THE SUPREME COURT

Record No. S:AP:IE:2021:000078

Between

CLARE COUNTY COUNCIL

Respondent

and

BERNARD McDONAGH AND HELEN McDONAGH

Appellants

and

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

OUTLINE SUBMISSIONS ON BEHALF OF THE *AMICUS CURIAE*

A. Introduction

1. These proceedings concern the operation of section 160 of the Planning and Development Act ('section 160'), and the factors to be taken into account in determining whether an order under that provision should be made, particularly in circumstances where it concerns a person's place of residence.

2. The factual background is provided in the submissions of the Parties.

3. In applying to intervene, the Irish Human Rights and Equality Commission ('the Commission'), in the affidavit of Sinéad Gibney, submitted that the human rights and equality issues in the appeal include:

   (i) whether section 3 of the European Convention on Human Rights Act 2003 ('the ECHR Act 2003') and/or section 42 of the Irish Human Rights and Equality Commission Act 2014 ('the IHREC Act 2014') require a local

authority to carry out a proportionality assessment prior to seeking injunctive relief and/or effecting an eviction;

(ii) what is (a) the nature of a housing authority's statutory obligation to provide Traveller-specific accommodation, and (b) the extent to which that obligation should have a bearing on any proportionality assessment that the housing authority and/or the courts are required to carry out;

(iii) what constitutes a *"reasonable offer"* of accommodation, in circumstances such as those which arise in this case;

(iv) in the event that the courts are required to carry out a standalone proportionality assessment, whether there are certain factors which the courts must consider in carrying out that assessment and the weight that should be attributed to each of those factors.[1]

4. The Commission observes that whilst there is much focus on the European Convention on Human Rights ('the ECHR'), Article 40.5 of the Constitution protects the dwelling and it is probable that the ECHR does not add to it: *Meath County Council v. Murray* [2018] 1 I.R. 189, para. 112 (***'Murray'***). It follows that the ECHR is a set of minimum standards, upon which additional rights might be protected by the Constitution. That said, the caselaw of the European Court of Human Rights ('the ECtHR') regarding Article 8 provides helpful guidance, including the approach which should be taken to minority social groups and housing.

5. Further, an important statutory obligation on housing authorities was not considered by the courts below: section 42 of the IHREC Act 2014. It imposes a mandatory obligation on housing authorities to have regard to the fundamental rights of persons to whom it provides services. This, in the view of the Commission, means, to borrow the language of Clare County Council's written

[1] Affidavit of Sinéad Gibney, 11 November 2021, para 8(i)-(vi).

submissions, that the Council must when acting *qua* landowner have regard to its duties *qua* housing authority.

6. Insofar as the High Court judgment in *Waterford City and County Council v. Centz Retail Holding Limited* [2020] IEHC 634 holds that there is never any obligation on a local authority to have regard to factors which are relevant to proportionality before instituting an application pursuant to section 160, relying on ***Murray***, the Commission respectfully submits that this is in error, having regard *inter alia* to section 42 of the IHREC Act 2014, and section 3 of the ECHR Act 2003. The mandatory duty imposed on local authorities by section 42 of the IHREC Act 2014 will in many, if not all, cases of eviction, require an assessment of the proportionality of the consequential interference with a person's family and/or private life, and home, where the Council itself owes duties to that person in the provision of housing supports. The Council in the herein appeal has statutory duties to the Appellants by administering their application for housing supports, a key distinction with *Waterford County Council v. Centz Retail Holing Limited* and ***Murray***.

7. The Commission has recently acted as a third party intervener in a case before the ECtHR which concerns the making of orders pursuant to section 160 against members of the Traveller community who were in unlawful occupation of lands owned by a local authority. It is *Faulkner v. Ireland,*[2] and the related matter of *McDonagh v. Ireland* (collectively referred to hereafter as ***'Faulkner'***).[3] The judgment of the ECtHR is awaited.[4]

8. In its observations to the ECtHR, the Commission submitted that while the judgment of this Court in ***Murray*** set out a range of factors that may be taken into account by a court in dealing with an application pursuant to section 160, it did not mandate that a proportionality assessment be undertaken in all cases, nor did it

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[2] *Faulkner v Ireland,* application no. 30391/18.

[3] *McDonagh v Ireland,* application no. 30416/18. The Statement of Facts communicated by the ECtHR is publicly available:
https://hudoc.echr.coe.int/eng#{%22appno%22:[%2230391/18%22],%22itemid%22:[%22001-204699%22]}

[4] The submissions filed by the Commission are publicly available:
https://www.ihrec.ie/documents/european-court-of-human-rights-case-faulkner-v-ireland-application-no-30391-18/

provide for matters which must be, as opposed to may be, considered. The Commission stated *inter alia*:

> "… the *dicta* of the Supreme Court places an overriding emphasis on the public interest objective of protecting the integrity of the planning system to the detriment of the balancing exercise that should be undertaken to ensure an excessive burden is not imposed on individuals who are said to have carried out an unauthorised development. Consequently, IHREC considers that the approach in *Murray* does not afford the sufficiently robust protections required by this Court's jurisprudence. It is considered that the absence of such protections has the potential to result in a disproportionate impact on Travellers."

9. The facts of the herein appeal are very different to those in *Murray*. Before proceeding to more detailed submissions, the Commission outlines its respectful position as follows:

    (i) the provision of Traveller-specific accommodation is a need, not just a desire, for some members of the Traveller community, and the statutory duties on housing authorities to make such provision must be applied in that context;

    (ii) a housing authority's failure to comply with its duties in the provision of Traveller-specific accommodation may be a factor to be weighed where that authority seeks orders of eviction against a member, or members, of the Traveller community;

    (iii) section 42 of the IHREC Act 2014 (as well as section 3 of the ECHR Act 2003) requires a housing authority to have regard to factors which are relevant to proportionality prior to seeking to evict a person from their home, or to remove that home;

    (iv) in assessing proportionality in a case of this type, a court should weigh a range of factors, including the Council's own assessment of the

impact on the human rights of those to be evicted and the Council's performance in its duty to provide Traveller-specific accommodation; the policy objective of compliance with planning regulations is not of itself determinative, or necessarily at the apex of any hierarchy of interests.

10. This appeal concerns the application of section 160: in that limited context, the Commission shall address, in the following order:

    (i) the Traveller community as a vulnerable minority, and the statutory obligation on housing authorities to make provision for Traveller-specific accommodation;

    (ii) the duties on a housing authority to consider the proportionality of its actions;

    (iii) the court's role in carrying out a proportionality assessment and ***Murray***.

