

**Christina Faulkner v Ireland (30391/18) and Bridget
McDonagh v Ireland (30416/18)**

**Intervention by the Irish Human Rights and Equality
Commission (“the IHREC”)**

**Lewis J Mooney BL
Siobhan Phelan SC
*The Bar of Ireland***

**Instructed by Áine Bhreathnach, Solicitor
*The Irish Human Rights and Equality Commission***

Dated 8 February 2021

A. Introduction

1. By letter dated 21 December 2020, the IHREC was invited to intervene in the above-entitled cases (“**the cases**”) as a third party, pursuant to Rule 44§3(a) of the Rules of Court.

2. The IHREC is the national human rights institution and the national equality body of Ireland. It is an independent public body that reports to the Oireachtas (the Irish Parliament) and has a mandate established under the IHREC Act 2014.¹ The purpose of the IHREC is to protect and promote human rights and equality in Ireland and to build a culture of respect for human rights, equality and intercultural understanding in the State.

3. The factual circumstances are complex and more fully set out in the Statement of Facts (“**the Statement**”),² communicated by the Court on 25 August 2020, and published on 14 September 2020.

B. Remedies

(i) Potential penalties for failure to comply with an Order of the Circuit Court

4. When an application for a stay of an order of a lower court is refused, it continues to have legal effect. A seminal text, Browne, *The Law of Local Government* (2014), para 9-211, sets out the potential penalties that may flow from failing to comply with an order made pursuant to s.160 of the Planning and Development Act 2000 (“**section 160**” and “**the 2000 Act**”) as including, on a finding of contempt of court, attachment and committal.³

(ii) Court waiting times

5. The Courts Service (of Ireland) recorded that during 2017 the average time period between a “non-jury” matter (the category which the cases fall into) being certified as ready for hearing and the case actually being heard was eleven months. In 2017 the average waiting time from the time of filing papers in the Supreme Court to the hearing of an appeal was 60 weeks.⁴

(iii) Mootness

6. The longstanding practice of the Courts in Ireland has been to decline to decide any question that is moot, in other words, a case upon which a decision can have no practical impact or effect on the resolution of some live controversy between the parties based on a continuing tangible and concrete dispute.⁵ Due to the manner in which Irish courts apply the doctrine of mootness and the limited availability in Irish law of a stay on an order under appeal,⁶ a failure to provide for a timely assessment of an entitlement to legal aid and suitably expedited hearings means the issue is not decided by the court.

¹ See: ss. 10, 40-41, the IHREC Act 2014, which set out the statutory functions of the IHREC.

² Communicated by the Court on 25 August 2020 and published on 14 September 2020.

³ See also: *Curley v. Galway Corporation* [2001] IEHC 53, (Unreported, High Court, Kelly J., 21 March 2001); *Dublin City Council v. Grant* [2008] IEHC 465, (Unreported, High Court, Budd J., 24 November 2008), wherein an order committing the respondent to prison for failure to comply with an order pursuant to s.160.

⁴ The Courts Service is statutory corporation created by the Courts Service Act 1998, the functions of which include managing the courts. See Courts Service, *Annual Report 2017*, pp. 102, 104 available at: <https://tinyurl.com/3uwm4cwx> [accessed: 29 January 2021].

⁵ See, for example: *Murphy v Roche* [1987] IR 106, p. 110; *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] 4 IR 274, p. 298. For rare exceptions to this general rule see: *Irwin v. Deasy* [2010] IESC 35 (Unreported, Supreme Court, Murray CJ., 14 May 2010), § 11, and *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 IR 152.

⁶ See *Danske Bank v. McFadden* [2010] IEHC 119, § 2.4; See also *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 IR 152, p. 193 and *C.C. v. Minister for Justice and Equality* [2016] 2 IR 680.

C. Housing law and Travellers' rights: The legislative and jurisprudential landscape in Ireland

(i) Relevant equal treatment principles in domestic law

7. S.42, IHREC Act 2014 places a positive duty on housing authorities as public bodies to perform their functions having regard to the need to eliminate discrimination, promote equality of opportunity and treatment of persons to whom it provides services and to protect the human rights of those persons.

8. Article 40.1 of the Constitution of Ireland also envisages that all citizens, as human persons, will be equal before the law.

