HUMAN RIGHTS PROTECTION: THE ROLE OF THE IRISH CONSTITUTION

Dilemma

The dilemma is where to start to where to finish. The topic which I am about to address in thirty minutes is one of the most important topics in the jurisprudential sphere affecting the citizens of this State. Undoubtedly, some matters which are of earth shattering importance can be expressed in one line or less. Unlike the intellectual endeavours of Einstein, this topic cannot be expressed briefly or in a formula such as $E=MC^2$. Lest I be accused of exaggeration, I would point out that in the most recent edition of the seminal commentary on the Constitution, the fourth edition of *J.M. Kelly: The Irish Constitution*, which was published in late 2003, the text on Articles 40 to 44 of the Constitution runs from page 1245 to 2049. Moreover, a lot has happened since 2003. All one can do in thirty minutes is to give a very broad overview of the constitutional protection of human rights.

Overview

As the information leaflet issued by the Irish Human Rights Commission and the Law Society of Ireland in relation to this Conference discloses, the Constitution of Ireland, which dates from 1937, pre-dated both the Universal Declaration of Human Rights (1948/1949) and the European Convention on Human Rights (1950). The expression "human rights" does not appear in the Constitution. However, rights of the type which, seventy five years after the enactment of the Constitution by the People, are generally, if not universally, in common parlance, as well as in the Basic Laws of States and International Conventions, referred to as "human rights", which are protected by the Constitution, are protected by the provisions of Articles 40 to 44

inclusive, which collectively are headed "Fundamental Rights" and individually are headed as follows:

Article 40 – Personal Rights;

Article 41 – The family;

Article 42 – Education;

Article 43 – Private Property;

Article 44 – Religion.

Of course, as is reflected in the third topic for Session 1 later today, the invocation of the provisions of the Constitution in the protection of human rights has been, and continues to be, of supreme importance in the context of the administration of justice. Broadly speaking, the source of that protection is Article 34 and Article 38.

In assessing how the role of the Constitution in the protection of human rights has evolved since 1937, in my view, the 1960s must be regarded as a watershed. In this connection, it is interesting to recall the perception of academics and the judiciary on the role of the courts in giving effect to the constitutional protection over the years. I have chosen two milestones.

1980 perspective

The first is the publication of the First Edition of Kelly on *The Irish Constitution*, which was published in 1980. In the foreword the late Professor Kelly made the following observation:

"If the judgment of the average liberal observer were asked for, he would probably say the overall impact of the courts on modern Irish life, in their

handling of constitutional issues, had been beneficial, rational, progressive and fair . . . ."

In support of that proposition he cited three decisions from the 1960s (*O'Donovan v. Attorney General* [1961] I.R. 114; *Ryan v. Attorney General* [1965] I.R. 294; and *Macauley v. Minister for Posts and Telegraphs* [1966] I.R. 345). He also cited three cases from the 1970s (*Byrne v. Ireland* [1972] I.R. 241; *McGee v. Attorney General* [1974] I.R. 284; and *de Búrca v. Attorney General* [1976] I.R. 38), commenting that the list could be extended. However, Professor Kelly had some reservations, observing that even "an admiring and respectful eye" could see certain strands in the texture of the then recent constitutional jurisprudence which invited a certain amount of doubt. One of the examples he gave was that there was not always "a firm dogmatic groundwork for the structures into which the courts must fit some of the situations they are called on to adjudicate". He instanced the rather confused relationship between the "personal rights" of Article 40.3 and the "fundamental rights" of Articles 40 – 44 in general, pointing to the fact that some rights, for example, private property, figure in both settings, as he put it, "in somewhat different verbal dress".

1987 perspective

The next milestone was the fiftieth anniversary of the coming into operation of the Constitution seven years later. The Chief Justice, Thomas A. Finlay, read a paper entitled "*The Constitution Fifty Years On*" in the Supreme Court in the presence of Uachtarán na hÉireann on 29th December, 1987 to commemorate that event.

