



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

S:AP:IE:2021:000078

**Dunne J
O'Malley J
Baker J
Woulfe J
Hogan J**

Between/

CLARE COUNTY COUNCIL

Plaintiff/Respondent

AND

BERNARD MCDONAGH AND HELEN MCDONAGH

Defendants/Apellants

AND

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

JUDGMENT of Mr. Justice Gerard Hogan delivered the 31st day of January 2022

Introduction

1. This judgment is being delivered just over 100 years since the first Provisional Government for an independent Irish State was called into being. It is nonetheless salutary to reflect that one hundred years later a distinct group – the Irish Traveller community – still

remains a vulnerable minority at the margins of Irish society. The members of that community have struggled for recognition of their own cultural identity and way of life. While any dispassionate observer would recognise that there has been fault on both sides, the fact remains that the legal system has not found it altogether easy to accommodate the distinct cultural traditions of the travelling community – such as nomadism and living in large family groups – within its traditional ambit of protecting and enforcing property rights, enforcing laws restraining trespass and legislation designed to give effect to legitimate planning, zoning and environmental concerns. The present case exemplifies many of these difficulties.

2. The appellants are husband and wife who are members of the Travelling community. It is accepted that they, along with two sons and other members of their extended family, currently illegally occupy lands which are the property of the respondents, Clare County Council, by placing three caravans and two mobile homes on a green field site (one of the mobile homes belongs to one of their sons.) It is also accepted that this occupation amounts to a form of unauthorised development, contrary to s. 3 of the Planning and Development Act 2000 (“the 2000 Act”). In addition it appears that the appellants have constructed a form of stone road and a form of “courtyard” between these temporary dwellings, although there is some dispute between the parties as to what may have been constructed by the appellants and what was already there. The Council has arranged for portable sanitary facilities to be installed on the site as a temporary measure.

3. The respondents have now sought (and obtained) a mandatory interlocutory order from the High Court requiring the appellants to vacate this site. This order was affirmed by the Court of Appeal and the appellants now appeal to this Court following the grant of leave pursuant to Article 34.5.3 of the Constitution.

4. At first blush it might seem that there is no answer to these claims, not least in view of a recent decision of this Court in *Meath County Council v. Murray* [2017] IESC 25, [2018] 1

IR 189 which articulates a presumption that a planning authority will generally be entitled to obtain an order under s. 160 of the 2000 Act requiring the demolition of an illegally constructed private dwelling. Yet the situation here is more nuanced and complex than that, in part because it is not clear that the Council, qua housing authority, has adequately discharged its duties to provide accommodation for the appellants under the Housing (Traveller Accommodation) Act 1998 or, for that matter, under the Housing Acts. Moreover, unlike the situation in *Murray* – where the defendants had constructed a very large dwelling entirely without planning permission which clearly affected the amenities and rights of others – the present case concerns purely temporary structures. In addition, it is clear that this is the only dwelling that the defendants have and if they are obliged to vacate this site they have no alternative land on which to reside as there are no other suitable lands or sites available to them within the functional area of the respondent Council.

5. A further complication is that while the appellants' caravans and mobile home are clearly a "dwelling" for the purposes of Article 40.5 of the Constitution (even if the force of that constitutional protection is diluted by reason of their illegal occupation of the lands), the Court of Appeal was not asked to consider this issue and many pertinent authorities on this point do not appear to have been drawn to that Court's attention. Had this happened it would presumably have affected the reasoning and, quite possibly, the conclusions of that Court.

6. The Court of Appeal at all events nonetheless determined that these caravans etc. did not constitute a "home" for the purposes of Article 8 ECHR and, as a result, did not as such perform any formal proportionality analysis in respect of the decision to require the appellants to leave the site beyond saying that the actions of the Council were proportionate and fair. All of this brings into play once again the relationship between the Constitution and the European Convention of Human Rights Act 2003, a topic most recently examined by this Court in *Gorry v. Minister for Justice* [2020] IESC 55.

7. Before, however, examining any of these issues, it is necessary first to set out the background facts of this appeal.

Background facts to the appeal

8. The appellants are members of the Traveller community which since March 2017 has been officially recognised as a distinct ethnic group within Irish society. Between March 1998 and around November 2012 the appellants resided as tenants of the respondent County Council in a small Traveller-specific housing development known as Ashline. In or around 11th November 2012 the dwelling house in which the appellants resided at Ashline was destroyed by a fire. Subsequently, the appellants lived for a brief time with relatives in Cork before ultimately moving into a private rented dwelling house in Ennis, County Clare. The appellants resided in this rented house until late September 2017, at which point it became necessary to vacate the property so that essential repairs could be carried out.

9. In the period that followed September 2017 the appellants lived on certain lands owned by the respondent County Council, the occupation of which has been the subject to protracted and numerous proceedings. At first the appellants purchased mobile homes which they placed to the side of the road outside of the Ashline site. This road comprised part of the public highway. The appellants thereafter moved onto the Ashline site. As a result, on the 15th December 2017, the respondent initiated proceedings against the appellants seeking mandatory and prohibitory interlocutory orders to restrain breaches of the 2000 Act and trespass. When the matter came on before the High Court on 18th January 2018 the appellants consented to the grant of interlocutory injunctions pending a plenary hearing. The Ashline proceedings proceeded to a plenary hearing and a reserved judgment was delivered on the 15th October 2019 in which Allen J ruled that he would grant a permanent injunction restraining trespass on

the respondent's lands: see *Clare County Council v. McDonagh* [2019] IEHC 662. This order was not appealed by the appellants.

10. Having vacated the Ashline site in accordance with the interlocutory injunctions which Allen J had granted in those proceedings, the appellants moved onto a piece of land approximately fifty metres from the entrance of the Ashline site. It is in respect of this site that the current proceedings were initiated. On the 23rd July 2018 the respondent County Council brought proceedings seeking both a permanent prohibitory injunction restraining the defendants and all other persons having notice of the making of the order from unlawfully placing and/or retaining caravans and associated vehicles or property on a public right of way situate at Ashline, and a permanent mandatory injunction compelling the removal forthwith of the said caravans, property and associated vehicles from the said public right of way.

11. By notice of motion returnable for the 8th August 2018, the respondent sought interlocutory orders of this nature. By the return date the appellants had relocated themselves together with their vehicles, caravans and associated property yet again. This time they relocated to other land owned by the respondent situated in Folio 50734F at Cahercallamore.

12. The application for interlocutory relief was granted by Allen J in the High Court by way of order on the 25th July 2019. This order had, however, inadvertently failed to reflect the fact that the appellants had moved from the public highway onto the Council's lands in Folio 50734F at Cahercallamore and that oversight was ultimately rectified by order of that Court on the 15th October 2019. This order was appealed to the Court of Appeal which upheld the High Court's decision in a judgment delivered by Whelan J on the 12th November 2020: [2020] IECA 307. By way of a determination dated the 14th September 2020, this Court granted the appellants' leave to appeal in respect of this decision: [2021] IESCDET 100.