9. S.3§2, Equal Status Acts 2000-2018 provides that as between any two persons, the prohibition on discrimination may include different treatment on the basis, "...that one is a member of the Traveller community and other is not (the "Traveller community ground")..."⁷ In recent years there has been a consistently high number of cases where membership of the Traveller community was cited as the reason for a complaint under this legislation.⁸ The IHREC has provided legal assistance to a number of Travellers, in particular, in cases regarding the requirement to have a fixed address for a period of time in order to access social housing, which leads to indirect discrimination against Travellers, particularly those who may have lived within the functional area of a local authority but who live a nomadic lifestyle and/or occupied an unauthorised site, for example by the roadside.⁹

(ii) The wider legal landscape in Ireland

10. On 1 March 2017, the IHREC welcomed the State's recognition of Traveller ethnicity,¹⁰ reflected in a statement made by An Taoiseach Enda Kenny TD in Dáil Éireann (Irish Parliament).¹¹ The former prime minister's statement has been found by the High Court to have no legal effect.¹² While this recognition was welcomed, it must be recognised that historically Irish Travellers have been an oppressed community.¹³

11. Prior to 1988, the statutory framework did not differentiate between the housing needs of Travellers and the settled community. In *University of Limerick v. Ryan*,¹⁴ the High Court held that the duty to provide social housing and in particular the obligation imposed on housing authorities by section 13 of the Housing Act 1988 ("the 1988 Act") to address the needs of Travellers extended to providing halting sites, and not only dwellings or houses. While it was a significant judgment, the relatively small number of

⁷ S.2, Equal Status Act 2000 defines "Traveller community" for the purpose of the Act as, "...the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland."

⁸ In 2017, 408 of 1113 complaints lodged with the Workplace Relations Commission cited discrimination on the ground of membership of the Traveller community as being the basis for a complaint Workplace Relations Commission, *Annual Report 2017*, p. 23, available at: <https://tinyurl.com/yyt4gre9> [accessed: 28 January 2021]. These included discrimination complaints relating to accommodation provision. See A Visser, Oireachtas Library and Research Service, *Traveller Accommodation: The challenges of implementation*, p. 28, available at: <https://tinyurl.com/yuuwods4> [accessed 29 January 2021].

⁹ The IHREC, *County Council Criterion for Traveller Family Access to Services Discriminatory*, 10 May 2018, available at: <https://tinyurl.com/1pt4gdq> [accessed: 3 February 2021].

¹⁰ The IHREC, *Historic Step as Traveller Ethnicity Recognised by State*, 1 March 2017, available at: <https://tinyurl.com/yuopxuso> [accessed 29 January 2021].

¹¹ Dáil Éireann, *Traveller Ethnicity: Statements*, 1 March 2017, available at: <https://tinyurl.com/y6myz489> [accessed 29 January 2021]. This is in line with the Court's jurisprudence, for example, in *Chapman v. United Kingdom*, no. 27238/94, 18 January 2001.

¹² *Mongans v. Clare County Council* [2017] IEHC 709, (Unreported, High Court, Eager J., 27 October 2017)

¹³ See, for example: The Commission on Itinerancy, *Report*, August 1963, available at: <https://tinyurl.com/yq7ql899> [accessed 3 February 2021], which refers to Travellers as "Itinerants", and stated that they needed to be absorbed into Irish society and are not an ethnic group.

¹⁴ *University of Limerick v. Ryan*, (Unreported, High Court, Barron J, 21 February 1991).

halting sites constructed in the State (as referenced below), demonstrate that it had little impact on the development of public policy.

12. The Housing (Traveller Accommodation) Act 1998 (“**the 1998 Act**”) is perhaps the most significant legislative development to have occurred in this area. Amongst other things, it recognises Travellers as belonging to a group who pursue a nomadic way of life, it places a mandatory obligation on housing authorities such as the Council to carry out assessments of the accommodation needs of Travellers in their functional areas, to publish accommodation programmes every five years detailing the provision of accommodation required to address those needs, and to take “*reasonable steps*” to ensure the said programmes are implemented.¹⁵ The Traveller Accommodation Expert Review (“**the Expert Review**”), an independent body established by the Government, has said that the 1998 Act is in need of “*overhaul*”, as it has failed to meet the scale of accommodation needed by the Traveller community, as evidenced by an “*extremely high rate of Traveller homelessness*,” an increase in those living in “*overcrowded conditions*”, and the uneven record of local authorities in developing Traveller-specific accommodation.¹⁶

(iii) Rights to certain categories of accommodation

13. Crucially important are the obligations placed on housing authorities by the 1998 Act to take account of the requirements for halting sites in their functional areas and the powers it bestows upon them to make financial loans available for caravans, and the acquisition of land for sites and/or associated constructions works.¹⁷ In addition, it amends s.13§2 of the 1988 Act to provide housing authorities with the powers to construct and provide halting sites, including sites that may not be permanent places of residence for those pursuing a nomadic lifestyle.¹⁸

14. As a matter of Irish law, it has been held that Travellers have no absolute right to be provided with halting site accommodation.¹⁹ Laffoy J summarised the position in *Ward v. South Dublin County Council* [1996] 3 IR 195 where she asserted that in light of *inter alia*, *University of Limerick v. Ryan* (referenced above), the housing authority’s contention that it had no duty to provide halting sites pursuant to s.13 of the 1988 Act was “*wholly incomprehensible and unsustainable*”,²⁰ but ultimately concluded that the court did not have the power to direct a local authority as to how it should prioritise the performance of its statutory functions.²¹ Judicial deference in this area makes it difficult, at least in part, to challenge what the Expert Review has described as, “*...a clear implementation gap between the number of accommodation units planned for and the numbers delivered*”.²²

¹⁵ See sections 29, 6-7 and 16, the 1998 Act.

