Neutral Citation Number: [2007] IEHC 204

THE HIGH COURT

RECORD NO. 2006/1904 P

BETWEEN

MARY O'DONNELL
(A MINOR SUING BY HER MOTHER AND NEXT FRIEND BRIDGET O'DONNELL)
PATRICK O'DONNELL
(A MINOR SUING BY HER MOTHER AND NEXT FRIEND BRIDGET O'DONNELL)
BERNARD O'DONNELL
(A PERSON OF UNSOUND MIND, SUING BY HIS MOTHER AND NEXT FRIEND BRIDGET O'DONNELL)

PLAINTIFFS

AND
SOUTH DUBLIN COUNTY COUNCIL

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 22nd May, 2007.

Factual background

1. The plaintiffs are siblings. They are members of a traveller family and they reside with their parents Bridget O'Donnell (Mrs. O'Donnell) and Simon O'Donnell (Mr. O'Donnell) and other members of their family in a mobile home at Lynch's Lane temporary halting site in Clondalkin, County Dublin. The facilities at Lynch's Lane are provided by the defendant, which is the housing authority for the area in which it is located.

2. The three plaintiffs suffer from a condition known as Hurler's syndrome, sometimes called gargoylism. The condition is caused by the body's inability to produce specific enzymes and leads to severe abnormalities in development resulting in orthopaedic complications with pain and immobility, obstructive airways disease with repeated respiratory infections, cardiac complications, visual impairment, loss of hearing and learning disability. Each of the plaintiffs has had a bone marrow transplant, aimed at halting the disease process and prolonging life. Each has had corrective surgery for joint contractures and other skeletal deformities. Functional performance across the range of personal activities of daily living is limited in each case.

3. The first plaintiff (Mary) has just turned eighteen years of age, although she was a minor when the proceedings were commenced and at the date of the hearing. She attends St. Michael's School in Chapelizod. She has had corrective surgery to her hips and knees. She has carpal tunnel syndrome in her right hand and poor manual dexterity bilaterally. Her vision is poor and she is awaiting a cornea transplant in both eyes. Her hearing is very bad and she underwent an operation some time prior to the hearing. She has a learning disability and her speech is unclear. On examination by Mary Patterson, occupational therapist, in January, 2006, Mary was found to be mobile without a walking aid. However, she had difficulty ascending and descending steps. Mary and her mother reported poor walking time and distance with frequent falls. Her knees and ankles were prone to swelling and were painful and she was constantly fatigued. She was found to have a limited range of movement in her upper limbs. As a result, she needs help in washing and drying and combing her hair and in dressing. She needs assistance in showering and needs to sit in the shower. She also suffers from nocturea.

4. The second plaintiff (Patrick) is fourteen years of age. He also attends St. Michael's School. He has undergone surgery to his knees, hips and wrists. He had a cornea transplant at the end of 2006 and at the date of the hearing was awaiting another. His hearing is very bad and he has a hearing aid in each ear. Ms. Patterson found that he was fully mobile without an aid, but he had a history of falls. Mrs. O'Donnell reported to the physiotherapist that he complained constantly of pain in his knees and that, following a period of inactivity, he had difficulty in moving from sit to stand because of stiffness and pain in the joints of his lower limbs. At the hearing, Mrs. O'Donnell testified that he can still walk without help, but that she is worried about the future. Patrick needs help putting on his socks and shoes because he is unable to bend and stoop. He is unable to reach over his head due to reduced range of movement at his shoulders. He needs assistance in washing his hair and showering. His manual dexterity and grip is reduced and he is unable to flex his fingers fully to form fists.

5. The third plaintiff (Bernard) is of full age. He is now over twenty-one. He has had surgery to his hips, knees and hands. He has pronounced kypho-scoliosis, which causes persistent back pain. He has severe learning disability and his speech is indistinct. He has not been made a ward of court. His mother brings these proceedings as his next friend. He had a cornea transplant at the end of 2006 and at the time of the hearing was awaiting another. His hearing is poor. Mrs. O'Donnell testified that he is on antibiotic medication for life. Ms. Patterson found Bernard's mobility to be limited. She found that he was poorly mobile in or around his home with a walking frame or pushing a wheelchair. He used the wheelchair for longer distances. He requires contact assistance from one person in order to negotiate a single step. Ms. Patterson found that within his home he became breathless on walking a short distance. Bernard requires help in dressing. He has reduced power and range of movement in his shoulders and has difficulty in bending and stooping. His father assists him to shower. Bernard attends Stewart's Hospital Training Centre.

6. In 2002 Bernard, suing by his next friend, Mrs. O'Donnell, brought proceedings against the defendant in this Court (Record No. 2002/3138P) in which he sought relief largely in the same terms as the relief sought in these proceedings, including an order requiring the defendant to provide accommodation for him as assessed and approved as being suitable to his needs, in particular, a wheelchair-accessible caravan, with indoor and wheelchair-accessible shower and toilet and adequate sanitary facilities and central heating. Those proceedings were compromised on terms that the defendant provided a wheelchair-accessible Pemberton Sovereign mobile home to accommodate Bernard as a wheelchair user. The mobile home was installed on Bay 18 at Lynch's Lane, which had been occupied by the O'Donnell family since about 1996 in October 2002. The defendant also provided an external ramped access to facilitate wheelchair access and the mobile home was connected to the services to ensure that Bernard had access to indoor running water, toilet and sanitary facilities. The provision of the mobile home was funded by means of a disability grant in the sum of €40,000 made available to the defendant by the Minister for the Environment and Local Government under s. 15 of the Housing Act, 1988, as amended.

7. That mobile home is currently occupied by ten persons: Bernard, Mary and Patrick and their parents and also two adult sisters of Bernard, two minor sisters of Bernard, who are aged sixteen and thirteen respectively, and a granddaughter of Mr. and Mrs. O'Donnell, who is ten years of age. The accommodation in the mobile home comprises two bedrooms, a living area and a bathroom with level access shower, toilet and wash hand basin. The six girls, including Mary, sleep in the larger of the two bedrooms in two beds, three to a bed. Bernard and Patrick share the smaller bedroom, which as two 3 ft. beds. Mr. O'Donnell and Mrs. O'Donnell sleep in the living area, bringing in a mattress at night and taking it out in the morning.

8. The O'Donnells have lived at Lynch's Lane since the temporary halting site was opened in 1996. Before the Pemberton mobile home was provided in compromise of Bernard's proceedings in 2002, there were two caravans on Bay 18. Mrs. O'Donnell's evidence was that one belonged to another son and that now occupies Bay 27 in Lynch's Lane, where the son and his family live. The second was hers but it was old and, because of its condition, was scrapped.

9. As is required under the Housing (Traveller Accommodation) Act, 1998 (the Act of 1998), the defendant has in place a Traveller Accommodation Programme (the Programme), which was adopted on 9th May, 2005 and covers the period from 1st January, 2005 to 31st December, 2008. In the course of the assessment carried out by the defendant of traveller accommodation needs in connection with the Programme, Mrs. O'Donnell was interviewed and expressed a preference for a bay in a residential caravan park in Clondalkin as permanent accommodation for her and her family, rather than accommodation in standard housing or group housing. In implementation of the Programme, the defendant is in the course of developing a permanent facility at Lynch's Lane which will comprise ten residential caravan bays and ten group houses. Mr. Philip Murphy, Senior Executive Officer of the Housing Department, testified at the hearing that, while that development had been delayed between 2000 and 2005 for a variety of reasons including local opposition and litigation, it is now on target and should be ready by the middle of 2008. The evidence is that the O'Donnell family will be provided with a large bay in that development, which will be tarmacadamed and will accommodate two or three caravans and it will also have a day house, which will have a kitchen and daytime living area and will be fully serviced to accommodate the O'Donnell's needs.

