THE SUPREME COURT

Appeal No. 203/2010 & 213/2010

IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003, SECTION 3(1)

BETWEEN/

LAURANCE PULLEN, CAROL PULLEN, EMMA LOUISE DOUGLAS [A MINOR] SUING BY HER MOTHER AND NEXT FRIEND CAROL PULLEN AND BRENDAN DANIEL DOUGLAS [A MINOR] SUING BY HIS MOTHER AND NEXT FRIEND CAROL PULLEN,

PLAINTIFFS/RESONDENTS

AND

DUBLIN CITY COUNCIL

DEFENDANT/APPELLANT

AND BY FURTHER ORDER HUMAN RIGHTS COMMISSION

AMICUS CURIAE

AND

THE ATTORNEY GENERAL

NOTICE PARTY

OUTLINE SUBMISSIONS ON BEHALF OF THE AMICUS CURIAE

Introduction

1. As apparent from the pleadings and the submissions of the parties already filed herein, this case involves the issue of the lawfulness of the eviction process provided for under s. 62 of the Housing Act, 1966 [hereinafter "the 1966 Act"].

The Role of the Human Rights Commission

2. The Commission is an independent statutory body established by the Human Rights Commission Act, 2000 whose functions include a power to make applications to the High Court or Supreme Court for leave to appear as *amicus curiae* in proceedings that involve or are concerned with the human rights of any person as defined in Section 2 of the said Act as follows:-

"(a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and

(b) the rights, liberties and freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention."

3. The Commission is mindful of the limitations of its role in offering assistance to the Court. The Commission does not have a role in repeating arguments or submissions which have been effectively made and will endeavour not to do so in these submissions or in subsequent oral submissions invited by this Court to the greatest extent possible and consistent with putting the submissions we make in context.

Prior Involvement of the Commission in the within Proceedings

4. The Commission first became involved in this case on the invitation of the High Court (Clarke J.) in December, 2007 in the context of an application for an interlocutory injunction (which was accommodated by an early hearing date of the substantive proceedings and voluntary undertakings). On foot of this invitation, the Commission participated in the main proceedings (heard in April, 2008 before Irvine J.), although not in the later proceedings relating to the availability of injunctive relief and the claim for damages under Section 3(2) of the European Convention on Human Rights Act, 2003.

5. At the hearing before the High Court in April, 2008, the Commission was the only party to raise the issue of the constitutionality of Section 62 of the 1966 Act and the requirement arising under the scheme of the European Convention on Human Rights Act, 2003 that consideration be given to any other remedy available before proceeding to rely on Section 3 of the Act. This issue was raised by the Commission notwithstanding that no direct challenge to the constitutionality of the section was pursued in the pleadings. The Commission raised the issue on the basis that it was relevant to the question of remedies under the 2003 Act and the requirement under that Act that remedies there provided for arose only in the absence of other available domestic remedies. It is useful to note in this context, that aside from the primary relief sought under Section 3 of the 2003 Act, the Plaintiffs had in the alternative sought a declaration of incompatibility under Section 5 of the Act, a relief not pursued in light of the finding of the Court in relation to Section 3. In addition to the

constitutional argument, the Commission also advanced arguments in reliance on the European Convention on Human Rights, specifically the right to a fair hearing (Article 6), the right to respect for private and family life and the home (Article 8), the right to non-discrimination in the enjoyment of Convention rights (Article 14) and the right to private property (Article 1 of Protocol 1). These submissions were advanced in writing and also through counsel in a brief oral intervention.

Decision of the High Court

6. In the judgment delivered on the 12th of December, 2008 (hereinafter "the first judgment") by Irvine J. the argument presented by the Commission was summarised (at p. 32 of the judgment). While noting the constitutional arguments advanced, the Court proceeded, implicitly, to deal with the case on the basis that the constitutional question had been determined (see summary appearing under heading "Irish Law" at heading 9 page 33 of the judgment) referring to the decision of this Court in ***State (O'Rourke) v. Kelly***[1] in which the constitutionality of Section 62 was considered and upheld. Ultimately, the Court concluded, following a review of jurisprudence under the European Convention on Human Rights, that there had been a breach of statutory duty pursuant to Section 3(1) of the European Convention on Human Rights Act 2003 in light of the provisions of Articles 6 and 8 of the Convention. No appeal has been brought against the Judge's findings in her first judgment.

7. Having thus determined that the Plaintiffs' rights under the Convention had been breached, the Court was required to consider further argument as to the remedy that might be granted under the 2003 Act. Specifically, in a second judgment (hereinafter "the second judgment") delivered on the 28th of May, 2009, the Court considered whether it had power to grant injunctive relief where it has found that an organ of the State has acted in a manner which is incompatible with its Convention obligations viz. whether it has power to restrain the enforcement of the District Court Order granting a warrant for possession in November, 2006. Irvine J. handed down Judgment on this issue on the 12th of October 2009. The Honourable Court, referring to its first Judgment, considered that the relief sought by the Plaintiffs in seeking an injunction restraining the Defendants from evicting them from their home was unavailable to them and that the only remedy available was in damages. The Plaintiffs/Respondents have cross-appealed in respect of the finding that injunctive relief is not available. This finding is of clear significance in terms of the effectiveness of remedies available under the 2003 Act and a matter of considerable importance. The Commission, in its role as *amicus curiae*, wishes to respectfully highlight the critical importance of subjecting this finding to full argument before this Honourable Court makes a final determination on the question given the implications of this finding in terms of the remedies available for breaches of fundamental rights and the manner in which the State has sought to give effect to the ECHR in domestic law, at a sub-constitutional level.

8. Subsequently, following a third hearing, the Honourable Court in a judgment delivered on the 12th of October, 2009 (hereinafter "the third judgment"), awarded a sum of €20,000 to both the first and second named Plaintiffs by way of compensatory damages for the wrongful breach by the Defendant of their

[1] [1983] IR 58.

Convention rights. The Defendant/Appellant appeals against this finding claiming firstly, that damages should not lie against a public authority who acts in reliance on a provision which has been found to be incompatible with the Convention. The Appellants submit that the correct course for the Learned Trial Judge to take in those circumstances was to grant a Declaration that Section 62 was incompatible with the Convention under Section 5 of the 2003 Act. Secondly, the Defendant/Respondent takes issue with the level of damages awarded. Both these issues are issues of importance in terms of the scope and effectiveness of protections available under the 2003 Act.

Proceedings before the Supreme Court

9. By uncontested Order of this Court made on the 21st day of December, 2010 the Human Rights Commission was granted permission to appear in the within proceedings as *amicus curiae* on foot of its application to so appear before this Honourable Court. Its application was grounded on the Affidavit of its Chief Executive Officer which sets out more fully the statutory role of the Commission and its prior involvement in this case. In his Affidavit grounding the application of the Commission to appear as Amicus Curiae, the Chief Executive of the Commission set out the interest of the Commission by identifying a number of important issues of principle which arise in the within proceedings. Following the exchange of written submissions, issues which the Commission considers arise for further submission include the implications of the provisions of the Constitution for this case; the relationship between the Constitution and the 2003 Act (including available remedies); the proper scope and interpretation of remedies available under the 2003 Act including whether injunctive relief lies to restrain a breach of Convention rights; the proper approach to the question of damages and the limitations of Section 5 of the 2003 Act in light of the primacy of the Constitution and the nature of the relief that may be provided thereunder.

Developments since the High Court Decisions

10. Since the within proceedings were determined in the High Court, this Honourable Court has handed down judgment in two separate but highly relevant cases, namely: ***Donegan v. Dublin City Council & Ors*** [2012] IESC 18 and ***Damache v. DPP, Ireland & Ors.***[2]

11. In ***Donegan*** this Court in a judgment delivered on the 27th of February, 2012, affirmed the decision of the Laffoy J. in the High Court granting a Declaration pursuant to Section 5 of the 2003 Act that Section 62 was incompatible with the Convention.

