THE SUPREME COURT

Record No. S:AP:IE:2019:000003

Between

DARREN FAGAN, SENNA COOGAN (A minor) SCOUTLARUE COOGAN (A minor) and DARREN COOGAN (A minor) suing by their father and next friend DARREN FAGAN

Appellants

And

DUBLIN CITY COUNCIL

Respondent

And

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

LEGAL SUBMISSIONS OF THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

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Introduction

1. The Appellants challenge the Respondent Council's refusal to treat the First Appellant and his three children as a household on a social housing application.

2. Mr Fagan has an agreement with the children's mother whereby he has available to him overnight access with the children up to three times per week. He does not currently have accommodation that can facilitate three children spending the night on such a regular basis.

3. Under the Housing Acts 1966 to 2015 ('the Housing Acts'), the Council has a statutory obligation to consider applications for social housing support. Such applications are made by a 'household', which is defined in the Housing Acts.

4. The issues for consideration in this appeal are the correct interpretation of the term 'household' in the specific context of a separated (in this instance non-marital) family and the factors to be considered by the Respondent when determining same.

5. This is entirely separate from the statutory functions that ensue thereafter upon consideration of the application, namely the assessment of eligibility and of need and the issue of housing allocation.

6. On 29 July 2019, the Irish Human Rights and Equality Commission ('the Commission') was granted liberty to appear as *amicus curiae*.

Issues Arising

7. The term 'household' is defined in section 20(1) of the Housing (Miscellaneous Provisions) Act 2009 ('the 2009 Act') (as amended by section 15 of the Residential Tenancies (Amendment) Act 2015) as follows:

> *"(1) For the purposes of this section 'household' means—*
>
> *(a) a person who lives alone,*

(b) 2 or more persons who live together, or

(c) 2 or more persons who do not live together but who, in the opinion of the housing authority concerned, have a reasonable requirement to live together."

8. In its Determination of 4 April 2019, the Court found (paragraph 7):

> *"It does, however, seem to the Court that there is at least an issue of law thereby arising regarding the extent of the discretion which a housing authority enjoys and the factors which can properly be taken into account in assessing a reasonable requirement to live together, the extent that it may be held that there are limitations on that discretion, and whether the factors actually taken into account in this case are permissible."*

9. The Commission submits that the following issues arise on foot of this determination:

   (i) What factors are a housing authority obliged to consider when forming its opinion within the meaning of section 20(1)(c) in a case where human rights are engaged?

   (ii) The extent to which the family and children's rights of the Appellants as guaranteed by Article 42A of the Constitution of Ireland and Article 8 of the European Convention on Human Rights ('ECHR') are affected by the Council's refusal to include the children as part of Mr Fagan's household.

   (iii) How do these rights inform the statutory interpretation of "reasonable requirement to live together"?

   (iv) What is the extent of a housing authority's discretion?

Statutory Framework

10. The Housing Acts 1966 to 2015 provide a detailed code for the provision of *inter alia* social housing support to persons unable to obtain accommodation from their own resources. Chapter 2, Part 3 of the 2009 Act provides for an

assessment of housing eligibility and need of a household and subsequently for the allocation of dwellings to those assessed as being eligible and as having a need.

11. Once a household has been assessed as being eligible and having a need, it is entered on the Council's 'record of qualified households'; see Article 16, Social Housing Assessment Regulations 2011 (SI 84/2011) ('the 2011 Regulations'), usually referred to as 'the housing list'. Once a household is on the housing list, it can be considered for allocation of social housing support. Allocation is carried out in accordance with an allocation scheme, as per section 22 of the 2009 Act.

12. There are separate steps within the section 20 process, namely:-

(i) Determination of composition of the household;
(ii) Assessment of that household's eligibility;
(iii) Assessment of that household's needs;
(iv) Allocation of social housing support.

13. This case concerns only the first of the above, and not the other statutory assessments of eligibility and of need (being the social housing assessment) or the subsequent allocation of support.

14. Hogan J. identified the separate and sequential nature of the assessments of eligibility and of need in *Kinsella v. Dun Laoghaire Rathdown County Council* [2012] IEHC 344. That is also clear from the wording and sequencing of the statutory provision itself.

15. The plain language of section 20 makes it clear that the decision on who comprises the "household" must arise as a separate issue prior to the assessment of eligibility and of need. It is the eligibility and need of the *household* that falls to be assessed, not that of the individual members. As such, the membership of the household as defined in section 20(1) must be determined before eligibility and need can be addressed.

16. The interpretation or meaning of "household" in a particular case under section 20(1) is not concerned with an assessment of eligibility or of need or with allocation.

17. Section 20(2) obliges a housing authority to conduct a *"social housing assessment"* of *"the household's eligibility, and need for, social housing support for the purposes of determining—*

(a) whether the household is qualified for such support, and

(b) an appropriate form of such support for that household."