B. <u>The Traveller community and Traveller-specific accommodation</u>

(i) General

11. The Appellants are members of the Traveller community. This is a pivotal fact.

12. On 1st March 2017, State recognition of Traveller ethnicity was announced by An Taoiseach Enda Kenny TD in Dáil Éireann.[5] Traveller ethnicity constitutes a protected ground under the Equal Status Acts 2000-2018. However, as the Commission highlighted in its submission to the ECtHR in ***Faulkner***, despite this formal recognition of Traveller ethnicity, systemic discrimination against Travellers permeates many aspects of Irish society.

[5] Dáil Éireann, *Traveller Ethnicity: Statements,* 1 March 2017, available at: https://www.oireachtas.ie/en/debates/debate/dail/2017-03-01/37/.

13. The Census of 2016 recorded 30,987 Travellers living in Ireland,[6] 22 per cent of whom were housed in temporary accommodation at the time.[7] As of 2018, 591 families lived on unauthorised sites.[8] The number was smaller in 2013, 361 families, but even that led the European Committee of Social Rights to hold unanimously that Ireland was in breach of Article 16 of the European Social Charter.[9] In its review of the collective complaint in 2020, the Committee found that Ireland was still not compliant with Article 16.[10]

14. In 2018, the Commission engaged the Economic and Social Research Institute to compile a peer-reviewed report examining discrimination in housing.[11] 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, being almost 9 times more likely to report discrimination in access to housing as compared to the White Irish population, even after education and labour market status are held constant.

15. In 2010, the Institute of Public Health (commissioned by what was then the Department of Health and Children) found that only 45.3 per cent of Travellers

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[6] Central Statistics Office, *Census 2016 Summary Results – Part I,* available at: https://www.cso.ie/en/media/csoie/newsevents/documents/census2016summaryresultspart1/Census2016SummaryPart1.pdf

[7] Central Statistics Office, *Census 2016 Summary Results – Part I,* p. 63, available at: https://www.cso.ie/en/media/csoie/newsevents/documents/census2016summaryresultspart1/Census2016SummaryPart1.pdf

[8] 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

[9] The European Committee of Social Rights, *European Roma Rights Centre v. Ireland,* 1 December 2015, paras. 63, 68, 88, and 92, available at: https://hudoc.esc.coe.int/eng/#{%22sort%22:[%22ESCPublicationDate%20Descending%22],%22ESCDcIdentifier%22:[%22cc-100-2013-dmerits-en%22]}

[10] The European Committee of Social Rights, *2nd Assessment of the follow-up: European Roma Rights Center (ERRC) v. Ireland, Complaint No. 100/2013, decision on the merits of 1 December 2015, Resolution CM/ResChS(2016)4* (2020), p. 160, available at: https://rm.coe.int/findings-ecrs-2020/1680a1dd39

[11] The Irish Human Rights and Equality Commission, *Discrimination and Inequality in Ireland in Housing in Ireland,* June 2018, available at: https://www.ihrec.ie/app/uploads/2018/06/Discrimination-and-Inequality-in-Housing-in-Ireland..pdf

had access to drinking water,[12] 24.4 per cent reported living in "very unhealthy" environments and 26.4 per cent in "very unsafe" homes.[13]

16. In 2016, the United Nations Committee on the Rights of the Child stated:

> *"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."*[14]

17. Whilst a different jurisdiction, the Court of Appeal of England and Wales in *The Mayor and Burgesses of the London Borough of Bromley v. Persons Unknown* [2020] EWCA Civ 12 had regard in its judgment to the cultural traditions of the Traveller community, their experiences as a socially disadvantaged group, and the lack of provision for Traveller accommodation (see, in particular, paragraphs 4 to 11; hereinafter ***'Bromley v Persons Unknown'***).

(ii) Traveller-specific accommodation

18. In its 2015 report on Ireland, the United Nations Committee on Economic, Social and Cultural Rights stated:

> *"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)."*[15]

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[12] Safa et al, *All Ireland Traveller Health Study Our Geels Technical Report 1: Health Survey Findings,* September 2010, p.77, available at https://www.ucd.ie/t4cms/AITHS_TechnicalReport1.pdf
[13] Safa et al, *ibid*, p.83.
[14] 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).
[15] 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.

19. The Department of Housing, Planning and Local Government funds 100 per cent of the capital cost of Traveller-specific accommodation provided by local authorities within the State.[16]

20. The Traveller Accommodation Expert Review, an independent group established by the Government, has described the shortage of appropriate accommodation for Travellers as being a *"critical problem"*,[17] and 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).*"[18]

21. In June 2019, the Commission invited the Council to undertake an equality review ('the Equality Review'), pursuant to section 32(1) of the IHREC Act 2014, to encompass:

    (i) an audit of the level of equality of opportunity and/or discrimination that exists in relation to members of the Traveller community who wish to avail of Traveller-specific accommodation; and

    (ii) a review of its practices, procedures and other relevant factors in relation to the drawdown of capital funding and the provision of Traveller-specific accommodation to determine whether same were conducive to the promotion of equality of opportunity for such service users having regard to the Council's obligations under the Equal Status Acts 2000-2018.

22. The Equality Review revealed that of the total funding of €1,894,444 allocated to the Council for Traveller-specific accommodation between 2015 and 2019, the Council drew down €742,293. The Council also reported expending €513,645 on Traveller-specific accommodation, without recouping funds from central

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[16] Department of Housing, Local Government and Heritage, *Traveller Accommodation,* 21 October 2021, available at: https://www.gov.ie/en/service/9c812-traveller-accommodation/

[17] Traveller Accommodation Expert Review, July 2019, p. v, available at: https://www.paveepoint.ie/wp-content/uploads/2019/07/Expert-Review-Group-Traveller-Accommodation.pdf

[18] 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, 12th December 2019, §27.

government. [19] In the Equality Review, the Commission noted that, at the time of publication, two extended families lived on unauthorised sites with a stated preference for Traveller group housing developments. As no scheme had been developed to provide housing solutions for those families, the funding provision had no impact on delivery.[20]

23. The Commission concluded that the Council's current Traveller Accommodation Programme frames its approach to the provision of Traveller-specific accommodation in restrictive terms, for example, it noted:

> *"It is the Council's policy that, where feasible, the preferred option in terms of the type of accommodation requested will be considered. If this is not possible, other accommodation options may be offered to individual households. If this reasonable accommodation offer is refused, without good reason, their housing application may be given a reduced priority in line with statutory provisions."*[21] (emphasis in original).