12. In ***Damache***, this Court found, by reference to Article 40.5 of the Constitution (inviolability of the dwelling) that Section 29 of the Offences Against the State Act, 1939 is unconstitutional because it permits a search of one's home contrary to the Constitution on foot of a warrant which was not issued by an independent person in a position to assess the conflicting interests of the State and the individual. The Court considered it a "fundamental norm of the legal order" established under the

[2] [2012] IESC 11.

Constitution that a decision to issue a search warrant trenching on the inviolability of the dwelling would be made by an independent person. If this is the case with regard to a decision to issue a bench warrant with a consequential temporary violation of the dwelling, it begs the question as to the constitutional requirements as regards the permanent violation effected by a warrant for possession under Section 62 of the 1966 Act.

The Constitutional Issue

13. Although, the constitutionality of Section 62 of the 1966 Act does not arise directly on the pleadings in that no claim is advanced that the section is unconstitutional, it is established (***Carmody v. Ireland*** [2009] IESC 71) that the question of a remedy under the 2003 Act only arises where there is no other "available" remedy in damages in the context of a damages claim or an "available and adequate" remedy in the context of a Section 5 claim. Thus, it is necessary for this Court, both having regard to the nature of the relief sought by the Plaintiffs/ Respondents and of its own motion, to be satisfied in the first instance as to the constitutional soundness of Section 62. It is only where there is no remedy in damages under the Constitution or where no other relief is available under the Constitution that this Court may proceed to make an award in damages under Section 3(2) of the 2003 Act or grant a declaration of incompatibility under the 2003 Act.

14. Section 62 of the 1966 Act has survived previous constitutional challenge, albeit that the issue of the constitutionality of the section appears to have been addressed directly by this Court on only one previous occasion, namely in this Court's decision in the ***State (O'Rourke) v. Kelly***[3]. The section was, of course, also the subject matter of this Court's consideration in ***Dublin City Council v. Fennell***[4] and later in the ***Donegan*** and ***Gallagher*** cases, but not in the context of a direct constitutional challenge. The proceedings came before the Court by way of consultative case stated on a question of retrospectivity of the 2003 Act in ***Dublin City Council v. Fennell***, by way of case stated as to the interpretative obligations under the 2003 Act in ***Gallagher*** and in plenary proceedings seeking Convention relief only in ***Donegan***.

15. In ***Dublin City Council v. Fennell***, Kearns J., in considering the statutory process provided for in Section 62 , observed that the section permitted a housing authority to effectively manage and control its housing stock, without being unduly restricted or unfettered and proceeded on the basis that the constitutionality of the section was upheld in ***State (O'Rourke) v. Kelly*** without any further scrutiny as to the parameters of that decision on the basis of the challenge considered by the court. Similarly, in the later cases of ***Gallagher*** and ***Donegan***, there has been no fresh re-argument of the constitutional issues and this Court has proceeded on the basis that the issue stands determined by ***State (O'Rourke) v. Kelly***, albeit without a fuller assessment by this Court of the issues actually argued and decided in that case, and a decision on whether other avenues of constitutional challenge are open (although an argument to this effect is noted as having been made by Counsel for ***Gallagher*** in the Supreme Court but without a decision on the argument).

[3] [1983] I.R. 58.
[4] [2005] 1 I.R. 604.

16. Thus, a logical starting point for any consideration of the constitutionality of Section 62 of the 1966 Act must be the decision of this Court in ***State (O'Rourke) v. Kelly.*** As apparent from the judgment, the challenge brought in that case against the section was based on a breach of the separation of powers doctrine. Notably, no challenge was brought or considered on the basis of the personal rights of the occupant (including rights to procedural fairness guaranteed under Article 40.3.1 of the Constitution) or the inviolability of the dwelling protected under Articles 40.3 and 40.5 of the Constitution and so on closer scrutiny it is clear that the case was not decided on the basis of a full constitutional challenge. Even if accepted that the Judgment was decided on the basis of a full constitutional challenge (which appears not to be the case), there is clear authority for the consideration of constitutional issues in light of contemporary conditions: the Constitution "is a constitution for the people expressing principles for its society ... it is a document for the people of Ireland, not an economy or a commercial company"[5] and one that must be interpreted in light of contemporary conditions. The *amicus curiae* respectfully suggest that the constitutional interpretation of Section 62 in light of contemporary conditions may be informed by the jurisprudence of the Strasbourg Court.

17. It is respectfully submitted that Section 62 is therefore not immune from constitutional challenge on different grounds to those at issue in the ***O'Rourke*** case on the established basis that a point not argued is a point not decided. The most relevant recent authority on this point is the decision of the Supreme Court in ***Laurentiu v. Minister for Justice***[6]. That case concerned a challenge to the constitutionality of s. 5 of the Aliens Act, 1935. Although the constitutionality of that section had previously been upheld by the Supreme Court[7], in the High Court Geoghegan J. held that he was not thereby precluded from holding that the sub-section was unconstitutional on different grounds:

> *"I accept the general principle asserted by counsel that the upholding of the constitutionality of an enactment against a particular ground of attack does not preclude the Court from reconsidering the matter in another case in the light of a quite different form of attack. In this connection counsel relies on the following passage in the judgment of O'Dalaigh CJ in The State (Quinn) v Ryan*[8]*,:*
>
> *"It requires to be said that a point not argued is a point not decided; and this doctrine goes for constitutional cases (other than Bills referred under Article 26 of the Constitution and then by reason only of a specific provision) as well as for non-constitutional cases."* [9]
>
> *The challenge to both the Act and the Statutory Instrument which is*

---

[5] See *Sinnott v Minister for Education* [2001] 2 IR 545 at p. 664 . In *A v The Governor of Arbour Hill Prison* [2006] 4 IR 88 Murray CJ (as he then was) recalled his previous comments in *Sinnott* that the Constitution may be viewed as a living document "which falls to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores", also citing Walsh J in *McGee v Attorney General* [1974] 284 as to how the Constitution was to be conditioned by "prevailing ideas" of prudence, justice and charity. See also O'Higgins CJ in *The State (Healy) v Donoghue* [1976] IR 325.

[6] [1999] 4 IR 26.

[7] *Tang v. Minister for Justice* [1996] 2 ILRM 46.

[8] [1965] IR 70.

[9] [1965] IR 70 at 120.

> *made [here] on behalf of the applicant is one that has not been made before."*[10]

18. On appeal to the Supreme Court the majority agreed that the previous decisions did not stand in the way of the present and novel challenge. Denham J. expressly approved of the dicta of O'Dalaigh CJ just quoted[11] and Keane J., having analysed the earlier case-law, commented:

> *"It follows that the issue raised in this case as to whether the Act is inconsistent with the Constitution in trespassing on the exclusive law making role of the Oireachtas is res integra."*[12]

19. Thus, it is submitted, a challenge on Article 40 grounds is not only **not** precluded by ***O'Rourke***, but this entire issue remains *res integra*.[13]

Personal Rights under Article 40.3.1 engaged by Eviction Process

20. It is respectfully submitted that it is clear from a consideration of constitutional jurisprudence in other areas that the forcible ejection of a person from their family home brings with it the entitlement to fair procedures and constitutional justice. For example, in ***DK v. Crowley,***[14] Section 4 of the Domestic Violence Act 1996 which provided for the grant of interim barring order was held to be unconstitutional on grounds of a lack of procedural protection in the section. As Keane CJ observed:

> *"However, although the proceedings are civil in character, the respondent remains entitled to the benefit of the constitutional guarantee that he or she will be afforded fair procedures in the hearing of the proceedings in accordance with the principles laid down by this court in Re Haughey [1971] IR 260.*

21. While the Oireachtas in giving effect to other constitutional rights – in the ***DK*** case the rights of spouses and dependant children to be protected against physical violence – is entitled to abridge the constitutional right to due process of persons, the extent of that abridgement must be proportionate, i.e. no more than is reasonably required in order to secure that the constitutional right in question is protected and vindicated: see ***Heaney -v- Ireland***.[15]