¹⁶ Traveller Accommodation Expert Review, July 2019, p.1, available at: <https://tinyurl.com/18tlg94j> [accessed: 3 February 2021].

¹⁷ Ss. 6(1), 13, 25, the 1998 Act.

¹⁸ For the exercise of powers under s.13 of the 1988 Act see: *O’Donoghue v. City of Limerick* [2003] 4 IR 93, p. 105. See also: *County Meath V.E.C. v. Joyce* [1997] 3 IR 402; *Ward v. South Dublin County Council* [1996] 3 IR 195.

¹⁹ See, for example: *O’Reilly v Limerick Corporation* [1989] ILRM 181; *McDonagh v. Clare County Council* [2004] IEHC 184 (Unreported, High Court, Smyth J., 20 May 2004).

²⁰ *Ward v. South Dublin County Council* [1996] 3 IR 195, p. 199.

²¹ See also: *Mulhare v. Cork County Council* [2018] IECA 206 (Unreported, Peart J., 2 July 2018), § 34, where it was held that the allocation of housing stock is not a matter for the courts unless there has been a clear error in decision-making.

²² Traveller Accommodation Expert Review, July 2019, p.i, available at: <https://tinyurl.com/18tlg94j> [accessed: 3 February 2021]. See also: *O’Reilly v. Limerick County Council* [2007] 1 IR 593, in which MacMenamin J. found there had been a breach of the local authority’s obligations to fulfil its obligations pursuant to s.13(2) of the 1998 and provide Traveller-specific accommodation, despite having made commitments to do so. The United Nations Committee on the Elimination of Discrimination against Women has expressed “*regrets*” that the 1998 Act has not been revised in order to sanction housing authorities when they fail to take measures to provide accommodation for Travellers, see United

15. Regulation 12(2), Statutory Instrument 198/2011 is a statutory provision that has caused significant difficulties for members of the Traveller community. It provides, where a household that qualifies for social housing supports refuses two “reasonable offers” of different dwellings in any continuous period of one year they will not be considered for another allocation for a further period of one year.²³

16. The Court of Appeal recently adjudicated upon a case in which the High Court had granted injunctive relief pursuant to s.160, Planning and Development Act 2000 (“s. 160” and “2000 Act”) in an earlier judgment, restraining a Traveller family and “all other persons having notice of the making of the order” from placing and retaining their caravans on the land of the housing authority. The Court of Appeal refused to find that Article 8 of the Convention had been breached, and the issue of what constituted reasonable offers was also engaged with. The appellants (a husband and wife) had received several offers of non-traveller specific housing to house them alone, apart from their extended family. Even though the housing authority accepted there was no Traveller-specific accommodation available, the Court found that the respondent had made reasonable offers of accommodation.²⁴ The caselaw supports a conclusion that the accommodation needs of Travellers, and what is reasonable, are not subjectively assessed but are assessed from the point of view of a settled person.²⁵

(iv) Evictions

17. In addition to the mechanism under s.160, the Criminal Justice (Public Order) Act 1994 also has a disproportionate impact on Travellers.²⁶ It allows the Irish police force, An Garda Síochána, to summarily direct individuals occupying land to vacate it where those officers have ‘reason to believe’ that a person is occupying land without the consent of the owner. Failure to abide by the direction may result in an individual’s property (including a caravan) being removed, stored or disposed of, the individual(s) in question being arrested without warrant, or even found guilty of a criminal offence (in some instances, resulting in a term of imprisonment).²⁷

18. Ss.14-14A of the Housing (Miscellaneous Provisions) Act 1997 is also a relevant provision in this area. It permits housing authorities to refuse to make or defer making an allocation of a dwelling to a person where the housing authority considers the person is or has been engaged in “anti-social behaviour” or where the allocation would not be “in the interest of good estate management”. This wide discretion has the potential to be used as a tool of discrimination, for example, where there is community opposition to housing a Traveller family.²⁸

Nations Committee on the Elimination of Discrimination against Women, UNDoc.CEDAW/C/IRL/CO/6-7, 9 March 2017, § 48, available at: <https://undocs.org/CEDAW/C/IRL/CO/6-7> [accessed: 5 February 2021].

²³ See: the facts which underpinned the case of *Crumlish v. Donegal County Council* [2020] IEHC 233 (Unreported, Meenan J., 28 April 2020), which was not fully adjudicated upon as the issues between the Parties were deemed moot before the matter was heard (first hearing date cancelled due to lack of judicial resources).

²⁴ *Clare County Council v. McDonagh* [2020] IECA 307, §15.

²⁵ In *Fingal County Council v. Gavin* [2007] IEHC 444 (Unreported, High Court, Peart J., 14 December 2007) Peart J. found that it was unreasonable to expect a local authority to provide accommodation for a family of eighty persons in a single unit or site and held instead that it was lawful to spread the family over three sites in the one functional area, despite it being a cultural tradition of the Traveller community to live with extended families.