24. The Commission further noted in the Equality Review:

> *"The Council makes a strong statement that trespass on its lands will not be tolerated and makes assistance to members of the Traveller community in such circumstances and in need of alternative housing conditional on them being approved social housing applicants. There is a need to ensure that this policy does not operate in a discriminatory manner given that members of the Traveller community face difficulties in making social housing applications over and above those of the settled community: difficulties arising from illiteracy; lack of access to the internet; and lack of awareness of services on offer. This is exacerbated in the case of the Council given that the LTACC does*

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[19] Irish Human Rights and Equality Commission, *An account of the Equality Review carried out by Clare County Council in respect of Traveller-specific accommodation,* 2021, p. 9, available at: https://www.ihrec.ie/app/uploads/2021/07/Clare-CC-Equality-Review-IHREC_Final.pdf.
[20] *Ibid,* p.10.
[21] *Ibid,* p.14. See: Clare County Council, *Traveller Accommodation Programme, 2019-2024,* 14 October 2019, p. 8, available at: https://www.clarecoco.ie/services/housing/publications/traveller-accommodation-programme-2019-2024-35464.pdf

not have a representative of the Traveller community and the Council does not have a Traveller-specific Unit or Traveller Liaison Officer." [22]

(iii) Cultural traditions and Traveller-specific accommodation

25. The jurisprudence of the ECtHR has long recognised Gypsies and members of the Traveller community as being a particularly vulnerable and socially disadvantaged minority whose needs and lifestyle should not only be given special consideration in regulatory planning frameworks, such as the Planning and Development Act 2000, but also in reaching decisions in particular cases.[23] In this regard, the Commission draws the Court's attention to the *dicta* of the ECtHR at paragraph 73 of *Chapman v. United Kingdom* (***'Chapman'***),[24] which is quoted in full at paragraph 4.20 of the Appellants' submissions.

26. It is very important to highlight that a nomadic lifestyle is only one aspect of the cultural identity of Travellers, another central aspect being the tradition of living with extended family members. Of 481 respondents surveyed during the course of research carried out by the Community Foundation for Ireland, 75 per cent said they viewed living close to family as being *"very important"*.[25] In a report for the Oireachtas Library and Research Service, Dr. Anna Visser wrote:

> *"The specific cultural needs of Travellers, along with significant experiences of social exclusion ... have consequences for the housing needs of Travellers in mainstream accommodation and in the Traveller specific accommodation. Cultural characteristics such as nomadism, living as extended family groups, and specific economic activities, including keeping horses, all raise specific needs in terms of accommodation"*[26] (emphasis added).

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[22] *Ibid*, pp.16-17. See also: *Ward v. South Dublin County Council* [1996] 3 IR 195, pp.204-205.
[23] See, for example: *Chapman v. United Kingdom,* application no. 27238/95, ECtHR, 18 January 2001, §96.
[24] *Chapman, ibid,* §73.
[25] A further 14 per cent of respondents said it is *"fairly important"* to live close to family. See: J O'Mahony, *Traveller Community National Survey* (2017), p. 63, available at: https://www.exchangehouse.ie/userfiles/file/reports/research/National_Traveller_Community_Survey_2017_07.pdf.
[26] A Visser, Oireachtas Library and Research Service, *Traveller Accommodation: The challenges of implementation,* p. 9, available at: https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2018/2018-10-01_spotlight-traveller-accommodation-the-challenges-of-policy-implementation_en.pdf

27. In its Comments on Ireland's 18th National Report on the implementation of the European Social Charter, submitted to the Council of Europe, the Commission stated this year:

> *"IHREC reiterates its concern that the current accommodation provisions do not fulfil the State's obligations to provide culturally appropriate accommodation to Travellers; reflect the preferences of the Traveller community; or respect the culture and identity of Travellers, including nomadism, living in extended family groups, keeping horses and other social and economic activities"*[27] (emphasis added).

(iv) The Housing (Traveller Accommodation) Act 1998

28. The Traveller Accommodation Expert Review, established by the Government, referred in 2019 to:

> *"...a clear implementation gap between the number of* [Traveller] *accommodation units planned for and the numbers delivered."*[28]

29. A central thread running through the judgment of the High Court in *Mulhare v. Cork County Council* [2017] IEHC 288 (***"Mulhare"***),[29] and the substantial body of caselaw which Baker J comprehensively set out and analysed, is that it is not the role of the Courts to direct how the limited resources of local authorities should be deployed.[30] There is a clear principle which emanates from those judgments, and others – local authorities are tasked with responding to a need, not a want.

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[27] Irish Human Rights and Equality Commission, *Comments on Ireland's 18th National Report on the implementation of the European Social Charter,* June 2021, pp. 11-12, available at: https://rm.coe.int/comments-irish-human-rights-and-equality-18th-nr-ireland-2021/1680a334b9

[28] Traveller Accommodation Expert Review, July 2019, p. i, available at: https://www.paveepoint.ie/wp-content/uploads/2019/07/Expert-Review-Group-Traveller-Accommodation.pdf

[29] The Judgment was upheld on appeal: [2018] IECA 206.

[30] See, for example: *McDonagh v Clare County Council* [2004] IEHC 184; *Doherty v South Dublin County Council* [2007] 2 IR 696; *Fingal County Council v. Gavin* [2007] IEHC 444.

30. The Commission does not seek to depart from that line of caselaw. However, as is expanded on in greater detail later in these submissions, in the section which addresses the concept of a *"reasonable offer"*, the provision of Traveller-specific accommodation for members of the Traveller community, such as the Appellants, should fall within the former categorisation as opposed to the latter – it is a need, not a want.

31. In that same vein, the Commission acknowledges that section 13 of the Housing Act 1988 (amended by section 29 of the Housing (Traveller Accommodation) Act 1998) is, on its face, an enabling provision. However, it is important to acknowledge that the very import of the 1998 Act is that efforts should be made to provide Traveller-specific accommodation to Travellers when they need it and therefore, in certain circumstances, that legislation will impose duties upon local authorities.

