

## THE HIGH COURT

[2005 No. 787 J.R.]

**IN THE MATTER OF THE HOUSING ACTS 1966 – 2002  
AND SECTION 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003**

BETWEEN

**NOREEN O'REILLY, WILLIAM O'REILLY, KATHLEEN O'REILLY, ARTHUR CONWAY, NOREEN O'REILLY (A MINOR SUING BY HER MOTHER AND NEXT FRIEND NOREEN O'REILLY), WILLIAM PATRICK O'REILLY (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND NOREEN O'REILLY), MARTIN O'REILLY (A MINOR SUING BY HIS MOTHER AND NEXT NOREEN O'REILLY), KATHLEEN CONWAY (A MINOR SUING BY HER MOTHER AND NEXT FRIEND KATHLEEN O'REILLY), MARGARET CONWAY (A MINOR SUING BY HER MOTHER AND NEXT FRIEND KATHLEEN O'REILLY)**

APPLICANTS

**AND  
LIMERICK COUNTY COUNCIL**

RESPONDENT

**AND  
THE ATTORNEY GENERAL AND HUMAN RIGHTS COMMISSION**

NOTICE PARTIES

Judgment of Mr. Justice John MacMenamin dated the 29th day of March 2006.

1. The first and second named applicants are husband and wife. They have three children who are the fifth, sixth and seventh named applicants. The third named applicant has been involved in a long term relationship with her fiancée the fourth named applicant. There are two children of that relationship who are the eighth and ninth named applicants in these proceedings. For ease of reference in these proceedings I will refer to the first set of applicants as the O'Reillys and the second set of applicants as the Conways.

**The O'Reillys**

2. The O'Reillys are members of the Travelling community. The first named applicant is originally from Castletroy in Limerick. She has lived in a caravan style accommodation all of her life except for a short period which she spent living in an apartment. She lived with her parents on a halting site in Castletroy until she got married to the second named applicant in 1994. The second named applicant is a native of Kilmallock and lived on the halting site in that town until the time of the marriage. Thereafter as there was insufficient room on the halting site the applicants moved to the side of the road and applied for accommodation from the respondent.

3. There are three children of the marriage. The eldest who is the fifth named applicant is called Noreen and she is nine years old. She is attending the National School in Kilmallock. The other two children of the marriage who are the sixth and seventh named applicants are twin boys who were born on 17th June, 2005 a month before the proceedings herein were initiated. The birth was somewhat difficult for the first named applicant as she had to have a caesarean section and she is still suffering from pain and discomfort. She has been advised by her doctor that for a full recovery she should be placed in proper accommodation.

4. There has been an unfortunate history between the applicants and the respondent County Council as regards the provision of accommodation. The O'Reillys state that caravan style accommodation is the only way of life that they know. To the recollection of Mrs. O'Reilly they have filled out three application forms for accommodation with the respondent. The first such application was in 1995 soon after the marriage. They sought halting site accommodation in the Kilmallock area. The second application form was completed in or around 1999 when a Traveller Accommodation Programme was being prepared. The O'Reillys had then been on the side of the road for about five years awaiting the development of a halting site in Kilmallock. They say there was no sign this was ever going to happen. The first and second named applicants have little formal education and did not understand that they should have applied specifically for halting site accommodation on the form. In fact when they were filling out the form they ticked all options other than that for a halting site. The family were not wholly sure what they had applied for as a local community development group filled out the forms for them and never fully discussed with them exactly which options they wanted, although they did sign the forms when they were prepared. They freely acknowledge that they should have been more careful in the way that they dealt with their accommodation application. The respondent employs two social workers in their traveller accommodation section. However the applicants state that they did not have their accommodation options fully explained to them or the importance of filling out the form accurately nor were they ever asked for their preferences even though they had poor literacy skills and little experience of dealing with officialdom. The O'Reillys say that the officials were consistent in saying that there would never be a new halting site in Kilmallock. Consequently they say it would not have made any difference what accommodation option had been indicated in the form as they were always going to be required by the respondent to accept housing.

5. In June 2003 the O'Reillys were finally offered accommodation in Kilmallock. This was almost 8 years after they had first applied. At the time they were under pressure to accept the offer, they say, from officials in Limerick County Council. The applicants say that they were informed that there would never be another halting site in Kilmallock and therefore their only option was to move on to an existing halting site, or accept the apartment which they were been offered, or if those alternative offers were refused, that they would be removed from the side of the road where they were camped in Kilmallock.

6. It must be said that the situation in relation to the existing halting site in Kilmallock was rendered more complicated as a result of other factors. The site itself is a small one in the village. It has been occupied by other members of the O'Reilly family (of which the second named applicant is a member) for upwards of 30 years. The first named applicant states that the site has been "effectively run" by the second named applicant's father Mr. Martin O'Reilly. This has apparently been the situation for upwards of 20 years. On the first day this case was listed for hearing on 8th December, 2005, the court was informed that Mr. Martin O'Reilly objected to the presence of any of the applicants in these proceedings coming on to the site and contends that there is insufficient room on the site for any further families to reside there.

The court was told that the Kilmallock halting site is in the registered name of the respondents. The adjoining open space property immediately to the rear of the site is in the ownership of the Limerick County Vocational Education Committee. The matter was then adjourned on a number of occasions thereafter in order to ascertain whether a practical solution could be found to the issue. Mr. Seamus O'Connor, Senior Social Worker attached to the Housing Department of the respondents made enquiries with the Vocational Education Committee about the possibility of purchasing a strip of land and they indicated that they would consider the matter further.

7. It was also suggested that negotiations should take place between the respondents and Mr. Martin O'Reilly either with a view to seeing whether he would change his viewpoint on admitting the O'Reillys to the site, or alternatively for the purpose of exploring

whether the site could be extended with his co-operation.

8. As a result of contacts which took place between the respondent's legal advisors and those advising Mr. Martin O'Reilly it appears that the latter has adopted his stance that the Kilmallock halting site is a private site held by him and his wife in their name. They state it is not a council halting site and furthermore that they have invested considerable sums of money to build walls around it and to place hard core in certain areas. Apparently previous proceedings were taken against them by the respondent in or about 1994. It is not clear whether those proceedings made any declaration as to the ownership of the site. Mr. Martin O'Reilly has stated that they had no objection to the Council purchasing the adjoining site. However they would not allow any access through their site. The court was been told that fundamentally Mr. Martin O'Reilly and his wife do not wish the first and second applicants and their children to share a site with them. Mr. O'Reilly is not a party to these proceedings and therefore this Court must refrain from expressing any concluded view on this issue.

At hearings on 11th January and 8th February, 2006 the court was informed that the respondent was now considering initiating proceedings seeking declarations as to the ownership of the site against Mr. Martin O'Reilly. Counsel for Mr. Martin O'Reilly appeared, indicated that such proceedings would be strongly resisted and also applied to have copies of all the affidavits in these proceedings served on his client also. As Mr. Martin O'Reilly Senior was not a party to these proceedings the court declined that application. At the resumed hearing on 13th March, 2006, the court was told that proceedings by way of notice of motion against Mr. O'Reilly are being prepared by the respondent and it was intended these will be initiated at the beginning of next term. There are clearly potential areas of conflict of fact and law between the respondent and Martin O'Reilly. It is not clear when such proceedings will be concluded.

The first named applicant says that at the time that she married the second named applicant her husband was obliged to leave the site in Kilmallock and to move to the side of the road. The second named applicant had 17 siblings living on the site at the time, six of whom were married. However the lack of space does not appear to be the only issue in the difficulties which have arisen. The de facto position appears to be that Mr. Martin O'Reilly considers that for whatever motive he is in a position to exercise a veto over who lives on the site, asserts that he himself owns it, and even contests the right of the respondent to come on to the site. In such circumstances it is difficult to conceive that an offer of accommodation to the applicants and their family on that site is in any way a realistic proposition. For the purposes of these proceedings this court must adopt must view that whether for social, personal or legal, reasons the Kilmallock site is not now part of the accommodation stock of the respondent and that for the same reasons or combination thereof it is not presently in the power of the respondent to allocate space thereon. Even earlier, on 13th July, 2005 an approach was made to Mr. Martin O'Reilly to ask whether both families who are the applicants herein and their vehicles could be accommodated on the site. Mr. O'Reilly Senior advised the official of the respondent that this would not be possible as he was trying to get families off the site rather than on to it. For reasons dealt with at paragraph 36 of the judgment it appears that the respondents have been aware of these difficulties for a number of years.

9. The first and second named applicants are concerned with the education of their daughter Noreen (the fifth named applicant) who is attending school in Kilmallock. Noreen has been attending the St. Paul's National School for the past five years. Her attendance is good and consistent. The evidence is that she works hard in school and is also receiving learning support. Her mother enjoys a good relationship with the teachers and meets them regularly. The school principal states that she gets on well with the other children in her class and that a change of school could have the effect of causing upset to the established process of her education.

