Submission to the Legal Aid Board re section 62 of the Housing Act 1966

Introduction

i. Section 62 of the Housing Act 1966 provides for a statutory procedure for the recovery of possession of a local authority dwelling by the local authority. A local authority must first serve the tenant with a Notice to Quit. Where the tenant does not give up possession, the local authority may make an application to the District Court for a warrant for possession.

ii. As a result of the decisions in cases such as *The State (Kathleen Litzouw) v Dublin* Corporation[1]; *The State (O'Rourke) v Kelly*[2]; *Dublin Corporation v Hamilton*[3] and *Byrne v Scaly*[4], it has been established that a District Court Judge, hearing an application under section 62, is obliged to grant the warrant provided the formal proofs under the section are complied with. The court does not have any discretion in respect of the underlying merits of the application. Subject to any stay in proceedings put in place by the Court, the local authority may immediately execute the warrant for possession.

The procedural requirements were listed by Kearns J in the Fennell case[5] as follows:

a) that the dwelling was provided by a local authority under the Housing Act 1966;
b) that there was no tenancy in the dwelling;
c) that a Notice to Quit had been served to the occupier; and
d) that in the event of non-compliance that the Notice to Quit made it clear that an application for a warrant for possession would follow.

iii. The District Court is therefore not entitled to consider *"disputes concerning rights or interests over land."* Similarly, any subsequent Plenary or Judicial Review action taken to the High Court does not relate to a dispute "*concerning rights or interests over land"* and rather concerns matters of statutory duty, natural and/or constitutional justice and tenant entitlements under both the Constitution and the European Convention on Human Rights. Section 62 proceedings do not therefore fall within the exemption provided for by Section 28(9)(a)(ii) of the Civil Legal Aid Act 1995.

iv. This submission applies equally to housing association tenants who can be evicted in exactly the same way under Deasy's act 1860.

Necessity for District Court Representation

v. It has been stated that given the fact that a District Court judge is not permitted to consider the merits of an application under section 62, there is no requirement for legal representation at the District Court stage. It is submitted that this is incorrect as there are a number of strictly legal matters at District Court stage which a lay litigant without the benefit of legal advice would not be able to deal with. These may be listed as follows:

[1] [1981] ILRM 273
[2] [1983] IR 58
[3] [1999] 2 IR 486
[4] Unreported Judgment of the High Court, 12 October 2000
[5] Dublin City Council v. Fennell [2005] IESC 33

a) The above mentioned procedural requirements need to be complied with before the District Court can grant a warrant for possession. A solicitor is therefore required to examine the relevant documentation i.e. the tenancy agreement, notice to quit and summons for warrant for possession.
b) It has been advised by Counsel that a tenant should seek a full hearing of all the evidence in relation to the merits of the application at the District Court hearing so that the refusal, if any, can be challenged.
c) If a warrant is being granted the tenant can look for a stay either to appeal or to be allowed longer time to leave their home. It is a matter for the judge to decide if it should be granted. It should be noted that the granting of an adjournment is often used as a device by the parties and/or the judge to assist in resolving matters.
d) It is open to the tenant to appeal the grant of a warrant for possession. A solicitor should advise on this.
e) The tenant may not be aware of any subsequent action which can be taken once the warrant for possession is granted and any time limits associated with such action e.g. Judicial Review, Appeal, Plenary action etc. Such time limits may commence from the date of service of the notice to quit and legal representation is therefore required at that early stage.

vi. The consequences of a grant of a warrant for possession are extreme and therefore legal representation should be provided to the tenant at the outset. Not only do a tenant and their family lose their home, but where the notice to quit is served on the basis of allegations of social behavior,[6] the future entitlements of the individual will also be affected. The Housing (Miscellaneous Provisions) Act 1997 provides that where a local authority considers that a person was engaged in anti-social behaviour it may refuse to make, or defer the making of a letting of a dwelling to such a person.[7] Also, under section 16 of the Housing Act 1997, the Health Service Executive may determine that such an individual is not entitled to a payment of rent supplement allowance for private accommodation.[8] Indeed, it was found in *Pullen* that a standard local authority tenancy agreement provides that a tenant evicted for breach of the tenancy agreement will be; *"deemed for the purpose of re-housing, to have deliberately rendered himself homeless…may not be provided with another home by the [local authority] until such time as the [local authority] is satisfied that the evicted tenant and his family are capable of living and are agreeable to live in the community without causing a further breach of this condition."*[9]

vii. Given the harshness of the consequences, the legal complexity involved and the inequality in bargaining power between local authorities and tenants, it is imperative that legal representation be afforded to tenants at the earliest possible juncture so that their entitlements under both the Constitution and European Convention on Human Rights can be fully realized.

[6] Under Section 1 of the Housing (Miscellaneous Provision) Act 1997, anti-social behaviour is defined as drug dealing and "…any behaviour which causes or is likely to cause any significant or persistent danger, injury, damage, loss or fear to any person living, working or otherwise lawfully in or in the vicinity of a house provided by a housing authority…"
[7] *Ibid ,* section 14 of the Housing Act 1997.
[8] Ibid section 16 of the Housing Act 1997.
[9] See *Pullen,* at page 8 (reference to Clause 13 of the Tenancy Agreement).