32. In *Ward v. South Dublin County Council* [1996] 3 I.R. 195, Laffoy J. referred to the obligations placed on housing authorities under section 13 of the Housing Act 1988.[31] The housing authority contended that in light of *University of Limerick v. Ryan,* Unreported, High Court, 21 February 1991, it had no duty to provide halting sites pursuant to section 13 of the 1988 Act. Laffoy J. described this as *"[w]holly incomprehensible and unsustainable"*[32] and reiterated the view that a local authority's functions under section 13 must be performed in a rational and reasonable manner and, in that regard:

> *"[t]he housing authority must have regard to the fact that housing needs and traveller accommodation needs in its area are continuing to grow..."*[33]

33. While holding that it is not for the courts to direct a local authority as to how it should deploy its resources, Laffoy J. did stipulate that the courts may intervene to provide relief by way of mandatory injunction where a housing authority failed to

[31] N.B. Laffoy J's judgment was also delivered prior to section 13, Housing Act 1988 being amended by the 1998 Act.
[32] *Ward v. South Dublin County Council* [1996] 3 IR 195, 199.
[33] *Ward*, pp.204-205.

make reasonable efforts to fulfil its obligations to members of the Traveller community under section 13 of the Housing Act 1988.[34]

34. That section provided local authorities with powers to make provision for Traveller-specific accommodation, when originally enacted. The introduction of the Housing (Traveller Accommodation) Act 1998 ('the 1998 Act') and particularly section 29 thereof, led to an expansion of those powers and provided a more accurate reflection of what was required in order to facilitate, and even promote, Travellers being able to occupy caravan accommodation and pursue a nomadic lifestyle. In particular, section 29(2) of the 1998 Act provides:

"A housing authority may provide, improve, manage and control sites for caravans used by persons to whom this section applies, including sites with limited facilities for the use by such persons otherwise than as their normal place of residence or pending the provision of permanent accommodation under an accommodation programme within the meaning of section 7..." (emphasis added).

35. In the circumstances of the herein appeal, it is important to highlight the fact that the aforementioned statutory provision envisages that local authorities would have temporary facilities available to provide members of the Traveller community with access to culturally appropriate accommodation until such time as a more permanent solution is available. The Council has been on notice of the Appellants' accommodation needs for several years.

36. The case of *O'Reilly v. Limerick County Council* [2007] 1 I.R. 593 followed the enactment of the 1998 Act and was against a backdrop where section 160 proceedings had previously been advanced and where they were threatened again. This precipitated the applicants to institute proceedings which effectively challenged the local authority's failure to provide halting site accommodation. MacMenamin J. was satisfied that the housing authority was not meeting its statutory duty to supply sufficient Traveller-specific accommodation, so indicating

[34] *Ward*, pp.203-204.

an obligation to provide the particular Traveller family with halting site accommodation.

37. In its defence, the housing authority had pointed to its TAP, which the applicants had described as *"[l]audable in its stated need for the provision of halting site accommodation"*, but they pointed to the fact that the *"[r]espondent has no clear objective as to how this need is to be met."*[35] MacMenamin J. broadly concurred with this view, describing the local authority's approach as being characterised by, *"[l]ong term, unperformed and unattained objectives or aspirations"*, which he said could not justify its failure *"... to implement short term, feasible and attainable means of complying with s.13(2) of the Act. To pursue this course is to use an unachieved end to justify inaction on an achievable means. That is the very essence of irrationality."*[36]

38. MacMenamin J.'s judgment is of importance in understanding the nature of the obligations placed on local authorities under the 1998 Act. It is clear that this legislation does not simply place broad and overarching obligations to examine what Travellers' accommodation needs are but to set out how those needs will be met and then to work towards implementation. The judgment serves to individualise the nature of the obligations placed on local authorities in respect of particular members of the Traveller community within their functional area.

C. The Council's obligations in respect of the promotion and protection of human and equality rights

(i) The European Convention on Human Rights Act 2003

39. As an organ of State, the Council is obliged, by section 3 of the ECHR Act 2003, to perform its function in a manner that is compatible with the ECHR.

40. In its submission in ***Faulkner***, the Commission has highlighted a recent judgment of the High Court in *Waterford City and County Council v. Centz Retail Holding*

[35] *O'Reilly v. Limerick County Council* [2007] 1 I.R. 593, p.602.
[36] *O'Reilly*, p.629.

Limited [2020] IEHC 634, a decision which is of particular relevance to these proceedings given the matters of public importance which this Court referred to in its Determination.[37]

41. In that judgment, Simons J. stated that there is no obligation on a local authority to carry out any form of proportionality assessment, *simpliciter,* before instituting an application pursuant to section 160. This function, he said, falls entirely to the court with carriage of the application.[38]

42. In the Commission's respectful submission, this approach does not conform with section 3 of the ECHR Act 2003. While judicial oversight is built into the mechanism provided for by section 160, thus providing a level of protection, local authorities as organs of the State must carry out their functions in assessing housing needs, distributing accommodation, and seeking to effect evictions, in a manner that is compatible with the ECHR.

43. The Commission does not consider this submission to be incompatible with the Court's judgment in ***Murray,*** in particular, paragraphs 60-66 thereof. In light of that portion of the Court's judgment, it may now be the case that the extent to which a local authority is obliged to take into account some considerations that may be relevant to a proportionality assessment will depend on the circumstances of the case.

44. However, where an eviction may interfere with a right to respect for private life, family life and home, of a member of a vulnerable group to whom the local authority itself has duties, the local authority should be required to determine the extent to which it has fulfilled its duties to that person or persons, what steps it has or could take to minimise the negative impact of an eviction on them, and the equality and human rights implications of an eviction.

45. In considering a statutory provision in England and Wales which also provides local authorities with the power to seek injunctive relief where a breach of planning control has occurred or is anticipated to occur - section 187B of the Town and

[37] [2021] IESCDET 100, para.13.
[38] At para.53.

Country Planning Act 1990 – the Court of Appeal there stated, in a judgment later upheld by the House of Lords[39], *South Buckinghamshire District Council v. Porter* [2001] EWCA Civ 1549, per Simon Brown L.J.:

> *"Relevant too will be the local authority's decision under s.187B(1) to seek injunctive relief. They, after all, are the democratically elected and accountable body principally responsible for planning control in their area. Again, however, the relevance and weight of their decision will depend above all on the extent to which they can be shown to have regard to all the material considerations and to have properly posed and approached the article 8(2) (of the ECHR) questions as to necessity and proportionality."*[40]

46. The courts, in carrying out their separate and distinct functions, should be satisfied, first, that a local authority has complied with its obligations pursuant to section 3 of the ECHR Act 2003, and second, that an order under section 160, if made, would comply with the requirements of necessity and proportionality under the ECHR. In this regard, section 2 of the ECHR requires courts, when interpreting and applying a statutory provision or rule of law, in so far as is possible, subject to the rules of law relating to such interpretation and application, in a manner compatible with the State's obligations under the ECHR.

