Housing Rights, The European Convention on Human Rights & National Mechanisms

Cormac Ó Dúlacháin SC

21 November 2009

1. The primary focus of this address is to explore in practical terms how the European Convention on Human Rights Act 2003, hereinafter referred to as the Act of 2003, has been invoked in housing cases and through that prism to identify issues that impact on the general utility of the Act in achieving its primary stated purpose, namely to enable further effect to be given to certain provisions of the Convention.

2. As an area for case study it enables us to compare the difficulties encountered by lawyers acting for public housing tenants both pre and post the Act of 2003.

3. Article 8 of the Convention does not create a right to housing per se. The Article does create a right to respect for a person's home and it does limit the extent to which public authorities can interfere with that right. It therefore creates a protective right in circumstances where one has a home. What constitutes a home is a factual matter and has to be distinguished from a legal interest in land, which of itself, may be protected under Article 1 of the First Protocol.

4. Where a person's right to reside in a home is in contention then Article 6 of the Convention which concerns the right to a fair trial may also be engaged.

5. At a general level all citizens whose right to possession of a home is challenged can invoke the rights guaranteed by Article 6 in so far as they seek to invoke the substantive law of the State in defence of their interests. However Article 6 does

not prescribe what legal rights home occupiers are entitled to, it is in substance a due process article.

6. The extent to which Article 8.1 may be relied on by all persons to demand that the law provides a minimum degree of substantive legal protection for the home has not been explored. It may be that "self-help" remedies such as re-entry and foreclosure would be regarded as incompatible with a right to respect for the home.

7. The main area of focus is the extent to which Article 8.2 effects those who are housed by public authorities, whether as tenants or simply by licence or permission. In physical terms a home may be a house, hostel, halting site or room in a bed & breakfast facility. The actual property need not be in the ownership of the housing authority, the property may be provided by a private party or operated by another organisation on an agency basis.

8. Accordingly Article 8.2 does not apply solely to the activities of Housing Authorities. What Article 8.2 achieves is that it imposes a "rights based" obligation on public authorities which is in addition to and superior to the "contract based" rights and obligations they may have vis-à-vis their tenants.

9. By way of example in the employment area the Unfair Dismissals Act, 1977 introduced into labour law the statutory concept of "fairness of dismissal" which created rights additional and superior to those arising from the contract of employment.

10. In the housing law, up until the Act of 2003, there was no similar concept of "fairness". The public housing tenant's rights were assessed purely on the basis of the contract of tenancy. In essence Article 8.2 introduces the general concept of fairness without the benefit of the fuller elaboration of what is fair that arises by way of example from legislation such as the Unfair Dismissals Act, 1977.

11. Public housing tenancies were regulated by contracts of tenancy that created tenancies from week to week which could be terminated at will on one weeks notice, since increased to four weeks. Essentially public housing tenants had in legal terms the lowest form of tenure inherited from the feudal system. As to why over the decades the concept of fairness did not emerge in public housing law is probably a reflection of prevailing attitudes, such as;

    (a) A perception that the provision of public housing was a charitable act and that beneficiaries of charity don't have substantive rights.

    (b) A deferential attitude to public authorities on the basis that such organs would not possibly act in an unfair manner.

12. The powerful position of housing authorities was re-enforced by section 62 of the Housing Act, 1966 which enabled the authorities to recover possession by proceedings in the District Court that did not require any hearing of the merits but rather evidence of compliance with procedural steps.

13. There were various attempts to challenge the constitutionality of Section 62 of the Housing Act 1966. Those challenges were motivated by a belief that such unrestrained power was manifestly unjust. All these challenges failed and were disposed of in the Supreme Court in the shortest of written judgments and without even an echo of concern. It appeared that the societal attitudes referred to above were also informing the judgments of the Supreme Court.

14. It is arguable that there may still be a constitutional argument as to the constitutionality of Section 62 on the basis that the previous challenges were not canvassed from the personal rights point of view. Further the legal significance of termination and eviction from public housing has changed given developments in

the law, in particular because of Sections 14 and 16 of the Housing (Miscellaneous Provisions) Act 1997.

