

Dear Mr. Healy

I am making a submission to the draft Anti Social Behaviour Plan as I have concerns in relation to Dublin City Council's disregard for the findings of the High Court that Section 62 of the Housing Act 1966 (as amended) is incompatible with the European Convention on Human Rights (ECHR). As you are aware this relates specifically to Article 6 (Right to a fair and public hearing by an independent tribunal) and Article 8 (Right to Respect for the Home).

In December 2009 the City Council voted in the motion that Dublin City Council adopt the charter of European Cities for Human Rights in a proactive way, with a view to making human rights more central to the workings of departments, particularly where funding has been cut for existing human rights organisations, and to work collaboratively with existing organisations to make human rights more immediate and visible at local government level. We now have the opportunity to act on that motion by amending the draft Anti Social Behaviour Plan which does not address issues raised by the courts in relation to the City Council's actions breaching the European Convention on Human Rights.

Section 62 of the Housing Act has been held to be incompatible with articles of the European Convention on Human Rights because it allows councils to evict tenants for antisocial behaviour with no opportunity to challenge the allegations against them before a court or impartial tribunal. The present position is that if council officials decide to evict a tenant, and the matter goes to court, they simply have to prove that the paperwork for the Notice to Quit and Demand for Possession is in order. No independent person can examine the eviction on its merits. Judges have ruled that this is disproportionate in a case where the person is at risk of losing their home. Given that the European Convention on Human Rights Act 2003 creates a specific obligation on public authorities to act in compliance with the European Convention on Human Rights, it is inevitable that it will have an increasing impact on judicial review cases, and should have an impact on the practice of public bodies such as Dublin City Council.

Mr. Ciaran Dunne, Dublin City Council Executive Manager, correctly observes that despite the declaration of incompatibility with the ECHR, Section 62 of the Housing Act 1966 remains valid until the Oireachtas chooses to revoke or amend legislation. He also correctly notes, however, that there is now a 'legal uncertainty' due to the position. He mentions that DCC are not prevented from continuing to use Section 62 to evict tenants on grounds of good estate management for anti social behaviour. It is my submission that compliance with the ECHR would not prevent in any way, DCC from evicting tenants on grounds of good estate management for anti social behaviour. It would simply introduce fair procedures that are absent.

There are three significant ECHR Act decisions all dealing with attempted evictions of local authority tenants under Section 62 of the Housing Act, 1966. This section is widely used by local authorities to evict tenants accused of anti-social behaviour. Two of these decisions led to declarations of incompatibility with the European Convention and will be dealt with below, but the third one was dealt with under Section 3 of the ECHR Act requiring organs of the State to act compatibly with the Convention.

The case of Mr. Gallagherⁱ, which I will refer to again later, went before the District Court which made a finding of fact upholding his claim, but *the court then expressed concern the s. 62 of the Housing Act did not allow the court to assess the merits of applications for possession orders*. These points were then referred to the High Court for clarification. *The judge said that Mr. Gallagher should not be made to take High Court judicial review proceedings in order to acquire procedural safeguards and that this would have been avoidable had the council put in places the procedures that would safeguard his rights*. (emphasis mine)

I am at loss as to why Dublin City Council do not adopt a proper human rights procedure in relation to evictions for ‘anti social behaviour’ instead of forcing Section 62 proceedings which, having been found to be incompatible with the European Convention on Human Rights, will inevitably lead to greater cost for the council in legal proceedings.

The Draft Anti Social Behaviour Plan should be amended to include, as one of its objectives, fair procedures for all. This should then be implemented by allowing provisions for courts to hear and determine facts. Preliminary investigations into alleged anti social behaviour should not be held by City Council staff alone. It is evidently a breach of fair procedure to have city council officials act as judge and jury in assessing the behaviour of city council tenants on city council property. There is also the question as to whether there is over reliance placed on information coming from certain sources perceived as being reliable and impartial eg an Garda Siochana. The Council will be well aware that pursuant to Section 3 of the ECHR Act, organs of the state must perform their functions compatibly with the Convention.

In the first S. 62 case to which the ECHR Act did apply, *Donegan v. Dublin City Council*ⁱⁱ, Ms Justice Laffoy gave a very careful and thorough judgment and granted a declaration that S. 62 was incompatible with Article 8 of the Convention “*insofar as it authorises the District Court, or the Circuit Court on appeal, to grant a warrant for possession where there was a factual dispute as to whether the tenancy had been properly terminated by reason of a breach of the tenancy agreement on the part of the tenant in the absence of any machinery for an independent review of that dispute on the merits being available at law*”.

She also said in the course of her judgment that the possibility of applying for judicial review of the council’s decision to seek a possession order was not an adequate remedy because the judicial review court could not review the council’s findings of fact about the applicant’s conduct, which were strongly contested.

In November 2008, in the case of *Dublin City Council v. Gallagher* in the High Court, Mr Justice O’Neill made another declaration of incompatibility in regard to S.62 of the Housing Act, in response to a case stated by the District Court. In this case there were no allegations about the conduct of the occupier or members of his family; instead the council had rejected Mr Gallagher’s claim to succeed to his mother’s tenancy of a local authority house.

There was a factual dispute about his entitlement, however, and O'Neill J. noted that there was no provision for the court to hear and determine the facts of the case. He held that the possibility of applying for judicial review was not an adequate remedy and said that Mr Gallagher's rights under Article 6 of the Convention (the right to a fair trial) had been breached, but he appears to have limited the declaration of incompatibility to Article 8 of the Convention.