18. Section 20(3) provides a permissive power to carry out a social housing assessment in circumstances where one member of a household is in receipt of rent supplement under section 198(3) of the Social Welfare Consolidation Act 2005:-

"(3) A housing authority may carry out a social housing assessment in respect of a household where a household member is in receipt of a supplement under section 198(3) of the Social Welfare Consolidation Act 2005 towards the amount of rent payable in respect of his or her residence."

19. Section 20(4) provides that the relevant Minister may make regulations providing for the means by which the eligibility of households for social housing support shall be determined.

20. Similarly, but separately, section 20(6) provides that the relevant Minister may make regulations providing for the means by which a household's need for social housing support and the form of such support shall be determined.

21. The allocation of social housing support is a distinct and subsequent stage which is governed by an allocation scheme adopted under section 22.

22. The Council's Allocation Scheme of May 2018 (see paragraph 9 of its Written Submissions) addresses *inter alia* the needs of children of separated parents. This is an allocation scheme for the purpose of section 22, not section 20. Such an approach may be lawful as regards determining allocations (which does not arise for consideration in this case) but is irrelevant to the determination of who constitutes the membership of a household. That is an *a priori* matter. The Allocation Scheme makes express reference to the children of separated parents. It provides *inter alia* at paragraph 2.5.1(b):

> *"b) Dublin City Council assigns multiple bedroom unit requirements to the parent with whom the children reside for the greater part and a 1-bedroom requirement to the other parent."*

23. It is hard to see why children of separated parents are to be so considered at that assessment stage given that by then they fall for consideration only within that one household.

24. The impugned decision excluded the Appellants as a household from getting to the point of consideration of eligibility, need and thus they cannot, as such, enjoy a consideration of allocation as set out in the scheme.

25. Unfortunately, the Respondent in its written submissions has persistently conflated these separate statutory functions; there is reference to housing "need" throughout the consideration of the concept of a "household." (See paragraphs 31; 33; 34; and 35.)

"Household" under Section 20(1)(c)

26. The Oireachtas created three different categories of "household" in the extended meaning of that term as defined for the purposes of section 20.

27. Section 20(1)(c) is solely concerned with persons who do not currently live together but have a "reasonable requirement" to live together. It is not

concerned with persons who are currently living together; such persons are provided for separately under section 20(1)(b). The distinction between section 20(1)(c) and section 20(1)(b) is significant: the Oireachtas expressly provided for persons not currently living together to be categorised as a household if they have a reasonable requirement to live together.

28. There is no statutory indication that each definition is exclusive. If the Oireachtas had intended that a person could fall into one only of the definitions that would be expressed. Such an approach would have necessitated very different wording.

29. Given that the vast majority of households are based on familial relationships, section 20(1)(c) must be considered to be directed to families in the first instance. Section 20(1)(c) contemplates family members who are not living together having a reasonable requirement to live together. If the definition of household were limited only to children who were currently living with one or other parent, then there would be no requirement for section 20(1)(c) as section 20(1)(b) would suffice to address the needs of all such families.

30. The core concept in the definition of household when more than one person is involved is that of "living together." While cohabitation seems conceptually necessary, that too must be seen in context. Cohabitation as defined in section 172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 involves a similar concept of living together. By analogy, the concept of living together under section 20 is a legal one: see *M.W. v D.C.* [2017] IECA 255 at paragraph 29, and does not require two persons to live physically at all times in the same shared premises.

31. In *Santos v Santos* [1972] 2 All ER at 255 it was held (albeit for a different purpose) that: "household is a word which essentially refers to people held together by a particular kind of tie, even if temporarily separated ..." In an UK Upper Tribunal judgment of *MA v Secretary of State for Welfare and Pensions* [2016] UKUT 0262 (AAC) the judge noted that:-

"54. In my judgment it would be unrealistic to regard the Claimant's son as simultaneously a member of two households, as he would be if they were living in separate accommodation and he spent part of the week living with one of them and part with the other."

32. In the EU Treaty rights context, the High Court (Barrett J.) indicated that it entails persons "who regularly reside together in the same accommodation and who share the same catering arrangements." (See *Shishu and Miah* v The Minister for Justice and Equality [2019] IEHC 566.)

33. Insofar as the Respondent relies upon *Holmes-Moorhouse v. Richmond upon Thames Borough Council* [2009] 3 All ER 277 some considerable care must be taken given the different statutory regimes in being. In that case, the father claimed a priority need for housing on the basis that he and his children were reasonably expected to reside together. It seems that such a conclusion would, without more, have sufficed to deem them a priority case and thereby create an obligation on the council in question to allocate them housing. Thus, the recognition of scarcity of resources and needs of others seems relevant given that the decision was directly related to allocation. No Article 8 ECHR issue was considered.