(ii) The Public Sector Duty

47. Section 42 of the IHREC Act 2014 has introduced a public sector duty which the Council, as a public body, is obliged to fulfil in carrying out its functions. Section 42(1) provides:

> *"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*

[39] *South Buckinghamshire District Court v Porter and Anor* [2003] 2 AC 558.
[40] [2001] EWCA Civ 1549, para.39.

(c) protect the human rights of its members, staff and the persons to whom it provides services."

48. Despite its relevance, no reference was made to this public sector duty in the Court of Appeal's analysis.

49. Section 42(1) places positive duties on public bodies which are mandatory in nature,[41] and the provision is engaged in this case where the local authority has acquired statutory duties to the Appellants because it is responsible for administering their application for housing supports. The Commission submits that in order to comply with section 42(1), a local authority must carry out a proportionality assessment where its actions as a service provider may interfere with a person's rights under the ECHR, and take measures to mitigate any such interference so that it is the least restrictive possible.

50. While, pursuant to section 42(11), nothing in the section shall "*of itself operate to confer a cause of action*" on any person against a public body in respect of the performance by it of its functions under section 42(1), there is otherwise no exclusion on reference to, or reliance on, the section 42 duty in legal proceedings.

51. A body of caselaw has developed in England and Wales on the statutory 'Public Sector Equality Duty' which exists there.[42] In the seminal judgment of *R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), the High Court set out guiding principles which have subsequently and repeatedly been approved by the appellate courts in that jurisdiction:[43]

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[41] In the context of England and Wales, see: *R (Bridges) v. The Chief Constable of South Wales Police* [2020] EWCA Civ 1058, paras.176 and 182.

[42] Section 149(1), (England and Wales) Equality Act 2010 provides:

> *"A public authority, in the exercise of its functions, have due regard to the need to –*
> *(a) eliminate discrimination, harassment, victimization and any other conduct that is prohibited by or under this Act;*
> *(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
> *(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."*

[43] See, for example: *R (Bracking v. Secretary of State for Work and Pensions)* [2013] EWCA Civ 1345,

(i) the duty must be fulfilled before and at the time when a particular policy is being considered;

(ii) it must be exercised in substance, with rigour, and with an open mind; it is not a question of *"ticking boxes"*;

(iii) the duty is non-delegable;

(iv) the duty is a continuing one;

(v) if relevant material is not available in order to make a decision which complies with the duty, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required;

(vi) provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of a decision on the equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision.[44]

52. The High Court of England and Wales has held that proceedings which seek injunctive relief, and which involve the occupation of sites by individuals as a place of residence, even where such occupation is unlawful, engage not only rights enjoyed under the ECHR but also the Public Sector Equality Duty.[45]

53. In *R (Bridges) v. The Chief Constable of South Wales Police* [2020] EWCA Civ 1058 the Court of Appeal of England and Wales held that the respondent had not discharged its duty under section 149 of the Equality Act 2010, by failing to satisfy itself either directly or by way of independent verification that facial recognition software it planned to use did not have an unacceptable bias.[46] In particular, the Court stated:

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[44] *R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), paras.90-96.
[45] *Cheshire East Borough Council v. Maloney* [2021] EWHC 350 (QB) (Admin), para.50.
[46] *R (Bridges)*, paras.163-199.

"176. We accept (as is common ground) that the PSED (Public Sector Equality Duty) is a duty of process and not outcome. That does not, however, diminish its importance. Public law is often concerned with the process by which a decision is taken and not with the substance of that decision. This is for at least two reasons. First, good processes are more likely to lead to better informed, and therefore better, decisions. Secondly, whatever the outcome, good processes help to make public authorities accountable to the public. We would add, in the particular context of the PSED, that the duty helps to reassure members of the public, whatever their race or sex, that their interests have been properly taken into account before policies are formulated or brought into effect ...

182 ... The whole purpose of the positive duty (as opposed to the negative duties in the Equality Act 2010) is to ensure that a public authority does not inadvertently overlook information which it should take into account"[47] (emphasis added).

54. In seeking to assess the impact of the Public Sector Equality Duty in areas such as housing law and unauthorised developments, the judgment in ***Bromley v. Persons Unknown***, referred to above, is of significance. The Court of Appeal of England and Wales observed:

"Although the stated target of the injunction was 'persons unknown', it was common ground that the injunction was aimed squarely at the Gypsy and traveller community."[48]

55. The interim injunctions obtained by the housing authority were discharged by the High Court, and that Court's decision was upheld on appeal. What Coulson L.J.'s judgment makes clear is that the Public Sector Equality Duty in that jurisdiction requires that regard be had to the human and equality rights outcomes of every decision. It means that "*[p]roper regard and full weight*" must be given to such

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[47] *R (Bridges),* paras.176 and 182.

[48] *Bromley*, para. 1. It was further stated at the same paragraph: *"The points arising from the appeal itself are of relatively narrow compass, but all parties were anxious that, in the light of the recent spate of similar cases, this court should provide some guidance as to how local authorities might address this issue in the future."*

issues.[49] General regard to issues of equality will not suffice, there must be specific regard, by way of conscious approach to the statutory criteria and objectives in each individual case, before a relevant decision is made.[50]

56. In respect of section 42 of the IHREC Act 2014, it is important to emphasise that the Public Sector Duty appears to apply both to an individual decision made by local authorities in a given case, such as a decision to seek an order for eviction, and to the exercise of a local authority's functions more broadly.

57. In the Commission's respectful submission, the extent to which the Council fulfilled its Public Sector Duty should play a role in the Court's proportionality assessment. In particular, consideration should be given to:

    (a) the nature of the consideration given to the human and equality rights issues arising at the time of the decision to seek an eviction order;

    (b) the steps taken to promote and protect the human and equality rights of the Appellants by the Council in carrying out its functions more generally, for example, in administering the Appellants' application for social housing supports and in meeting its obligations under the 1998 Act.

