

## THE HIGH COURT

## JUDICIAL REVIEW

[2016 No. 955 J.R.]

## BETWEEN

**DAVID MONGANS, MARGARET LISA MONGANS AND MARGARET LISA MONGANS AS MOTHER AND NEXT FRIEND OF DAVID MONGANS (A MINOR), MICHAEL JAMES MONGANS (A MINOR) AND MARTIN MORGANS (A MINOR)**

APPLICANTS

AND

CLARE COUNTY COUNCIL

RESPONDENT

**JUDGMENT of Mr. Justice Eagar delivered on the 27th day of October, 2017**

1. The applicants in this case took judicial review proceedings by *ex parte* application before Humphreys J. on the 19th day of December, 2016. In summary the reliefs sought were:-

- (1) An order of *mandamus* directing the respondent to provide for the applicants' accommodation which comprises with the guidelines for the provision of accommodation for travellers under the Travellers Accommodation Program 2014 to 2018 as adopted by the respondent.
- (2) An order of *mandamus* by way of an application for judicial review directing the respondent to implement and/or comply with the provisions of s. 2 and/or s. 9 and/or s. 10 and/or s. 13 of the Housing Act 1988 (as amended).
- (3) A declaration that the applicants require accommodation to be provided from the local authority and are living in accommodation which was not suitable for their needs (medical or otherwise) and are homeless in all the circumstances and are unable to obtain suitable alternative accommodation.
- (4) An order of *mandamus* directing the respondent to implement and comply with the provisions of ss. 6, 7, 10, 16, 19, 23 and/or 24 of the Housing (Traveller Accommodation) Act 1998 as amended.
- (5) A declaration of the applicants to require assessment and/or accommodation to be provided from the local authority and further a living accommodation which is not suitable for their needs (medical or otherwise) and/or are homeless in all the circumstances and are unable to obtain suitable alternative accommodation.
- (6) An order of *mandamus* directing the respondent to carry out an assessment of the need for the provisions by the respondent of adequate and suitable housing accommodation for the applicants.
- (7) A declaration that the respondent has failed to provide suitable and/or adequate accommodation for the applicants and/or has failed to assess their need in accordance with statute.
- (8) An order of *mandamus* directing the respondent to implement and/or comply with the provisions of s. 10, 11, 12, 14, 19, 20, 21, 22, 37 and/or s. 28 of the Housing (Miscellaneous Provisions) Act 2009 as amended.
- (9) A declaration that the applicants for the purposes of the Housing (Miscellaneous Provisions) Act 2009 as amended their assessment and/or accommodation to be provided from the local authority and are living in accommodation which is not suitable for their needs (medical or otherwise) and/or are homeless in all the circumstances and unable to obtain suitable alternative accommodation.
- (10) An injunction directing the respondent to take such measures as are necessary directing the respondent to provide suitable accommodation for the applications.
- (11) A declaration that insofar as the respondents Traveller Accommodation Programme fails to consider properly the needs of the applicants is deficient and in breach of s. 6, 7 and 10 of the Housing (Traveller Accommodation) Act 1998.
- (12) A declaration that the respondent has failed in its duty as a local authority in housing authority to provide the applicants with proper and/or adequate and/or appropriate accommodation.
- (13) A declaration that insofar as the respondent's development plan fails to provide or meaningfully so to provide for accommodation to meet the needs of the applicants, it is deficient and in breach of statutory author.
- (14) A declaration that the respondent is in breach of the applicants' fundamental rights in respect of their home and/or family life under Article 3 and/or Article 8 and/or Article 14 of the European Convention on Human Rights.
- (15) A declaration the respondent is in breach of the applicants' constitutional right to bodily integrity, atomony and/or privacy.

