amount of which was directly related, inter alia, to those living in the premises whose income should be included for that purpose. Mr. Gallagher did not live with his mother between August, 1995 and May, 1997 when he resided with his partner elsewhere: such is not in dispute. Neither is the fact that his name was removed from the rent account of the premises in August, 1995, and was not re-entered at anytime thereafter. An issue, but not the only one, is where in fact he did reside from May, 1997 to July, 2005.

23. Mr. Gallagher's mother died on the 12th July, 2005. On the 25th August, 2005 he made an application to the Council to succeed to his mother's tenancy. The Council rejected this application by letter dated 20th September, 2005, on the grounds that Mr. Gallagher did not fulfil either of the criteria set down in the Council's Scheme of Letting Priorities for succession to tenancies, created under s. 60 of the Act of 1966, which were that:-

i) he had resided at the address for a period of two years immediately prior to his mother's death; and,

ii) he was on the rent account for the premises during the same two year period.

24. At Mr. Gallagher's request he met with the Council and subsequently submitted additional documentation in support of his position as to residency, which according to the Council's letter of rejection on the 5th January, 2006, was only to the effect that he had been living there for two and a half years prior to July, 2005. Following this unsuccessful effort of persuasion, the Council issued and served a Notice to Quit and Demand for Possession on Mr. Gallagher and on the personal representatives of his mother's estate. A Summons under s. 62 of the Act of 1996 was then served to recover possession of the property.

25. During the resulting proceedings before the District Court, the Judge made certain findings of fact, including (i) that, save for the aforementioned 2 year period, Mr.

Gallagher had continuously lived with his mother at No. 11 Adare Road and had regarded such dwelling as his permanent residence and (ii) that he had not been on the rent account or assessed for rent in respect of that property since August 1995. As can be seen the first finding was contrary to that previously made by the Council. Before the District Court Mr. Gallagher argued, that the Act of 2003, when enacted, imposed a requirement of evidentiary and fair procedures on the Council, when seeking a warrant for possession under s. 62 of the Act of 1966. The District Judge, on foot of these submissions, therefore decided to pose four questions to the High Court, by way of case stated.

26. These were as follows:

"1. Is there an obligation on the District Court by virtue of section 2 of the European Convention on Human Rights Act 2003, to interpret section 62 of the Housing Act 1966, as amended by section 13 of the Housing Act 1970, insofar as is possible in a manner compatible with the State's obligations under the Convention in proceedings issued by the Complainants under section 62 of the Housing Act, 1966 as amended by section 13 of the Housing Act, 1970 subsequent to the coming into operation of the said European Convention on Human Rights Act 2003?

2. If the High Court answers Question (1), above in the affirmative, in appearing to a summons in the District Court issued pursuant to proceedings under section 62 of the Housing Act 1966 as amended by section 13 of the Housing Act 1970, does a District Court Justice have a discretion to explore the merits of the matter, and is he/she then entitled to address the merits of the aforesaid procedures in endeavouring to show cause why a warrant under section 62 of the said Act should not issue for delivery of possession of the relevant dwelling to the Complainants in reliance upon Articles 6, 8 and 13 of the Convention and Article 1 of the First Protocol thereto?

3. In appearing to a summons in the District Court issued pursuant to the procedures provided for under section 62 of the Housing Act 1966 is a Defendant entitled to address the merits of the aforesaid procedures in endeavouring to show cause why a warrant under section 62 should not issue for delivery of possession of the relevant dwelling to the Complainants in reliance upon Articles 6, 8 and 13 of the Convention and Article 1 of the First Protocol thereto?

4. Is the effect of section 2 of the European Convention on Human Rights Act 2003, that a local authority must adduce evidence in proceedings under section 62 of the Housing Act 1966, as amended, justifying its decision to terminate a tenancy and/or to seek a warrant for possession?"

27. In essence, advice was sought as to whether s. 2 of the Act of 2003, placed an obligation on the District Court to interpret s. 62 of the Act of 1966, insofar as possible, in a manner compatible with the State's obligations under the Convention,

and if so, to what extend could the District Judge enter into the merits of the decision to seek delivery of possession of the relevant dwelling.

The High Court decision:-

28. O'Neill J. in the High Court, outlined his approach to the questions posed in the manner following:-

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

29. O'Neill J. therefore proceeded to consider the correct way in which s. 62 of the Act of 1966 had to be interpreted in light of s. 2 of the Act of 2003. He noted that there was a significant difference between the wording of s. 2 of the Act of 2003 and the analogous U.K. provision, in s. 3(1) of the Human Rights Act 1998 ("the U.K. Act"). In particular the U.K. Act did not contain the phrase "subject to the rules of law relating to such interpretation", as contained in s. 2 of the Act of 2003, but instead stated that: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

30. This difference meant that whilst the Irish courts were bound to continue applying the rules of construction which had applied prior to the Act of 2003, the U.K. courts were not so bound: therefore they were afforded a far greater range of manoeuvre in imposing a compatible interpretation on a statutory provision in light of the Convention. In this regard he noted the judgments of Lord Hope and Lord Steyn in *R v. A* [2001] 3 All E.R. 1.

31. In considering the construction of s. 62 of the Act of 1966, O'Neill J. applied Fennell (para. 12 supra) to the effect that on a s. 62 application, the District Court had no discretion to explore the underlying merits and had no jurisdiction to address the procedures employed by the Council in arriving at its decision to terminate the tenancy: in effect it was a "rubber stamping" exercise, so that once the proofs were established, the District Court had to grant the order.

32. The judge, in arriving at this conclusion, rejected an argument to the effect that it was possible to construe s. 62 of the Act of 1966 together with s. 86 of the Landlord

and Tenant Law Amendment Act Ireland 1860 ("Deasy's Act"), as obliging the District Court to hear and determine the application on the basis of the merits of the case. On such submission his opinion was:

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

Indeed he noted that even had the more expansive U.K. provisions been concerned, this still would have been impermissible.

33. Having therefore found that it was not possible to read s. 62 of the Act of 1966 in a Convention compliant manner, in accordance with s. 2 of the Act of 2003, he proceeded to deal with the matter firstly in the context of Article 8 of the Convention and having done so by then invoking s. 5 of the Act of 2003. Being satisfied, that the property was Mr. Gallagher's "home" which of itself invoked Article 8, that the interference was in accordance with law and had a legitimate aim, being the regulation of a limited housing stock required to be distributed in accordance with the Council's Scheme of Letting Priorities, he concluded that the only issue was whether it was "necessary in a democratic society".

34. Citing Connors (paras. 12 and 13 supra), he noted that the ECtHR had also recognised that Article 8 encompasses implicit procedural requirements, and that these must be considered when assessing the proportionality of any interference with Article 8 rights. In this regard such requirements were similar to the constitutional guarantee of fair procedures which flows from Article 40.3.1 of the Constitution (In re Haughey [1971] I.R. 217 and Flanagan v. University College Dublin [1988] 1 I.R. 724 cited). O'Neill J.'s conclusion on this point was:-

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

'50. The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in

principle be able to have the proportionality of the measure determined by an independent tribunal in 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.'"

35. In relation to the alleged infringement under Article 6 of the Convention, the learned judge considered *McCann v. United Kingdom* [2008] E.C.H.R. 385, in which the ECtHR had found that the complaint was more properly referable to Article 8, and that no separate issue arose under Article 6 of the Convention, since complaints relating to the fairness of proceedings may only relate to the actual determination of one's rights and obligations. In McCann it was accepted that it was the courts, rather than the local authority, which ultimately made a determination of the applicant's civil rights and obligations. O'Neill J. distinguished the situation with regards to Mr. Gallagher, noting that:-

"[U]nlike the McCann case, there was a determination of the defendant's rights by the complainant, insofar as it made the decision that the defendant was not entitled to succeed to the tenancy. There was no appeal from this decision within the decision making structures of the complainant and the issue could not be opened up again in the s. 62 proceedings as discussed above. Thus I am satisfied that I should adopt a different approach in this regard to the McCann case and am inclined to conclude that the defendant's complaint about the procedures followed by the complainant to determine his claim to succeed to his mother's tenancy engaged his Article 6 rights."

He was however satisfied that insofar as Mr. Gallagher's Article 6 rights were engaged, they were confined to the process carried out internally by the Council; no complaint having been made as to the fairness of the conduct of proceedings before the District Court.

36. Considering Connors, O'Neill J. did conclude however that the restriction in s. 62 of the 1966 Act, to exclude a hearing on the merits did not raise fair procedures grounds. Rather, this restricted jurisdiction gave rise to grounds of complaint under Article 8 of the Convention, since these proceedings resulted in the final legal instrument which deprived Mr. Gallagher of his home, in circumstances where he did not have a hearing of his case on the merits, thus depriving him of procedural safeguards deemed essential by the ECtHR.

37. Having considered the cases of Leonard (para. 16 supra) and Donegan (paras. 3 to 21 supra) and in particular the way in which Laffoy J. distinguished the former from the latter, (para. 16 supra) he was therefore satisfied that:

"[T]he defendant's rights under Articles 6 and 8 of the Convention and his right to fair procedures under Article 40 of the Constitution have not been adequately protected in this entire process."

Furthermore, he concurred with the opinion expressed by Laffoy J. in Donegan that in

the present circumstances, where there would be no question of a hearing on the merits, judicial review could not be described as a sufficient "procedural safeguard" as required by Article 8 of the Convention.

38. Finally he noted that he was entitled to make a declaration under s. 5 of the Act of 2003 in a case stated procedure in light of the phrase "in any proceedings" contained therein. He therefore made such a declaration that s. 62 of the Act of 1966 is incompatible with the Convention.

39. The Attorney General and the Council, by Notices of Appeal dated the 19th and 20th February, 2009 respectively, appealed this decision, and Mr. Gallagher cross-appealed on the 24th February, 2009. The grounds relied upon by all parties were expanded upon in written submissions, which are considered below.

Submissions:-

40. A number of submissions have been received from the Attorney General, the Council and Messrs. Donegan and Gallagher. The latter will be dealt with together as they cover broadly similar ground. Where significant differences or case specific arguments arise, these will be identified.