34. Given the different statutory regimes, the issues of eligibility for housing, or housing need, or the ultimate allocation of housing is not relevant to the definition of "household" in section 20. Those issues are separate and necessarily considered thereafter.

35. The interpretation of section 20(1)(c) and the factors to be considered in an individual case must be informed by the context in which it arises in a social and remedial statute. In addition, the interpretion and application thereof must be consistent with the ECHR and the Constitution.

36. The Respondent's reliance on *Holmes-Moorhouse v. Richmond upon Thames Borough Council* seems correct insofar the meaning of "reasonable requirement to live together" is objective, not subjective. It has a defined legal meaning that is not subjectively arrived at either by an applicant or the housing authority. It has a defined legal meaning that does not vary from applicant to applicant, nor from housing authority to housing authority.

37. The "reasonable requirement" is not (or at least not limited to) a legal one. It must refer to a familial, relational or interpersonal requirement. The phrase is broader than an obligation and encompasses expectations.

Factors considered by Respondent in deciding household

38. The Respondent's approach, as demonstrated in its written submissions of 4 June 2019, is to consider need at all stages seems predicated upon the incorrect and/or restrictive matters it had regard to when it considered the issue of household in this case. Those issues were identified by the Respondent in its Statement of Opposition, as set out by the High Court at paragraph 7 of its judgment as:-

> [1] Matters required to be considered under section 20 of the Housing (Miscellaneous Provisions) Act 2009;
> [2] Information relevant to the Applicants' housing need;
> [3] The purposes of the Housing Acts;
> [4] The accommodation available and/or to be made available to the minor applicants with their mother;
> [5] In accordance with section 69 of the Local Government Act 2001, the resources available to or likely to be available to the Council and the need to secure the most beneficial, effective and efficient use of such resources;
> [6] The prospect of under-utilisation of its housing resources in the event of allocation of bedrooms to the minor applicants in separate dwellings; and

[7] The needs of others, including children, on its housing lists for multi-bedroom accommodation.

39. Bar the first and third, these seem to be generally irrelevant to the decision as to the composition of this household, as opposed to the assessment (whatever its composition) of its eligibility, need and the issue of allocation of housing to it following determination of its composition.

40. While section 69 of the Local Government Act 2001 is relevant to each function as such, it is not relevant to each and very discrete component thereof. It is obviously relevant to the allocation of housing; it is irrelevant to the definition of a household. Those resource issues are not germane to the issue engaged herein: the composition of a household for the purpose (thereafter) of its social housing assessment and potential allocation. Resource issues are relevant only to the latter, which is the appropriate stage for consideration of those important matters.

41. The Commission submits that the Respondent was obliged to consider other factors when determining the composition of a household, namely the rights of the Appellants to reside together and the respect for their familial unit as it stands and their relationships as they are.

42. It is well established that a decision-maker is obliged to have regard to relevant factors and to refrain from having regard to irrelevant factors (*P & F Sharpe Ltd v. Dublin City and County Manager* [1989] IR 701, pp.717-718 *per* Finlay CJ; *State (Lynch) v. Cooney* [1982] IR 337, pp.380-381 *per* Henchy J). Those matters can include human rights but are not necessarily restricted to human rights. (*IRM v Minister for Justice* [2018] 1 IR 417, paragraph 97).

43. Given the vital filtering function inherent in the definition of a household, those rights and relationships must be considered at this stage. The composition of a household as accepted by the housing authority is that which proceeds to assessment. If the Appellant father and children are not considered to be a

household, their eligibility and need as such cannot be assessed. This of itself demonstrates how irrelevant resources issues are at this stage.

44. This Respondent has determined that separated parents cannot form a household with their children, unless they are full-time primary carers. It acknowledges that in the long run it wishes for this, but asserts that resources do not facilitate same at present. This is contradictory and confused reasoning.

45. It appears from the quoted provision in the Council's Allocation Scheme that there is a policy of treating all children of separated parents as residing 'for the greater part' with one parent over the other. The possibility of a shared parenting arrangement, where equal time is spent with each parent, is not countenanced at all.

46. In the case of *McCormack v Minister for Social Protection* [2014] IEHC 489. Baker J quashed a decision on the basis that the family circumstances of the applicant had not been sufficiently considered in determining his application for rent supplement under section 198(3) of the 2005 Act. She held (paragraph 52):

> *"I am satisfied that the decision making process was flawed as a matter of law in that the decision body took an erroneous view of the test it had to apply, and looked only to test the accommodation needs of the applicant himself without having any regard to the complexity of his family relationships, the needs of the children and their intrinsic interconnectedness with those of their father, the fact that the accommodation needs of the children when they are visiting their father in Dublin are an element in the test of whether they are qualified within the meaning of the legislation, and that if they have needs which are required to be satisfied by their father, his needs are to be accessed as including theirs. Further, the deciding body failed to have any regard to the fact that the accommodation and maintenance needs and claims of the children were met by a capitalized payment in the separation agreement."*

47. The Respondent asserts that the case of *McCormack v Minister for Social Protection* is not relevant. That seems incorrect, especially given the direct link as between the receipt of rent supplement under section 198(3) of the 2005 Act and section 20(3) of the 2009 Act. That the receipt of such a payment upon a wide definition of household empowers the housing authority to conduct a social housing assessment is indicative of the intention of the Oireachtas.