13. The issues in this appeal which were identified by this Court in its determination and subsequently during case management are as follows:

- a. whether a housing authority in the position of the respondent is obliged to consider the impact of removal on persons such as the applicants and their prospects for obtaining lawful accommodation elsewhere, as well as its own interests, powers and obligations both as landowner and as housing and planning authority;
- b. whether the courts are, when asked for injunction relief in such cases, obliged to carry out a detailed proportionality assessment taking account of all the factors in the case; and
- c. and whether, if such assessments are required, they were adequately carried out in this case.

14. It is next necessary to set out the procedural history of the proceedings to date. The present appeal arises in the following way.

The High Court Ruling

15. As noted above, this appeal concerns an order for interlocutory relief which was granted by Allen J on the 25th July 2019 (and subsequently amended on the 15th October 2019 to reflect the fact that the appellants had moved sites). Allen J delivered his judgment on this matter *ex tempore* following the hearing on the 25th July 2019.

16. By the time of that High Court hearing there were five units on the respondent's land at the Cahercallamore site, namely two mobile homes and three caravans, which were brought on to the land by Mr and Ms McDonagh and members of their family. It is not disputed that the bringing of mobile homes and caravans onto the land constituted "development" for the purposes of s. 3 of the 2000 Act and that the development in this case constituted unauthorised development such that the respondent was entitled to apply to the Court under s. 160 of the 2000 Act for an order in respect of the appellants' occupation of the land.

17. The appellants, however, resisted this application for interlocutory relief on a number of grounds. First, it was argued that the respondent had breached its obligations under s. 10(2) of the 2000 Act to include in the county development plan objectives for the provision of accommodation for Travellers for the use of particular areas for that purpose. Indeed, it was agreed that the respondent's development plan did not provide areas which are zoned for Traveller use. Second, the appellant claimed that the respondent had not drawn down funding which was made available to it specifically for the purposes of providing Traveller accommodation. Third, it was contended that if the order sought by the respondent was made by the Court, the appellants would have nowhere else to go. The appellants advanced this claim on the basis that the Traveller-specific accommodation that had been offered by the respondent at a site called Beechpark would give rise to so-called compatibility issues with an incumbent family, while the other accommodation that had been offered by the respondent was not Traveller-specific and could not accommodate the extended McDonagh family.

18. In his ruling Allen J rejected the first ground on the basis that s. 10(2)(a) of the 2000 Act which refers to zoning does not require land to be zoned for Traveller use. On this basis Allen J held that the fact that no land had been specifically zoned for such use did not mean that the plan failed to meet the statutory objective to make provision for accommodation for Travellers and the use of particular areas for that purposes. In respect of the appellants' second ground, Allen J observed that while the site at Ashline is near to the site that was the subject of the present proceedings, it is ultimately a different site, and thus even if the respondent had been found in breach of the appellants' rights in relation to Ashline, this would not justify them in trespassing upon or carrying out unauthorised development on other Council land. This same reasoning was employed in relation to the argument to the effect that even if the respondent had failed to draw down funds for Traveller-specific accommodation this could never justify the appellants taking the law into their own hands and annexing a site for their occupation. As

for the final ground, Allen J ruled that the respondent had offered the appellants housing and that these offers did fulfil the respondent's statutory duty since it is well-established in law that housing authorities are only obliged to respond to a need and not a want.

19. Allen J concluded by reiterating that had the respondent acted unlawfully in any of the ways contended by the appellants this would more appropriately be dealt with by way of judicial review and could not justify a trespass on Council land or unauthorised development on the land. For the foregoing reasons, the High Court granted the application for interlocutory relief.

The Court of Appeal Judgment

20. The appellants appealed the ruling of the High Court to the Court of Appeal which delivered its judgment on the 12th November 2020: [2020] IECA 307. The grounds of appeal advanced in the Court of Appeal were that the High Court failed to determine whether the appellants' caravans, vehicles and associated property as placed on the respondent's Cahercallamore lands constituted a "home" within the meaning of Article 8 ECHR such as to attract the protection thereof and, if so, whether the interference proposed by the Council in the form of the orders granted by the High Court amounted to a proportionate interference with the right under Article 8 ECHR to respect for one's home.

21. In a comprehensive judgment Whelan J dismissed the appellants' appeal. In the first instance Whelan J provided a detailed exposition of the law governing the grant of interlocutory injunctions and the approach taken by appellate courts in reviewing the exercise of judicial discretion in this context. Whelan J then went on to consider the status of the ECHR in domestic law. Relying on the decision of this Court in *McD v. L* [2009] IESC 81, [2010] 2 IR 199, she pointed out that it was "clear from the framework" of the European Convention on Human Rights Act 2003 ("the 2003 Act") that the "ECHR is not directly applicable as part of the law

of the State and may be relied upon only in the circumstances and in the manner specified in the 2003 Act.”

22. In respect of how Article 8 ECHR might apply in this case, Whelan J considered that the jurisprudence makes clear that Article 8 ECHR “does not confer any entitlement to be provided with a home or a positive obligation to provide alternative accommodation of an applicant’s choosing,” and that in cases involving Travellers “Article 8 cannot be construed as imposing a positive obligation to ensure vacancies on official sites for persons wishing to return from settled residence to the traditional Traveller way of life” as exemplified by *Burton v. United Kingdom* (1996) 22 EHRR 135. This being so Whelan J confirmed that she was satisfied that the decision of the High Court was made in the exercise of the trial judge’s direction, based on a correct application of the relevant principles, and that the decision was one that was open to the trial judge to make on the evidence. In this regard Whelan J placed particular emphasis on the fact that the appellants did not dispute at appeal the title of the respondent to the property in question in these proceedings. Furthermore, Whelan J stated that she could not identify any stateable legal basis upon which the appellants could argue that they were entitled to trespass on the respondent’s property or continue to use the respondent’s lands for an unauthorised development (in breach of s. 160 of the 2000 Act), notwithstanding the application of ECHR jurisprudence. Accordingly, Whelan J found that the enforcement procedure relied upon by the respondent and applied by the High Court was proportionate in the circumstances of the case.

23. As for the contention that the respondent failed to draw down funds for Traveller-specific accommodation and did not comply with its obligation pursuant to the Housing (Traveller Accommodation) Act 1998, Whelan J determined that neither of these allegations had been established and that, even if they had, they could not give rise to a valid defence to either the claim for relief under s. 160 of the 2000 Act or the claim to restrain trespass.