41. The Attorney General lodged submissions in Donegan on the 30th April, 2010 and in Gallagher on the 21st October, 2009. These submissions were substantively the same, save for a number of issues which related specifically to Mr. Gallagher's case; his being later in time.

42. At the outset the Attorney General notes that whilst the judgments are careful and considered, if upheld the decisions would have far-reaching implications, which extend beyond the law of recovery of local authority dwellings. In particular, whilst it is not explicitly stated, the judgments would appear to envisage a comprehensive judicialisation of the process of recovery of possession of local authority housing; requiring a hearing on the merits and an assessment of the proportionality of the grant of a warrant for possession either by the District Court or some other independent review body. If there were disputed issues of fact, this might require summonsing witnesses, oral evidence and cross-examination. Given the issues to be considered in such proceedings, it is also arguable that legal aid would be required (see comments of O'Caoimh J. *in Byrne v. Scally* (unreported, High Court, O'Caoimh J., 12th October, 2000) [2000] IEHC 72). Such requirements, it is stated, would reduce the summary process for recovery of possession, to a slow and expensive "gridlock". This court should therefore carefully scrutinise the decisions, given the far-reaching practical implications which could arise therefrom.

43. The next matter which the Attorney General takes issue with, is that the s. 62 proceedings were in some way deficient because they did not permit a hearing "on the

merits" and/or in relation to the "proportionality" of the Council's decision. There is nothing improper in the District Court on an application under s. 62 of the Act of 1966, being confined to a consideration of a limited number of matters, and not being in a position to substitute its own views for those of the Council. In particular, given the competing right of the Council to recover its property, and its public law obligations to manage the housing stock, and take account of others, including neighbours and prospective tenants, summary proceedings are justified, by reference to the Convention. Were the District Court required to decide upon the proportionality of the Council's decision, it could not do this without adequately knowing the extent of the housing available, the number seeking accommodation, the other demands on the Council's budget, and also perhaps the views of neighbours, family members and other parties. Such matters are ill-suited to the decision-making process of the court.

44. The Attorney General observes that s. 62 of the Act of 1966, cannot be viewed in isolation, and must be considered in the entirety of the legal context applying to local authority housing, including the remedies available to a tenant or prospective tenant, before deciding on its compatibility with Article 8 of the Convention. It should be noted that far greater protections are afforded to public housing tenants than to private tenants. In this regard, significant opportunities are available to challenge the procedures and actions of the Council and their application in individual cases; for example by reference to the constitutionality of the legislation, the vires of the regulations and schemes made thereunder, the fairness of the procedures adopted, or the compatibility of the foregoing with the Convention. A case in point is *Wynne v. Dublin Corporation* (unreported, High Court, Shanley J., 22nd July, 1998) where the High Court held that the decision of the Council to issue a Notice to Quit was invalid for failing to take into account all the relevant circumstances at the date of the issuance of that notice (see also *Bristol District Council v. Clarke* [1975] 3 All E.R. 976). None of these remedies would be open to a private tenant.

45. A number of Irish cases are drawn to the court's attention. In particular *The State (O'Rourke) v. Kelly* (para. 12 supra); *Dublin City Council v. Hamilton* [1999] 2 I.R. 486, and *Byrne v. Scally* (para. 42 supra). From these decisions it is contended that it is clear that there is nothing improper in the District Court, on a s. 62 application, being confined to consider only issues of proof and not being required to consider justification from the Council or to grant legal aid to a defendant. The comments of the Supreme Court in Fennell (para. 12 supra)should be noted in this regard: although holding that the Convention could not be invoked in relation to proceedings instituted before the coming into force of the 2003 Act, the court observed that s. 62 had survived constitutional and judicial scrutiny "not least because of the obvious need of a housing authority to be able to effectively manage and control its housing stock without being

unduly restricted or fettered while so doing."

46. Although the High Court in the instant case relied upon the decisions of the ECtHR in *Connors* (paras. 12 and 13 supra) and McCann (para. 35 supra) these only form part of a line of developing authority, which does not appear to have reached its terminus and which is more complex that suggested by either High Court judgment. In particular reference is made to the U.K. cases (cited at para. 15 supra) of *Harrow LBC v. Qazi, Kay v. Lambeth LBC, and Doherty v. Birmingham City Council*. Following a detailed analysis of these cases, and their consideration of the jurisprudence of the ECtHR as recorded, in particular in Connors and McCann, the Attorney General submits that it is clear that the repeated attempts by the House of Lords, on the one hand, and the ECtHR, on the other, to resolve the question of the application of the Convention to possession proceedings for public authority housing has given rise to "considerable confusion and indeed frustration". It cannot, it is submitted, be presumed that the position is resolved or clarified. In such circumstances this court should adopt the approach of Lord Hope in *Qazi*, namely that each case should be determined on its own facts and broader generalisations should be avoided. In this regard, the approach adopted in the High Court is far too sweeping, and too far removed from the specific facts of the case. It is entirely possible for the court to resolve, on narrower grounds, the issues in the present cases, without recourse to a Declaration of Incompatibility.

47. Whilst it is admitted that the ECtHR has found that the remedy of judicial review in the U.K. is not of itself sufficient to comply with the Convention requirement under review in the instant cases, it is however submitted that this conclusion cannot be applied to all cases, nor does it mean that any deficiency, if such continues to exist, cannot be remedied. In particular the Attorney General notes that judicial review is an extraordinarily powerful remedy, which has been extremely effective in the control of administrative action. It extends beyond a reconsideration of the facts and can invalidate actions irrespective of the merits. It is an over-generalisation to say that the procedure cannot resolve any factual controversy. On judicial review, where it is determined that there is a matter of fact in controversy, which is relevant to the dispute, it is commonplace for discovery and cross-examination to be available. Further, there is jurisdiction to quash decisions on the basis that a tribunal has proceeded on an "incorrect basis of fact" (see *Secretary of State, Education and Science v. Tameside* [1977] A.C. 1014 at 1047; De Smith, Judicial Review (Sweet and Maxwell, 6th ed., 2007), paras. 11-048 to 11-051; Craig, "Judicial Review Appeal and Factual Error" (2004) Public Law 788; and, Daly, "Judicial Review of a Factual Error in Ireland" (2008) 30 D.U.L.J. 187), and it is accepted that there is jurisdiction to direct judicial review proceedings to continue by way of plenary hearing. The limitation in relation to fact finding in judicial review is therefore not a general one. Whilst it is true that review

on the ground of unreasonableness, established in State (Keegan) v. Stardust Tribunal [1986] I.R. 642, has been applied, so that a court will not review the conclusion of a decision-maker unless it is one which not reasonable body could have come to, the structure of unreasonableness and irrationality recognises the separation of powers between the courts and administrative decision-makers.

48. Even if judicial review was considered to be an insufficient procedural safeguard, the Attorney General argues that the court should consider if, as discussed in Doherty, it is possible to make adjustments to its procedures to satisfy the requirements of the Convention. In this regard if adapted, such procedures should be sufficient to constitute "respect" for the home of the applicant. Furthermore, judicial review would in any event seem peculiarly suited to disputes such as have arisen, where it is only in highly exceptional circumstances that a court would consider, that the Convention required a party seeking possession, to do more than had been agreed when the tenancy was first established.

49. Ultimately it is only if the range of remedies available, including judicial review, is considered to be inadequate, at least to satisfy Article 6 of the Convention, that the question of compatibility of s. 62 of the Act of 1966 would arise. Even should the compatibility of s. 62 of Act of 1966 be considered, it should be borne in mind that the words contained in s. 2 of the Act of 2003, "subject to the rules of law relating to such interpretation and application", qualify the preceding words "in so far as possible". It is only if no Convention compatible interpretation is open, should the court consider making a declaration under s. 5 of the Act of 2003. It is further submitted, in any event, that even if the court were to conclude that it was necessary to permit the District Court to consider the reasonableness of the Council's decision, then it is still possible to do so, by reference to the Landlord and Tenant Act (Amendment) (Ireland) 1860 ("Deasy's Act"). A Declaration of Incompatibility should not, therefore, have been made in relation to s. 62(3) of the 1966 Act.

50. A number of points were raised by the Attorney General in relation to Mr. Gallagher only, and these will now be outlined. The Attorney submitted that the analysis of the High Court proceeds on the basis that this case is at least functionally indistinguishable from the situation in *Donegan* (paras. 3 to 21 supra) and Leonard (para. 16 supra). However, there are significant factual and legal differences in this case which, if they had been identified, would have given rise to a different result. Firstly, it is submitted that, Mr. Gallagher is not, nor ever has been, a tenant of the Council. He therefore had no legal right to be on the premises. In this regard it is important to bear in mind that Article 8 of the Convention does not confer a right to a home (*Chapman v. United Kingdom* [2001] 33 E.H.R.R. 399, at para. 99; Kay (para. 15 supra)). The decision to be made by the District Court was whether or not the Council

should be granted an order for possession. If, as is implicit in the High Court judgment, the District Court should be entitled to refuse the order on the grounds that the Council was wrong in refusing to permit Mr. Gallagher to succeed to this mother's tenancy, then a situation may arise, where a person may be in occupation who cannot be removed, and whose occupation is unregulated by any agreement or statutory provision; in effect such a person would become at least a "non-illegal occupier". Such a situation should not be countenanced.

51. The next issue taken with the judgment is the characterisation of there being a dispute as to facts between the parties; in particular with regards to whether Mr. Gallagher had been resident in the premises for the two years prior to his mother's death, which if resolved in his favour would lead to him becoming entitled to succeed to the tenancy, and therefore defeat the s. 62 proceedings. However, it is clear that there is no relevant factual dispute, since it was accepted that Mr. Gallagher had not, in any event, been on the rent book for two years prior. The lack of this prerequisite, under the Scheme of Letting Priorities, was in and of itself, fatal to any application to succeed: consequently, the residency issue was irrelevant. Mr. Gallagher therefore would inevitably have had to fail in his application. It is highly relevant in this regard that Mr. Gallagher did not dispute the rent book issue. It is therefore difficulty to understand what deficiency there can be said to lie in the s. 62 procedure operated in this case.