Judge O'Neill also discussed whether there was any need to make a declaration in this case following the one made in Donegan's case but decided it would be appropriate to do so as without it, Mr Gallagher would not have a right to apply for an ex gratia compensation payment under Section 5 (4) of the ECHR Act. Since both the Donegan and Gallagher cases are under appeal, however, the question of how compensation is to be determined in such cases has not yet been addressed.

In all, the Gallagher case is the third declaration of incompatibility with the ECHR.

Ms Justice Irvine gave judgment in the High Court on 13 December 2008 in the case of *Pullen v Dublin City Council*ⁱⁱⁱ. Following complaints of anti-social behaviour, the council sought an order from the District Court for possession of the Pullen family's home under S. 62 of the Housing Act, which provided no opportunity for the tenants to challenge the allegations that led to the eviction application.

Eviction under S. 62 could also mean that the council would refuse to re-house the tenants concerned. Ms Justice Irvine held that the Pullens' Article 8 rights had been interfered with by the lack of fair procedures and the council had failed to show that such interference could be justified, especially as she held that other procedures were available to the council which would have protected the tenants' rights. She also held that Article 6 of the Convention had been breached by the lack of due process.

Declarations of Incompatibility

Section 5 of the ECHR Act contains the new (to this jurisdiction) provision that where a decision by a public authority is held to infringe someone's rights under the European Convention but was correctly taken pursuant to a statute or rule of law, the High Court or Supreme Court cannot strike it down, but can issue a declaration that the relevant section of the statute or the rule of law is incompatible with the Convention.

Such a declaration will not affect the validity, continuing operation or enforcement of the statute or rule and it will not *entitle* the successful applicant to damages. S/he can apply for an ex gratia award of compensation but such an award is discretionary and, even if granted, is likely to be at a lower level than ordinary awards in the civil courts.

When or if the declaration becomes final, either because it has been upheld by the Supreme Court or has not been appealed, then the Taoiseach must formally notify

the Oireachtas that it has been made, though s/he is not obliged to initiate steps to amend the law or even to tell the Oireachtas what are the Government's intentions in the matter.

This rather cumbersome mechanism is modelled on S.4 of the UK Human Rights Act, 1998, which sprang from a concern in the UK not to give the courts power to strike down legislation adopted by parliament. Here there was also a concern not to allow the courts to override the will of the Oireachtas or to give the European Convention a status equivalent to the Constitution.

To see how the declaration system has worked in practice it is worth looking at the UK experience. At first many UK lawyers were sceptical about its worth and the European Court of Human Rights was also unimpressed. In the case of *Hobbs v UK*^{iv}, an admissibility decision in 2002, the Strasbourg Court held that a declaration of incompatibility did not constitute an effective remedy for the purposes of the Convention because, even if granted, it did not create any obligation on government to reverse the decision in question or to change the law. This meant, inter alia, that if no remedy other than a declaration of incompatibility was available, it was not necessary to apply for such a declaration before taking a case to Strasbourg.

In fact, however, the UK authorities have taken the declaration provision quite seriously. While they have appealed many of the declarations, where they have been upheld the government has so far always moved to change the law. A total of some 27 declarations of incompatibility had been granted by the UK courts between October 2000, when the Human Rights Act came into effect, and May 2009. Eight were subsequently overturned by the Court of Appeal or the House of Lords and one was still under appeal in May 2009.

In the 18 cases where declarations have become final and the UK government has had to respond to them, the law has been changed in 15 cases. In another case, concerning voting rights for prisoners, the UK government has recently announced a compromise proposal to give the vote to prisoners serving shorter sentences, and in the two remaining cases it is considering how to amend the law in question.

A list of the declarations of incompatibility made in the UK up to January 2009, with a thumbnail sketch of each case and what has been done about the decision, is given in a report published in January 2009 by the UK Lord Chancellor and Minister for Justice^v.

Based on this record the European Court of Human Rights has modified its view somewhat. In the case of *Burden v. UK*^{vi}, in April 2008, while maintaining that a declaration of incompatibility was not an adequate remedy, the Strasbourg Court said that in the future "*evidence of a long-standing and established practice of ministers giving effect to ... declarations of incompatibility might be sufficient to persuade the Court of the effectiveness of the procedure*".

So far, three declarations of incompatibility have been granted here, two in relation to the same issue, Section 62 of the Housing Act, 1966. All were granted by the High Court and are still under appeal, with the result that the obligation on the

Taoiseach to report the making of the declarations to the Oireachtas and its possible effects have not yet been put to the test.

I would urge the council, in the intervening period, to take note of the High Court findings and our own motion from December 2009 and become a leader in introducing a human rights policy instead of waiting to be forced to do so by a change in law if the declarations are made final, with more costly litigation guaranteed in the meantime.

Councillor Claire O' Regan
Dublin North Inner City
22nd July 2010

ⁱ Dublin City Council v. Liam Gallagher [2008] IEHC 354

ⁱⁱ Donegan v. Dublin City Council & Others [2008] IEHC 288

ⁱⁱⁱ Pullen & Others v Dublin City Council [2008] IEHC 379

^{iv} Hobbs v. UK, Application No. 63684/00, 18 June 2002

^v Lord Chancellor and Secretary of State for Justice: "Responding to Human Rights Judgments – Government Response to the Joint Committee on Human Rights' Thirty first Report of Session 2007-8", January 2009, Cm 7524

^{vi} Burden v UK [2008] ECHR 357

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