²⁶ As amended by s.24, Housing (Miscellaneous Provisions) Act 2002.

²⁷ See S.19C(1), 19D, 19E and 19 F Criminal Justice (Public Order) Act 1994. See, further: G Deegan, *Travellers spend night in vans after gardai seize caravans*, Irish Times, 13 March 2004, available at: <https://tinyurl.com/1fiumx07> [accessed: 1 February 2021].

²⁸ This provision is the subject of a challenge by a Traveller family, in proceedings currently before the courts in Ireland, *B v Wexford County Council and Ors* 2019/846JR. The family claim it has been used to discriminate against them in the provision/allocation of social housing and that it is repugnant to the Constitution and/or incompatible with the Convention.

D. Discriminatory practices in the provision of public services for Travellers

(i) Attitudes towards Traveller community and their engagement with public services

19. The Census of 2016 recorded 30,987 Travellers living in Ireland. 1,476 of the national Traveller population lived in Limerick and 22 per cent of those were housed in temporary accommodation at the time of the Census in 2016.²⁹ As of 2018, 591 families lived on unauthorised sites.³⁰ An even smaller number, 361 families, occupied unauthorised sites in 2013, but still the European Committee of Social Rights (“**the ECSR**”) held that Ireland was in breach of Article 16 of the Charter for this reason and also because of the lack of procedural safeguards provided in a number of the legal frameworks relating to evictions.³¹ The infant and adult mortality rates among the Traveller community are over three times higher than those of the settled community in Ireland,³² approximately 3 per cent of Travellers are over 65 in comparison to 13 per cent of the general population.³³ As of 2016, almost 6 in 10 Traveller men (57.2 per cent) were only educated to at most primary level in contrast to the general population (13.6 per cent),³⁴ only 167 Irish Travellers held a third level qualification in 2016. Of the 10,653 Travellers in the labour force in 2016, 8,541 of those were unemployed (an unemployment rate of 80.2 per cent among the Traveller population).

20. In 2018, the IHREC commissioned the Economic and Social Research Institute to compile a peer-reviewed report examining discrimination in housing (“*Discrimination in Housing Report*”). The research found that members of the Traveller community are more at risk than any other group in Irish society of being homeless - despite only making up 1 per cent of the Irish population they make up 9 per cent of the homeless population. Members of the Traveller community also experienced the highest levels of discrimination. They are almost nine times more likely to report discrimination in access to housing as compared to the White Irish population.³⁵

21. Standards of accommodation offered to Travellers across the State varies, but the Institute of Public Health (commissioned by the Department of Health and Children in Ireland) found that where halting sites have been constructed, they are consistently situated far away from shops and other amenities.³⁶ A study carried out by the same body found that only 45.3 per cent of Travellers in the Republic of Ireland have access to drinking water, and 24.4 per cent reported living in “*very unhealthy*” environments and 26.4 per cent in “*very unsafe*” homes.³⁷

²⁹ Central Statistics Office, *Census 2016 Summary Results – Part 1*, available at: <https://tinyurl.com/jwy31fjc> [accessed: 2 February 2021], p. 63.

³⁰ Department of Housing, Local Government and Heritage, *Total number of Travellers in all categories of accommodation*, 15 December 2020, available at: <https://www.gov.ie/en/publication/80929-2018-estimate-all-categories-of-traveller-accomodation/?referrer=http://www.housing.gov.ie/housing/special-housing-needs/traveller-accommodation/2018-estimate-all-categories-traveller> [accessed: 2 February 2021].

³¹ The ECSR, *European Roma Rights Centre v. Ireland*, 1 December 2015, paras. 63, 68, 140, available at: <https://tinyurl.com/35fsp8oa> [accessed: 8 February 2021]. In its review of the collective complaint in 2018, the ESCR found that Ireland had not brought the situation into conformity with Article 16, available at: <https://tinyurl.com/1a8o23f3> [accessed: 8 February 2021].

³² Safa et al, *All Ireland Traveller Health Study Our Geels*, September 2010, available at: <https://tinyurl.com/2b5mlz9x> [accessed: 2 February 2021], pp. 87-89. See also, pp. 17-18 for historical findings.

³³ Central Statistics Office, *Census 2016 Summary Results – Part 1*, available at: <https://tinyurl.com/jwy31fjc> [accessed: 2 February 2021], pp. 60-62.

³⁴ Central Statistics Office, *Census of Population 2016 – Profile 8 Irish Travellers, Ethnicity and Religion*, available at: <https://tinyurl.com/scezmhm> [accessed 2 February 2021].

³⁵ The IHREC, *Discrimination and Inequality in Ireland in Housing in Ireland*, June 2018, p.2 available at: <https://tinyurl.com/ljzohfpo> [accessed: 2 February 2021].