52. Furthermore, the High Court judgment would seem to contemplate the possibility that a court or tribunal could refuse to grant a warrant of possession, if it considered that the failure to comply with a requirement of the Council's Scheme of Letting Priorities, was merely an oversight or could be excused. This demonstrates the potential breadth of the decision. If this is correct the District Court on an application under s. 62 of the Act of 1966, or some other tribunal, would be entitled to form its own view, in any individual case, as to whether a person complied with the Scheme of Letting Priorities, and further, it seems, would also be invited to consider whether non-compliance should be excused.

53. It is finally submitted in this regard that the question of compatibility of s. 62 of the Act of 1966 with the Convention simply did not arise. There was no relevant factual dispute which, if resolved in his favour, would entitle Mr. Gallagher to a tenancy under the Scheme of Letting Priorities. There was no challenge to the validity of the Scheme of Letting Priorities, or the decision of the Council not to permit Mr. Gallagher to succeed to the tenancy.

54. The Council provided written submissions in *Donegan* on the 2nd June, 2010 and in Gallagher on the 22nd June, 2010. The latter submissions adopted those previously made, and added further and additional points.

55. By way of general overview, the Council submits that Article 8(1) of the Convention guarantees every person the right to "respect" for his private and family life and, as relevant to the instant cases, his home. By virtue of Article 8(2) of the Convention, no interference by a public authority with the enjoyment of these rights is permitted, unless such is in accordance with law, pursues a legitimate aim, as provided for in Article 8(2) of the Convention, and is necessary in a democratic society. The ECtHR has held that any person at risk of an interference with his rights, referable to this home, should in principle, be afforded the opportunity to have the proportionality and reasonableness of the measure determined by an independent tribunal in light of the relevant principles, developed in that regard under Article 8: this notwithstanding that, under domestic law, he or she has no right to occupy the dwelling in question (see *McCann* (para. 35 supra) and *Paulic v. Croatia* [2009] E.C.H.R. 1614 and *McMichael v. United Kingdom* [1995] 20 E.H.R.R. 205.

56. The Council notes that s. 62 of the Act of 1966 has withstood constitutional scrutiny, and supports the arguments of the Attorney General in this regard. It claims that the section has proved to be a "vital tool" in the fulfilment of the Council's housing functions, and forms a key part of its strategy for dealing with anti-social behaviour, especially in light of the "very real difficulty of adducing oral testimony" of such behaviour, should the Council be required to do so in possession proceedings. The Council also undertakes numerous other administrative decisions, some of which have a factual context and thus potentially may engage with Convention rights. Should this Court find that a full appeal on the merits to an independent tribunal is necessary, significant burdens would be placed on the Council pending any legislative amendment, as it would be unable to safely act upon factually based decisions, for fear of being found to have acted in breach of the Convention, and thereby potentially expose itself to claims in damages under s. 3 of the Act of 2003. Such a finding would also have serious implications for the Council's finances and resources.

57. It further contends that, the claim in reality is not that s. 62 of the Act of 1966 is incompatible with the Convention, but rather that no effective remedy is available in respect of the Council's decision: as such this would, at most, be a breach of Article 13 of the Convention. Accordingly, since a Declaration of Incompatibility requires that the court be satisfied that (a) no other legal remedy is adequate and available, and (b) s. 62 is incompatible with the State's obligations, such a declaration should not have been issued in these cases. In this regard, the cases of *Connors, Blecic* and *McCann* should be considered. Although it is clear from these cases that the application of conventional grounds of review in accordance with the test expounded in Associated Provisional Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223 is not sufficient to meet the requirements of Article 8(2) of the Convention, it is argued that the grounds for review presently applicable in this jurisdiction go beyond that test, and are

therefore sufficient; particularly in light of the decisions in *Sweetman v. An Bord Pleanála* [2007] 2 I.L.R.M. 328 and *Meadows v. Minister for Justice Equality and Law Reform* [2010] 2 I.R. 701. It is submitted that judicial review provides an effective remedy, and that it is capable of taking into account issues of proportionality, as well as considering an individual's rights under the Constitution and the Convention.

58. With regard to Mr. Gallagher, it is stated that paramountcy is afforded to the decision to issue a Demand for Possession, and a prompt application for judicial review lies to deal with any complaint that may arise, with the manner in which the decision to refuse the application for succession was made. Furthermore, the specific status of the Convention, having regard to both its nature as an international treaty and "its enactment into law through the Act of 2003" (sic), must be taken into account when applying it (see *McD v. L & Ano'r* (unreported, Supreme Court, 10th December, 2009) [2009] IESC 81), as well as the already substantial jurisprudence in this jurisdiction dealing with human rights. In this regard, the Council submits that it is clear that the learned High Court Judge wrongly sought to give direct effect to the Convention, in particular Articles 6 and 8 thereof, which is impermissible having regard, inter alia, to Article 29 of the Constitution.

59. The Council submits that the High Court was wrong to conclude that Mr. Gallagher's right to fair procedures, under Articles 6 and 8 of the Convention and under Article 40 of the Convention, were not adequately protected. In particular the enactment of s. 11 of the Housing Act 1988, requiring the Council to provide a Scheme of Letting Priorities, and its preceding and amending legislative provisions, essentially give statutory effect to the requirement for fair procedures. Furthermore, s. 62 of the Act of 1966 has already been found to be compliant with Article 40 and the requirement of fair procedures in a series of decisions of the Irish Superior Courts (see *The State (O'Rourke) v. Kelly* (para. 15 supra); *Hamilton* (para. 45 supra); *Fennell* (para. 12 supra*); Rock v. Dublin City Council* (Unreported, Supreme Court, 8th February 2006); *McConnell v. Dublin City Council* (Unreported, Supreme Court, ex tempore, Murray C.J., 15th December, 2008); *Leonard v. Dublin City Council* (No. 1) [2007] I.E.H.C. 404; *Leonard* (No. 2) (para. 16 supra), and; *The State (Kathleen Litzouw) v. Dublin Corporation* [1981] I.L.R.M. 273)).

60. In any event, the Council submits, O'Neill J. was incorrect in proceeding to issue a Declaration of Incompatibility without it ever being argued in the case.

61. In relation to costs, the Council submits that since it is the State which is responsible for the promulgation of legislation, the Council should not be forced to bear the costs in a case to which the Attorney General is party, where the Declaration of Incompatibility is made in respect of legislation.

62. Finally, the Council contends that the analysis carried by the High Court in

relation to the non-applicability of s. 86 of Deasy's Act is correct.

63. The written submissions of Mr. Donegan were lodged on the 6th July, 2010. A number of heads are put forth which it is contended refute the arguments advanced by the Attorney General and the Council. First, it is the eviction which constitutes the interference, and it is the unchallengeable nature of the s. 62 application, which must result in the warrant for possession being incompatible with the Convention.

64. Secondly, it is clear from *McCann* (para. 35 supra) and *Connors* (paras. 12 and 13 supra) that procedural safeguards are required when eviction from one's home is proposed by a public authority, particularly where there is a dispute as to facts. *Connors* was not in this regard confined to the vulnerable position of "gypsies", particularly in light of *McCann*, which did not involve "gypsies" (see also *Blecic*, para. 14 supra).

65. It is submitted that judicial review ought not to be promoted as a primary remedy to cure failures in a statutory scheme, to provide sufficient safeguards in relation to fundamental rights. Matters of evidence, which would include the disputes of fact at issue here, and the weight to be attributed to them are errors within jurisdiction and are not reviewable by way of certiorari (see *Keegan* para. 47 supra). Such is distinct from issues of reasonableness or irrationality. Furthermore, as a matter of practicality, insistence on recourse to judicial review, as an operative remedy fails to take into account to the socio-economic position of most local authority tenants who are, generally, of limited financial means.

66. Mr. Donegan submits that the Council has incorrectly characterised the ratio of the High Court. It is not that judicial review is an inadequate remedy where Convention rights are involved, but rather where there is so severe an intrusion of Article 8 rights as eviction by the Council is, procedural safeguards are required. Where there is a dispute on the facts as to the justification for such intrusion, judicial review cannot offer adequate redress for an aggrieved tenant; some other mechanism, for example independent review, is required. Further, the High Court judgment does not impugn summary proceedings generally, only those in relation to s. 62 of the Act of 1966, which permit no defence once proofs are made out, which take no account of the reasons for the council in seeking possession, and which offer no independent review. It is noteworthy in this regard that private residential tenants are afforded far greater protection under the Residential Tenancies Act 2004.

67. With regards to the U.K. case law mentioned by the Attorney General and the Council, it should be noted that it is of course the ECtHR decisions that must be taken into account when interpreting and applying the Convention and not U.K. law, although the latter may of course illuminate the common law context of the Convention's application. In any event, the U.K. regulatory framework for local

authority tenants is notably different from the Irish provisions. In particular, in England the majority of local authority tenants occupy properties under "secure tenancies", within the meaning of Part IV of the Housing Act 1985. Crucially, a local authority landlord is required to establish specified grounds for possession (set out in Schedule 2 of the Housing Act 1985), and to demonstrate to the County Court that it is reasonable to make such an order if sought (see *Manchester City Council v. Pinnock* [2010] 1 W.L.R. 713). Even where a secure tenancy is terminated, eviction is not commenced, and instead a demoted tenancy comes into effect, which effectively provides a one year probationary period, on completion of which the secure tenancy is restored. Where possession proceedings are brought within that period, s. 143E of the Housing Act 1985 requires that reasons for such possession must be stated and that the local authority must inform the tenant of the right to request a review of the decision to serve notice of proceedings for possession. Such review must be carried out by a person not associated with the original decision and may involve an oral hearing. The U.K. system therefore, in fact, offers far greater protections than those under the Act of 1966. Notwithstanding this, the cases referred to in para. 15 supra, namely *Kay, Qazi* and *Doherty*, are simply not analogous with Mr. Donegan's position.

68. Finally it is contended that the High Court decision is fully consistent with the other Irish authorities, such as *Fennell, Leonard* and *Gallagher*. With regards to the constitutional issues in *Hamilton* and *State (O'Rourke) v. Kelly* [1983] I.R. 58 these are not at issue in this case, and those cases did not in any event involve considerations of procedural fairness, rights or family rights.