---

[10] [1999] 4 IR 26 at 36.
[11] [1999] 4 IR 26 at 59.
[12] [1999] 4 IR 26 at 83.
[13] See Hogan, Some Thoughts on the Relationship between the ECHR 2003 and the Constitution in the light of the *Dublin City Council v. Fennell* and *Carmody v. Minister for Justice, Equality and Law Reform* (CPD Paper, 2005) where he says (p. 6) "But there are two things to note here. First, the constitutional challenge in O'Rourke has been based exclusively on the separation of powers. No Article 41 or property rights issues have ever been raised in that case. In these circumstances, there is clear Supreme Court authority for the proposition that the High Court would not have been bound by the O'Rourke insofar as the challenge was based on different grounds.....secondly, since no one disputes that Article 8 embodies values which are different from Article 41 (not least so far as this sort of case is concerned) or that the property rights provisions of Article 40.3.2/Article 43 differ in substance from Article 1 of the 1st Protocol, then the most obvious question which arises is this: If section 62 is incompatible with the right to family life/property rights under the ECHR and if we admit that these provisions are broadly similar to the equivalent constitutional guarantees, then why is there not a similar doubt about the constitutionality of section 62 on these particular grounds?"
[14] [2002] 2 IR 744.
[15] [1996] 1IR 580

22. In reaching a decision as to whether that constitutional balance had been achieved in the legislation under consideration in ***DK***, the Court considered that it was of importance to bear in mind the consequences of the order made. In ***DK*** it resulted in the forcible removal of ***DK*** from his family in circumstances where he had not been heard in relation to a dispute of fact as to whether he had been residing at the family home for a period considerably in excess of five years and no consideration was given to the impact of his eviction on his constitutional rights.

23. The forcible eviction from a family home under Section 62 of the 1966 Act has consequences which are (at least) as drastic as those of a barring order and it is therefore not clear why the ratio in ***DK*** does not provide compelling authority for the proposition that section 62 is unconstitutional because it affords no procedural fairness in the process which culminates in exclusion from the home and does not require procedural fairness in a hearing before the District Court in the Section 62 process.

24. It is submitted that the Constitution provides for a legal framework within which administrative decisions of a public law nature fall to be excercised. Just like the Convention (as considered in detail by this Court in ***Donegan***), the Constitution requires procedural fairness in a decision making process which impacts on fundamental rights. Thus to suggest that the ECHR requires procedural fairness, but that the Irish constitutional protection does not, appears apposite. The position was summarised by O'Neill J. in ***Gallagher*** in the following terms (p. 28-29):

> *"This requirement for procedural safeguards [under the Convention] is comparable to the Constitutional guarantee of fair procedures in decision making by public bodies which flows from the unenumerated rights provision of Article 40.3.1 of the Constitution which states: 'the State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen'.*
> *In re Haughey [1971] IR 217 established that where a procedure affected the Constitutional rights of an individual, then certain safeguards must apply....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."*

25. As this Court is aware having considered the facts of the ***Gallagher*** case on appeal, Mr. Gallagher had an application to succeed to a tenancy. O'Neill J. went on to say in his judgment in ***Gallagher*** (at p. 40):

> *"I am satisfied that the 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".*

Having determined that Mr. Gallagher's right to procedural fairness under Article 40.3.1 of the Constitution had not been adequately protected in the eviction process, it is unclear why the Learned Trial Judge proceeded to grant a Declaration of Incompatibility without first deciding whether an adequate or available remedy under

the Constitution existed. If the eviction process provided for under Section 62 does not protect a constitutionally protected right to fair procedures (as O'Neill J. in the High Court appears to have found) and cannot be construed in a manner which provides such protection, surely it must follow that the section is unconstitutional and all the remedies available in respect of a violation of a constitutional right including injunctive relief, damages and a declaration of unconstitutionality are available as considered appropriate by the Court.

Inviolability of the Dwelling – Article 40.5

26. The Plaintiff enjoys separate rights under Article 40.5 of the Constitution to protection of the inviolability of his dwelling. As Hardiman J. put it in ***The People v. Barnes***[16]***:***

> "*Article 40.5 of the Constitution, under the heading "Inviolability of the dwelling" provides as follows:*
> *"The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law".*
>
> *This is a modern Irish formulation of a principle deeply felt throughout historical time and in every area to which the Common Law has penetrated. This is that a person's dwellinghouse is far more than bricks and mortar; it is the home of a person and his or her family, dependents or guests (if any) and is entitled to a very high degree of protection at law for this reason. Most of the cases on the topic relate to the restrictions which this puts on the State itself (most obviously the police force) in entering a person's home. But the home is, of course, also entitled to protection from criminals. This form of protection, indeed, was to the forefront of the concern of law makers in the early days of the Common Law…….*
> *……The propositions just set out derive from the nature of the dwellinghouse itself, and its constitutional standing as a place required by the dignity of the human person to be inviolable except in accordance with law. Though a dwellinghouse is property and often indeed the most valuable piece of property an individual citizen possesses, it would be quite wrong to equate it with other forms of property such as money or moneys worth or other pieces of personal property. Though these may have a sentimental as well as a cash value, and may in certain circumstances be important or even essential for the individual who owns them, a dwellinghouse is a higher level, legally and constitutionally, than other forms of property. The free and secure occupation of it is a value very deeply embedded in human kind and this free and secure occupation of a dwellinghouse, apart from being a physical necessity, is a necessity for the human dignity and development of the individual and the family.*

27. Support for the proposition that the Plaintiff's constitutional rights are breached by the Section 62 procedure and the manner in which it allows for

[16][2007] 1 ILRM 350.

interference with their private life and home may be drawn from the recent decision of the High Court (Hogan J.) in ***Wicklow County Council v. Katie (otherwise Catherine) Fortune***, 4th of October, 2012). This case concerned an appeal under Section 160 of the Planning and Development Act, 2000 where the Court was required to consider issues relating to the nature of the "inviolability of the dwelling" as provided for in Article 40.5 of the Constitution and the extent to which it might be available as a ground of defence where an order is sought directing the removal of the home under the planning code. The Judge stated:

> *"At the same time, Article 40.5 affords a real protection which the courts must safeguard by word and deed. Insofar as the Article 40.5 speaks of "inviolability", the drafters must be taken to have intended to convey through the use of rhetorical and philosophically inspired language drawn (as Hardiman J. pointed out in Cunningham) from the European constitutional tradition that the dwelling should enjoy the highest possible level of legal protection which might realistically be afforded in a modern society. In the planning context, this does not mean that the courts cannot order the demolition of an unauthorized dwelling unless the necessity for this step is objectively justified and, adapting the language of the European Court of Human Rights (in an admittedly different context) in Goodwin v. United Kingdom (1996) 22 EHRR 123, the case for such a drastic step is convincingly established.*
>
> *In this regard, it is not simply enough for the applicant Council to show – as indeed it already has – that the structure is unauthorized or that the householder has drawn these difficulties upon herself by proceeding to construct the dwelling without planning permission. It would be necessary to go further and show, for example, that the continued occupation and retention of the dwelling would be so manifestly at odds with important public policy objectives that demolition was the only fair, realisitic and proportionate response."*

28. In reliance on the decision of the High Court in the ***Wicklow County Council*** case, it is respectfully submitted that serious arguments arise as to whether an eviction order should or should not be made having regard to the guarantee of inviolability of the dwelling contained in Article 40.5 of the Constitution, absent adequate procedural safeguards. Under the Section 62 process, these arguments cannot be entertained by the District Court. Following a finding of unconstitutionality, it follows that the remedies of injunctive relief and damages are available to a Plaintiff.

29. This brings us to the decision of this Court in ***Damache*****.** In ***Damache***, this Court ruled that s. 29(1) of the Offences against the State Act, 1939 (as inserted by s. 5 of the Criminal Law Act, 1976) and referred to as s. 29(1) of the Act of 1939, was repugnant to the Constitution as it permitted a search of the appellant's home contrary to the Constitution, on foot of a warrant which was not issued by an independent person. In so doing the provision failed to reflect, and provide for, the essential balance between the requirements of the common good and the protection of the appellant's individual rights.

