Neutral Citation Number: [2008] IEHC 242

THE HIGH COURT

Record Number: 2007 No. 465 JR

BETWEEN

VERA DOOLEY, THOMAS DOOLEY, THOMAS DOOLEY JUNIOR, A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, VERA DOOLEY, PATRICK DOOLEY, A MINOR SUING BY HER MOTHER AND NEXT FRIEND, VERA DOOLEY

APPLICANT

AND

KILLARNEY TOWN COUNCIL AND KERRY COUNTY COUNCIL

RESPONDENTS

Judgment of Mr Justice Michael Peart delivered on the 15th day of July 2008

1. By order of the High Court (McKechnie J.) dated 10th May 2007, leave was granted to seek certain reliefs as set forth in the said order. Those reliefs are as follows:

> 1. A declaration that the respondents have a statutory obligation under the Housing Act 1966 -- 2002 to provide suitable accommodation to the applicants, and that by decision dated 19th October 2004 the first named respondent assessed the applicants as requiring local authority housing, which said assessment the respondents are under a statutory duty to perform.
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> 2. A declaration that the temporary housing provided by the respondents to the applicants in October 2004 at Deerpark Halting Site in Killarney, in which the applicants have since had to reside, is not sufficient performance of the respondents' statutory duty to provide the applicants with permanent housing.
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> 3. Further to 2, a declaration that the applicants cannot reasonably continue to occupy the chalet at Deerpark Halting Site in Killarney which the first named respondent provided for them as a temporary measure in October 2004, and which is under the management and control of the second-named respondent.
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> 4. An order of Mandamus requiring the respondent to perform their statutory duty to provide the applicants with a permanent house and to comply with the first named respondent's assessment dated 20th March 2006 that the applicants qualified for a three bedroomed house, and the second-named respondent's Traveller Accommodation Programme 2005 -- 2008.
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> 5. A declaration that the respondents have acted in breach of the applicants' right to constitutional justice and fair procedures in failing to provide the applicants with information as to when they can expect to be allocated permanent housing and in failing to provide the applicants with information as to the respondents' compliance with their own internal programmes and guidelines in respect of the provision and allocation of housing.
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> 6. An order of Mandamus requiring the first named respondent to provide the applicants with an updated copy of all documents and correspondence that it has on file in respect of the applicants, as requested by the applicants under the Freedom of Information Act .
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> 7. A Declaration that the respondents are under a duty to provide equality of treatment between members of the Traveller Community and the settled community in the provision of housing in "bricks and mortar" where that is their preferred choice.
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> 8. A Declaration that the respondents have failed to comply with a duty to provide equality of treatment in the provision of housing in "bricks and mortar" because the respondents have treated the applicants differently to members of the settled community by placing the applicants in temporary halting site accommodation.
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> 9. An order of Mandamus requiring the respondents to process the applicants' application for housing in a manner that complies with their duty to provide equality of treatment between members of the Travelling Community and the settled community.
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> 10. A declaration that the failure of the respondents to provide the applicants with adequate housing is in breach of the applicants' rights under Articles 3 and 8 of the European Convention on Human Rights, and in breach of the respondents' duties under section 3 of the European Convention on Human Rights Act, 2003.
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> 11. A Declaration that the respondents have unlawfully discriminated against the applicants in breach of the Constitution (Articles 3 and 8) when read in conjunction with Article 14 of the European Convention on Human Rights, and section 3 of the European Convention on Human Rights Act, 2003.
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> 12. Such further or other relief as to this Honourable Court shall seem meet.
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> 13. An order providing for costs.

2. The first and second named applicants ("the applicants") who are members of the Traveller Community were married on 20th December 2002, and resided first of all with the parents of the first named applicant in Killarney. However at that time six of the first named applicant's siblings also resided there and it was therefore deemed to be overcrowded. The previous August they had commenced living there together, and say that they applied to the first named respondent ("the Town Council") for accommodation, although it appears from the affidavit of John Breen sworn on the 8th November 2007 that the Town Council file does not record this application.

3. While they resided with her parents, she gave birth to their first child in November 2003 and a second child in October 2004. The first named applicant states however that while she was pregnant with her second child she and her husband went to the Town Council and explained their need for housing. They were asked to complete a form declaring themselves as homeless. That form was completed on 13th July 2004 and returned to the Town Council, explaining therein that as members of the Traveller Community they were unable to obtain private rented accommodation. On that date they also completed a Housing Service Application Form. This application was acknowledged by the Town Council by letter dated 14th July 2004. She has exhibited a memo from the Town Council

file in which Dan O'Leary of that body comments that they are living in conditions that were very overcrowded, and recommends to the Housing Administration section that "*this couple would accept a house anywhere in Killarney or a bay in the halting site would be an option also*". The first named applicant states that they never indicated that a bay in a halting state was acceptable on any permanent basis, but only as a way of relieving their situation on a temporary basis, and that what they wanted was a house.

4. In any event it appears that by letter dated 19th October 2004 the Town Council informed the applicants that they had been approved for local authority housing on account of their circumstances and that their application would be "*progressed in due course subject to the Local Authorities Scheme for Letting Priorities for Housing and the availability of houses for allocation in the area of [their] choice*". However, Mr Breen in his affidavit states that the accommodation specified in the recommendation of Dan O'Leary dated 19th October 2004 "*is not short term, emergency accommodation*".

5. After that date they received an offer of halting bay accommodation at the Deerpark halting site in Killarney ("Deerpark") sometime towards the end of October 2004. In support of the relief claimed in relation to discrimination as members of the Traveller Community, the first named applicant states that the Town Council made this offer solely on the basis that they are members of that community and would never make such an offer to a member of the settled community. She goes on to state that they accepted this offer of halting bay accommodation only as a temporary measure, since it was a chalet consisting only of a kitchen, sitting-room, bathroom and one bedroom, all of which was too small for her, her husband and their two children. She states also that even though she is proud of her traveller roots she wishes to live in a house. Her evidence has been that her own family (as opposed to her husband's family) are settled travellers and that she, unlike her husband, had never lived in a halting site. However, Mr Breen avers that this offer was not on the basis that it was a temporary solution to the applicants' situation, and arose from Mr O'Leary's recommendation.

6. There is clearly an issue arising as to whether the applicants accepted the offer of halting site accommodation as a permanent solution to their situation, or whether they accepted this offer of accommodation only as a temporary measure until such time as a house was available for allocation to them.

7. Mr Breen denies that there is any discrimination in the manner in which this accommodation was offered to the applicants, and that it was the only long-term solution available at that time. He also states that if the applicants had turned down that accommodation, there were other families looking to be accommodated at that Deerpark site, and that the applicants would have had to await an allocation of housing, and, in the interim, have had in common with other housing applicants, to have sourced private rented accommodation.

8. On 21st February 2005 the applicants completed a housing application form, and in this form they specifically stated that they were not applying for "Traveller accommodation". This is confirmed in a copy of that form which has been exhibited in her grounding affidavit.

9. By the date of swearing of that affidavit on the 27th April 2007 no offer of permanent housing had been made by the Town Council, and she has exhibited a memo dated 20th March 2006 from the Town Council file in which Dan O'Leary states firstly that the applicants have been living "*in a good demountable unit for the past 2 years*", that the applicants would accept a house anywhere in Killarney and that they "*qualified for 3 bedroomed housing on financial grounds*". The first named applicant disputes that this unit was a good unit and states that the chalet is wholly unfit for them and their two children, and that it was at that stage already twenty one years old, and is constructed of flimsy plasterboard which has become degraded over the years. She describes the kitchen area as infested with wood lice and that there have been constant plumbing problems which have caused the floor of the chalet to become rotten, and that the chalet was damp and draughty. She believes also that the existence of a solid fuel stove in the chalet constitutes a fire hazard, especially since there is only one door out of the chalet, and also that the windows are too small to enable a person to exit through. Mr Breen on the other hand avers that when the applicants moved into this chalet it was in perfect condition and fit for habitation, and similar to other such chalets on this site.

10. The applicants believe that the only reason that they have not been given housing by the Town Council is that they are members of the Traveller Community, and states that she is aware that there are a number of council houses in Killarney which are boarded up and vacant, and that any one of these would be suitable for them. She goes on to state that the chalet accommodation is entirely unsuitable for them especially now that their children are getting older, and they are all required to sleep in the same bed, depriving herself and her husband of any marital privacy.

11. Mr Breen in his said affidavit has stated that on some date after 21st February 2005, Mr O'Leary offered the applicants a further demountable two bedroom unit as an extension to and therefore in addition to their existing one bedroom unit, but that this offer was at that time rejected. The applicants deny that they were made such an offer at that time.

12. It was in March 2006 that Mr O'Leary then reassessed the applicants' needs and made a recommendation that the applicants be allocated a three bedroom house. However, Mr Breen states that although that recommendation was made, the actual decision to allocate such a house is one to be made by Mr Breen as the Director of Services with responsibility for housing in the functional area concerned. That decision, he states, is one based on the availability of housing at the time, and "*on an assessment of those who have the greatest need*", rather than on the basis of the length of time that any applicant has been on the housing list. It is for this reason that it is not possible for the respondents to give any indication as to precisely when any individual applicant will be allocated specific housing.

13. Not having received any offer of a house by September 2006 the applicants instructed a solicitor to act on their behalf with the respondents, who in due course sent a letter dated 12th September 2006 to the first named respondent ("the Town Council") which set out the family circumstances of the applicants, and sought information as to what accommodation was to become available to the Town Council over the coming months, and whether it was intended to allocate one of these to the applicants. This letter also made the point that the allocation of the chalet dwelling in Deerpark was discriminatory.

14. By letter of the same date this solicitor wrote in similar terms to the second named respondent ("the County Council"), and also made reference to the Traveller Accommodation Programme 2005-2008 which refers to the existence of 19 traveller families in Killarney in need of housing, and also stated that it was presumed that the applicants are one of these families. This letter referred to the fact that this Programme stated an intention to provide housing to traveller families at the rate of 13 families per year up to 2008, meaning that 52 units would be provided over the period of the Programme. The letter sought information as to the year in which it was intended to provide the applicants with housing, noting that it was by then 2006, and asking whether "*the full quota of thirteen units of local authority housing has been already allocated to travellers in need of housing in the Kerry County Council's area for the present year, and what impact this may have on [the applicants]*". This solicitor requested confirmation that the applicants would receive housing before the end of 2006, and "*preferably before Christmas of this year*".

