

THE HIGH COURT

2008 1068 JR

BETWEEN

DAVID FITZGERALD, PAT ROHAN, DEBBIE ROHAN, EVELYN ROHAN AND BRENDA MAGUIRE

APPLICANTS

AND

**THE COUNTY COUNCIL OF THE
COUNTY OF TIPPERARY NORTH RIDING**

RESPONDENT

AND

CHARLIE O'REILLY AND NOREEN O'REILLY

NOTICE PARTIES

JUDGMENT of Mr. Justice Hanna delivered on the 5th day of May 2009

1. The applicants are residents of Cullenagh, Ballina, Co. Tipperary. As well as representing their own interests, they also purport to represent the interests of some 62 other persons being with Cullenagh Residents Association.
2. The respondent is Tipperary North Riding County Council. It is, inter alia, the housing authority for the area within which the applicants reside.
3. The notice parties are members of the travelling community and have between them eight children. They currently reside in roadside caravan accommodation near Ballina. The respondent has purchased a dwelling house in Cullenagh which is adjacent to where the applicants reside. The respondent intends to let this house to the notice parties, it being suitable for the needs of that family.
4. There is no dispute as to the unfortunate plight of the notice parties. They are currently living in cramped and unfit conditions. Mrs. O'Reilly suffers from a physical disability and is cared for by Mr. O'Reilly. Of their eight children, one suffers from scoliosis of the spine and requires special attention. Two children have special needs and a third child suffers from attention-deficit hyperactivity disorder. They have been residing in the area for a number of years and the children are being educated both in Ballina and in Killaloe.
5. According to the affidavit filed on behalf of the respondent, Ms. Sharon Kennedy, Senior Executive Officer of the Housing Capital Schemes Section of the respondent, the family has been on the housing list since the year 2000 along with some 370 others approximately. She confirms that the family live in unfit and overcrowded conditions, which are unfit and materially unsuitable for human habitation. The family desire to be accommodated in a halting site. This is not, however, a feasible option in the short to medium term. Previous efforts to accommodate the family did not come to fruition.
6. The dwelling house at the centre of the dispute between the parties herein was purchased pursuant to an order signed by the Deputy County Manager on the 3rd July, 2008, and was transferred to the ownership of the respondent by deed of transfer dated the 8th September, 2008. It is important to note that the suitability of the house for the needs of the notice parties have been noted by the local authority before it proceeded to acquire same. It seems that the Council's intention was not made known either to selected members or to the public in general and the applicants and their co-residents in particular until some time prior to the execution of the deed of transfer. The intentions of the Council were then made known to elected representatives and to the applicants.
7. Reference is made in the proceedings to certain incidents which allegedly occurred following on from news of the proposed actions by the Council. These resulted in the bringing, by the respondent, of injunction proceedings in the High Court. This Court is not concerned with those proceedings or with any alleged wrongful acts by any party. I will concern only with the issues raised in these proceedings and will not dwell further upon matters raised in parallel proceedings.
8. On the 24th September, 2008, the applicants applied for leave to bring judicial review proceedings. That application was refused by Charleton J. This refusal was then appealed to the Supreme Court. The appeal was successful. The applicants were given leave to apply for a number of reliefs. They were as follows:-
 - (i) An order of prohibition preventing the respondent from proceeding with the conclusion of a tenancy agreement between the respondent and members of the O'Reilly family of Cullenagh, Ballina, Killaloe, Co. Tipperary for the lease of the house at Cullenagh, Ballina, Co. Tipperary, recently purchased by the respondent from Peter Lyons and Louise Barry, or any agreement in respect of the occupation of the said house pursuant to the respondents Traveller Accommodation Programme;
 - (ii) In the alternative, in the event that such an agreement has been executed, an order of certiorari setting the said agreement aside;
 - (iii) An interim injunction restraining the respondent from concluding any such tenancy agreement and from causing

the said house to be occupied by the said O'Reilly family pursuant to any such lease or by the said family or any persons pursuant to the said Traveller Accommodation Programme of the respondent pending further of the court;

(iv) An interlocutory injunction restraining the respondent from concluding any such tenancy agreement and from causing the said house to be occupied by the said O'Reilly family pursuant to any such lease or by the said family or any persons pursuant to the said Traveller Accommodation Programme of the Respondent pending the determination of these proceedings or further order of the court;

(v) Such further or other order as this Honourable Court shall seem meet;

(vi) Costs.

9. The applicants were granted leave to rely upon two grounds. First, that the respondent had purchased the house the subject matter of the application and has stated through its County Manager that it proposes to house a traveller family therein and to execute a tenancy agreement with the said family to that end. The applicants contend that such an agreement and such an arrangement would be ultra vires the power of the respondent. Secondly, that the housing of the said family, as aforesaid, is proposed to be organised by the respondent's County Manager and in concluding such an agreement and/or arrangement, the said County Manager would be acting ultra vires.