10. It is the perception of the O'Reillys that while travellers have camped on the Mill Road in Kilmallock for many years it has been the aim of the respondent to remove all members of the travelling community from the side of the road. It is contended that this process has been engaged in without ensuring that travellers have accommodation that is appropriate to their needs. In June 2003 the O'Reillys, were faced with having to leave Kilmallock altogether. They had nowhere else to go. They were concerned for the education of Noreen, and therefore accepted an offer to move into an apartment in Kilmallock. They did not actually move in until the end of August 2003 as they were travelling for most of the summer. The first named applicant states that they now sincerely regret having availed of this offer from the respondent as, even when the offer was accepted, she already apprehended that it would not be appropriate for them. The O'Reillys have lived in the open all their lives. They say living on halting sites with caravans involves a life with fewer boundaries and also involves constant contact with family and neighbours. All the children on the site play together. Many travellers consider that this is a supportive environment to live in, and also feel isolated if placed in housing with no other members of the travelling community nearby and no family network close to them. When the O'Reillys moved into an apartment in Kilmallock they felt an immediate sense of isolation and dislocation. They was no garden or open space. Within three weeks of moving into the apartment Noreen O'Reilly the first named applicant says that her husband felt that the walls were pressing in around him, and that she herself felt claustrophobic. They were conscious that if they returned to the side of the road they faced the risk of a prosecution from the respondent. Her husband actually continued residing at the side of the road at Mill Road near Kilmallock where they had previously lived. After three months of living in the apartment, and being effectively separated from her husband the first named applicant informed the respondent that she would have to leave and rejoin her husband at the side of the road at Mill Road near Kilmallock where they had previously lived. She did so in December 2003. The first named applicant states in affidavit:

"I know it may seem that we are ungrateful after being accommodated by the Respondent, but this is not the case at all. We simply had no choice but to leave the apartment, and I would have hoped that the Council would understand that it is not always easy for Travellers to make the transition into housing and particularly an apartment with no space around it, in the same way as many settled people would find it very difficult to live permanently in a caravan".

11. In any event the question of accommodation would again have become an issue in the light of arrival of the twins in June 2005. Thus the apartment would have been too small for the applicants in a very short space of time. At the time the first named applicant lived in the apartment she was pregnant but unfortunately lost that child in the sixth week of her pregnancy. Since that time the applicant O'Reilly have been unequivocal in any communication with the respondent that their preference is for halting site accommodation. The first named applicant states that the respondent was aware of this even before they moved into the apartment. In the respondents Traveller Accommodation Programme 2005 – 2008 in dealing with the section (Kilmallock) it is stated as follows:

"Two families have applied for halting site accommodation in Kilmallock. These applications will be considered in the context of the existing halting site in Kilmallock. It is the Council's intention to improve the accommodation on this site pending the agreement of the families resident there".

It is uncontested that this paragraph refers to the two families who are the applicants herein.

12. The essential point made by the applicants is that while the Traveller Accommodation Programme is laudable in its stated need for the provision of halting site accommodation, the respondent has no clear objective as to how this need is to be met. The applicants state that the only halting site in Kilmallock has effectively, for the reasons described earlier, been ruled out. Even were the respondents to succeed in their legal proceedings, whenever concluded, it would appear that the intra-familial relationship has

deteriorated to an extent as would rule out the two generations of the O'Reilly family, that is the applicants herein and Martin O'Reilly, father of William and Kathleen O'Reilly, living in close proximity to each other. The applicants' case is that while the respondent has assessed the need for halting site accommodation, they have no proposal to meet the need. They assert that the respondent has a strong inclination in favour of encouraging travellers into settled housing, and have decided that there will never be another halting site anywhere near Kilmallock. There is no evidence of an intention on the part of the respondent to construct any halting site. The applicants point out that the absence of an alternative project is evidenced by the fact that the current relevant housing application form for Limerick County Council does not contain an option for a halting site, while previous ones did.

13. Originally in 1995 the applicants camped on the Mill Road where many travellers lived over the years. The respondent initiated Circuit Court legal proceedings against them under s. 160 of the Planning and Development Act 2000. They sought an enforcement order against them. On receipt of these legal proceedings the O'Reillys sought legal aid and were refused this as the case was not deemed to be eligible for legal aid. They then secured the assistance of a private solicitor. The enforcement proceedings were defended on a technical legal point that is that the limitation period had expired within which time the respondent could bring enforcement proceedings against the encampment. This defence did not succeed. On 24th September, 2004 the applicants were ordered to leave the Mill Road taking their caravans and vehicles with them. A stay was put on the order until early December of that year in order to allow them time to arrange their affairs. The applicants were advised there would be little benefit in appealing the judgment.

14. Thereafter the applicants moved to their present location at Tipperary Road, Deebert in Kilmallock which is about a mile away from the previous campsite on the Mill Road. The applicants have been parked behind the mart in the town since December 2004. Again this was a location where travellers camped in the past although in recent times the respondents had built up a high embankment closing off the space for parking thereby rendering it more difficult of access. The applicants state that since they arrived there they have not been made aware of any complaints about their occupation of the land. They are well off the road. They keep the area spotlessly clean. They can access water nearby. Noreen is able to attend school. There are amenities nearby. There is little traffic on the road except on mart day, when a number of vehicles pass up and down. The main difficulty is caused by the high embankment created by the Council. The first named applicant states that while she is recovering from the operation there some pain because she needs a rope to pull herself up by the side of the embankment.

15. In March 2005 the applicants again received a letter from the solicitor for the respondents warning that they would be prosecuted under the Planning and Development Acts if they did not leave their location on the Tipperary Road. They had nowhere else to go. This time there was no offer of alternative accommodation. Consequently they did not move. At the time the first named applicant was six months pregnant expecting twins and she did not feel able to face another move so soon. In June 2005 the Public Health Nurse working in the area made representations to the respondent asking that they not be moved as the first named applicant was still recovering from the operation.

16. Nonetheless the applicants received a letter from the respondents dated 4th July, 2005 informing them that if they did not move by 9 am on 6th July, 2005 that they would be instituting proceedings. Faced with this situation the applicants sought the assistance of a local community development group who in turn assisted the applicants in obtaining the services of the solicitor acting for them in these proceedings.

17. The O'Reillys say that they are now in an impossible position. The respondents are effectively seeking to evict them but are not offering them any appropriate alternative accommodation (that is halting site accommodation) in the Kilmallock area. They say there is not even the remotest possibility that they would be permitted to enter onto the site occupied by Mr. Martin O'Reilly. They concede that the respondent offered them a house in the Riverview Estate in Kilmallock. However in the light of their previous difficulties with housing they do not consider that they are in a position to accept this offer.

18. The first named applicant is particularly concerned about the present situation because of the fact that her daughter Noreen is attending school. She does not wish her to miss out on the educational opportunities at such an early stage in her life. The O'Reillys have established an effective relationship with the Public Health Nurse who has called every week to ensure that the twins' progress is being maintained.

19. In the course of her affidavit the first named applicant states:

"In brief I feel we have reached the end of the line, it is clear now from the present proceedings pending in the Circuit Court, that the respondent has every intention of forcing us out of Kilmallock, and indeed out of County Limerick altogether."

They consider that they have paid a heavy price for their lack of education and the mistake which they made in ever accepting the apartment which had an address at Radharc na Cille in Kilmallock. All they wish for in the first instance is that they are allowed to stay where they are until such time as appropriate halting site accommodation is provided for themselves and the other applicants. They say that if there were temporary services where they are now it would be adequate for them as they are safe from the road and have a bit of space around them.

### **The Conway Family**

20. The third named applicant has been in a relationship with the fourth named applicant for a number of years and they are engaged to be married. They are, in fact, known as the Conways. The third named applicant is sister to William O'Reilly, the second named applicant herein and is a daughter of Mr. Martin O'Reilly. The fourth named applicant Arthur Conway is also a native of Kilmallock and was brought up in a house in the village. Kathleen O'Reilly-Conway described her family moving onto the piece of waste ground now known as the halting site in Kilmallock some 30 years ago and there they have lived ever since. Apparently as the family grew the campsites spilled over into a field next to a piece of waste ground. Kathleen describes the respondent taking proceedings against her father in 1992 or 1993 relating to occupation of the adjacent field. Apparently these legal proceedings were resolved between the respondent and Mr. Martin O'Reilly. There is some suggestion that the terms might allegedly have involved an agreement from the respondent not to dispute Mr. Martin O'Reilly's ownership of the waste ground. This is a matter however which is outside Kathleen O'Reilly-Conway's own personal knowledge and falls within the realm of the proceedings now being brought by the respondent against Mr. Martin O'Reilly, where such contention will doubtless be contested.