48. Even prior to addressing the human rights considerations arising, it appears that there are relevant factors to be considered that are not addressed in the Council's current approach.

Obligation to consider human rights

49. Given that factors unrelated to human rights can constitute a 'relevant factor' for the purposes of administrative law generally, where a human right is potentially encroached upon by a decision of a public body then the obligation to consider that right arises *a fortiori*.

50. Such an obligation has been given express statutory recognition in section 42(1) of the Irish Human Rights and Equality Commission Act 2014, which provides *inter alia* that:

> *(1) A public body shall, in the performance of its functions, have regard to the need to—*
>
> > *(a) eliminate discrimination,*
> >
> > *(b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and*
> >
> > *(c) protect the human rights of its members, staff and the persons to whom it provides services.*

51. Section 2(1) of the European Convention on Human Rights Act 2003 ('the ECHR Act 2003') provides as follows:

"In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

52. Section 3(1) of the ECHR Act provides that:

"Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

53. The effect of section 3 is that unless there is some other statutory provision or rule of law to the contrary (and none has been shown in the within appeal) there is an obligation on a statutory decision-maker to consider ECHR rights insofar as this is a necessary prerequisite to performing its functions in a manner compatible with the ECHR.

54. In *Donegan and Gallagher v Dublin City Council* [2012] 3 IR 600, McKechnie J. held (paragraph 109):

"It is quite clear that the Oireachtas has directed that every statutory provision or rule of law should be given a Convention construction if possible; that is a construction compatible with the State's obligations under the Convention. Therefore, if such a construction is reasonably open it should prevail over any other construction, which although also reasonably open, is not Convention compliant. Even in cases of doubt, an interpretation in conformity with the Convention should be preferred over one incompatible with it. However, this task must be performed by reference to the rules of law regarding interpretation."

55. In *O'Donnell (A Minor) v. South Dublin County Council* [2015] IESC 28, MacMenamin J. considered the interpretive duty in the context of the Housing Acts, and held (paragraph39):

"Clearly, section 2(1) provides that 'statutory provisions' or 'a rule of law' are subject to the general rules of law governing interpretation. Even accepting that the statute here may be remedial in nature and entails a purposive interpretation, a court is not entitled to interpret in such a manner so as to legislate."

56. In *C v Galway City Council* [2017] IEHC 784 O'Regan J. refused to find that the respondent had acted unlawfully in withdrawing emergency accommodation from the applicants. Notwithstanding this outcome, she considered the obligations on the respondent council to address human rights in making its decision. She held (paragraphs18-19):

"The respondent suggests that it is not for the respondent to vindicate the constitutional rights and European Convention on Human Rights of the applicant, however I am satisfied they must certainly have regard to these rights in their decision making process. Such claimed rights refer to equality before the law, personal rights, the best interest of the children, a right to education, and the right to private life and family life. Insofar as jurisprudence contained within Meadows v. Minister for Justice and Ors [2010] 2 IR 701, is claimed as applicable, I would accept this proposition."

57. This is in keeping with the Supreme Court judgment in *Luximon & Balchand v Minister for Justice* [2018] 2 IR 542. The Court held that the Minister's officials were obliged to have regard to the applicants' Article 8 ECHR rights when considering an application to extend an immigration permission. MacMenamin J (with whom the rest of the Court agreed) set out the obligations on officials under the ECHR Act 2003 (paras 61-62):

"The provisions of ss. 2 and 3 of the European Convention on Human Rights Act 2003 are the starting point in this part of the consideration. Under s. 2 of that Act, courts are enjoined in that interpreting and applying any statutory provision or rule of law, as far as is possible and

subject to the rules of law relating to such interpretation and application, they should do so in a manner compatible with the State's obligations under the Convention provisions. Under s. 3 of the 2003 Act, every organ of the State is, subject to any statutory provision or rule of law, to perform its functions in a manner compatible with the State's obligations under the Convention provisions.

In my opinion, whether the Minister's decision be seen as "statutory" or "executive", his decisions in these cases, made as an "organ of State", under s. 4(7), were the exercise of a "function". Thus, in making the decisions in these cases, the Minister was under a duty to act in a manner compatible with the Convention provisions. The manner in which ECHR provisions are to be interpreted and applied is set out in the established jurisprudence of this court, and requires no repetition."