10. The property has been transferred to the local authority as noted above. No letting agreement has yet been signed.

11. On behalf of the applicants, Mr. Rodgers S.C. pointed to the fact that pursuant to s. 7 of the Housing (Traveller Accommodation) Act 1998, the respondent was obliged to draw up an accommodation programme specifying the accommodation needs of travellers in its functional area and the provision of accommodation required to address those needs. Pursuant to the said legislation, the respondent adopted its Traveller Accommodation Programme 2005-2008. Under s. 16 of the said Act of 1998, Mr. Rodgers contended, the respondent was required to implement the programme and take such steps as were necessary for the implementation of the proposals specified in the programme. It required that regard be had to the plans.

12. Section 149 of the Local Government Act 2001 provided that all matters and things necessary for the performance of executive functions of a local authority shall be done by the manager of the authority. That Act goes on to stipulate that the functions of the manager shall, subject to law, be performed in accordance with the authority's policy as determined by the elected council in accordance with Chapter 1 of Part 14 of the said Act. Section 130 provides:-

"It is the function of the elected council of a local authority to determine by resolution the policy of the local authority subject to and in accordance with this Act and the other enactments relating to that authority."

13. Section 7(3) of the said Act of 1998, states:-

"The adoption of an accommodation programme or an amendment to or replacement of the accommodation programme by a relevant housing authority shall be a reserved function."

14. Section 132 of the Local Government Act 2001, states:-

"It is the duty of every manager to carry into effect all lawful directions of the elected council of a local authority or a joint body for which he or she is manager in relation to the exercise and performance of the reserved functions of the local authority or joint body."

15. Mr. Rodgers S.C. argued that the respondent's Traveller Accommodation Programme is the policy of the respondent within the meaning of s. 130 of the Local Government Act 2001. As a consequence, both the manager of the respondent and thereby the respondent itself, was obliged to perform his added functions in respect of the said programme in adherence to the said programme.

16. Mr. Rodgers S.C. elaborated in great detail on the provisions of the Housing (Traveller Accommodation) Act 1998. As well as mandating the drawing up of an accommodation programme for members of the travelling community, the Act provided such things as public consultation, notice to several relevant bodies. It affords levels of choice to the travelling community with regard to the nature and location of their accommodation so as, in effect, to place them in a specially privileged position. It was the will and intent of the Oireachtas that the accommodation programme, when adopted, would provide the framework within which all travelling families were to be accommodated. From the confines of that policy, neither the respondent nor its manager could depart. It could, of course, frame it in such a manner as it wished, but once framed that was that.

17. How, therefore, did the respondent step out of line? Mr. Rodgers S.C. pointed to p. 5 of the Accommodation Programme. They set out the strategies to be pursued for the provision of accommodation. Under the heading "Permanent Accommodation" the plan identified the following types of permanent accommodation for members of the travelling community:

- Standard Housing in Local Authority Schemes;
- Group housing;
- Serviced sites;
- Combinations of Group Housing/Serviced Sites;
- The purchase of rural houses;
- To facilitate other Social Housing options which are available under "The Plan for Social Housing – the Way Ahead

1997", or may become available in the future.

18. The house at Cullenagh does not fit in with any of those categories, it is a once off house. It is not part of a group housing scheme. It is clearly not standard housing in a local authority scheme. It does not come under any of the categories. A second leg, if I may so describe it, to his argument is that it is not even a rural house. If, for example, the strategy identified urban as well as rural houses then Mr. Rodgers' point could not succeed. But it does not and that puts an end to the matter. The County Manager is not empowered to do what he proposes to do.

19. Even if the house in question could be shoehorned into the sort of property identified at p. 5 of the Accommodation Programme, the house was not in a rural area. No definition of rural was provided. Reference was made to certain statutory provisions unrelated to the Act of 1998. The identifiable population in the area of Cullenagh/Ballina/Killaloe was to such a degree as to indicate urban rather than rural status.

20. Mr. David Kennedy S.C. for the respondent, supported by Mr. Sexton S.C. for the notice parties, advanced a simple argument as to what was urged on behalf of the applicants. Because of the significant needs of the O'Reilly family, it was intended to house them in the exercise of an executive power under the Housing Acts. The family's needs were such that, to borrow a phrase coined by Mr. Rodgers S.C. the Council was bypassing the Traveller Accommodation Programme.

21. Since, it was contended, the Council had been given powers to address questions of specific need in allotting accommodation to the public in general, it would seem absurd and indeed unconstitutional and contrary to the rights of the O'Reilly family under the European Convention on Human Rights to exclude them from the bounty of the exercise of this executive function because of their status as members of the travelling community.

Conclusion

22. An important point of departure in outlining the views of this Court in relation to this case is to be found at s. 1(2) of the Housing (Traveller Accommodation) Act 1998. It declares as follows:-

"The Housing Acts, 1966 to 1997, and this Act, other than sections 26 and 27, may be cited together as the Housing Acts, 1966 to 1998, and shall be construed together as one Act."