10. It was suggested by an officer of the defendant to Mrs. O'Donnell early in 2005 that, having regard to the medical condition of the plaintiffs, she might consider an offer of a specially adapted house in the new Lynch's Lane facility. However, Mrs. O'Donnell's position is that, as a traveller, she would not be happy living in a house; she wants a bay and she wants her children living in mobile homes in the bay with her. I am satisfied on the evidence that the suggestion about a suitably adapted house was merely a suggestion, which I have no doubt the officials of the defendant bona fide considered to be in the best interests of the plaintiffs, which never evolved into a specific offer.

11. Over the past year the defendant has been upgrading the existing temporary facilities at Lynch's Lane. The utility pod on Bay 18 was replaced last year. The new utility pod has been adapted for special needs with a ramp and grab rails. It is heated by a blow heater. Works have been carried out to the ground at Bay 18 to render it level and suitable for wheelchair use.

12. The defendant accepts that the plaintiffs are living in overcrowded conditions in the Pemberton mobile home, but suggests that the overcrowding is of the O'Donnell's own making. Mrs. O'Donnell has been advised by officers of the defendant to apply for a caravan loan to enable her to acquire a caravan to accommodate some members of her family. The maximum loan for purchase of a new or second-hand caravan payable under the Traveller Accommodation Schemes, which was laid down in Circular Letter TAU 4/2002 dated 22/2/02, is €6,350. Mrs. O'Donnell has not applied for a loan. Indeed she has rejected the loan as a solution to the family's accommodation problems on two grounds. First, she contends that she could not get a suitable caravan for €6,350. Despite Mr. Murphy's evidence to the contrary, I am far from convinced that it would be possible to acquire a second-hand caravan, eight to twelve years old, in excellent condition and fully serviceable and ready to move into for €6,350. I am satisfied that it would not be possible to acquire the type of caravan or mobile home, which would be suitable for Mary or any of the plaintiffs at that price. The second reason is that Mrs. O'Donnell is of the view that she would not be able to service the loan. The loan would be repayable over five years at the rate of €20 per week. Leaving aside the income of Mr. O'Donnell from his business of dealing in scrap and recycled vehicles, between them, the adult members of the O'Donnell family who reside in the Pemberton mobile home in 2006 had a weekly income of €993.20, comprising unemployment assistance paid to the plaintiffs' two adult sisters, carer's allowance paid to Mrs. O'Donnell and disability assistance paid to Bernard and Mary. In addition, Mrs. O'Donnell was in receipt of €670 per month in respect of children's allowance. The defendants calculation is that, disregarding Mr. O'Donnell's income, the weekly household income was €1,317.75, which equates to an annual income of €68,263.00. I assume those benefits have increased in 2007. While I have no doubt that there are many calls on that income, I do not accept that, if the caravan loan was a solution to the problem, Mrs. O'Donnell and the other members of her family could not fund the loan repayments.

Expert evidence

13. Ms. Patterson's evidence was that the Pemberton mobile home is seriously overcrowded. The space available is inadequate having regard to the needs of the family members with disability. Bernard has been supplied with a mobile shower chair, but there is insufficient space in his bedroom for either that chair or his wheelchair. The three plaintiffs require assistance with dressing and washing. On school days they have to be ready by 8 o'clock in the morning when they are collected by bus and the able-bodied children also have to be ready around the same time. The three plaintiffs suffer from visual impairment and, in the crowded environment, their safety is compromised. They have no privacy when using the shower room independently, because the sliding door is awkward and heavy and cannot be closed by any of them. Bernard's mobility has deteriorated as he has grown older. Ms. Patterson's view was that it was to be expected that Mary and Patrick will suffer similar limitations as they grow older as they face increased orthopaedic complications. However, Ms. Patterson could not say when the condition of either will deteriorate in the future.

14. Ms. Patterson's opinion was that, in order to alleviate the overcrowding situation, a second wheelchair-accessible mobile home is required, with ramped access in order to accommodate mobility restrictions. Ideally, in her view, it should have three bedrooms. But she acknowledged that the provision of wheelchair-accessible showering and toileting facilities reduces the space available for bedrooms within a mobile home. Her opinion is that appropriate showering facilities are essential to meet existing and long-term functional limitations of the plaintiffs.

15. In line with Ms. Patterson's recommendation, Mrs. O'Donnell envisaged that the new mobile home would be for Mary. The girls would live there with her and her eldest sibling would look after her. The existing Pemberton mobile home would be for Bernard and Patrick and Mr. and Mrs. O'Donnell. Ms. Patterson's opinion was that the room which Bernard and Patrick currently share is not of sufficient size and they need a bigger room. The bigger room would be available, if Mary moved out to another mobile home.

16. Fiona Maguire, occupational therapist, gave evidence on behalf of the defendant. Ms. Maguire was retained by the defendant in October, 2004 to carry out an assessment regarding the long-term housing needs of Bernard, Mary and Patrick for both a residential caravan bay and group housing, in the context of the proposed new development at Lynch's Lane. Ms. Maguire reported on 21st January, 2005. She has not been asked to update her report since then. Ms. Maguire pointed out that the bedroom occupied by Bernard and Patrick did not allow for storage of Patrick's wheelchair. The mobile home would be fully wheelchair accessible if the larger bedroom were occupied by Bernard and if one bed was removed. The smaller bedroom would be suitable for Patrick, again if one bed was removed. An alternative approach to accommodating Bernard and Patrick was also suggested: they could be accommodated in the main bedroom in the mobile home, which would allow an able-bodied family member to be accommodated in the smaller bedroom, which in Ms. Maguire's opinion would undoubtedly better accommodate the needs of Bernard and Patrick.

17. While in Ms. Maguire's opinion those suggestions would alleviate the obvious overcrowding and the consequent compromise to

wheelchair access in the mobile home, she also recognised that they would necessitate suitable alternative accommodation being provided for Mary and the other family members. The only difference which I discern between Ms. Maguire's assessment in 2005 and Ms. Patterson's assessment in 2006 is that Ms. Maguire was of the view that Mary was then able to climb steps and should be able to manage steps provided they were not excessively high. As I have already recorded, Ms. Patterson's assessment a year later was that ascending and descending steps presented a difficulty for Mary. Ms. Maguire recognised that wheelchair access might become essential for Mary and also that Patrick's mobility might disimprove to a degree where he would also have to use a wheelchair. In either event, the facilities would have to be modified or extended for them. While Mary's need for wheelchair accessible accommodation at this point in time was the subject of much debate at the hearing, the fact is that she needs accommodation and, given her condition, prudence would seem to suggest that it should be wheelchair accessible.

18. In her report in 2005 Ms. Maguire also made recommendations in relation to the provision of a satisfactory recreational and play area for Bernard, Mary and Patrick around the mobile home. As I understand Mr. Murphy's evidence, her recommendations have been implemented.

19. Ms. Maguire readily acknowledged at the hearing that the accommodation available for the plaintiffs is far from ideal and that they require more space.

20. Mr. Murphy's suggestion that the family arrangements could be configured to meet the plaintiffs' special needs if the able-bodied members moved into a standard caravan is at variance with the analysis of the experts. On the evidence, it is clear that it is Mrs. O'Donnell's wish and her intention that Bernard, Mary and Patrick will continue to be cared for within their home environment. Because of the nature and extent of their disabilities and their dependency, they require a considerable degree of care and supervision and this is likely to increase in the future. In my view, it is beyond doubt that even in the short term there is an urgent necessity that they be provided with more appropriate accommodation, which they do not have at present, their current accommodation being grossly over-crowded, potentially unsafe for them and wholly unsuitable to their special needs.

21. The issue in this case is whether there is any obligation on the defendant to make that provision.

The claim and defence as pleaded

22. In these plenary proceedings, the plaintiffs claim that the defendant is in breach of its statutory duties to them and is in breach of their constitutional rights and their rights under the European Convention on Human Rights (the Convention).

23. The primary relief the plaintiffs seek is an order requiring the defendant to provide accommodation for them, as has been assessed as being suitable to their needs, in particular a second wheelchair-accessible mobile home with ramped access and appropriate showering and toilet facilities. In the alternative, they seek an order that the defendant make sufficient funding available to the plaintiffs to enable them to provide such accommodation.