69. The written submissions of Mr. Gallagher were lodged on the 29th June, 2010 in reply to the submissions of the Attorney General and the Council. He notes that at the heart of the litigation is the absence of any procedure to deal with factual disputes which arise. In this regard it is noted that both the Attorney General and the Council respond that judicial review is a sufficient safeguard in this regard. Issue is taken with the adequacy of such a remedy since, apart from the inability of judicial review to properly deal with conflicts of fact, most judicial review applications fail. Further such requirement would seem patently unfair especially for a class of persons with limited or exiguous means. What is absent, it is submitted, is a transparent process whereby a decision of the Council involving a conflict of facts, adverse to a person's interest can be resolved in a transparent procedure with minimum fuss and delay.

70. In relation to the numerous judgments of the U.K. superior courts referred to by the Attorney General and the Council, Mr. Gallagher submits that, notwithstanding their somewhat unclear nature, these judgments stand in contrast to the recommendations of the recent report of the Joint Committee on Human Rights of the House of Lords and House of Commons entitled "Enhancing Parliament's Role in

relation to Human Rights Judgments" (HL Paper 85, 2010). This report preferred primary legislation to deal with the application of the ECtHR decisions in Connors and McCann, rather than repetitive litigation before the courts, and the consequential referrals to the ECtHR. Furthermore, in a recent judgment of the U.K. Superior Courts in *Coombes v. Waltham Forest LBC and Secretary of State for the Communities and Local Government* [2010] All E.R. 940, Cranston J. noted:-

"These Irish cases [Donegan and Gallagher] deserve close attention. There are, however, some important distinguishing features. For example, under s. 62 of the legislation it seems that once a notice to quit expires the matter moves inexorably to a warrant for possession if formal proofs are in order. Moreover, judicial review before the Irish courts does not seem to enable any resolution of disputed facts. Under Gateway (b) of Lambeth London BC v Kay [2006] 2 AC 465 and Doherty v Birmingham City Council [2009] AC 267 an occupier is able to raise factual matters in an action under section 3 of the Protection from Eviction Act of 1997 in the manner outlined earlier. The key difference is the obvious point that – unlike this court – the Irish High Court is not bound by the decisions of the House of Lords."

In this regard the learned judge continued that notwithstanding obvious conflicts between the jurisprudence of the ECtHR and the decisions of the House of Lords, it was undoubtedly bound to apply the latter, and therefore could not make a declaration of incompatibility.

71. Mr. Gallagher submits that the U.K. legislation which governs similar situations regarding local authority tenants, namely the Housing Act 1985, is significantly different from the Act of 1966 in this jurisdiction. In particular, in the U.K. the County Court is given jurisdiction to deal with recovery of possession from the outset, and may make an order for possession on the grounds set forth in the legislation, namely "if it considers it reasonable" (see s. 82 and schedule 2 of the Housing Act 1985).

72. Notwithstanding this, Mr. Gallagher cross-appeals the High Court judgment on the ground that s. 62 of the 1966 Act incorporates the provisions of ss. 86 to 88 of Deasy's Act. In particular this incorporation provides a wider entitlement to show cause before the District Court, in the manner previously interpreted in *R (Quinn) v. Justices of Tipperary* (1883) 12 L.R. Ir. 393. In this regard reliance is also placed on the Supreme Court decision in *Kerry County Council v. McCarthy* [1997] 2 I.L.R.M. 481. The legal issue in that case was whether a summons under s. 62 of the 1966 Act should be issued by a judge of the District Court rather than a District Court Clerk, with reliance on s. 88 of Deasy's Act. This case, Mr. Gallagher contends, is consistent with a defendant making his case by way of defence of the summons, and is authority for the proposition that s. 86 of Deasy's Act should be taken into account when considering the jurisdiction conferred by s. 62 of the 1966 Act. Should this interpretation find

favour with this court, it is stated, there would be no requirement for a Declaration of Incompatibility under the 2003 Act.

73. Mr. Gallagher disputes the Council's contention that a housing authority tenant is in a better position compared to a similarly situated private tenant. In particular he notes that the recently enacted Housing (Miscellaneous Provisions) Act 2009, dealing with anti-social behaviour, provides for a dispute resolution and for supervision over a new category of local authority lettings, through private third party owners via the Private Residential Tenancies Board, under the Residential Tenancies Act 2004, which would resolve any factual conflicts in the context of such a letting. In contrast, where the letting only involves the local authority no equivalent procedure exists for dealing with conflicts of fact.

74. In replying to the submissions of the Council, Mr. Gallagher notes that he was set to be summarily dispossessed of a home in which he has lived for virtually all of his life; a period in excess of 42 years. This decision was not made following a hearing on the merits, but as a result on an internal ad hoc decision by the Council. In this regard, therefore, no procedural safeguards were afforded. No issue is taken with the Council's Scheme of Letting Priorities itself. The issue is rather one of fair procedures.

75. As to the specific submission put forth by the Council, Mr. Gallagher first submits that the Council's reliance upon *McD v. L* (para. 58 supra) as authority for the proposition that the Convention is not directly applicable is misplaced. That case is distinguishable from the present case as Mr. Gallagher is not asserting stand-alone rights under the Convention, and is not seeking the direct application of those articles to national legislation. Instead Mr. Gallagher seeks a Convention compatible interpretation of s. 62 of the Act of 1966, and complains that the dispute and conflict of facts with the Council have not been determined by an independent impartial tribunal. This is in accordance with the Act of 2003, in particular ss. 2 and 4.

76. In relation to the appropriateness of the Declaration of Incompatibility under s. 5 of the Act of 2003, it is noted that, notwithstanding that no request was made for such a declaration, it is clear from the wording of s. 5 that a declaration made be made in any proceedings, including, it is contended, in proceedings by way of case stated, before the High Court or Supreme Court, and that such a declaration may be made by the court of its own volition.

77. In relation to the Council's submission that, irrespective of whether Mr. Gallagher had actually lived in the premises for two years prior to his mother's death, he would not have been entitled to a tenancy in any event since he failed to meet the condition in para. 1.7 of the Scheme of Letting Priorities that he was not "included in the family household details for rent assessment purposes", he notes that this second requirement is not mandatory in nature. The following sentence states that "[g]enerally

no application will be considered where this condition is not complied with". Particular attention is drawn to the word "generally", which rather than indicating an absolute condition would be consistent with a discretion on the part of the Council with regards to the presence on the rent account in the context of an application to succeed to a tenancy. The factual dispute at issue in the present case is therefore entirely relevant to whether Mr. Gallagher was entitled to succeed to his mother's tenancy.

78. With regards to the relevant ECtHR authorities, it is submitted that in the present case the absence of transparent procedures to resolve conflicts of fact or a merits review involving the Council and the occupant of the premises, particularly taking into account the proportionality of any such measures taken against the occupant, are in breach of Article 6, 8 and 13 of the Convention. In this regard reliance is placed on the cases of *Connors* (para. 13 supra), *McCann* (para. 35 supra), *Bryan v. United Kingdom* (1996) 21 E.H.R.R. 342, and *Doran v. Ireland* (2006) 42 E.H.R.R. 13.

79. Mr. Gallagher also disputes the grounds raised by the Attorney General, in particular denying that the High Court judgments give rise to a floodgates argument. If the situation is remedied so as to afford individuals with appropriate procedural safeguards at the decision-making stage, the summary process would be unobjectionable.

80. As to the case law which is identified to argue that the issue of the constitutionality of s. 62 of the 1966 Act has been determined, inter alia, *State (O'Rourke) v. Kelly* (para. 12 supra), this case dealt with a net constitutional challenge on the separation of powers.

81. Mr. Gallagher notes that proceedings have already been lodged before the ECtHR in his case (Application No. 42717/09, Gallagher v. Ireland), and that court has requested to be informed of any further developments in these proceedings, although no further action will be taken pending the outcome of the present Supreme Court action.

82. Finally, with regards to the questions posed in the consultative case stated (see para. 26 supra), Mr. Gallagher contends that the answers should be:

Question 1: Yes

Question 2: On a true construction of s. 62 of the Act of 1966, incorporating ss. 86 to 88 of Deasy's Act, a District Court Judge has jurisdiction to explore the merits of the procedures followed where disputed facts are present and raised to show why possession should not be granted, either in reliance of Articles 6, 8 or 13 of the Convention or otherwise.

Question 3: In appearing to a summons under s. 62 of the Act of 1966, incorporating ss. 86 to 88 of Deasy's Act, a defendant is entitled in the District Court to address the merits of the procedure followed by the Council in deciding to seek a warrant for possession, including the merits of the underlying dispute, where disputed facts arise

for the purposes of showing cause why a warrant for possession should not be granted, either in reliance on Articles 6, 8 or 13 of the Convention or otherwise.

Question 4: Yes.

The Decision:

83. There is considerable overlap in the law in relation to the two cases presently under appeal. The exception to this is the issue raised on behalf of Mr. Gallagher in relation to the application of s. 86 of Deasy's Act. In addressing the issues in these cases, I propose to consider, in this order, the following; (i) s. 62 of the Act of 1966 and the case law on it, (ii) the impact, if any, which s. 2 of the Act of 2003, have had on its meaning, (iii) Article 8 of the Convention and relevant ECtHR case law on it, (iv) U.K case law, (v) sufficiency of judicial review, (vi) Articles 6, 13 and 14 of the Convention, (vii) conclusion on Article 8, (viii) s. 5 of the Act of 2003, in the context of appropriate orders, if any, and (ix) disposition.

Statutory and Convention Provisions:

84. As is now abundantly evident, s. 62 of the Act of 1966 is the central focus in this case. In reciting its terms I have ignored the amendment made by s. 13 of the Housing Act 1970 as not being materially relevant. It reads 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) …."

85. Sections 2, 3 and 5 of the 2003 must also be outlined:

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

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

3.— (1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

(2) A person who has suffered injury, loss or damage as a result of a contravention of

subs. (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subs. (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.

(3) The damages recoverable under this section in the Circuit Court shall not exceed the amount standing prescribed, for the time being by law, as the limit of that Court's jurisdiction in tort.

5.— (1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of s. 2 , on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as "a declaration of incompatibility") that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.