58. In this case, the Court of Appeal found no merit in a two-fold argument that a failure by the Council to draw down funds from central Government for Traveller-specific accommodation, and/or a failure by it to fulfil its obligations pursuant to the 1998 Act could and/or should have a bearing on the Council's application for relief pursuant to section 160.[51]

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[49] See, for example: *R (on the application of Lunt) v. Liverpool City Council* [2009] EWHC 2536 (Admin), para.64.

[50] *R (Meany) v. Harlow District Council* [2009] EWHC 559 (Admin), paras74 and 84.

[51] At para. 88. Whelan J. adopted the same wording as that which is included in Regulation 12(2), Statutory Instrument 198/2011, but she did not make explicit reference to the statutory provision. It is a provision of significant consequence, particularly with regard to assessing and responding to the accommodation needs of members of the Traveller community within the State. It provides, where a household that qualifies for social housing supports refuses two *"[r]easonable offers"* of different dwellings in any continuous period of one year that household will not be considered for another allocation for a further period of one year.

59. The Court of Appeal appeared to endorse the High Court's conclusion that the Council had fulfilled its obligations under the 1998 Act. The High Court had observed that the Appellants were taken into account in the Council's Traveller Accommodation Programmes.[52]

60. It is important to highlight that a housing authority's obligations under the 1998 Act are more extensive than that. The Commission very respectfully submits that the extent to which a housing authority has sought to meet the accommodation needs of members of the Traveller community, such as the Appellants, and how it has gone about doing so, should have a bearing on how the courts adjudicate upon applications pursuant to section 160 in such cases. This factor, while not determinative, is one which has been taken into account by the courts in England and Wales when deciding whether to grant similar injunctive relief.[53]

61. Two key questions arise.

    (i) Whether the failures of a housing authority to make Traveller-specific accommodation available for social housing applicants who hold themselves out as requiring same should form part of a proportionality assessment to be carried out by the courts?

    (ii) When applicants for social housing represent themselves as requiring Traveller-specific accommodation, and are instead offered standard housing, do they constitute reasonable offers, as a matter of law?

62. Beginning with the second question, the Court of Appeal appeared to accept, as the High Court had done before it, that there is no Traveller-specific accommodation available to the Appellants within the functional area of the Council. [54] That is the case notwithstanding the fact that the Council has, for a number of years, been on notice of the Appellants' housing needs and their requirements for Traveller-specific accommodation.

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[52] At para.23.
[53] See, for example: *Cheshire East Borough Council v. Maloney* [2021] EWHC 350 (QB) (Admin), para.51.
[54] At paras.19-21, 91.

63. The Court of Appeal characterised several offers of standard housing which had been made to the Appellants by the Council as being reasonable offers.[55]

64. In so doing, it placed significant reliance upon the judgment of the High Court in ***Mulhare***. With respect, Whelan J. appeared, mistakenly in the view of the Commission, to rely upon the judgment of Baker J. in ***Mulhare*** as supporting the proposition that the Council had no obligation to make provision for Traveller-specific accommodation that would allow the extended McDonagh family to live together.[56] In ***Mulhare***, the respondent council had offered to make adaptions to the applicant's home as had been said to be required by her occupational therapist. However, it had refused to rehouse the applicant in a property closer to Cork University Hospital, this being a desire of hers which it was said would be of benefit to her, as opposed to being a medical requirement. The provision of Traveller-specific accommodation for members of the Traveller community, such as the Appellants, constitutes a need as opposed to a desire. Such provision is necessary in order for such individuals to maintain their identity as Travellers and to lead their private and family life in accordance with that tradition, as is required by the 1998 Act (and section 3 of the ECHR Act 2003, giving effect to Article 8 of the ECHR).

65. It is also important to stress that in exercising its statutory powers and functions in the provision of social housing, the Council is required to exercise those powers in a manner that is rational and reasonable: see, by analogy, *County Meath VEC v. Joyce* [1997] 3 IR 402 at 413, in which Flood J. stated:

> *"[W]herever a serviced campsite is located, it will never be a popular decision as far as local residents are concerned.*
> *Sooner or later somebody is going to have to bite the bullet and break the log jam ...*

[55] See, for example, para.89.
[56] At para.68.

Nothing is solved by merely moving travelling families from place to place and of necessity moving them from unauthorised campsite to unauthorised campsite ..."[57]

66. The Commission submits that, in assessing whether relief pursuant to section 160 should have been granted, the Court should have regard to the fact that the Council is seeking the Appellants' removal from the lands they are currently in occupation of, in circumstances where there is no alternative Traveller-specific accommodation available to them.

67. The Court of Appeal's judgment follows a line of caselaw (see, for example, *Fingal County Council v. Gavin* [2007] IEHC 444), in which the accommodation needs of Travellers, and what is reasonable, have not been subjectively assessed but have instead been analysed from the point of view of a settled person. In the Commission's respectful submission, such an approach is not in keeping with the jurisprudence of the ECtHR, and arguably does not conform with earlier authorities outlined above, namely *Ward v. South Dublin County Council* [1996] 3 I.R. 195 and/or *O'Reilly v. Limerick County Council* [2007] 1 I.R. 593, which analyse the nature of the obligations placed on local authorities under the 1998 Act.

68. The issue of whether the Council made reasonable offers in the Appellants' case should play a part in any proportionality assessment to be undertaken by the Court – it goes to the question of whether the Council has taken adequate steps to minimise the negative impact of an eviction on the Appellants, and/or the interference with the Appellants' rights pursuant to the Constitution and Article 8 of the ECHR.

D. <u>Proportionality</u>

(i) The concept of "home" and having sufficient and continuous links

[57] *County Meath VEC v. Joyce* [1997] 3 I.R. 402, p.413.

69. The Court of Appeal rejected the Appellants' contention that the caravans and/or the site which they occupy, constitutes a *"home"* within the meaning of Article 8 of the ECHR.[58]

70. Principally, this appears to be based on a finding that the Appellants had not spent a significant period of time living at Cahercallamore, and had *"[n]o nexus with or interest in the Cahercallamore lands."*[59]

71. The Commission notes the submissions made by other Parties in respect of this finding, and seeks to avoid repetition. As has been already stated, the concept of *"home"* is autonomous.[60] The ECtHR has repeatedly held that a *"place"* may constitute a home where *"sufficient and continuous links"* may be established. The Commission makes the following submissions:

    (i) The Court should not construe the concept of a *"place"* in a narrow manner. The ECtHR has not been prescriptive in terms of what size the geographical area must be in order to constitute a *"place"* – it will be dependent on the particular facts of a given case.[61] It may be a particular site, but it could also be a locality in a town or in the functional area of a local authority.