Having outlined the third to tenth amendments of the Constitution between 1972 and 1987, two of which related to Ireland's membership of the European

Community, he expressed the view that none of the others even remotely approached the character of a major or fundamental alteration in the broad structure of the Constitution. His conclusion, which was based also on a consideration of the daily working of the provisions of the Constitution in matters coming before the Courts, was that the Constitution had been reasonably adaptable to changes in society. He suggested that that fact may owe much to "the doctrine of the unenumerated personal Constitutional right" first identified by Mr. Justice Kenny in the High Court in *Ryan v. The Attorney General* and endorsed on appeal by the Supreme Court. He rejected the view of some commentators that the necessity for that principle could be seen as a sign of want in, or inflexibility of, the Constitution stating:

> "The unenumerated rights are to be found, not by the transient needs or moods of society, but rather by a consideration of the fundamental nature of society envisaged by the Constitution itself. In a sense they can be said to be *ejusdem generis* with the rights expressly provided for in the Constitution. This conclusion arises, I think, not only from the terms in which these rights have been recognised and the principle underlined, but also in the nature of the rights which have been identified. They include the right of bodily integrity, which was that at issue in *Ryan's* case; the right to privacy in marriage; the right to work or earn a livelihood; the right to travel; and, though sometimes differently established, the right of access to the Courts."

Chief Justice Finlay concluded that the "doctrine" permitted the Constitution to adapt itself to changes in the needs and requirements of society, and expressed the view that it also provides "a comprehensive and safe method of further adaptation".

Later, having observed that the main focus of judicial decisions at that point in time had been on the section of the Constitution dealing with fundamental rights,

Chief Justice Finlay stated that it is "illuminating" to list the rights guaranteed and protected by Articles 40 and 44, listing:

> "Equality before the law tempered by regard to differences of capacity;
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> The right to life;
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> The protection of the person of the citizen;
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> The protection of his good name;
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> The protection of his property rights;
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> His right to liberty;
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> The inviolability of his dwelling;
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> The right to free expression of conviction and options;
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> The right to assemble peaceably and without arms;
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> The right to form associations and unions;
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> The rights of the family antecedent and superior to positive law, including the
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> Rights of parents to be educators of their children;
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> The right of children to free primary education;
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> The general right to provide ownership of external goods;
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> Freedom of religion."

Having pointed to the need to add to the rights listed above the provisions of Article 38 guaranteeing fair procedures in criminal charges and the right in all but minor criminal offences to trial with a jury, he expressed the view that in the Constitution we have "as complete a set of fundamental rights and liberties as are to be found in any charter or bill of rights".

2012 perspective

If, in attempting to get an overview of the role of the Constitution in protecting human rights in the twenty five years since 1987, one adopts a similar approach to that adopted by Chief Justice Finlay, I think it is reasonable to conclude that amendments to the Constitution which have been enacted in the period in question have impacted significantly on the broad structure of the provisions of the Constitution which protect human rights. In that period there have been sixteen amendments. It is true that of that sixteen, six amendments arose from the State's participation in the European Union. However, Articles 40 and 41 were amended. The thirteenth and fourteenth amendments enacted in 1992 provided that the right to life of the unborn protected by Article 40.3.3° would not limit freedom to travel between Ireland and another state and would not limit freedom to obtain or make available information relating to services lawfully available in another state. The fifteenth amendment enacted in 1996 inserted into Article 41 provision for the dissolution of marriage in certain specified circumstances. Looking to the immediate future, next month the People will have an opportunity to vote in a referendum on the proposed thirty-first amendment which, if approved by the People, will amend Article 42 by adding a provision in which the State recognises and affirms the natural and imprescriptible rights of all children and guarantees, as far as practicable, by its laws to protect and vindicate those rights, with ancillary provisions to enable the State introduce laws to give effect to such protection in a proportionate manner.