24. Although Whelan J discussed the reasoning of the European Court of Human Rights in *Winterstein v. France* at some length, she ultimately concluded (§ 95(b)(ii)) that as the defendants could not demonstrate that they had the “requisite close and continuous links with Cahercallamore which is a prerequisite to establishing a Convention-recognised ‘home’”, they could not establish that they had a fair question to be tried in respect of Article 8 ECHR. In those circumstances it was unnecessary for the Court of Appeal to conduct a proportionality analysis.

25. For all of the foregoing reasons, and applying the legal principles relevant in cases of interlocutory injunctions, Whelan J concluded that the High Court was entitled to come to the conclusions that it did.

The relevant legislative provisions

26. It is appropriate to set out at this stage the relevant legislative provisions that apply or may apply in this case. In the first instance the power of the High Court to grant both an interlocutory and a final injunction derives from s. 160 of the Planning and Development Act 2000 which provides as follows:

“160 – (1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

...

(3)(a) An application to the High Court or the Circuit Court for an order under this section shall be by motion and the Court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate.”

27. The appellants place considerable reliance on the provisions of the European Convention on Human Rights (“ECHR”) whose application in domestic law is governed by the 2003 Act. Section 2 of the 2003 Act provides that:

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

28. Section 4 of the 2003 Act states that:

“(4) Judicial notice shall be taken of the Convention provisions and of –

a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction,

b) any decision or opinion of the European Commission of Human Rights so established on any question in respect of which it had jurisdiction,

c) any decision of the Committee of Ministers established under the Statute of the Council of Europe on any question in respect of which it has jurisdiction,

and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments.”

29. The actual provision of the ECHR on which the appellants rely is Article 8 which provides as follows:

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

30. It is also helpful at this stage to set out the wording of Article 40.5 of the Constitution which states that:

“The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.”

Appellants’ Submissions

31. The appellants’ case centres on the submission that the Court of Appeal did not have proper regard to the failure of the respondent to demonstrate that its interferences with the appellants’ rights under Article 8 ECHR was in accordance with the law and necessary in a democratic society. The appellants also submit that the High Court and Court of Appeal failed to properly consider the proportionality of the measures to be imposed, namely the interlocutory injunctions, as required by the ECHR and the 2003 Act.

32. The appellants maintain that while the ECHR does not have direct effect and therefore cannot be relied upon by the appellants directly in this case the High Court and appellate courts are under an obligation by virtue of s. 2 of the 2003 Act to interpret and apply any statutory provision or rule of law so far as possible in a manner compatible with the ECHR. The appellants accordingly go on to consider how the ECHR might apply in the present case. In particular the appellants contend that they enjoy the protection of Article 8 ECHR on the basis

that their habitation constitutes a “home” in accordance with the criteria set out in *Winterstein v. France* [2013] ECHR 984 insofar as their current home is of “sufficient duration and evidenced by meaningful ties to the area.” Furthermore, for the avoidance of doubt, the appellants submit that this protection is not vitiated by the fact that the appellants “may not have lawful authority to reside in their current home” (*Buckley v. United Kingdom* (1997) 23 EHRR 101).

33. In addition, and in the alternative, the appellants argue that the ECHR applies insofar as the respondent’s actions have constituted an infringement on the appellants’ right to respect of private life and family life. The appellants say that this right has an inherent nexus with an individual’s “identify, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community” and that, in this respect, the cultural needs of the appellants in the present case should be given due regard. In particular the appellants refute the Court of Appeal’s characterisation of the housing requests of the appellants as “bespoke” but rather a reflection of the cultural rights that are duly conferred under Article 8 ECHR. The appellants stop short of submitting that Article 8 ECHR entails a positive obligation on the respondent to provide the appellants with a home but they do maintain that the respondent is required to carry out its statutory functions and duties in a manner that sufficiently respects the appellants’ cultural rights – otherwise, the appellants contend, the respondent could not claim that they were acting “in accordance with the law” pursuant to the wording of Article 8(2) ECHR. This being so the appellant submits that due respect has indeed not been given to their cultural rights and as such the respondent has not acted “in accordance with the law” under Article 8 ECHR. On this basis the appellants conclude that the respondent should not be entitled to interlocutory relief (per the dissenting opinion of Bonello J in *Chapman v. United Kingdom*).

34. The appellants final submission is that it is necessary to consider the proportionality of the injunctive relief granted by the High Court which, the appellants contend, the High Court and Court of Appeal failed to do, adequately or at all. The appellants acknowledge that the High Court has a large measure of discretion in the exercise of its jurisdiction under s. 160 of the 2000 Act and that this discretion must be exercised in a manner compatible with the EHCR in accordance with s. 2 of the 2003 Act. This being so it appears that the appellants maintain that High Court and Court of Appeal should have considered the following factors in assessing the proportionality of the injunctive measures: the failure of the respondent to specifically zone Traveller accommodation in accordance with its statutory duty under s. 10 of the 2000 Act; the failure of the respondent to draw down funding made available by central government for the purposes of facilitating Traveller-specific accommodation; and the failure of the respondent to offer appropriate Traveller-specific accommodation to the appellants. On this basis the appellants say that the High Court and Court of Appeal erred in law and the appeal should be allowed.

Respondent's Submissions

35. The respondent's submission is essentially that the appellants' mobile home which is currently situated at Cahercallamore does not constitute a "home" for the purposes of Article 8 ECHR, that the High Court and Court of Appeal did carry out a satisfactory proportionality test to consider any potential inference with the appellants' rights under the ECHR, and that the respondent did not fail in its statutory duty in respect of the appellant (and that, even if it had done so, this would not entitle the appellants to unlawfully occupy the respondent's land).

36. On the issue of whether the appellants' mobile home constitutes a "home" for the purposes of Article 8 ECHR, the respondent in the first instance points out that the appellant's mobile home had only been occupied on the Cahercallamore site for a short period of time and

that it is accepted by the appellants that their occupation constitutes an illegal trespass and unauthorised development. The respondent also emphasises that at no point did it delay or acquiesce in taking legal action in order to remove the appellants from the County Council land (at the current site, or at any other sites). The respondent appears to accept that the appropriate test set out in *Winterstein v. France* [2013] ECHR 984 is relevant, but argues that the appellants' submission as to the outcome of this test is misconceived. The respondent submits that in light of the illegal occupation of the land and the short period of time that appellants have been there, *inter alia*, *Winterstein* can be clearly distinguished from the facts here. For this reason the respondent submits that the appellants cannot be afforded protection under Article 8 ECHR on the basis of the assertion that the appellants' mobile home constitutes a "home".