21. The Conways have been living together since 1996. Arthur Conway came to live with Kathleen O'Reilly in a caravan at the side of the road at that time. They have been there ever since that time except for a short period which they spent in a house. Again, as in the case of the first and second named applicants Kathleen O'Reilly says that she had never lived in a house before. She could not remain on what was referred to as "her father's site". They presently have two children namely Margaret who is 7 years also attending Kilmallock National School, and Kathleen who is 4 years and was attending the playschool attached to the National School,

prior to entering junior infants in September 2005.

22. The Conways applied for accommodation from the respondent in or about 1996. At the time they applied for housing their first choice would have been halting site accommodation. Again precisely the same difficulty appears to have arisen as in the case of the O'Reillys. The respondent, at least in the perception of the Conways, adopted the view that a halting site had been constructed. They were not disposed to build another one. The same consequences have followed. The Conways camped on the Mill Road from 1996. When they realised that they would have no choice but to accept housing (in circumstances similar to the first and second named applicant) they asked to be allocated a house in Deebert Park where the houses have gardens and space around them and which is also near the house where the fourth named applicant's father lives. However the respondent had constructed a house on Orr Street near the fourth named applicant's father. This was completed in 2002. When the Conways were offered this house they realised it was unsuitable for them and their two children. Nonetheless they accepted this offer in circumstances where they felt that they would be evicted from the side of the road if they did not move into it. They felt they had no other option. Kathleen O'Reilly-Conway states that despite having access to proper washing and cooking facilities they never really had comfort there. For precisely the same reasons as described by Noreen O'Reilly the Conways felt ill at ease. The backyard was small. It was inadequate to allow the children play. The front door of the house opened straight onto a busy one way street. The stairs presented a challenge and a risk to the children. The house was near to an abattoir from which emanated a foul smell. They asked for a transfer to a house with a garden in the Glenfield Estate in Kilmallock. However nothing ever came of this request.

23. The Conways remained in the house at Orr Street until May 2003. They then realised that the respondent would not provide them with any alternative accommodation. For the same reasons they left the house and joined the other applicants at the Mill Road in Kilmallock. Having been at that location for over a year the respondent issued legal proceedings to have them moved on. These proceedings also initiated to s. 160 of the Planning and Development Act 2000 were taken in June 2004. They came on for hearing on 24th September of that year. The Conways were ordered to remove their dwelling from the Mill Road by 10th December, 2004.

24. After the making of the order, community representatives wrote to the respondent on behalf of the families and sought to resolve the accommodation difficulties. However this proved to be of no avail.

25. On foot of the court order, and what they considered was a threat of imprisonment in the event of non compliance, the Conways moved from the Mill Road in Kilmallock to the Tipperary Road, Deebert Kilmallock on 6th December, 2004. They are in the same location as the O'Reillys who are the other applicants in these proceedings. They consider that they made a mistake in moving into the house in Orr Street and that by moving out of the house the children are being penalised.

26. Proceedings have been initiated against them in relation to the campsite which the applicants have created in the Mill Road. These were issued in the Circuit Court by the respondent on 6th July, 2005. They too now stand adjourned. Kathleen O'Reilly states that one of her greatest fears is that they would not be allowed to remain in Kilmallock which is their home and the only place they have ever lived. She is concerned that the applicants could effectively be "exiled" from their home place and that proceedings might be brought against them anywhere they camped in County Limerick.

### **General Background**

27. In support of the applicants case there is filed an affidavit of Bridget Casey an accommodation worker with the Limerick Travellers Development Group. This organisation among other things works to ensure that travellers have access to good quality accommodation, appropriate to their needs.

28. Ms. Casey states that she has worked with traveller families in Kilmallock over the past number of years along with Ballyhoura Development Limited (a community development enterprise) to establish their accommodation needs. Ms. Casey states that it has been apparent for some time that there is a need for a new halting site to be developed in Kilmallock in order to cope with existing demand for such accommodation and also in order to ensure that travellers have a choice of the type of accommodation which they apply for in the future. Ms. Casey states that her experience through her work is that in areas where there is no available halting site space, and where travellers are not aware that they can apply for that type of accommodation they will opt for housing. While this can be a choice which is successful for some Travellers, particularly those who are brought up in housing, it can also have unfortunate consequences where members of that community cannot adapt to housing having moved from living on the roadside or a halting site. Ms. Casey states that she understands the respondents point of view that it is difficult to manage an accommodation programme where people leave settled accommodation provided for them. However she states that any person working with members of the Travelling community would know that the transition for a family moving from caravan style accommodation is a difficult one. This was made all the more difficult for the O'Reillys when they were allocated a first floor apartment. Ms. Casey considers that this was an inappropriate form of accommodation in which to place this family.

29. Similar considerations apply in relation to the Conway family. Albeit the house was built newly, it took no cognisance of their traveller background. It was a small townhouse, built directly on to the street with no open space and no where for children to play. Such space community created an oppressive atmosphere for a traveller family used to living in caravans in an open space.

30. The applicants albeit because they have left their previous accommodation for the reasons referred to above now have no choice but to live on the side of the road. Ms. Casey states that it is understandable that the respondent may have reservations about accommodating the families again but that what is now occurring which is to remove them from their present encampment with no offer of suitable alternative accommodation, is effectively to remove the families from Kilmallock altogether. Ms. Casey says that this would appear to ignore the duties and functions of the respondent as a housing provider and their particular duty to be aware of travellers' unique position vis-à-vis culturally appropriate accommodation.

31. Ms. Casey adds that the existing halting site in Kilmallock is effectively private. Mr. Martin O'Reilly apparently came to live in Kilmallock in or about 1980. He and his family occupied what was then a piece of waste ground outside the village for a number of years. Ms. Casey refers to the court proceedings which were taken by the respondent against Mr. Martin O'Reilly Senior in the early 1990s and an alleged agreement, the effect of which was that he would become the owner of the piece of waste ground but would have to remove himself from the adjoining land. As indicated earlier it is not the function of this court to deal with evidence or legal issues which more properly appertain to proceedings which may be taken by the respondent against Mr. Martin O'Reilly regarding the halting site of which the respondent is registered owner.

32. Mr. Martin O'Reilly has apparently himself done, or had carried out, work on the site, putting down a hard surface, building a boundary wall, and also maintaining it in a habitable condition. While the site is well maintained it would apparently fall short of the standards required by the Department of Environment Heritage and Local Government. At present the only sanitary facilities on the site are two toilets which were installed by the respondents some time ago. There is an electricity supply and water connection. Otherwise there are no cooking washing or laundry facilities. Ms. Casey states that although the respondent has offered to upgrade

the site, Mr. O'Reilly will not permit them to do so as it is a "private site". Aside from any lack of facilities thereon, the site as presently constituted is in Ms. Casey's view overcrowded. It occupies approximately one half acre of ground. To place two more caravans or trailers with accompanying vehicles would be to create a hazard in terms of fire safety. It would also put pressure on the already limited facilities on the site to a point where they could not cope, and there would be an added health hazard. Because of the need for another halting site in Kilmallock, Ballyhoura Development Ltd made a submission to the respondent in relation to its draft Traveller Accommodation Programme 2005 – 2008. This was based on the empirical evidence that there was a real need for at least one more halting site, or preferably two smaller halting sites to cope with the different family groupings in the area. Ms. Casey states that from her contacts with Mr. Martin O'Reilly, she is aware that a number of his other children, presently single, would like to get married but cannot do so because there is no accommodation for them. It appears that the submission made by the Ballyhoura Development Limited formed no part of the Traveller Accommodation Programme adopted by the respondent in February 2005.

### **The County Development Plan**

33. The County Development Plan for County Limerick 2005 - 2011 was adopted by the respondent on the same day as the Traveller Accommodation Programme for County Limerick 2005 – 2008 that being the 28th February, 2005. In the Plan there are no areas identified for the development of traveller accommodation anywhere in the county of Limerick. The County Development Plan does not contain as an objective the provision of traveller accommodation in Kilmallock. There is no objective for the construction of a halting site by the respondent at that location.

34. However two objectives in the Development Plan refer to traveller accommodation, these being objectives H7 and H11. Inter alia objective H7 states as follows:

"It is a policy of the Council to support the development of housing for the following groups ...

(b) provide appropriate accommodation for Travellers and/or halting sites facilities through the implementation of the Traveller Accommodation Programme ..."

Objective H11 states as follows

"It is the policy of the Limerick County Council to provide appropriate accommodation for indigenous traveller families who requested, and who pursuant to generic Housing legislation and the Housing (Traveller Accommodation) Act 1998 are considered to be in need of accommodation. The policy of the respondent is based on the proposition that an application for accommodation will be assessed and considered in the context of this programme and the respondents scheme of Letting Priorities. Indigenous families are defined as those who originally come from the administrative area of the respondent and have been resident in the area for 12 months or more prior to application. It is necessary that one of the applicants come from the administrative area of the respondent. The policy of the respondent is that where feasible the preferred option requested will be considered but if this is not possible, other accommodation options will be considered and may be offered to individual families. If this is refused by individual families without good reason, their application for accommodation may be given a reduced priority or be closed and they may not be considered for future accommodation".