Although since 1987 there has been a considerable body of legislation enacted with the objective of giving practical effect to the State's constitutional obligation to protect human rights, which makes provision for quasi-judicial remedies and quasi-judicial tribunals to administer and award such remedies, as is reflected in the topic

for discussion later in Session 4, the courts remain the ultimate safeguard for ensuring that a citizen's constitutional rights are not violated. Many examples could be given of decisions of the Superior Courts during the past twenty five years which can be interpreted as, in the words of Chief Justice Finlay, permitting the Constitution to adapt itself to changes in the needs and requirements of society. I believe that a similar approach to the interpretation and application of the provisions of the Constitution which protect human rights will continue in the future.

While one must be ultra cautious in generalising on the manner in which the courts interpret and apply the provisions of the Constitution, I think it is true to say that the concept of the Constitution as a "living document" or "living instrument" is broadly accepted today. The objective of the adoption and enactment of the Constitution is expressed in its preamble as "seeking to promote the common good, with due observance of Prudence, Justice and Charity" and one of the intended outcomes of that objective expressed in the preamble is "that the dignity and freedom of the individual may be assured". In his judgment in the Supreme Court in the *McGee* case, Mr. Justice Walsh made the following observations in relation to that element of the preamble:

> "The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts."

Mr. Justice Walsh invoked the constitutional law of the United States of America in support of that statement.

In practice, it must be concluded that the courts have had regard to the observations of Mr. Justice Walsh. This is discernible in the manner in which the courts have applied the provisions of the Constitution, in particular, Article 40.1 and Article 40.3, which has not remained static and immutable. I will just take one example to illustrate that point, which I have chosen because I think it is of particular relevance in the context of this Conference. It is the decision of the Supreme Court on the reference under Article 26 in *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321. The aspect of the decision of the Supreme Court, which was delivered by Chief Justice Hamilton, which illustrates the point is his analysis of the constitutional protection afforded to the right which Chief Justice Finlay summarised as "equality before the law tempered by regard to differences of capacity", which is the first of the personal rights to be found in the section on fundamental rights. It is Article 40.1 which provides:

> "All citizens shall, as human persons, be held equal before the law.
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> This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

Previously there had been prevalent an interpretation of that provision which focused on the words "as human persons", and resulted in a restrictive interpretation of the guarantee of equality given to citizens, in that it was held to relate to their "essential attributes as persons, those features which make them human beings". For instance, in a case in 1972, it was held in the High Court by Mr. Justice Kenny that Article 40.1 had nothing to do with the trading activities or with the conditions on which persons are employed (*cf. Murtagh Properties v. Cleary* [1972] I.R. 330). Since the decision of the Supreme Court in the *Employment Equality Bill* reference,

that restrictive interpretation is no longer the basis for the application of Article 40.1. In the context of difference of treatment of employees on the ground of age, the Supreme Court gave the following analysis of the application of Article 40.1:

> "Article 40, s. 1 as has been frequently pointed out, does not require the State to treat all citizens equally in all circumstances. Even in the absence of the qualification contained in the second sentence, to interpret the Article in that manner would defeat its objectives. In the present context, it would mean that the State could not legislate so as to prevent the exploitation of young people in the work place or, at the other end of the spectrum, to make special provision in the social welfare code for the elderly. The wide ranging nature of the qualification which follows the general guarantee of equality before the law puts beyond doubt the legitimacy of measures which place individuals in different categories for the purposes of the relevant legislation. In particular, classifications based on age cannot be regarded as, of themselves, constitutionally invalid. They must, however, be capable of justification on the grounds set out by Barrington J. in *Brennan & Ors. v. Attorney General* . . . as follows –
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> > 'the classification must be for a legitimate legislative purpose . . . it must be relevant to that purpose, and that each class must be treated fairly'."