37. The respondent then goes on to consider the Court of Appeal judgment and in particular the approach that the Court adopted in determining whether there was any interference with the appellants' rights under Article 8 ECHR more generally which may be considered disproportionate. The respondent notes first that the Court of Appeal was correct to find that Article 8 ECHR does not confer any entitlement to be provided with a home or alternative accommodation of an applicant's choosing and that Article 8 ECHR cannot be construed as imposing a positive obligation to ensure vacancies on official sites for persons wishing to return from settled residence to a traditional traveller way of life. The respondent then takes issue with the appellant's contention that the Court of Appeal incorrectly applied the ECtHR's decision in *Winterstein* in this case (in the sense of affording protection to the appellant on the basis of the appellants' right to respect for their family and private life). In particular the respondent contends (for similar reasons as above) that the Court of Appeal appropriately distinguished *Winterstein* from the present case in circumstances where the appellants here are occupying land to which they have no interest and where the families in *Winterstein* had been

occupying the land over a long period of time. This argument notwithstanding, the respondent also submits that even if it could be said that the appellants' Article 8 ECHR rights had been interfered with, this interference was in accordance with the law (namely s. 160 of the 2000 Act), in accordance with a legitimate aim and necessary in a democratic society. For this reason the respondent contends that the Court of Appeal was properly entitled to conclude that there was no disproportionate interference with the appellants' Article 8 ECHR rights.

38. The final section of the respondent's written submissions concern the claim made by the appellants that the respondent has breached its statutory duty towards the appellants. The respondent summarises its submission on this matter at para. 5.2. of its written submissions where it states that:

“The appellants have not provided any evidence to demonstrate the alleged breach of statutory duty on the part of the respondent. Moreover, any such issues are matters of public law which have not been raised in a timely fashion or with the requisite specific detail of the alleged unlawful actions or inactions on the part of the respondent. Furthermore, the issues regarding the alleged failure to draw down funds for traveller specific accommodation has already been determined in the Ashline proceedings, which the appellants did not appeal. In addition, any alleged breaches of statutory duty do not disentitle the respondent from seeking relief to restrain trespass and/or unlawful development being carried out on its land.”

Irish Human Rights and Equality Commission: *Amicus Curiae*

39. The Irish Human Rights and Equality Commission (“the Commission”) was brought into these proceedings at a late stage and given an opportunity to file *amicus curiae* submissions. In the first part of their submissions the Commission considers the kinds of statutory duties and obligations on housing authorities in respect of Travellers such as the

appellants. The Commission notes that not only does the respondent County Council have an obligation under s. 3 of the 2003 Act to perform its functions in a manner that is compatible with the ECHR, but it also has a public sector duty (which was not considered by the parties or the lower courts in this case) under s. 42 of the Irish Human Rights and Equality Commission Act 2014 (“the 2014 Act”) to fulfil its functions while having regard to the need to eliminate discrimination, promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and protect the human rights of its members, staff and the persons to whom it provides services. The consequence of these duties in the Commission’s view is that contrary to what was held by the Court of Appeal in this case the respondent County Council is under an obligation to carry out a proportionality assessment prior to seeking injunction relief and/or effecting an eviction.

40. The Commission accepts on this point that its position may at first seem to be incompatible with the decision of this Court in *Meath County Council v. Murray* [2017] IESC 25, [2018] 1 IR 189 and more recently of the High Court in *Waterford City and County Council v. Centz Retail Holding Limited* [2020] IEHC 634 (Simons J), in which it was held that there is not an obligation on a local authority to have regard to factors which are relevant to proportionality before instituting an application pursuant to s. 160 of the 2000 Act. However, it contends that the facts in this appeal are very different to those in *Murray* and that accordingly the decision in *Murray* and the Commission’s submission are not incompatible. In particular it is submitted that unlike in *Murray* the appellants in this case are members of the Traveller community, a distinct minority group who are afforded specific protection under the ECHR (as is clear from the case-law of the ECtHR) and in domestic law (by virtue of s. 3 of the 2003 Act and under the public sector duty). The Commission also notes that its position on this issue follows how the law has developed in England and Wales in respect of a similar public sector equality duty in that jurisdiction.

41. In terms of precisely what the respondent County Council should take into account in this proportionality assessment, the Commission submits that the Court of Appeal was wrong to find no merit in the argument that a failure by the respondent to draw down funding from the central government for Traveller-specific accommodation and/or a failure to fulfil its obligations pursuant to the Housing (Traveller Accommodation) Act 1998 (“the 1998 Act”) should have a bearing on the respondent’s decision to apply for relief pursuant to s. 160 of the 2000 Act. On the latter issue the Commission argues that the obligations imposed on the respondent are far greater than those endorsed by the Court of Appeal in this case. The Commission submits that the Court of Appeal erred in finding that the respondent had made reasonable offers to the appellants of appropriate housing since these offers did not in the Commission’s view respect the cultural identity of the appellants as Travellers, which the Commission’s considers as giving rising to housing *needs* as opposed to desires. For this reason the Commission argues that this case can be distinguished from the decision of Baker J in *Mulhare v. Cork County Council* [2017] IEHC 288 since that case concerned a desire for certain provisions in accommodation rather than a need. In this respect the Commission reiterates that Traveller-specific accommodation is a need as opposed to a desire as such accommodation 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.”

42. In addition to the proportionality test which it contends should have been undertaken by the respondent, the Commission also submitted that the Court is required to assess the proportionality of granting an interlocutory injunction under s. 160 in the light of Article 8 ECHR and in turn s. 2 of the 2003 Act. While the Commission appears to accept that a proportionality assessment was undertaken by the Court of Appeal in these proceedings, however, the Commission contends that the Court erred in placing considerable weight on the unlawful nature of the appellants’ occupation of the respondent’s land in this case. In the first

place the Commission submits that greater weight should have been placed on the fact that the appellants were not entirely to blame for moving from one unauthorised site to another. In any event the Commission argues that the lawfulness of the occupation of a place is only one factor to be considered alongside many others in assessing the need for interference. Indeed, although the Court has a wide discretion in terms of what should and should not be taken into account, the Commission argues that there are certain critical matters which should also be taken into account in each adjudication including the impact of the making of the order, the ethnic minority status of the potential subjects of the order, and the efforts of the local authority to minimise the impact of an eviction, including by making an offer of appropriate accommodation. It is the Commission's view that these factors were not taken into account (adequately or at all) and that therefore the Court of Appeal applied the incorrect test.

The nature of the order of the Court of Appeal under appeal

43. Perhaps the first thing to be determined is the actual nature of the judgment under appeal. While the curial part of the order of the Court of Appeal as perfected on the 27th May 2021 tends to give the impression that the order compelling the defendants to vacate the Council's lands at Cahercallamore was in the nature of a final order, I consider that this cannot be so. Insofar as the Council sought the order qua landowner, it is clear from the pleadings that the case never proceeded beyond a claim for interlocutory relief in the High Court. And so far as the claim for a planning injunction pursuant to s. 160 of the 2000 Act (as amended) is concerned, it is clear from the opening paragraph of the judgment of Whelan J in the Court of Appeal that she was considering an appeal from the making of an interlocutory order pursuant to s. 160(3)(a) of the 2000 Act which had been made by Allen J in the High Court.