2. The notice of motion for judicial review appeared in the list on the 24th of January 2017 and the statement of opposition of Clare County Council the respondent was dated the 18th of March, 2017. The affidavit grounding the statement of opposition was the affidavit of Sean Lenihan, Acting Senior Executive Officer of the respondent sworn the 13th of March, 2017. As part of the notice of opposition he stated at para. 11:-

"I say and advise that the following malicious fire to the accommodation occupied by the applicants at 1 Knockanean, Tulla Road, Ennis, Co. Clare on the 31st May, 2015 while the respondent was advised by Ms. Deirdre O'Grady, property underwriter with Irish Public Bodies Insurance that until further notice, any loss or damage caused by fire that is malicious

in origin is excluded from any and all Clare County Council social housing units occupied by the first named applicant. This applies to Units the first named applicant maybe temporary upon the residing act. He further says that "further enquiries have been made of the Irish Public Bodies and the respondent is advised that any accommodation occupied by the first named applicant is an uninsurable risk and accordingly in providing accommodation to the first named applicant the risk of potential loss or damage caused by fire that is malicious in origin is a risk that has to be borne by the respondent without the comfort of having insurance in place."

3. There was a joint replying affidavit of David and Margaret Lisa Mongans was sworn on the 19th of May, 2017 stating that any contention that they knew or were involved in a fire started maliciously are rejected and without basis of foundation and outrageous in the extreme.

4. By way of notice of motion dated the 20th of June, 2017 the applicants indicated that they would apply to this Court for:-

(a) An order pursuant to O. 84, r. 23(2) of the Rules of the Superior Courts allowing the applicants to rely upon the additional relieves and additional grounds of relief in the amended statement required to ground application for judicial review included in this application.

(b) An order pursuant to the inherent jurisdiction of the court allowing the applicants to rely upon the amended reliefs and amended grounds of relief set forth in the amended statement required to ground application for judicial review.

(c) If necessary an order allowing the applicants to rely upon the further affidavit sworn by and on their behalf following the service of the respondent's statement of opposition and the application was granted.

5. The notice of motion was grounded on the affidavit of Andrew Darcy, solicitor sworn on the 12th of June, 2017 wherein he says that he acted as solicitor for the applicants the traveller family at all times in the proceedings and he makes this affidavit on behalf of the applicants in these proceedings and he refers to the papers already lodged with the court. He states that the affidavit was sworn for the purpose of grounding an application for leave to deliver an amended statement required to ground application for judicial review. He refers to a draft amended statement of grounds and indicates that the draft pleading in the underlined print describes the additional relief and additional grounds of reliefs sought. He says that he is advised that each of the additional reliefs and additional grounds are relevant to the application for various housing reliefs sought by the applicants. They also relate to the reliefs sought by way of application for judicial review arising from the housing needs of the applicants in the context of the statutory matrix that now applies to members of the traveller community.

6. He says that since the issue and service of the proceedings and coinciding with the respondent's letter requesting an unprecedented indemnity from the applicants, the State through the Statement for Recognition of the Traveller Community as an Ethnic Group dated the 1st of March, 2017 delivered by the An Taoiseach in Dáil Éireann was promulgated. This declaration of ethnicity is relied upon by the applicants for reliefs already claimed and for the additional reliefs and grounds of reliefs sought in this application. The Statement of Recognition of the Traveller Community as an Ethnic Group further supports the applicants' application for local authority housing in the within proceedings under the Housing Act 1966 to 2015 and the respondent's Traveller Accommodation Programme 2014 to 2018. He says that the defence by way of opposition of the council. He refers to a request for a form of indemnity for the applicants to hold the respondents blameless in the event of any fire occurring in any premises occupied by David Mongans, the first named applicant.

7. He also referred to the provisions of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of their racial or ethnic origin, insofar as they find reflection in the effort said Statement for Recognition of the Traveller Community as an Ethnic Group dated the 1st of March, 2017 is relevant and applicable in all the circumstances and it is relied upon by the applicant as expressing a similar statement of principle to be found in the Declaration of Ethnicity of the Traveller Community dated the 1st of March, 2017.

8. He said that the guarantee of equality and protection against discrimination on ethnic grounds is breached by the indemnity requested of the applicants and the respondents requested dated 1st of March, 2017 and he says that for the first and second named applicants to furnish a letter on behalf of themselves and their children holding the respondent harmless in respect of personal injury, loss or damage that they arise from any fire on premises allocated to the first and second named applicants whether on temporary or permanent basis to request an impossibility. He says these raises an impossible obligation of the applicants to furnish. He said it is beyond the capabilities of any traveller family otherwise eligible for local authority housing, as must be well known to the respondent and its indemnity insurer, Irish Public Bodies Insurance, before making such a request of the applicants in the respondent's letter dated the 1st of March, 2017.