    (ii) The concept of *"sufficient and continuous links"* should not be construed as relating only to the length of time during which a person has been living in a place. Time may be relevant, but sufficient and continuous links should also be able to be evidenced by personal and social links to a particular area as well.

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[58] At para.95(b)(ii).
[59] At para.95(f).
[60] *Buckley v. United Kingdom* (1996) 23 EHRR 101, §63.
[61] *Winterstein v. France,* application no, 27013/07, 17 October 2013, ECtHR, §140.

(iii) Regard should be had to why a person has had to move from place to place, including where that is because of some failure on the part of a local authority.[62]

(ii) The court's requirement to assess proportionality

72. Article 8 of the ECHR requires courts to undertake a detailed proportionality assessment of all the factors in a case when an eviction order is sought. As was stated in *Hirtu v. France:*

> *"[u]nder the procedural safeguards of Article 8, any persons whose rights under that provision have been interfered with must be allowed to have the proportionality of that measure reviewed by an independent tribunal in accordance with the relevant principles therein..."*[63]

73. The judgment of the Court of Appeal places considerable weight on the unlawful nature of the Appellants' occupation of the Council owned lands. It appeared to blame the Appellants almost entirely for the situation that has arisen, and dismissed the reasons put forward by them in seeking to justify moving from one unauthorised site to another.[64] It is important to emphasise that the lawfulness of occupation of a place is only relevant insofar as it relates to considerations under Article 8(2) of the ECHR and, in particular, the balancing of the interests of the community over those of the individual in assessing the need for the interference.[65] In light of this, any proportionality assessment should be based on the premise that the unlawfulness of the occupation is a factor to be considered alongside the impact that an eviction may have on a member or members of the Traveller community, which includes the following.

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[62] See: *Bromley v. Persons Unknown* [2020] EWCA Civ 12; *London Borough of Barking and Dagenham* [2021] EWHC 1201 (QB), where these factors were said to be of relevance in respect of different but related questions.
[63] Application no. 24720/13, 14 August 2020, ECtHR, §75.
[64] See, for example, para.57.
[65] *Buckley v. United Kingdom* (1996) 23 EHRR 101.

(i) Whether there is any other alternative accommodation available to those who may be the subject of the eviction order.[66] Where no such accommodation is available, the potential interference with those persons' rights should be considered all the more serious.[67] The *"suitability"* of that alternative accommodation is also a relevant factor,[68] thus the question of whether the alternative accommodation complies with the requirements of respecting the needs and cultural traditions of members of the Traveller community is a relevant factor.

(ii) Where a person may be rendered homeless by virtue of an eviction order, *"[p]articuarly weighty reasons of public interest"* must be demonstrated to justify the making of such an order.[69] It is important to highlight that homelessness should not be construed in a narrow sense in this context. For example, while the applicant in *Connors* had been evicted from the site that he was in occupation of, he retained his caravan.

74. It is also apparent from the caselaw of the ECtHR that a different and arguably more exacting approach is to be taken to an assessment of proportionality in circumstances such as arise in this case where the potential subject of an eviction order is a member of the Traveller community. The ECtHR has continually identified this group as requiring a special status of protection, given their particularly vulnerable and socially disadvantaged status.[70] As a result, the impact which an eviction may have on such individuals must be elevated in the hierarchy of factors to be taken into account in the courts' assessment of whether such relief is proportionate and necessary. Their status as a socially disadvantaged group and their specific needs must play a central part in deciding whether an eviction is in fact necessary.[71] In *Yordanova v. Bulgaria,* the ECtHR stipulated that the underprivileged status of what it has described as an outcast community:[72]

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[66] *Yordanova v. Bulgaria,* application no. 25446/06, 24 April 2012, §126.
[67] *Chapman v. United Kingdom,* application no. 27238/95, 18 January 2001, §§103-104.
[68] *Chapman, ibid,* §§103-104.
[69] *Connors v. United Kingdom,* application no. 66746/01, 27 August 2004, §§103-104.
[70] *Hirtu v. France, ibid,* §70.
[71] *Hirtu, ibid,* §70.
[72] *Yordanova v Bulgaria,* application no. 25446/06, 24 September 2012, para.128.

"[m]ust be a weighty factor in considering approaches to dealing with their unlawful settlement and, if their removal is necessary in deciding on its timing, modalities, and, if possible, arrangements for alternative shelter."[73]

75. In this regard, the Commission respectfully submits that the proportionality assessment to be undertaken by the courts in this jurisdiction in dealing with applications pursuant to section 160 must logically take account of:

    (i) the efforts a local authority has taken to meet the requirements of potential respondents in respect of their needs for Traveller-specific accommodation; and

    (ii) the local authority's fulfilment of the statutory obligations pursuant to relevant legislation, such as the 1998 Act and section 42 of the IHREC Act 2014, more broadly.

76. This is so given that the object of Article 8 is not only to protect the individual against arbitrary interference but also to place certain positive obligations on the State, in particular to give special consideration to the needs and different lifestyle of the Traveller community and thus to facilitate their way of life,[74] including but not limited to the fact that occupation of a caravan is a corollary of the right to a private and family life and that there is therefore a practical need for locations to station a caravan in order to have full enjoyment of that right.[75]

77. It is also important to acknowledge in respect of the proportionality assessment to be undertaken that it is not necessarily the case that a person must establish sufficient and continuous links with a place where they are currently residing in order for an eviction to constitute an unlawful interference with their rights pursuant to Article 8. While the circumstances of the eviction in *Hirtu v. France* were extreme, the Commission interprets that judgment as establishing that the consequences, or the failure to consider the consequences, of an eviction may in

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[73] *Yordanova, ibid,* para.133.
[74] See, for example: *Chapman, ibid,* §96; *Connors, ibid,* §84; *Winterstein, ibid,* §148.
[75] *Winterstein, ibid,* §142.

themselves render unlawful an interference with rights enjoyed under the ECHR even where such sufficient and continuous links have not been established.

(iii) Approach of the Irish Courts in respect of section 160

78. In ***Murray***, the Supreme Court analysed the type of factors to be considered by a court in a section 160 application, with reference to conflicting High Court judgments. However, no reference is made to ***Murray*** by the Court of Appeal in its judgment in this case.