The respondent states that it will implement this programme based on proper consultation with individual families, members of the public and community based voluntary organisations where appropriate, other statutory agencies, the local traveller consultative committee, the voluntary sector and other relevant bodies. It states that regard will at all times be had to the statutory obligations of the respondent and to the feasibility of recommendations and suggestions made in relation to the implementation of the programme. The respondent stipulates that new applicants must meet the requirements outlined and if applying from the roadside or an unofficial site they must provide evidence that they have pursued other accommodation options. If other options are available as interim solutions the respondent states that it must be satisfied that a family decision to opt for the roadside or an unofficial site is reasonable taking individual circumstances into account. If the respondent is satisfied that the applicants have no other option, an application for a roadside or unofficial site will be approved if the applicants are considered to be in need of assistance or meet with the other qualifying criteria.

35. The policy of the respondent is that priority will be given to the provision of permanent accommodation for indigenous families and that the provision of emergency/temporary services will be considered only in exceptional circumstances. Such services will not be provided if an offer of accommodation is refused, or to families who already have been accommodated or who have the resources to provide their own accommodation.

### **The Traveller Accommodation Programme**

36. With regard to the Kilmallock electoral area the Traveller Accommodation Programme states as follows

"5. (c) Kilmallock Electoral Area

The assessment of need for the Kilmallock electoral area indicates that there are eight families seeking accommodation. Their preferred accommodation options are

Standard local authority housing six families

Halting site accommodation two families

Total eight families

It is proposed that during the course of the 2005 – 2008 Traveller Accommodation Programme, the six families who applied for standard council housing will be allocated same in the Kilmallock/Brurea area.

*Two families have applied for halting site accommodation in Kilmallock. These applications will be considered in the context of the existing halting site in Kilmallock. It is the Council's intention to improve the accommodation on this site pending the agreement of the families resident there. Families who own their properties and who are considered to be in need of assistance with accommodation will be assisted to improve or develop these properties where deemed appropriate."* (Emphasis added).

The true construction and interpretation of these opaque words will be considered from para. 58 to para. 60 of this judgment. However, the guarded phraseology allows for the inference that the respondents have been well aware of the intra-familial difficulty for a number of years, and nevertheless, initiated Circuit Court proceedings against the applicants.

### **The Application for Leave**

37. On 18th July, 2005 McKechnie J. granted ex parte leave to the applicants to apply for an application for judicial review for the following reliefs which will be summarised. The reliefs in question included

1. *Certiorari* quashing the respondents decision to issue planning enforcement proceedings pursuant to s. 160 of the Planning and Development Act 2000;
2. *Mandamus* directing the respondents to provide alternative accommodation for the applicants, or an order directing the respondents to provide the applicants with essential services;
3. An order of *mandamus* directing the respondents to provide suitable alternative accommodation prior to taking any further steps on foot of the decision to issue s. 160 proceedings;
4. A declaration that the decision to issue the s. 160 proceedings in the absence of suitable alternative accommodation represents a breach of the respondents statutory duties qua housing authority under the Housing Acts 1966 – 2002 and in particular s. 13 of the Housing Act, 1988 as amended by s. 29 of the Housing (Traveller Accommodation) Act 1988 to house homeless people and members of the traveller community;
5. A declaration that the decision to issue the s. 160 proceedings represents a breach of the respondents duty pursuant to s. 3 of the European Convention on Human Rights Act 2003, is in violation of the applicants constitutional rights protected under Article 40.3 and 41 and 45 of the Constitution,
6. A declaration that insofar as s. 3 of the Planning and Development Act 2000 includes the habitation of caravans/mobile homes on the roadside pending the provision of suitable alternative accommodation that Act is incompatible with Article 8 of the European Convention on Human Rights;
7. A declaration that insofar as the respondents Traveller Accommodation Programme 2005 – 2008 fails to consider properly the applicants needs it is deficient and in breach of s. 6, 7, 10 and 13 of the Housing (Traveller Accommodation) Act 1998;
8. A declaration that insofar as the respondents development plan fails to provide or meaningfully so to provide for lands to meet the applicants accommodation needs pursuant to s. 10(2)(i) of the Planning Development Act 2000 (as amended) it is deficient.

38. The applicant was given liberty to serve an originating notice of motion together with copies of the grounding Statement and verifying Affidavit and of this order to the respondent and also to the Chief State Solicitor on behalf of the Attorney General and on the Chief Executive of The Human Rights Commission.

39. On 25th July, 2005 a notice was served, pursuant to Order 60A of the Rules of the Superior Courts placing the notice parties herein on notice of the applicants intention to seek a declaration that insofar as s. 3 of the Planning and Development Act 2000 includes the habitation of caravans/mobile homes on the roadside pending the provision of suitable alternative accommodation it is incompatible with Article 8 of the European Convention on Human Rights.

40. While the Attorney General has served a notice of opposition denying incompatibility of the impugned legislation with Article 8 of the European Convention on Human Rights it has been accepted that the court should deal first with the substance of the present application insofar as it relates to the duties of the respondent, and that any involvement of the notice parties on these issues will be left over until a point subsequent to the delivery of the judgment herein on the issues confined to the applicants and the respondent.

### **The Stance of the Respondent**

41. The respondents oppose the reliefs sought on the applicants notice of motion denying there has been a breach of statutory duty, and asserting that they have made provision for the accommodation needs of travellers as an objective in their development plan aforesaid. They deny that there has been a failure to properly assess the accommodation needs of the applicants or to carry out a meaningful assessment of those needs. The respondent asserts that it has put into action the necessary requirements pursuant to s. 16 of the Housing (Traveller Accommodation) Act 1998. They deny that there has been a failure to take into consideration all relevant issues. They assert that the decision to issue the enforcement notice and subsequent proceedings was not unreasonable. They deny that they have by their actions in anyway violated the applicants right to bodily integrity, endanger their health, or subjected them to inhuman or degrading treatment or that there has been a failure to give full and proper recognition of the respondents rights pursuant to Bunreacht na hÉireann and the European Convention on Human Rights Act 2003. The respondents assert that they have made all reasonable efforts to meet their statutory duties to members of the travelling community and in particular the applicants and each of them and that, in the premises, they have acted in discharge of their duties in a rational and even handed manner in the application of a coherent and fair system of consideration of the accommodation needs of the applicants.

### **The Affidavit Evidence**

42. In an affidavit sworn on the 30th September, 2005 Ms. Patricia Phillips Social Worker with the respondents' housing department states that she knows the applicants and is familiar with their circumstances. Ms. Phillips says that the O'Reilly family sought housing accommodation from the respondent and in consultation with them an apartment at Radharc na Cille was identified as being suitable for their needs and provided for them in July 2003. She says that the O'Reillys occupied the apartment intermittently up to November 2003 when the first named applicant informed the respondent had been vacated and that the applicants had returned to live on the roadside. She states that there was no halting site accommodation available to the respondent for allocation at that time and that the O'Reilly family was advised accordingly. With regard to the accommodation, she states that the two bed roomed apartment had been identified by the O'Reilly family as being appropriate and suitable, having been disappointed as a result of previous housing allocations in Kilmallock. Ms. Phillips says that it came as a surprise to officials of the respondent when they were informed that the accommodation was unsuitable and that it had been vacated. She states that up and until that time the O'Reillys had sought housing rather than halting site accommodation. She denies that at any stage was any pressure applied to the O'Reilly family nor were they coerced in any way by inducement or threat to accept the accommodation.

43. With regard to the Conway family, Ms. Phillips states that that family were provided with housing accommodation by the respondent in August, 2002. They occupied the house until the month of July, 2003 when they returned to live in a caravan on the roadside at Mill Road with the O'Reillys. Ms. Phillips asserts that the three bed roomed house had been built by the respondent for the Conway family on lands identified by them as being suitable for their needs and close to the former home of Arthur Conway's grandfather, with whom he lived prior to his marriage, and close to a similar house constructed by the respondent for the father of

the Conway family, Patrick Conway.

44. Ms. Phillips states that the applicants are mistaken when they say that there was an absence of consultation between the applicants and the respondents regarding the accommodation provided for them and that the matter was discussed in some detail on the basis of a long history of dealings between the parties.

45. Ms. Phillips accepts that no halting site accommodation is available to the respondent in Kilmallock. She states that the site "under the ostensible tutelage of Martin O'Reilly" is fully occupied. The respondent, while it has plans to improve and expand that site, has no plans to open or construct another such halting site in the general area of Kilmallock. Ms. Phillips asserts that the Kilmallock site is in the ownership of the respondent which provides all the necessary services thereto. She says that the respondent has identified the applicants as being in need of halting site accommodation and she refers to the applicants herein as being the "two families" who had applied for halting site accommodation in the Kilmallock area at s. 5(c) of the respondent's Traveller Accommodation Programme.