9. Mr. Darcy says that since the receipt of the respondent's replying affidavit and its letter of the 1st of March, 2017 he has made insurance enquiries and has been advised by a local insurance broker in Limerick that no insurer would indemnify such a risk on the part of the Mongans in the context of the respondent's correspondence and what has been alleged.

10. An exhibit to his affidavit relates to the letter dated the 1st of March, 2017 from Michael Houlihan and Partners and the relevant portion of the letter states:-

"We are advised by our client that the fire damaged house in which your clients previously resided at No. 1 Knockanean, Tulla Road, Ennis, Co. Clare has now been refurbished and has just been returned to Clare County Council for letting. Accordingly, it is our clients' intention to offer that property to your clients, having regard to your clients' needs and in particular to the needs of the minor children. Please note that this offer has been made without an admission of liability in these proceedings and in the interest of securing early accommodation for your clients and in particular, the children.

You might note, however, that our client is unable to obtain insurance in respect of any social housing unit occupied by David Mongans either on a temporary or permanent basis for any loss or damage caused by fire that is malicious in origin. In those circumstances we would require your clients to provide our client with a letter on behalf of themselves and their children holding our client harmless in respect of any personal injuries, loss or damage that may arise from any fire on the premises."

11. Also exhibited to the affidavit of Andrew Darcy where the amended statement of grounds as follows:-

"17. The Statement for Recognition of the Traveller Community as an Ethnic Group dated the 1st of March, 2017 by An Taoiseach in Dáil Éireann, further supports the applicant's application for local authority housing in the within proceedings

under the Housing Acts 1966 to 2015 and the respondent's Traveller Accommodation Programme 2014 to 2018.

18. The provisions of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin insofar as it finds reflection in the aforesaid Statement for Recognition of the Traveller Community as an Ethnic Group dated the 1st of March, 2017 is relied upon by the applicants in support of the reliefs claimed.

19. The principle of direct discrimination, or in the alternative, indirect discrimination under Article 40.1 of the Constitution of Ireland. The said principle applies to the respondent's request dated the 1st of March, 2017 that the first and second applicants furnish a letter on behalf of themselves and their children holding the respondent harmless in respect of personal injuries, loss or damage that may arise from any fire on the premises allocated to the first and second named defendants whether on a temporary or permanent basis. Reliance is also placed on the evidence outlined in para. e(22) below.

20. The correspondence dated the 27th of August, 2015 from IPB Insurance Co. Ltd. by guarantee trading as IPB Insurance relied upon in the respondent's letter dated the 1st of March, 2017 disclosed for the first time the respondent's replying affidavit discriminates against the applicants in a manner prohibited by Article 40.1 of the Constitution of Ireland. This correspondence denies the applicants dignity as human beings by treating them as an inferior position to other individuals in the community by reason of their ethnic background.

21. The correspondence dated the 27th of August, 2015 from IPB Insurance Co. Ltd. by guarantee trading as IPB Insurance relied upon in the respondent's letter dated the 1st of March, 2017 fails to respect the applicants' rights and entitlements under Articles 8 and 14 of the European Convention on Human Rights regarding respect for their private life and prohibition from discrimination direct and indirect.

22. The correspondence dated the 27th of August, 2015 from IPB Insurance Co. Ltd. by guarantee trading as IPB Insurance just brought to the applicants notice in the respondent's replying affidavit the report of G4S Secure Solutions (Ireland) Ltd. on the "incidence in Beach Park, 1st and 2nd of December, 2012 Exhibit SL in the respondent's verifying affidavit; the report of Ennis Fire Service on the fire at No. 1 Knockanean, Ennis, on the 31st of May, 2015 Exhibit S of 3 in the respondent's replying affidavit; the respondent's correspondence to the applicants' solicitors dated the 26th of July, 2016 referring to "unsolved matters relating to fires at both locations which is something the council must take into consideration". The failure of the respondent to reply to the applicants' solicitor correspondence dated the 8th of August, 2016 rejecting involvement in the fires and requesting immediate clarification, the respondent's letter dated the 1st of March, 2017 requesting that the applicants provide the respondent with a letter on behalf of themselves and their children holding (the respondent) harmless in respect of any personal injuries, loss or damage that may arise from the fire on the premises (allocated). The letter from the respondent dated the 5th of May, 2017 and the adverb "worryingly" in describing unspecified vandalism affecting the premises No. 1 Knockanean, Ennis, together with correspondence from the respondent's indemnity insurer are relied upon as *prima facie* evidence of direct discrimination or indirect discrimination against the applicant by reason of their ethnic background as members of the traveller community. Particular reliance is placed on Article 40.1 of the Constitution of Ireland and the guarantee against inequalities grounded on an assumption that some individuals by reason of their ethnic background had to be treated as inferior to other individuals.