30. This Court recognized in ***Damache*** that there are two aspects of the issuance of a search warrant which are important. First, that a search warrant be issued by an independent person and, secondly, that such a person must be satisfied on receiving sworn information, that there are reasonable grounds for issuing a search warrant. The Court ruled (at paragraphs 47 and 51) that for the issue of a search warrant to be in accordance with law having regard to the constitutional protection for the home provided for in Article 40.5 of the Constitution, that the procedure for obtaining a search warrant should adhere to fundamental principles encapsulating an independent decision maker in a process which may be reviewed. The process should achieve a proportionate balance between the requirements of the common good and the protection of an individual's rights. The Court stated:

> *"For the process in obtaining a search warrant to be meaningful, it is necessary for the person authorising the search to be able to assess the conflicting interests of the State and the individual in an impartial manner. Thus, the person should be independent of the issue and act judicially. Also, there should be reasonable grounds established that an offence has been committed and that there may be evidence to be found at the place of search."*

31. The reasoning underpinning the ***Damache*** decision in relation to the need for an independent arbiter as to whether the requirements of the common good required the interference in question with the individual's rights applies with even greater force, it is respectfully suggested, in this case where the interference is so much more and amounts to complete dispossession rather than mere powers of entry and search.

Unconstitutional by reason of Disproportionate Interference

32. The constitutional frailty of Section 62, however, is not limited to the absence of an independent review procedure or a lack of procedural fairness in the decision making process. If Section 62 has the effect of authorising an order dispossessing the Plaintiffs of their home in the circumstances of this case as has been found, then it is difficult to understand why the section itself would not be unconstitutional as giving rise to a disproportionate interference with Plaintiff rights. The proportionality test as laid down by Costello J. in ***Heaney v. Ireland*** [1994] 3 IR 593 requires that the objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right and must relate to concerns pressing and substantial in a free and democratic society. The means chosen must be rationally connected to the objective and not be based on irrational considerations, must impair the right as little as possible and the effects on rights must be proportionate to the objective. The decision of this Court in ***Donegan***, however, recognises that the section interferes to a disproportionate extent with a right protected under the Convention. It is not clear why, where the same right is protected in equivalent terms under the Constitution, the provision is not similarly flawed as disproportionate on a constitutional analysis.

33. It hardly needs to be stated that if Section 62 is unconstitutional, this Court enjoys the wide jurisdiction vested in it under the Constitution to vindicate and protect rights protected under the Constitution, including remedies in damages,

declaratory relief to the effect that the section is void and by way of injunction. No question arises as to the effectiveness or adequacy of domestic remedies where constitutional infringements are found, provided the constitutional remedy is accessible to individuals.[17]

The Convention Case - Remedies under the 2003 Act

34 If, following a re-examination of the jurisprudence in which the constitutional issue has been addressed, this Court concludes that Section 62 is constitutionally sound, several significant questions arise on this appeal in relation to the application of the provisions of the 2003 Act.

Effectiveness of Remedies under the 2003 Act

35. The Convention requires an "effective" remedy under Article 13 of the Convention. This it is submitted has a bearing on the approach taken to the proper interpretation of Section 3 and the question which this Court is called upon to determine as to the availability of an injunctive remedy in aid of protection of Convention rights. The European Court of Human has held in a long line of cases dating from ***Silver v United Kingdom*** (1983) 8 EHRR 347 that Article 13 requires that "where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress". The requirement of an effective remedy is that the substance of the Convention right is protected and does not require that the remedy flow from the Convention itself but is sufficient in its form. Therefore it is possible for a Plaintiff bringing a claim for breach of the Article 8 right to privacy to have his claim dealt with by way of the right to privacy protected in the Constitution.[18] The European Court has stated that in order for a remedy to comply with Article 13 it must be effective, adequate and accessible, both in practice and in law.[19]

36. In the case of ***Kudla v Poland*** (2002) 35 EHRR 11 the European Court stated:

> "*As the Court has held on many occasions, Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief*".

37. The European Court acknowledged in ***Kudla*** that the effectiveness of a remedy under Article 13 did not depend on the certainty of a favourable outcome for the applicant. Nor did it require that the "authority" which determined the remedy be a judicial authority, but where the authority is not a judicial authority the powers and guarantees which it affords will be relevant in determining its effectiveness as a

---

[17] See *McFarlane v Ireland* at paras 115-124, 2-1- HUDOC (Application no. 31333/06) 10 December 2010.
[18] See *Norris v Attorney General* [1984] IR 36
[19] See *Rotaru v Romania* App. No. 28341/95

remedy. Finally the European Court noted that "even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so".

38. The case of ***Doran v Ireland***[20] reaffirmed the decision in ***Kudla*** and the court provided a useful summary of the requirements of Article 13. The ***Doran*** case involved proceedings in negligence against solicitors which had lasted almost eight and a half years. The applicants argued that they had no effective remedy as regards the length of the proceedings. In the circumstances of the case the European Court accepted there had been a violation of Article 13. The court set out three basic principles in respect of Article 13:

> "*55. Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, among many other authorities, Kudła v. Poland [GC], no. 30210/96, § 157, ECHR 2000-XI).*
>
> *56. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law (see, for example, İlhan v. Turkey [GC], no. 22277/93, § 97, ECHR 2000-VII). The term "effective" is also considered to mean that the remedy must be adequate and accessible (Paulino Tomás v. Portugal (dec.), no. 58698/00, ECHR 2003-...).*
>
> *57. In addition, particular attention should be paid to, inter alia, the speediness of the remedial action itself, it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration (Tomé Mota v. Portugal (dec.), no. 32082/96, ECHR 1999-IX, and Paulino Tomás, cited above).*

39. Arising from *O'Keeffe v Ireland*[21] Article 13 remedies must be available and effective and it is noteworthy that the 2003 Act differs in including reference to Article 13 whereas Section 1 of the UK's Human Rights Act 1998 precludes the provision from the definition of "Convention rights". As noted by De Londras and Kelly, Article 13 can be relied upon in a domestic context in the same way as any other Convention right under the 2003 Act.[22] This means that in interpreting statutory provisions under Section 2 a Court must consider Article 13 when attempting to interpret the provision in a Convention compliant manner. Similarly a court may find that an organ of the State has failed to perform its functions in a manner compatible with Article 13 under Section 3 of the Act. Finally under Section 5 a court may make

[20] Doran v Ireland (Application No. 50389/99), Judgment 31 July 2003.
[21] Application no. 35810/09, 28 January 2014, HUDOC 2014.
[22] Fiona de Londras & Cliona Kelly (2010) "*The European Convention on Human Rights Act: Operation, Impact and Analysis*" Dublin: Round Hall/Thomson at page 184.

a declaration that a statutory provision or rule of law is incompatible with the State's obligations under Article 13.

40. A Convention compatible interpretation as required by Section 2 of the 2003 Act calls for a wide interpretation of the Court's jurisdiction, particularly if Article 13 rights are to be afforded effective protection under Irish law.

Section 2 of the 2003 Act

41. In light of the comprehensive decision of this Court in ***Donegan*** concerning the interpretative obligation in Section 2 of the 2003 Act, the Commission does not seek to add to the submissions already filed by the parties herein save to identify to the Court developments since February, 2012 as regards interpretative obligations as a means of securing a remedy at domestic level. At the Interlaken (2010) and Izmir (2011) Ministerial Conferences, the Member States of the Council of Europe agreed unanimously that reform of the Court is needed in order to ensure the continuing effectiveness of the Convention system and to reduce the backlog of, *inter alia*, repetitive applications coming before the Court particularly where those applications should have benefited under effective remedies being available at the national level (the principle of "subsidiarity" as set out in Article 1 of the Convention). The aim of the Brighton Conference in April, 2012 (post judgment of this Court in ***Donegan***), was to agree on a package of concrete reforms to ensure that the Court can be more effective and it was in this context that the terms of the Brighton Declaration of the Council of Europe was agreed.