15. No reply whatsoever was received from either the Town Council or the County Council to either of these letters, and she wrote again by letters dated respectively the 2nd and 3rd October 2006, indicating that a failure to receive responses would lead to the commencement of proceedings. In response to this reminder letter to the Town Council, that body replied by letter dated 4th October 2006 stating firstly that the applicants had been assessed and had qualified for re-housing, but made the point that the applicants had indicated at the time of their application that they would consider the option of a bay in a halting site, and that accordingly they had been allocated the chalet in 2004, that the applicants are qualified for re-housing on Band 1 for a 3 bedroom house, but that it was not possible to indicate when the applicants would be re-housed since it depended on the availability of houses for allocation having regard to the Council's Scheme of Letting Priorities, and a copy of that Scheme was enclosed.

16. The applicant's solicitor wrote again in response to that reply by letter dated 11th October 2006 reiterating the plight of the applicants and stating that it could only be presumed that the applicants were not being treated with any priority, and pointed out a further deterioration in the applicants' circumstances arising from an attack by other residents at Deerpark on the 8th October 2006, as well as a previous attack in respect of which the Gardai were bringing a prosecution against the perpetrators. She stressed the urgency of the situation faced by the applicants. She referred also to the first named applicant being informed by the Traveller Liaison Officer that other families would be allocated housing in Arbutus Grove before her, and that while this person could not account for why these other families were being given priority over the applicants, he stated that priority was being given "*by reference to how long she was residing on the halting site and not by reference to how long she was on the housing list*". This person, according to the solicitor's letter, also stated that her husband, the second named applicant, had "an attitude", and she says that it was clear from this remark that this was also another reason why they were not being allocated housing, but drew attention that there had never been any allegation of anti-social behaviour being made against the second named applicant.

17. No response whatever was received from the County Council to the letters dated 12th September 2006, and the reminder letter dated 3rd October 2006. A further reminder letter which was written by the solicitor dated 13th October 2006 which eventually received a response from the County Council by letter dated 26th October 2006. That letter stated that the applicants were offered a vacant bay in the halting site in October 2004 and that at that time they indicated that they were interested in being considered for a tenancy in that bay, and that they were appointed as tenants thereof on the 1st November 2004. It also stated that the applicants are "*qualified applicants with Kerry County Council for re-housing*", but that it was not possible to indicate how many families would be housed before the end of 2004 since that question depended on the number of houses which might become available. This letter also indicated that there was a process of consultation in relation to refurbishment of this halting site, and that it was intended to consult with all families there in order to ascertain their views, and that it was hoped that an agreed process could be put in place which would meet the needs of those who wished to remain on that site and those who wished to be housed elsewhere. The final paragraph confirmed that the County Council was willing to carry out any necessary repairs to the unit occupied by the applicants, but that when the County Council's Clerk of Works called to the applicants to assess what needed to be done in relation to repairing their unit "*Mr Dooley refused to allow him examine the unit*".

18. The applicants' solicitor replied to this letter reiterating that the acceptance by the applicants of a unit in the halting site was on a temporary basis only, and that their preference was for housing accommodation, and furthermore that any reference to "rehousing" was incorrect since they had never in fact been given a house. Other points were made in relation to the manner in which the County Council was allocating housing and meeting its targets under the Traveller Accommodation Programme., and this letter concluded again by stating that in the absence of any clear proposal for housing the applicants' legal proceedings would follow.

19. A further letter was written by the applicants' solicitor on the 16th November 2006 disputing the allegation which had been made that Mr Dooley had refused access to the Clerk of Works as referred to above, and called upon the County Council to carry out the required repairs, without prejudice to the applicants' wish to be housed.

20. Mr Breen in his said affidavit has stated that in October 2006 the respondents learned of a feud at the Deerpark site, and that Mr O'Leary at that time offered the applicants alternative accommodation in bed and breakfast accommodation for an indefinite period, but that the applicants rejected this offer. Mr O'Leary in his own affidavit has averred also to this matter.

21. A further letter was written by the applicants' solicitor on the 22nd March 2007 both to the Town Council and the County Council, which add nothing to facts necessary to set forth herein.

22. Following the delivery of a Statement of Opposition on behalf of both respondents on the 9th November 2007, a number of replying affidavits were also filed in support thereof.

23. In this Statement of Opposition the respondents plead that in their management and control of its housing/halting accommodation in accordance with its policies and resources, they operate and continue to operate within the margin of appreciation vested in them, having regard to the competing claims of all persons having a housing need in their functional area. They deny that the provision of the unit occupied by the applicants was made on the basis of it being either an emergency or temporary measure as alleged by the applicants. They deny that they are discriminating against the applicants as members of the Traveller Community, and state that if the applicants did not wish to be accommodated in this unit they could have waited until they could be housed and, in the meantime could have occupied private rented accommodation. They state also that before the applicants moved into this unit it was properly refurbished and provided in perfect condition. They say also that in February 2005 when the applicants applied for housing, the respondents' employees inspected the unit and found it to be damaged by having had decorative timber sheeting affixed to an interior wall which had fallen down, given that the wall in question was made of plaster board, and that no further examination was possible because of abusive and aggressive behaviour by the second named applicant who demanded that the respondents to leave the unit.

24. The Statement of Opposition refers also to the offer later in February 2005 of a two bedroom demountable unit in addition to their one bedroom chalet, which offer, they say, was rejected by the applicants, and to a later offer in October 2006 of alternative accommodation in bed and breakfast accommodation, which also was not availed of by the applicants, as I have already set forth.

25. Mr Dan O'Leary has sworn as to this offer in paragraph 6 of his affidavit of the 8th November 2007, and to a renewal of that offer which was also rejected by the applicants. The Statement of Opposition refers also to the fact that in October 2006 some repairs were carried out to the access door, and that in April 2007 a water leak was also fixed, and that as a result of this leak the floor had become warped and that in October 2007 the applicants were accommodated elsewhere by the respondents for a two day period while repairs were carried out to the floor of this unit.

26. The Statement of Opposition pleads also that the applicants' housing application is in "Band 1" of the housing list, which means that it is "priority housing", but that in accordance with the Scheme of Letting Properties it is not possible to predict when such accommodation will be allocated to any individual applicant, and that the respondents will continue to fulfil its statutory obligations under the Housing Acts 1966-2004. They refer also to what is stated to be "*a good record of success in meeting the accommodation*

needs of travellers in its functional area", and that the County Council has met the projected needs as set forth in its Traveller Accommodation Programme 2000-2004 in housing 90 families.

27. It is asserted that the respondents have made all reasonable efforts to meet their statutory duties to members of the traveller community and in particular the applicants, and that they have acted in an even-handed and non-discriminatory manner in the application of a coherent and fair system of consideration of the applicants' accommodation needs. They deny that the applicants have received unfair treatment, and assert that the effect of being members of the traveller community "*is to permit the option at their choice of seeking an alternative to a house, a bay in a halting site (in this case equipped with a demountable unit*". They assert that they have fully complied with "*the recognised obligation to provide members of the travelling community with an option, should they wish for same to continue to reside in a halting site (subject to availability) and this has been complied with by the respondents*".

28. I have already referred to certain of the contents of Mr Breen's affidavit evidence. Specifically Mr Breen avers in paragraph 28 of his affidavit that the second named applicant appears to have significant assets and is carrying on a tarmacing business and he has exhibited some photographs which purport to show vehicles, machinery and equipment at the site which are used by him in connection with that business. He expresses the view that it is accordingly likely that the second named applicant "*may well be in a position to provide alternative accommodation for himself and his family from his own resources should they no longer wish to reside in their current accommodation*".

29. An affidavit has been sworn also by Gerry Collins, a Clerk of Works in the employment of the second named respondent, and he states that prior to the letting of this chalet to the applicants in November 2004 he oversaw the refurbishment of same and that it was thereafter in perfect condition when it was let to them. He also refers to a number of occasions on which further repairs were carried out both in February 2005, October 2006, April 2007 and October 2007. In relation to the visit in April 2007, when the purpose of the visit was to fix a leak, he states that following that visit when the applicants were absent from the chalet, the second named applicant subsequently verbally abused him for entering the unit at a time when they were absent. He exhibits a letter written by the County Solicitor to the applicant's solicitor dealing with some damage to the floor of the chalet which the respondents inspected on the 19th October 2007. That letter states that in order to repair that floor it would be necessary for the applicants to vacate the chalet, and that "*the most expeditious way of dealing with the situation is to take the unit away for repair and replace it with another unit*". That procedure was estimated to take two days during which the applicants would be accommodated in bed and breakfast accommodation. The applicants' solicitor was requested to confirm her clients' agreement to such a proposal.

30. On the 23rd October 2007 the applicants' solicitor replied that her clients were agreeable to moving out into bed and breakfast accommodation for that two day period, but that they would also need some storage facilities also to be provided for their personal belongings. She stated also that their acceptance of this offer was without prejudice to the proceedings herein. However, from the second affidavit sworn by Gerry Collins it now appears that this new unit was never installed. In his affidavit he states "*… the new unit has not in fact been provided as the respondent did not have one in stock at that time, although it had believed that one was in stock. A new unit was ordered at this time and the respondent is still awaiting delivery of same*."

31. The first named applicant has sworn a second affidavit on the 13th December 2007 in order to address certain matters averred to by Mr Breen, Mr O'Leary and Mr Collins. In addition she reiterates a number of matters to which she deposed in her first affidavit. Specifically she reiterates that when they received the offer of halting site accommodation in October 2004 this was accepted only on the basis that it would be temporary until housing became available, and that she, unlike her husband, had never lived on a halting site prior to that date.