23. The long title of the Act, of course, makes clear the intended focus of the 1998 Act, namely the provision for accommodation for members of the travelling community. However, the Act is not to be taken in isolation, but forms part of the purpose of housing legislation and, indeed, Local Government (Planning and Development) Legislation. It is not a "stand alone" Act. What it repeals, it repeals. What it amends, it amends. What it retains, it retains.

24. The respondent is empowered under the provisions of the Housing Act 1966 to provide accommodation for homeless persons (see section 56). The provision of a chalet for a travelling family by Dublin Corporation was held by the Supreme Court to be a sufficient discharge of its obligations under the Housing Act. (See McDonald v. Feely & Ors (Unreported, Supreme Court, 23rd July, 1980).

25. The Housing Act 1988 was the first major legislative effort to regulate the provision of accommodation for members of the travelling community. Section 13 (subsequently amended by s. 29 of the Act of 1998) enabled the local authority in question to provide halting sites. However, the power and duty to house contained in the 1966 Act is not abrogated. It remains untrammelled notwithstanding the mandated programme for traveller accommodation. Thus, this case may be distinguished from that the The East Wicklow Conservation Community Limited v. Wicklow County Council [1996] 3 I.R. 175.

26. Section 8 of the Act of 1988 obliges a local authority to make an estimate of the existing and prospective housing requirements for its functional area. Section 9 mandates the making of an assessment of housing needs for its functional area. Subsection 2 of s. 9 provides as follows:-

"(2) Without prejudice to the generality of subsection (1), a housing authority in making an assessment under this section shall have regard to the need for housing of persons who –

(a) are homeless,

(b) are persons to whom section 13 applies,

(c) are living in accommodation that is unfit for human habitation or is materially unsuitable for their adequate housing,

(d) are living in overcrowded accommodation,

...

(g) are in need of accommodation for medical or compassionate reasons,

...

(i) are disabled or handicapped..."

27. Not surprisingly, Mr. Kennedy S.C. on behalf of the respondent pointed to the foregoing subsections. It is not difficult to see and nor can there be any dispute but that Mr. and Mrs. O'Reilly and their family falls squarely within those subsections quoted. They will be granted a letting under the most stringent terms. There is no evidence that will do other than abide by them. If not, appropriate sanctions can be applied. That they might come within the scheme for travel or accommodation (indeed, it was accepted that they are identifiable in the scheme) does not, in my view, oust such rights

as they possess as citizens to the benefit of the Housing Acts generally. That they should be treated in some way differently from other citizens would not only be erroneous in law but would, in my view, fall foul of the notice parties rights under Article 40.1 of the Constitution which provides:-

"All citizens shall, as human persons, be held equal before the law."

28. I expressly adopt the words of Charleton J. in *Doherty v. South Dublin County Council & Ors* [2007] I.R. 696. At page 717 :-

"It is easier to find a circumstance where a State body is actively infringing on someone's constitutional rights than to define the circumstances under which the State must positively intervene to uphold a right. For instance, if a law were passed, or an administrative measure adopted, providing that members of the Irish Traveller Community could never be housed in communities that were settled, this would be a positive denial of their constitutional right as human persons to be treated equally before the law. The State cannot set out to infringe constitutional rights: but when is it obliged to intervene to uphold them?"

29. In my view, the Council is acting in an executive capacity in proposing to let the house in question. As Laffoy J. says in *Ward & Ors v. South Dublin County Council* [1996] 3 I.R. 195 at p. 203:-

"It is not the function of this Court to direct a local authority as to how it should deploy its resources or as to the manner in which it should prioritise the performance of its various statutory functions. These are matters of policy which are outside the ambit of judicial review. Moreover, in relation to the function at issue here, the provision of accommodation in the form of halting sites for members of the travelling community to whom a housing authority owes a duty under s. 13, while there may be informed opinions as to how the function would be best performed, which differ from the approach being adopted by the housing authority, it is no function of this Court to adjudicate on the merits between the differing points of view."

30. The situation is no different where the form of accommodation is a dwelling house.

31. The County Manager must ask by way of written order in carrying out an executive function. (See s. 151(2) of the Local Government Act 2001). Schedule 15 of the said Act provides that a manager's order would be required for the purchase or sale of land and the letting of a dwelling. (See Articles 4 and 5) This has occurred and will occur in this case as far as the letting is concerned.

32. For the reasons foregoing, I dismiss the application.

33. For the sake of completeness there was a remaining issue, now irrelevant in the light of my finding, that this was not a rural dwelling. Reference was made to certain pieces of legislation, the word rural as being defined. I am of the view the word rural as used in the plan should be interpreted with a degree of elasticity. I do not think it is capable of bearing the rigid interpretation urged upon this Court. It is obvious what a city is and it is obvious what is rural in the pure sense. To a city dweller Cullenagh might represent the acme of rural dwellings. To a person living in the middle of the countryside it may seem quite otherwise. I am of the view that it would be inappropriate to apply rigid and strict statute like interpretation in this instance.

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