46. Ms. Phillips states that it is the intention of the respondent to take all reasonable steps to implement its stated programme by ultimately accommodating the O'Reilly and Conway families in the respondent's traveller halting site at Kilmallock. She says that when the applicants were so informed they said that the existing halting site, even if improved or extended, would not be suitable because of difficulties that had arisen within the O'Reilly family and Martin O'Reilly aforesaid. The respondent asserts that what the applicants are seeking is a halting site to accommodate themselves exclusively. In a further affidavit sworn on behalf of the respondent, John Considine, Administrative Officer in the respondent's Environment and Building Control Department, outlines the background previously described. He states that the respondents have acted in a practical and reasonable manner in relation to their dealings with the O'Reilly and Conway families. It is stated that due consideration has been given to their health, educational and other needs. He asserts that the proceedings are in part premature, the Circuit Court having yet made no determination on foot of the proceedings which were initiated by the respondent against the applicants herein.

### **The Response of the Applicants**

In response to these affidavits, Ms. Noreen O'Reilly, the first named applicant, says that prior to 2002, there were approximately seven traveller families living on the side of the road in Kilmallock without services. During the following two years, most of the families were offered housing and the O'Reillys were one of the last families left on the side of the road along with the other named applicants herein. Noreen O'Reilly, the first named applicant, was aware that the apartment in question had been offered to a cousin of her husband who had refused it. She says that they were under considerable pressure to move from the side of the road and, in those circumstances only, asked whether the apartment at Radharc na Cilla was available and it was then offered to them. She says that at all stages the family would have preferred to have remained at the side of the road until more suitable accommodation became available. The first named applicant specifically denies the contention that no pressure was put upon them. She says that until the year 2002, when other families living on the side of the road started to be accommodated, the applicants had little contact with the respondent. However, from that point on, they were under constant pressure to move on. She states that before they moved into the apartment they were informed in no uncertain terms by Ms. Phillips and Mr. Seamus O'Connor, a senior social worker with the respondent, that if they did not move into housing they would be forced to move off the side of the road and that the respondent had the power to do so. The first named applicant says that it appeared that the respondent was more anxious to deal with complaints emanating from residents in Kilmallock as to the presence of the camp (despite the absence of any complaints as to its condition) than to respond in any genuine way to their lack of accommodation.

47. On behalf of the Conways, Kathleen O'Reilly-Conway states that she had no significant input into the choice of the house in Orr Street and had no input at all into the development of the house and accepted it under pressure or duress. She says that while the fourth named applicant and herself expressed a wish to be accommodated near her husband's father, there was no further consultation in relation to the house to be provided. She says that in fact the house was offered to three other traveller families, including her sister-in-law Bridget O'Reilly, and at least one settled family before it was ever offered to her family. Other families refused the offer for the same reasons that the Conways ultimately were reluctant to accept it.

### **Summary of Evidence**

48. Each of the applicants point out:

- (1) that it is now acknowledged that the site in Kilmallock is full;
- (2) that it is not available for the occupation of the applicants;
- (3) it is not as a matter of fact part of the accommodation stock of the respondent;
- (4) that while the respondent is well aware of this fact, it refused to admit there is in fact no local authority halting site in Kilmallock;
- (5) that there is no reality to the contention that the applicants will be accommodated on that site and that this is the only site mentioned in the Traveller Accommodation Programme in order to conceal failure on the part of the respondent to provide the necessary halting site accommodation in the village.

49. The applicants specifically deny that they are asking for a halting site only for them and say that there are a number of other persons on the housing list in Kilmallock who would immediately opt for halting site accommodation if this were available. However, they say travellers are obliged to apply for housing as the respondent has consistently maintained that no further halting site will be provided in the area. The applicants also assert that the issuing of Circuit Court proceedings in order to have them moved cannot be regarded as an act which takes into account their needs and their health or the requirements of their children to education, health or family life.

50. While there are some areas in dispute, the following matters are clearly not so. First, that the applicants wish to be located in halting site accommodation. Second, that there are no plans to build a further halting site in the area of Kilmallock. No such areas have been identified for development in the County Development Plan. Third, the current halting site in Kilmallock is not available to accommodate the applicants. Fourth, the respondent's development plan contains as an objective the policy of supporting and developing housing for travellers in an appropriate way through the implementation of the Traveller Accommodation Programme. Fifth, the applicants themselves are specifically mentioned in the programme in the manner described above. Sixth, they are longstanding members of the community of Kilmallock. Two of the applicants are attending the local school. Seventh legal proceedings have been initiated to remove them from their present campsite to a location unspecified.

## The legal issues

51. The factual scenario described gives rise in to the consideration of the following legal issues:

(1) has the respondent qua housing authority and/or planning authority fulfilled its duties as prescribed in the Housing Acts, 1966 to 2004 and the Planning and Development Act, 2000, with regard to the applicants?

(2) if the answer to the first question is no, what are the consequences, both under the Constitution of Ireland and the European Convention on Human Rights Act, 2003 (ECHR).

For the moment, in this part of the proceedings, it is necessary only to deal with the first issue.

52. Prior to 1998 the statutory obligations of a housing authority in relation to traveller accommodation were largely dictated by the provisions of s. 13 of the Housing Act, 1988 (as amended by the Housing (Miscellaneous Provisions) Act, 1992. However, the law in this area was significantly amended as a result of the Housing (Traveller Accommodation) Act, 1998.

## The Housing (Traveller Accommodation) Act, 1998

53. The preamble to the latter Act refers to its principal objective as being to:

"make provision for the accommodation needs of travellers" and the legislation imposes a number of obligations on housing authorities. The first question for determination is to gauge the extent of these duties.

54. Section 7 of the 1998 Act requires a housing authority to adopt an accommodation programme within a specified period and also obliges that authority to specify two matters in the accommodation programme. First, the programme must specify the accommodation needs of travellers. In the case in suit, the respondent's "Traveller Accommodation Programme, 2005 to 2008" has mentioned the accommodation needs of the applicants at s. 5(c) of the programme as referred to earlier. This is confirmed by the affidavit of Patricia Phillips who states that the respondent has identified the applicants as being in need of halting site accommodation. The question of specifications of remedy is considered below.

55. Under s. 13(1) of the Housing Act, 1988, certain obligations were imposed on housing authorities (such as the respondent) to provide for those members of the travelling community who "traditionally pursue or who have pursued a nomadic way of life". Under s. 29(2) of the Act of 1998, it is provided that for persons who traditionally pursue or have pursued a nomadic way of life, housing authorities may provide, improve, manage and control sites for caravans, including sites with limited facilities for the use of such persons otherwise than as their normal place of residence or pending the provision of permanent accommodation under an accommodation programme within the meaning of s. 7 of the Housing Traveller Accommodation Act, 1998 and may carry out any works incidental to such objectives. Under s. 29, sub-s. (7) of the Act, a caravan is defined as any structure designed or adapted for human habitation capable of being moved from one place to another, whether by towing, transport or vehicle trailer, and includes a mobile home but does not include a tent. "Sites with limited facilities" are defined as sites which:

"Having regard to the temporary nature of such sites or the short duration of periods of use, have sufficient water, facilities for solid and liquid waste disposal and hard surface parking area for caravans".

56. Under s. 5 of the Act of 1998 the respondent comes within the description of a "relevant housing authority".

Then Section 6 of the Act of 1998 provides:

"(1) A relevant housing authority when making an assessment under s. 9 of the Act of 1988, shall, in addition to such assessment and at such other times as the Minister may by direction specify, make an assessment of the needs for sites in the functional area concerned ..."

At sub-s. (4) it is provided:

"... Without prejudice to the generality of sub-section (1) a relevant housing authority in making an assessment shall have regard to -

(a) the estimate of travellers referred to in sub-s. (5)

(b) the need for sites with limited facilities referred to in s. 13 of the Act of 1988 (as amended by this Act) in relation to the annual pattern of movement of travellers, otherwise than as their normal place of residence, and

(c) the views, if any, of the local consultative committee concerned.

57. Section 7 deals with the issue of the accommodation programme. Section 7(1) provides:

"A relevant housing authority shall adopt as respects their functional area an accommodation programme not later than the date specified by the Minister, or within twenty-one days of that date as provided under section 13, and shall specify in that accommodation programme the accommodation needs of travellers and the provision of accommodation required to address those needs for the period specified in s. 10(1)."