24. In broad outline, the defendant takes a somewhat different approach in answering Bernard's claim to the approach adopted in answering the claims of Mary and Patrick. In relation to Bernard's claim, it is contended that he is estopped from maintaining the proceedings because of the 2002 proceedings, the settlement thereof and the fact that the settlement was approved by the court. Alternatively, it is contended that the bringing of these proceedings on behalf of Bernard is an abuse of process. Without prejudice to that position, the defendant denies that Bernard has an entitlement to be provided with or has a need for a wheelchair-accessible mobile home as claimed, given that he was provided with a Pemberton mobile home in 2002.

25. In relation to Mary and Patrick, the defendant denies that either is entitled to be provided with, or has need of, a wheelchair-accessible mobile home as claimed and asserts that the overcrowding conditions in which they are living can be relieved by the acquisition of another caravan by their parents.

26. The defendant denies any breach of its statutory duties and asserts that it is carrying out its duties, asserting that it has provided the site (Bay 18) at Lynch's Lane and the existing facilities for the plaintiffs and the Pemberton mobile home. It also asserts that it has assessed the plaintiffs' long-term accommodation needs and that appropriate permanent accommodation will be provided for them under the Programme in the new development at Lynch's Lane. In the interim, it asserts, it has made reasonable efforts to meet their temporary accommodation needs and for the provision of financial assistance by means of loans and grants.

27. The specific breaches of statutory duty, constitutional rights and of the provisions of the Convention alleged by the plaintiffs are denied.

Scheme of judgment

28. There is a certain degree of overlap between the various breaches alleged and the relief claimed by the plaintiffs. Further, having taken an overview of the submissions made, it seems to me that certain aspects of the submissions can conveniently be dealt with in tandem. For those reasons, I propose addressing the following issues and the submissions made by the parties and setting out my conclusions in the following order:

> (1) Whether there has been a breach by the defendant of its statutory duties under the Housing Acts, as properly construed having regard to the provisions of the Constitution and s. 2 of the European Convention on Human Rights Act, 2003 (the Act of 2003).
>
> (2) Whether there has been a failure on the part of the defendant to perform its functions in a manner compatible with the State's obligations under the Convention, in particular, articles 3 and 8 of the Convention, and whether a remedy is available to the plaintiffs under s. 3 of the Act of 2003.
>
> (3) Whether the plaintiffs have established any breach of the Equal Status Act, 2000 (the Act of 2000) or any failure on the part of the defendant to perform its functions in a manner compatible with article 14 of the Convention.
>
> (4) Whether the plaintiff's constitutional rights have been infringed by activity or inactivity on the part of the defendant.
>
> (5) Whether Bernard is estopped or, as regards his participation, these proceedings are an abuse of process.

29. One matter raised on the pleadings - whether the plaintiffs have a case on the basis that the defendant has acted in breach of the State's duties arising from international legal covenants - was not pursued on behalf of the plaintiffs at the hearing and I do not propose to address it. Another matter - whether the plaintiffs can rely on the Disability Act, 2005 – was raised on behalf of the plaintiffs, although not pleaded at all. I do not propose to address that matter because, although counsel for the defendant evinced a

reasonable attitude, I consider that the novel and important issues which that Act raises should be left for a forum in which they have been fully explored in the pre-trial process and at the hearing.

30. Before considering the issues outlined, I have some general observations to make.

31. First, I think it is important to emphasise at this juncture that the defendant is a defendant to these proceedings in its capacity as a local authority and as the housing authority for the area in which Lynch's Lane is situated. Other organs of the State, no doubt, owe duties to the plaintiffs because, in the case of Patrick and until recently Mary, of their minority status, and, in the case of all three, the state of their health and their disabilities. Moreover, no doubt there are administrative schemes operated by organs of the State from which they could benefit. I mention this because counsel for the defendant in their submissions referred to the Disabled Persons' Grant Scheme operated by the Department of the Environment and Local Government, which they stated is discretionary and subject to the largesse of the Minister for Finance. This judgment is concerned only with whether the defendant has liability to the plaintiffs for any of the alleged breaches of the plaintiffs' rights.

32. Secondly, while there is an inherent contradiction in the manner in which the defendant ultimately responded to Bernard's proceedings in 2002 in the settlement thereof and its response in these proceedings to the claims of Mary and Patrick, I consider that it would be inappropriate to attach any weight to that factor in addressing the legal issues which arise here.

Breach of the Housing Acts?

33. One of the reliefs sought by the plaintiffs is a declaration that the defendant, in failing to provide for the accommodation needs of the plaintiff's, has acted in breach of its duties, including its statutory duties under the Housing Acts, 1966 to 1988, the Act of 1998 and the Department of the Environment and Local Government Guidelines pursuant thereto. Specifically, the provisions of the Housing Acts which the plaintiffs allege impose a duty on the defendant to provide them with the accommodation which they seek and which they allege have been breached are:

> (a) ss. 9 to 13 of the Housing Act, 1988 (the Act of 1988):
>
> (b) ss. 6 to 17 and s. 24 the Act of 1998 and
>
> (c) s. 138 of the Local Government Act, 2001 (the Act of 2001).

34. In the Act of 1988, for the first time, the provision by a housing authority of housing accommodation for travellers was addressed. Section 9 required a housing authority to carry out periodic assessments of the need for provision by the authority of adequate and suitable housing accommodation for persons requiring or likely to require such accommodation who were unable to provide it from their own resources. Sub-section (2) of s. 9 directed that a housing authority should have regard to the needs of certain categories of persons for example, homeless persons and persons to whom s. 13 applied. Section 13 applied specifically to travellers.

35. Sub-section (2) of s. 13, as now contained in s. 29 of the Act of 1998, provides as follows:

> "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 provision of permanent accommodation under an accommodation programme within the meaning of s. 7 of the [Act of 1998], and may carry out any works incidental to such provision, improvement, management or control, including the provision of services for such sites."

36. Sub-section (3) of s. 13 provides that s. 56(2) of the Housing Act, 1966 shall apply in connection with the provision of sites under s. 13 as it applies in connection with the provision of dwellings under s. 56. Section 56 empowers a housing authority to:

> "… 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."

37. It is well settled, as a result of a long line of authority commencing with the seminal judgment of Barron J. in *University of Limerick v. Ryan* (Unreported, High Court, 21st February, 1991), that s. 9 and s. 13 are not merely enabling provisions which confer power on a housing authority to meet the accommodation needs of those unable to provide for themselves, but the sections also impose a corresponding duty on the housing authority to make use of those powers where appropriate. Indeed, the defendant accepted that it is clear from s. 13 and the authorities, including a later decision of Barron J. in *Mongan v. South Dublin* (Unreported, High Court, 31st July, 1995), that the duty imposed on a housing authority in respect of a traveller, who does not wish to be provided with a dwelling, should be performed by providing a caravan site with the same quality of services which are provided to dwellings. However, the defendant contends that s. 13 does not extend to imposing a duty on a housing authority to provide a caravan or mobile home.

38. The response of counsel for the plaintiffs to that was not to point to a provision in the Housing Acts which empowers or mandates a housing authority to provide a caravan or a mobile home. No such provision exists, although s. 30 of the Act of 1998 amended s. 15(1) of the Act of 1988 to enable regulations be made providing for a grant or a subsidy toward the provision of a caravan out of public funds. The response was that the statutory of provisions relating to the defendant's duty towards the traveller community, by virtue of s. 2 of the Act of 2003, must now be construed and applied in a manner that is consistent with the articles of the Convention they invoke, in particular, articles 3 and 8. However, that argument was advanced in a general way and they did not indicate precisely what specific provision should be interpreted as required by s. 2 or what meaning should be ascribed to such provision, which would not be open but for the application of s. 2, which provides as follows:

> "In interpreting and applying any statutory provision or rule of law, a 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."

39. In relation to the application of that provision, both sides submitted that there is guidance to be obtained from decisions of the superior courts in England and Wales on the application of the corresponding provision of the Human Rights Act 1998 (HRA), s. 3(1), of which provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect to in a way

which is compatible with the Convention rights."