(2) A declaration of incompatibility—

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

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

(3) The Taoiseach shall cause a copy of any order containing a declaration of incompatibility to be laid before each House of the Oireachtas within the next 21 days on which that House has sat after the making of the order.

(4) Where—

(a) a declaration of incompatibility is made,

(b) a party to the proceedings concerned makes an application in writing to the Attorney General for compensation in respect of an injury or loss or damage suffered by him or her as a result of the incompatibility concerned, and

(c) the Government, in their discretion, consider that it may be appropriate to make an ex gratia payment of compensation to that party ("a payment"),

the Government may request an adviser appointed by them to advise them as to the amount of such compensation (if any) and may, in their discretion, make a payment of the amount aforesaid or of such other amount as they consider appropriate in the circumstances.

(5) In advising the Government on the amount of compensation for the purposes of subs. (4), an adviser shall take appropriate account of the principles and practice applied by the European Court of Human Rights in relation to affording just satisfaction to an injured party under Article 41 of the Convention."

86. Finally, Articles 6 and 8 of the Convention must be noted:-

"Article 6

Right to a fair trial

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

2. …

3. …

Article 8

Right to respect for private and family life

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with 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."

87. In addition, Article 13 provides for the right to an effective remedy and Article 14 prohibits discrimination.

The Housing Authority: Section 62 of the Act of 1966 and relevant caselaw pre and post Act of 2003

88. Dublin City Council is a local authority for the purposes of the Local Government Acts 1925/2001, as amended. In that general capacity it has many functions, duties and responsibilities. When exercising those in the context of housing, including the provision of housing accommodation and related matters, it is known as a "Housing Authority", having been designated as such, under and by virtue of the provisions of the Housing Act 1966. That Act, although amended, altered and changed on multiple occasions since its enactment, remains the cornerstone of the public housing policy of the State. Under its provisions, 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. It is accepted and, in the case Mr. Gallagher so found by the Judge of the District Court, that the rules governing, inter alia, succession to a tenancy are to be found within the Scheme.

90. In supporting the performance of these functions, the Oireachtas has provided a special procedure for the recovery of possession of let dwellings, in the form of s. 62 of the Act of 1966. That provision is quoted in full at para. 84 of this judgment.

91. If untouched by authority, and in applying the normal interpretive rules, it would appear from its provisions that, once the requirements specified in subs. (1) of the section are established, a District Judge before whom an application for possession is made, has no choice or discretion in that regard. Once satisfied as to such conditions, the requested warrant must issue.

92. These conditions are:-

(i) that the dwelling is provided by the housing authority: such can be established by certificate under s. 118 of the Act of 1966;

(ii) that no tenancy exists in respect of such dwelling: whether by effluxion of time, or by termination for breach or otherwise, it matters not;

(iii) that notwithstanding a demand for possession, the dwelling remains occupied by the individual to whom the demand is addressed, and;

(iv) that within the demand there is contained a statement of the housing authority's intention to invoke s. 62 of the Act in the event of possession being refused or denied.

Once these requirements have been established to the satisfaction of the District Court, the Order must follow.

93. It follows from this construction of the section that an occupier has no right or entitlement to raise any defence to such an application, other than by way of challenging the housing authority on these formal proofs. In addition, the absence of judicial discretion means that the personal circumstances of such occupier must be disregarded as being irrelevant; equally so with questions regarding the reasonableness or fairness of making the Order: these simply have no part in this statutory procedure. It is not surprising therefore, to find that the section has attracted much judicial attention.

94. In *State (O'Rourke) v. Kelly* (cited at para. 12 supra) the constitutionality of s. 62(3) of the 1966 Act was challenged, on the basis that its mandatory nature constituted an unwarranted intrusion into the judicial domain. The Supreme Court, in rejecting this challenge, said at p. 61 of the report:-

"It will be seen that it is only when the provisions of subs (1) of s. 62 have been complied with and the demand duly made to the satisfaction of the District Court that he must issue the warrant. In other words, it is only following the establishment of specified matters that the subsection 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…"

95. In *Hamilton* (para. 45 supra) an argument was advanced that by reason of the inclusion of the word "duly", on two occasions within subs (3) of s. 62 of the Act of 1966 (para. 84), the District Court could embark upon a wide ranging review of matters, such as whether the plaintiff was in breach of its statutory housing responsibility to the defendant, as a person to whom they owed a legal duty. Geoghegan J. held that such an issue was not one for the District Court under s. 62 of the 1966 Act, but rather had to submit itself to the remedy of judicial review. He went on however, to justify the summary process provided for by that section, by stating at p. 493:-

"…it would seem to me to be both reasonable and constitutional that there would be available to a housing authority a rapid method of recovering possession of any one dwelling provided by it without having to give reasons for so doing. The local authority has to consider its overall management of housing and it owes an obligation to all the persons in need of housing as well as to any one individual. In that context it is in order to be entitled to plan its arrangements for providing houses…"

96. The above cases were considered by the Supreme Court in *Fennell* (para. 12 supra), where the real issue was one of retrospection i.e. did the Act of 2003 have any affect on events occurring before the statute became operative? In the course of his judgment Kearns J., speaking for the court, reaffirmed the traditional understanding of the section and re-echoed the views expounded in Hamilton as to the justifying reasons for the summary nature of its provisions. Therefore, subject to what follows, there cannot be any doubt as to the section's proper interpretation.

97. Interestingly, although evidently speaking obiter, the learned judge in Fennell at p. 614 of the report went on to say:-

"it may also be seen that the summary method whereby possession of such dwellings may be recovered, notably in circumstances where the tenant is regarded as having through misbehaviour brought about the termination of his tenancy and thus forfeited the right to any alternative accommodation, may arguably infringe certain Articles of the Convention, and in particular, Articles 6, 8 and 13 thereof and also Article 1 of the Protocol 1 (Protection of Property) of the Convention."

Of course, that is the precise issue in *Donegan* and has a clear parallel to *Gallagher*.

Impact of the Act of 2003 on the meaning of section 62(3) of the Act of 1966

98. It is unclear with what force 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. In this regard it is said firstly, that by virtue of s. 2 of the Act of 2003, the provisions of s. 62(3) are capable of being read in this expansive way and secondly that such a result may also follow by reason of subs. (4) of the Act of 1966, which applies ss. 86, 87 and 88 of Deasy's Act to its provisions.

99. Dealing firstly with the latter point, it should be noted that s. 86 of Deasy's Act is the only provision of those mentioned, which could have any relevance to this issue; moreover, only that part of s. 86, as relates to the issue of a warrant, is incorporated. Therefore, it has very much a restricted application.

100. Section 86, which is quoted in full at pp. 7 to 8 of the High Court judgment, deals with the recovery of possession of certain types of property, envisaging the possibility of two applications being made to what is now, the District Court. In the first instance, possession may be sought by way of an application in which the occupier is called upon to "show reasonable cause why possession of the said premises should not be delivered up" (emphasis added). As a result of this wording it is suggested that scope exists for a "merits argument". Secondly, having obtained such order, but not possession, the landlord is empowered under the section, to return to the Court seeking a warrant, which if granted, would authorise the sheriff to effect vacant possession. The phrase herein underlined is not repeated in that part of the section dealing with the warrant. Thus, even the argument itself may not be available, if such reading of s. 86 is correct.

101. If, however, the call to "show cause" is part of s. 62 of the Act of 1966, a question arises as to its meaning. *Dublin Corporation v. McDonnell* [1946] I.R. Jur Rep 18, when dealing with the phrase "to show reasonable cause" under s. 15(3) of the Summary Jurisdiction (Ireland) Act 1851, by virtue of which possession of a public authority dwelling was sought, held that, this phrase could have no wider import than one permitting an occupier to avail of such defences as were known to law, but no others. In particular such phrase, which if anything is more extensive than that used in s. 86

of Deasy's Act, did not confer any judicial discretion on such an application. If, therefore, this interpretation should apply to s. 62 of the Act of 1966, it would mean that any defence under the section is restricted to that which is referable to what has been described as the "formal proofs" required by subs. (1). The trial judge agreed with this view as I do; accordingly, for these reasons s. 86 of Deasy's Act cannot have any effect on the interpretation of s. 62 of the Act of 1966.

102. Finally in this context, I can see nothing in *R (Quinn) v. Justices of Tipperary* (para. 72 supra) which could dislodge this suggested interpretation of s. 62.

103. The second aspect of this matter is whether s. 2 of the Act of 2003, in and of itself, when applied to s. 62(3) of the 1966 Act, achieves a like or similar result. That section (para. 85) obliges a court when interpreting and applying any statutory provision, passed before or after its enactment, to do so, in so far as possible, in a manner compliant with the State's obligations under the Convention. However, the court when undertaking this exercise is "subject to the rules of law relating to such interpretation and application". Such would include both the common law and statute law.

104. A question thus arises as to whether, and if so to what extent, the provisions of s. 2 of the Act of 2003, have affected the meaning or application of these rules; or to put the matter in another way, does s. 2 introduce a new rule of interpretation in this jurisdiction? For the reasons given at para. 106 infra, I do not consider it necessary to analyse this issue in any detail, but I do wish to make the following observation.

105. 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.

106. 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.

ECtHR Jurisprudence and Article 8:

107. Article 8 of the Convention has many aspects to it, but in this case we are concerned only with the "right to respect" for one's home and this in the broad context of a landlord and tenant relationship. It is clear that such a right does not give a person a right to a home, or to have his/her housing needs supplied by a public authority. Para. 1 of the Article does not arise for consideration in either of the instant cases. Paragraph 2 states that a public authority shall not interfere with the exercise of the right except:

i) as in accordance with law:

ii) as is necessary in a democratic society; and,

iii) in pursuance of a legitimate aim.