58. Section 5(c) of the Travellers' Accommodation Programme adopted by the applicant states baldly that the application by the applicants for halting site accommodation in Kilmallock will be considered in the context of the existing halting site in Kilmallock, and that it is the council's intention to improve the accommodation on this site "pending the agreement of the families resident there". The question of the respondent's statutory compliance must now be interpreted in accordance with the evidence. A number of undisputed facts are relevant. For whatever reason Mr. Martin O'Reilly claims a veto on those who may occupy the site. It is quite clear that the applicants have been precluded from such occupation. Mr. O'Reilly Senior's views may be well founded or otherwise. However, it will be noted that he apparently contends that the applicants should not occupy the site even were it extended. In this connection it will be noted that the respondent's tentative project of extension of the site was only very recently considered. It is not in any way advanced. It was pursued only when raised in court. The court has, as yet, received no evidence of any significant or concrete steps having been made in relation to the purchase of extended lands from the Vocational Education Committee. Mr. Martin O'Reilly states that in any case the site is already overcrowded. But more directly, it seems that there may be a personal animus of some type between the applicants and Mr. Martin O'Reilly and his more immediate family. As far back as the year 2002 it was stated that it was the council's intention to improve accommodation on this site. The phrase used, "pending the agreement of the families



resident there" is, as stated earlier, studiously opaque. It is clear, however, that whatever may now be the respondent's stated intention, no steps had been taken by the initiation of the proceedings prior to this case, nor even by the time of their ultimate conclusion on 13th March, 2006. While it is contended on behalf of the respondent that the provisions cited do not impose an obligation to provide accommodation, this is not the point. The statutory obligation which devolves upon the respondent is to *specify* the provision of accommodation required to address the *needs* of persons such as the applicants. The obligations which devolve upon the respondent under s. 7 are not a mere formulaic statement. Nor on any proper interpretation is the duty imposed upon the respondent merely aspirational. The actual evidence adduced even by the respondent is that there is no other halting site accommodation at or near the town of Kilmallock, that the existing halting site is fully occupied and that, while there may be an aspiration to improve or expand the halting site, no actual evidence has been furnished yet to support this assertion. This must be seen in the light of the *de facto* situation where the respondents apparently concede that they are not administering the site, have no control over it, and, in particular, may not specify who may or may not move on to it. The respondent's statement that Mr. Martin O'Reilly Senior has the site under his "ostensible tutelage" is carefully phrased and, it may be thought, long in gestation. It is eloquent in what is left unsaid. There is no espoused intention or objective to provide for an alternative site. Can it be said then that the respondent has specified the provision of accommodation required to address the applicants' needs? In the light of the evidence, regrettably the contrary is the case. Rather than specifying the provision of accommodation required to address the needs of the applicants (and perhaps others) the actual phraseology adopted by the applicant achieves the opposite end, and thereby fails to carry out its statutory purpose. Section 7 of the Act of 1998 must be interpreted with the "needs" of persons in the category of the applicant as the primary starting point. It is in the context of those needs as specified that a statutory duty devolves upon the respondents to specify precisely the provision of accommodation which is required to address the needs in question as identified. The word "specify" means to set down in detail or particularise. Such detail is entirely absent from the Programme. In fact the question of need is not addressed at all, in any real sense.

59. The respondent contends that the applicants, having been given accommodation in accordance with the provisions of the Housing Acts, decided to vacate those properties and go back to live by the roadside. It contends, therefore, that the applicants cannot be considered to be "homeless" for the purposes of the Housing Acts. It is further contended that, while the respondent is obliged to have regard to the needs of the persons such as the applicants in the present proceedings, their priority in accordance with the terms of the Act are not as great as those persons who are homeless. They rely on the statement of Keane J. (as he then was) in the case of *O'Reilly & Ors. V. O'Sullivan and Dun Laoghaire/Rathdown County Council*, (the Supreme Court, Unreported, 26th February, 1997) at p. 23 wherein he states:

"Since the evidence was that all the travellers concerned had been offered, but had not in every case accepted, accommodation by the Council, it follows that they could not properly have been regarded as "homeless persons within the meaning of s. 2 (1988 Act)". The context of this statement will be considered later.

60. But this contention does not address what is a statutory duty which devolves upon the respondent under s. 7 aforesaid. Having regard to the totality of the contents which have been outlined earlier in the Travellers' Accommodation Programme, references to a possibility, or a contingency, or phrased in a generality, or obscurely, do not constitute a fulfilment of the statutory duty which is to specify the provision of accommodation necessary to address the needs of persons in the category of the applicant. Accordingly, the court must hold that there has been a failure on the part of the respondent to comply with its statutory duty under s. 7 of the Act of 1998.

61. It is noteworthy that under s. 8(e) there is a duty placed upon a relevant housing authority to give notice in writing of its intention to draft an accommodation programme or, where appropriate, a draft of an amendment to or a replacement of such accommodation programme. Under this provision, one of the bodies to whom notice of such accommodation programme should be given are "such local community bodies as the relevant housing authority consider appropriate". In this regard the court notes that there is apparently no reference to any submission which was made to the respondent by Ballyhoura Development Ltd relating to the needs of the applicants in the consideration and devising of the Programme.

Under s. 10(2) of the Act of 1998 it is provided:

"In preparing an accommodation programme, or a replacement of it, the relevant housing authority shall –

(a) include the most recent assessment made by that relevant housing authority under section 6 and any particulars concerning the accommodation needs of travellers in assessments made under section 9 of the Act of 1988."

62. At section 10(2)(e) it is provided that in the preparation of an accommodation programme there shall:

"(e) include measures for implementation by the relevant housing authority concerned or, as the case may be any other housing authority in relation to –

(i) the provisions of the range of accommodation required to meet accommodation needs which have been identified."

63. This statutory provision places in sharper focus the obligations which have been identified under s. 7(1) of the Act. On a consideration of the programme it is not possible to find any measures for the implementation by the respondent of the range of accommodation required to meet the needs even had they been specified. The statement contained at s. 5(c) of the Travellers' Accommodation Programme (*para. 36 of the judgment*) cannot be regarded in any significant way as involving implementation measures, or indeed any identified measures or all. What it contains is simply a reference to an intention to carry out somewhat vague steps at an unspecified time in the future based on a condition the scope of which is uncertain. It follows from the finding made in relation to s. 7(1), that a *fortiori* there has been a failure of duty under s. 10(2) of the Act of 1998. This programme was devised in 2002. Thus it cannot even be said that its authors had in mind any of the events which occurred in the years 2003 to 2005.

The intent of the Oireachtas as outlined in the preamble to the Act is made further clear by the provisions of s. 16 of the Act of 1998. At subs. (1) of that section it is provided:

"(1) A relevant housing authority shall, in securing the implementation of an accommodation programme, or an amendment to or replacement of an accommodation programme take *any reasonable* steps as necessary for the purpose of such implementation. ..." (emphasis added)

At subs. (3) it is provided:

"(3) A housing authority, other than a relevant housing authority, shall take such steps as are necessary for the implementation of proposals for the functional area of that housing authority which have been specified in an accommodation programme or in amendment to or replacement of it, adopted by the relevant housing authority or under s. 14 for the functional area of that relevant housing authority within which such housing authority is situate."

And at subs. (4)

"(4) A housing authority, other than a relevant housing authority, shall in the performance of a function concerning the provision of accommodation for travellers, have regard to the provisions of the accommodation programme, or an amendment to or a replacement of it, adopted by the relevant housing authority or under s. 14 for the functional area of that relevant housing authority within which such housing authority is situate."

In summary therefore the consideration of these three sections together impose the following duties

- (a) the identification of needs
- (b) the specification of measures for the provision of accommodation
- (c) the measures for implementation and the provision of the range of accommodation required to meet the needs are to be identified having regard to
- (d) (as provided for by s. 10(3)), the distinct needs and family circumstances of travellers and
- (e) the need to address such needs other than as to their normal place of residence and having regard to their annual patterns of movement, and
- (f) pursuant to s. 16 such authority in securing the implementation of such accommodation programme must take any reasonable steps as are necessary for the purpose of such implementation.

While progress may have been achieved elsewhere in the county, unfortunately none of these statutory requirements have been fulfilled in the instant cases.

#### **The Planning and Development Act, 2000**

64. It is necessary now to turn to the provisions of the Planning and Development Act 2000. Pursuant to s. 10(2)(i) of that Act the respondent is placed under an express duty to provide in its development plan objectives for the provision of accommodation for travellers and in particular

"(i) the provision of accommodation for travellers, and the use of particular areas for that purpose."

The statutory obligation to include these objectives in a Development Plan was first introduced under the aegis of the Act of 1998. This was in response to contentions suggesting that, in the absence of reference to such issues in the Development Plan, the development of land by local authority as a halting site would amount to a material contravention of the Development Plan, contrary to planning legislation (see *Roughan v. Clare County Council*, Unreported, Barron J. 18th December, 1996; *Wicklow Heritage Trust Limited v. Wicklow County Council*, Unreported McGuinness J. 5th February, 1998).