40. The authority relied on by counsel for the plaintiffs is the decision of the House of Lords in *R v. A* [2001] 3 All E.R. 1. They referred the court to the following analysis of s. 3 of HRA contained in the speech of Lord Steyn (at para. 44):

> "Section 3 of the 1998 Act places a duty on the court to strive to find a possible interpretation compatible with Convention rights. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: s. 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: s. 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is a primary source of interpretation; other sources are subordinate to it … Section 3 of the 1998 Act qualifies this general principle because it requires a court to find an interpretation compatible with convention rights if it is possible to do so. … In accordance with the will of Parliament as reflected in s. 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only invoke the reading down of express language in a statute but also the implications of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a clear limitation on convention rights is stated *in terms*, it is plainly impossible to do so."

41. The wide scope of a court's entitlement to depart from the words of the legislature in interpreting a statutory provision which that passage appears to permit, in my view, is not necessarily borne out by the result. The provision at issue in the case was a provision which gave a court, on a trial for rape, power to give leave in relation to any evidence sought to be adduced or question sought to be put in cross-examination by the accused about sexual behaviour of the complainant, if it was satisfied that a succeeding provision applied and that the refusal of leave might have the result of rendering unsafe a conclusion of the jury on any relevant issue in the case. One "gateway", as Lord Steyn put it, in the succeeding provision which permitted the evidence, s. 41(3)(c), applied where the evidence or question related to a relevant issue in the case and "it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar – (i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or (ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence." In essence, the House of Lords held that, on ordinary methods of interpretation, that provision could render inadmissible evidence in a manner which would deprive the accused of his right to a fair trial as guaranteed by article 6 of the Convention. The ratio of the decision is to be found in para. 46 of Lord Steyn's speech, with which the other Law Lords expressly concurred. Lord Steyn said:

> "The effect of the decision today is that under section 41(3)(c) …, construed where necessary by applying the interpretative obligation under section 3 of the 1998 Act, due regard being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention. If this test is satisfied the evidence should not be excluded."

42. It is interesting to note that Lord Hope stated (at para. 108) that he would find it very difficult to accept that it was permissible under s. 3 of the 1998 Act to read into s. 41(3)(c) a provision to the effect that evidence of questioning which was required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible and continued:

> "The rule of construction which section 3 lays down is quite unlike any previous rule of statutory interpretation. There is no need to identify an ambiguity or absurdity. Compatibility with Convention rights is the sole guiding principle. That is the paramount object which the rule seeks to achieve. But the rule is only a rule of interpretation. It does not entitle the judges to act as legislators. As Lord Woolf C.J. said in *Poplar Housing … v. Donoghue* [[2001] 3 W.L.R. 183], section 3 of the 1998 Act does not entitle the court to legislate; its task is still one of interpretation. The compatibility is to be achieved only so far as this is possible. Plainly this will not be possible if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible. It seems to me that the same result must follow if they do so by necessary implication, as this too is a means of identifying the plain intention of Parliament …"

43. Counsel for the defendant relied on decision of Woolf C.J. in *Poplar Housing v. O'Donoghue* referred to in the above quotation. They also referred the court to the decision of the House of Lords in In *re S (Care Order: Implementation of Care Plan)* [2002] 2 A.C. 291. There, Lord Nicholls, with whom the other Law Lords agreed, made some general observations on the effect of s. 3(1) HRA. He described it as a powerful tool whose use is obligatory, as is the case with s. 2 of the Act of 2003 in this jurisdiction. However, the reach of the tool is not unlimited. Section 3 is concerned with interpretation. Section 4 of HRA, the power to make a declaration of incompatibility, he suggested presupposes that not all provisions in legislation can be rendered Convention compliant by the application of s. 3(1). A similar comment could be made in this jurisdiction in relation to the interrelationship of s. 2 and s. 5 of the 2003 Act. He then went on to consider the parameters of s. 3, stating as follows at paras. 39 and 40:

> "39. In applying section 3 courts must be ever mindful of this outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament.
>
> 40. Up to this point there is no difficulty. The area of real difficulty lies in identifying the limits of interpretation in a particular case. … For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention compliant by legitimate use of the process of interpretation. The boundary line may be crossed even though a limitation on Convention rights is not stated in express terms. Lord Steyn's observations in R v. A …, para. 44 are not to be read as meaning that a clear limitation on Convention rights on terms is the only circumstance in which an interpretation incompatible with the convention may arise."

44. In the ordinary course of the application of s. 2 of the Act of 2003 one would follow the rubric suggested by Woolf C.J. in the Poplar Housing case at p. 204 and one would first ascertain whether, absent s. 2, there would be any breach of the Convention. If there would, then one would limit the extent of the modified meaning to that which was necessary to achieve compatibility. I have not been able to follow that approach here because, as I have stated, counsel for the plaintiffs have not pointed to a specific section

which, by the application of ordinary canons of construction, would be incompatible with the Convention, nor have they suggested what would have to be read down of the language of such provision or, alternatively, implied into it to render it compatible with the Convention. Counsel for the defendant have assumed that the plaintiffs' argument is that the court should read into s. 13(2) the words "may provide caravans". They submit that such an amendment may appear modest, but its effect would be wide. It would have a significant impact on social housing policy and impose a significant burden on housing authorities and their resources. I incline to agree with that submission and I incline to the view that to interpret s. 13(2) in that way would cross the boundary between interpretation and amendment. I think it probable that it is s. 13(2) which the plaintiffs say should be construed by reference to s. 2 and it may be that they have an even more modest and narrower meaning in mind to bring it in line with the Convention. However, it would not be proper for the court to speculate on that. In my view, the plaintiffs have not made out a case for the application of s. 2 of the Act of 2003 to the statutory provisions relating to the defendant's duties to the travelling community or persons in the position of the plaintiffs in a manner from which one could conclude that the defendant is infringing its statutory duties to the plaintiffs.

45. The plaintiffs' submission that relevant statutory provisions must be construed having regard to the provisions of the Constitution is no more fruitful than their submission based on s. 2 of the Act of 2003. The plaintiffs referred the court to the decision of Costello J. in *O'Brien v. Wicklow Urban District Council* (Unreported, 1st June, 1994) and in particular the following passage:

> "I accept the argument that the plaintiffs have a right to bodily integrity which is being infringed by the conditions under which they are living. I accept that the provisions of the Housing Act, 1988 must be construed in the light of a constitutional duty towards the plaintiffs and the factual position in which the plaintiffs find themselves. The Supreme Court has held in the course of a number of judgments and particularly in the judgment of Mr. Justice Walsh in *the East Donegal Co-operative* case that the Acts of the Oireachtas must be read in the light of the Constitution. If statutory powers are given to assist in the realisation of constitutionally protected rights by a Local Authority and if the powers are given to relieve from the effects of deprivation of such constitutionally protected rights and if there are no reasons why such statutory powers should not be exercised then I must interpret such powers as being mandatory."

46. As I have already indicated, although framed as conferring powers, in accordance with the authorities, including that decision, the defendant accepts that ss. 9 and 13 of the Act of 1988 impose positive duties on the defendant. Beyond that, the plaintiffs have not pointed to a constitutionally permitted construction of s. 13(2) which would require the defendant to give plaintiffs what they say they are entitled to: the provision of another mobile home for Mary. As counsel for the defendant pointed out, the constitutional limitation on the "double construction" rule of interpretation is clear from the following passage from the judgment of Walsh J. in *East Donegal Co-operative Livestock Mart Limited* [1970] I.R. 317 at 3431:

> "Therefore, an Act of the Oireachtas or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution; and it is not only a question of preferring a constitutional construction to one which would be unconstitutional where they both may appear to be open but it also means that an interpretation favouring validity of an Act should be given in cases of doubt. It must be added, of course, that interpretation or construction of an Act or any provision thereof in conformity with the Constitution cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by another provision with a different context, as that would be to usurp the functions of the Oireachtas. In seeking to reach an interpretation or construction in accordance with the Constitution, a statutory provision, which is clear and unambiguous, cannot be given an opposite meaning."