58. Given the ECHR and Constitutional rights arising in this Appeal, it follows from the approach set out above that there was an obligation on the Council to give consideration to those rights in forming its opinion as to whether Mr Fagan and the children had a reasonable requirement to live together.

Purposive interpretation

59. In *O'Donnell (A Minor) v. South Dublin County Council* MacMenamin J acknowledged that the Housing Acts are legislation of a type that is to be purposively interpreted. He held (paragraph 71):

"There are abundant examples in our jurisprudence as to the approach applied by the courts when considering socially 'remedial' legislation such as this. Such statutes allow for a purposive interpretation, and are to be constructed as widely as can fairly be done, subject to the Constitution itself, and within the constitutional limits of the courts interpretive role."

60. As a social and remedial statute, a broad definition of "household" is appropriate. Such an approach is consistent with general policy concerning

contact by separated parents with their children as enacted by the Oireachtas. Thus, section 11A of the Guardianship of Infants Act 1964 (as inserted by section 9 of the Children Act 1997 and amended by section 54 of the Children and Family Relationships Act 2015) provides that a court may grant custody of a child to the child's parents jointly. Section 31 of the 1964 Act (as inserted by section 63 of the 2015 Act) provides a list of factors to which a court should have regard when determining what is in a child's best interests, which includes at sub-section 2(a) the: "*benefit to the child of having a meaningful relationship with each of his or her parents.*"

61. The reasonableness of a requirement to live together is best understood having regard to the purpose of the Act and the constitutional and ECHR rights affected by the provision.

62. In turn, the fact that such rights are engaged indicates that a housing authority must consider same when determining the composition of a household. The relevant factors are informed by the broad meaning of the term 'household'.

Family and children's rights and section 20(1)(c)

Constitutional rights – Article 42A

63. Article 42A.1 provides:

> *The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.*

64. Article 42A.2.1° provides for the State to take the place of parents in exceptional cases; in so doing it expressly disregards the marital status of the parents. This harmonising of the position of the children of marital and non-marital families applies to Article 42A as a whole and not solely to Article 42A.2.1°. In *IRM v. Minister for Justice* [2018] 1 IR 417, this Court held (paragraph 218):

"A number of important points are immediately apparent from a consideration of the terms and provisions of Article 42A. First of all, there is no distinction made between the children of married parents or unmarried parents."

65. This Court continued (paragraph 223):

"Article 42A is a composite provision recognising the rights of children, making it clear that its provisions apply to all children regardless of the marital status of the parents, providing that the children's best interests will be the paramount consideration and providing for the voice of the child to be ascertained in proceedings concerning them."

66. In *PH v. Child and Family Agency* [2016] IEHC 106 the High Court noted the child's entitlement to the society of both parents.

"44, Article 42A of the Constitution, with its emphasis on the rights of the child and the paramountcy of best interests, does not take away from (indeed it enhances) the right of the child to the society of both of its parents, and the presumption that the best interests of the child lie in the child's enjoying such society."

67. In *Chigaru v. Minister for Justice* [2015] IECA 167, Hogan J (for the Court of Appeal) held (at paragraph 29) that:

"It is clear that the right of children to the care and company of their parents is a core constitutional value which is inherent in the entire structure of Article 41, Article 42 and Article 42A of the Constitution."

68. Taken in combination, these recent *dicta* indicate that all children enjoy a constitutional right to the care and company of their parents pursuant to Article 42A; that right is not dependent on the martial status of the child's parents and is separate from the rights of the marital family arising under Article 41; the

obligation to vindicate the child's rights falls on all organs of the State, including housing authorities as well as the Courts.

69. Article 42A demands an interpretation of section 20(1)(c) that considers the children's constitutional right thereunder to enjoy the care and company of both parents. These are rights of the children, not of the parents.

70. The interpretation of section 20(1)(c) proposed by the Council operates to exclude Mr Fagan and his children from constituting a 'household'. No consideration of their right to continue to enjoy the attributes of familial relations and to reside together was considered.

71. This approach fails to adequately vindicate the children's rights in a practical sense. The assumption that they can only form part of their mother's household undermines their right to enjoy the care and company of both parents on an equal basis. As was set out in detail above, this is not a question of allocation: it is a question of whether the children are entitled to be considered as having a reasonable requirement to live with both parents.

72. Article 42A requires a reading of section 20(1)(c) to facilitate a practical recognition of the children's actual relationship with their parents. Mr Fagan clearly wishes to play a substantial role in his children's upbringing. A definition of section 20(1)(c) which allows the Council to exclude him from the children's household by definition does little to vindicate the Article 42A rights of the children.

Constitutional interpretation and international treaties

73. Article 42A.1 is broad in its terms, and its parameters have yet to be fully ventilated before the Superior Courts. It appears that the recognition of natural and imprescriptible rights in Article 42A.1 must include protections above and beyond those set out in Articles 42A.2-4.

