Neutral Citation Number: [2007] IEHC 4

THE HIGH COURT

JUDICIAL REVIEW

[2006 No. 131 JR]

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

BETWEEN

PADDY DOHERTY AND BRIDGET DOHERTY

APPLICANTS

AND

SOUTH DUBLIN COUNTY COUNCIL
THE MINISTER FOR THE ENVIRONMENT, HERITAGE AND LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE EQUALITY AUTHORITY

NOTICE PARTY

Judgment of Mr. Justice Charleton delivered on the 22nd day of January 2007

Facts

1. The applicants have been married to each other for fifty three years. They have fourteen surviving children and over one hundred grandchildren. They are members of the Irish Traveller Community. Most of their lives have been spent as nomads. Mrs. Doherty is seventy years old while Mr. Doherty is seventy five. They have always lived in a caravan. The pattern of where, and how, they have lived is a reflection of the changing legal attitudes towards their community. For decades they moved from place to place, for ten years they had lived in a place called Hillside in Galway, along with other traveller families, though without facilities. They had also lived near Ennis on a site which had basic services. As a result of trouble the site was closed down and they then lived on the side of the road for around four years. When they moved to Dublin, about ten years ago, it was the first time that they had access to any accommodation facilities or services in their lives. After an error, they were offered a place at Lynch's Lane halting site on a temporary basis pending the provision of permanent halting site accommodation. This has continued for some seven or eight years.

2. Lynch's Lane was opened by South Dublin County Council in the mid-1990s in order to provide serviced bays for the caravans of Travellers who traditionally pursued a nomadic way of life and to accommodate Travellers who are awaiting the provision of permanent accommodation by the Council. There are twenty four caravan bays accommodating twenty two families. The transient nature of the site means that not every bay has a standard electricity supply. To provide this, according to the Council, would mean that what was supposed to be transient or temporary becomes permanent. Their long-term plan, due to be completed in mid 2008, involves the redevelopment of Lynch's Lane to the most modern standard for the caravan accommodation of members of the Irish Traveller Community. Meanwhile, the facilities on Lynch's Lane are basic. The applicants now live in a mobile home that was purchased three or four years ago with the assistance of a loan from the Council. It has not been repaid. Its electricity supply is basic, it has no internal plumbing, so therefore toilet and shower facilities are in a central block; with pots in the caravan providing temporary relief. The applicants live and sleep in the sitting room area of the caravan in order to keep warm. Only one electrical appliance can be used at a time. The applicants are in poor health. Mrs. Doherty uses an electrically powered nebuliser for up to sixteen hours a day. The attempt to heat the caravan has caused condensation in cold weather and the resulting dampness seems to be contributing to them both picking up ailments including, in Mrs. Doherty's case, pneumonia. She needs to use the toilet frequently and, in consequence of her increasing immobility, the use of a pot at night is the best practical facility available to her. Because of concerns in relation to her health, and the poor standard of their accommodation, an occupational therapist's report was prepared in November, 2004. Whether this was brought to the attention of the Council or not at the time, it appears that it was never placed on their housing file, a fact which became apparent on 5th October, 2005, when the applicants' solicitor made a request to seek the release of the housing file.

3. When, on 27th April, 2005, Mrs. Doherty was discharged from the Adelaide and Meath Hospital, Dublin; Irene Dunne, the Community General Nurse, wrote to the Travellers Unit of South Dublin County Council indicating that Mrs. Doherty had a serious chest condition which in its final stages had to be treated with home oxygen. Her letter indicated that the basic needs of Mrs. Doherty were for an indoor toilet, central heating in her caravan, and hot running water. The letter continued:-

> "The caravan she is living in is cold and damp and ideally needs to be replaced with a newer model with double glazing, central heating and indoor sanitation. I understand that all of this is a very tall order for the Council to meet, however as Mrs. Doherty's health is under serious stress because of their living conditions they deserve your immediate consideration in this matter."

The Offers

4. These proceedings were commenced in February, 2006. The first substantive offer to the applicants was made about six weeks later. The material part of the letter reads as follows:-

> "The Council has been advised by the County Architect that equivalent standards and specifications required for standard type social housing under Departmental Guidelines and the Building Regulations are not found in, and cannot be achieved in respect of, caravan/mobile home type accommodation ….
>
> In the circumstances, the Council is of the opinion that the provision of another, albeit newer, caravan with internal plumbing would not adequately or safely address the needs of the applicants or safeguard them against cold, draughts and dampness. Accordingly, the Council is unable to provide your Clients with caravan accommodation of the type sought by them. As your Clients can no longer remain in occupation of the caravan situate in Bay 16, they may now be regarded as homeless persons for the purpose of the Housing Acts. While the Council is in a position to arrange them temporary accommodation of the type offered to other homeless applicants, that is, accommodation in a 'Bed and Breakfast' establishment, it is accepted that such accommodation would not be appropriate having regard to your Client's ill health and advancing years. The Council accepts that your Clients have indicated that standard housing accommodation is not generally acceptable or suitable to them as members of the Traveller Community and notes that your Clients have not applied for such accommodation. Your Clients are included in the assessment carried out by the Council under the Traveller Accommodation Programme 2005-2008 and while it was intended to meet their accommodation needs in the new residential caravan park comprising ten group houses and ten residential caravan sites planned for Lynch's Lane, the

position is that these accommodation works are not expected to commence until the third quarter of 2006 and will not be completed until the summer of 2008. As the Council is unable to provide your Clients with suitable temporary accommodation of the type that they would prefer and does not possess any other suitable temporary alternatives at the present time, I am instructed to inform you that by reason of your Clients' homelessness and medical priority, the Council is in a position to allocate to your Clients standard housing accommodation in a two bed roomed ground floor apartment at either [addresses stated]. These apartments can be viewed by prior appointment. …"

5. That offer was refused by letter dated 28th March, 2006. By a further letter dated 21st April, 2006, the Council varied their offer:-

> "While the Council is of the view that the offer of permanent accommodation is a sufficient discharge of its statutory duties to your Clients in circumstances where it is not in a position to provide them with permanent accommodation in a residential caravan park, it is nonetheless prepared, having regard to your Clients age and health concerns to offer your Clients on a temporary basis accommodation at [a two bed ground floor apartment in Clondalkin] pending the development of the new residential caravan park at Lynch's Lane and the provision of permanent accommodation to them in that park. It may be of some assistance to your Clients to know that an elderly traveller couple … and their daughter resides [there]. This site is part of a recently constructed sheltered housing development, with on site support services. There are no vacancies at the moment in Ballyowen Hall, Lucan. However one of the remaining units which has yet to be handed over to the Council, has been reserved for your Clients. Another temporary alternative which might be of interest to your Clients is a housing development reserved for older persons at [stated]. There are already two traveller families living in this development …"

Reasons for Refusal

6. Neither of these offers was taken up. It is a consistent feature of the correspondence between the applicants and the Council that they have always opted for caravan type accommodation with a group housing scheme, among other Travellers, as a second option. As early as 18th December 1998, the Clondalkin Travellers Development Group, on their behalf, made it clear that the residence in Lynch's Lane was temporary and was one which they felt would impact negatively on their health. It was an offer which they accepted "because of the electricity and the safety of having neighbours". That letter seeks to impress on the Council "the extreme reasons as to why they are willing to move into Lynch's Lane for Christmas" and asks for priority in the provision of permanent accommodation.