42. In the Brighton Declaration the State Parties to the Convention recognized in express terms that the States Parties and the European Court of Human Rights share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. Under the Declaration great emphasis was placed on the implementation of the Convention at national level emphasising that the full implementation of the Convention at national level requires States Parties to take effective measures to prevent violations. Under the terms of the Declaration, all laws and policies should be formulated, and all State officials should discharge their responsibilities, in a way that gives full effect to the Convention. States Parties must also provide means by which remedies may be sought for alleged violations of the Convention.[23] To the extent that the interpretative obligation of the Court under Section 2 is a primary means of securing a remedy domestically, then the Court may see some significance in the fact that the State has declared its commitment to full implementation of the Convention domestically and have committed at international level to the discharge by State officials, including judges, of their responsibilities in a manner which gives full effect to the Convention in construing the scope and ambit of the Court's powers under that section.

Jurisdiction of the Court under Section 3

43. A number of features of Section 3 of the 2003 Act bear emphasis. Firstly, there is nothing in the terms of Section 3 to suggest that a remedy under that section

[23] See for instance Committee of Ministers Recommendations 2004 (6) on the improvement of domestic remedies, and 2004 (5) on the verification of compatibility of draft laws, existing laws and administrative practice with Convention standards.

is confined to a remedy in damages. True, Section 3(2) of the 2003 Act relates specifically to a claim in damages and the circumstances in which same arises but this does not detract from the generality of Section 3(1) which introduces a new statutory duty and requires every organ of the State to perform its functions in a manner compatible with the State's obligations under the Convention provisions and is thus not prescriptive as to the Court's powers to this end. It is respectfully submitted on behalf of the Commission that a wide interpretation of the Court's powers in aid of Section 3(1) of the 2003 Act, to include a power to grant injunctive and declaratory relief, is the interpretation which sits best with the obligation on the State under the Convention to provide an effective domestic remedy. The fact that Section 3(4) specifically states that the section does not create a criminal offence supports an otherwise wide interpretation of Section 3(1), as there is a requirement for a criminal offence to be created in clear language and thus, the fact that the Legislature considered it necessary to expressly state that a criminal offence is not created, must support a view that the section is wide in its import.

45. Secondly, there is no requirement on the Court to have regard to principles of "just satisfaction" under the Convention, and such a requirement is not imported into domestic law under the 2003 Act but rather the guide or benchmark as to the quantum of damages expressly provided for in Section 3(3) is "the Court's jurisdiction in tort." It is important to note the difference between the jurisdiction of the European Court of Human Rights, being a supervisory one under the Convention, and the role of the domestic courts, being to directly provide remedies and vindicate Convention rights at first instance.

Whether Injunctive Relief Available to Restrain Breach of Convention Right

46. In her judgment of the 28th day of May 2009 the Learned Trial Judge held that the Court had no jurisdiction to grant a permanent injunction as a remedy for a breach of Section 3 of the European Convention on Human Rights Act, 2003. To do so, the Learned Trial Judge concluded, would amount to a breach of the doctrine of the separation of powers as it would result in the court restraining the use of a valid and lawful statutory provision. The Commission respectfully submits that the Learned Trial Judge erred in law in finding that injunctive relief was not available under the 2003 Act and that the only remedy available under Section 3 was one of damages.

47. The Learned Trial Judge in her earlier judgment held that the Defendant/Appellant had breached their obligation under Section 3(1) of the 2003 Act to perform their functions in a manner which is compatible with the European Convention on Human Rights, 1950 (as amended). The breach had occurred as a result of the Defendant/Appellants conducting an investigation which breached the Article 6 rights of the Plaintiffs/Respondents and in utilising Section 62 of the Housing Act, 1966 to evict the Plaintiffs/Respondents breaching their Article 8 rights.

48. It is respectfully submitted that Section 3 of the 2003 Act creates a statutory obligation on Organs of the State which attracts the same range of remedies available in respect of any other statutory obligation including injunctive relief. To suggest otherwise would be to hold that absent unconstitutionality, or a possible award of damages pursuant to section 3, on a retrospective basis the only remedy available to meet Article 13 requirements is that of the declaration of incompatibility

available in Section 5 of the Act. The effect of the granting of a declaration of incompatibility is that the particular legislative provision which is pronounced to be incompatible with the Convention remains valid and in force. It is clear in those circumstances that it would not be possible to grant a permanent injunction on the basis of a statutory provision being incompatible with the Convention as to do so would amount to striking down the legislation.. The *amicus curiae* respectfully submits that the granting of injunctive relief in individual cases involving breaches of obligations under Section 3(1) of the 2003 Act would not amount to having the legislation declared invalid as it would still be possible for the legislation to be operated in a convention compliant manner. It is only where it is not possible for a statutory provision to be operated in a convention compliant manner or for the organ to discharge its functions in a Convention compliant manner that it is necessary to have recourse to the weaker remedy under Section 5.

49. Section 3(1) of the 2003 Act creates a statutory obligation on the organs of the State to perform their functions in a manner which is compatible with the State's obligations under the European Convention on Human Rights, 1950 (as amended). This imposes a duty on organs of the State to comply with the provisions of the Convention. The Commission supports the Plaintiffs'/Respondents' submissions that this caveat only applies to mandatory statutory provisions and does not provide immunity to organs of the State in respect of enabling legislation where the organ retains a discretion to utilise the legislation. This is the situation in the instant case where there was no mandatory requirement to invoke Section 62, and the Learned Trial Judge held that it was possible for the Defendant/Appellant to use Section 14 of the Conveyancing Act 1881 to regain possession of the premises in a Convention compliant manner. No appeal has been filed against this finding by the Learned Trial Judge and it is not clear why the First Named Defendant/Appellant considers that it is obliged to use Section 62 of the 1966 Act when this alternative, Convention compliant method of recovery is available.

50. Thus, the Commission would distinguish between a mandatory legislative provision which is incompatible with the Convention and a breach of an individual applicant's Convention rights. It is clear and uncontested that an injunction could never be granted in the former case as to do so would be tantamount to striking down the legislation. However, in the latter situation, it is respectfully submitted that an injunction could be granted by the courts to prevent an individual breach by an organ of the State of an applicant's Convention rights, contrary to Section 3(1).

51. In the respectful submission of the Commission Section 3(1) of the 2003 Act imposes an obligation on organs of the State which the courts may enforce through the full arsenal of remedies available to the court. In support of this submission the Commission points to the fact that it is clear in the judicial review of administrative actions that remedies other than damages are available for breaches of Section 3 of the 2003 Act.[24] The obligation imposed by Section 3(1) represents a general limitation on the powers of organs of the State that can be enforced by way of judicial review and therefore all of the remedies available under Order 84 of the Rules of the

[24] See Oran Doyle and Desmond Ryan "Judicial Interpretation of the European Convention on Human Rights Act 2003: Reflections and Analysis" 2011 DULJ at p. 6 and Fiona de Londras & Cliona Kelly, The European Convention on Human Rights Act: Operation, Impact and Analysis (2010) Dublin:Round Hall/Thomson Reuters, p, 215.

Superior Courts are available in such cases. This can be seen in a number of cases. In ***Bode v Minister for Justice, Equality and Law Reform***[25] Finlay Geoghegan J granted an order of *certiorari* quashing a deportation decision of the Respondent on the grounds that it breached Section 3 of the 2003 Act.[26] In ***Oquekwe v Minister for Justice, Equality and Law Reform***[27] Finlay Geoghegan J held that in ordering the deportation of the applicant the Respondent was in breach of his obligation under Section 3(1) of the 2003 Act and granted an order of *certiorari* quashing the deportation order (albeit that in both cases the Convention right was linked with its corollary right under the Constitution - Article 40.3 of the Constitution). The Supreme Court upheld this aspect of the decision on appeal.[28] In relation to the availability of prohibition for breaches of Section 3 it was noted *obiter* by Kearns J (as he then was) in the Supreme Court in ***McFarlane v DPP*** [2008] IESC 7:

> "*Prohibition is nonetheless to my mind a remedy which, in the absence of actual prejudice, should only be granted where a serious breach of either the applicant's rights under Article 38.1 of the Constitution or article 6(1) of the European Convention on Human Rights is established. I would accept that a distinction may require to be drawn between breaches of the right which give rise to an entitlement to obtain prohibition and lesser transgressions which may conceivably give rise to some other remedy, such as one in damages*".