15. The net effect of a decision by a local authority that a tenant has been involved in anti-social behaviour is that;

    (a) They are liable to be evicted.
    (b) If evicted they are regarded as having made themselves homeless and therefore not entitled to homelessness assistance.
    (c) They can be refused rent supplement for private accommodation.
    (d) All other housing authorities can refuse housing support.
    (e) The information that eviction was sought on the basis of anti-social behaviour can be communicated to other housing agencies here and abroad.

16. In other words the tenant can, without any independent hearing, find themselves been homeless, deprived of further statutory entitlements and have their name permanently condemned.

17. Notwithstanding the extent to which the above offends against any normal sense of what is just and fair there is both institutional and political opposition to the concept that public housing tenants, as a class, are entitled to due process. This reflects a view that public housing authorities have to deal with such a concentration of anti-social behaviour that to fetter their actions in any way is against the public interest. In so far as society needs to tackle anti-social behaviour it is extraordinary that it deals with people on the basis of their housing tenure. The end result is that on the one street those own their homes may be able to engage in anti-social behaviour with immunity while those who are tenants are subject to a different regime.

18. There were various attempts to judicially review the decisions of housing managers to terminate tenancies but these met have with little success (*Wynne v. Dublin Corporation Unreported Highy Court, Shanley J, 22/07/98* is an exception). Even attempts to secure legal aid for S.62 cases failed see, *Byrne v Scally Unreported High Court, 12th October 2000, O'Caoimh J.*

19. The Act of 2003 presented new opportunities to challenge the Section 62 procedure especially when the European Court of Human Rights delivered judgment in the case of *Connors v. The United Kingdom, Application no. 66746/01, 27 August 2004.* In that case it held that a summary eviction procedure, used by a local authority to evict a traveller, which did not afford a hearing on the merits, infringed Article 8.

20. The first attempt to challenge Section 62 under the Act of 2003 arose in the case of *Fennell v. Dublin City Council, 12 May 2005.* The case went to the Supreme Court which determined that the Act of 2003 did not have temporal effect as the actions of the Council and proceedings which commenced prior to the commencement of the Act. While there is a logic to the decision in that prior to the Act the Convention only imposed on the obligations on the State itself and only as a matter of international law. However the analysis of whether the Convention as a matter of fact did bight needs to be reviewed in light of the decision of the European Court of Human Rights in *Silih v. Slovenia, Judgment of the Court of Human Rights of 9 April 2009* which reviewed the Courts own temporal jurisdiction.

21. The argument can be advanced that Dublin City Council's involvement was not complete either on the date of the termination of the tenancy or the date of the Court decision but that it still had to consider its convention obligations up to the time that it sought to enforce the Court order that is until the point of time that it instructed the sheriff to go in. In other words it had within its absolute discretion

whether or not to seek to enforce a Court Order and that decision was a decision which was subject to Section 3 of the Act.

22. It was soon to emerge that the State had sets it face against the decision of the European Court in Connors. In cases that were to come before the Courts the State adopted some later judgments of the UK courts which sought to interpret Connor's as a special case decision referable to the special circumstances of travellers. The European Court itself put an end to that line of argument in the case of *McCann v. United Kingdom 2008 47 E.H.R.R 913* where the Court held that the Connors principles were not limited to traveler specific cases. The Court noted;

23. *"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."*

24. The State and Dublin City Council are still advancing arguments based on what is a tension that continues to rumble between the UK Courts and their reluctance to accept as correct the analysis of ECHR in Connors & McCann.

25. There may be a concern that the qualifying criteria referred to in Article 8.2 places the courts into the realm of passing factual judgments on political assessments, an exercise that is far wider than that traditionally adopted by the courts when exercising its jurisdiction to judicially review administrative actions. The limits of the judicial review were noted by the European Court in *Tsfayo v. The United Kingdom, Application no. 60860/00, 14 November 2006.*

26. The lawfulness of interference by a public authority under Article 8.2 involves judicial assessment of;

> *What 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.*

27. In order to appreciate the significance of Article 8 it helps to reflect on the historical origins of the convention and the article. The convention was to afford international protection for human rights in the context where such rights had been crushed by the atrocities of national socialism and where national guarantees had proved inadequate. No where were those atrocities more visible than in the dehumanising of minorities and the stripping of rights to a family, rights to a home and the intellectual freedoms that are protected by the right of correspondence. The drafters of the Convention were that these core rights were stripped gradually and systematically over a period of years and in many cases by rules and regulations that might on their own have appeared relatively insignificant . Accordingly actions of states which involved any interference in these areas were identified as critical areas the convention needed to address if democratic and human values were to be the foundation for the future. For a fuller history see the special website of the Council of Europe dedicated to the 50th anniversary of the Convention and the original memorandums concerning the drafting of each separate article.