7. Paddy Doherty, in his grounding affidavit in these proceedings emphasises his aversion to a permanent form of housing. He says:-

> "I do not believe that physical housing would be the more appropriate solution to our difficulties. Our poor living conditions can be just as well addressed through the provision of a properly insulated and heated mobile home which has an indoor toilet and shower. What my wife and I seek is simply a home in which we can safely live, appropriate to our traditions and customs as members of the Travelling Community. It is our deepest wish that we be able to spend our final years together as a family."

8. In a later affidavit dated 3rd April, 2006, Mr. Doherty says that, while he appreciates the offers coming from the Council, he and his wife are unable to accept them:-

> "We have lived in caravan style accommodation all our lives and have lived among the Traveller Community all our lives. We are now too old to adjust to a new way of life, living in an apartment amongst people whom we do not know and in an environment we are not familiar with. We are not refusing the offer of standard accommodations in order to be awkward or difficult. Our connection with the traveller way of life is something we cannot change. While some of our children have moved into housing and have made that adjustment successfully, my wife and I would find that simply impossible. We would be like fish out of water. We get on well with our neighbours on Lynch's Lane and they provide us with the community and support that we need at this stage of our lives. Although we no longer travel the way we once did, living on a halting site still maintains that connection with our old way of life … I have no doubt that if we were to move to one of the apartments, we would find ourselves very isolated and lonely and without the support and friendship that exists for us on the Lynch's Lane site. I say that being as old as we are, we simply want to be left where we are, live the way we have always lived and to stay in the only community we have ever known. All we need to do that is an improvement in our physical accommodation. This is not a matter of demanding a high level of luxury, or of the Council spending a large amount of money on our behalf, but we are looking for something that would be adequate to our needs as elderly Travellers with a number of health problems. I can understand why members of the settled community would find it exceptionally difficult to adjust to living on a halting site; as Travellers, my wife and I would find it exceptionally difficult to adjust to living in a house."

The Claim

9. These proceedings seek a declaration that the failure of the respondents to ensure that the applicants are provided with a centrally heated, insulated and internally plumbed caravan is in breach of the respondents' duties under the Housing Acts 1966-2004, as interpreted in the light of s. 2 of the European Convention on Human Rights Act, 2003; is in breach of s. 3 of European Convention on Human Rights Act, 2003; is in breach of the Equal Status Acts 2000-2004; and is in breach of Council Directive 2000/43/EC (The Race Directive). Other relief is sought including injunctive relief requiring the Council to provide the applicants with a centrally heated, insulated, and plumbed caravan, an order of *mandamus* in that regard and ancillary reliefs. The opposition to this claim has been in the form of contrary affidavits, legal argument and an objection that the reliefs sought are not available in judicial review proceedings. If the proceedings are capable of being compressed into a simple claim and answer, it is that the applicants feel that they are being treated unequally by being offered bricks and mortar accommodation and that they have an absolute statutory right to opt for the traveller way of life, involving caravan accommodation, under the relevant legislation. Insofar as they have made this option, which undoubtedly they have, they say that the treatment afforded to them by the Council is unequal by reason of the fact that members of the settled community who, by reason of their homelessness, are required to be housed by local authorities, receive a roof over their heads, in the form of bricks and mortar. However, members of the Irish Traveller Community who exercise the option special to them in the relevant legislation receive only a piece of tarmac on which to park their caravan, together with ancillary services of a variable kind. The applicants assert that the Council is discriminating against them as members of the Traveller Community by insisting on moving them into a house and, in effect, to adopting a way of life, or circumstance of living, which is alien to them. In effect, the applicants assert that once they have made the choice as Travellers – for non bricks and mortar accommodation – that choice must be respected in all circumstances by the Council and they should then receive a caravan roof over their heads in the same way as the settled community receive a bricks and mortar roof over their heads. The answer of the Council to this assertion is that their offers to the applicants are reasonable and accord with what they are obliged to do by statute.

10. It is not impressive that accommodation offered to the applicants on a temporary basis has continued to be their place of residence for in excess of six years. Nor is it helpful that two substantive offers were made to the applicants only on the commencement of these proceedings. It is important to record, however, that insofar as accusations of unequal treatment and mentions of the Race Directive may give rise to the suspicion that the worse forms of motivation for human conduct are at play here, the Court finds no evidence on the papers before it that the respondents have acted out of prejudice against Travellers. Much of the delay can be explained on the basis of administration and its burdens coupled with the fact that the applicants, having moved into Lynch's Lane, began to reassert entitlements in writing only after a health crisis. South Dublin County Council does, in fact, have a traveller accommodation programme which was adopted by the County Council at its meeting held on 9th May, 2005. At that stage they were either planning or had completed 215 Units for the accommodation of Travellers in a variety of schemes including the group housing transient halting sites and temporary halting site accommodation. In addition, the plan notes that approximately 120 families are in standard houses in mainstream Council accommodation. Those schemes that are in the course of development show that the Council is moving from accommodating Travellers in a number of very basic tarmacadam sites, with basic services, to permanent facilities where a caravan can be parked beside a day house, assigned to one family, where all the functions of living can be carried out except that bedrooms are reserved to the caravan or mobile home parked nearby. No doubt the Council could, or perhaps should, do more. That however, is not an issue for the court. What is at issue here is as to whether there has been a breach by them of their legal duties towards the applicants or whether there have been failures by the other State bodies contributing to same.

The Equality Acts

11. Both counsel for the Attorney General and for South Dublin County Council have argued that there is no unequal treatment in the provision of accommodation offered pursuant to statute to the applicants. Fundamentally, they argue that the Court, in adjudicating on this judicial review, is not entitled to have any regard to the provisions of the Equal Status Act, 2000 and the Equality Act, 2004. The rights and obligations therein created, it is argued, belong only within the scheme created by those Acts and administered within the mechanisms set up by them. Prior to the Equal Status Act, 2000, a person selling a house would have been entitled to advertise it in the newspapers as being for sale only to a purchaser of a particular Christian denomination or an individual over 60 years of age. The Act of 2000 announces itself, in its long title, as a measure to promote equality and to prohibit discrimination whereby members of the public will have general access to goods and services. Most importantly, the Act has mechanisms for investigating and remedying discrimination through the Equality Authority, which it sets up. The applicants are clearly members of the "Traveller community", which the Act, by s. 2, defines as "the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland". Discrimination occurs, within the meaning of the Act, where one person is treated less favourably than another person. There can be good reasons for discrimination. For instance, one does not pick an elderly man as part of an international sprinting team. The discrimination that is prohibited is therefore described in the Act. It includes gender, marital status, family status, sexual orientation, religious belief, age, disability, ethnic origins, membership of the traveller community or victimisation because a complaint has been made by that person under the Acts; s. 3 of the Equal Status Act, 2000 as amended by s. 48 of the Equality Act, 2004. This kind of discrimination is prohibited within a range of human activities including the sale and renting of accommodation, the provision of goods and services, and within clubs and educational establishments. Part 3 of the Act of 2000, as amended, deals with enforcement. Section 21 provides that a person who claims that discrimination has been directed against them "may…seek redress by referring the case to the Director": that is the person in charge of the Equality Authority set up by the Act. The case is then, subject to time limits and other procedural matters, investigated and may be subject to mediation and ultimately decision; s. 25 of the Equal Status Act, 2000 as amended by s. 59 of the Equality Act, 2004. Redress may be ordered under s. 27 of the Equal Status Act, 2000 as amended by s. 61 of the Equality Act, 2004. There may be compensation or a mandatory order. Thereupon the matter may be appealed to the Circuit Court; s. 28 of the Equal Status Act, 2000. From there an appeal may be taken on a point of law to the High Court. Under the scheme of the Acts, this Court could have been involved earlier, pursuant to s. 23 of the Equal Status Act, 2000, as amended by the Equality Act, 2004. This creates a legal norm whereby an injunction may be granted by the High Court, on the application of the Director, in respect of discrimination, which is called prohibited conduct, which is likely to re-occur. The Equality Act, 2004 recites in its long title that it is passed into law, in part, for the purpose of implementing certain European Union Directives. So, for instance, s. 64 inserts a new s. 38A in the Equal Status Act, 2000 providing for a reversal of the burden of proof and this accords with Article 8 of Council Directive 2000/43/EC of 29th June, 2000.