23. In the promises the respondent has breached the principle of direct discrimination or in the alternative indirect discrimination against the applicants in a manner that the applicants have been discriminated against by reason of their ethnic background as members of the traveller community contrary to Article 40.1 of the Constitution of Ireland.

24. The applicants further rely upon Article 40.1 and Article 40.3.1 and 2 of the Constitution of Ireland and the Statement of Recognition of the Traveller Community as an Ethnic Group dated the 1st of March, 2017 by An Taoiseach in Dáil Éireann to shift the onus of proof to the respondent to justify the discrimination alleged. Sufficient *prima facie* evidence of discrimination by the respondent against the applicants is described in the amended pleading herein including para. e(22) above.

25. In the promises the burden of proof to justify the alleged discrimination against members of the traveller community shifts to the respondent.

26. Such further or other grounds that may be advanced at the hearing of the proceedings in the context of the facts yet to be found by this Honourable Court.

12. The affidavit of Marina Keane solicitor sworn on the 29th of June, 2017 in response to the applicants' application to rely on additional reliefs and grounds in the amended statement required to ground application for judicial review. She is a solicitor in the firm of Michael Houlihan and Partners who act on behalf of the respondent and indicates that she understands that most of the matters raised are properly matters for legal submission. She says that the proceedings were commenced by the applicants on the 19th of December, 2016 and the reliefs now sought are entirely new and different to the case previously being advanced by the applicants.

13. She says the basis on which the applicants seek additional reliefs arise out of:-

(1) a statement made by An Taoiseach in Dáil Éireann on the 1st of March, 2017 in which he recognised the traveller community as an ethnic group referred to by the applicants as a declaration of ethnicity; and

(2) the indemnity requested by the respondent in its letter of the 1st of March, 2017 in which it is requested that the applicants furnish a letter on behalf of themselves and their children holding the respondent harmless in respect of future personal injuries, loss or damage that may arise from fire on the accommodation offered to the applicants.

#### **"The Time" Submission that the Applicant's Motion was Served out of Time**

14. She points out that the within motion for leave to seek the additional grounds was issued by the applicants on the 12th of June, 2017 being more than three months after the date when the grounds relied upon first arose namely the 1st of March, 2017 and she says that the applicants are outside the time permitted by O. 84, r. 21 of the Rules of the Superior Courts and that the applicants have not made any application for an extension of time in relation to the additional reliefs and she believes that the reliefs sought in the notice of motion should be dismissed.

15. She says that without prejudice to the foregoing she believes and is advised that the additional reliefs sought are not stateable. She believes she said that the declaration of ethnicity made by An Taoiseach is not something which is justiciable and which gives rise to any legal rights actionable on the part of the applicants.

16. She further says that the reliefs are not stateable and are futile and says that nothing that has been set out in the proposed grounds at para. e that establishes on a *prima facie* basis that the request made to the applicants on the 1st of March, 2017 to furnish a letter holding the respondent harmless for further loss or damage arising out of a fire at the offered accommodation 1 Knockanean was related to the applicants being members of the traveller community. As explained in the affidavit of Sean Lenihan she says that following the malicious fire to the accommodation occupied by the applicants as 1 Knockanean the respondent was advised by the Irish Public Bodies Insurance that until further notice any loss or damage caused by fire that is malicious in origin is excluded from the respondent's social housing which is occupied by the first named applicant whether occupied on a temporary or permanent basis.