³⁶ Safa et al, *All Ireland Traveller Health Study Our Geels*, September 2010, available at: <https://tinyurl.com/2b5mlz9x> [accessed: 2 February 2021], pp. 125;

³⁷ Safa et al, *All Ireland Traveller Health Study Our Geels Technical Report 1: Health Survey Findings*, September 2010, p. 77 and 83, available at: <https://tinyurl.com/3vzrvj6t> [accessed: 3 February 2021]. The United Nations

(ii) Accommodation provision in the State

22. The Department of Housing, Local Government and Heritage (“the DHLGH”) funds 100 per cent of the capital cost of Traveller-specific accommodation provided by local authorities within the State. Despite the chronic shortage of appropriate accommodation for Travellers - labelled by the Expert Review in 2019 as being a “critical problem” - there was what the United Nations Committee on the Rights of the Child described as, “drastic reductions”,³⁸ in the capital budget made available during a ten year period.³⁹ Even when capital funding for Traveller accommodation programmes is increased, the evidence demonstrates that local government has failed to make use of the opportunity it provides to develop accommodation to meet the needs of the Traveller population. The United Nations Committee on the Elimination of Racial Discrimination has highlighted its concern about what it described as, “...the persistent underspending of available budgets by local authorities on culturally appropriate housing for Travellers (art. 5).”⁴⁰ Indeed, in 2016, the year preceding the events which characterise the within cases, Limerick County Council made use of €21,209 of the €81,000 funding for Traveller-specific accommodation that was allocated to it.⁴¹

23. Limerick County Council’s Traveller Accommodation Programme, 2019-2024, records 159 Traveller families as requiring accommodation. A further 80 families currently residing in Traveller Specific Accommodation in the functional area of Limerick County Council are seeking support with regard to their accommodation needs (a transfer to alternative accommodation or an upgrade to existing accommodation). The Council projects that an additional 60 Traveller families may require accommodation support during the lifetime of the Programme but despite this Limerick County Council aspires to meet the accommodation needs of 105 families during the lifetime of its Programme.⁴² The IHREC is concerned that housing authorities continue to make offers of non-Traveller specific accommodation to families whose wish is for Traveller specific accommodation,⁴³ particularly against the backdrop of Regulation 12(2), Statutory

Committee on the Rights of the Child has stated that “It is particularly concerned about:... Significant numbers of Traveller households in mobile or temporary accommodation with no access to adequate water and sanitation facilities or safe and appropriate play areas...” United Nations Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland*, UNDoc. CRC/C/IRL/CO/3-4, 1 March 2016, § 69(b).

³⁸ United Nations Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland*, UNDoc. CRC/C/IRL/CO/3-4, 1 March 2016, § 69(c).

³⁹ From 2008 when €40 million was allocated, as compared to €12 million in 2018 (a 70 per cent decrease). The decline was particularly marked between 2008 and 2014, when funding fell to €3 million for the development of Traveller-specific accommodation across all local authorities in the country. See Traveller Accommodation Expert Review, July 2019, pp. 38-39, available at: <https://tinyurl.com/18tlg94j> [accessed: 3 February 2021].

⁴⁰ United Nations Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined fifth to ninth reports of Ireland*, UNDoc. CERD/C/IRL/CO/5-9, §27. Over the decade between 2008 and 2018, the DHLGH allocated a total capital budget of €168.8 million to local authorities for the provision and refurbishment of Traveller-specific accommodation but only 66 per cent of that total (€110.6 million) was drawn down by local authorities. The situation has led the IHREC to invoke its statutory powers pursuant to s.32 of the IHREC Act 2014 calling upon all local authorities to carry out a review in respect of accommodation provision for Travellers.

⁴¹ Dáil Éireann, *Traveller Accommodation*, 20 November 2018, available at: <https://tinyurl.com/7uv9ahh1> [accessed 3 February 2021].

⁴² Limerick County Council, *Traveller Accommodation Programme 2019-2024*, p.11, 12 & 13, available at: <https://tinyurl.com/ne8wh9mn> [accessed: 3 February 2021].

⁴³ See: N. Murphy, *Travelling Through Homelessness: A Study of Traveller Homelessness in County Offaly*, p.25, available at: <https://tinyurl.com/esppfp84> [accessed: 5 February 2021]: “For Travellers the structural causes could be widened to include the institutional racism faced when accessing services. For example, the fact that Travellers are often offered accommodation which may not be suitable for their needs rather than culturally appropriate accommodation. In other words, offering private rented or standard local authority housing to a family who wish to live on a halting site (Norris and Winston, 2005; Offaly Traveller Movement, 2012). Another structural issue faced by Travellers are the provisions of the Housing (Miscellaneous Provisions) Act, 2002 which made trespass on land a criminal offence and punishable by the confiscation of property – in other words confiscation of a person’s home...”