32. She also denies that they were ever offered an additional demountable two bedroomed unit to be added to the one bedroomed unit in February 2005, and believes that Mr O'Leary is mistaken in this recollection. She also states that this offer is not recorded in any of the documentation which was obtained by them under Freedom of Information. In a further affidavit sworn by him on the 6th March 2008, Mr O'Leary has stated that this offer was *made verbally* and that, as this verbal offer was rejected by the applicants, he did not subsequently follow up the offer with an offer in writing. This appears to be his normal procedure, and the one he says was adopted when making the first offer of the one bedroom chalet unit in February 2005 which was accepted by the applicants, and that he subsequently followed up that verbal offer with a written offer.

33. Mrs Dooley also refers to a complaint which she made to the Ombudsman concerning the manner in which their housing application was being handled by the respondents. Following that complaint the Ombudsman sought a report from the second named respondent, and she has exhibited a copy of that Report and refers to the fact that it contains no reference to the said offer alleged to have been made to the applicants in February 2005 of a two bedroomed unit in addition to their single bedroom chalet. She states also that the correspondence with their solicitors never referred to this offer either, and that it has only recently been seen as relevant. However, in his second affidavit, Mr O'Leary has responded to this by stating that as the applicants had rejected this offer he did not recommend to the first named respondent to make a formal offer in that regard, and that accordingly the first named respondent was unaware of this rejection and could not have included this information in its reply to the Ombudsman. Mr O'Leary goes on to say that the offer of this two bedroomed chalet is still available to the applicants.

34. The first named applicant states also that the first offer of any improvement in their accommodation was the offer which was contained in the respondent's letter to the applicants' solicitor dated 19th October 2007 (i.e. the offer to replace the one bedroomed unit), and that the applicants would be accommodated for the necessary period of two days in bed and breakfast accommodation. She goes on to state that in fact that offer was accepted by them in writing, and that they never heard anything further from Mr O'Leary following their acceptance of that offer, and questions whether it will ever materialise.

35. In relation to the reference to the feud at the site to which Mr O'Leary referred, and the offer of bed and breakfast accommodation made to them at that time, she states that such an offer was made, but that it was rejected on the basis that to accept same would have rendered them 'homeless' since, according to her, the offer was conditional on them leaving the unit and not returning to it.

36. She reiterates that it would be impossible for them, as members of the Traveller Community, to access private rented accommodation. In his second affidavit, Mr O'Leary states that this offer of bed and breakfast accommodation was made in order to address the first named applicant's concerns about her safety at the Deerpark site, and that it would have entailed a surrender of that accommodation which he had understood she wanted to get out of in view of her preference for living in a house. He goes on to state that the acceptance of that bed and breakfast accommodation would amount to declaring herself homeless "*and would have put the applicants in the position of being able to apply for a rent subsidy for private rented accommodation*", and that while the County Council's Traveller Programme acknowledges that travellers can experience difficulty in renting private accommodation, this is not always true and that there are travellers who have been able to rent from the private sector, including one of the second named

applicant's brothers and his family.

37. She denies also that the original unit was in perfect condition when they occupied it in October 2004, and denies also that the deterioration in its condition was their doing. She accepts that her husband was very annoyed and expressed himself "*in quite strong terms*" on the occasion in April 2007 described by Mr Collins, and which I have referred to above, but goes on to say that what he has said about that incident is exaggerated by him. I should add that in a later affidavit, Mr Collins has reiterated that the second named applicant was abusive to him and that thereafter he was reluctant to again visit the applicants' chalet, and that when they entered the chalet in the absence of the applicants, this was something which they were entitled to do under clause 5.1 of the tenancy agreement. The first named applicant reiterates also much of what she has already stated in her first affidavit regarding the manner in which the respondents have dealt with their application and have conducted themselves in relation to the implementation of the Traveller Programme, and repeats her belief that the applicants are being discriminated against as members of the Traveller Community. She states also that the applicants are not trying to gain some priority over other applicants for housing, but want rather to get some acknowledgment that their circumstances deserve priority and to be assured that their application for housing is being properly assessed.

38. In addition to those matters, the first named applicant takes issue with the Mr Breen's averment regarding the alleged substantial assets of the second named applicant and the tarmacing business. She says that some of the photographs exhibited by him are in fact of bays occupied by other families, and their vehicles. She gives some further information about that business and the machinery shown in the photographs, but there is no need to set out that material in detail, except to say that she denies that the business is generating the sort of income which Mr Breen implies.

39. Mr Breen has responded to the first named applicant's second affidavit by again stating that the offer of the chalet unit in October 2004 at the halting site was "*permanent until the respondent was in a position to offer alternative accommodation such as a house*", and that from the time that they applied for housing the applicants were listed in Band 1 for a three bedroomed house. He denies that the manner in which the respondent allocates housing is "*chaotic, incoherent, arbitrary and unpredictable*" as alleged by the applicants, and that traveller accommodation is provided in compliance with its statutory duties under the relevant legislation, and that it is done on the basis of the greatest need, including emergency needs, and bearing in mind also good estate management.

40. He then goes on to state there is a new "*Killarney Town Council housing development of 60 houses at Direen, Killarney which is due for completion in October 2008*", and that housing there will be "*allocated on the basis (a) most pressing accommodation need at that time, (b) Killarney Town Council Housing List, (c) good and proper estate management*". He states that *Kerry County Council* does not operate a Band system for allocation of houses. This would seem to be in contrast to Killarney Town Council, as it has been stated that in that functional area there is a Band system and the applicants were placed in Band 1 thereof, as has been stated above. He states that the County Council's area is rural and that housing applications are dealt with on a case by case basis.

41. Mr Breen goes on to deal again with the presence of equipment at the Deerpark site which is shown in the photographs already referred to. He states that the storage of this equipment is a breach of the applicants' tenancy agreement, and in particular clause 2.1 and 2.9 thereof. He has exhibited that agreement in his first affidavit. Clause 2.1 states, *inter alia*, that "*the bay shall be used for residential purposes only*". Clause 2.9 states that "*scrap collecting, storage, dealing or conducting business is not permitted by the Council*". He also states that the second named applicant's late father who died in 2006, had previously operated a tarmac business, but had used a warehouse at a separate location to store his equipment for that business.

Cross-examinations
42. Notices of Cross-examination were served in respect of the first named applicant by the respondents, and in relation to Mr Breen, Mr O'Leary and Mr Collins by the applicant. I will deal as necessary with certain matters addressed during those cross-examinations.

The first named applicant
43. Esmonde Keane SC for the respondents cross-examined Mrs Dooley. It seems to be the case that on the Friday before this matter was listed before me, the respondents again offered the two bedroom chalet unit which had, according to the respondents, been offered to the applicants in February 2005, as an addition to their existing one-bed chalet, and which at that time they (i.e. the respondents) say was rejected by them. It appears that this second offer of the proposed improvement to their accommodation was also rejected by the applicants. The applicants were apparently informed also that the unit in question was actually in stock now and therefore available to them immediately. She was asked why that offer was rejected again, and she responded that she had three children now, and that it would not solve their accommodation problems in the long-term. It was pointed out to her by Mr Keane that the new two bed room unit had a dining room area which they could use as an additional bedroom if they wished.

44. She again denied that Mr O'Leary had ever made a verbal offer of such a two bedroomed addition to the original chalet in 2005.

45. It was put to her that the reason why she did not accept this offer was simply that she did not wish to be in this halting site at all. She stated that if she was to accept this offer it would mean that they would be left on this site, and what they wanted was a house for which they had been approved as qualifying back in 2005. She disagreed that their refusal of the offer was so that as much pressure as possible would be put on the respondents to provide them with a house. She denied also that they were trying to get priority over others on the housing list whose need might be considered greater.

46. She was asked if they had made any effort to obtain private rented accommodation. She said that they had, not even though they would be interested in that as a possible solution, but again stated that it was impossible for travellers to get such rented accommodation.

47. I have not set out every answer to every question that she was asked. I should say also that while a good number of questions were put by Mr Keane, and she answered them as best she could, especially when pressed, I felt at the time that in some instances she was at some disadvantage in making herself very clear, for reasons which I do not need to specify. I have made some allowance in that regard.

John Breen
48. I will not set out everything that Mr Breen was asked and all his responses, as really much of it amounts to a reiteration of what he has stated on affidavit. But he was asked by Mel Cristle SC for the applicants about the offer that was made to them in October 2007 to replace the existing one bedroomed unit in view of the repairs which were then thought to be necessary. It will be recalled that this offer was made in a letter dated 19th October 2007 to the applicant's solicitor, and included that the applicants would be accommodated for the two day period necessary for the installation of that unit. That offer was accepted in writing by the applicants' solicitor on their behalf, but this was never followed up upon by the County Council. Mr Breen confirmed that he had instructed the County Solicitor in relation to that offer, and also that, at that time, the unit had been in stock and had been available to be installed

then. Mr Breen stated, however, that subsequent to the acceptance of that offer the unit became suddenly unavailable, and that they had had to place an order for another one, and according to him the lead time on such an order is in the region of seven months. He stated that another emergency situation had arisen in the meantime which necessitated the use of that unit, and that this prevented it being available for the applicants. However, it is clear from his evidence that this turn of events was never communicated either to the applicants or to their solicitors. The Court was informed that the two bedroomed unit was now currently available, but the replacement one bedroomed unit would not be available until the end of April 2008, given the lead time for such orders.

49. He accepted also that a one bedroomed unit is inadequate for the applicants who now have three young children. He accepted the view also that in 2005, 2006 and 2007 the accommodation in which the applicants were living was unacceptable, but stated also that the County Council had to address such matters in the light of the resources available at any time to the Council. He accepted that it was now over three years since the applicants had applied for housing, and referred also to the new development of houses at Direen already referred to, and stated that this was an exceptional provision, and that it had been about four years since the local authority had been in a position to build more houses. He stated that no social housing units in the ownership of the Council had become available to the Council for letting during this period. In relation to the chances of the applicants being offered one of these 60 houses at Direen when the development is completed, Mr Breen stated that all he could say was that the applicants would be considered in the normal way for housing therein, but that there were up to 400 other applicants, and that the Council was obliged to consider all applicants under the criteria for such consideration i.e. on the basis of need. He concluded, when pressed in this regard, that given the applicants' present circumstances "*they should be in the reckoning*". But that was as far as he was able to go.