For the purpose of the Article, "home" has an autonomous meaning (*Buckley v. United Kingdom* (1996) 23 E.H.R.R. 101 at para. 63 refers to "the existence of sufficient and continuous links" as being a prerequisite for a "home"), with the domestic legal status of the occupier being irrelevant. In the decisions of the ECtHR, which I propose to look at, all had in common a concession or a finding, that the property in question was such a "home", that the act or threatened act amounted to an interference by a public authority, that such was in accordance with domestic law and that the aim of such interference was a legitimate one, as measured by reference to the provisions of the second para. of Article 8. The issue in each case was thus narrowed to whether the interference was "necessary in a democratic society". This requirement has two aspects to it, one of substance and one of procedure (para. 49 of *McCann*). It is the latter which this judgment is concerned with, as in the instant cases, the area of concern, under the Article 8 challenge, is confined to this net point.

108. An interference will be considered "necessary in a democratic society", assuming a legitimate aim, if it answers a pressing social need and in particular if it is proportionate to the legitimate aim pursued (para. 81 of *Connors*). These concepts were considered in some depth and applied in *Connors, Blecic* and *McCann* which I now propose to consider.

Connors:

109. In *Connors* (cited at para. 13 supra), Mr. Connors and family, after sixteen years living on a gypsy site as licensee to a local authority, was served with a notice to quit in January, 2000. This step had, as its immediate background, complaints of unacceptable behaviour on the part of his family and their guests, which was said to constitute a breach of the licence conditions. These allegations were strenuously denied by the applicant, who unsuccessfully sought to judicially review proceedings, which the council took seeking possession of the site. In the face of such denials the complaints of misbehaviour were dropped: instead the council relied on its right to terminate on notice only, that is, without underlying reasons. This was in accordance with English law and so the requested order was granted. Therefore, the factual dispute giving rise to that determination was never ventilated.

110. In the ECtHR the issue was one of necessity and proportionality, in accordance with the description of these terms as given at para. 108 supra. The court, having considered what the margin of appreciation permits and demands, reflecting as it should, "the nature of the Convention right, its importance for the individual, the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions", went on to say at para. 83:-

"The procedural safeguards available to the individual will be especially material in determining whether the respondent state has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the court must examine whether the decision making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8." (see Buckley; Chapman v. United Kingdom)."

Thus, the central issue was whether the legal framework, within which possession of the site could be recovered from the Connors family, provided sufficient procedural protection to safeguard their Article 8 rights.

111. The Court, in its consideration of the issue, looked at a number of matters but essentially at the nature of the right, the procedural safeguards such as they were, the position of gypsies who as a minority attracted the positive obligation under Article 8(1), and their disadvantaged position of living on a public site when compared to those living on a private site. It identified the family's real complaint as being unable to have determined by an independent body, the clear factual dispute regarding the anti-social acts complained of, and those responsible for them. It was not being alleged that the council had committed a breach of duty or had carried out an unlawful act. Therefore in such circumstances, the court was not impressed by the respondent's insistence that judicial review was an adequate remedy. At para. 92 it disposed of this argument by stating:

"While therefore the existence of judicial review may provide a valuable safeguard against abuse or oppressive conduct by local authorities in some areas, the court does not consider that it can be regarded as assisting the applicant, or other gypsies, in circumstances where the local authority terminates licences in accordance with the applicable law."

112. Its conclusion was thus stated:-

"However, even allowing for the margin of appreciation which is to be afforded to the State in such circumstances, the Court is not persuaded that the necessity for a statutory scheme which permitted the summary eviction of the applicant and his family has been sufficiently demonstrated by the government. The power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal has not been convincingly shown to respond to any specific goal or to provide any specific benefit to members of the gypsy community." (para. 94)

Further the family's eviction:

"was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently, cannot be regarded as justified by a "pressing social need", or proportionate to the legitimate aim being pursued." (para. 95).

Accordingly, there had been a violation of Article 8.

Blecic:

113. A case which is frequently contrasted with Connors, is that of *Blecic* (cited at para. 14 supra), where the court reached a contrary conclusion, giving primacy to the margin of appreciation in the following circumstances. The applicant had been a protected tenant of a public authority flat for over 40 years in Zadar. Under the law the tenancy could be terminated, if without justifying reasons, she was absent from the flat for a continuous period of six months or more. She was so absent but claimed for good reason. By the time she had returned the landlord public authority had instituted proceedings seeking possession.

114. The sole issue, as with *Connors*, was whether the interference was necessary in a democratic society, in that did it answer a pressing social need and was it proportionate to the aim of recovering possession of such protected units which remained unoccupied over such period. The court was satisfied that the national authorities had remained within the margin of appreciation in that her case was reviewed at three court levels, commencing at first instance where she was provided with an oral hearing and where she was assisted by legal counsel. Whilst the appellate process involved only a review of the case file, nonetheless it permitted further representations to be made on her behalf: therefore when looked at collectively, the

safeguards available did not fall short of affording due respect for her Article 8 rights.

McCann:

115. The final case of immediate relevance is *McCann* (cited at para. 35 supra). In 2001, because of a marriage breakdown, the applicant's wife and their son moved out of the family home, which she had occupied jointly with her husband as secure tenants for the previous two years. When Mr. McCann was forced to leave the house under court order, his family returned only to depart again, when further violence was threatened. Eventually the wife and the children of the marriage were re-housed elsewhere by the local authority.

116. Sometime after these events, the applicant, who had spent much money in renovating the house, moved back in, but finding it too large for his needs, applied to downsize. On the same day as this application was made, a housing officer visited Mrs. McCann and had her sign a Notice to Quit, the effect of which was not only to close the tenancy but also to extinguish the husband's right to live in the house and his right to pursue the exchange which he had sought. She tried to withdraw the Notice to Quit but without legal effect. A Possession Order was thereafter sought and eventually granted.

117. The ECtHR took time to consider some U.K. authorities, such as *Qazi* and *Kay* (cited at para. 15 supra). On the key question of whether the eviction was proportionate to the aim and thus "necessary in a democratic society", the court repeated what it had said at paras. 81 – 83 of Connors and explicitly rejected the suggestion that Connors was special as involving gypsies and therefore confined to its own facts. Given the extreme form of interference with the right to respect for one's home, which eviction is, the court at para. 50 of the judgment said:-

"…The loss of one's home is the 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."

118. The court was critical of the local authority in by-passing the statutory scheme, which if it had been used to seek possession, would have allowed the applicant to have the reasons for his wife's departure from the home looked at, as well as having his personal circumstances considered, which included the need to provide accommodation for his children on visitation occasions. By having Mrs. McCann sign the Notice to Quit in the manner which she did, the local authority failed to have any regard for her husband's Article 8 rights. Moreover the County Court from which the

possession order was granted could not consider the issues which he wished to have addressed, save in exceptional circumstances, which did not arise.

119. At para. 53, the court once more looked at judicial review and said:-

"…the "procedural safeguard" required by Article 8 for the assessment of the proportionality of the interference were not met by the possibility for the applicant to apply for judicial review and to obtain a scrutiny by the courts of the lawfulness and reasonableness of the local authority's decision. Judicial review procedure is not well adapted for the resolution of sensitive factual questions which are better left to the County Court responsible for ordering possession. In the present case the judicial review proceedings, like the possession proceedings, did not provide any opportunity for an independent tribunal to examine whether the applicant's loss of his home was proportionate under Article 8(2) to the legitimate aims pursued."

Therefore, there was a violation also in this case.

U.K. Case Law:

120. A number of U.K. cases have been referred to which deal with the jurisprudence of the ECtHR, in particular *Connors* and *McCann*, and seek to apply it in a national context. These cases include: *Qazi; Kay; Price*; and, *Doherty* (cited at para. 15 supra). The Court of Appeal, per Carnwath L.J., in *Doherty* provided a useful factual summary of the aforementioned cases, and compared them to the ECtHR's decisions in Connors.

121. Whilst the court was invited to consider such cases and to compare the legal situation as it is in the U.K. to that which prevails in this jurisdiction, it does not consider it necessary or desirable to do so, as irrespective of any legal differences which may exist, the facts of the U.K. cases are clearly distinguishable from the facts in the instant cases and accordingly, for that reason no assistance can be derived from such authorities. Moreover, the challenge of both Mr. Donegan and Mr. Gallagher is specifically focused on Article 8 of the Convention and on the ECtHR case law in that regard. Therefore, Connors and McCann are the primary source of application to the instant appeals. Consequently, any review of the judgments last mentioned must await a more appropriate case.

Adequacy of Judicial Review:-

122. The availability of any legal means by which disputes may be resolved, in a domestic context, is a factor to be considered when assessing the adequacy of the safeguards demanded by Article 8 of the Convention. The only one of any relevance in this jurisdiction is that of judicial review. On behalf of both the Council and the Attorney General it is submitted, with varying degrees of assertiveness, that such is an adequate means by which the issues of concern, as pleaded in these cases, can be

addressed.

123. In considering this matter, it is immaterial whether the primary aim or principal focus of the remedy lies elsewhere; even therefore, if judicial review is directed to such matters as ultra vires, the control of statutory and other powers or duties, discretionary or otherwise, it would not matter. Once there is a mechanism available within the process which is adequate and which affords fairness and independence, such will suffice for Article 8 purposes.

124. The Council argues that both Mr. Donegan and Mr. Gallagher could have legitimately challenged the decision of the Council to serve a Notice to Quit on several grounds such as its failure to make adequate inquiries, its consideration of extraneous matters or its failure to consider relevant ones. All, or at least most of these examples may indeed be capable of attracting judicial review but none of them relate to the issue in Mr. Donegan's case or the residency issue in Mr. Gallagher's case. What has been lost sight of in this submission is the very simple and straightforward conflict which requires resolution. Was Mr. Donegan's son a drug addict or a drug pusher? It is purely a question of fact, simple, I even dare say to resolve. Was Mr. Gallagher residing with his mother for the period in question or was he not? Again, a rather straightforward matter. It is therefore difficult to see how a remedy like judicial review, modelled in the manner in which it is, could in any way make a decision or reach a conclusion on these issues. At most, it could set aside a decision unlawfully made but such would leave quite unresolved the basic dispute. It could never, of itself, substitute its own findings of fact for those made by a decision-maker. Therefore, judicial review is not, in any meaningful sense, a forum to which recourse can be had in the presenting circumstances.

125. Equally so with regard to any challenge based on unreasonableness. To succeed, an applicant would have to establish that the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense or that the decision-maker had no relevant material with which to support its decision. See Keegan (para. 47 supra) and *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. Again, even if such could be engaged the underlying dispute remains unresolved.