Instrument 198/2011, which provides, that where an applicant “...refuses 2 reasonable offers of the allocation of different dwellings”, in any one year, they may be suspended from a local authority’s housing list.⁴⁴

E. Article 8 of the Convention

(i) The interplay between identity and the concept of “Home”

24. The IHREC draws attention to the autonomous concept of “Home” under the Convention jurisprudence: see *Buckley v United Kingdom*.⁴⁵ The Court in *Buckley* emphasised that the “lawfulness” of occupation is only relevant insofar as it relates to considerations under Article 8§2 and, in particular, the balancing of the interests of the community over those of the individual in assessing the necessity of an interference. The Court has also recognised the importance for Travellers of occupying a caravan as a corollary of the right to private and family life and the practical need for locations to station a caravan in order to have full enjoyment of that: see *Winterstein v. France*.⁴⁶ In its recent judgment in *Hirtu v France*,⁴⁷ the Court found that despite there not being evidence of sufficient and continuous links with the location where the applicants had been living, it considered that the clearance of an encampment had repercussions on private and family life and therefore, there had been an interference with the applicants’ right to same. Finally, in *Chapman v. United Kingdom*, the Court highlighted that the object of Article 8 is not only to protect the individual against arbitrary interference but also to place positive obligations on the State, which are inherent in an effective respect for private or family life, in certain instances.⁴⁸

(ii) Proportionality

25. Section 160 does not expressly mandate a proportionality assessment, unlike other provisions within the 2000 Act.⁴⁹ The discretion bestowed upon a court with seisin of an application under s.160 is very far reaching permitting a judge to do “...anything that the Court considers necessary...” to restrain an unlawful development and restore the land to its original condition. Despite there being no specific reference to the principle of proportionality, the Irish courts have engaged with the question of whether s.160 mandates or permits a proportionality test. In a recent judgment of the High Court (albeit in an entirely different context) it was stated that there is no obligation on a local authority to carry out a proportionality assessment before instituting an application pursuant to s.160. This function, the Court said, falls entirely to the court with carriage of the application. This appears to be the position, notwithstanding that local authorities are the organs of State tasked with the assessment of housing needs and distribution of accommodation to meet those needs.⁵⁰

26. However, the Irish courts are far from settled on a position in respect of the extent to which s.160 mandates or even allows for a proper proportionality assessment. Two judgments of the High Court have been delivered that seem to arrive at contradictory

⁴⁴ See also: United Nations Committee on Economic, Social and Cultural Rights, *Concluding observations on the third periodic report of Ireland*, UNDoc.E/C.12.IRL/CO/3, 8 July 2015, §27: “The Committee is also concerned at the lack of culturally appropriate accommodation provided to Travellers and Roma and of adequate legal protection of Traveller families at risk of eviction (art. 11).”

⁴⁵ (1996) 23 EHRR 101, § 63.

⁴⁶ Application no. 27013/07, 17 October 2013, § 142.

⁴⁷ Application no. 24720/13, 14 August 2020.

⁴⁸ *Chapman v. United Kingdom*, no. 27238/95, 18 January 2001, §96.

⁴⁹ See: ss.172(1)(a)(iii), 177K(2E)(a)(iii), 248(b)(ii), 2000 Act.

⁵⁰ *Waterford City and County Council v. Centz Retail Holding Limited* [2020] IEHC 634, (Unreported, High Court, Simons J., 16 December 2020), §53.

positions on the extent of the proportionality assessment which s.160 permits.⁵¹ In *Wicklow County Council v. Fortune (No. 1)*, Hogan J. acknowledged the courts' obligation to carry out a proportionality assessment when adjudicating upon an application pursuant to s.160, however, Kearns P. (also in the High Court) criticised the judgment of his colleague in *Wicklow County Council v. Kinsella* leaving the extent to which s.160 permits a proportionality assessment very uncertain.⁵²

(iii) Margin of Appreciation

27. The Court has acknowledged that while the matters that arise for consideration in this area may depend on a multitude of local factors, it is open to the Court to conclude that where there has been a manifest error of appreciation, a breach of Article 8 may be found to have occurred. In arriving at a conclusion as to whether there has been a manifest error of appreciation, the Court has placed particular reliance on the procedural safeguards available to the individual: see *Chapman v. UK*.⁵³ Procedural safeguards such as that of a court adjudication are manifestly inadequate where an individual cannot effectively represent themselves without a lawyer and where court delays are such that a timely determination is not possible.

F. Article 6 of the Convention

(i) Case management and adjournments

28. A judge of the Circuit Court enjoys a great deal of discretion in respect of whether a hearing should be adjourned or not. Order 33, Rule 10, Circuit Court Rules⁵⁴ provides a specific legal basis for granting an adjournment where judges "...think it expedient in the interest of justice."⁵⁵

29. In finding a breach of article 6§1, the Court outlined in *Bartaia v. Georgia* that while there is no automatic right under the Convention to legal representation in civil proceedings, it must be ascertained whether the applicant's appearance before the courts without the assistance of a lawyer would be effective, in the sense of whether he or she would be able to present his or her case properly and satisfactorily.⁵⁶