44. It follows, therefore, that as the orders which had been made by the High Court were both interlocutory in nature, the same is necessarily true of the order made by the Court of Appeal.

The appellants' Article 8 ECHR case

45. As we have already seen, a key part of the appellants' case is that these orders infringe Article 8 ECHR insofar as that provision guarantees "respect for his private and family life [and] his home." It must be said immediately that the appellants' exclusive reliance on Article 8 ECHR before the High Court and the Court of Appeal is, with respect, both puzzling and problematic. Indeed, their written submissions before this Court made no reference at all to Article 40.5 of the Constitution and that provision really only entered the case at the prompting of the *amicus curiae* and following the clarification sought by this Court in the Statement of Case and the subsequent written and oral questions to the parties.

46. Viewed from the standpoint of the appellants, such exclusive reliance is puzzling because the actual wording of Article 8 ECHR ("respect") would seem to encompass less than the corresponding provision contained in Article 40.5 of the Constitution with its reference to the "inviolability" of the dwelling. There is, as it happens, more or less unanimous agreement among constitutional scholars and historians that Article 40.5 traces its lineage via Article 7 of the Constitution of the Irish Free State 1922 directly back to Article 115 of the (German) Weimar Constitution 1919, not least because in general "the Weimar Constitution of 1919 was an extremely influential model": see Cahillane, *Drafting the Irish Free State Constitution* (Manchester, 2016) at 85. Article 115 of Weimar in turn reached even further back into the first experiments with constitution-making in various European countries in the 19th century: see, e.g., Hand, "A Re-Consideration of a German Study of the Irish Constitution of 1922" in Bieber eds., *Das Europa der zweiten Generation* (Engel Verlag, 1981) at 855 at 861. For

Professor Hand, the “verbal resemblances” between these provisions, together with the fact that the guarantee of the inviolability of the dwelling “has no really precise precedent in the common law tradition” all suggested that this (and certain other constitutional guarantees) were “evidently in part derived from the German source.”

47. In passing it may be observed that the Irish language version of Article 40.5 (“Is slán do gach saoránach a ionad cónaithe...”) possibly captures even more precisely the language of Article 115 of Weimar with the latter’s description of the home as “a sanctuary and inviolable”: in both instances the sense of the home as a secure and safe place is conveyed by the respective language versions: see Ó Cearúil, *Bunreacht na hÉireann: A study of the Irish text* (Dublin, 1999) at 571. It is for this very reason that Article 40.5 “presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world”: *The People (Director of Public Prosecutions) v. O’Brien* [2012] IECCA 68 per Hardiman J.

48. Similar language and guarantees are to be found in respect of the dwelling (“inviolability”) in a range of constitutions of other European Union Member States, including, for example, Article 14(1) of the Italian Constitution of 1947 and Article 13(1) of the German Basic Law of 1949. In passing it may be interesting to note that while the published *travaux préparatoires* of the European Convention of Human Rights demonstrate that the original draft of Article 8 ECHR used the word “inviolability” in respect of the home, in the end the drafters ultimately settled upon the word “respect”: see, e.g., Diggelmann and Cleis, “How the Right to Privacy Became a Human Right” (2014) 14 *Human Rights Law Review* 441 at 452-457.

49. While, irrespective of any drafting history, we must take Article 8 ECHR as we find it – particularly as that provision has subsequently been interpreted by the European Court of Human Rights – the clear inference which nonetheless may be drawn from all of this was that in 1949-1950 the drafters of the European Convention of Human Rights elected not to use the formula which was then in vogue in European constitutionalism at the time (“inviolable”),

preferring instead the somewhat more modest term, “respect.” A comparison of both the text and the drafting histories of these two provisions all suggest that Article 8 ECHR was intended to secure a common basic European standard of protection, leaving the Contracting States accordingly free to use the more expansive phrase (“inviolability”) in their national constitutions should they wish to do so: it would, after all, be surprising if a provision (Article 8 ECHR) which spoke of simply “respecting” the dwelling in fact secured a more extensive protection in practice for the dwelling than one (Article 40.5) which had declared such to be “inviolable.” As O’Malley J observed in *AC v. Cork University Hospital* [2019] IESC 38, [2020] 2 IR 38 at 125, the ECHR was not intended to be applied in the various Contracting States as a “surrogate constitution” or to “weaken rights established in national law”, but is instead “primarily concerned with ensuring the application of minimum standards rather than imposing uniformity.”

50. The exclusive reliance on Article 8 ECHR by way of defence to the Council’s claims (both qua landowner and as planning authority) was also, in several respects, problematic. It is hard to avoid the overall impression – which I think, in her judgment for the Court of Appeal, Whelan J appears to have shared – that the appellants have in substance sought to give a form of direct effect to Article 8 ECHR. Starting with its judgment in *McD v. L* [2009] IESC 81, [2010] 2 IR 199, this Court has frequently affirmed in a series of decisions that the ECHR does not have direct effect in Irish law and can only be relied to the extent specified in the 2003 Act.

51. Yet the issue presented here is even more fundamental. Here it may be convenient to contrast the treatment of the Charter of Fundamental Rights of the European Union with that of the European Convention of Human Rights. The Charter does, in principle, have direct effect in our law, subject only to the conditions of its application specified in Article 51 and Article 52 of that document. The Charter enjoys that status, however, because, first, Article 6(1) TEU prescribes that it “shall have the same legal value as the Treaties” and, second, because the

State is in turn empowered to ratify the Treaty on European Union by virtue of the express words of Article 29.4.6 of the Constitution. The European Convention of Human Rights has never been given that constitutional status in our own legal order: it has instead been given effect in our domestic law in accordance with Article 29.6 of the Constitution to the extent specified by the Oireachtas in the 2003 Act itself, i.e., without direct effect and at sub-constitutional level.

52. The Long Title to the 2003 Act accordingly makes it clear that the giving effect to the ECHR in domestic law was subject to the provisions of the Constitution. Even if the 2003 Act had not expressly said so, it could scarcely have been otherwise. As McKechnie J observed in *Gorry v. Minister for Justice and Equality* [2020] IRESC 55 the Constitution remains “the principal source for the protection of rights in Ireland” and the Oireachtas could not, in the absence of a constitutional amendment, have elected to treat the ECHR as if it were some form of shadow or substitute Constitution.