52. It seems from this that Kearns J saw that prohibition was a possible remedy available under Section 3 for breaches of convention rights by organs of the State, even if the instances in which such a remedy would be granted were limited. Section 3(2) of the 2003 Act does not, in the respectful submission of the *Commission* amount to a limitation on the available remedies under Section 3(1). The purpose of Section 3(2) is to ensure that a right to claim damages for a breach of Section 3(1) is available to Plaintiffs. It does not prevent an applicant from seeking another remedy or remedies when claiming a breach of their Convention Rights under Section 3(1). The wording of Section 3(2) supports the proposition that it was the intent of the legislature for the section to operate independently of Section 3(1) and was to act merely as confirmation that a remedy in damages is available for breaches of Section 3(1). The section refers to "no other remedy *in damages*" (*emphasis added*) being available this clearly indicates the section does not limit remedies other than damages. On application of the statutory interpretation doctrine of *expressio unis est exclusio alterius* the express reference to no other damages being available would indicate that the Oireachtas was not attempting to rule out the availability of other types of remedies.

53. In support of this submission the *Commission* points to the decision of Murphy J in ***Byrne v Dublin City Council***[29] where the Learned Judge granted an interlocutory injunction where there was a serious question to be tried as to whether a permanent injunction was available under Section 3. Murphy J stated that to refuse the interlocutory injunction the court would have to be "clearly justified in

---

[25] [2006] IEHC 341
[26] This decision was overturned in the Supreme Court on the merits of the case.
[27] [2006] IEHC 345
[28] *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] 2 ILRM 481
[29] [2009] IEHC 122

determining, at this stage of the proceedings, that the trial court would have no jurisdiction to grant the perpetual injunction sought".

54. It should also be noted that the European Court of Human Rights in Strasbourg may grant so called "interim measures" under rule 39 of the Rules of Court of the Strasbourg Court. While initially the application of such interim measures arose in cases involving immediate danger to the life of the applicants, in more recent times the Strasbourg Court has expanded the application of Rule 39. This can be seen in the case of ***Evans v The United Kingdom*** (2007) 46 EHRR 34 where the court used Rule 39 to prevent the destruction of frozen embryos which were the subject of the proceedings pending the outcome of the matter. The sheer weight of individual applications including requests for interim measures has limited the Court's willingness to apply Rule 39 routinely. However, it remains at the disposal of the Court, albeit in using its supervisory function which also presupposes domestic remedies capable of preventing serious anticipated violations under the doctrine of subsidiarity.

55. It is also evident in the reasoning of the Court in ***Yordonova v. Bulgaria*** (24th of April, 2012), a case relied upon by the Respondents for a different purpose, that the Court expects that State parties will take measures including measures suspending enforcement of orders made, in compliance with its obligations under the Convention, particularly the Court's reasoning in respect of the Article 13 complaint canvassed in that case in circumstances where the Applicants had argued that in the event of enforcement of the order of 17 September 2005 there would also be violations of Articles 3 and 13 of the Convention and Article 1 of Protocol No. 1. The Court noted that "the enforcement of the order of 17 September 2005 has been suspended" and found (at paragraph 151) that it could not "speculate about the modalities of any future enforcement and cannot assume, as urged by the applicants, that the authorities would again seek to remove them at very short notice or would not offer alternative shelter where appropriate. Nor can it assume that the authorities would damage their belongings or would not allow time to move them."

56. The Court continued at paragraph 152:

> *"In any event, the Court has already found that the enforcement of the removal order of 17 September 2005 would violate the applicants' rights under Article 8 on the grounds that it was issued and reviewed in a manner which did not secure the minimum procedural safeguards. In these circumstances, there is no reason to doubt that the respondent Government would comply with the present judgment and would not act in violation of the Convention by removing the applicants on the basis of a deficient order."*

57. This finding was made despite the fact that the municipal authorities had stated their intention to issue a separate demolition order in the event of enforcement of the impugned removal order. In relation to State compliance with its findings in ***Yordanova***, the Court continued:

> *"The Court reiterates that, in the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which*

the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order. Furthermore, it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it (see Maestri v. Italy [GC], no. 39748/98, § 47, ECHR 2004-I).

164. Contracting States' duty in international law to comply with the requirements of the Convention may require action to be taken by any State authority, including the legislature (see Viaşu v. Romania, no. 75951/01, 9 December 2008).

165. In view of the relevant strict provisions in the Municipal Property Act, noted in the present judgment (see paragraphs 122 and 123 above), and the fact that the order of 17 September 2005 is still enforceable in Bulgarian law, it appears necessary to assist the respondent Government in the execution of their duty under Article 46 of the Convention.

166. In particular, in view of its findings in the present case, the Court expresses the view that the general measures in execution of this judgment should include such amendments to the relevant domestic law and practice so as to ensure that orders to recover public land or buildings, where they may affect Convention-protected rights and freedoms, should, even in cases of unlawful occupation, identify clearly the aims pursued, the individuals affected and the measures to secure proportionality.

167. In so far as individual measures are concerned, the Court is of the view that the execution of the present judgment requires either the repeal of the order of 17 September 2005 or its suspension pending measures to ensure that the authorities have complied with the Convention requirements, as clarified in the present judgment."

58. Following a finding of a violation of the Convention, the Court can provide for individual and/ or general measures which the State must implement under Article 46. An injunctive remedy or damages may be viewed as remedies individual to a Plaintiff whereas general measures would refer to legislative or other measures or a more general application are required. Under Section 4 of the Act of 2003, judicial notice is required to be taken of these principles of the Court's jurisprudence as set out in its Judgments, while Section 2 as noted requires for compatible interpretation and application in as far as possible. Thus, in ***Yordonova,*** the Bulgarian State was left in no doubt but that it was expected to provide suspensive measures pending measures to ensure that the authorities had complied with Convention requirements. It is respectfully submitted in light of the foregoing that the only interpretation of the Court's jurisdiction in aid of enforcement of the rights protected under the Act which is in compliance with the requirements of the Convention, is that the Court has

jurisdiction to grant an injunction as a suspensive measures. This is an interpretation which it is respectfully submitted is clearly open to this Court in line with the interpretative obligations under Section 2 elaborated upon by this Court in ***Donegan***.

Quantum in Damages

59. The Defendant/Appellant contends that the Learned Trial Judge erred as to the level of damages awarded in this case and asserts that the jurisprudence of the European Court of Human Rights suggests that payments ordered by way of "just satisfaction" are more modest and the award in this case is out of kilter with that jurisprudence. The Commission does not share this view and submits that the award in damages made was not inconsistent with the case-law of the European Court on Human Rights and conservative in terms of an award that might be made for any other breach of statutory rights.

60. It is recalled that Article 41 of the Convention provides:

> *"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".*

61. The Convention does not provide any guidelines as to what will amount to "just satisfaction" in a particular case. The Court will take a number of factors into account in determining the appropriate quantum of damage to award in an individual case. Unlike the approach in this jurisdiction and in England and Wales of having clear guidelines in respect of quantum of damage, the Strasbourg Court deals with such matters on a case by case basis. This is made clear in the *Practice Direction on Just Satisfaction Claims*, issued by the President of the Strasbourg Court in accordance with Rule 32 of the Rules of Court on 28 March 2007:

> *"2. Furthermore, the Court will only award such satisfaction as is considered to be "just" (équitable in the French text) in the circumstances. Consequently, regard will be had to the particular features of each case. The Court may decide that for some heads of alleged prejudice the finding of violation in itself constitutes adequate just satisfaction, without there being any call to afford financial compensation. It may also find reasons of equity to award less than the value of the actual damage sustained or the costs and expenses actually incurred, or even not to make any award at all. This may be the case, for example, if the situation complained of, the amount of damage or the level of the costs is due to the applicant's own fault. In setting the amount of an award, the Court may also consider the respective positions of the applicant as the party injured by a violation and the Contracting State as responsible for the public interest. Finally, the Court will normally take into account the local economic circumstances.*
>
> *3. When it makes an award under Article 41, the Court may decide to take guidance from domestic standards. It is, however, never bound by them".*