12. In my judgment, the Equal Status Acts, 2000 - 2004 do not create new legal norms which are justiciable outside the framework of compliance established by those Acts. Prior to the Local Government (Planning and Development) Act, 1963 one could lawfully turn one's house from being a family home into a block of apartments. Subject to tort laws relating to nuisance, one could establish a factory or workshop in one's back garden. Many activities which involved the development of land would also have required one to obtain a licence, for instance to run a slaughter house, but these were incidental to one's general right to develop one's property as one wished. Prior to the Unfair Dismissals Act, 1977, the only right that an employee would have in respect of his or her employer was for a period of notice to be given of dismissal, as specified in the contract of employment, or such as were implied by law where the contract was silent. There was no recognition that an employee had a right to work or had any quasi-proprietary interest in their job; see Redmond, *Dismissal Law in Ireland* (Butterworths, Dublin, 1999) 3 – 27. The Unfair Dismissals Act, 1977 established such rights and, like the Equal Status Acts, 2000 - 2004, set them up within a framework providing for a specific tribunal enforcing new legal norms and with particular rights of appeal to specified courts in particular circumstances. The difference between the Unfair Dismissal legislation and the Equal Status Acts, 2000 - 2004 is that under the Unfair Dismissal Act, 1977, a person must opt to choose between a claim for wrongful dismissal pursuant to his employment contract, or for unfair dismissal under the Act. Wrongful dismissal would involve litigation in the ordinary courts, which historically have dealt with all the questions related to contract, whereas by claiming unfair dismissal one would come under the special tribunal established by that Act.

13. Article 34.3.1 of the Constitution provides that "The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal." It is on this basis that the applicant claims that the rights available to him under the Equal Status Acts, 2000 - 2004 may be pleaded and determined in judicial review. In *Tormey v. Ireland* [1985] I.R. 289, Henchy J. at 295 analysed this provision of the Constitution in the light of the remainder of Article 34 and in the light of the Constitution as a whole. He said:-

> "Article 34, s. 3, sub-s. 4 amounts to a recognition of the fact that the High Court is not expected to be a suitable forum for hearing and determining at first instance all justiciable matters. Apart from practical considerations, it would seem not to be in accordance with the due administration of justice underlying the Constitution that every justiciable matter or question could, at the instance of one of the parties, be diverted into the High Court for trial. For example, the right given by Article 38, s. 2 of the Constitution to provide for the trial of minor offences in the District Court must imply that it would not be open to a prosecutor or a defendant in any such case to opt for a trial in the High Court. Fundamental fairness, the right to equality before the law and compliance with the basic purpose of Article 38, s. 2 would all seem to require that it should not be an option of one of the parties to such a prosecution to frustrate a trial in the District Court by asserting a constitutional right to a trial in the High Court."

14. Earlier, Henchy J. referred to the wording of Article 34.3.1 as giving jurisdiction to the High Court to determine "all matters and questions" as being required to be read "all justiciable matters and questions". Many of the rights and obligations created by modern statute were never justiciable until they were created by the passage of legislation. Some legislation consolidates existing rights in a code form while others interfered with the general freedom of contract by establishing, for instance, that particular terms of contracts in particular circumstances may be unfair. These Acts tag onto the existing law, by way of amendment or tidying up, and divert the law in a particular direction. Such legislation contemplates that the courts are to be used for the settling of controversies. Where, however, an Act creates an entirely new legal norm and provides for a new mechanism for enforcement under its provisions, its purpose is not to oust to the jurisdiction of the High Court but, instead, to establish new means for the disposal of controversies connected with those legal norms. In such an instance, administrative norms, and not judicial ones are set: the means of disposal is also administrative and not within the judicial sphere unless it is invoked under the legislative scheme. In the case of the Planning Acts, in employment rights matters and, I would hold, under the Equal Status Acts, 2000 - 2004, these new legal norms and a new means of disposal through tribunal are created. This expressly bypasses the courts in dealing with these matters. The High Court retains its supervisory jurisdiction to ensure that hearings take place within jurisdiction, operate under constitutional standards of fairness and enjoy outcomes that do not fly in the face of fundamental reason and common sense. In some instances, the High Court has declined jurisdiction on the basis that a forum established by law, over which it exercises supervisory jurisdiction, as above, is a more appropriate forum. In *Deighan v. Hearne* [1986] 1 I.R. 603 at 615, Murphy J. declined to engage in a tax assessment of the plaintiff in favour of the administrative tribunal established in this regard. He felt the jurisdiction of the High Court would only come into play in the most exceptional circumstances because legislation provided a constitutional procedure "competently staffed and efficiently operated to carry out that unpopular but very necessary task". In my judgment it is no function of the High Court, at first instance, to adjudicate on planning matters, to assess income tax, to decide on unfair dismissal or to decide whether there has been unequal treatment. I allow that there is a category of legislation which creates specific rights under statute and the breaches of which can be pleaded as tortious liability as breaches of statutory duty. An example of this is the Safety and Industry Acts. These create conditions whereby workers may be safely employed, breaches of which are criminal offences. A failure to comply with these is not simply a crime triable before the court given jurisdiction in that regard but is also a breach of the workers rights and which can give rise to damages. Francis Bennion in his *"Statutory Interpretation"* (Butterworths, London, 2002) states at p. 53 that if no criminal sanction is provided for a breach of a statute the inference is that a civil sanction is intended. Here, instead of a criminal sanction, there is a complete mechanism for resolution.

15. The general test developed in the law of tort was stated by Lord Diplock in *Lonrho Limited v. Shell Petroleum Co. Limited and Others* [1982] A.C. 173, [1981] 2 All E.R. 456 where he indicated that the existence of a statutory provision could give rise to a right in damages:-

> 1. Where the provision is designed for the protection or benefit of a particular class of persons and a member of that class is injured as a result of the breach; or
>
> 2. Where the provision creates a public right, but the plaintiff has suffered particular injury over and above the type of harm suffered by the public generally.