17. She says that Niall O'Keeffe the administrative officer in the housing department of Clare County Council (the respondent) has averred on affidavit that this is the only instance that the respondent has ever experienced of insurance being declined on the basis of the occupancy of accommodation by a named individual.

18. The affidavit of Niall O'Keeffe also makes the point that this is the only instance in which the respondent has been refused insurance cover for a property on the basis of the occupancy of the accommodation by a particular individual.

19. Order 84, rule 23(2) provides:-

"The court may, on the hearing of the motion or summons, allow the applicant or the respondent to amend his statement, whether by specifying different or additional grounds of relief or opposition or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with new matters arising out of an affidavit of any other party to the application."

20. Counsel on behalf of the applicants submitted that the amendment motion issued by the claimants on the 12th of June, 2017 was grounded on the affidavit of Andrew Darcy solicitor sworn on the 12th of June, 2014 and the principal affidavit and reply was sworn by Marina Keane solicitor in the firm of Michael Houlihan and Partners the respondent's solicitors. The respondent raised a time issue in opposing the application and he submitted that reliance was placed on the short affidavit of Natasha Dalton, legal secretary of Andrew Darcy & Co. sworn on the 14th of June, 2017 which describes the circumstances leading to the issue of the amendment notice of motion on the 12th of June, 2017. This affidavit indicates that Natasha Dalton is a legal secretary of the firm of Andrew Darcy & Co. He says that the affidavit is intended to set out in detail the relevant dates leading up to the application being heard by the court and to deal with "time issues" raised by the respondent solicitors and she sets out as follows:-

"(1) The respondent statement of opposition was received by the office under cover of email dated the 13th of March, 2017 at 18:14.

(2) The original draft motion affidavit seeking to amend the statement of grounds for in the within proceedings was served in draft from counsel on the 18th of May, 2017.

(3) The affidavit of Andrew Darcy was sworn on the 30th of May, 2017 and was then sent by her office together with the amendment motion and exhibits to their town agent for issue on the 30th of May, 2017.

(4) The papers were sent by ordinary post but the papers returned due to insufficient postage.

(5) On the 31st of May, 2017 the motion was sent with the correct postage to their town agents.

(6) The commissioner for oaths for Mr. Darcy's affidavit was paid by cheque on the 30th of May, 2017 and the draft statement of grounds was dated the 18th of May, 2017 and she produces a copy of the same.

(7) She said that by letter dated the 18th of May, 2017 the solicitors on record for the respondent were requested to consent to the amendments sought and the respondent's solicitor refused to consent on the 22nd of May, 2017.

(8) A copy of the amended statement of grounds was sent to the respondent's solicitor under cover of the said letter requesting their consent on the 18th of May, 2017.

(9) She said that the motion undated was then furnished to their town agents on the 30th of May, 2017 and the office did not receive a response from their town agent and emailed on the 9th of June, 2017 to require of him as to whether the mooted affidavit had been issued for service.

(10) Counsel then attended in court on the 15th of June, 2017 and an amended motion was adjourned to the 5th of July, 2017.

(11) The motion and affidavit were issued by the central office on the 15th of June, 2017, however, a copy of the motion and affidavit was served by fax on the solicitors for the respondent on the 12th of June, 2017 and her office received a call from the solicitors for the respondent on the 13th of June indicating that some of the pages sent by fax were missing and these were refaxed on the same date.

She says that the sequence of events leading to the service of these proceedings and the time taken by the respondent to file a statement of opposition and verifying affidavit is a matter to be taken into account in the context of "the time" issue laterally raised by the respondent in opposing the amended motion.

21. In respect of the time submission that the applicants motion was served out of time, counsel referred to the *3rd Ed. of Judicial Review* by Mark de Blacam. A number of points emerged from this legal text book:-

(1) An applicant will be tied to the grounds of relief as set out in this statement of grounds.

(2) There are two provisions in O. 84 dealing with amendments, one deals with amendments to amend at the leave stage and the other with other applications. Clearly the application in this case is not at the leave stage.

(3) Order 84, rule 23(2) deals with applications to amend otherwise than at the leave stage.

(4) In relation to when the application may be made he suggests that the wording of O. 84, r. 23(2) suggests that an application to amend is to be made at the substantive hearing, it is accepted that the application may be made at the interlocutory stage.