50. Mr Cristle asked Mr Breen also about the lack of response to letters written by the applicants' solicitor to the Council in 2006. It is only fair to say that Mr Breen was not in his present position at that time, and that the person whose task it would have been to deal with that correspondence has left the Council since that time. However, Mr Breen did not consider it to be right that such correspondence would go unanswered. Mr Cristle drew attention to the fact that in none of the letters which were written to the applicants was there ever a mention that in February 2005 an offer of a two bedroomed chalet addition to the one bedroomed unit had been made, and he referred also to the fact that this offer was not mentioned either in the report given to the Ombudsman following the applicants' complaint to the Ombudsman. However, Mr Breen stated that the offer had been a verbal one which had been rejected, and that therefore no written offer was made thereafter. The point was also made that the person making the report to the Ombudsman was not the same person who had made the verbal offer. He also stated that it was not normal procedure to make such offers to solicitors, even though those solicitors were in correspondence with the Council, but rather to the applicants themselves or to the Traveller Representative Group.

Dan O'Leary

51. Mr O'Leary is the Traveller Liaison Officer with the County Council. He confirmed that in 2006 he was of the view that the applicants were entitled to accommodation in a two bedroomed house. He confirmed also that he had not been consulted in relation to the correspondence from the applicants' solicitor in September 2006 and March 2007, though he was aware that such letters were being written. He was not given this correspondence, though information had been sought from him in relation to the matters raised, and he had presumed that this information would be passed on in correspondence. He was also aware of the complaint to the Ombudsman, but was unaware of the response thereto. He accepted that in October 2004, as is stated in the report to the Ombudsman, "*the applicants were considered most in need and were offered [the one bedroomed chalet] as being the only accommodation available at the time*", since they were then living in overcrowded conditions.

52. He was also able to say that up to March 2007 the County Council had provided housing to some 58 traveller families, though not the applicants. He stated that these other 58 families were considered to be in greater need than the applicants because they may have had two or three children.

53. Mr O'Leary was asked also about the offer that was made in October 2007 to replace the existing one bedroomed chalet, and to accommodate the applicants in bed and breakfast accommodation for the two day installation period. He confirmed that at that date this unit was available, and he was also aware that an emergency had arisen which had rendered that unit unavailable for the applicants, as offered. He assumed that this 'emergency' was a fire, which, he said, was the usual sort of 'emergency' which arose from time to time. He accepted also that he visited this halting site on a weekly basis, and Mr Cristle asked him why, in such circumstances, he had not at least informed the applicants of what had happened in relation to that unit, since he knew that the applicants had accepted that offer. He stated that he had not done so and that since it was not available there was no point. He accepted that it would have been better if he had done so, but that he found it difficult to deal with the applicants. He accepted that he had not disclosed these difficulties in the affidavits which he has sworn on this application.

54. Mr O'Leary again confirmed that in February 2005 he had made a verbal offer to the applicants of the two bedroomed unit as an addition to their one bedroomed unit, and that this verbal offer and its rejection had not been recorded in writing since they had indicated that they were not interested in same. He accepted also that this had not been conveyed to the applicants' solicitor or to the Ombudsman.

55. Mr Cristle put a hypothetical situation to Mr O'Leary for his consideration. He asked him to consider a situation where there is a family of five persons (two adults and three children) who were living on a halting site in a one bedroomed chalet, and there was also another family of the same size who were living in a three bedroomed chalet, and where the first of these families had been there for three years and the other for one year. He was asked which of these families would be offered a house in circumstances where there was only one such house available. Mr O'Leary stated that the family who had been living there for three years would get it. He confirmed that during the seven years that he has been working with the County Council up to 70 families would have been housed, but he did not accept that although the applicants had been recommended as qualifying for a three bedroomed house back in 2005, they may in fact never receive such a house, and that it simply depended on availability.

56. Mr O'Leary then stated that many factors are taken into consideration in the interests of estate management, such as where the house might be and "*what plant they might wish to bring with them*". This last comment caused much controversy since it had never been indicated, either in correspondence or on affidavit, that the existence of plant and equipment on the applicants' halting site, as shown in the photographs which have been referred to already, might be a factor, although never indicated to the applicants as being a factor, which was militating against the applicants ever being offered a house. Mr O'Leary, for example, referred to the presence of tar barrels on the halting site and that these presented a fire hazard. He stated that the applicants had been requested to remove these barrels but that they had never been removed. Even though the applicants stated that they did not own these barrels, Mr O'Leary stated that they were responsible for them since they were on their bay. He confirmed that he had not in fact looked into the barrels to establish that there was tar therein. He stated that the caretaker on the site had on several occasions asked that they be removed, as well as the other plant present there, and that these requests had been simply met with abuse. He accepted that no written notice had been given to the applicants to remove these items, but that in most cases the tenants on these sites would

cooperate and the plant would be removed on request. He accepted also that the applicants' solicitor had not been told of this problem. Mr Cristle made the point that the applicants were never made aware that this matter was causing a problem. He told Mr O'Leary also that his present instructions from his clients was that these barrels were in fact empty and were simply used for storing water, and not tar. In answer to Mr Cristle, Mr O'Leary stated that the removal of these barrels and the plant would make it a lot easier for an offer of a house to be made to the applicants, but if they wanted to bring this plant and equipment with them to any house they were offered, that would mean that they could not be provided with a house. He was asked if the matter of cooperation with the caretaker and the plant and equipment were factors being taken into account when considering the applicants' application for housing. To this Mr O'Leary stated that it would depend on where the proposed house was, but that if it was in a town rather than in a rural setting, these matters would certainly be a problem. He accepted that these matters had never been explained to the applicants.

57. These matters had not been put to Mrs Dooley when she was cross-examined and had not been mentioned in any of the affidavits filed by the respondents on this application. For that reason, I permitted Mrs Dooley to be recalled for questioning about them. She stated that there was no tar in the barrels, and that they are filled with water so that she and others on the site can clean the yard area. Mr O'Leary doubted if this was correct since there was a water tap available on the site which can be used for that purpose. She also stated that these barrels are not just owned by her husband, but that they are owned by him and his brothers.

Applicants' legal submissions

58. Mr Cristle has highlighted certain features of this case from the evidence which has been adduced. He refers to the fact that in late October 2004 the applicants were recommended as qualifying for a house due to the overcrowded conditions they were living in when residing with the second named applicant's family, and having made application in that regard, and that they were at that time considered to be "*the most in need*" of housing at that time by the Council. He asks the Court to accept that when the applicants agreed to be accommodated in a halting site they did so as a temporary measure only, since their expressed preferred wish was to be accommodated in a house. In this regard he refers to the fact that the first named respondent had never prior to her marriage to the second named applicant lived on a halting site as she was from a settled traveller family, and has no desire to do so. He emphasises that it is now well over three years since they applied for housing, and to the fact that the applicants are now a family of five members living in a one bedroomed unit of some antiquity, and that it is not appropriate for such a family.

59. He accepts that there is a conflict of evidence in relation to whether or not the respondents made an offer in February 2005 to enlarge the applicant's unit by adding to it a two bedroomed unit which would have eased their situation pending the availability of a house, but submits that even if such an offer was made it was rejected on the basis that the applicants would have seen it as only ensuring that they remained even longer in halting site accommodation which they did not want.

60. He refers to all the efforts which the applicants have made through their solicitor to achieve an improvement in their situation and be accommodated in a house, and he places a great deal of emphasis on the fact that some of that correspondence from the applicants' solicitor received either a formal response only, or no response at all. He refers to the fact that there has never been any apology to the applicants for this lack of response, and submits that it is not acceptable for the respondents simply to say now in Court that it ought to have been responded to in a more meaningful way, and to explain that the person whose responsibility it was at that time to respond is no longer working for the respondents.

61. He refers also to the evidence that a great number of other families have succeeded in obtaining housing ahead of the applicants (i.e. 30 families in 2006 and a further 13 families up to 30th November 2007, according to Mr Breen), and submits that it is not reasonable to accept that all of those families must have been living in worse circumstances, or have been on the list for longer than the applicants, over this three period, and that this demonstrates that the manner in which the respondents make decisions on how and to whom housing is allocated is inconsistent, arbitrary, chaotic and lacking transparency. In the context of transparency and fair procedures Mr Cristle places a lot of emphasis on the evidence given by Mr O'Leary under cross-examination regarding the uncommunicated problem, which is in his mind, regarding the plant and machinery referred to.

62. He refers also to the evidence of Mr Breen in relation to the prospects for the applicants of being allocated one of the 60 houses under construction at Direen, and that the most that Mr Breen could say was that the applicants were "*in the reckoning*", and submits that this statement, in the absence of any promise, or even estimate as to when they might be housed, is indicative of a purely aspirational approach to the allocation of housing to the applicants.

63. Mr Cristle is also critical of the fact that when the applicants' agreed in writing, through their solicitor on 23rd October 2007, to moving out for two days into bed and breakfast accommodation so that a replacement single bed roomed unit could be installed, the respondents did nothing further, and never communicated to the applicants the fact that the unit intended for them had had to be used to deal with an unexpected emergency.

64. It is submitted that none of the matters deposed by the respondents and stated in cross-examination, in an effort to explain and justify the respondents' alleged inaction and failure to allocate a house to the applicants since late 2004, can justify that situation, and that the inaction on the part of the respondents constitutes a breach of their statutory duties and obligations towards the applicants.

65. It is submitted also that the fact that it is accepted by the respondents that no settled family would ever be offered halting site accommodation amounts to unlawful discrimination of the applicants and a breach of their rights to equality of treatment.

66. Mr Cristle has referred to the judgment of McMenamin J. *in O'Reilly v. Limerick County Council*, unreported, High Court, 29th March 2007. In that judgment at para. 58 thereof, the learned judge referred to the provisions of s. 7(1) of the Housing (Traveller Accommodation) Act, 1998 which provides:

> *"7. -- (1) 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 21 days of the date as provided under section 13, and shall specify in that accommodation programme the accommodation needs of travellers and the provision for accommodation required to address those needs for the period specified in section 10 (1)."*

67. He stated in relation to this provision:

> *"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."