126. In *Tsfayo v. United Kingdom* (2009) 48 E.H.R.R. 18, the ECtHR examined the inadequacy of judicial review as a means of satisfying the requirements of Article 6 where there was a conflict of fact (it had previously done so in Connors and McCann in the context of Article 8). At para. 48 of its judgment the court stated:

"The applicant had her claim refused because the 'Review Board' did not find her a credible witness. Whilst the High Court had power to quash the decision if it considered, inter alia, that there was no evidence to support the 'Board's' factual findings, or that its findings were plainly untenable, or that the Board had misunderstood or been ignorant

of an established and relevant fact…it did not have jurisdiction to rehear the evidence or substitute its own views as to the applicant's credibility. Thus, in this case, there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute."

In my view this summary in a general sense reflects the position as it exists in this jurisdiction.

127. As was noted by Laffoy J. in *Donegan*, a person's Article 8 rights will be infringed when a warrant for possession is obtained by the Council in proceedings before the District Court under s. 62 of the Act of 1966 and when that warrant is executed; I would agree with this position. Nonetheless, I would not make a conclusive determination on whether the Notice to Quit itself, infringes upon a person's Article 8 rights; this point is ultimately not at issue in the within proceedings.

128. When considering the adequacy of judicial review as a sufficient safeguard in this context it must therefore be done with reference to the s. 62 application; the question is whether judicial review will provide a sufficient safeguard against an interference, by virtue of the provisions of that section. In this regard it is patently clear that it could not. As already noted, the function carried out by the District Court is merely to ensure that the requirements of subs (1) of the section have been established, and if so, to issue an order under that section. Any judicial review of this decision, save possibly where the District Court Judge patently failed to comply with the section itself, would be bound to fail. Certainly the court, on judicial review, could not enter into an assessment of the facts or personal circumstances behind the application, such matters are not even within the consideration of the District Court Judge. Judicial review of a s. 62 application could in no way be capable of resolving a conflict of fact between the Council and a person subject to the application.

129. Therefore, I do not believe that the remedy of judicial review gives any comfort in the context of the State's obligation to show respect for the right to one's home within Article 8 of the Convention.

130. The Council have submitted that the Supreme Court decision in Meadows (para. 57 supra) has notably changed the scope of judicial review, and that therefore, notwithstanding that such remedy may not have been a sufficient safeguard in the past, it is now clear that it is. In particular, it is argued that Meadows has incorporated a consideration of proportionality into judicial review, where an administrative decision bears on constitutional or Convention rights.

131. In this regard the decision of Murray C.J. at p. 723 should be noted:-

"In examining whether a decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense I see no reason why the Court should not have recourse to the principle of proportionality in

determining those issues. … Application of the principle of proportionality is in my view a means of examining whether the decision meets the test of reasonableness, I do not find anything in the dicta of the Court in Keegan or O'Keefe which would exclude the Court from applying the principle of proportionality where it could be considered relevant."

It is clear from this statement, that although some extension of judicial review for reasonableness is envisaged so as to take account of the proportionality of the action, it is to be done on the basis of *Keegan* and *O'Keeffe*, rather than as an entirely novel criterion. As Fennelly J. noted at p. 817 in the same case:-

"Two fundamental principles must, therefore, be respected in the rules for the judicial review of administrative decisions. The first is that the decision is that of the administrative body and not of the court. The latter may not substitute its own view for that of the former. The second is that the system of judicial review requires that fundamental rights be respected."

Thus although some consideration of fundamental rights may be entered into in judicial review, this in no way affects the traditional position that such remedy cannot be used as a rehearing or otherwise to determine conflicts of fact.

132. In light of the comments already made as to the adequacy of judicial review, I would not find that Meadows has substantially altered that position in this regard.

Applicability of Article 6, 13 and 14 of the Convention:

133. In relation to the reliance placed on additional articles in the Convention, these are not applicable to the present cases. As noted in *Connors*, since the protection of Article 8 rights necessarily incorporates consideration of sufficient procedural safeguards, the requirements of Article 6, insofar as they are relevant, are effectively subsumed into the Article 8 rights (see Connors at paras. 102-103). In those circumstances no separate decision is required on whether there is also a contravention of Article 6 of the Convention.

134. Notwithstanding this, insofar as the requirements of Article 6 are incorporated in the determination with regards to the fair procedures required to vindicate infringements of Article 8 rights, the ECtHR case in *Tsfayo* is instructive. In particular the court stated at paras. 46 and 47 that:

"46. The Court considers that the decision-making process in the present case was significantly different. In Bryan, Runa Begum and the other cases cited in paragraph 43 above, the issues to be determined required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims. In contrast, in the instant case, the [Housing Benefit and Council Tax Benefit Review Board ("HBRB")] was deciding a simple question of fact, namely whether there was "good cause" for the applicant's delay in making a claim. On this question, the applicant had

given evidence to the HBRB that the first that she knew that anything was amiss with her claim for housing benefit was the receipt of a notice from her landlord – the housing association – seeking to repossess her flat because her rent was in arrears. The HBRB found her explanation to be unconvincing and rejected her claim for back-payment of benefit essentially on the basis of their assessment of her credibility. No specialist expertise was required to determine this issue, which is, under the new system, determined by a non-specialist tribunal (see paragraph 22 above). Nor, unlike the cases referred to, can the factual findings in the present case be said to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take.

47. Secondly, in contrast to the previous domestic and Strasbourg cases referred to above, the HBRB was not merely lacking in independence from the executive, but was directly connected to one of the parties to the dispute, since it included five councillors from the local authority which would be required to pay the benefit if awarded. As Mr Justice Moses observed in Bewry (paragraph 33 above), this connection of the councillors to the party resisting entitlement to housing benefit might infect the independence of judgment in relation to the finding of primary fact in a manner which could not be adequately scrutinised or rectified by judicial review. The safeguards built into the HBRB procedure (paragraphs 23-24 above) were not adequate to overcome this fundamental lack of objective impartiality."

135. Thus where a conflict of facts arises, which is required to be determined in relation to an alleged illegitimate infringement of Article 8, it is necessary 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. It is clear that any review undertaken in this regard, must be performed by a person who is rationally unconnected to those whom I have mentioned. This however should not be interpreted as requiring that a court must be the body to determine upon the matter. This could not be so; once there are in place procedures to ensure that where such questions of fact arise, there is access to an independent decision-maker acting within a process which is otherwise safeguarded, such will suffice. This requirement will only arise where the factual dispute is genuine, and where it is materially central and related to the Convention rights at issue.

136. Insofar as it is contended that Article 13 of the Convention has been breached, it is suggested that there is no effective remedy for the protection of rights under Article 8, given that there is no mechanism to challenge findings of fact. Whilst it is arguable that this may be the case, as with the matters under Article 6, this issue, and the complaint in relation thereto, can effectively be subsumed into the consideration of Article 8 rights. No alternative consideration is required.

137. In relation to the alleged breach of Article 14 of the Convention, this is rejected. Unlike in the cases of McCann or Connors, or indeed many others, the treatment of both Messrs. Donegan and Gallagher did not arise by virtue of discrimination based on any of the grounds set forth in Article 14 of the Convention. Whilst it is true that local authority tenants are treated differently to private tenants, this could not be considered discriminatory in the sense of Article 14 of the Convention. Their difference in treatment arises not by virtue of any particular individual characteristic. Even should Article 14 of the Convention arguably be engaged, I would nonetheless conclude that any such difference in treatment is readily justifiable by virtue of the particular circumstantial differences between housing authority and private tenants, and in addition, as referable to a legitimate aim.

The Floodgates Argument:

138. The Council has argued that should this Court find in favour the Messrs. Donegan and Gallagher in the instant cases, this will make the operation of their obligations and duties, including their responsibility for housing allocation, unworkable. Furthermore, it is likely that the situation which arises in the present cases would become commonplace, with even the merest hint of a conflict of facts being raised to force the Council to undertake some form of independent review.

139. Such a consequence is not accepted. The fact that additional administrative burdens may be placed on the Council, in appropriate cases, where the factual circumstances are those described above, cannot be allowed to permit a violation, if otherwise found to exist, to remain without remedy. In any event, according to the Council's own evidence, there are only a small number of cases in which s. 62(3) of the Act of 1996 is used.

140. Irrespective of this, there is no evidence to suggest that it will have any significant impact on the performance of the Council's public duties. In most cases there will be little dispute on facts which are central to the issue. Where no such dispute arises, the decision to terminate a tenancy will not give rise to a requirement of procedural safeguards, necessitating independent review; a good example in this regard would be the circumstances in Leonard, where what the tenant wished to offer had no bearing on the lawfulness of her eviction (paras. 150 to 152 infra). The mere fact that a person seeks to make a plea ad misericordiam is not sufficient to engage the procedural rights identified.

141. The contention that a positive finding in favour of either Mr. Donegan or Mr. Gallagher will give rise to a significant burden on the Council when carrying out its functions in relation to its social housing obligations is therefore rejected.

142. It might lastly be noted in this regard that obviously questions, such as those

considered above, will only arise where Article 8 rights are actually engaged in the first place. Thus it could not be the case that in allocating housing the Council, would be required to comply with the procedures set out above. In performing this function the Council, having regard to the provisions of domestic law which apply to it, must have sufficient flexibility in that regard, bearing in mind the multiple competing interests that arise. It would therefore be difficult to see how a complaint could be made, for example, that it failed to properly consider an application for housing, at least under Article 8 of the Convention. It is trite to note that in order for any question of Article 8 of the Convention to arise, the decision in question must relate to the person's "home"; this is a factual question relating to the person's place of occupation at the time. Where an application is made, their potential future place of occupation is not their home for the purposes of Article 8 of the Convention. The decision herein therefore has no application in those circumstances.

In Conclusion:

143. The general principles deducible from the above are as follows:

(1) That the District Court, on a s. 62 application, cannot entertain any submission other than that relating to the formal proofs demanded by the section. In particular it has no jurisdiction to hear and determine issues of fact, or mixed issues of fact and law, referable to the preceding decision or the reasons therefor, of the housing authority to terminate the tenancy.