Protection of Human Rights: significant development post-1987

As regards the protection of human rights, perhaps the most significant event which has occurred since 1987 was the coming into operation of the European Convention on Human Rights Act 2003 on 1st January, 2004. Until this year, it has been difficult to make an assessment of the extent to which the implementation of that

Act will supply lacunae which may be found in the protection of human rights afforded by the provisions of the Constitution. The decision of the Supreme Court in February of this year in *Donegan v. Dublin City Council*, which is now reported at [2012] 2 ILRM 233, throws some light on that issue. That decision was the first occasion on which the Supreme Court has made a declaration of incompatibility in relation to a statutory provision pursuant to s. 5 of the Act of 2003. The Supreme Court the judgment, with which the other four Judges of the Supreme Court concurred, was delivered by Mr. Justice McKechnie, who, coincidentally, as is recorded in the biographical note in the information leaflet for this Conference, made the first declaration of incompatibility under s. 5 while a High Court Judge in the transgender case of *Foy v. An t-Ard Chlaraitheoir & Ors*. [2007] IEHC 470. The reason I consider the decision in the *Donegan* case to be relevant to the topic which I have been asked to address is because the statutory provision which was declared incompatible in the *Donegan* case had been the subject of a number of unsuccessful challenges invoking the provisions of the Constitution before the enactment of the Act of 2003.

The alleged miscreant section

The statutory provision at issue in the *Donegan* case was s. 62 of the Housing Act 1966. Section 62 is one of a range of provisions in that Act which govern the provision and management of housing authority dwellings. The obvious objective of s. 62 was to provide an easy mechanism whereby a housing authority could recover possession of a dwelling from a tenant. That mechanism is available where there is no tenancy in the dwelling, whether by reason of the termination of the tenancy or otherwise, and there is an occupier of the dwelling who does not vacate on demand

for possession being made by the housing authority, and the occupier is threatened with an application being made under s. 62 if the demand for possession is not complied with. In those circumstances the housing authority may apply to a Judge of the District Court for the issue of a warrant for possession. The aspect of s. 62 which tenants and occupiers have sought to impugn over the years is subs. (3) which deals with the jurisdiction of the Judge of the District Court on the hearing of the application. Subs. (3) provides that the Judge of the District Court "shall, in case he is satisfied that the demand mentioned in subs. (1) has been duly made, issue the warrant".

I cannot say whether s. 62 deserves a place in the Guinness Book of Records as the most challenged statutory provision taking account of its lifespan. However, a policy statement issued by the Commission and published on its website in March 2009 listed some of the reported and unreported cases in which s. 62 had been considered. The procedural avenues by which the s. 62 issue has come before the Superior Courts have been varied: in some cases by way of judicial review; in others by case stated either of the District Court or the Circuit Court. The *Donegan* case was a plenary action for declaratory and injunctive relief.

Constitutional challenges to s. 62

What I wish to emphasise is that during its almost forty years lifespan up to the enactment of the Act of 2003, s. 62(3) was secure against a finding of constitutional invalidity. For instance, in *The State (O'Rourke) v. Kelly* [1983] I.R. 58, the constitutional challenge to subs. (3) of s. 62 on the ground that it constituted an interference with the function of the District Court in the administration of justice by depriving the District Justice of any real discretion in determining an application

was rejected by the Supreme Court. In effect, the Supreme Court held that provided the formal proofs stipulated in subs. (1) of s. 62 have been complied with, the Judge of the District Court must issue the warrant in accordance with the legislative provision, which was within the competence of the Oireachtas. Indeed a similar view had been expressed in July 1968 by Henchy J. in *Corporation of Dublin v. McDonald* (High Court, 3rd July, 1968), as is recorded in the report of the O'Rourke case.

More recently, in *Dublin Corporation v. Hamilton* [1999] 2 I.R. 486, which came to the High Court by way of case stated, and did not involve a challenge to the constitutionality of s. 62, Mr. Justice Geoghegan, following the decision of the Supreme Court, held that the Judge of the District Court had no discretion under subs. (3) of s. 62 once the necessary proofs had been complied with, holding that it was both reasonable and constitutional that a housing authority have available a rapid method of recovering possession of a dwelling without the provision of reasons for doing so. In that case, it was argued on behalf of Ms. Hamilton, unsuccessfully, that the Judge of District Court could only issue a warrant if he was satisfied that the housing authority had given due considerations to its statutory duties contained in the Housing Act 1998 in respect of Ms. Hamilton and, further, considered her constitution rights to equal treatment, fair procedures and bodily integrity as guaranteed by Articles 40.1 and 40.3 of the Constitution.