68. He went on to refer to s. 10 of the 1998 Act, which, he stated, *"places in sharper focus the obligations which have been identified under s. 7(1) of the Act"*, including that under s. 10(2)(e) of the Act the Traveller Accommodation Programme prepared by the housing authority shall 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 provision of the range of accommodation required to meet accommodation needs which have been identified…"*. At para. 63 of his judgment McMenamin J. stated in this regard:

> *"…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 Traveller Accommodation Programme…cannot be regarded in any significant way as involving implementation measures, or indeed any identified measures at 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…"*

69. Mr Cristle referred also to the provisions of s. 16 of the Act which are referred to also by McMenamin J. in this judgment. That section provides:

> *"16.-- (1) a relevant Housing authority shall, in securing the implementation of an accommodation programme, or an amendment to all replacement of an accommodation programme, take any reasonable steps as are necessary for the purpose of such implementation.*
>
> *(2) 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 an amendment to all replacement of it, adopted by the relevant housing authority or under section 14 for the functional area of that are relevant housing authority within which such housing authority is situate.*
>
> *(3) 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 all replacement of it, adopted by the relevant housing authority or under section 14 for the functional area of that relevant housing authority within which such housing authority is situate."*

70. The learned judge summarised these three sections as imposing 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 must take any reasonable steps as are necessary for the purpose of such implementation".*

71. In that case, the learned judge found on the facts of that case that the respondents had failed in its statutory duties. Mr Cristle has referred also to a further passage, where on the facts of that case the learned judge stated:

> *"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."*

72. Mr Cristle submits that the present case demonstrates a failure on the part of the respondents to take reasonable steps to implement its Traveller Accommodation Programme for their functional area in so far as the applicants are concerned, and in that regard has referred to the Traveller Accommodation Programme adopted by the County Council.

73. In addition to his submission that the respondents have failed to adequately implement the Traveller Accommodation Programme in respect of the applicants, Mr Cristle submits that the conditions in which the applicants are living due not only to conditions of overcrowding, but also on the basis of the condition of the unit itself on the halting site, means that the applicants must be seen as 'homeless' in the wider sense of that word. He refers in that regard to the provisions of s. 2 of the Housing Act, 1988 which provides:

> *"2. A person shall be regarded by a housing authority as being homeless for the purposes of this Act*
>
> *if –*
>
> > *(a) there is no accommodation available, which, in the opinion of the authority, he, together with any other person who normally resides with him or who might reasonably be expected to reside with him, can reasonably occupy or remain in occupation of, or*

(b) he is living in a hospital, county home, night shelter or such other institution, and is so living because he has no accommodation of the kind referred to in paragraph (a),

and he is, in the opinion of the authority, unable to provide accommodation from his own resources."

74. Mr Cristle has referred to certain judgments which have construed s. 9 and s. 13 of the same Act as imposing on a housing authority a positive duty to use its powers in order to meet the accommodation needs of those persons who are unable to do so for themselves from their own resources, for example the judgment of Keane J. as he then was, in *O'Reilly v. O'Sullivan and Dun Laoghaire and Rathdown County Council* [1997] IESC 120 in which, having referred to a number of earlier decisions, he stated:

"The decisions referred to earlier in this judgment would appear to support the proposition that the conferring of powers on housing authorities to meet the accommodation needs of those unable to provide for themselves impose a corresponding duty on the authorities to make use of those powers where appropriate".

75. He referred also to the obligation imposed on a housing authority by s. 9(2) of that Act, when making an assessment of housing needs in its functional area, to have regard to the need not only of persons who are 'homeless', but also of persons to whom s. 13 of the Act applies (i.e. members of the travelling community), and in that regard stated:

"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 of those in the travelling community who are living in unacceptable conditions but who do not wish to abandon their traditional way of life."

76. Mr Cristle has referred to the judgment of Charleton J. in *Doherty v. South Dublin County Council*, unreported, High Court, 22nd January 2007, wherein he referred to the assessment of needs to be made by the housing authority, and stated that this assessment was something which was required to be acted upon. He went on to express his agreement with a submission made in that case on behalf of the Attorney General that:

"homelessness does not depend alone on the accommodation which a person is occupying, but depends as well on what accommodation is available to him or her: once, within the meaning of section 2 of the Housing Act, 1988, there is accommodation available which a homeless person can reasonably occupy, the state of homelessness ends… It is impossible to ignore that to be homeless, under the Acts, one is required to have not just no accommodation but none that one could reasonably occupy …. Once, however, a reasonable offer has been made by the housing authority which the applicants choose not to take up, their state of homelessness has ended."

77. Mr Cristle submits that in the present case the evidence is that no offer of accommodation has been made to the applicants which they have chosen not to accept, and that the conditions in which they have been living are such that they cannot reasonably be expected to live in given their circumstances of overcrowding and the condition of the unit, including its age and state of repair.

Respondents' submissions

78. Mr Keane has submitted that the evidence demonstrates that the respondents have complied with their statutory obligations as regards the assessment of needs in their functional area (including the applicants) and the subsequent preparation of the Traveller Accommodation Programme 2005-2008, and that the manner in which the respondents have addressed the applicants' accommodation since the end of 2004 when they were offered and accepted the refurbished one bed-roomed chalet at the Deerpark halting site, and have maintained that unit in good condition for them in so far as they have been permitted by the applicants, is within the margin of appreciation to be allowed to a housing authority in the manner in which it implements its housing programme. He submits that this Court should be satisfied that the applicants accepted this offer of accommodation not simply as a temporary measure but on a permanent basis, even though they later applied for a house, and are on the housing list awaiting allocation.

79. While the respondents accept that the applicants applied for a three bed-roomed house in February 2005, and were considered to qualify for such accommodation, it is submitted that this Court cannot direct the respondents as to the manner in which they should allocate housing, and that this is a matter purely within the competence and discretion of the respondents who are required to consider not just the position of the applicants but also all the other families who have applied for such housing. Mr Keane submits that it is appropriate that the respondents should be permitted to make allocations of housing to applicants in accordance with the Scheme of Letting Priorities which has been referred to, and in accordance with its available resources, and that there is no evidence that they have not done so, even if that has resulted in the applicants not yet having been allocated a house of the type which they seek. Mr Keane refers to the evidence that over the course of this Programme considerable progress has been made towards its full implementation, and in particular to the evidence that the development of 60 houses at Dirrane is due to be completed by October 2008, and that the applicants will be "in the reckoning" for accommodation in that development.

80. He refers also to the reference in the Introduction to this Programme which notes that the respondents met its obligations under the previous Programme for the years 2000 – 2004. It is further submitted that in the light of the evidence given by the respondents it cannot be concluded that the Traveller Accommodation Programme 2005-2008 is only aspirational, and that how it is implemented over the course of its life is a matter which is exclusively within the competence and expertise of the respondents, and that the Court ought not to interfere by making mandatory orders as sought by the applicants.

81. Mr Keane submits that the respondents cannot be considered to have ignored the position of the applicants, since they first of all provided chalet accommodation in November 2004 since at that time the applicants were living in overcrowded conditions with the parents of the second named applicant. He refers to the fact that prior to the applicants moving into this chalet it was refurbished and in perfect condition. He asks this Court to accept the respondents' evidence that in February 2005 a further offer was made to the applicants of the addition to their unit of a further two bed-roomed unit in order to extend their accommodation, and that this offer was rejected, including the rejection by them of bed and breakfast accommodation while that work was carried out. He submits accordingly that the respondents must be seen as acting reasonably and that the applicants are now precluded from asserting that their accommodation is not adequate for their needs. He refers also to, and asks the Court to accept, the evidence of efforts which the respondents have made, as referred to above, to carry out repairs to the chalet unit following complaints by the applicants, which efforts have been thwarted by the abusive and aggressive behaviour of the second named applicant towards the respondents' employees who attended at the chalet to carry out such repairs. He refers to the judgment of Smyth J. in *McDonough v. The County Council of the County of Clare and Ennis Town Council*, unreported, High Court, 20th May 2004 wherein he stated at p.23:

"It is not the duty of a Housing Authority to yield to a situation of pressure which has in whole or part been voluntarily created by an applicant. Even if in the instant case the respondents failed to provide the type of accommodation that

the applicants sought and wanted, such failure, in my judgment, does not amount to, nor is, a breach of statutory duty. The obligation of a Housing Authority is to respond to a need not a want. An applicant is of course entitled to express a preference for the type of accommodation he/she bona fide believes, grounded on objective evidence, is suited and meets his/her accommodation needs. There is however no obligation on the Housing Authority to provide immediately such specified accommodation – it must not only assess needs and priorities but have regard to all other persons who have needs and to its availability of accommodation. It is the function of the Housing Authority to adjudicate on the claims of the applicants, not that of the Court."

82. Mr Keane submits that the applicants have no entitlement to any assurance or guarantee that they will be provided with a house during any particular time-frame, or with information from the respondents as to the manner in which the respondents make decisions in relation to how or the basis on which houses are allocated as between competing families for such housing, and their place on the housing list. Mr Keane refers to the judgment of Smyth J. in *McDonough* [supra] in this regard also as to the inappropriateness of such information being available or provided. He has referred to Mr Breen's evidence that decisions in this regard are made by the Council on the basis of the greatest need and not simply on the basis of which applicant is on the housing list for the longest period of time. In his submission, the applicants' must await their turn until they are allocated a house in accordance with the respondents' assessment of their priority, and cannot by means of bringing this kind of application for a mandatory order demand that they be allocated a house ahead of others on the list of applicants. He has submitted also that there is no evidence adduced which shows in any way that other families on the list of applicants for housing who are either in the same position of, or in a better position than, the applicants have been allocated a house ahead of them.