Discrimination

viii. Section 3(1) of the European Convention on Human Rights Act 2003 (ECHR Act) provides that *"Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."*

ix. Organs of the State are defined by section 1 of the ECHR Act as including *"a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised".*

x. The Legal Aid Board constitutes an "organ of state". It has been in existence since 1979 and was set up as a statutory body on foot of the Civil Legal Aid Act 1995, as amended.

xi. Article 14 of the ECHR provides *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

xii. Article 14 is only applicable if the matter falls within one or more of the substantive provisions of the ECHR. In *Donegan v Dublin City Council*[10] a declaration of incompatibility was made under section 5 ECHR Act[11] that section 62 of the Housing Act 1966 is incompatible with the obligations of the State under Article 8[12] of the ECHR i.e. the process embodied in s.62 which enabled the Plaintiff to be evicted without the merit being examined by an independent tribunal violated his rights to respect for his private and family life and home as guaranteed under the provisions of Article 8.

The court in *Dublin City Council v Gallagher*[13] made a second declaration that section 62 of the Housing Act 1966 is incompatible with the obligations of the State under Article 8 the ECHR.

In *Pullen & Others v Dublin City Council*[14], the court made a declaration that s62 is incompatible with Articles 6[15] and 8 ECHR.

[10] (2008) IEHC 288
[11] Section 5 empowers the High Court to make a declaration of incompatibility i.e. that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.
[12] Article 8 of the ECHR provides, *"Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*
[13] (2008) IEHC 354
[14] (2008) IEHC 379

xiii. In *Larkos v. Cyprus*[16] a State tenant claimed a violation of Article 14 in conjunction with Article 8 on the basis that he enjoyed less security of tenure than a tenant of a private landlord. The ECtHR held that Article 14 was applicable in that case. In this regard, the ECtHR accepted Mr Larkos' claim that he was, as a tenant renting accommodation from the State, and so was in an analogous position to a tenant renting accommodation from a private landlord. In this case the Court considered that no reasonable and objective grounds were provided by the State for not extending the protections available to private tenants, to State tenants.

xiv. Section 28(9)(a)(ii) of the Civil Legal Aid Act 1995 provides that *"Subject to any order made under subsection (10) and to the other provisions of this subsection, legal aid shall not be granted by the Board in respect of any of the following matters…(ii) disputes concerning rights and interests in or over land".*

xv. Section 28 (9) (c) (i) as amended by Section 79 of the (Civil Law Miscellaneous Provisions) Act 2008 provides *"Notwithstanding the provisions of paragraph (a) and subject to the other provisions of this Act, legal aid may be granted—(i) in respect of proceedings under the Landlord and Tenant Acts, 1967 to 1994 (in so far as they relate to residential property), the Residential Tenancies Act 2004".*

xvi. <u>As a result of Section 28 (9) (c) (i), private tenants are entitled to legal aid in respect of tenancy disputes but local authority tenants are not so entitled as the legal aid board has refused to grant legal aid in respect of actions under section 62 of the Housing Act 1966 on the basis of section 28(9)(a)(ii) of the Civil Legal Aid Act 1995.</u>

xvii. There is therefore a clear violation of articles 14, 6 and 8 ECHR by the legal aid board who are consequently in breach of their obligations under section s 3(1) of the ECHR Act 2003.

xviii. It is submitted that this differentiation also constitutes discrimination on the basis of "social origin" or "other status" contrary to Article 14 ECHR (and Article 40.1 of the Constitution) given the socio economic background of persons in private accommodation compared to local authority accommodation.

xix. In respect of statutory interpretation, it has been indicated that the maxim of interpretation *Expressio Unius Est Excusio Alterius* applies i.e. by expressly making provision for the Landlord and Tenant Acts, 1967 to 1994 and the Residential Tenancies Act 2004, section 62 of the Housing Act 1966 is by implication excluded. However, we would advocate a teleological approach to interpreting the Civil Legal Aid Act 1995, as amended, to bring it in line with the legal aid board's obligations under the ECHR Act. Section 29 of the Civil Legal Aid Act 1995, as

[15] Article 6 ECHR provides *"in the determination of…civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

[16] *Larkos v Cyprus* (Application No. 2951/95) Judgment of the European Court of Human Rights of 18 February 1999.

amended excludes landlord and tenant disputes from the exception provided by section 28(9)(a)(ii). A teleological interpretation would suggest that such landlord and tenant disputes should not be limited to those in the private tenancy arena only. Further, the Legal Aid Board are required to interpret the 1995 act, as amended, in a constitutionally compatible manner, insofar as possible (*East Donegal* principles). A similar position arises in relation to the interpretation obligations on foot of the ECHR Act 2003. If the act is not interpreted as providing for legal aid in eviction cases then it follows that the Act is both unconstitutional[17] and incompatible with the Convention[18]

xx. Finally, the failure to award legal aid in circumstances where an applicant is likely to lose their home constitutes a breach of section 3 ECHR Act in relation to Articles 3, 6, 8, 13 and 14 by failing to taking appropriate steps to protect such rights.

[17] Article 40.5 Constitution "the dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law

[18] Article 6, 8 & 14 ECHR infra. Also, Article 13 "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."