74. An understanding of the full content of Article 42A.1 will require constitutional interpretation by the Superior Courts and can be expected to emerge over time. For example, in *CB and PB v Attorney General* [2018] IESC 30 (which concerned interpretation of the Adoption Act 2010) MacMenamin J disputed the possibility that the best interests guarantee in Article 42A could become a '*Trojan Horse which can undermine the intent of the Act*' (paragraph 113). There is no suggestion of undermining the intent of the Housing Acts in the within appeal.

75. In order to interpret Article 42A it is open to the Court to look to Ireland's public international law treaty obligations. In *NHV v Minister for Justice* [2018] 1 IR 246 the Supreme Court was informed by the findings of the UN Committee on Economic Social and Cultural Rights in its interpretation of the unenumerated constitutional right to seek work (paragraph16-17 *per* O'Donnell J).

76. Similarly, in *DPP v Gormley* [2014] 2 IR 591 Clarke J (as he then was) recognised the value of European Court of Human Rights jurisprudence in interpreting the provisions of the Constitution relating to fair trial (paragraphs37 and 52). These judgments are relevant to the within appeal not just because they are concerned with using international law to interpret statute law; the relevance is that they used international treaty obligations to interpret the parameters of the constitution itself.

77. Article 42A concerns the rights of children *as children*. Article 42A.1 provides a generalised rights guarantee for children. The provisions of the UN Convention on the Rights of the Child (UNCRC) are relevant to the understanding of Article 42A.1. Article 3(1) of the UNCRC provides:

> *"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

78. Article 16 of the UNCRC provides:

> *"1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*
> *2. The child has the right to the protection of the law against such interference or attacks."*

79. In *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, paragraph 1)* the UN Committee on the Rights of the Child observed (paragraphs 19-20):

> *"The legal duty applies to all decisions and actions that directly or indirectly affect children. Thus, the term "concerning" refers first of all, to measures and decisions directly concerning a child, children as a group or children in general, and secondly, to other measures that have an effect on an individual child, children as a group or children in general, even if they are not the direct targets of the measure. As stated in the Committee's general comment No. 7 (2005), such actions include those aimed at children (e.g. related to health, care or education), as well as actions which include children and other population groups (e.g. related to the environment, housing or transport) (para. 13 (b)). Therefore, "concerning" must be understood in a very broad sense.*
>
> *Indeed, all actions taken by a State affect children in one way or another. This does not mean that every action taken by the State needs to incorporate a full and formal process of assessing and determining the best interests of the child. However, where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate."*

80. Article 42A has been recognised as safeguarding the right of children to the care and company of both parents, regardless of marital status. Where those

rights are potentially affected by the decision of a public body (such as has occurred herein) that public body must at the least consider same.

Position of non-marital families since Article 42A

81. In *GT v KAO (Child Abduction)* [2008] 3 IR 567, McKechnie J in the High Court considered the circumstances of unmarried fathers. He acknowledged the existing jurisprudence, which limits the extent of such fathers' rights as being a right to apply for guardianship (see *JK v VW* [1990] 2 IR 437). He observed (paragraph51):

> *"... Any rights which a father may have are founded upon, and evolve and develop by reason of, his relationship with his child and, if it exists, with the child's mother. Such rights are alive and present before any court hearing and do not merely spring into existence on the application date. In my view, what the court does is to declare such rights rather than even confirming them, much less creating them. It declares them essentially, or in substantial part, on evidence which is largely historical with of course a prospective and future element to govern an orderly and beneficial relationship into the future. Admittedly it is the declaration which presently renders such rights lawfully enforceable, but as a matter of fact their existence has been created prior to any court hearing. I therefore feel that a father fulfilling a parenting role of the type which I have described, should be recognised as having rights referable to his child, even if such rights are contingent on a declaratory order. Whether such rights may also be described as 'inchoate rights' is a matter of choice and is largely inconsequential unless put in context."*

82. *GT v KAO* was not the first judicial indication that recognition of non-martial parental relationships might be necessary under the Constitution. In *WO'R v EH* [1996] 2 IR 248, Barrington J dissented from the majority on the constitutional position of an unmarried father. He argued for revisiting the principles espoused in *State (Nicolaou) v An Bord Uchtála* [1966] IR 567. He observed (pp.283-284):

> "...[I]*llegitimate children are not mentioned in the Constitution. Yet the case law acknowledges that they have the same rights as other children. These rights must include, where practicable, the right to the society and support of their parents. These rights are determined by analogy to Article 42 and are captured by the general provisions of Article 40, s. 3 which places justice above the law. Likewise a natural mother who has honoured her obligation to her child will normally have a right to its custody and to its care. No one doubts that a natural father has the duty to support his child and, I suggest, that a natural father who has observed his duties towards his child has, so far as practicable, some rights in relation to it, if only the right to carry out these duties. To say that the child has rights protected by Article 40, s. 3 and that the mother, who has stood by the child, has rights under Article 40, s. 3 but that the father, who has stood by the child has no rights under Article 40, s. 3 is illogical, denies the relationship of parent and child and may, upon occasion, work a cruel injustice."*