83. As to the claim by the applicants that they are being discriminated as members of the traveller community by having been offered halting site accommodation, an offer which would never be made to a settled family, Mr Keane submits that this cannot be regarded as discrimination, given that it is an additional housing provision available to members of the travelling community. He refers to a further passage from the said judgment of Smyth J. in *McDonough*, where he stated:

"I am satisfied and find as a fact that there was no policy being operated by the respondents or either of them of a form of graduation process imposed or on members of the travelling community who are homeless, deliberately or otherwise, desiring or in need of conventional housing of moving from roadside to halting site to conventional housing. If members of the travelling community are temporarily accommodated in temporary or permanent halting sites prior to being housed in conventional housing, such interim accommodation is accommodation that is not available to the settled community and I venture to think that if a housing authority were to make such interim accommodation available to members of the settled community, more litigation would ensue."

84. Mr Keane makes the point that when the applicants were offered a unit on the Deerpark halting site they accepted it at that time, and were under no obligation to do so. He makes the point also that at that time they were already fully familiar with that site as other family members were already residing there. He submits that there can be no question of that offer amounting to discrimination against the applicants as members of the travelling community, since it constituted an additional benefit to them as such members which would not be available to members of the settled community, who would have to obtain their own accommodation while awaiting an allocation of a house, whether by way of bed and breakfast accommodation or by way of rental from the private sector. He submits that it is always the case that the availability and allocation of a house must take some time to achieve, and that while any delay is regrettable, the reality is that a housing authority is confined as to resources and the availability of houses from its stock at any particular time.

85. Mr Keane submits that there has been no breach of the applicants' rights under Article 3 and Article 8 of the European Convention on Human Rights, and that the events which have occurred do not amount to discrimination under Article 14 of the Convention. He has referred to the judgment of Charleton J. in *Doherty v. South Dublin County Council and others*, [2007] IESC 4 where he stated as follows:

"Insofar as Art. 8 imposes positive obligations, these are not absolute. Before inaction can amount to a lack of respect for private and family life, there must be some ground for criticising the failure to act. There must be an element of culpability. At the very least there must be knowledge that the claimant's private and family life were at risk … Where the domestic law of a state imposes positive obligations in relation to the provision of welfare support, breach of those positive obligations of domestic law may suffice to provide the element of culpability necessary to establish a breach of Art. 8, provided that the impact on private or family life is sufficiently serious and was foreseeable."

86. Mr Keane submits that considering the offer of accommodation made to the applicants in November 2004, the further efforts by the Council to improve the accommodation of the applicants by offering in February 2005 the addition of the two bed-roomed unit to their chalet, as well as the repairs which have been carried out since the applicants first moved into that site, that the applicants refused to accept the further offer of bed and breakfast accommodation following the feud referred to in 2006, and the refusal in March 2008 of a replacement one bed-roomed chalet, the respondents cannot be found to be culpable in relation to the alleged breach of rights under Art. 8 of the Convention. He refers also to the evidence of the respondents that in fact the applicants, or at least the second named applicant, has prevented the respondents from properly inspecting and carrying out repairs which the applicants had requested be attended to. He submits that the respondents have at all times acknowledged, observed and acted in accordance with their statutory obligations within the resources available to them, and in accordance with their Scheme of Letting Priorities referred to.

Conclusions

87. The first four reliefs sought by the applicants relate to whether or not the respondents have complied with their statutory duties by the provision of the chalet unit at the halting site in November 2004, and/or whether they are in breach of their statutory duties by failing to have yet provided the applicants with a three bed-roomed house which they applied for in February 2005. They first of all seek a declaration that the respondents have a statutory obligation to provide them with suitable accommodation, and that having assessed the applicants as requiring local authority housing, they have a statutory duty to provide it. The applicants do not seek to show that the respondents have not complied with their statutory duty to make an assessment of needs prior to adopting the Traveller Accommodation Programme 2005-2008, or that the Programme itself is not one that fulfils the statutory requirements. Essentially, the case made is that by failing to have provided the applicants with a house yet, which was applied for by them as far back as February 2005, and thereby requiring the applicants to remain in what they consider to be overcrowded and unacceptable conditions, the respondents have failed to properly *implement that Programme* since they cannot even now state when the applicants will be housed. The applicants submit that they are homeless by reference to the definition of 'homeless' as contained in s. 2 of the Housing Act, 1988, which I have set out already.

88. Before looking at that Traveller Accommodation Programme, I should make a number of findings of fact in view of certain conflicts

of evidence which have emerged. In fact, nothing may turn on the resolution of some of these conflicts of evidence, since the main thrust of the applicants' complaint is that the delay in providing them with a house is a breach of the respondents' obligation to implement the Traveller Accommodation programme by providing them with a house in a reasonably timely manner.

89. Firstly, I am satisfied on the balance of probabilities that when the applicants accepted the offer made to them at the end of October 2004 of the one unit chalet at the Deerpark halting site, their acceptance was on their understanding that it would be a temporary provision until a house was allocated to them. They may not have made that understanding crystal clear to the respondents at that time, but in my view it is reasonable to conclude that the respondents could not have thought that they accepted it as a permanent accommodation, given, as I have referred to, that by letter dated 19th October 2004 the Town Council informed the applicants that they had been approved for local authority housing on account of their circumstances (overcrowding) and that their application would be "*progressed in due course subject to the Local Authorities Scheme for Letting Priorities for Housing and the availability of houses for allocation in the area of [their] choice*".

90. It is also relevant that the first named applicant, unlike the second named applicant, had never lived on a halting site previously, and it is reasonable to accept her evidence in that regard as also indicative that the acceptance of the halting site accommodation was intended by the applicants as a temporary measure only.

91. Secondly, I am satisfied by the evidence on affidavit and the evidence given in cross-examination, again on the basis of probability, that there was no verbal offer made by the respondents in February 2005 of a two bed-roomed unit to be added to the existing one bed-roomed unit. It is regrettable that the respondents did not make any record of such an offer at that time, because it had not been accepted. If such an offer had been made and refused and a memo was made in that regard, the matter would be put beyond dispute. But it seems to be the policy of the respondents that a record of any verbal offer is kept only if it is accepted. That also had the effect that the report made to the Ombudsman to which I have referred, also made no mention of this verbal offer. I feel that the respondents must be fixed with the consequences of such a policy, in the face of the second named applicant's evidence that no such offer was made. But I am also satisfied from her evidence that even if such an offer had been made she would have rejected it on the basis that to accept it would tend to suggest that they would remain on the list for housing longer than if they refused it. That seems to be consistent with her evidence that at all times they wanted to be accommodated in a house. If I was satisfied that such an offer had been made, and they refused it, it could on the other hand mean that they had refused a reasonable offer of accommodation and thereby excluded themselves from being categorised as 'homeless'. In that regard I respectfully agree with the comments of Charleton J. in *Doherty v. South Dublin County Council* [supra] when he stated, as already set forth, that once a reasonable offer has been made which the applicants choose not to take up "*their state of homelessness has ended*".

92. In relation to whether, for the purpose of the first four reliefs sought by the applicants, the respondents have failed to take reasonable steps to implement their Traveller Accommodation 2005-2008, as required by s.16 (1) of the 1998 Act, it is necessary to consider its contents in more detail than I have set forth already.

93. The Traveller Accommodation Programme states a number of relevant matters. It states, *inter alia*, in its introduction, that the requirement on the Council under the 1998 Act "*ensures that significant steps will be taken to resolve the Traveller accommodation issue within the County*", that "*the purpose of the 1998 Act and the Accommodation Programme is to put into place the necessary procedures, measures, resources and facilities which are required to successfully accommodate Travellers in a manner that will address all concerns relating to the provision of accommodation*", and that "*the provision of adequate accommodation, as outlined in the programme, will not be achieved quickly or easily. However, it is essential that the process commences throughout County Kerry immediately in order to make progress to resolve the problems arising from the current lack of suitable housing*".

94. Part 1 of the Programme states at its outset that the existing locations of Traveller families who are living on serviced halting sites, in private rented accommodation and in overcrowded conditions "*highlight the urgent need for suitable accommodation for many of these families*", and went on to say, *inter alia*, that "*overall 87 families will require permanent accommodation during the lifetime of the Traveller Accommodation Programme 2005-2008*" and that "*taking into consideration the age profile of existing travellers and the rate of new family formations in the county, it is expected that an additional 24 new families will require accommodation during the period of the programme*".

95. Part 2 of the Programme describes a process of ongoing consultation in order to continue to assess the needs over the period of the programme, including "*the selection of suitable sites, design of the proposed accommodation and the number of families to be accommodated*".

96. Under the heading "Specific Targets for Meeting Needs" the Council stated that it intended to accommodate 87 families by the 31st December 2008 in accordance with the programme, that the numbers and types of accommodation to be provided will be identified during each year of the four year period of the programme, and that "*the provision of accommodation will, as far as possible, be arranged in order of priority of Traveller families accommodation needs*". I will in due course set out relevant provisions of the "*Scheme of Letting Priorities*" which has been referred to earlier.

97. Part 2 of the Programme also sets out certain targets in respect of the implementation of the Programme, and states at para. 2.4:

> *"The provision of adequate Traveller accommodation, as outlined in the Assessment of Needs, is essential in order to fully cater for the accommodation needs of travellers during the period of the programme. Kerry County Council will allocate the available resources to provide permanent accommodation required to accommodate travellers in County Kerry as indicated in the Summary of Accommodation Needs…"*

98. It also sets out certain provisions for training and support for travellers, and stated in that regard that the County Council "*recognises the need for support for Traveller families, in order to ensure that the accommodation which is provided will be suitable and effective in resolving the accommodation needs of these families*". It states also that "*the individual family circumstances and distinct needs of Traveller families will be ascertained by the Council when specific accommodation for these families is being arranged. This will involve consultation between the Traveller families, Council staff and Traveller support representatives, as required*".

99. In Part 3 under the heading "Direct Provision by Implementing Authorities" at para. 3.3.1 it is stated:

> *"The Housing Authorities for Tralee, Killarney and Listowel will be required to take whatever steps are necessary to implement these proposals for their functional areas. The Town Councils must also have regard to the provisions of the Accommodation Programme when performing any functions in relation to Traveller Accommodation …… Standard Local Authority housing and Halting Sites will be the forms of accommodation which will be provided by all Local Authorities*

within the County".