30. A failure to fully examine and properly answer an application for an adjournment has led the Court to hold that Article 6 has been breached: see *Rivière v. France*, no. 46460/10, 25 July 2013. The Court has found a requirement to provide legal aid in certain circumstances.⁵⁷ The observations of the ECSR in its decision in *Medecins du Monde-International v. France*,⁵⁸ are also of note. It said that in order for an eviction to comply with the Charter there must be *inter alia*, an obligation to consult affected parties, a

⁵¹ See: *Pepper Finance Corporation (Ireland) v. Cannon* [2020] IESC 2, (Unreported, Supreme Court, O'Malley J., 4 February 2020), §29, where O'Malley J. cites the judgments of *Wicklow County Council v. Fortune (No. 1)* [2012] IEHC 406 and *Wicklow County Council v. Kinsella* [2015] IEHC 229, as illustrating the difficulties when two judges of the same court arrive at contradictory conclusions.

⁵² *The County Council of Wicklow v. Fortune (No. 1)* [2012] IEHC 406, (Unreported, High Court, Hogan J., 4 October 2012), §§41-42.

⁵³ *Chapman v. The United Kingdom*, no. 27238/95, 18 January 2001, §92.

⁵⁴ Incorporated into law Statutory Instrument 510/2001.

⁵⁵ See: *Zambra v Collins and Dublin City Council* [2012] IEHC 565, (Unreported, High Court, White J., 3 May 2012), §47, where White J. found that, "...very fundamental fair procedures were not followed in this case," where a judge of the District Court failed to grant an adjournment in order for a defendant to call a witness to challenge an application by a local authority for an exclusion order banning him from a certain place, was.

⁵⁶ *Bartaia v. Georgia*, no. 10978/06, 26 July 2018, §§32-33. A breach of Article 6§1 was found in *Vardanyan and Nanushyan v. Armenia* No. 8001/07, 25 July 2019 §§87-88 where the Applicant was in hospital and not represented before the Court having submitted documentation to this effect.

⁵⁷ See *Steel v. UK*, no. 68416/01, 15 February 2005, § 61, *Nenov v. Bulgaria*, no. 33738/01, 16 July 2009, §52, *Airey v. Ireland*, no. 6289/73, 9 October 1974, *McVicar v. UK*, No. 46311/99, 7 May 2002, § 49-62.

⁵⁸ Complaint no.67/2011, 11 September 2012, §75, available at: <https://tinyurl.com/1qirjzv> [accessed: 8 February 2021].

reasonable notice period and access to legal aid.⁵⁹ Delay in the processing of applications for State funded legal aid has not been found a sufficient answer to a complained breach of Article 6 where an adjournment is refused to allow for legal aid where it is considered legal aid is required to ensure effective protection of rights.

(ii) Legal aid

31. Historically, delay has been a prominent feature of the legal aid system in Ireland. The case of *O'Donoghue v. The Legal Aid Board and Ors* concerned an applicant who had waited to obtain an appointment with a solicitor for a period of 25 months. Kelly J. found that a client seeking to obtain the assistance of the Legal Aid Board should wait no longer than two to four months to obtain an appointment with a solicitor.⁶⁰ In many instances, where an urgent situation arises, even a period of two to four months will be too long.

32. The 2017 Annual Report of the Legal Aid Board outlined that where it is unlikely that an applicant would be provided with a full legal service within four months of applying, he or she would be provided with a “triage” appointment with a solicitor within six weeks. In 2017, an applicant for legal aid in Limerick could have waited a maximum of 6 weeks for an initial appointment, this figure was down from 16 weeks in 2015 and 12 weeks in 2016. In 2019, the maximum waiting time to obtain a legal aid appointment in Limerick rose again to 15 weeks.⁶¹

33. In her concurring judgment in *Keaney v. Ireland*, O’Leary J. stated that it is, “...up to the State to erect the appropriate “scaffolding” to support the efficient administration of justice”.⁶² In this context it is relevant to note that while delays in the legal aid process are well-known in Ireland, there are examples of special schemes being established to meet an identified unmet need for legal aid. One such scheme is the “*Abhaile*” Scheme which was set up in response a significant rise in cases involving financial lenders seeking repossession orders in respect of private properties during the financial crisis 2008-2012.⁶³ This Government-established scheme is tailored to assist those who are insolvent or in mortgage arrears to access independent financial and legal advice.⁶⁴ When cases involving repossessions are listed in a particular Circuit Court venue, the Scheme (operated by the Legal Aid Board) ensures that there is a “duty solicitor” in attendance at the venue in question. In most cases, the Legal Aid Board will engage a solicitor in private practice to take on the role as an agent, who will be able to provide basic information and guidance, and who can assist in applying for an adjournment to facilitate substantive legal advice being sought.⁶⁵

34. Despite the similarly severe ramifications that an application for an eviction order (whether it be instituted under s.160 or other) can have for a person, no such special service is provided in respect of this category of proceedings which impact disproportionately on Travellers. The lack of a fast, effective legal aid system that services Travellers’ needs in eviction proceedings has a foreseeable consequence that

⁵⁹ See also: United Nations Committee on Economic, Social and Cultural Rights, *General Comment 7: The right to adequate housing (Art.11.1):forced evictions*, available at: <https://tinyurl.com/35n5d4ad> [accessed: 4 February 2021].