28. There have been three significant High Court judgments concerning Section 62 of the Housing Act, 1966.

29. In two separate cases Ms.Justice Laffoy in *Donegan v. Dublin City Council, 8 May 2008* and Mr. Justice O'Neill *in Dublin City Council v. Liam Gallagher* have ruled that Section 62 of the Housing Act 1966 is incompatible with the European Convention on Human Rights.

30. In *Pullen v. Dublin City Council, 12 December 2008* Ms Justice Irvine dealt with the matter under Section 3 of the Act of 2003 and held that the decision of Dublin City Council to use the section 62 procedure constituted a failure by it to perform its functions in a manner that was not convention compliant. The rationale in Pullen was that Section 62 was not the only procedure available to the Council and that if it chose a procedure that was not convention compliant that it was in breach of Section 3 of the Act.

31. In the above three cases there were issues of fact in relation to conduct or the circumstances of the Applicants in issue. However in *Gifford v. Dublin City Council, 20th November 2007* Mr Justice Smyth held that judicial review was an appropriate remedy this view was supported by Ms. Justice Dunne in *Leonard v. Dublin City Council, Unreported 31 March 2008.* In the *Leonard case* Ms Justice Dunne held that there was in fact no factual dispute to be resolved and that to argue for a right to a hearing in that context was meaningless.

32. What the above cases fail to appreciate is that even if the facts are admitted the interference could still be disproportionate, and it is proportionality that is at the heart of Article 8. Is the housing authority to be the final arbiter of whether its own actions are or are not proportionate? If the decision is not proportionate what is the remedy? Traditionally judicial review has been limited to setting aside decisions that are irrational, but irrationality is not the same as proportionality.

33. It is also interesting to note that the State has also sought to argue that the relief available under the Act of 2003 is limited. In respect of a Section 3 breach it has been argued that the Court can only award damages. Mr. Justice Irvine in *Pullen*

v,. Dublin City Council (No.2) 28 May 2009 held that she could not grant an injunction restraining the Council and held in the circumstances of that case she could only award damages. In *Pullen v. Dublin City Council (No.3) 13 October 2009* she went on to assess damages.

34. Prior to that judgment, Murphy J. had held in *Byrne v. Dublin City Council Unreported, 18th March 2009* that he could grant an interlocutory injunction in proceedings challenging Section 62.

35. In Byrne v. An Taoiseach (not a housing case), hearing pending, the State is further contending that the Court has no jurisdiction even to grant a declaration under Section 3.

36. By way of conclusion it should be observed that the Act of 2003 provides for the domestic vindication of the some of the rights and freedoms guaranteed by the Convention but not all. The Act does not apply to all possible circumstances of infringement that might arise from the acts or inactions of the State, notwithstanding that those actions may constitute infringements of the State's international obligations.

37. In light of the foregoing one has to question how effective the Act of 2003 will be if it transpires that in this key area of human rights the Courts powers are significantly constrained. In the area of human rights the restraint of government action can be far more important than the award of damages. In addition, if the Supreme Court does no prioritise the hearing of appeals in cases where the High Court has found either laws or conduct to be in breach of the Convention, then organs of the State may well use the Court process to defer meeting their human rights responsibilities.

38. To some of us it appears that the stance adopted by the State and State Agencies in ECHR Act actions and the arguments advanced give the clear impression of a

State that has found itself with a "foundling law" placed at its backdoor and arriving by circumstance rather than by invitation, an Act that whose potential scope and effect has to be tamed.

39. We really do have to ask ourselves whether the Act of 2003 represents a half-hearted begrudging acknowledgement of the European Convention of Human Rights. Our domestic legislation should be infused with the spirit of the Convention and should be a sufficiently powerful instrument as to be a testament to the immense sufferings which the Convention is a response to.