(5) In *Molloy v. Governor of Limerick Prison* [1991] ITLR (2nd of December 1991) the Supreme Court held that a statement of claim in judicial review proceedings may be amended at any time.

(6) An application to amend should in any event be made promptly; if it is not and no reason is offered for the delay it may be refused on that basis.

22. de Blacam quotes *McCormack v. Garda Siochana Complaints Board* where Costello P. observed that "only in exceptional circumstances would liberty to amend a grounding statement be made because the court's jurisdiction to entertain the application is based on unlimited by the order granting leave". Mr. de Blacam comments that when new facts come to light which could not have been known at the time when leave was obtained it is appropriate to allow an amendment in the absence of prejudice to the respondent.

23. He quotes the Supreme Court in *Keegan v. Garda Siochana Ombudsman Commission* [2012] 2 I.R. 570 where he describes that Costello P.'s approach was reconsidered by the Supreme Court. Fennelly J. pointed out that proof of "exceptional circumstances" does not imply that the court should adopt a "quantitative or statistical approach". The test is instead a more liberal one which allows for an amendment "where the interest of justice requires a decision when an order is made". In assessing an application to amend the court may also have regard to the nature of the amendment, the degree of prejudice to the opposing party and the interest of justice.

24. de Blacam also deals with applications made outside the three months limit. He states that the Rules of the Superior Court (judicial review) 2011 has now imposed a standard three month time limit for a review application irrespective of the nature of the reliefs sought. The new rules have, furthermore, made it considerably more difficult to obtain an extension of time in that the court can only grant an extension only where it is satisfied that there are "good and sufficient reasons for doing so" and that the circumstances which result in the failure to make the application within time:-

"(1) Where outside the control of; or

(2) could not reasonably have been anticipated by the applicant for the extension."

25. He quoted Fennelly J. in *Keegan* which was decided before the Rules of the Superior Court (judicial review) 2011 Rules where he indicated that an applicant applying outside the time limit would have to justify the application. Fennelly J. also stated:-

"There is no reason, in logic, to impose on an applicant a criterion of newly discovered fact to justify an application to amend, when an application for an extension of time is not subject to any equivalent condition."

26. In response of the time limit counsel for the respondent cited *Duffy v. The Road Safety Authority* [2015] IEHC 579 in relation to the failure to abide the time limit prescribed in O. 84, r. 21(1) RSC. Thus in which Noonan J. stated:-

"Thus, in the absence of compliance with those time limits, the application for relief must, as a matter of law, fail. No discretion arises in circumstances such as here, where there is no application for an extension of time and even if there were, no obvious grounds for granting such an extension arise."

27. Counsel submitted that the court should determine the question of compliance with the time limits set out in O. 84, r. 21(1) in the first instance. If, as is submitted by the respondent the applicants are out of time then the court should simply dismiss the application and not proceed to consider the merits of same.

28. He pointed to the letter dated the 11th of July, 2017 where the applicants' solicitor indicated that the applicants will, if necessary seek an order for an extension of time to apply for the additional reliefs. He cited O. 84, r. 21(5) RSC which provides:-

"An application for an extension referred to in subrule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which will set out the reasons for the applicant's failure to make the application for leave within the prescribed period by subrule (1) and shall verify any facts relied on in support of these reasons."

He submitted that no affidavit had been filed by the applicants in respect of an application for an extension of time.

29. In O. 84, r. 21 the following are the provisions contained therein:-

"21(1) An application for leave to apply for judicial review shall be made within three months from the date when the grounds for the application first arose.

(2) Where the relief sought is an order of *certiorari* in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding.

(3) Notwithstanding subrule (1), the court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made but the court shall only extend such period if it is satisfied that:-

(a) there is good and sufficient reason for so doing; and

(b) the circumstances of a result in the failure to make the application for leave within the period mentioned in subrule (1) either:-

(i) outside the control of; or

(ii) could not reasonable have been anticipated by the applicant for such extension.

(4) In considering whether good and sufficient reason exists for the purpose of subrule (3) the court may have regard to the fact which an extension of the period referred to in that subrule (1) might have on a respondent or third party.