53. In *Gorry* this Court quashed a decision of the Minister for Justice to refuse to grant an entry visa in respect of the third country spouse of an Irish citizen. The evidence was that the Minister had elected to address the matter by reference to Article 8 ECHR, treating parallel arguments based on Article 41 of the Constitution as essentially subsidiary to the ECHR argument and as in effect adding nothing to the ECHR claim. This approach was held to be erroneous in law. Both O’Donnell and McKechnie JJ agreed, however, that the precise sequence in which these matters were considered by the Minister was a matter for her, for as McKechnie J put it, where “the Convention provides the same remedy then there is nothing in principle to prevent the Minister from addressing the Convention first, *provided that the Constitution is also properly considered and addressed.*” (emphasis in the original).

54. This principle can, I suggest, be usefully adapted to the circumstances of a case such as the present. A litigant remains free, in principle, to elect as between the ECHR and the

Constitution in terms of priority of emphasis and argument, albeit subject to the proviso that the ECHR does not have direct effect. But what cannot be allowed to happen is that a court should engage with a provision of the ECHR in proceedings involving an organ of the State *without* also engaging at the same time with the corresponding provision of the Constitution. Such a constitutional provision cannot, however, be treated as if it did not exist: it must also be “properly considered and addressed.” Any other conclusion would mean, in effect, that the courts yielded a sort of constitutional primacy to the ECHR so that it thereby acquired a form of quasi-constitutional status which it has never been accorded. I cannot refrain from observing that this, however, is precisely what has been allowed to happen in the present case so far as the proceedings in the High Court and the Court of Appeal are concerned.

55. In any event, this approach can lead to a series of practical difficulties. These were particularly acute in the present case, as the leading case on the scope of Article 40.5 also happens to be the leading case on the use of the s. 160 machinery in the context of private dwellings: *Meath County Council v. Murray* [2017] IESC 25, [2018] 1 IR 189. It was thus impossible in the context of the present case to discuss the Article 8 ECHR question as to when or whether it would be appropriate to make an order under s. 160 without also simultaneously considering the scope of Article 40.5 of the Constitution. At all events, I now propose to examine this matter both from the perspective of Article 40.5 and that of Article 8 ECHR, even though it would, of course, have been far more satisfactory if this approach had been adopted by the appellants at the very beginning of these proceedings. A comparison of this case-law shows that there is in fact strong overlap between the two provisions, albeit that there are some differences in emphasis and approach.

Can the appellants point to the existence of a “dwelling” for the purposes of Article 40.5 or “home” for the purposes of Article 8 ECHR?

56. Perhaps the first thing to be considered in this context is the status of the appellants' dwelling(s). They consist of a number of caravans together with two mobile homes grouped together on the Council's lands. As I have already noted, in the Court of Appeal Whelan J took the view that the appellants' caravans were not a "home" within the meaning of Article 8 ECHR. This was not because a caravan or mobile home could not, as such, qualify as a "home" for this purpose. It was rather because Whelan J took the view that the caravans had not been sufficiently long in that specific location for that location to be their "home" within the meaning of Article 8 ECHR: the appellants lacked "the requisite close and continuous links with Cahercallamore which is a prerequisite to establishing a Convention-recognised 'home'" so that no arguable issue arose by way of defence to the Council's application for mandatory relief.

57. One must immediately say in response that whatever the precise parameters of Article 40.5, it has never been suggested that the occupier of the dwelling must show "close and continuous links" with a specific place. It is sufficient that any person asserting the protection of Article 40.5 actually resides there. As Fennelly J observed in *The People (Director of Public Prosecutions) v. Lynch* [2009] IECCA 31, [2010] 1 IR 543 this is always a question of fact, a view "reinforced by the Irish language version of Article 40.5" with its reference to "ionad cónaithe", i.e., literally a place of residence.

58. This is illustrated by the facts of *Lynch* itself. Here, it was accepted that the entire case against the accused turned on whether he was entitled to the protection of Article 40.5. The Gardai had used a defective search warrant to enter a flat where they found stolen goods. Having heard evidence on a *voir dire*, the trial judge ruled that the accused was simply a trespasser in the property and he was thus not entitled to claim the constitutional protection. On appeal, however, the Court of Criminal Appeal thought otherwise and set aside the conviction. As Fennelly J put it ([2010] 1 IR 543 at 546):

“It is at least quite obvious that the constitutional protection would extend to a wide variety of people with dubious legal titles, such as an overholding tenant, the widow of a deceased legal owner, or a person in *bona fide* possession on foot of an invalid title.”

59. This point had also previously been made by Hardiman J in *The People (Director of Public Prosecutions) v. Barnes* [2006] IECCA 165, [2007] 3 IR 130 at 145 when he said that the protection of Article 40.5 extended to “householders”, a group which encompassed “...the owner or lawful occupier of every sort of premises from a palace to a shack and regardless of whether is the full owner, a tenant or a licensee or other form of permissive occupant.” Likewise in *CA v. Minister for Justice and Equality* [2014] IEHC 532 MacEochaidh J held that the room(s) lawfully allocated to asylum seekers at an asylum reception centre constituted a “dwelling” for the purposes of Article 40.5.

60. There is also authority of (relatively) long standing to the effect that a caravan of this kind is nonetheless a “dwelling” for the purposes of Article 40.5: see *The People (Attorney General) v. Hogan* (1972) 1 *Frewen* 360 at 362, per Kenny J. A mobile home would also clearly in principle come within the scope of the constitutional guarantee. It is thus clear that, whatever the situation with regard to Article 8 ECHR, the caravans and the mobile home(s) occupied by these appellants enjoy the protection of Article 40.5 since it is the place where, as a matter of fact, they actually reside.

61. In any event, I find myself, with respect, unpersuaded by the treatment of the Article 8 ECHR issue contained in the judgment of Whelan J. Contrary to the views which she expressed at paragraph 95(b)(ii) of her judgment, I do not think that one can say that no fair question has been raised in the context of an application for a mandatory interlocutory injunction as to whether the caravans and mobile home at Cahercallamore are in fact a home for this purpose given the appellants’ admitted connections with the locality. It is indeed quite possible that they may as a result be able to satisfy the *Winterstein* test as a result.

62. In a case involving a conventional house no such distinction arises between the structure and the location since the house is itself embedded in the site. Where a s. 160 order is made in respect of an unlawfully constructed or occupied house this may even involve the destruction of the house itself: *Murray* is itself eloquent testimony to this. In the present case the mobile home(s) and the caravans are the home of the appellants. The fact that these structures are mobile and can be moved to a different site does not prevent them from being a “dwelling” for the purposes of Article 40.5. Any other conclusion would involve an inappropriately restrictive view of what constitutes a “dwelling” for the purposes of this constitutional provision which could in practice exclude many members of the travelling community from the protection of their home.