16. The ultimate test, however, is a matter of statutory interpretation. The issue is whether the legislature intended that private law rights of action should be conferred upon individuals where breaches of statutory duty are shown to have occurred. Of itself, the fact that a particular provision was intended to protect certain individuals, such as member of the Irish Traveller community, is not sufficient to confer a right of action before a court. Legislation creates obligations. All of the case law concerned with private law rights centres around categories of legislation where the right of enforcement is not specifically stated to be in the context of a civil claim. Often, the breach is triable before a criminal court. In addition, rights of action in private law may be created where the breach of the protection has caused an injury to the persons in respect of whom it was designed to provide protection and where the legislation creates a public right where the plaintiff has suffered a particular injury as a result of the breach. The fundamental rule of statutory interpretation remains, however, that stated by Tenterden C.J. in *Doe d, Bishop of Rochester v. Bridges* [1824-34] All E.R. Rep. 167 at p. 170:-

> "Where an act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

The rules as to determining tort liability arise by virtue of an exception to that rule. I note that in amending s. 21 of the Equal Status Act, 2000, s. 54 of the Equality Act substitutes for the words "to seek redress under this Act", with "to seek redress by referring the case to the Director". Here, a specific legal obligation is created for the first time by statute, a mode of enforcement is set up through an agency which was thereby created and limited rights of access to the courts are created. In my judgment this amounts to the creation of a separate legislative and administrative scheme which does not create a series of private rights which are either enforceable in damages, or outside the context of that scheme.

17. I am fortified in this conclusion by a statement made by Fennelly J. in the course of his judgment in *Maha Lingam v. Health Services Executive*, (Unreported, Supreme Court, 4th October, 2005) where, in the context of a claim which, in part, relied on the Protection of Employee's Fixed Term Work Act, 2003 he stated:-

> "However, having looked at that Act the Court cannot see that it significantly alters the matter. It is unnecessary to go into it except that the general policy of the Directive and the Act seems to be to protect employees who are employed on short term fixed term contracts and who have been employed on such basis for a certain minimum number of years, either three or four years, and, accepting for the sake of the purpose of the present case, that the plaintiff is employed under such a contract of employment, the question would be whether he could make out a case to justify the grant of an interlocutory injunction. There are two major obstacles in place of the plaintiff/appellant in this context; firstly that it is the implementing Act, the 2003 Act, contains, like the Unfair Dismissals Act, its own statutory scheme of enforcement and it does not appear to be envisaged by the Act that it was intended to confer independent rights at common law or to modify in general the terms of contracts of employment to be enforced by the common law courts; and the second is that in any event the general terms and provisions and policy of the Act and of the Directive seems to be to put persons who were in such short term contracts in the same position as if they were persons who were on fixed long term contracts but in neither event does it appear to interfere with the ordinary right and obligation of the employer to terminate the contract on the giving of reasonable notice and for that reason the matter comes back within the general ambit, therefore, of the sort of remedy that would be available to the plaintiff/appellant for the termination of the contract."

18. For the sake of removing doubt, if I were to analyse the case of the applicants under the Equal Status Acts, 2000 - 2004, I do not feel that I could hold that their treatment has been discriminatory. My reasons are as set out below.

The Right to be Housed

19. The Housing Act, 1966 consolidated existing legislation as to the provision of housing. It also cast a duty on local authorities to survey the need for housing within their functional area and to make provision, based on the scheme of priorities, whereby people who are otherwise unable to afford housing might be offered accommodation at reasonable rent. Section 60 provided that it is the duty of a housing authority to make a scheme determining the priorities to be accorded to categories of persons who are in need of housing. This scheme was a public document which could be inspected; s. 60(9). The primary objectives of this section were replaced by s. 9 of the Housing Act, 1988, which recasts s. 60, which it repealed. Section 9 makes it the duty of a housing authority to assess the needs of the homeless, of Travellers, of those in unsuitable accommodation, of young people without family support, of the sick and the elderly, and those without adequate means. This includes those who may later enter the functional area of the authority. Under s. 10 further powers to offer accommodation, such as Bed & Breakfast accommodation, are conferred on the housing authority. Part IV of the Act of 1966 is concerned with the elimination of slum and tenement dwellings and, in that regard, empowers local authorities to serve orders for repair or demolition and to bring prosecutions in respect of related offences. Section 56 of the Act of 1966 provides:-

> "56 - (1) A housing authority may erect, acquire, purchase, convert or reconstruct, lease or otherwise provide dwellings (including houses, flats, maisonettes and hostels) and such dwellings may be temporary or permanent.
>
> (2) A housing authority may, in connection with dwellings provided, to be provided or which in the opinion of the authority will in the future require to be provided under this Act, provide and, if they think fit, maintain in good order and repair roads, shops, playgrounds, places of recreation, parks, allotments, open spaces, sites for places of worship, factories, schools, offices and other buildings or land and such other works or services, as will, in the opinion of the authority, serve a beneficial purpose either in connection with the requirements of the persons for whom the dwellings are provided or in connection with the requirements of those persons and of other persons."

20. The following section of the Act of 1966 allows for the provision of sites for housing in a similar way. There is no specific mention in the Act of 1966 of the Irish Traveller Community. One notes however, the reference in s. 56 to temporary accommodation which could, although it is not specified, include a mobile home or caravan. Section 13 of the Housing Act, 1988 applies only to those who belong "to the class of persons who traditionally pursue or have pursued a nomadic way of life." The section was replaced by s. 29 of the Housing (Traveller Accommodation) Act, 1998. It is to be noted that the definition does not confine the rights enabled by the section to those who have pursued this lifestyle on this island, as does the Equal Status Acts, 2000 – 2004. It applies, on the face of it, to all traditional nomads. As substituted by s. 29 of the 1998 Act, s. 13 of the 1988 Act reads, as to its material part:-

> "13 - (1) This section applies to persons belonging to the class of persons who traditionally pursue or have pursued a nomadic way of life.
>
> (2) A housing authority may provide, improve, manage and control sites for caravans used by persons to whom this section applies, including sites with limited facilities for the use by such persons otherwise than as their normal place of residence or pending the provision of permanent accommodation under an accommodation programme within the meaning of s. 7 of the Housing (Traveller Accommodation) Act, 1998, and may carry out any works incidental to such provision, improvement, management or control, including the provision of services for such sites.
>
> (3) Section 56(2) of the Principal Act shall apply in connection with the provision of sites under this section as it applies in connection with the provision of dwellings under that section."

21. Section 56(2) of the Housing Act, 1966, enables the authority to maintain buildings and services ancillary to housing. Section 13(7) of the Act of 1988, as substituted by s. 29 of the Act of 1998, defines a caravan as:-

> "Any structure designed or adapted for human habitation which is capable of being moved from one place to another, whether by towing or transport on a vehicle or trailer, and includes a motor vehicle so designed or adapted and a mobile home, but does not include a tent."