65. On its face, the Limerick County Development Plan 2005 – 2011 does not include any objectives for the use of particular areas for the purpose of provision of traveller accommodation. Furthermore as regards the applicants herein, there is no area in Kilmallock which is identified for use of traveller accommodation development, either by way of improving and expanding the existing halting site or by way of constructing another halting site.

It is clear that this duty too is an express one and is mandatory in nature. There has been a failure of duty on the part of the respondent on this issue also.

#### **The Housing Act, 1988: Decided Authorities**

66. It is now necessary to turn to the provisions of s. 13 of the Housing Act 1988 and to certain decisions of the Superior Courts in relation thereto.

67. Under s. 2 of that Act it is stated that a person shall be regarded by a housing authority as being "homeless" for the purposes of the Act if

"(a) there is no accommodation available which, in the opinion of the authority, he, together with any other person who normally resides with him or who might reasonably be expected to reside with him, can reasonably occupy or remain in occupation of ..."

68. Under s. 9 of the Act a duty is imposed on housing authorities to carry out an assessment of the needs for the provision by the authority of adequate and suitable housing accommodation for persons whom the authority has reason to believe are likely to require accommodation from the authority and who in the opinion of the authority are in need of such accommodation and are unable to provide it from their resources. Under s. 9(2) it is provided

"without prejudice to the generality of subs. (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 s. 13 applies, (emphasis added)
- (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,

(e) are sharing accommodation with another person or persons and who, in the opinion of the housing authority, have a reasonable requirement for separate accommodation

(f) are young persons leaving institutional care or without family accommodation

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

(h) are elderly

(i) are disabled or handicapped or

(j) are in the opinion of the housing authority not reasonably able to meet the cost of the accommodation which they are occupying or to obtain suitable alternative accommodation."

It is clear from that each category set out in this subsection is to be read disjunctively. This can be seen first from the fact that certain categories of persons identified therein clearly are distinct and exclusive from other such categories of person contained within the said subsection. Second, the fact that each of these categories is to be read disjunctively is illustrated by the usage of the word "or" between subs. (i) and (j).

Under s. 13 of the Act it is provided;

"(1) this section applies to persons belonging to the class of persons who traditionally pursue or have pursued a nomadic way of life."

However s. 13(2) of the Act of 1988 was substituted by s. 29 of the Act of 1998 recited earlier so that it now provides

"(2) a housing authority may provide, improve, manage and control sites for caravans used by persons to whom this section applies, *including sites with limited facilities for the use by such persons otherwise than as their normal place of residence or pending the provision of permanent accommodation under an accommodation programme within the meaning of s. 7 of the Housing (Traveller Accommodation) Act 1998*, and may carry out any works incidental to such provision, improvement, management or control including the provision of services for such sites". (Emphasis added).

The portion of the subsection in italics identifies the amendment effected by s. 29 in the 1998 Act.

69. The question which arises then is whether the term "may provide" in the Act of 1998 is mandatory or permissive. Decided authority is clear on this issue, even in the context of s. 13, both prior to amendment by the Act of 1998 and subsequent thereto.

70. In *Ward v. Dublin South County Council* [1996] 3 I.R. 195, at p. 203, Laffoy J. stated in relation to the unamended interpretation of s. 13 of the 1988 Act:

"Each of the applicants has sought declaratory relief in the same terms designed to define the duty of the respondent, as housing authority to him or her as a member of the traveller community. In its statement of opposition on each of the applications the respondent has denied that s. 13 of the Housing Act 1988, imposes any duty on the respondent to provide sites for caravans used by persons to whom the section applies. *Moreover at the hearing of the application it was submitted on behalf of the respondent that s. 13 is permissive but not mandatory. Having regard to the existence of four clear decisions this Court as to the effect of s. 13 to the contrary one of which affected the respondent, the respondents stance, which apparently is not merely a pleading posture, is wholly incomprehensible and unsustainable*"

Clearly the interpretation of Laffoy J. would apply equally in the context of s. 29 of the 1998 Act which substitutes s. 13(2) of the Act of 1988. Laffoy J. went on to identify and summarise the four decisions from p. 199 of the report onwards.

71. The first of the four decisions was that of Barron J. in the *University of Limerick v. Ryan* (Unreported, High Court, Barron J. 21st February, 1991). In that judgment Barron J. having referred to the decision of the Supreme Court in *McDonnell v. Dublin County Council* (Unreported, Supreme Court, 23rd July, 1980) and having considered the provisions of ss. 8 to 13 inclusive of the Act of 1988 went on to state as follows at p. 28 of the judgment.

"The question to be answered is whether the enactment of s. 13 imposes a duty to provide such caravan sites or merely empowers the council to do so. As a matter of construction it may be argued that since s. 8, 9 and 11 do not include the need for caravan sites, so the obligation imposed upon the council by s. 13 must be different. I do not accept that. There is no distinction in principle between the manner in which the powers to provide dwellings under s. 56 subs. (1) of the Act of 1966 as framed and that under which the power to provide caravan sites under s. 13(2) of the Act of 1988 is framed. Both appear to give a discretion, but this is a discretion which must in appropriate circumstances be exercised."

Continuing Barron J. stated:

"The position of a traveller family which becomes entitled to be provided with a dwelling must be considered. It is uncontested that such a family must be offered a dwelling. If this is refused because the family belongs to the class of persons who traditionally pursue or have pursued a nomadic way of life, does this mean that the council now has a discretion whether or not to provide that family with a caravan site. The answer to the question is no. It would not be a proper construction to be placed upon the relevant provisions of the Act. *Section 13 must be taken to intend that the obligation of the council to provide for housing needs extends in the case of those to whom s. 13 applies to the permission not of dwellings but of caravan sites.*"

That judge continued

"It is I think significant that s. 56, subs. (2) of the Act of 1966 is to apply to serviced halting sites as it does to dwellings. In my view s. 13 imposes on the local authority an obligation to provide serviced halting sites to those who require them instead of conventional dwellings in the same way as s. 56 subs. (1) requires them to provide the latter. Such obligation is, of course, subject to all the provisions which limit the obligations of the housing authority under s. 56 of the Act of 1966. The section does, however, mean that the housing authority cannot meet its statutory obligations by offering only a conventional dwelling to travellers. It must bring into force the estimate, assessment and scheme respectively required

by ss. 8, 9 and 11. If in accordance with the result of these matters the housing authority has obligations in accordance with its resources for persons who are travellers, then those obligations must be fulfilled. In the case of those persons to whom s. 13 applies and who did not wish to be provided with dwellings, the obligation must be fulfilled by the provision of caravan sites.

Barron J. concluded

"As a matter of construction of s. 13, it seems to me that the statutory obligation to provide a caravan site for travellers is identical to the statutory obligation to provide dwellings for those of the settled community. The only difference in the obligation lies in the nature of the housing to be provided. *Whether the person in need is a traveller or a member of the settled community, once the duty exists it must be performed. In the one case it is preformed by providing a caravan site; in the other by providing conventional housing. I refer only to the position of those travellers who live permanently in a particular area and whose need for a caravan site is as a permanent home. The provision of a temporary halting site or sites is a different matter and does not arise in the present case.*"

Laffoy J. in Ward commented in relation to the observations of Barron J:

"The foregoing is such a clear statement of the effect of s. 13, that in my view, it will be otiose to attempt to elaborate on it. The only comment which I think is necessary in the context of the instant application is that I believe that, by the expression "temporary halting site" in the last sentence, Barron J. meant a halting site for transient travellers". The construction placed upon s. 13 by Barron J. meant a halting site for transient travellers". The construction placed upon s. 13 by Barron J. in the *University of Limerick v. Ryan* was expressly accepted by Costello J. (as he then was) in *O'Brien v. Wicklow County Council* (Unreported, High Court, Costello J. 10th June, 1994)."

72. In *County Meath VEC v. Joyce* [1994] 2 ILRM 210 Flood J. also came to the conclusion that s. 13 imposed a duty on a housing authority. At p. 219 of the judgment he stated:

"In my opinion the County Council as housing authority have a duty to perform their functions under the Housing Acts in a rational and reasonable manner and to provide accommodation for persons defined as homeless in the Act of 1988 which in my opinion undoubtedly includes the travellers on this site. The obligation on the County Council as housing authority is under the statute and obligation which arises in the precedence currently ascribed to the travelling community in the scheme of priorities under s. 9 and 11 of the Act of 1988 in the first instance, but as the Supreme Court pointed out in *McNamee v. Buncrana UDC* "that irrespective of whatever scheme of priorities may from time to time be in operation each housing authority must have regard to those who in fact at any particular time or in the functional area and are in need of housing". By virtue of the provisions of s. 13 this phrase is applicable to and includes the travelling community".