(2) This interpretation of s. 62, which had been established prior to the enactment of the Act of 2003, has not been effected by the provisions of s. 2 of the that Act. Neither has it been affected by virtue of s. 86 of Deasy's Act.

(3) 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. "Home" has a meaning special to the Convention, which is not dependent on the legal status of the occupier under domestic law.

(4) (i) Under Article 8 there shall be no interference with this right save:-

(a) as is in accordance with law,

(b) as is necessary in a democratic society, and

(c) as in pursuance of a legitimate aim,

(ii) The obtaining of a warrant under s. 62 of the Act of 1966, and its execution, is undoubtedly such an interference with the right given by Article 8: accordingly, by reason of that fact Article 8 is engaged. Whether any preceding step, such as the

decision to serve a Notice to Quit and its actual service also constitute such an interference is a question not necessary for determination.

(iii) When a warrant is issued, by virtue of s. 62 of the Act of 1966, it is issued in accordance with law,

(iv) The objective of obtaining such a warrant can be regarded as being within the scope of the legitimate aims referred to in para. 2 of Article 8, such as, amongst others, in the interest of good estate management, in the protection of the rights of others, including of the landlord and neighbouring tenants,

(v) The phrase "necessary in a democratic society" is understood to mean that such will be satisfied if it answers a "pressing social need" and if the interference is proportionate to the aim pursued.

(5) It is accepted that by reference to the constituent elements in Article 8, only those referable to necessity and proportionality are relevant to the instant cases.

(6) 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.

(7) 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.

(8) 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.

(9) It is accepted, and I so hold, that on a judicial review application the court cannot substitute, for the facts presented, its own view as to what they should be. Moreover, the court is not fact finding and thus cannot resolve conflicts in this regard. This limitation, applies even if the challenge is one of unreasonableness in the O'Keeffe

sense.

The Case of Mr. Donegan

144. Mr. Donegan has been a tenant of the Council for more than 25 years. He has always discharged his rent and otherwise complied with the terms and conditions of his letting agreement. His occupation at all times has been lawful. It has not been suggested that apart from the issue with his son, the Council would have terminated his tenancy and sought a s. 62 order.

145. The consequences of such a step, as it applies to Mr. Donegan, are most far reaching. For the first time in more than 25 years, perhaps in his lifetime, he will be without a home. As a matter of domestic law he has no right to remain in occupation of the house, although with the indulgence of the Council he so remains. Moreover, as clause 13 of the lease is in play, he has been deemed to have deliberately rendered himself homeless within the meaning of s. 11(2)(b) of the Housing Act 1988, with serious consequences resulting from that provision. This has all come about, not because of anything done personally by Mr. Donegan, but by reason of some vicarious responsibility which he has for the conduct of his son. This conduct, said the Council, shows that his son is a drug pusher, whereas Mr. Donegan insists that he is an addict who is dealing with his addiction.

146. This issue came to light after a garda search of Mr. Donegan's dwelling house in November, 2003. No actual drugs were found, but certain items associated with them, were. The gardaí made a report to the housing authority under statutory request. A number of meetings took place between Mr. Donegan and officials of the Council. At such meetings this allegation of his son being a drug pusher was made and repeated, but all stages was emphatically denied by Mr. Donegan. Evidently the Council rejected what he had to say in this regard as they continued to seek his eviction.

147. It is interesting to note that during these exchanges he was offered, as a means of keeping his house, the choice of applying for an exclusion order against his son. He declined to do so. If his contention be correct, it is hard to find fault with his fatherly instincts to look after a recovering son. In any event, what is of significance is the fact that the Council bypassed a statutory procedure which would have enabled them, at least to seek such an order if they saw fit. The reason, or at least part of the reason, which is admitted as much in the submissions, is that on such a hearing a contest on the merits of the application could be conducted. This, they say, creates particular difficulties for them in terms of getting witnesses to prove anti-social behaviour. Accordingly, justifying their actions in this way, they bypassed that process and instead terminated on notice.

148. It should also be noted that the process by which the Council interviewed Mr.

Donegan is ad hoc, unstructured and unregulated. Insofar as the evidence goes it is quite uncertain if the manner as to how it works is published or within the public domain. It is of course conducted by the Council and it is unclear what, if any, measure of independence or distance such persons have with those deciding on the eviction. It is solely in the nature of an investigation. Therefore, in my view, by no means of understanding could such a process be regarded as of value, within the safeguarding procedures as demanded, by Article 8 of the Convention.

149. Apart from such interview process, Mr. Donegan has had no opportunity of having his argument as to his son's condition aired or determined before an independent body. The issue is one of extreme simplicity but requires a mechanism to determine factual conflicts. If determined in his favour it must be that the Council could not pursue the eviction order which it presently seeks. It would be entirely contrary to their reasoning justifying such a move, were they to do so. Therefore, a resolution of this matter is of the highest importance to Mr. Donegan. Given the enormous significance which this interference, by way of eviction, would have on his right to have due respect shown for his home, it follows, that the existing process by which such eviction may be sought, constitutes an inadequate safeguard in that respect and therefore, his Article 8 rights have not been respected.

150. The decision of the High Court in Leonard, in rejecting the Convention challenge to s. 62 of the Act of 1966, was sought to be relied upon by the Attorney General and by the Council in this case. However, it does not in my view in any way enhance or support their position. Ms. Leonard held a council house under the terms of a letting agreement, which by incorporation included a term that a named individual would not reside in it. If he did, such would constitute a breach of the agreement and would entitle the council to recover possession. On a number of occasions, complaints were made to the council that such a person was seen in the premises. The council met with Ms. Leonard, put these complaints to her and warned that, if the situation continued she would be in breach of clause 13 of the letting agreement, thereby entitling the council to seek possession.

151. The situation did not improve and on further interviews she admitted that the individual in question, her partner, was on the premises. She was given an opportunity to have her file reviewed as the council intended to seek possession. They did so by the service of a Notice to Quit. In her judicial review application her essential focus of challenge was on the proceedings before the District Court where she complained of not being afforded an adequate opportunity of addressing the issues, surrounding this individual in the context of the breach of the Anti-Social Behaviour clause in the lease. In essence, her complaint was that by reason of the provisions of s. 62 she was not afforded an opportunity of making what has been described as a plea "ad

miscericordiam".

152. The critical distinguishing feature between that case and the instant case is the fact that Ms. Leonard admitted to being in breach of clause 13 of the agreement. Furthermore, she did not dispute the council's entitlement to terminate the agreement by virtue of its provisions. Therefore, there was no factual dispute concerning the decision to terminate the tenancy. This is in striking contrast to what the situation was in Connors, McCann, and in the instant cases. Therefore, the fact that the learned judge was satisfied that there was no violation of Article 8, was specifically related to the factual context as above described. Such decision has no wider meaning or implications than that.

Mr. Gallagher:

153. The position with regard to Mr. Gallagher is, in one respect pretty identical to that of Mr. Donegan, but in another fundamentally different. It will be recalled that in accordance with the Council's Scheme of Letting Priorities, for a son or daughter to succeed to their parent's tenancy, that person has to be resident in the house and have been on the rent account for the period of two years immediately preceding, as in this case, the death of the tenant. Mr. Gallagher claims that he has complied with the first requirement. Following a number of meetings with the Council, during which he submitted supporting documentation, the Council came to the view, that he did not come within requirement number one. In the District Court, on the s. 62 application, the District Judge, so as to facilitate the case stated, embarked upon a fact finding mission on this issue. Having heard various witnesses he concluded that Mr. Gallagher had been so resident as he had claimed. Thus, there is a clear conflict between the Council's view and the finding of the District Court. To that extent he becomes the beneficiary of the same views as I have expressed in the case of Mr. Donegan.

154. However, there is no conflict with regard to the second requirement in that Mr. Gallagher does not dispute the fact that he was removed from the rent account in August 1995, when he went to live with his partner, and that at no time thereafter was his name re-entered on the account, or was he otherwise assessed for rent in respect of the dwelling house in question. Therefore, this requirement is conflict free and its existence as a condition of succession is not disputed. It would therefore seem entirely superfluous to have such an issue further explored. The position is as stated by the Council, and accepted by Mr. Gallagher.

155. There can be no doubt but that the Council are entitled to have such requirements, as conditions of succession. They are justified in so doing so that individuals will not obtain accommodation free of contribution, to the detriment of others, who are both willing and obliged to pay. Moreover, an obvious effect of acting in

breach of this requirement is that the rent actually paid by Mr. Gallagher's mother has been less than what it should have been. Therefore there can be no doubt, but that such a requirement is a legitimate part of the Council's estate management regime so as to efficiently and effectively discharge their public duties.

156. In addition, the position of Mr. Gallagher is further unlike that of Mr. Donegan in this most material way: the former was never a tenant of the Council and his occupancy of the house, such as it was, was in breach of clause 8 of the Tenancy Agreement. In addition, he never had any proprietary estate or interest in the property, and had no legal right to reside there. Therefore at best his situation is analogous to Ms. Leonard, in who's case as previously stated, Article 8 rights were not engaged. In Mr. Gallagher's situation, noting the circumstances which I have described, his optimum position is to plead with the Council to have requirement number two disregarded for the purposes of succession. I do not think that Article 8 rights can be invoked for this purpose. That being the situation, and notwithstanding the residency conflict, I do not believe that the safeguards required have been substandard so as to violate his Article 8 rights. Consequently, I would refuse to grant any relief in his case.

157. Nonetheless, in relation to the questions posed by the District Court in Gallagher (noted at para. 26 supra) I would agree with the learned High Court judge, and would answer, in light of the reasons already outlined:

Question 1: Yes

Question 2: No

Question 3: No

Question 4: No

158. For the reasons above given, I will dismiss his cross appeal insofar as it relates to the submission referrable to Deasy's Act.

159. Finally, in relation to the relevant remedy in the case of Mr. Donegan, in light of the decision given above and noting the absence of any other adequate legal remedy, I would issue a Declaration of Incompatibility in relation to s. 62(3) of the Act of 1966, pursuant to s. 5(1) of the Act of 2003.

160. In light of the aforesaid, it is not necessary to deal with any other issues raised in these appeals.