47. To interpret s. 13(2) as mandating a housing authority to provide a mobile home for a traveller, or even a seriously disabled traveller, would, it seems to me, be usurping the functions of the Oireachtas.

48. Sections 6 to 17 of the Act of 1998 contain provisions imposing duties on a housing authority to assess the need for sites when making an assessment under s. 9 of the Act of 1988, to adopt an accommodation programme specifying the accommodation needs of travellers after going through certain processes, and to secure the implementation of the accommodation programme. The defendant's position is that it has complied with those provisions in the Programme for 2005 to 2008 and in the provision they are making for the plaintiffs under the Programme. It is unfortunate that the defendant encountered opposition in implementing its plans in relation to the development of the new facility at Lynch's Lane. However, the difficulties appear to have been surmounted and hopefully the new facility will be ready for use in August, 2008 as is anticipated. In my view, the plaintiffs have not established any breach of the provisions of ss. 6 to 17 of the Act of 1998.

49. Section 24 of the Act of 1998, as amended by the Act of 2001, provides that nothing in the Act of 1998 shall prevent a manager from exercising the powers conferred on a manager under sub-ss. (4) and (5) of s. 138 of the Act of 2001 in an emergency situation. Sub-section (4) empowers a manager to deal with an emergency situation calling for immediate action without regard to ss. (1) to (3), which impose a duty on him to inform the elected members of the council before embarking on any works, other than works for maintenance, or before committing the local authority to any expenditure in connection with the proposed works, other than maintenance and repair. Sub-section (5) provides that an emergency situation is deemed to include a situation where the works concerned are urgent and necessary, having regard to personal health, public health or safety considerations, in order to provide a reasonable standard of accommodation for any person. The plaintiffs submitted that s. 24 and s. 138 should be construed as providing for a duty on the part of the defendant to act in circumstances of urgency. Even if that submission is correct, it does not avail the plaintiffs because they have failed to point to a substantive provision of the Housing Acts which obliges the defendant to do what they say should be done.

50. For the reasons outlined, in my view, the plaintiffs have not established an entitlement to a declaration that the defendant, in failing to provide for the accommodation needs of the plaintiffs in the manner in which they assert they should be provided for, has acted in breach of any of its duties under the Housing Acts.

Breach of Convention/Act of 2003

51. One of the reliefs claimed by the plaintiffs is a declaration that the defendant, in failing to provide for their accommodation needs, has acted in breach of the Convention and in breach of s. 3 of the Act of 2003. The plaintiffs also claim damages, including damages under s. 3 of the Act of 2003.

52. Section 3(1) of the Act of 2003 provides as follows:

> "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."

53. Sub-section (2) of s. 3 provides for a remedy in damages for a person who has suffered injury, loss or damage as a result of a

contravention of sub-s. (1), where no other remedy is available.

54. The plaintiffs have invoked article 3 and article 8 of the Convention. Article 3 provides:

> "No-one shall be subjected to torture or to inhuman or degrading treatment or punishment."

55. Article 8 provides:

> "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 freedom of others."

56. The fundamental issue which emerged in relation to the plaintiffs' Convention based claim to have the provision made for them which they seek from the defendant was whether article 8 gives rise to positive obligations on the part of organs of the State to vindicate a person's right to respect for their private and family life and their home. Counsel for the plaintiffs submitted that it does, whereas counsel for the defendant submitted that the European Court of Human Rights (ECHR) has consistently held that article 8 rights do not confer any right to be provided with a home or any positive obligation to provide alternative accommodation of an applicant's choosing. It is necessary to look at recent decisions of national courts and the ECHR on article 8 to determine which contention is correct. I propose considering the authorities which I believe to be of importance chronologically.

57. *Chapman v. The United Kingdom* (2001) 33 E.H.R.R. 399 was a decision of the ECHR, Grand Chamber, delivered on 18th January, 2001. Mrs. Chapman was a Gypsy by birth. Her complaint was that the refusal of planning permission to station caravans on her land and the enforcement measures implemented in respect of her occupation of her land constituted a violation of article 8. The ECHR stated (at para. 95) that to accord to a Gypsy who has unlawfully stationed a caravan at a particular place different treatment from that accorded to non-Gypsies who have established a caravan site at that place or from that accorded to any individual who has established a house in that particular place would raise substantial problems under article 14 of the Convention. However, it went on to state (at para 96), that, although the fact of belonging to a minority with a traditional lifestyle different from that of the majority does not confer an immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment, it may have an incidence on the manner in which such laws are implemented. The vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyles both in the relevant regulatory planning framework and in reaching decisions in particular cases. The court stated that, to that extent, there is thus "a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life."

58. Having stated that it appeared from the material placed before the ECHR that the provision of an adequate number of sites in the United Kingdom which Gypsies found acceptable and on which they could lawfully place their caravans at a price which they could afford was something which had not at that point in time been achieved, the court continued (at para. 98) as follows:

> "The court does not, however, accept the argument that, because statistically the number of Gypsies is greater than the number of places available on 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 all 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 protection of minorities, that Article 8 can be interpreted as implying for States such far reaching positive obligations of general policy."

59. There followed (at para. 99) the passage from the judgment which was particularly relied on by counsel for the defendant which is to the following effect:

> "It is important to recall that Article 8 does not in terms recognise 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 have 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 of political not judicial decision."

60. The ECHR identified the issue to be determined in the *Chapman* case as the narrow one of whether the particular circumstances of the case disclosed a violation of Mrs. Chapman's right to respect for her home under article 8 of the Convention, not the broader issue of the acceptability or not of a general situation, however deplorable, in the United Kingdom. The narrow issue involved balancing the conflicting interests of the right of the individual under article 8 for her home and the right of others in the community to environmental protection. The court found that there had been no violation of article 8.

61. In *R. (Bernard) v. Enfield London BC* [2003] L.G.R. 423, which was a decision of the Queen's Bench Division of the English High Court, the claimants, who were husband and wife, sought damages for breach of their rights under articles 3 and 8 of the Convention on the basis that the defendant local authority had not provided them with accommodation in accordance with an assessment of their needs. The husband and wife lived with their six children in accommodation provided by the defendant. The wife was severely disabled and the accommodation had not been adapted to her needs. The defendant undertook an assessment of their needs in September, 2000 and concluded that the family needed to be re-housed in accommodation suitably adapted. After the court had made a mandatory order in the proceedings directing the defendant to provide the claimants with accommodation in accordance with their assessment, the defendant complied with the order in October, 2002. The issue which the court was concerned with in the judgment delivered on 25th October, 2002 was whether the claimants were entitled to damages. In dealing with the claim under article 8, Sullivan J. noted that, while the main thrust of article 8 is to prevent arbitrary interference by public authorities with an individual's private and family life, the ECHR has recognised that article 8 may require authorities to take positive measures to secure respect for private or family life, citing and quoting from *Botta v. Italy* (1998) 26 E.H.R.R. 241. In the passage from the judgment of Sullivan J. relied on by counsel for the plaintiffs (at para. 32 et seq.) he stated as follows:

> "Respect for private and family life does not require the State to provide every one of its citizens with a house … However, those entitled to care under s. 21 are a particularly vulnerable group. Positive measures have to be taken (by way of community care facilities) to enable them to enjoy, so far as possible, a normal private and family life. … Whether

> the breach of statutory duty has also resulted in an infringement of the claimants' art. 8 rights will depend upon all the circumstances of the case. Just what was the effect of the breach in practical terms on the claimants' family and private life?"