A site with limited facilities is defined by reference to the temporary nature of the stay but which, in that regard, must have sufficient water, a hard parking surface and facilities for waste disposal. Just as under the Housing Act, 1966, there was a duty to make an assessment of housing needs, so under the Housing (Traveller Accommodation) Act, 1998, Part II provides a duty on a housing authority to assess the need for sites and to adopt an accommodation programme for Travellers. Under s. 25, the authority may make a loan for the acquisition or repair of a caravan, or to purchase a site. Under s. 15 of the Housing Act, 1988, as inserted by s. 30 of the Housing (Traveller Accommodation) Act, 1998, the Minister may pay to a housing authority a grant or subsidy in respect of:-

> "(a) The provision of dwellings (including houses, flats, maisonettes and hostels) by the authority;
>
> (b) The improvement or reconstruction of dwellings provided by the authority;
>
> (c) The provision of caravans or the provision, improvement or management by the authority of sites for caravans referred to in s. 13 (as amended by the Housing (Traveller Accommodation) Act, 1998) for persons to whom that section applies;
>
> (d) The acquisition of land for the provision of dwellings or sites referred to in this section;
>
> (e) The carrying out of ancillary works … ; and
>
> (f) The provision of assistance under s. 5 to a body approved of by the Minister for the purposes of that section."

22. Counsel for the applicants have argued that the foregoing legislation, which I have referred to in some detail, comprises a scheme for the housing of members of the Irish Traveller Community and of settled persons on an unequal basis. It is claimed that this amounts to discrimination. Further, it is argued that this legislation has running through it a division as to the accommodation requirements of Travellers and of members of the settled community. Once, it is asserted, a person who has pursued a nomadic life opts to be treated as such, then the relevant legislation allows that person to make an untrammelled choice for caravan accommodation: they cannot be housed in bricks and mortar unless they make a choice to opt out of caravan accommodation. The inequality claimed arises from the fact that a Traveller will only receive a site, with services, whereas a non-Traveller will receive accommodation. I cannot accept either argument.

23. Under the scheme of the Acts there was a duty cast upon housing authorities to work on the elimination of homelessness within their functional areas according to a scheme of priorities set out by the Oireachtas. Homelessness is, of its nature, a measure requiring an emergency response. I cannot accept that it was the intention of the Oireachtas to establish a rigid division between members of the Irish Traveller Community and persons who are settled by providing that the problem of homelessness would be dealt with by the authority always being required to provide only caravan or site accommodation to Travellers, at their option, but bricks and mortar accommodation to settled persons. It seems to me that the resolution of this problem hinges around the issue as to how homelessness is defined. Section 2 of the Housing Act, 1988, provides that definition:-

> "2. A person shall be regarded by a housing authority as being homeless for the purposes of this Act if -
>
> (a) there is no accommodation available which, in the opinion of the authority, he, together with any other person who normally resides with him or who might reasonably be expected to reside with him, can reasonably occupy or remain in occupation of, or
>
> (b) he is living in a hospital, county home, night shelter or other such institution, and is so living because he has no accommodation of the kind referred to in paragraph (a), and he is, in the opinion of the authority, unable to provide accommodation from his own resources."

24. There is no distinction drawn in this section between accommodation available to a member of the Irish Traveller Community and to a member of the settled community. The same definition applies to both. I would find it impossible to hold that there is an untrammelled statutory right vested only in members of the Irish Traveller Community to opt in all and any circumstances for caravan accommodation and to reject bricks and mortar. Such an interpretation would mean that those who are very elderly, very infirm or very ill and who would be unsuited, for that reason alone, to caravan accommodation would be entitled to caravans adapted to their needs; and adapted ever more extremely as their disability grew. Such a right would be in contradistinction to the ordinary adaptations which every member of the community must make as they are stricken by age, infirmity or illness. People, in the ordinary course of life, often leave the homes which they occupied with their family for flat accommodation, for single storey accommodation, for a retirement village or for a nursing home. Often, this is a traumatic transition. If the statutory scheme required me to make a distinction conferring a special right on Travellers always to be housed in a caravan, I would do so but the definition of a homeless person, as set out in s. 2 of the Housing Act, 1988, apart from any other provision, requires that I should not.

25. Counsel for the Attorney General has argued that homelessness does not depend alone on the accommodation which a person is occupying, but depends as well on what accommodation is available to him or her: once, within the meaning of s. 2 of the Housing Act, 1988, there is accommodation available which a homeless person can reasonably occupy, the state of homelessness ends. I agree with this. It is impossible to ignore that to be homeless, under the Acts, one is required to have not just no accommodation but none that one could reasonably occupy. Living, as they are, in a caravan which is damp and without the provision of an indoor toilet which they need and which is unsuited to their state of health, the applicants are homeless. Once, however, a reasonable offer has been made by the housing authority which the applicants choose not to take up, their state of homelessness has ended.

26. The further assertion that there is inequality of treatment between members of the Irish Traveller Community and those who are settled is based on the premise that a settled person, applying for a house and being successful, will receive a roof over his or her head, whereas a traveller will not. In accordance with s. 15 of the Housing Act, 1988, as amended by s. 30 of the Housing (Traveller Accommodation) Act, 1998, there is, in fact, a scheme of loans and grants for the purchase of caravans pursuant to circular letter TAU 1A/2000 of the 18th October, 2000, from the Department of the Environment and Local Government. This requires that a caravan must be purchased from a reputable supplier who is registered for VAT, that it is value for money and that it will be located in a bay or other site provided by the Local Authority. According to documents handed in during the course of the hearing, a scheme is available whereby loans may be made under s. 25 of the Housing (Traveller Accommodation) Act, 1998, which empowers local authorities to give loans for the provision of private Travellers specific accommodation; SI 37 of 2000 provides that a loan of up to €6,350, repayable over one to five years, together with a once off grant of €640 is available and a special, though small, grant is available only to Travellers for the purchase of a new or second hand house in the amount of €3,810. Circular letter TAU 4/2002 and circular letter TAU 1/2000 explain that the purpose of the scheme is "to encourage initiatives to address the needs of traveller families who live in substandard caravans or in over crowded conditions".

27. There is equality of treatment between members of the Irish Traveller Community and the settled community vis à vis the provision of housing in bricks and mortar. Anyone, without distinction, will have an entitlement to same upon being homeless. Members of the Irish Traveller Community have a special and unique additional provision made for them in the form of caravan sites, site works and loans for the purchase of caravans. The fact that this additional option is available only to Travellers, from whatever country, does not mean, in my judgment, that it can be exercised in all and every circumstance so as to apparently continue the state of homelessness that gives rise, in the case of all citizens, to the requirement of the local authority to seek to offer accommodation to homeless persons that they might reasonably be expected to reside in.

28. This is the first case in which a claim has been made by a member of the Irish Traveller Community to be provided with more than a site. In all the previous cases to which I have been referred, the argument has been as to whether there is a statutory duty on a housing authority to make provision for sites for members of the Irish Traveller Community and as to whether in particular circumstances, that duty has been fulfilled. In *McDonald v. Dublin County Council* (Unreported, Supreme Court, 23rd July 1980), it was held that the offer of provision of chalet accommodation to the plaintiff, was in the circumstances, a reasonable discharge by the defendant of its duty to house the plaintiff. In *O'Reilly and Others v. Limerick County Council and The Attorney General and Human Rights Commissioner*, (Unreported, High Court, 29th March, 2006), it was held by MacMenamin J. that a choice to resume accommodation in unacceptable conditions may not disentitle an applicant to relief and that there is a duty on a county council to fully advise those members of the Irish Traveller Community who were uneducated as to their full rights with regard to housing.