62. A number of general principles have evolved from the practice of the court. The overall approach of the Strasbourg Court in respect of damages is to place the applicant, in so far as is possible, in the same position as if the violation had not occurred, *restitutio in integrum*. This was seen in the case of ***Barberà, Messegué and Jabardo v Spain*** A 285-C (1994) where the court held that the release of the applicant did not sufficiently deal with the violation claimed by the applicant:

> *"In any event, they suffered a real loss of opportunity to defend themselves in accordance with the requirements of Article 6 (art. 6) and thereby to secure a more favourable outcome. There was thus, in the opinion of the Court, a clear causal connection between the damage claimed by the applicants and the violation of the Convention. In the nature of things the subsequent release and acquittal of the applicants could not in themselves afford restitutio in integrum or complete reparation for damage derived from their detention (see, mutatis mutandis, the Ringeisen v. Austria judgment of 22 June 1972, Series A no. 15, p. 8, para. 21)".*

63. The Court will also award damages for both pecuniary and non-pecuniary damage. However, unlike the position in damages for tortious action in this jurisdiction, punitive, aggravated or exemplary damages are not awarded by the Strasbourg Court. The Court has stated that there must be a clear causal link between the damage claimed and the alleged violation. The Court has also noted that the amount of damages awarded will vary depending on the seriousness of the violation and its effect on the applicant.

64. Unlike the Human Rights Act, 1998 in the United Kingdom which specifically mentions "just satisfaction" when dealing with the issues of damages under the Act, the 2003 Act does not expressly mention an obligation to take account of Article 41 when awarding damages under Section 3 of the Act. However Section 2 of the 2003 Act requires a court to interpret legislation in so far as is possible in line with the Convention. Furthermore Section 4 of the 2003 Act requires a court to take notice of the decisions of the Strasbourg Court. Therefore, a court making an award of damages under Section 3 should have regard to the principle of "just satisfaction" and the approach of the European Court of Human Rights to its implementation, which admittedly is not very consistent.

65. The Courts in England and Wales in dealing with quantum of damages under the Human Rights Act, 1998 have held that an equitable approach must be adopted in relation to damages. In the case of ***Van Colle v Chief Constable of Hertfordshire Police,***[30] the Court of Appeal emphasised that the European Court of Human Rights has interpreted Article 41 as being premised on the need to adopt an "equitable" approach (both as to the award and the amount thereof). In light of this, it set aside a damages award made at first instance as being too high, substituting a lower amount regarded as more properly reflecting the nature of Article 41 as interpreted in the case law of the Strasbourg court. On the other hand, the Strasbourg Court has stated that there is a wide margin of appreciation to domestic courts in determining its own level of compensation. This is to allow national courts to have the remedy be consistent with its own legal system and traditions and

[30] [2007] 1 WLR 1821.

consonant with the standard of living in the country concerned. This was set out in ***Scordino v Italy (No.1)***[31] and sits comfortably with the decision of the Legislature to expressly link damages with awards under the Courts jurisdiction in tort. Nothing in Section 3 itself links the proper approach to quantum in damages to the jurisprudence of the European Court of Human Rights in "just satisfaction" cases, but rather Section 3(3) specifically refers to the jurisdiction of the Court in tort where there is judicial precedent for the quantum of damages on foot of breaches of statutory duty, albeit having regard to the culpability of the tortfeasor and the suffering occasioned to the Plainiff. Given the difference between the wording of the section and the wording adopted in the UK, this appears to have been a deliberate choice on the part of the Legislature.

66. This Court has not yet had occasion to pronounce on the principles which should guide the exercise of the Court's power to award damages under Section 3 of the 2003 Act. In her Decision in the High Court, the Learned Trial Judge developed a reasoned approach to the exercise of the power to award damages informed by established principles in relation to the award of damages in claims in tort. It is clear from her reasoning that she was mindful of the obligation to provide an effective remedy and a remedy which has dissuasive effect. It is, of course, telling in this context that the Court had been informed in forthright terms that notwithstanding a finding that Section 62 was incompatible with the Convention (in ***Donegan***) and notwithstanding a finding in this case that there had been a breach of the Plaintiffs' rights, the Council remained determined to enforce the Possession Order obtained in the District Court in the face of positive findings that the enforcement of the orders would give rise to a breach of fundamental rights. Accordingly, the need for an award which had a dissuasive effect was marked having regard to the manner in which the case was presented before the Court and this was a factor, it is submitted, which properly informed the Court's approach in line with the intention of the Legislature in providing for an award in damages under Section 3(2) of the 2003 Act.

Remedy under Section 5 of the 2003 Act

67. Section 5 of the 2003 Act provides the machinery whereby the Superior Courts may decide that a legislative provision is incompatible with the Convention. However, such a declaration does not operate to invalidate the continuing effectiveness of the legislation so declared to be incompatible. As such, the remedy that is available under Section 5 of the 2003 Act is a limited one. A litigant obtaining such a declaration has no right to compensation and the legislation in question continues to have legal force and power unless and until it is amended by the Oireachtas. Thus, Section5 of the 2003 Act is in harmony with the Long Title to the Act where it states that further effect is given to the Convention *"subject to the Constitution."* The effect of a declaration under Section 5 is that the Oireachtas is informed by way of a message from the Taoiseach that the statutory provision that was the subject of the declaration has been deemed to be incompatible with the Convention, there is no requirement that remedial action take place. McKechnie J noted in ***Foy v An t-Ard Chlaraitheoir*** that "as such declaration can only issue from a constitutional court, such a court can have a reasonable expectation that the other branches of government (Article 6 of the Constitution) would not ignore the

[31] [2007] 45 EHRR 7.

importance or significance of the making of such a declaration". However despite these comments contained in the judgment of McKechnie J in granting the declaration of incompatibility to the Plaintiff in **Foy,** the offending legislation remains in effect over 6 years after the judgment and remedial legislation has yet to be passed by the Oireachtas.

68. Opposing positions appear to have been adopted by the Defendant/Respondent and the Attorney General as to the appropriate remedy for a breach of the Convention rights of the Plaintiffs, a finding which stands and has not been appealed from. The Defendant/Appellant makes the case that the appropriate remedy is a Declaration of Incompatibility rather than an award in damages whilst the case made by the Attorney General is that this Court has no jurisdiction to make an order under Section 5 where an order is not made in the High Court. This, of course, is at odds with the express language of Section 5 which provides for a wide jurisdiction to grant the order "in any proceedings" either before the High Court or the Supreme Court when exercising its appellate jurisdiction, either on application to it in that behalf by a party, or of its own motion. The section thus expressly provides that the declaration may be made before the High Court or the Supreme Court and the Court may make the order even when it has not been sought by the parties. The Attorney General's reliance on the decision in ***Kennedy v. DPP*** may not be helpful in this context. That decision was handed down in the context of an application for prohibition in a case of alleged prosecutorial delay and is not concerned with the specific jurisdiction of the Court under Section 5. Rather this Court found that the applicant in **Kennedy** neither pursued his Section 3 claim for damages before the High Court or on appeal before the Supreme Court, and therefore the issue did not arise. The judgment does **not** say that the applicant was in some way disbarred from raising a claim under the European Convention on Human Rights on appeal.

Appropriate Remedy: Damages or Declaration of Incompatibility or Both

69. A material difference between the ***Donegan*** case and this case, which touches on the question of the appropriate remedy, is that the District Court proceedings in ***Donegan*** stood adjourned pending a determination of the plenary proceedings and no warrant for possession had issued. Further, the Council in the ***Donegan*** case did not declare an intention to proceed to seek an order for possession and to enforce same in the face of a Declaration of Incompatibility by the Court and there was no reason to suppose that the State would not respond to the Declaration of Incompatibility. As we have seen, in this case the facts were starkly different when the question of a remedy came back before the High Court. In this case a warrant for possession had been granted in the District Court and the Defendants had confirmed their positive intention to seek to enforce same, notwithstanding that the section had by then been found incompatible with the Convention, thereby crystallizing the interference with the Plaintiffs' rights under the Convention. It is not surprising therefore that the remedy ordered by the Court should be different in each case. The facts were different in each case and thus, the appropriate remedy was properly considered to be different in each case.