62. Sullivan J. answered that question as follows (at para. 33):

> "Following the assessments in September, 2000 the defendant was under an obligation not merely to refrain from unwarranted interference in the claimants' family life, but also to take positive steps, including the provision of suitably adapted accommodation, to enable the claimants and their children to lead as normal a family life as possible, bearing in mind the second claimant's severe disabilities. Suitably adapted accommodation would not merely have facilitated the normal incidence of family life, for example the second claimant would have been able to move around her home to some extent and would have been able to play some part, together with the first claimant, in looking after the children. It would also have secured her 'physical and psychological integrity'. She would no longer have been housebound, confined to a shower chair for most of the day, lacking privacy in the most undignified of circumstances, but would have been able to operate again as part of her family and as a person in her own right, rather than being a burden, wholly dependent upon the rest of her family. In short, it would have restored her dignity as a human being."

63. The court concluded that the failure of the defendant to act on the September 2000 assessments over a period of twenty months was incompatible with the claimants' rights under the Convention. They were awarded damages under s. 8 of the HRA.

64. The domestic provision at issue *in R (Bernard) v. Enfield L.B.C.*, s. 21 of the National Assistance Act, 1948, which empowers a local authority to "make arrangements providing … residential accommodation for persons aged 18 or over who by reason of age, disability or other circumstances are in need of care and attention which is not otherwise available to them …" was also in issue in one of the appeals which were dealt with by the Court of Appeal of England and Wales and are reported as *Anufrijeva v Southwark London B.C.* [2004] 1 All E.R. 833. The *Anufrijeva* claimants were members of a family who claimed that their local authority failed to respect their private and family life, contrary to article 8. The basis of the claim was that the local authority failed to discharge their duty under s. 21 to provide them with accommodation that met the special needs of one elderly member of the family, with the result that the quality of family life was drastically impaired. Delivering the judgment of the Court of Appeal, Lord Woolf C.J. reviewed the decision in *R (Bernard) v. Enfield London B.C.*, noting (in para 40) that, so far as article 3 was concerned, no issue had been raised before Sullivan J. as to there being a positive duty to provide accommodation that would not subject the claimants to conditions that constituted inhuman or degrading treatment. The only issue was whether the degree of severity of the claimants' predicament reached the article 3 threshold. Lord Woolf C.J. noted that "with some hesitation" Sullivan J. had concluded that it did not, but he had held that it was a clear breach of article 8. Paragraphs 32 to 34 of the judgment of Sullivan J. were quoted. The conclusions of the Court of Appeal on the judgment of Sullivan J. were set out at para. 43 as follows:

> "Neither [counsel instructed by the Treasury solicitor] nor [counsel], who appeared for the defendant in the *Anufrijeva's* case challenged the decision of Sullivan J. in *Bernard's*, either in principle or on the facts. Our conclusion is that Sullivan J. was correct to accept that art 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 art 8 requires him to be provided with welfare support, where his predicament is not sufficiently severe to engage art 3. Article 8 may be more readily engaged where a family unit is involved. Where the failure of children is at stake, art 8 may require the provision of welfare support in a manner which enables family life to continue. Thus, in *R(J) v Enfield London B.C.* … [2002] L.G.R. 390, where the claimant was homeless and faced separation from her child, it was common ground that, if this occurred, art 8(1) would be infringed. Family life was seriously inhibited by the hideous conditions prevailing in the claimants' home in *Bernard's* case and we consider that it was open to Sullivan J. to find that art 8 was infringed on the facts of that case."

65. The Court of Appeal went on to outline, in general terms, the circumstances in which maladministration would constitute a breach of article 8. The other two appeals, in broad terms, concerned complaints by asylum seekers that, due to maladministration in dealing with their applications and resulting delay, their rights under article 8 had been breached. Of relevance to the issues which arise here is the following passage from the judgment (at para. 45), which was quoted by this Court (Charleton J.) *in Doherty v. South Dublin County Council & Ors.* [2007] I.E.H.C. 4, in which judgment was delivered on 22nd January, 2007:

> "Insofar as art 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 … 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 art 8, provided that the impact on private life or family life is sufficiently serious and was foreseeable."

66. The Court of Appeal dismissed the *Anufrijeva* appeal, essentially on the ground that there was no basis for upsetting the findings of fact made by the trial judge, who, unusually on a judicial review, had heard oral evidence over six days, and found that there was no conduct on the part of the defendant local authority which could arguably amount to an infringement of article 8.

67. The most recent decision of the ECHR dealing with article 8 to which the court was referred was the decision in *Moldovan & Ors. v. Romania* (application Nos. 41138/98 and 64320/01), in which judgment was delivered on 30th November, 2005. Counsel for the plaintiffs emphasised that this decision post-dated the decision of the Court of Appeal in *Anufrijeva*. The complexity of the facts in the *Moldovan* case gave rise to a multiplicity of issues. The essential facts were that, during a fracas in a bar in a village in Romania in which the applicants, who were of Roma origin lived, a non-Rom was killed, following which three Roma involved fled the scene. This led to attacks on Roma living in the village and on their property. Thirteen Roma houses belonging to the applicants were destroyed. In invoking articles 3 and 8 of the Convention, the applicants complained that, after the destruction of their houses, they could no longer enjoy the use of their homes and had to live in poor, cramped conditions. They alleged the involvement of State officials in the destruction of their homes. They claimed that the Romanian Government had a positive obligation under article 3 to provide sufficient compensation to restore them to their previous living conditions. They alleged that the reconstruction funds had been mis-managed by local officials and that the houses which were re-built by the State were badly constructed and largely uninhabitable. They contended that the government's failure in respect of their positive obligations had resulted in families with small children and elderly members being forced to live in cellars, hen houses, stables, burnt-out shells, or to move in with friends and relatives in such overcrowded conditions that illness frequently occurred.

68. In outlining the general principles applicable, the ECHR stated (at para. 93):

> "The Court has consistently held that, although the object of art 8 is essentially that of protecting the individual against

> arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference. There may, in addition to this primary negative undertaking, be positive obligations inherent in an effective respect for private or family life and the home. These obligations may involve the adoption of measures designed to secure respect for these rights even in the sphere of relations between individuals …"

69. Later (at para. 97) the ECHR stated:

> "Whatever analytical approach is adopted – positive duty or interference – the applicable principles regarding justification under Article 8.2 are broadly similar …In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole. In both contexts the State enjoys a certain margin of appreciation in determining the steps to ensure compliance with the Convention … Furthermore, even in relation to the positive obligations flowing from Article 8.1, in striking the required balance, the aims mentioned in Article 8.2 may be of relevance."

70. Later, in outlining the general principles applicable to article 3, it was stated (at para. 100) that, according to the case law of the ECHR, ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3. It depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some case, the sex, age and state of health of the victim, citing The *Ireland v. United Kingdom*, judgment of 18th January, 1978. It then gave examples (in para. 101) of cases in which the ECHR had considered treatment to be "inhumane" and "degrading".

71. In applying the principles to the facts of Mr. Moldovan and the other applicants the court found that there had been a violation of article 3. There also had been a serious violation of article 8 of a continuing nature in the hindrance by, and repeated failure of, the authorities to put a stop to the breaches of the applicants' rights. On the issue of living conditions, the ECHR stated (at para. 110):

> "It furthermore considers that the applicants' living conditions in the last ten years, in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicants' health and well-being, combined with the length of the period during which the applicants have had to live in such conditions and the general attitude of the authorities, must have caused them considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement."