63. The issue here, of course, is slightly different. The interlocutory order under appeal does not, as such, involve the destruction or the taking of the caravans, but rather whether these appellants can be ordered to move their home elsewhere. It is true that the applicants have only moved onto these lands in late 2019. This site is, however, itself only about 1km away from the earlier Ashline site where they had previously resided for some years. To my mind, therefore, it is at least arguable that they can satisfy the “specific and continuous links with a specific place” test articulated by the European Court in *Winterstein*. It is, accordingly, sufficient to say that the appellants have raised a fair question that the location of these caravans at this site constitutes a home for the purposes of Article 8 ECHR.

64. The net effect of the Court of Appeal’s conclusion on the Article 8 ECHR issue, however, was, critically, that no formal proportionality analysis was ever performed by the Court of Appeal in respect of either application for a mandatory interlocutory injunction. I accept, of course, that Whelan J did describe the *conduct of the Council* as “proportionate and fair”, but the Court itself nonetheless does not appear to have engaged in the proportionality analysis required by Article 8 ECHR in respect of an order requiring the occupants to vacate a

home. Furthermore, Whelan J was not asked to consider the matter in the light of Article 40.5. Since, however, I am clearly of the view that the caravans and mobile home on Cahercallamore site is a “dwelling” for the purposes of Article 40.5 and is at least arguably such for the purposes of Article 8 ECHR, it seems appropriate that this exercise should now be performed by this Court in considering whether the Council is entitled to the interlocutory relief.

Whether the appellants can advance an arguable case that the removal of the caravans and mobile home would be disproportionate in the circumstances

65. It seems clear that Article 40.5 requires that any decision leading to the loss of one’s dwelling must be capable of being subject to review by an independent tribunal such as a court. Thus, for example, in *Irish Life and Permanent plc v. Duff* [2013] IEHC 43, [2013] 4 IR 96 at 112 I held (sitting as a judge of the High Court) that the guarantee of inviolability in Article 40.5 precluded a mortgagee taking peaceable possession other than by consent of a dwelling pursuant to a form of contractual arrangement if it were claimed that the mortgagor was in default, saying that: “...those elements of formal notice, foreseeability and an independent determination of the objective necessity for possession of the dwelling are presupposed by the guarantee of inviolability and these protections cannot be assured outside the judicial process or, at least, something akin to the judicial process.” This is, in any event, reflected in contemporary statutory provisions (see, e.g., s. 97 of the Land Law and Conveyancing Law Reform Act 2009). All of this simply means that there can be no order for possession of a family home (other than by consent) without a formal court order to this effect.

66. The European Court has adopted a broadly similar position, saying in *Winterstein* (at paragraph 76) that:

“Since the loss of one’s home is a most extreme form of interference with the right under Article 8 to respect for one’s home, any person at risk of being a victim thereof

should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, he has no right of occupation.... This means, among other things, that where relevant arguments concerning the proportionality of the interference have been raised by the applicant in domestic judicial proceedings, the domestic courts should examine them in detail and provide adequate reasons...”

67. The more pressing question here is the extent to which illegally constructed dwellings or those constructed on land which the person has no right or licence to occupy can enjoy either constitutional or ECHR protection. This is highly pertinent in the present case because the defendants here openly admit that their occupation of the site at Cahercallamore is unlawful. They do not claim any entitlement to occupy the lands and they also accept that this occupation constitutes a form of unauthorised development for the purposes of s. 3 of the 2000 Act.

68. It is clear, nonetheless, that an illegally constructed or occupied dwelling attracts – at some level of principle – the protections of Article 40.5. This issue was explored by me (as a judge of the High Court) in *Wicklow County Council v. Fortune (No.1)*[2012] IEHC 406 and *Wicklow County Council v. Fortune (No.2)*[2013] IEHC 255 and, subsequently, by this Court in *Murray*. I will have occasion to discuss the importance of these decisions shortly, but for the moment it is sufficient to say that these were cases where occupiers had constructed the dwelling unlawfully without planning permission, even if (unlike the present defendants) they actually owned the lands in question. While this Court subsequently overruled key aspects of my reasoning in the *Fortune* litigation, McKechnie J nonetheless clearly stated ([2018] 1 IR 189 at 235):

“...I am readily prepared to accept that Article 40.5 of the Constitution is not confined to criminal law or its procedural surrounds. It must, at the level of principle, have an

application in civil law. Accordingly, my following observations on both *Fortune (No.1)* and *(No.2)* are based on an acceptance that the Article undoubtedly confers protection at a constitutional level on one's dwelling house, whether that be where Ms. Fortune resides with her family or Mr. and Ms. Murray with theirs."

69. A broadly similar approach is taken by the European Court with regard to Article 8 ECHR. As that Court explained in *Winterstein* (at paragraphs 141 to 142):

"The Court reiterates that the concept of "home" within the meaning of Article 8 is not limited to premises which are lawfully occupied or which have been lawfully established. It is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular premises constitutes a "home" which attracts the protection of Article 8 will depend on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place ... In the present case it is not in dispute that, at the material time, the applicants had been residing for many years (between five and thirty years) at the locality of Bois du Trou-Poulet in Herblay. The Court thus takes the view that the applicants had sufficiently close and continuous links with the caravans, cabins and bungalows on the land occupied by them for this to be considered their "home", regardless of the question of the lawfulness of the occupation under domestic law."

70. In the present case it is not disputed that the caravans and mobile home presently parked on the Council's lands at Cahercallamore are in fact owned by the defendants. No one has suggested that they have any other home or that they do not reside there.

71. This brings us directly to the heart of the issue in the present appeal: to what extent is this constitutional protection diluted by virtue of the fact that Mr. and Ms. McDonagh are not only trespassing on the lands of the Council, but have also flouted the requirements of the planning laws: it is not disputed their occupation of these lands constitute a form of

unauthorized development within the meaning of s. 3 of the 2000 Act? Here it is necessary to look first at the Article 40.5 case-law.

72. The two *Fortune* cases were High Court decisions delivered by me as a judge of that Court. The case concerned the construction of a small chalet deep in a Wicklow forest. While the chalet in question was unobtrusive and did not clearly intrude upon the amenities of any other nearby resident, it had nonetheless been constructed entirely without planning permission. It was also constructed close to an area of considerable natural beauty. While I granted a declaration that the chalet had been illegally constructed, I refused to make the demolition order which the Council had requested pursuant to s. 160 of the 2000 Act.

73. I took the view that in view of the constitutional guarantee in Article 40.5 no order should be made under s. 160 in respect of the dwelling in question unless the case for demolition had been “objectively justified and convincingly established.” I concluded that the arguments advanced by the Council – which related to matters such as the potential impact on third party amenities, the road hazard posed by the entrance, its closeness to an area of natural beauty and, above all, perhaps, its impact on the integrity of the planning system by effectively rewarding an owner who had so clearly and willfully disregarded the planning laws – did not meet this standard in these circumstances.