Section 62 and the Act of 2003

While that was the state of play when the Act of 2003 came into operation, after a lull necessitated by the decision of the Supreme Court in *Dublin City Council v. Fennell* [2005] 1 I.R. 604, in which it was held, effectively, that the Act of 2003

does not have retrospective effect, there was a veritable tsunami of challenges to s. 62 under the Convention. These included, apart from the *Donegan* case, the following:

- *Leonard v. Dublin City Council* [2008] IEHC 79.
- *Dublin City Council v. Gallagher* [2008] IEHC 354, which was the subject of an appeal which was heard by the Supreme Court in conjunction with the appeal in the *Donegan* case.
- The various stages of *Pullen v. Dublin City Council* – judgment of Irvine J. of 12th December, 2008 [2008] IEHC 379, the judgment of Irvine J. dated 28th May, 2009 [2009] 2 ILRM 484, and the judgment of Irvine J. of 12th December, 2009 [2010] 2 ILRM 61.

The Commission participated in the Pullen case as *amicus curiae*.

The *Donegan* decision

The outcome of the *Donegan* appeal was that the appellant was granted the following remedy (at para. 159 of the judgment):

> "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."

That clarity has been brought to the issue of the compatibility of s. 62 with the Convention by the decision of the Supreme Court in the *Donegan* appeal is to be welcomed. However, the significance of the decision goes beyond the question of whether s. 62 interfered with the Convention protected rights of the appellants, having regard to the circumstances in which the appellants found themselves. Therefore, I have taken the liberty of summarising the legal, as opposed to the factual findings,

which were made by the Supreme Court in the appendix attached hereto. In particular, I would draw attention to what the Supreme Court had to say about the adequacy of judicial review as a remedy for the appellants and its conclusion on the application on Article 8 of the Convention.

Parting thoughts

One could spend much longer than thirty minutes trying to tease out how effective the remedies available under the Act of 2003 will prove to be for litigants who have to resort to them to protect their human rights, rather than being able to invoke the provisions of the Constitution to afford them protection. Even factoring in the entitlement of persons in this State to have recourse to the European Court of Human Rights in Strasbourg to seek redress for violation of Convention protected rights, one's instinctive response is that in circumstances, in which the protection of human rights afforded by the Constitution can be invoked, the means of redress of violations of those rights and the remedies available, in reality, afford superior protection than is available under the Act of 2003 or under the Convention generally.

In 1987, Chief Justice Finlay stated that what he referred to as "this charter of individual rights", meaning Articles 40 – 44 and Article 38, had truly been and become "a ready, efficient weapon for the procurement of true justice". In my view, the Constitution remains the primary and most effective source of the protection of human rights in the State. I believe it has been and it will continue to be "a ready, efficient weapon for the procurement of true justice".

APPENDIX

Summary of legal issues/findings of the Supreme Court in *Donegan v. Dublin City Council*

Issues/relevant law identified by the Supreme Court

In addressing the issues in the *Donegan* and *Gallagher* appeals, McKechnie J. addressed:

(a) the interpretation of s. 62;

(b) the impact, if any, which s. 2 of the Act of 2003 has on such interpretation;

(c) Aticle 8 of the Convention and the relevant European Court of Human Rights case law on it;

(d) the U.K. case law;

(e) sufficiency of judicial review; and

(f) Articles 6, 13 and 14 of the Convention.

He then set out his conclusions on Article 8 and the application of s. 5 of the Act of 2003.

Construction of s. 62

As regards the construction of s. 62, McKechnie J. summarised the position as follows (at para. 93):

> ". . . 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."

Impact of s. 2 of the Act of 2003

When considering the impact of s. 2 of the Act of 2003 on the meaning of s. 62(3), McKechnie J. (at para. 98) considered what would have to be read into that provision to give the District Court a discretion which would meet the facts of the appeals and posed a number of rhetorical questions:

> "Could it be read in such a way that the District Court could adjudicate on issues, including issues of fact, which are extraneous to the specified requirements of the section, and, depending on its findings, could the Court, as a result, refuse to make the order sought; in the case of Mr. Donegan, could the District Court resolve the factual conflict, and if decided in Mr. Donegan's favour, have a discretion to refuse the order on that ground; in the case of Mr. Gallagher, could the District Court resolve the residency dispute and, if decided in his favour, have the discretion to refuse the order on that ground, despite the agreed position on the rent issue."