83. In *IRM v. Minister for Justice* [2018] 1 IR 417 the Supreme Court held (paragraph240-241):

> *"It cannot be doubted but that Irish society, in many fundamental ways, has changed quite dramatically in a relatively short period of time, with perhaps the greatest intensity in this regard occurring in the last twenty to twenty-five years or so. The reasons for such change and their recognition by formal structures such as those referred to by the trial judge can be viewed in a wider context as reflecting the prevailing mores of the majority of its citizens. That being so, at some point in the future the question may arise as to whether the legal and constitutional position of unmarried parents, as between themselves and their children, should be afforded greater recognition than presently exists."*

84. In the within appeal, these developments must be understood in the context of the children's right to the care and company of their father and not solely on the

basis of any right the father may have to the children. The express purpose of Article 42A was to introduce a specific set of rights for children into the Constitution.

European Convention on Human Rights – Article 8

85. Article 8 of the ECHR is entitled *'Right to respect for private and family life'* provides as follows:

> *"1 Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

86. Article 53 of the ECHR stipulates that Convention rights must be construed in accordance with other international human rights obligations of State Parties, including the UNCRC rights set out above.

87. It is well established that Article 8 protects the family rights of unmarried parents and their children. In *Marckx v Belgium* (1979-80) 2 EHRR 330 the European Court of Human Rights ('ECtHR') held (paragraph 40):

> *"The Court recognises that support and encouragement of the traditional family is in itself legitimate or even praiseworthy. However, in the achievement of this end recourse must not be had to measures whose object or result is, as in the present case, to prejudice the 'illegitimate' family; the members of the 'illegitimate' family enjoy the guarantees of Article 8 on an equal footing with the members of the traditional family."*

88. In *Boughanemi v France* (1996) 22 EHRR 228 the ECtHR indicated a presumption in favour of family life existing between biological parents and their

children (paragraph 35). In *Berrehab v. The Netherlands* (1989) 11 EHRR 322 the ECtHR held that continuous cohabitation was not required for family rights to continue to exist under Article 8. The Court held (paragraph 21):

> *"The Court likewise does not see cohabitation as a sine qua non of family life between parents and minor children. It has held that the relationship created between the spouses by a lawful and genuine marriage - such as that contracted by Mr. and Mrs. Berrehab - has to be regarded as 'family life' ... It follows from the concept of family on which Article 8 (art. 8) is based that a child born of such a union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to 'family life', even if the parents are not then living together.*
> *Subsequent events, of course, may break that tie, but this was not so in the instant case. Certainly Mr. Berrehab and Mrs. Koster, who had divorced, were no longer living together at the time of Rebecca's birth and did not resume cohabitation afterwards. That does not alter the fact that, until his expulsion from the Netherlands, Mr. Berrehab saw his daughter four times a week for several hours at a time; the frequency and regularity of his meetings with her (see paragraph 9 in fine above) prove that he valued them very greatly. It cannot therefore be maintained that the ties of 'family life' between them had been broken."*

89. The presence of real close personal ties between members of a non-marital family will demonstrate the existence of family life. In *Lebbink v Netherlands* (2005) 40 EHRR 18 the ECtHR found a violation of Article 8 and recognised the existence of Article 8 family rights between a father and his daughter in circumstances where he had not lived with her. The Court held (paragraph 36):

> *"Although, as a rule, cohabitation may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto "family ties" ... The existence or non-existence of "family life" for the purposes of*

Article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties .... Where it concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth ..."

90. In *Khan v United Kingdom* (2010) 50 EHRR 47 the ECtHR found a decision to deport the applicant to be a violation of Article 8. The Court held (paragraph 34):

"It is clear from the Court's case-law that children born either to a married couple or to a co-habiting couple are ipso jure part of that family from the moment of birth and that family life exists between the children and their parents ... Although co-habitation may be a requirement for such a relationship, however, other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto family ties .... Such factors include the nature and duration of the parents' relationship, and in particular whether they had planned to have a child; whether the father subsequently recognised the child as his; contributions made to the child's care and upbringing; and the quality and regularity of contact ..."

91. In *Schneider v Germany* (2012) 54 EHRR 12 the ECtHR the applicant claimed to be the father of a child born to a woman who was married to another man. He successfully argued that the denial of his right to contest paternity and seek access to his child was a violation of his right to respect for family life. The ECtHR summarised the current approach to unmarried fathers and Article 8 (paragraphs 79-80):

"The Court reiterates that the notion of "family life" under Article 8 of the Convention is not confined to marriage-based relationships and may

encompass other de facto "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is ipso jure part of that "family" unit from the moment, and by the very fact, of the birth ....