100. This Part also highlights the need for good public relations in order to achieve progress, and that the programme itself will be "*an effective public relations instrument and it should help alleviate the fears and worries of members of members of local communities and travellers*". It goes on to observe that "*the negative effects of fears and concerns if not addressed, or the lack of information in relation to the need to provide traveller accommodation, may result in slower progress in achieving implementation of the programme…"*

101. Part 4 of the Programme sets out measures for the implementation of the Programme by the County Council, which includes the following at para. 4.1 (ii):

> *"Land will be acquired as needed by the implementing authorities for the Traveller Accommodation Programme, either by agreement or by Compulsory Purchase Order if necessary, in order to secure adequate land to implement the programme."*

102. I referred earlier to the Scheme of Letting Priorities adopted by the Town Council by which decisions are made to allocate accommodation to particular applicants.

103. Paragraphs 6 and 7 thereof are relevant to set forth. They are:

> *"6. In making any letting the following priorities shall apply:*
>
> *(a) First preference shall be given to persons living in accommodation which, as a result of statutory operation of the Council, requires to be closed or demolished because it is dangerous or is affected by re-development in the area.*
>
> *(b) Second preference shall be given to persons living in accommodation that is unfit for habitation or is materially unsuitable for their adequate housing as defined in Section 66(2) of the Housing Act, 1966, and as has been determined by the Local Authority such property not to be re-let until such time as it has been brought into an acceptable condition.*
>
> *(c) Third preference will be given to qualified applicants living in rented accommodation.*
>
> *(d) Fourth preference shall be given to persons living in overcrowded conditions as defined in Section 63 of the Housing Act, 1966.*
>
> *(e) Fifth preference shall be given to persons in need of accommodation on medical, compassionate or other similar grounds.*
>
> *(f) Sixth preference shall be given to persons not included in any other category above who lack adequate and suitable accommodation and who are, in the opinion of the Council unable to provide such accommodation from their own resources.*
>
> *7. In determining priorities within the categories defined in this scheme, regard may be had, in the allocation of tenancies, to the length of time which has elapsed since the applicant applied to the Council for housing. All things being equal, priority to be afforded to the person who has been on the Housing List for the longest time." (my emphasis)*

104. I have underlined those sections which seem of particular to the applicants.

105. Paragraph (b) refers to a premises "unfit for habitation" as defined by s. 66(2) of the Housing Act, 1966. That section provides:

> *"66 (2)— The housing authority in considering whether a house is unfit for human habitation shall have regard to the extent (if any) to which the house is deficient as respects each of the matters set forth in the Second Schedule to this Act."*

106. That Second Schedule sets out a list of matters to be considered in relation to fitness for human habitation, namely stability, resistance to fire, safety of staircases and common passages, resistance to moisture, transmission of sound and infestation, water supply, sanitary arrangements, drainage, air space, ventilation, lighting, facilities for the preparation, storage and cooking of food, as well its non-compliance with Bye-Laws and Building Regulations. The applicant's unit has not been shown by any evidence before me to come within any of these criteria for being considered "unfit for habitation", and they are not therefore within the second preference category.

107. The third preference category does not apply to the applicants.

108. Paragraph 6(d) refers to "overcrowded conditions" as defined in s.63 of the Housing Act, 1966. That section provides at (a) thereof:

> *"63.— A house shall for the purposes of this Act be deemed to be overcrowded at any time when the number of persons ordinarily sleeping in the house and the number of rooms therein either –*
>
> *(a) are such that any two of those persons, being persons of ten years of age or more of opposite sexes and not being persons living together as husband and wife, must sleep in the same room…".*

109. Accordingly, the applicants' circumstances, given the ages of their children, do not, in spite of the fact that they have three young children under the age of ten, come within that definition of "overcrowded conditions", and they are not within the fourth category of preference.

110. The fifth preference category is not applicable to the applicants.

111. It must be assumed therefore that they come only within the sixth and lowest category of preference, albeit that the length of

time that they have been on the Housing List is a factor which the Town Council *may have regard* to under paragraph 7 of the Scheme in order to raise them up on the list of preferences.

112. In 2006 the Town Council re-assessed the needs of the applicants, and concluded that they were in need of a three bed-roomed house. However, in the letter dated 4th October 2006 to which I have referred earlier, it stated that it was not possible to indicate when the applicants would be re-housed since it depended on the availability of houses for allocation having regard to the Council's Scheme of Letting Priorities, and a copy of that Scheme was enclosed.

113. There has been evidence from both Mr Breen and Mr O'Leary which has given information as to the manner in which the respondents have sought to implement the Programme. Mr Breen has stated that the Council must implement the Programme within the resources available, and in accordance with the Scheme of Letting Priorities, and he has referred to the impending completion of the 60 house development at Dirrane, and that the applicants will be "in the reckoning" for a house there. He referred also to what he considers to be the good record of the Council in implementing the previous 2001- 2004 Programme. Mr O'Leary has stated that up to March 2007 some 58 families had been accommodated under the Programme. I have considered that evidence, as well as the other evidence given by the respondents as to the implementation of the Programme. In my view it is clear that, as required by s. 16 of the 1998 Acct, the respondents have taken reasonable steps to implement the Programme. It is relevant that the applicants appear, as shown above, to be in the lowest category of preference for allocation of housing. This is not a case where it has been in any way shown that the respondents have not taken reasonable steps to implement the Programme, even though to date this has not resulted in the provision to the applicants of a house that they have applied for. The applicants are within the families whose needs are included in the Programme. The Programme is still extant, and a development of 60 houses is currently in the course of construction, which may mean that one of them can be allocated to the applicants. A fair margin of appreciation must be permitted to the respondents in the manner in which such implementation is achieved, and it would require very clear evidence of inactivity on the part of the respondents before this Court should find that there has been a breach of statutory duty in the manner in which the Programme was being implemented. I accept of course that the Programme must not be merely formulaic and aspirational, and that it is intended by the Oireachtas that meaningful steps be taken within available resources to implement same. It must set out the identified needs, and the manner in which it is intended to implement same. But it does not necessarily follow that there is a breach of statutory duty simply because by the end of the Programme's life, in this case at the end of 2008, there were some families among those included in the Programme, who had not by that time been accommodated as may have been planned for. The requirement on the Council is that reasonable steps be taken to implement same, and not that it be in fact fully implemented by the time the next Programme is adopted. The extent of implementation of the Programme is something which will be affected by many factors over its life, such as the extent of available financial resources, the number of houses and other types of accommodation which are within the Council's stock at any time, and the availability of other lands for acquisition and development.

114. An even more uncertain factor which could in any three year period affect the full implementation of a Programme is the number of traveller families who are not included in the Programme when it is adopted, and who may in accordance with the nomadic lifestyle which is part and parcel of traveller life and culture arrive into the functional area of the respondents. Such persons may, depending on their particular circumstances, need to be accommodated from the existing stock of available accommodation ahead of other families such as the applicants, and this could have the effect of delaying the allocation of a house to the applicants. Another such uncertain factor could arise if due to some emergency arising, such as a fire, an available unit or house must be used to relieve that emergency. These in my view are all factors which necessitate a considerable margin of appreciation being afforded to a housing authority when it is being considered whether a Programme is being reasonably implemented, and how houses and other units are allocated.

115. But it must always be the case that the Council makes its allocation on the basis of greatest need, which is not the same as on the basis of length of time on the housing list. The Scheme of Letting priorities shows how the question of greatest need is assessed, while the applicants have certainly been on the list for allocation for over three years now, that length of time is simply something which the respondents may take account of in order to raise them up the on the preference list referred to. But the fact is that under that Scheme the applicants' circumstances place them in the sixth category of preference. That must mean that if the Scheme is properly adhered to, there may always be a chance that another family will be in a higher category. The Council must be permitted to make decisions in accordance with this Scheme of Letting Priorities, and they clearly have a wide discretion in how they make such assessments of need.

116. Mr Cristle has placed considerable reliance on a matter which came out only during cross-examination, and that is the concern expressed by Mr O'Leary about the existence of plant and machinery and tar barrels at the applicants' chalet in Deerpark, and the impact which this has on the chances of the applicants being allocated a house. He refers to the fact that these concerns were never communicated to the applicants. It is suggested that this is the real and uncommunicated, and therefore hidden, reason why the applicants have not been allocated a house yet. He refers to the fact that none of the pre-litigation correspondence with the applicants' solicitor disclosed that the respondents had a problem in relation to the existence of such plant and machinery, and to the fact that no written notice had been given to the applicants to remove the offending plant and equipment. There has on the other hand been evidence that the applicants had been verbally requested by the caretaker to remove it and that they had not done so. By way of reminder, I should repeat that what Mr O'Leary stated, as I have already set forth, was that many factors are taken into consideration in the interests of estate management, such as where the house might be and what plant the applicants might wish to bring with them. He also stated in relation to this that the removal of these barrels and the plant would make it a lot easier for an offer of a house to be made to the applicants, but if they wanted to bring this plant and equipment with them to any house they were offered, that would mean that they could not be provided with a house. As to whether the matter of cooperation with the caretaker and the plant and equipment were factors being taken into account when considering the applicants' application for housing, Mr O'Leary stated that it would depend on where the proposed house was, but that if it was in a town rather than in a rural setting, these matters would certainly be a problem. Mr Keane suggested that these matters were referred to by Mr O'Leary, not in relation to allocation of housing generally to the applicants, but in the context of whether they might be allocated one of the 60 new houses being completed at the site at Dirrane. He submitted therefore that in so far as those houses are not yet complete and therefore no decisions had yet been made as to their allocation, it was irrelevant to the question of whether the respondents are in breach of their statutory obligations by not yet having allocated a house to the applicants.