(5) An application for an extension referred to in subrule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which sets out the reasons for the applicant's failure to make the application for leave within the period prescribed in subrule (1) and shall verify any facts relied on in support of those reasons.

(6) Nothing in subrules (1), (3) or (4) shall prevent the court dismissing the application for judicial review on the ground that the applicants delay in applying for the leave to apply for judicial review (even if otherwise within the period prescribed by subrule (1) or within the extended period allowed by an order made in accordance with subrule (3) has caused or is likely to cause prejudice to a respondent or third party.

(7) The proceedings of rules are without prejudice to any statutory provision which has the effect of limiting the time within which application for judicial review may be made."

30. The court is satisfied that the affidavit of Natasha Dalton setting out the sequence of events which led to the delay identifies the respondent's statement of opposition having been received by the Office of Andrew Darcy & Co. on the 13th of March, 2017. Three months in the court's view starts from the period which would allow the applicants to make their application to amend the statement of grounds by the 13th of June, 2017. The court notes that the affidavit of Andrew Darcy was sworn on the 30th of May, 2017 and on the 18th of May, 2017 the solicitors on record for the respondent were requested to consent to the amendments sought. The respondent's solicitors refused to consent to same on the 22nd of May, 2017. It is quite clear to this Court that the respondent's solicitor that the respondent was aware of the proposed amendment being sought by the applicants and the further delay appeared to be caused by the town agent. On the 15th of June, 2017 counsel attended court to move the application for amendment which was two days outside the three month period.

31. The court is satisfied that the court can extend the period within which the application for leave to amend the statement of grounds for judicial review on the basis that the affidavit of Natasha Dalton satisfies the court that (a) there is good and sufficient reason for doing so and (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in subrule (1) were outside the control of the applicants and the court is satisfied that the respondent where aware of the nature of the application being made and did not in those circumstances cause prejudice to the respondent.

#### **Amended Reliefs based on An Taoiseach's Declaration of Ethnicity, the 1st of March, 2017 read in Conjunction with Article 40.1 of the Constitution**

32. Counsel on behalf of the applicants said that the declaration of ethnicity is justiciable. He submitted that the statement of An Taoiseach made on the 1st of March, 2017 may be seen as reflecting what is also reflected in Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

33. He submitted that the declaration of ethnicity has been noted in a news report dated the 8th of March, 2017 by the European Commission with reference to the racial equality directive and the news report prepared by Judy Walsh:-

"It *also ensure* that domestic courts and Tribunal take account of the Race Directive in all cases concerning travellers rights that fall within its material scope".

34. Counsel submitted that there was no reason in principle while the Declaration of Ethnicity may not give additional answers to a discrimination alleged contrary to Article 40.1, the Equal Protection Clause.

35. Counsel on behalf of the respondent said the applicants would not be entitled to amend the statement of grounds to include the additional reliefs in respect of the Taoiseach's statement as they are not stateable and/or appropriate reliefs in judicial review. He submitted that the reliefs sought in relation to the statement was in effect requiring the respondent to apply certain provisions of the Housing Acts "with particular sensitivity" when providing local housing to homeless members of the travelling community and that "it resonates with the provisions, aims and policies of Council Directive 2000/43/EC". He submitted that both of these declarations are meaningless and do not give rise to any justiciable controversy. It is impossible to understand what legal effect might result from the award of such late declarations.

36. He submitted that it was not for the court to determine whether or not a statement by An Taoiseach is in keeping with an EU Directive. The courts role is to give effect to legislation that has been passed by the legislator, not to give effect to statements of members of the Oireachtas, irrespective of the nature of the statement. He submitted that if the applicants' contention that the State has failed to implement an EU Directive then that is a different case and must be litigated as such otherwise the remedy for the applicants is to claim under the relevant national legislation which implements the Directive in this instance the Equality Acts. He said it was difficult to understand what legal effect any declaration would achieve.

Murray J. in *Crilly v. T.J. Farrington Ltd.* [2001] 3 I.R. 251 stated:

"The legislative process consecrated by the Constitution commencing with the initiation in one or other of the Houses of the Oireachtas and cumulating with its signature and promulgation into law by the President, is a means by which the constitutionally expressed will of the Oireachtas is achieved. It is by law so adopted and promulgated that the citizens are bound."