⁶⁰ *O'Donoghue v. The Legal Aid Board and Ors*. [2006] 4 IR 204, p.237.

⁶¹ Legal Aid Board, *Annual Report 2019*, p. 23, 29 and 37 available at: <https://tinyurl.com/wzqg4o2> [accessed: 4 February 2021].

⁶² Application no.72060/17, 30 July 2020, concurring judgment of Judge O’Leary, §17.

⁶³ See, for example, C. Gallagher, *High Costs and Rise in Repossessions Drive Growth of Lay Litigants*, 4 February, 2017.

⁶⁴ Other examples of special provision for legal aid using the services of private practitioners to supplement the State body exist in the area of District Court Family Law, Divorce/Separation (Circuit Court), International Protection and Child Care (Pilot), available at: <https://tinyurl.com/gabrinjr> [accessed: 5 February 2021].

⁶⁵ Legal Aid Board, *Abhaile*, available at: <https://tinyurl.com/yobkmgua> [accessed: 4 February 2021].

they may not be represented at hearings which may result in them being directed to vacate a site that they treat as their home.

35. While there is a need for a more efficient service in respect of eviction proceedings generally, given the speed at which these types of proceedings are disposed of before the Courts, the IHREC further considers that a tailored approach to the provision of legal aid for historically oppressed and minority groups is desirable to redress systemic imbalance arising and a culture of discrimination. The IHREC is concerned that there is insufficient evidence in the decisions of the Irish Courts that the fact that, typically, the moving party in eviction proceedings is the same local authority with statutory responsibility to meet the assessed accommodation need of members of the Traveller community is really weighed in eviction proceedings. This is so even in the absence of other accommodation being available despite a protracted period on the housing list. Further, given the apparent lack of appreciation that what constitutes “reasonable” accommodation provision is different if you are a settled person or a member of the Traveller community who has sought Traveller specific accommodation, tailored measures directed to supporting the effective legal protection of Travellers through the justice system are required.⁶⁶

(iii) Judicial engagement with minority groups

36. “Scaffolding” may not be confined to additional service provision to ensure that legal aid is available in a timely manner to members of the Traveller Community facing eviction but may also include awareness raising amongst the judiciary. Academic commentary indicates that the Irish judiciary has access to an internal guide, *The Equal Treatment of Persons in Court: Guidance for the Judiciary* (2011),⁶⁷ but a copy of the said document is not publicly available. The IHREC has previously recommended that such a guidance document be compiled for judges and that appropriate training be given in respect of equality and intersectionality principles.⁶⁸

37. Jurisdictions such as Kenya, and New South Wales (Australia), and the Courts of England and Wales,⁶⁹ have all taken a forward-looking approach and published detailed “bench books” to guide their judiciaries in respect of equality issues and to highlight the particular vulnerabilities that certain groups may have while engaging with the legal system.⁷⁰

G. Conclusion

38. The IHREC welcomes the opportunity to intervene in the above-entitled cases, and thanks the Court for the invitation to do so.

⁶⁶ One example of a tailored approach having been adopted is the “*Civil Law Service for Aboriginal Communities*,” a service of Legal Aid New South Wales (Australia). The Service includes a number of Aboriginal people on its staff and provides an outreach service, which involves staff travelling to areas populated by Aboriginal people to provide them with advice on civil law matters (including evictions, police complaints and historical reparation schemes): See Legal Aid New South Wales, *Civil Law Service for Aboriginal Communities*, available at: <https://tinyurl.com/lmfpq43h>

⁶⁷ See: C. Edwards et al, *Access to Justice for People with Disabilities as Victims of Crime in Ireland*, February 2012, p.46, available at: <https://tinyurl.com/3k737w58> [accessed: 4 February 2021].

⁶⁸ See, for example: the IHREC, *Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland’s combined sixth and seventh periodic reports*, January 2017, p.31, available at: <https://tinyurl.com/1a8liv41> [accessed: 4 February 2021].

⁶⁹ The Courts of England and Wales describe the objective behind its guidance (which is publicly available) as being, “...to increase awareness and understanding of the different circumstances of people appearing in courts...It is full of practical guidance to make the court experience more accessible...There are practical tips on communicating with those speaking English as a second language, communicating with people with mental disabilities, a guide to different naming systems, and latest views on acceptable terminology. See Courts and Tribunals Judiciary, *Equal Treatment Bench Book: latest edition*, 5 May 2020, available at: <https://tinyurl.com/masoonqe> [accessed: 4 February 2021].

⁷⁰ For more detailed information, see: Flynn et al, *Final Report: Access to Justice of Persons with Disabilities*, December 2019, NUI Galway (available online).