72. The scope of the duties imposed on an organ of the State by s. 3 of the Act of 2003 in combination with article 8 was considered recently by this Court (Finlay Geoghegan J.) in *Bode v. Minister for Justice, Equality and Law Reform* [2006] IEHC 341 in which judgment was delivered on 14th November, 2006. In that case each of the judicial review proceedings to which that judgment related included, as applicants, an Irish citizen child and a non-national parent or parents whose application to remain in the State under the administrative scheme established by the respondent in 2005, which came to be known as the IBC/05 Scheme, was refused or not considered. The applicants contended that the respondent, in deciding to refuse the parents' application under IBC/05 by reason of the alleged failure to establish continuous residency in Ireland since the date of the birth of the Irish citizen child without having regard to and considering the private and family rights of the child and their own family rights, had acted in a manner which was not compatible with the State's obligations under article 8 and hence contrary to s. 3(1) of 2003. Counsel for the plaintiffs referred the court to a passage from the judgment of Finlay Geoghegan J. in which she quoted from the decision of the ECHR of 16th June, 2005 in *Sisojeva v. Latvia*. In the context of having found that the first named applicant had lived in the State since the date of her birth and so had a private life in the State which commanded respect from the respondent, and having identified the issue as whether the applicants had established that the taking of a decision to refuse an application under IBC/05 constituted an interference with the respect for such right, Finlay Geoghegan J. quoted para. 104 of the judgment in the *Sisojeva* case in which the ECHR stated, inter alia:

> "The Court further notes that no formal deportation order has been issued in respect of the applicants. It reiterates, however, that article 8, like any other provision of the Convention or the Protocols thereto, must be interpreted in such a way that it guarantees not rights that are theoretical or illusory but rights that are practical and effective … Furthermore, while the chief object of Article 8, which deals with the right to respect for one's private and family life, is to protect the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effect of respect for private and family life… In other words, it is not enough for the host State to refrain from deporting the person concerned; it must also, by means of positive measures if necessary, afford him or her the opportunity to exercise the rights in question without interference."

73. On the facts of the case, and, in particular, the nature of the rights of the Irish citizen child, which were constitutionally protected personal rights, Finlay Geoghegan J. held that there had been an interference with the Irish citizen child's right to respect for his or her private life within the meaning of article 8.1 of the Convention. The respondent had not sought to justify that interference under article 8.2. On that basis, she held that the decision to refuse the parents' application was contrary to article 8 and a breach of s. 3(1) of the Act of 2003.

74. Coincidentally, the applicants in *Doherty v. South Dublin County Council & Ors*. were an elderly couple residing in a caravan in the temporary halting site at Lynch's Lane, who are to be accommodated in the new facility at Lynch's Lane. Their complaint was that, being in poor health, and having regard to the condition of the mobile home in which they resided, which had only basic electricity supply, had no internal plumbing, no internal toilet and shower facilities, no central heating and was cold and damp, the failure of the respondents to provide them with a centrally-heated, insulated and, internally plumbed caravan was in breach of, *inter alia*, s. 3 of the Act of 2003. In the proceedings, which were by way of judicial review proceedings in which the Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General were respondents, in addition to South Dublin County Council, and to which the Equality Authority was a notice party, the applicants invoked articles 3, 8 and 14 of the Convention. As I have stated, Charleton J. quoted from the judgment of the Court of Appeal in *Anufrijeva*. At para. 40 he stated:

> "I would find it impossible to apply the test 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 eighteen months."

75. In that case, South Dublin County Council, citing the applicant's homelessness and medical priority as the reason for so doing, offered to allocate to the applicant standard housing accommodation in a two-bedroomed, ground floor apartment. It was made clear that the new facility at Lynch's Lane would not be available until the summer of 2008 and that the council was unable to provide the applicants with suitable temporary accommodation of the type they would prefer and did not possess any other suitable temporary alternatives at the time.

76. Having considered the decision of the ECHR in *Chapman* and its later decision of 7th February, 2006 in *Codona v. The United Kingdom*, in which *Chapman* was followed, Charleton J. set out his decision on the claim by reference to article 8 (at para. 45) as follows:

> "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."

77. Turning to the claims made by the plaintiffs in this case, I am not satisfied that the plaintiffs have made out a case for breach of s. 3(1) of the Act of 2003 by reference to article 3. Counsel for the defendant submitted that the defendant's treatment of the plaintiffs did not attain the minimum level of severity necessary to constitute ill-treatment within the scope of article 3, that it to say, inhuman and degrading treatment, and that the defendant has not engaged in any conduct that was capable of amounting to a violation of the plaintiffs' rights under that article. I accept that submission as being correct, subject to what follows in relation to the relationship between article 3 and article 8.

78. The general proposition advanced by the Court of Appeal in the *Anufrijeva* case, that it was difficult to conceive of a situation in which the predicament of an individual would be such that article 8 would require him to be provided with welfare support, where his predicament was not sufficiently severe to engage article 3, raises the question whether the conclusion I have reached on the plaintiffs' claim that article 3 was breached precludes the plaintiffs from maintaining a case that the failure to provide a wheelchair accessible home for Mary is a breach of article 8. It must be acknowledged that it could be argued that that proposition is not at variance with the decision of the ECHR in *Moldovan*, where the court looked at the applicant's bad living conditions in combination with the general attitude of the authorities, which it concluded led to humiliation and debasement and where the court actually found that there had been a breach of article 3. Notwithstanding that, the conclusion I have come to is that it is open to this Court to make a finding on the facts of this case that there has been a breach of article 8, even though I conclude that it is not appropriate to make a finding that there has been a breach of article 3.

79. The question which arises in determining whether there has been a breach of article 8 is whether practical and effective respect for the private and family life and of the home of each of the plaintiffs requires the defendant to adopt the measure which the plaintiffs contend is necessary to alleviate the overcrowded and potentially unsafe conditions in which the plaintiffs are living. That question has to be considered in the context that the defendant accepts that the provision in the temporary halting site at Lynch's Lane which the defendant has made, and which the plaintiffs, their parents and siblings are now availing of, is not adequate or sufficient to fulfil the defendant's obligation to provide the plaintiffs with suitable and adequate living accommodation. It has also to be considered in the context that the defendant is committed to remedying that situation by the summer of 2008 when accommodation in the new facility at Lynch's Lane will be available. Therefore, the issue boils down to whether the compliance with article 8 requires that another wheelchair accessible mobile home be made available for occupation and use by Mary, so that her living conditions and those of Bernard and Patrick can be brought to an acceptable level now. In determining that issue the court must strike a fair balance between competing interests, the interests of the community as a whole, on the one hand, and the interests of the individual plaintiffs, on the other hand, within the margin of appreciation which the ECHR has held the State has.

80. As long ago as January, 2005, Ms. Maguire reported to the defendant on the overcrowding in the Pemberton mobile home and the necessity for more accommodation for Bernard, Mary and Patrick. The inevitable delay which was going to be encountered in completion and commissioning of the new Lynch's Lane facility was clearly known to the defendant at that stage.

81. The general interest which has to be weighed in the balance against the effect of having to live in overcrowded, potentially unsafe and admitted inadequate accommodation for three and a half years and, perhaps, longer, which is what the defendant's refusal to fund the second mobile home has consigned the plaintiffs to, in the terminology of article 8, is the economic well being of the State. It is possible to evaluate the impact on the economic well being of the State of providing the second mobile home for the plaintiffs: the cost will be in the region of €58,000 and the installation cost and the cost of connecting it with the services and such like.

82. This case is very unusual, if not unique. It is difficult to comprehend the level of disability, hardship and deprivation which Bernard, Mary and Patrick endure between them. That Mrs. O'Donnell desires, and intends, to care for them with the assistance of other members of her family in the home setting must be in their best interests and it must be in the interest of the State and its organs to facilitate her in so doing.

83. This is not a case which is based on an assertion that the State or any of its organs has a positive obligation to make certain provision for every traveller family, for instance, that the State should legislate or have an administrative scheme to provide two de luxe mobile homes for every traveller family. This case is about the particular circumstances of one family, which has three severely disabled members, two of whom were minors when these proceedings started, who to the knowledge of the defendant have been living in unacceptable conditions since 2005 and whose plight is not going to be alleviated until August, 2008 at the earliest, if it will be then. I express that reservation because it is by no means clear that, from August, 2008 onwards, the plaintiffs will have adequate sleeping accommodation with suitable sanitary facilities at the new facility, because what the defendants officers have in contemplation is to move the Pemberton mobile home onto the large bay and to encourage Mr. and Mrs. O'Donnell to acquire a standard caravan for which there will be space in the bay The offer of a loan of €6,350, which I have found would not be sufficient to fund the acquisition of a second suitable caravan or mobile home for Mary, even with the possibility of a €500 grant, is not a sufficient answer to ensure that the rights of Bernard, Mary and Patrick under article 8 are effectively and practically respected.