29. Since *University of Limerick v. John Ryan and Others and the County Council of the County of Limerick*, (Unreported, High Court, 21st February, 1991), a line of authorities have followed the judgment of Barron J. in that case that the scheme of the Housing Acts contemplates not only that an assessment of housing needs should be made in relation both to the Irish Traveller Community and to settled persons, but that it should be acted upon. In two cases, orders were made by the High Court that serviced halting sites should be provided by housing authority respondents within a period of 12 months. In *County Meath V.E.C. v. Joyce and Others* [1994] 2 ILRM 210, Flood J. ordered that Meath County Council should bring their assessment of housing and serviced camp site needs up to date and to provide sites within 12 months of the date of the perfection of the order he made in that regard. In *John O'Brien and Others v. Wicklow Urban District Council and Wicklow County Council*, (Unreported, High Court, 10 June 1994), Costello J. made an order that the County Manager should carry out works at specified locations providing for hard core sites, an electricity supply and drainage to certain members of the Irish Traveller Community. All of these judgments followed the decision of Barron J. in *University of Limerick v. John Ryan and Others and the County Council of the County of Limerick*, (Unreported, High Court, 21st

February 1991). Having first decided that s. 13 of the Housing Act, 1988 imposed a duty to provide caravan sites, as opposed to merely empowering a housing authority to do so, Barron J. went on:-

> "Section 13 must be taken to intend that the obligation of the Council to provide for housing needs extends in the case of those to whom s. 13 applies to the provision not of dwellings but of caravan sites. It is I think significant that s. 56(2) of the 1966 Act is to apply to serviced halting sites as it does to dwellings. In my view, s. 13 imposes on the local authority an obligation to provide serviced halting sites to those who require them instead of conventional dwellings in the same way as s. 56(1) requires them to provide the latter. Such obligation is, of course, subject to all the provisions which limit the obligations of the housing authority under s. 56 of the 1966 Act. The section does however mean that the housing authority cannot meet its statutory obligations by offering only a conventional dwelling to Travellers. It must bring into force the estimate, assessment and scheme respectively required by ss. 8, 9 and 11. If in accordance with the result of these matters, the housing authority has obligations in accordance with its resources for persons who are Travellers, then those obligations must be fulfilled. In the case of those persons to whom s. 13 applies and who do not wish to be provided with dwellings, the obligation must be fulfilled by the provision of caravan sites. As a matter of construction of s. 13, it seems to me that the statutory obligation to provide a caravan site for Travellers is identical to the statutory obligation to provide dwellings for those of the settled community. The only difference in the obligation lies in the nature of the housing to be provided. Whether the person in need is a traveller or a member of the settled community, once the duty exists it must be performed. In the one case, it is performed by providing a caravan site; in the other by providing conventional housing. I refer only to the position of those Travellers who live permanently in a particular area and whose need for a caravan site is as a permanent home. The provision of a temporary halting site or sites is a different matter and does not arise in the present case."

30. As a matter of fact, the respondent Council has made available to the applicants a halting site on a temporary basis. It is the intention of the Council to redevelop the site in which they currently reside so as to make provision for them on a permanent basis so that their caravan can be used in conjunction with a day house as explained above. This accommodation will be available within a period of 18 months from the date of this judgment. There has therefore been no failure by the respondent housing authority to fulfil its duty under the relevant provisions of the Housing Acts. It would be desirable were this accommodation to be available immediately. The housing authority, however, has obligations only in accordance with its resources and according to the scheme of priorities set out by it.

Human Rights

31. The applicants argue that their status as members of the Irish Traveller Community means that special arrangements are required to be made for them, even apart from the statutory provisions already referred to. It has been argued that the scheme under the Housing Acts operates on the basis of an untrammelled choice to be made by a member of the Irish Traveller Community between accommodation in bricks and mortar and in a caravan. It is urged that this interpretation be placed upon the Acts because of s. 2 of the European Convention on Human Rights Act, 2003. This provides:-

> "2(1) In interpreting and applying any statutory provision or rule of law, the court shall, insofar as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.
>
> (2) This section applies to any statutory provisions or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

32. It is further argued that the respondents, and in particular the housing authority, have an obligation to treat the applicants in a special way having regard to their status as members of the Irish Traveller Community and that this obligation arises by virtue of s. 3 of the European Convention on Human Rights Act, 2003 which reads:-

> "3(1) 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."

33. Under the Act, judicial notice has to be taken by all courts of the Convention provisions and the decisions in relation thereto. If in any proceedings before the High Court, or the Supreme Court exercising its appellate jurisdiction, it emerges that a provision of Irish legislation is incompatible with any Article of the Convention, then a declaration of incompatibility should be made under s. 5 of the Act of 2003. This does not affect the continuing operation of the law. An *ex gratia* payment of compensation may be made once an application for compensation by a party wronged has been made to the Attorney General. It is not stated, but it is to be inferred, that where a declaration of incompatibility with the European Convention on Human Rights has been made by a court that a political will may exist to alter relevant legislation in favour of compatibility.

34. The European Convention on Human Rights was agreed between the signatory governments in Rome in November, 1950. Its text sets out the fundamental rights which the citizens of Europe are entitled. The Articles pleaded here were Articles 8 and 14. Article 14 prohibits discrimination and provides:-

> "14. 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."

Article 8 secures rights whereby the State must respect private and family life. This provides:-

> "8. -(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) 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."

Article 3 is also relevant in that it prohibits torture. It states:-

> "3. No one shall be subjected to torture or to inhumane or degrading treatment or punishment."

35. These Articles may be contrasted with Article 40.3 of Bunreacht na hÉireann which provides:-

> "1. 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.
>
> 2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

36. The guarantee in Article 40.3 is a promise never to infringe a right. Thus, there can be no laws passed in Ireland which infringe constitutional rights or, in the case of a conflict, which do not draw a reasonable balance between the interaction of two differing rights. When it comes, however, to taking positive action to defend and vindicate the personal rights of the citizen, the text of the Constitution makes it clear that the State is only obliged to do as much as is practicable, or in the original text "sa mhéid gur feidir é". It is easier to find a circumstance where a State body is actively infringing on someone's constitutional rights than to define the circumstances under which the State must positively intervene to uphold a right. For instance, if a law were passed, or an administrative measure adopted, providing that members of the Irish Traveller Community could never be housed in communities that were settled, this would be a positive denial of their constitutional right as human persons to be treated equally before the law. The State cannot set out to infringe constitutional rights: but when is it obliged to intervene to uphold them? Many rights could be set at nought by reason of the inability of a citizen to provide the means to exercise them. There is certainly a constitutional right to life and a provision denying access to particular medicines which are necessary for the exercise of that right would be unlawful but where a citizen did not have the means to purchase necessary medicine would that mean that the State had an obligation to intervene by providing him or her with some form of welfare in that regard? The answer may be that the State could, in certain circumstances, have an obligation consistent with its financial and administrative commitments. A similar problem arises in relation to the European Convention on Human Rights. It is to be noted that there is no positive obligation to intervene to uphold private and family life in Article 8 and that, expressly, the text forbids "interference by a public authority with the exercise of this right". The courts of England and Wales and the European Court of Human Rights have attempted to grapple with this issue without formulating a principle as to when State welfare provision may be necessary in order to allow for the meaningful exercise of the rights protected. It may be that there is a positive duty cast upon public authorities to intervene under Article 8, consistent with the proper disposal of available resources, where special circumstances cause a direct interference of a serious kind in family life and where the subject of that interference has no available means to alleviate the absence of that right. Counsel for the applicant argued that no more than practicable assistance could be offered from State resources and that a citizen has a general obligation to have recourse to welfare as a last resort only.