37. The court is satisfied that the statement made by the Taoiseach on the 1st of May, 2015 has no legal effect, clearly it is not legislation. This Court is bound to apply the law in accordance with the description by Murray J. in *Crilly v. T&J Farrington Ltd.* A news report of the European Network of Legal Experts in gender equality and non-discrimination is of some interest particularly with regard to the difficulties encountered by travellers but does not constitute a basis on which this Court can allow for reliefs in relation to such a statement of An Taoiseach.

#### **Amended Reliefs based on Respondent's Correspondence dated the 1st of March, 2017 Read in Conjunction with the Ethnic Bias alleged under Article 40.1 of the Constitution**

38. Counsel argued that until the applicants received a statement of opposition and verifying affidavit of Sean Lenihan, Acting Senior Executive Officer, they did not have the facts on which to bring their amendment to motion. He emphasised the following facts:-

(1) Malicious fires in arsenal against traveller accommodation which related to group housing schemes at Ashline and Beach Park.

(2) Reports from G45 Secure Solutions on incidents at Beach Park 1st and 2nd of December, 2012. This report makes extensive reference to intruders speaking "in a travellers accent". The Mongans residence within this travellers scheme was fire damaged maliciously. The Mongans were on site at the time.

(3) The IPP Insurance Company letter makes extensive reference to the fire when Mr. Mongans unit was damaged by fire along with his family's caravan. He submitted that the documents relied upon by the applicants raise a *prima facie* case of ethnic based discrimination against the family that is part of the traveller community but defends the constitutional mandate of equality as stated in the Supreme Court and he also confirmed that the affidavit of Mr. Darcy describes the impossibility of the Mongans obtaining the indemnity requested.

39. In response counsel for the respondent suggests that the proposed additional reliefs seek declarations in relation to the respondent's letter of the 1st of March, 2017 which requested the applicants agreed to hold the respondent harmless in the event of a fire on any premises allocated to the applicants including the said request which amounts to direct or indirect discrimination of the applicants as members of the travelling community contrary to the Constitution and the European Convention on Human Rights. He submitted that no evidence whatsoever was provided by the applicants to ground this allegation that the request made by respondent was related to the applicants being members of the travelling community. The only evidence is that (a) the applicants are members of the travelling community and (b) that the request was made and whilst the applicants might not like that the request was made of them, that does not make it discrimination.

40. Counsel for the respondent contended that the evidence of the applicants in relation to this relief is not sufficient to meet the test set out in *G. v. DPP*. They continued that the evidence of the applicants in relation to this relief is not sufficient to meet the test set out in *G. v. DPP* [1994] 1 I.R. 374 namely that "the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review" and states that the respondents own evidence is that this request was made solely on the basis that the respondents ensure and impose such an exclusion on the insurance of any property occupied by the first named applicant. He also submitted that if the applicants were permitted to include these additional reliefs that would amount to an entirely different case to that which was being made by the applicants today. In effect, rather than seeking orders requiring that the respondent provide them with accommodation, they now seek to mount some form of discrimination claim.

#### **Decision of the Court**

41. The court is satisfied that the court can extend the period within which the application for leave to amend the statement of grounds for judicial review as the court is satisfied that the respondents were aware of the nature of the application being made and did not in those circumstances cause prejudice to the respondent.

42. The courts view is that in respect of the amendments sought, the reliefs D(22), (23) and (24) of the amended statement of grounds, would amount to an entirely different case to that which has been made by the applicants to date and the court concludes that the initial orders sought required the respondent to provide them with accommodation. It is clearly opened to the applicants to make the application to ground the application on ethnic bias contrary to Article 40.1 but did not take that opportunity when applying for leave to apply for judicial review and in these circumstances the court is refusing to the reliefs sought in the notice of motion to allow the applicants to rely upon the amended statement required to ground application for judicial review dated the 12th of June, 2012.

43. The court is satisfied that the statement made by the Taoiseach on the 1st of May, 2015 has no legal effect clearly it is not legislation but fact. The court is bound to apply the law in accordance with the description by Murray J. in *Crilly v. T.J. Farrington Ltd.* and in these circumstances the statement of the Taoiseach has no legal effect for the purpose of these proceedings.