84. As regards its factual component, this case is very similar to the *Bernard* case, if not worse. In my view, it is open to the court to make a finding on the facts that there has been a breach of article 8. I so find.

85. Counsel for the defendant, in addressing the relevance of the decision in the *Moldavan* case to this case, submitted that there is nothing in the relevant legislation here, the Housing Acts, which can be pointed to as a gap in the protection of the plaintiffs. The judgment of the Court of Appeal in *Anufrijeva* suggests that a breach of positive obligations under domestic law, although it may be indicative of, is not an essential prerequisite to an infringement of article 8. In my view, given that the defendant has argued successfully that the defendant does not have a statutory obligation to provide a suitable mobile home for Mary, and that there has been no breach of a positive obligation of domestic law, there must be a gap in the protection of the plaintiffs. Sections 9 to 15 of the Act of 1988, impose obligations on housing authorities to address housing requirements, including need arising from *inter alia*, overcrowding and disability or handicap. Sections 6 to 17 of the Act of 1998 impose additional obligations on a housing authority in

relation to traveller accommodation. If there is no statutory protection for the plaintiffs in their current predicament which ensures suitable and appropriate accommodation for them having regard to their age, mental condition, disability, dependency and family circumstances, the interstices into which they have fallen must represent a failure of the State and its organs to function in a manner compatible with article 8.

86. Having regard to the special facts of this case, in my view, a finding that article 8 has been breached in this case does not amount to the court "second guessing" the housing authority or acting as a "shadow housing authority", as the defendant contended. The Oireachtas has legislated in s. 3 of the Act of 2003 that a housing authority shall perform its functions in a manner compatible with the Convention.

87. For completeness, I should say that, as was urged on behalf of the plaintiffs, I consider the *Doherty* case to be distinguishable on the facts. The applicants in that case were offered accommodation pending the completion of the new facility at Lynch's Lane which the court considered that it was reasonable that they should avail of. I believe that that the level of disability and dependency of Bernard, Mary and Patrick and the degree of care and supervision they require and the appalling conditions in which they and their carers are living and the meagre inadequate assistance proffered by the defendant distinguishes the factual situation in this case from the factual situation in the *Doherty* case, which Charleton J. summed up in the following passage in his judgment (at para. 42):

> "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 redevelopment. In the meanwhile, it is not unreasonable that the available accommodation is in bricks and mortar nor is it unreasonable that the County Council will not go and immediately buy them a plumbed, centrally heated mobile home with electricity supply: …"

88. I will deal with how the breach of article 8 is to be remedied later.

Act of 2000/Article 14 breached?
89. One of the reliefs sought by the plaintiffs is a declaration that the defendant, in failing to accommodate their special needs, or in failing to make the funding available to them to enable their needs to be met, has discriminated against them as persons suffering from a disability and/or as members of the traveller community contrary to the Act of 2000 and incompatible with the State's obligations under article 14 of the Convention, thereby giving rise to a breach of s. 3 of the Act of 2003.

90. Both the claim under the Act of 2000 and the claim by reference to article 14 can be disposed of summarily. As counsel for the defendant submitted, the plaintiffs have neither put forward a factual basis in the statement of claim to justify a complaint of discrimination nor was any evidence adduced that the defendant had discriminated against them on the grounds alleged or any ground. Aside from the fact that, having succeeded under article 8, it is unnecessary to address the plaintiffs' claim under article 14, the position is that the plaintiffs have made no case that there was different treatment as respects a substantive Convention right meted to them, on the one hand, and to other persons they have put forward as comparators, on the other hand. Therefore, they have made out no case on discrimination under article 14.

91. Similarly, no question of discrimination having occurred within the meaning of the Act of 2000 arises because the plaintiffs have made out no case on the pleadings or on the evidence of having been treated less favourably on any ground than any other person or persons.

Infringement of the plaintiffs' constitutional rights?
92. The plaintiffs also seek a declaration that the defendant, in failing to provide for their accommodation needs, has acted in breach of their constitutional rights. The claim for damages also covers alleged breach of constitutional rights.

93. The plaintiffs' allegation of such breach, as pleaded, is that the defendant failed to properly respect, vindicate and act in accordance with their constitutional rights, including their right to bodily integrity, their right not to have their health endangered, and their right to respect for their private and family life.

94. I have already outlined the argument advanced on behalf of the plaintiffs that the statutory provisions of the Housing Acts should be construed in the light of the Constitution by reference to the judgment of Costello J. in *O'Brien v. Wicklow Urban District Council*. While the right to bodily integrity is one of the unenumerated personal rights guaranteed by Article 40.3.1 of the Constitution, the plaintiffs did not develop the argument to show how the defendant, on the facts of this case, should be held to have infringed the right of each of the plaintiffs to bodily integrity.

95. Counsel for the defendant addressed the issue on the basis that what the plaintiffs were claiming was the right to be provided with accommodation which, if it was to be found in the Constitution, could only be found in an unenumerated personal right guaranteed by Article 40.3.1. Counsel reminded the court of the caveats issued by the Supreme Court in T.*D. v. Minister for Education* [2001] 4 I.R. 259: first that, save where an unenumerated right has been unequivocally established by precedent, for example, the right to travel and the right to privacy, some degree of judicial restraint is called for in identifying new rights (*per* Keane C.J. at p. 281); and, secondly, the inadvisability of the courts at any stage assuming the function of declaring what are frequently described as "socio-economic rights" to be unenumerated rights guaranteed by Article 40 (*per* Keane C.J. at p. 282). Finally, counsel referred to the passages in the judgment of Murphy J. in the *T.D.* case, which the Chief Justice earlier had commended in his judgment, in relation to that second point, including the concluding paragraph of his judgment in which Murphy J. stated (at p. 321):

> "It is, of course, entirely understandable, and desirable politically and morally, that a society should, through its laws, devise appropriate schemes and by means of taxation raise the necessary finance to fund such schemes as will enable the sick, the poor and the underprivileged in our society to make the best use of the limited resources nature may have bestowed on them. It is my belief that this entirely desirable goal must be achieved and can only be achieved by legislation and not by any unrealistic extension of the provisions originally incorporated in Bunreacht na hÉireann. I believe that Costello J. (as he then was) was entirely correct when, in *O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181, he concluded that the courts were singularly unsuited to the task of assessing the validity of competing claims on national resources and that this was essentially the role of the Oireachtas. It is only fair to add, as I have already pointed out, that those who framed the Constitution seem to have anticipated this problem and provided a solution for it"

96. That being the state of the submissions, I am not satisfied that a case has been made out that the defendant has infringed the plaintiffs' constitutional rights.

Estoppel/res judicata abuse of process
97. The defendant's contention that Bernard is estopped from bringing these proceedings, or alternatively, these proceedings are an abuse of process, is based on the fact that Bernard's proceedings in 2002 were compromised and that Bernard's current action is similar to the action he brought in 2002. In my view, that analysis is not factually correct.

98. Bernard is not trying to re-litigate the claims which were settled in 2002. His claim relates to the circumstances which have prevailed since October 2002 and the family circumstances as a result of which he has not been adequately or suitably accommodated, having regard to his disability and dependancy, in recent years.

99. Accordingly, in my view, the objection based on estoppel and abuse of process is misconceived.

Remedy
100. On the basis of the plaintiffs' claim as formulated, the only remedy which the court can provide for the breach it has found of article 8 of the Convention is an award of damages. The only evidence which has been adduced which would go towards measuring the damages is that the cost of the Pemberton mobile home of the type provided for Bernard. The evidence is that a similar mobile home would cost €58,000 today.

101. I propose adjourning the matter, to give the parties an opportunity to consider this judgment and to decide how to proceed from here.

102. Finally I wish to emphasise that the claims with which I have dealt are the claims of Bernard, Mary and Patrick and the overall case has been presented on the basis that a new mobile home is required to accommodate Mary. Whatever approach is adopted as a result of this judgment, in my view, whatever assets accrue to the plaintiffs should be secured for the plaintiffs, not for the O'Donnell family generally.