37. In *Anufrijeva and Anor v. Southwark London Borough Council* [2004] 1 QB 1124 the Court of Appeal of England and Wales dealt with three different cases that concerned the right to a family and private life under Article 8 of the Convention. Lord Woolf C.J. noted at para. 25 in relation to the problem of deciding when a positive obligation of intervention was cast on State authorities, apart from a duty not to interfere:-

> "Strasbourg provides little guidance in this area, for we are not aware of any case where the Court of Human Rights has held a state in breach of the Convention for failure to provide housing to a certain standard, or for failure to provide welfare support. … The dearth of authority is evidenced by the fact that counsel on each side attached importance to two recent decisions, which seem to us of only peripheral significance."

38. These cases were *Botta v. Italy* (1998) 26 EHRR 241 where a physically disabled person failed in a claim under Article 8 on the assertion that his rights were infringed because there were no facilities to enable him to get down into the sea in a resort distant from his home. In *Zehnalová and Zehnal v. Czech Republic*, Reports of Judgments and Decisions 2002 – V, p. 337, a complaint under Article 8 failed where the national authorities had failed to provide access for physically disabled persons to all public buildings. This, the court held, was to invoke rights which were "too wide and indeterminate" as to give "convincing proof of an attack on their private lives". It may be speculated that some minimum welfare provisions may constitute a positive obligation inherent in effectively respecting private and family life. In *Anufrijeva*, the Court of Appeal offered these observations, at paras. 43 to 45, as to the formulation of a useful legal test:-

> "… Article 8 is capable of imposing on a State a positive obligation to provide support. We find it hard to conceive, however, of a situation in which the predicament of an individual will be such that Article 8 requires him to be provided with welfare support, where his predicament is not sufficiently severe to engage Article 3. Article 8 may more readily be engaged where a family unit is involved. Where the welfare of children is at stake, Article 8 may require the provision of welfare support in a manner which enables family life to continue. Thus, in *R(J) v. Enfield London Borough Council* [2002] EWHC 735 (Admin), where the claimant was homeless and faced separation from her child, it was common ground that, if this occurred, Article 8(1) would be infringed. Family life was seriously inhibited by the hideous conditions prevailing in the claimants' home in Bernard and we consider that it was open to Sullivan J. to find that Article 8 was infringed on the facts of that case … insofar as Article 8 imposes positive obligations, these are not absolute. Before inaction can amount to a lack of respect for private and family life, there must be some ground for criticising the failure to act. There must be an element of culpability. At the very least there must be knowledge that the claimant's private and family life were at risk: see the approach of the Court of Human Rights to the positive obligation in relation to Article 2 in *Osman v. United Kingdom* (1998) 29 EHRR 245 and the discussion of Silber J. in *N.* [2003] EWHC 207 (Admin) at 126-148. Where the domestic law of a State imposes positive obligations in relation to the provision of welfare support, breach of those positive obligations of domestic law may suffice to provide the element of culpability necessary to establish a breach of Article 8, provided that the impact on private or family life is sufficiently serious and was foreseeable."

39. In this regard, I note that Costello J. in *John O'Brien and Others v. Wicklow Urban District Council and Wicklow County Council*, (Unreported, High Court, 10th June, 1994) stated that conditions which are totally unacceptable in a Christian community and which could be relieved if the statutory powers of a local authority were exercised, and without any great expense can give rise to an obligation to intervene, he said:-

> "I am also satisfied that the County Manager has power to deal with an emergency and that this power in the circumstances of a case now amounts to a duty."

40. I would find it impossible to apply the tests of culpability and of inhuman treatment where a number of offers of housing have been made, and where the best form of halting site accommodation is to be made available to the applicants within 18 months.

41. It is argued, in addition, that the housing legislation should be interpreted in favour of the applicants. The limits to which the interpretation requirement set out in the corresponding provision of the United Kingdom Human Rights Act, 1998 may be taken are to be found in the decision of the House of Lords in *Ghaidan v. Godin-Mendoza* [2004] 3 WLR 113 where it was held that a definition of spouse as extending to a person living with a tenant "as his or her husband or wife" could encompass a surviving homosexual partner

who is not, under the decision, to be put in any less secure a position than the survivor of a heterosexual relationship in respect of statutory tenancy rights.

42. It has been urged on the Court that what is reasonable in terms of accepting or refusing accommodation, within the definition of homelessness in s. 2 of the Housing Act, 1988, must take into account the particular circumstances of the applicants living, as they have, all their life either as nomads on the side of the road or, for the about the last ten years in various halting sites. Circumstances can occur where persons who have led a nomadic way of life may find it difficult to accept, on a permanent basis, settled accommodation. It is not, however, what the applicants are being asked to do here. In asserting their rights to nomadic accommodation, they are being met with an answer, from the Council, that a symbolic vestige of their tradition may be preserved in the shape of a site for their caravan with a day house, but only after a reasonable interval of time for the purposes of re-development. In the meanwhile it is not unreasonable that the available accommodation is in bricks and mortar and nor is it unreasonable that the County Council will not go and immediately buy them a plumbed, centrally heated mobile home with electricity supply: this is not in accordance with the scheme of priorities set down by the Council under the Housing Acts and its provision is outside the relevant regulations made under s. 15 of the Housing Act, 1988, as amended.

43. A duty to take into account the sensitivities of members of the Roma communities, whether Gypsies from the neighbouring kingdom, members of the Sinti from Central Europe, or members of our own Irish Traveller Community, can arise when interpreting administrative measures. These obligations are not, however, unlimited. In *Chapman v. United Kingdom* (2001) 33 EHRR 18 the European Court of Human rights dismissed an argument that a nomadic lifestyle gives rise to an automatic duty on States to intervene in favour of preserving this way of life, stating, at paras. 96 to 99, as follows:-

> "Nonetheless, although the fact of being a member of a minority with a traditional lifestyle different from that of the majority of a society does not confer an immunity from general laws intended to safeguard assets common to the whole society such as the environment, it may have an incidence on the manner in which such laws are to be implemented. As intimated in the *Buckley* judgment, the vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in arriving at the decisions in particular cases. To this extent there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life.
>
> It is important to appreciate that in principle gypsies are at liberty to camp on any caravan site which has planning permission; there has been no suggestion that permissions exclude gypsies as a group. They are not treated worse than any non-Gypsy who wants to live in a caravan and finds it disagreeable to live in a house. However, it appears from the material placed before the Court, including judgments of the English Courts, that the provision of an adequate number of sites which the gypsies find acceptable and on which they can lawfully place their caravans at a price which they can afford is something which has not been achieved.
>
> The Court does not, however, accept the argument that, because statistically the number of gypsies is greater than the number of places available in authorised Gypsy sites, the decision not to allow the applicant Gypsy family to occupy land where they wished in order to install their caravan in itself, and without more, constituted a violation of Article 8. This would be tantamount to imposing on the United Kingdom, as on other Contracting States, an obligation by virtue of Article 8 to make available to the Gypsy community an adequate number of suitably equipped sites. The Court is not convinced, despite the undoubted evolution that has taken place in both international law, as evidenced by the Framework Convention, and domestic legislations in regard to the protection of minorities, that Article 8 can be interpreted to involve such a far-reaching positive obligation of general social policy being imposed on States.
>
> It is important to recall that Article 8 does not in terms give a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not of judicial decision."