79. The Supreme Court identified a list of factors in ***Murray***, some of which *may* be relevant to the issue of proportionality, which a court is permitted, as opposed to being mandated, to consider.[76]

80. While the Court did stipulate that the weight to be attributed to each factor will depend on the case,[77] it also adopted a hierarchical approach outlining clearly that the *"[i]nterests of the public will be ever present on the enforcing side"*, which will *"[m]ost likely...stand first in the queue for consideration."*[78] In the Commission's respectful submission, the judgment in ***Murray*** has, at its centre, a presumption that a demolition order should be made to protect the public interest in upholding planning controls. The potential effect of this is that vulnerable members of society, and in particular Travellers, will face an uphill battle ensuring their rights are protected and in seeking to rebut the presumption that an order should be made. Placing such emphasis on the unlawfulness of a development has been viewed as legally problematic in the jurisprudence of the ECtHR.[79]

81. The Commission acknowledges that the Court rejected the approach proposed in *Fortune No. 2,* the effect of which was to require that compelling reasons to justify a demolition order should be shown. However, it is important to re-emphasise that in order for an interference with rights under Article 8 to be legally justified, that interference must be based on a pressing social need. In this sense, the ECHR does

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[76] At para. 92.
[77] At para. 93.
[78] At para. 91; see also paras. 120-124.
[79] See, for example: *Winterstein, ibid,* §156.

require the State to provide justification(s) where an interference with rights under that provision has occurred.

82. In its submission to the ECtHR in ***Faulkner,*** the Commission has acknowledged that the Supreme Court considered that its approach conforms with the judgments of the ECtHR,[80] particularly *Chapman,* but the Commission has argued that ***Murray*** did not take full account of the developing jurisprudence of the ECtHR. For example, as referred to above, in *Yordanova v. Bulgaria,* the ECtHR stipulated that the legislation underpinning a removal order must *require* a proportionality analysis, including an assessment of the impact of an eviction or a demolition on an individual's circumstances.

83. The Commission has also argued in ***Faulkner*** that neither the Court's judgment in ***Murray***, nor section 160 itself, explicitly acknowledge the need to take account of and/or protect minorities in making planning decisions, and/or to make offers of appropriate accommodation where it is necessary to make an eviction order against a minority group, as has been said to be required by the ECHR.[81] The absence of such protections has the potential to result in a disproportionate impact on Travellers who will often be rendered homeless as a result of demolition orders being executed.

84. It should be acknowledged that ***Murray*** did not concern a case involving the privacy rights of a vulnerable minority, such as arises in these proceedings, nor did it concern the question of whether a local authority had met its obligations to the potential subject(s) of a section 160 order. In such cases, more weight should be placed on the impact of an eviction – there must be a pressing social need which warrants an eviction, and the regulatory planning framework should be utilised in such a way as to ensure that their needs and way of life are fully taken account of. In the respectful submission of the Commission, the Public Sector Duty also has a greater role to play in the courts' analyses where such cases concern the privacy rights of vulnerable and traditionally socially disadvantaged groups.

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[80] ***Murray***, para. 141.
[81] *Hirtu, ibid,* §70; *Chapman, ibid,* §96.

85. In light of the jurisprudence of the ECtHR outlined above, the courts should be mandated to carry out proportionality assessments, which must involve full and proper consideration of all pivotal factors. With respect, ***Murray*** appears to indicate that the courts may elect to carry out an assessment and that they have a very wide discretion in terms of what should and should not be taken into account. While it is important that courts are provided with latitude to take account of all material factors, there are certain matters which should be taken account of in each adjudication of an application for a section 160 order including:

(i) the potential impact of the making of the order;

(ii) the ethnic minority and vulnerable status of the potential subjects of the order (should such considerations arise); and

(iii) the efforts of a local authority to minimise the impact of an eviction or a demolition, including by making offers of appropriate accommodation.

86. The Commission considers the judgment in ***Murray*** as leaving open the possibility of a reformulation of the proportionality assessment to be undertaken where an application for an eviction or demolition order concerns a socially disadvantaged group, such as members of the Traveller community, and/or where it can be demonstrated that a local authority has failed in its own obligations toward the potential subjects of an order, and/or where a *prima facie* case of discrimination has been made out. Such scenarios can be readily contrasted with the factual circumstances which underpinned the Court's judgment in ***Murray***, as well as the judgments of the High Court in *Kinsella* and even in *Fortune*.

87. In addition to the pivotal considerations outlined in the jurisprudence of the ECtHR, the guiding principles provided by ***Bromley v. Persons Unknown*** may also be of assistance in contemplating what range of factors a court is obliged to take account of under section 160, in circumstances such as arise in this case, which the Court outlined as follows:

(i) When injunction orders are sought against the Traveller community, the evidence should include what other suitable and secure alternative housing

or transit sites are reasonably available. This is necessary if Traveller cultural traditions including, but not limited to, a nomadic lifestyle are to have effective protection under Article 8 of the ECHR.

(ii) If there is no alternative or transit site, no proposal for such a site, and no support for the provision of such a site, then that may weigh significantly against the proportionality of any injunction order.

(iii)A submission that members of the Traveller community can go elsewhere or occupy private land is not a sufficient response, particularly where other local authorities are taking similar action.

(iv) There should be a proper engagement with the Traveller community and an assessment of the impact that an injunction might have, taking into account their specific needs, vulnerabilities and different lifestyle. Equality impact assessments and welfare assessments of individual members of the community prior to the initiation of enforcement action should be considered good practice and be considered by the courts.

(v) Special consideration should be given to the timing and manner of approaches to dealing with any unlawful settlement and as regard the arrangements for alternative pitches or housing.[82]

E. Conclusion

88. Central to this case is the ongoing failure of the Council to provide a family, who come from a recognised ethnic minority, with culturally appropriate accommodation. Traveller-specific accommodation is a need having regard to their culture and identity, rather than a desire. Given the Council's statutory obligation under s.42 of the IHREC Act 2014 and relevant Strasbourg caselaw, which helps informs the baseline of rights afforded under the Constitution, the Commission submits that the Court of Appeal applied the incorrect test. For the reasons set out above this case is distinguishable from ***Murray*** and it also provides

[82] ***Bromley v. Persons Unknown***, para. 108.

the Court with an opportunity to clarify the constitutional and statutory rights of this Traveller family having regard to recent Strasbourg caselaw. The Commission invites the Supreme Court to set out the relevant two-part test, firstly, the criteria that informs what constitutes a 'home' for members of the Traveller community and secondly, in such a case the proportionality test that must be applied and the criteria for consideration in that regard.

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