73. The final decision identified quoted and relied on by Laffoy J. was that of Barron J. in *Mongan v. South Dublin County Council* (Unreported, High Court, Barron J., 31st July, 1995). The applicants had been served with notice under s. 10 of the Act of 1992 directing them to move their caravans to the respondents temporary halting site. In his judgment Barron J. reiterated that s. 13 of the Act of 1988 imposes an obligation on a housing authority to provide halting sites for travellers, but it is not an absolute duty. It is a duty to provide for those who were assessed under s. 9 subs. (1) of the Act of 1988 as being homeless. In his judgment that judge specifically addressed the question of the level of services to be provided under s. 13 and stated as follows at p. 2 thereof:

"There is nothing in those statutory provisions which suggests that the level of services to be provided with halting sites should be any less than the level of services to be provided with homes. In other words they have to receive permanent sites for their caravans in the same way as others receive houses. The quality of service available at these sites must be the same as the quality of those services for those whom houses are provided".

74. In Ward at p. 209 Laffoy J. commented on the effect of these judgments:

"As is clear from the decisions of this court in *University of Limerick v. Ryan*, *O'Brien v. Wicklow County Council* and *County Meath VEC v. Joyce*, this court will intervene and provide relief by way of mandatory injunction where inactivity on the part of a housing authority in relation to its obligations under s. 13 of the Act of 1988 is such to constitute a breach of that housing authority statutory duty".

75. In *Ward* Laffoy J. granted an order prohibiting the County Council from taking any further steps pursuant to the notice under s. 10 of the Housing Act (Miscellaneous Provisions) Act 1992. But in *Mongan* Barron J. refused to direct that the travellers be moved to an alternative but inadequate site. In the instant case no alternative site at all has been identified or specified in accordance with the applicants statutory duty as identified earlier.

76. In later the case of *O'Donoghue v. Limerick Corporation* [2003] 4 I.R. 93 the applicants sought a declaration that the respondent was statutorily obliged to provide "suitable accommodation namely a properly serviced halting site accommodation" in circumstances very similar to those of the applicants herein. They also sought an injunction requiring the respondent to assess the needs of the applicants and to provide a halting site for them. At p. 105 Herbert J. stated that no evidence was offered or argument advanced at the hearing of the application that the applicants needs for accommodation in the respondents area had not been established or that they were not entitled to have this need addressed as a matter of urgent priority. The affidavit evidence indicated the applicants were in an emergency situation, i.e. they were a family with four young children living with no services whatsoever at the side of a public road or street for over two months as of the date of the most recent assessment of needs prior to the application to court. At p. 109 Herbert J. concluded:

"The court cannot accept that it was rational or fair for the respondent, in effect, to suspend dealing with the immediate and urgent accommodation needs of the applicants while it endeavoured to grapple on a middle to long term basis with this problem, either generally or specifically as regards the Long pavement site. While I accept the bona fides of the respondents expressed intention to resolve this problem under the accommodation programme for travellers, adopted by it on 13th March, 2000, in my judgment it was neither fair nor reasonable and indeed defeated the whole purpose of s. 23 of the Act of 1998 that nothing whatever, even by way of an objectively reasonable temporary measure, was done to meet the critical need of the applicants for accommodation pending the eventual implementation by the respondent of its plans for the period of 2000 to 2004."

Each of those observations is apposite and relevant in the instant case.

It was not rational or fair nor was it in compliance with s. 13(2) of the Act as amended for the respondent to suspend delivery of the immediate and urgent accommodation needs of the applicants herein. It may be that the respondent is now beginning to grapple with the long existent problems in this case but no evidence has been adduced of any temporary measures, objectively reasonable or otherwise, to address the critical need of the applicants. It is not a rational interpretation or implementation of a statutory duty imposed by the Oireachtas to identify long term, unperformed and unattained objectives or aspirations as a reason for failing to implement short term, feasible and attainable means of compliance with s. 13(2) of the Act. To pursue this course is to use an unachieved end to justify inaction on an achievable means. That is the very essence of irrationality.

77. The respondents to these proceedings state that the court should be reluctant to make orders in respect of persons who have been offered taken and availed of accommodation and then returned to the roadside in circumstances where, "through their own initiative", they have ended up living in unacceptable conditions. They add that the applicants now seek in effect that the court should direct the respondents to provide them with halting sites. They contend that the court should be slow to make such a direction bearing in mind the decision of the High Court in *Ward* where at

p. 203 Laffoy J. stated:

"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 best be 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."

However in the sentence immediately prior to that quotation Laffoy J. stated:

*"On the evidence, I am satisfied that the respondent is currently taking steps to fulfil his statutory obligations under s. 13 to the member of the travelling community to whom it owes such obligations."*

There is no evidence to the same effect in the instant case as to the applicants, persons to whom s. 9(2) (b) of the Act of 1988 applies as members of the travelling community.

78. The respondent has made reference to part of the decision of the Supreme Court in *O'Reilly and Others v. O'Sullivan and Dun Laoghaire County Council* 26th February, 1997. In the course of that judgment Keane J. stated at p. 8:

"That however is not the only difficulty arising out of the use by the manager of his powers in this case. It is clear that the families on the Ballyogan Road site and other families on the road site in the administrative area were regarded as "homeless persons" within the meaning of s. 2 of the 1988 Act. Since the evidence was that all the travellers concerned had been offered, but had not in every case accepted, accommodation by the Council it follows that they could not properly have been regarded as "homeless persons" within the meaning of s. 2, i.e. persons for whom "there is no accommodation available which in the opinion of the authority (they) ... can reasonably be occupy ...".

"Section 13 of the 1988 Act provides that

"(1) this section applies to persons belonging to the class of persons who traditionally pursue or have pursued a nomadic way of life."

"(2) a housing authority may provide improve manage and control sites for caravans used by persons to whom this section applies ..."

Section 9(2) of the same Act requires a housing authority in making an assessment of the housing needs in their area to have regard to the need for housing of persons who –

"(a) are homeless

(b) are persons to whom s. 13 applies ..."

It is thus clear that a housing authority such as the Council in the present case, are obliged to have regard to the needs, not merely of those who are "homeless" within the meaning of s. 2 of the Act, but also those in the travelling community who are living in unacceptable conditions but do not wish to abandon their traditional way of life".

It is clear therefore that the decision in *O'Reilly* insofar as material turned on the question of the utilisation of emergency powers in the context of persons who were defined as "homeless". A distinct statutory situation arises in the consideration of persons who are members of the travelling community. As was pointed out by Keane J:

"The manager was accordingly entitled to provide a halting site at this location for those members of the travelling community who were not 'homeless' within the meaning of s. 2 but who did not wish to be accommodated in local authority housing. However as already noted in the course of the final paragraph of the senior administrative officers report on which his order was based it was expressly stated that

"The six families on the site and those other families on the road side in the county without basic facilities are homeless persons within the meaning of s. 2 of the Housing Act 1988 and ... there is an urgent need to provide them with accommodation ...".

It was in that context that the Supreme Court treated the order made in *O'Sullivan* as *ultra vires*, in that the evidence was that the persons concerned were not, as properly defined, "homeless persons" within the meaning of s. 2 and, if that was the basis upon which the halting site was established it was an unlawful use of the power under s. 13 of the Act. Clearly however different considerations arise in relation to persons to whom s. 13 applies, that is *qua* members of the Travelling community.

79. There remains one other issue. The respondent says that the court should be slow to grant relief in circumstances where, by their

own choice the applicants have resumed habitation in unacceptable conditions. The court rejects this assertion. First the evidence which is uncontested demonstrates that the applicants are persons of little formal education. Second it flows from the first premise that they should, and ought to have been fully and properly advised in relation to their housing requirements. The evidence does not disclose that they were advised in this way. This is of particular importance in the light of the fact that, on the evidence it is not infrequent that persons in the category of the applicants are unable to sustain living in settled accommodation especially accommodation which the evidence shows was not in fact well suited for their needs and not specifically designed or identified with their requirements in mind. In assessing the evidence the court will proceed on the basis of that adduced by the applicants regarding the circumstances in which they commenced residing in settled accommodation. In so holding this is far from concluding that the applicants were "coerced" in any classical legal sense of the term. However having regard to their particular circumstances and conditions it cannot be said that the choice which they made came within the category of a free or fully informed consent. Certainly the applicants did not act unreasonably merely by virtue of their considering that they were ill suited for settled accommodation. The factual position must be seen in the context of the desire, expressed by the applicants to be accommodated now in a halting site in or near Kilmallock. This does not in anyway appear to be an unreasonable position to adopt. It may be one shared by other members of the Travelling community there. Finally the position must be seen from the point of the respondents stated policies and objectives in the light of the actual position and the respondent's statutory duties. The position adopted is neither a rational nor proportionate implementation either of the statutory duties which have devolved upon them or of the objectives which should have been complied with in the fulfilment of their statutory duties as described. In particular it is not a rational implementation of statutory duty to cite a long term aspiration as a basis for not dealing with the more immediate needs and requirements of the applicants as they are now located and the conditions under which they are constrained to live.

80. The court will hear counsel on the terms of such orders as are now to be made.