44. This decision was followed by the European Court of Human Rights in the decision in *Codona v. The United Kingdom*, judgment delivered on 7th February, 2006. The applicant was a Gypsy who lived with her young son and other members of her extended family in caravans. Injunction proceedings were issued against her because the site on which the caravans were placed did not have the relevant planning permission. During the course of court proceedings the applicant averred that she did not "wish to be given bricks and mortar. She has always lived in a caravan, has only spent one night in a building in her life. Mrs. Codona wishes to live in a caravan and have the support of her extended family around her". The housing authority, on examining the case, concluded that they could only offer bricks and mortar accommodation in a bed and breakfast establishment until it could make a final offer of accommodation. The application before the Court of Human Rights was, in essence, for relief under Article 8 on the complaint that the response of the Council did not take into account her rights as a Gypsy under Article 8 of the Convention. The court held:-

> "Following *Chapman*, the court does not rule out that, in principle, Article 8 could impose a positive obligation on the authorities to provide accommodation for a homeless Gypsy which is such that it facilitates their "Gypsy" way of life. However, it considers that this obligation could only arise where the authorities had such accommodation at their disposal and were making a choice between offering such accommodation or accommodation which was not "suitable" for the cultural needs of a Gypsy. In the instant case, however, it appears to be common ground that they were, in fact, no sites available upon which the applicant could lawfully place her caravan. In the premises, the court cannot conclude that the authorities were then under a positive obligation to create such a site for the applicant (and her extended family). Such would be to extend the positive obligation imposed by Article 8 far beyond the - limited - bounds established in previous case law. In particular, to accept that the authorities were under such an obligation would be to have the effect of imposing upon the respondent State the positive obligation to create either one or more caravan sites so as to equate supply with demand. The court recalls that this was precisely the obligation that the Grand Chamber found that the contracting states could not be said to owe in *Chapman* (para. 98). The court does not find that there are any compelling reasons in the present case to depart from the position adopted by the Grand Chamber in *Chapman*."

45. In addition to the foregoing, I can find nothing in any other decision of the European Court of Human Rights, or of the courts in the United Kingdom or here, which would establish that the particular aspect of family life that requires to be respected in the case of a member of the Irish Traveller Community demands the provision of a new, centrally heated, plumbed caravan with electricity supply. On analysis of the relevant case law under the European Convention of Human Rights, my judgment is that the statutory entitlements of the applicants exceed any benefit that might be available to them on the basis of an interpretation of Article 8 of the European Convention on Human Rights.

46. I would add that the decisions to date show a reluctance to require State authorities to intervene with forms of welfare as an aid to the exercise of rights. Whether welfare is provided, and at what level, and in what particular circumstances, is essentially a matter of political decision. The discourse of politics in this area tends to move between the poles of urging self-reliance and of offering cradle-to-grave support. Like a family, the resources of any nation are limited and it is a matter for political and executive decision as to what resources should be committed to what problems and with what priority. A breach of legislation prescribing such an allocation, as in housing, calls for judicial intervention. Where, however, a plea is made that the court should declare the absence of welfare support to be wrong in a particular situation of itself, the applicant should show a complete inability to exercise a human right from his or her own means and a serious situation that has set the right at nought with the prospect of serious long term harm. Any proposed intervention by the court should take into account that it is the responsibility of the legislature and executive to decide the allocation of resources and the priorities applied by them.

Procedural Matters

47. Some procedural matters were pleaded in order to bar certain sections of the applicants claim. Since the substantive decision has gone against them, I can deal with these matters briefly.

48. It was claimed that as there was a conflict of evidence on the affidavits as between the applicants and South Dublin County Council, that the court should not proceed to judgment but should refer the matter for plenary hearing. I do not accept this. Insofar as any conflict existed, it was on the basis that the applicants claimed that they wished to continue to live in a caravan, and an assertion by South Dublin County Council that their age and medical condition made it entirely unsuitable that they should be accommodated in a caravan or mobile home which, of its nature, has insulation difficulty and, consequently, condensation problems. The duty cast on the High Court in judicial review is to resolve such facts as can be resolved on affidavit and to determine, on the basis of those facts, as to whether any of the reliefs sought should be granted.

49. Secondly, it was pleaded that the applicants should involve themselves, in some unspecified way, in an appeal mechanism and that, in consequence, the decision of the Supreme Court in the *State (Abenglen Properties Limited) v. Corporation of Dublin* [1984] I.R. 381, gave me a discretion to refuse that application. I do not accept that. Persons given statutory rights to a hearing may be able to call in aid the High Court's jurisdiction under judicial review. The fact that an appeal might be available as an alternative can, depending on the circumstances, bar the availability of a remedy but it does not automatically exclude it.

50. Thirdly, it has been argued that a mandatory order should not issue in this case. In *Minister for Labour v. Grace* [1993] 2 I.R. 53 at 55, O'Hanlon J. held:-

> "An order of mandamus may be granted ordering that to be done which a statute requires to be done, and for this rule to apply it is not necessary that the party or corporation on whom the statutory duty is imposed should be a public official or an official body. In order, however, for an order of mandamus to issue for the enforcement of a statutory right it must appear that the statute in question imposes a duty, the performance or non-performance of which is not a matter of discretion, and if a power of discretion only, as distinct from a duty, exists, an order of mandamus will not be granted by the court."

As against that, I note that in the decisions cited earlier in this judgment – namely *The University of Limerick v. Ryan*, *Mongan v. South Dublin County Council*, and *O'Brien v. Wicklow County Council* – such an order was in fact made on the basis that a statutory duty to provide a halting site had not been complied with.

51. Lastly, I note that in *T.D. v. Minister for Education* [2001] 4 I.R. 259 the limits on the court in terms of interference with executive decision-making was set out. Hardiman J. stated:-

> "I have read the judgment of Murray J. in this case and I wish to express my agreement with what he says in relation to the circumstances in which the court may make a mandatory order compelling the executive to fulfil a legal obligation. First, such a thing may occur only in absolutely exceptional circumstances 'where an organ or agency of the State has disregarded its constitutional obligations in an exemplary fashion. In my view the phrase 'clear' disregard can only be understood to mean a conscious and deliberate decision by the organ of State to act in breach of its constitutional obligation to other parties accompanied by bad faith or recklessness'. Secondly, even in such circumstances, the mandatory order might direct the fulfilment of a manifest constitutional obligation but 'without specifying the means or policy to be used in fulfilling the obligation'. Such an order, in my view, could only be made as an absolutely final resort in circumstances of great crisis and for the protection of the constitutional order itself. I do not believe that any circumstances which would justify the granting of such an order have occurred since the enactment of the Constitution 64 years ago. I am quite certain that none are disclosed by the evidence in the present case."

52. Were it to be the case that the applicants' statutory rights, or their human rights or constitutional rights, had been infringed a suitable order by way of declaration, at least, could have been made in this case. In the result, I am not satisfied that any such infringement has occurred.