70. In fact, the submissions of both the Council and the Attorney General appear to proceed on the basis that the award in damages under Section 3 and a declaration of incompatibility under Section 5 are mutually exclusive. It is

respectfully submitted, however, that such an approach does not properly reflect the approach under Convention jurisprudence to the question of remedies and is not consistent with the proper interpretation of Sections 3 and 5 read together.

71. The Convention jurisprudence is replete with examples of cases where the Court has made an award in damages for a specific breach of Convention in an individual case (individual measure) whilst also declaring the law to be incompatible with the Convention or to give rise to a breach of rights protected under the Convention requiring legislative action in a Member State with much more general and systemic import (general measure). It would appear to follow that remedies under the domestic legal order designed to protect Convention rights on a subsidiarity basis should mirror those available under the Convention. This being the case, in principle, the Court should be empowered to grant relief by way of damages and declaratory relief in the same proceedings as is the practice of the European Court of Human Rights where appropriate.

72. Turning then to the language of Sections 3 and 5, this Court will be required to consider the proper meaning of the limiting words in Section 5 *"where no other remedy is available and adequate".* It is respectfully submitted that properly construed this section does not have the effect of precluding both an award in damages and declaratory relief in one set of proceedings. Section 5 clearly envisages the grant of relief under that section in circumstances where other relief is available but is not "adequate". For a remedy under Section 5 to be precluded, the use of the conjunctive "and" in Section 5(1) makes it clear that the other remedy would need to be both available and adequate. Thus, the mere availability of an alternative remedy in damages under Section 3(2) does not foreclose a jurisdiction under Section 5(1) to grant a declaration of incompatibility where the Court is of the view that the damages award under Section 3 alone is not an "adequate" remedy.

73. It is respectfully submitted that an award in damages under Section 3 in this case is only directed to the individual breach of rights suffered by the Plaintiffs but is not effective to compel systemic change and should properly, therefore, be coupled with such other remedies as this Court considers open to it. In the absence of injunctive relief which would be effective in limiting the effect of the breach to past damage which could then be compensated in damages, this Court also has available to it a remedy under Section 5 for the purpose of creating an imperative for encouraging systemic change in the future.

Section 5 as an Effective Remedy

74. As has already been shown above, the effects of a declaration of incompatibility under Section 5 of the 2003 Act are very limited. The only mandatory outcome of the declaration is that the Taoiseach is required to lay a copy of any order containing a declaration of incompatibility before each house of the Oireachtas within 21 days of the declaration being made. The value of such a remedy to an applicant is limited and can only really act as a tool to place political pressure on the government and the Oireachtas to alter and amend the offending statutory provision or rule of law. Thus far declarations have not been successful in this jurisdiction in changing a single legislative provision which the courts have held to be incompatible with the Convention. Despite the fact that the corresponding provision of the Human Rights Act, 1998 (Section 4) in the United Kingdom has been far more effective (the

European Court recorded in the case of ***Burden v United Kingdom*** (2008) 47 EHRR 38 that up to the date of that judgment in all cases where a final declaration of incompatibility had been granted the UK had taken steps to amend the offending laws), the Strasbourg Court has on a number of occasions examined the effectiveness of declarations of incompatibility under Section 4 of the Human Rights Act, 1998 for the purposes of Article 35 of the Convention[32] and found them wanting.

75. Article 35 requires an Applicant to exhaust all available domestic remedies before the European Court will determine the application to be admissible and is intrinsically linked to the provision of effective remedies under Article 13 when read in conjunction with Article 1 of the Convention. The European Court held Section 4 of the 1998 Act to be an ineffective remedy for the purposes of Article 35 as the UK declaration of incompatibility, like the declaration made under Section 5 of the 2003 Act, places no legal obligation on the executive or the legislature to amend the law. The European Court stated in the case of ***B v United Kingdom*** that a remedy "which is not enforceable or binding or which is dependent on the discretion of the executive falls outside the concept of effectiveness as established in the convention case law, notwithstanding that it may furnish adequate redress where it has a successful outcome". The Court has also noted that where an applicant has suffered loss or damage as a result of a breach of their Convention Rights a declaration of incompatibility cannot amount to an effective remedy as it is not binding on the parties and is not capable of compensating the applicant:

> *"The Grand Chamber notes that the Human Rights Act places no legal obligation on the executive or the legislature to amend the law following a declaration of incompatibility and that, primarily for this reason, the Court has held on a number of previous occasions that such a declaration cannot be regarded as an effective remedy within the meaning of Article 35 § 1 (see the decisions in Hobbs, Dodds, Walker, Pearson and B. and L. v. the United Kingdom, all cited above, and also Upton v. the United Kingdom (dec.), no. 29800/04, 11 April 2006). Moreover, in cases such as Hobbs, Dodds, Walker and Pearson, where the applicant claims to have suffered loss or damage as a result of the breach of his Convention rights, a declaration of incompatibility has been held not to provide an effective remedy because it is not binding on the parties to the proceedings in which it is made and cannot form the basis of an award of monetary compensation".*[33]

76. In ***Burden*** the Strasbourg Court stated that the practice of giving effect to declarations of incompatibility in the UK might at some time in the future become so certain as to amount to a binding obligation. In those circumstances the granting of a declaration may amount to an effective remedy. In the more recent admissibility decision in ***Malik v United Kingdom*** (App. No. 32968/11) 28 May 2013 (cited more fully by the Plaintiff/Respondent) the Court reiterated that unless the granting of the declaration of incompatibility is followed as a matter of almost certainty by amending legislation it does not amount to an effective remedy.

---

[32] *Burden v United* (2008) 47 EHRR 38; *B v United Kingdom* (2006) 42 EHRR 11; *Upton v United Kingdom* App. No. 29800/04; *Walker v United Kingdom* App. No. 37212/02; *Hobbs v United Kingdom* App. No. 63684/00.
[33] *Burden v United Kingdom* (2008) 47 EHRR 38 at para. 40.

77. In ***A, B & C v Ireland***[34] the Grand Chamber of the European Court of Human Rights addressed the question of whether a failure to seek a declaration of incompatibility under the 2003 Act would constitute a failure to exhaust domestic remedies. The Irish government argued that: "While a declaration of incompatibility was not obligatory on the State, it would be formally put to the houses of the Oireachtas and Ireland's record of solemn compliance with its international obligations entitled it to a presumption that it would comply with those obligations and give effect to declarations of incompatibility" (para. 134). In response, the Court held:

> "[*T*]*he Court does not consider that an application under the 2003 Act for a declaration of incompatibility of the relevant provisions of the 1861 Act, and for an associated ex gratia award of damages, could be considered an effective remedy which had to be exhausted. The rights guaranteed by the 2003 Act would not prevail over the provisions of the Constitution (paragraphs 92-94 above). In any event, a declaration of incompatibility would place no legal obligation on the State to amend domestic law and, since it would not be binding on the parties to the relevant proceedings, it could not form the basis of an obligatory award of monetary compensation. In such circumstances, and given the relatively small number of declarations to date (paragraph 139 above) only one of which has recently become final, a request for such a declaration and for an ex gratia award of damages would not have provided an effective remedy to the first and second applicants*". (para. 150)

Conclusion

78. As a declaration of incompatibility under Section 5 cannot be considered an effective remedy, the Commission invites this Honourable Court to first consider whether section 62 is in fact unconstitutional for the reasons set out heretofore. If the Court determines that section 62 is indeed constitutional then it is submitted that, given that this Court has already made a declaration of incompatibility in respect of Section 62 in **Donegan**, consideration should be given to whether the aggregate of available remedies under the 2003 Act, properly construed, constitute an effective remedy within the meaning of Article 13 of the Convention. If the Court cannot be so satisfied, then it is respectfully requested that this Court, of its own motion, consider granting a declaration under Section 5 of the 2003 Act that the said Act is ineffective in providing a remedy for breach of the Plaintiffs' Convention rights and thus incompatible with the Convention.

29 January, 2014

Siobhan Phelan

[34] [2010] ECHR 3032.