However, a mere biological kinship between a natural parent and a child, without any further legal or factual elements indicating the existence of a close personal relationship, is insufficient to attract the protection of Article 8 ... As a rule, cohabitation is a requirement for a relationship amounting to family life. Exceptionally, other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto "family ties" ..."

92. Taken together, the foregoing authorities establish certain core principles: the existence of family life protected by Article 8 does not require proof of cohabitation between the parents or even between a parent and child; the existence of protected family life is a question of fact to be decided on each case and the relevant factors in respect of an unmarried father will include: the nature of the relationship; demonstrated commitment to the child; contributions made to the child's upbringing; and the duration and regularity of contact between the child and the father.

93. Given the clear facts that Mr Fagan is sufficiently committed to his children to have made arrangements with their mother whereby he agrees to care for them three nights out of seven and he has sought to include them on his social housing application, it cannot seriously be disputed that the protections of Article 8 apply to Mr Fagan and his family.

94. At issue in the within appeal is whether the correct interpretation of section 20(1)(c) is one which takes account of the Article 8 family rights that Mr Fagan and the children enjoy in respect of their mutual relationships was applied and the correct factors considered by the Respondent.

95. The Respondent has, in effect, under the guise of application of the Housing Acts, sought to prioritise the children's relationship with one parent over the other. Such an approach is not open to the Respondent upon correct interpretation of section 20. The factors as outlined above ought to have been considered by the Respondent in reaching its decision as to the composition of the household at issue herein.

96. Section 2 of the ECHR Act 2003 places an interpretive obligation on the courts. The State's obligations under the ECHR include the obligation not to disproportionately interfere with Mr Fagan and his children's Article 8 rights to one another's care and company.

97. The exclusion of Mr Fagan and his children from even being considered for eligibility and need under section 20 is an interference with those rights insofar as its practical effect will be to limit, by definition, the children's ability to enjoy normal communal family life with Mr Fagan as part of a household.

Extent of housing authority discretion.

98. Section 20(1)(c) confers upon the Respondent a discretion to form an opinion as to whether or not the persons applying to be considered for social housing support have a reasonable requirement to live together. This only arises in a case where they are not already living together; it is only in section 20(1)(c) that the opinion of the housing authority is deemed to be relevant.

99. The Oireachtas has legislated for a definition of a household where, in the opinion of the housing authority concerned, the persons have a reasonable requirement to live together. The test is objective, not subjective.

100. In so legislating the Oireachtas intended a uniform definition of 'household' to be applied throughout the various housing authorities.

101. The opinion referred to of the housing authority in question is that of the application of the facts to the legal definition. As the High Court rightly

considered, there is no discretion as regards the legal interpretation of section 20(1)(c).

Curial deference

102. In *Viridian Power Ltd & Ors v Commission for Energy Regulation* [2011] IEHC 266, Clarke J (as he then was) considered curial deference, setting out two broad reasons for courts to defer to decision-makers. He accepted (paragraph 5.4) that in general there would be some degree of deference arising from the legal entitlement to make a decision under a statutory power. That form of deference arises in the vast majority of judicial review matters, since such proceedings concern the exercise of statutory functions. Clarke J also considered the circumstances in which a higher degree of deference would arise due to some 'expertise', but only where the decision-making process involved the actual exercise of that expertise (paragraph 5.5).

103. It is accepted that the ordinary level of deference arising from the legal entitlement to make a statutory decision arises in the within appeal. However, there does not appear to be any evidence before the Court justifying a heightened level of deference to the Council along the lines countenanced in *Viridian*, and certainly not at the stage in the process when the composition of a household falls for determination.

104. No discretion can be wide enough to permit the housing authority to misconstrue the legal definition, to consider irrelevant matters or to fail to consider relevant matters, in particular fundamental rights.

Conclusion

105. The within appeal is concerned with the definition of household pursuant to section 20(1)(c) of the 2009 Act. Section 20(1)(c) affords the Council a

discretion in forming an opinion on whether persons not living together have a reasonable requirement to live together. However, that discretion must be exercised in a manner which is compatible with the Constitution and the ECHR and which has due regard to the rights guaranteed thereunder.

106. The children have a right under Article 42A to the care and company of both parents. In considering that right, the children's best interests appears to be a relevant factor, having regard to the UNCRC. The children and Mr Fagan have a corollary right to each other's care and company under Article 8 ECHR.

107. The approach taken by the Council to section 20(1)(c) has been to exclude Mr Fagan and his children from the definition of 'household'. This prevents them from being considered together for eligibility and need pursuant to section 20, which is distinct from any question of allocation arising under section 22. In refusing to recognise Mr Fagan and the children as a household *at all*, it appears to the Commission that the relevant constitutional and ECHR rights have not been vindicated.

Word count: 8,580

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14 August 2019