In identifying the scope of s. 2 of the Act of 2003, McKechnie J. emphasised that when the Court is applying that provision it is doing so "subject to the rules of law relating to such interpretation and application". He specifically referred to the principles in relation to the interpretation of statutes laid down by the Supreme Court in *McGrath v. McDermott* [1988] I.R. 258 and *Howard v. The Revenue Commissioners* [1994] 1 I.R. 101. McKechnie J. concluded (at para. 106) that applying those principles, one could not read into s. 62(3) jurisdiction on the part of

the Court to adjudicate on issues, including issues of fact, extraneous to this specified requirements of the section and to exercise discretion of the type envisaged in the questions he had posed earlier. In short, he concluded that s. 2 of the Act of 2003 has no effect on s. 62(3) (para. 106).

Article 8/Strasbourg decisions/U.K. decisions

The kernel of the decision of the Supreme Court is the application to the operation of s. 62(3) of Article 8 of the Convention, which provides that everyone has "the right to respect for his private and family life, his home and his correspondence", and, in particular, paragraph 2 of Article 8 which provides:

> "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 wellbeing of the country, for the prevention of disorder or crime, for protection of health or morals, or for the protection of the rights and freedom of others."

In considering the application of Article 8, McKechnie J. pointed to two decision of the Strasbourg Court as "the primary source of the application of the instant appeals". He considered it was not necessary or desirable to consider U.K. case law on the application of Article 8. The two Strasbourg authorities in question are:

(1) *Connors v. United Kingdom* [2004] 40 E.H.R.R. 189; and

(2) *McCann v. United Kingdom* [2008] E.C.H.R. 385, the decision in which post-dated the *Donegan* decision at first instance.

It is interesting to note that before embarking on a consideration of the *Connors* decision, the *McCann* decision and the decision of the Strasbourg Court in *Blecic v. Croatia* [2004] 41 E.H.R.R. 13, McKechnie J. clearly defined the core issue in each case as follows (at para. 107):

> "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."

Adequacy of judicial review remedy

On the procedural aspect, McKechnie J. pointed out (at para. 122) that 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. He pointed out that the only one of relevance in this jurisdiction is that of judicial review. He emphatically rejected the submissions made on behalf of the Council and the Attorney General that, in this jurisdiction, judicial review provides an adequate safeguard, pointing out that very simple and straightforward conflicts required resolution on the facts of both appeals. Was Mr. Donegan's son a drug addict or a drug pusher? Was Mr. Gallagher residing with his mother for the period in question or was he not?

In addressing whether those issues could be resolved on judicial review, he stated (at para. 124):

> "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."

Similarly, with regard to any challenge based on unreasonableness, he pointed out that the challenger would have to meet the requirements laid down by the Supreme Court in *State (Keegan) v. Stardust Tribunal* [1986] I.R. 642 and *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. Again, even if judicial review could be engaged, the underlying dispute would remain unresolved.

Articles 6, 13 and 14

As regards the other Articles of the Convention invoked by Mr. Donegan and Mr. Gallagher (Articles 6, 13 and 14), McKechnie J. held that they were not applicable to the appeals. The outcome was determined entirely by the application of Article 8.

Conclusions on the application of Article 8 to the operation of s. 62(3)

The general principles to be applied in assessing the compatibility of s. 62(3), having regard to the requirements of Article 8, were summarised by McKechnie J. in para. 143. I think it would be helpful to quote in full what he said about the application of Article 8 in the context of the facts before the Supreme Court, because it is indicative of the reasoning process in dealing with an issue of compatibility of a law with the Convention. Having stated that Article 8 affords to every person the

right to respect in his private and family life and, as relevant to the case before the Supreme Court, his home, he stated:

"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.

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

(ii) 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,

(iii) 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. . . .

(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."