117. I am not satisfied that there is any evidence that it has been the plant and machinery which has resulted in the applicants not being allocated a house thus far. Mr Cristle has submitted that this has emerged as the principal reason militating against the applicants being allocated a house. If it was I would have little doubt that the applicants would have been informed about it. But given the place in the order of preferences which the applicants occupy, as shown above, it is more likely that this is the principal reason why other families have been allocated houses ahead of them. In so far as it may be a factor in the future as to whether the applicants are allocated one of the houses at Dirrane, and in the interest of good estate management I could well understand that it might, it would be reasonable and fair that this should be made known to the applicants and preferably in writing. It would clearly be in the best interests of the applicants themselves if they cooperated with the respondents in relation to this matter, since they must

be taken as aware that it is a breach of the tenancy agreement that plant and machinery be kept at the accommodation. But that is by way of comment only and for another day perhaps, and not something which is relevant on this application.

118. Another question which is not really determinative in relation to the first four reliefs sought on this application is the fact that the applicants were offered, and they accepted, a new one bed-roomed chalet to replace their existing one in November 2007 because of its condition, but that this never materialised because of some emergency which arose at short notice. Neither is it relevant that an offer of an additional two bed-roomed chalet as an addition to their existing one bed roomed unit has been made by the respondents at the commencement of the hearing of this application before me. These measures may well have served to improve the quality of the accommodation for the applicants, but would not have relieved the respondents of the need to allocate a house to them in accordance with the Council's Scheme of Letting Priorities.

119. In all of these circumstances, I am not satisfied that the applicants are entitled to the declarations and order sought under these four heads of reliefs.

120. The fifth and sixth reliefs sought by the applicants herein seek a declaration that that their right to constitutional justice and fairness has been breached by the failure to provide them with information as to when they can expect to be allocated permanent housing as well as with information as to the respondents' compliance with their own internal programmes and guidelines in respect of the provision and allocation of housing, and, further, an order of mandamus requiring them to provide the applicants with an updated copy of all documents and correspondence which are on file in respect of the applicants, as requested by them under the Freedom of Information Act.

121. Following the evidence of Mr O'Leary being given under cross-examination in relation to the plant and machinery, an expanded relief was sought to be included, namely for a declaration that the respondents have acted in breach of the applicants' right to constitutional justice and fairness "*in failing to provide the applicants with information that was being held against them in the allocation of housing*".

122. First of all, in relation to information and documents sought under Freedom of Information Act, the applicants appear to have a significant amount of documents sought in correspondence, but apart from that, it is clear that under the Freedom of Information Act itself there is a statutory scheme whereby the applicants can pursue that matter. They have not done so. I am not satisfied that there has been any breach of rights as alleged, or breach of fairness.

123. As to the claim to a right to be provided with information as to when the applicants can expect to be allocated permanent housing, as well as information as to the respondents' compliance with their own internal programmes and guidelines, this question has, as submitted by Mr Keane, been considered by Smyth J. in his judgment in *McDonagh v. Clare County Council and Ennis Town Council*, unreported, High Court, 20th May 2004. He concluded:

> *"One of the complaints of the applicants is that they were not informed as to where they were in the scheme of priorities of the housing list. Altogether from being under no legal obligation to furnish such information, I am satisfied and find as a fact that because the decided case law imposes an obligation on a housing authority to consider all persons in need of housing if and when any form of accommodation becomes available and because of the dynamic nature of the demand, it would be inappropriate and unwise to make any such disclosure, which as a matter of probability would lead to more needless litigation based on grounds of legitimate expectation, estoppel or a representation which, no doubt, would be said to be acted upon to detriment. In matters of policy – so long as operating within a statutory legal framework, but subject only to necessary judicial review, the Courts ought not to enter into the function of the housing authority. In my judgment, the type of disclosure envisaged by the applicants – modified in counsel's submissions, would move the Court in the direction of evaluation of competing needs, rather than judicial review of administrative action."*

124. Given the similarity of the submission under this heading in the present case, I can respectfully adopt this statement in order to also reject this submission and conclude that the applicants are not entitled to the reliefs sought in this regard.

125. The seventh, eighth, and ninth reliefs sought relate to the claim that the respondents have failed to afford to the applicants, being members of the traveller community, equal treatment with members of the settled community because they have been provided with temporary halting site accommodation in ease of their accommodation needs, whereas no settled family would be offered such accommodation. It is submitted by the applicants that a settled person would not be expected to live in temporary accommodation on a halting site, and that therefore persons such as the applicants are being discriminated against on the basis that they are members of the Traveller community. There is no doubt from the evidence in this case that the respondents would never offer such an accommodation to a settled family. Halting sites are facilities are provided by housing authorities specifically for members of the Traveller community in order to facilitate and accommodate the nomadic nature of their culture and lifestyle for those members of that community who wish to maintain that way of life. Members of the settled community do not have the benefit of any equivalent provision as a means of addressing a state of homelessness which may exist for them. Such persons if homeless may apply to the housing authority for a house, but until such an allocation can be made for them, they will have to be accommodated either in private rented accommodation or in bed and breakfast accommodation. These facilities are available also for homeless traveller families, albeit that it may be more difficult, though not impossible, for traveller families to access private rented accommodation. In other words, halting site accommodation is an additional means available to traveller families to address their accommodation needs, either on a temporary basis until permanent housing can be allocated to them, or on a permanent basis should that be desired. I cannot accept that the fact there is available to the Traveller community an additional accommodation provision which is unavailable to the settled community constitutes an unlawful discrimination against the traveller community, and therefore the applicants. It seems to me that it is the very opposite of discrimination, and equates to what in other contexts is referred to as positive discrimination. It is certainly not within discrimination for the purpose of Article 14 of the Convention.

126. In the present case, the housing authority did not force the applicants to accept halting site accommodation in October/November 2004. The applicants freely accepted same, and I have already found that as a matter of probability, they so accepted it on the basis that it was a temporary measure to assist them, and that what they wanted for the long-term was a house. The respondents have not refused to allocate the applicants a house. They are on the housing list and qualify for a house, and a house will be allocated to them in due course when, in accordance with the Scheme of Letting Priorities, it is possible to allocate a house for them. The applicants complain that since they moved into the halting site accommodation, their family has increased in size so that they now have three small children and that the chalet which they were given in 2004 is no longer suitable for them, and has deteriorated to the point where it is damp and dilapidated, and unfit for habitation. But in that regard, I am satisfied that the respondents have taken reasonable steps to address that situation. While I am not sufficiently satisfied that the offer of an additional two bed-roomed unit was made in February 2005, though it may have been, the applicants were offered bed and breakfast accommodation at a later stage while a new one bed-roomed chalet was installed to replace their existing one, and in more recent

times the offer a two bed-roomed addition to the one bed-roomed chalet was made. It is a great pity that the respondents did not, following the acceptance by the applicants of the replacement one bed-roomed chalet in October 2007, inform the applicants that the unit offered and accepted was no longer available. They did not communicate this at all, and the applicants were left waiting and wondering. The applicants are entitled to be critical of that lack of explanation, and I can only conclude that this failure in communication, even courtesy, will have done nothing to improve the relationship between the applicants and the respondents, and it is regrettable. I understand that at the hearing of this case before me the applicants have accepted, on a temporary basis and without prejudice to their wish to be allocated a house, the offer now of a replacement one chalet unit and the installation of a two bed-roomed chalet unit as an addition to the one bed-roomed unit. It is to be hoped that this will be done without delay, as even the respondents seem to accept that even if the definition of 'overcrowding' under s. 66 of the Housing Act, 1966 is not fulfilled, the applicants are sleeping with their three young children in a single bed-roomed chalet.

127. If the respondents were refusing to allocate a house to the applicants or were unwilling to enlarge their existing one bed-roomed chalet, this would be unacceptable and would constitute a breach of statutory duty in my view, and could well give rise to a breach of rights under Article 3 and Article 8 of the European Convention on Human Rights, and also Article 14 thereof. But that is not the situation in the present case. The respondents have demonstrated a willingness to improve the conditions in which the applicants are living pending the allocation of a house. They are continuing to consider the applicants' application for a house in accordance with the Scheme of Letting Priorities.

128. There have been relationship difficulties between the applicants and the respondents. It is understandable that the applicants wish to move to a house, and that they should feel that they have been waiting for such a house now for more than three years, and that they are being overlooked in that regard. It is understandable at a human level that this impatience might manifest itself in some animosity developing, especially from the applicants towards the respondents. But it has to be said that where the respondents respond to complaints by the applicants regarding the state of repair of their chalet by calling to the premises in order to inspect and carry out repairs, the abusive and aggressive behaviour of the second named applicant, which I am satisfied occurred, serves only to dilute the strength of the applicants' argument that the respondents are responsible for breaching the applicants' rights to suitable and habitable accommodation.

129. While in an ideal world every person on a housing list would be provided with a house without delay, none of us inhabit such an ideal world. There are budgetary and other resource limitations which exist within each housing authority's functional area, and it is inevitable that delays will occur. Those delays should not result from unnecessary dilatoriness or inaction on the part of a housing authority, since the Traveller Accommodation Programme is not simply aspirational, and something prepared and adopted in order to fulfil a statutory requirement that it be prepared and adopted. It must serve the purpose for which it is intended, namely to put in place a three year programme of plans to meet the needs which have been assessed and considered to exist over the period of the Programme. It must constitute what in other contexts might be called a Strategic Plan, containing objectives and targets to be met within available resources.

130. I have already concluded that the circumstances in which the applicants live place them in the lowest preference category on the Scheme of Letting Priorities, albeit that they can be raised on the priorities by virtue of the length of time they have been on the housing list. But it seems to me that one cannot conclude that there has been a breach of Convention rights under Article 3 or Article 8 of the Convention unless it can be established, which it has not, that the respondents are simply permitting the applicants to needlessly languish, without any justification, in conditions which are such as to amount to inhuman or degrading treatment, or lacking in respect for their private and family life. These rights are not absolute rights. They are rights which must be respected and vindicated, but within the margin of appreciation allowed to a housing authority to do so within their available resources.

131. These conclusions are sufficient also to disentitle the applicants to the tenth and eleventh reliefs sought by the applicants, namely the declaratory reliefs which are sought in relation to Convention rights.