74. This approach has not been endorsed in the subsequent cases. In *Wicklow County Council v. Kinsella* [2015] IEHC 229 Kearns P expressed his disagreement with the reasoning in emphatic terms, saying that such an approach would compromise the integrity of the planning system and would act as an encouragement to others tempted to flout the law. This matter was also considered by this Court in *Murray*. In a comprehensive judgment McKechnie J stated clearly why the approach in *Fortune* was wrong. Here it is necessary to set out his reasoning at some length ([2018] 1 IR 189 at 236-239):

“The learned judge required that demolition should not be ordered unless the necessity for such step is objectively justified and convincingly established. Thus he held that before ordering demolition, it was not sufficient that the house be unauthorised, no matter how egregious that step might be, but rather that the authority would have to “go further and show, for example, that the continued occupation and retention of the dwelling would be so manifestly at odds with important public policy objectives that demolition was the only fair, realistic and proportionate response.” Hogan J also understood ‘proportionality’ in this context in a broad sense, meaning whether, in the circumstances of any given case, the policy objectives of legislative compliance and environmental protection could be said to justify such a far-reaching interference with property rights and the inviolability of the dwelling.

In so doing, not only did the learned judge stand down what I have described as the traditional approach, but in addition he seems to have:-

- (i) discounted the possibility that the integrity of the planning system could of itself be justification for a demolition order;
- (ii) refocused the emphasis on the moving party having to establish reasons, specific to the particular development, as to why such a demolition order would be justified; and
- (iii) assumed the responsibility to interrogate those reasons, as it happens to a conclusion which disagreed with and in effect set aside the reasons advanced by both the Planning Authority and An Bord Pleanála for refusing the retention application made by Ms. Fortune. For the reasons following, I do not believe that this approach was the appropriate one.

Earlier in this judgment, I have examined the public interest imperative in upholding and maintaining planning control, planning regulation, orderly and sustainable

development and the rule of law. As adapted to suit that branch of public concern, the courts have frequently accepted that the integrity of the asylum system, of itself, may be a sufficient justification for refusing entry, the making of a deportation order, or the Minister's refusal to allow individuals to remain on humanitarian grounds. I cannot see why, at the level of principle, if the circumstances are so compelling, a similar approach should not be available for consideration in a planning context.

With the utmost respect to the learned trial judge, in shaping the decision in the manner in which he did, he placed undue influence on why a demolition order *should* be made. Given the public interest elements which I have previously identified, I very much doubt that this approach is correct. In addition, in the particular circumstances of the case, having regard to the development plan, the decision of the planning authority and ultimately that of An Bord Pleanála, and the reasons given therefor, the focus of the inquiry should have been on what basis and why such an order *should not* follow from the established evidence. That error inevitably led to many of the significant factors in favour of such an order not being given the due weight which they should have.

It will be recalled that in *Fortune* the retention application was rejected by the Board, *inter alia*, because:-

- (i) the site in question was part of an "area of outstanding natural beauty" as designated in the County Development Plan; whilst some residential development was permitted, the applicant did not meet the necessary criteria. Accordingly, to grant retention would have contravened the stated policy of the plan and would have been contrary to the proper planning and sustainable development of the area; and
- (ii) the access road was substandard in both horizontal and vertical alignment and in poor condition. Its use in the context of the development would therefore endanger public safety by reason of "traffic hazard and obstruction of road users."

The question arises as to how far a judge, on a section 160 application, can review the merits of a retention refusal given by either the Planning Authority or An Bord Pleanála. It is not an easy task to try and articulate a visible boundary line beyond which a judge should not go when applying the proportionality test. Some engagement with the facts is obviously required. However, he is not permitted to reach his own independent view on the planning merits of a case. That is the function of the planning process. The courts must not act as a surrogate for the nominated bodies. They have no role in performing such function through some process of reviewing the merits of a decision reached by either of them within their remit. Still less, do they have the expertise to carry out such a function.

In *Dublin Corporation v. Garland* [1982] ILRM 104 at 106, Finlay P. made this very point:

“There can, in my view, be no function in the court on the making of an application under [section 27] in any way to review, alter or set aside a decision of the Planning Authority with regard to the granting or withholding of permission. The entire scheme of the Planning Acts is that, subject to the limited exceptions for the determination by the High Court of questions of law specifically referred to it, decisions as to the proper planning and development of any area are peculiarly the function of the Planning Authority in the first instance and of An Bord Pleanála on appeal from them.”

Very much the same was said by Kearns P. in *Kinsella*.

I am not suggesting that this passage from *Garland* is necessarily the last word on the point, as the concept of proportionality has evolved very considerably in the past 30 years. However, even considering that development, I am satisfied that the Court should not embark on what might in effect be a further review of matters the determination of

which is committed by legislative policy and statutory provision to stipulated bodies. Although in a somewhat different context, Denham J., as she then was, in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701, emphasised that the courts should be reluctant to interfere with the decisions of expert bodies, such as An Bord Pleanála...

As part of his examination of the reasons which prompted the Board to refuse Ms. Fortune's retention application, the learned judge concluded that the unauthorised development did not as such "jeopardise or threaten the rights or amenities of other parties", and came to a like conclusion regarding the substandard condition of the access laneway: in his view it did not present a "real and imminent traffic hazard". Such an examination and conclusion seems perilously close to conducting a further review of the merits of that rejection.

With the greatest of respect to Hogan J., in holding as he did, he effectively discounted the willful and deliberate decision by Ms. Fortune to erect her chalet and the nature and extent of the planning violation at issue. These important considerations have virtually always been given great weight in the case law: I see little reason to change that. Such authorities also show that where the planning breach in question is a gross and intentional one, a removal or demolition order is certainly within the range of available remedies; the exercise of discretion in this manner in *Kinsella*, on the traditional approach, could not be seriously challenged."

75. So far as the general approach to s. 160 was concerned, McKechnie J stressed the general importance of planning enforcement ([2018] 1 IR 189 at 223-235). It is again necessary to set out these important passages at some length:

“...the principal starting point on planning control is that no development can lawfully be commenced without the cover of an appropriate permission; this subject to certain specific exemptions which are not to the fore of this discussion. Failure to apply, even where an application might be favourably looked upon, is in itself a serious breach where works are carried out or uses made of the subject lands. The legislative view is to criminalise such unauthorised conduct, with both terms of imprisonment and fines on indictment up to over €12m. This is a significant expression of the high level of public concern there is in regulating orderly and sustainable development. The fact that one can apply for retention permission impacts very little, if at all, on this point: such an application would not of itself prevent the bringing of a criminal prosecution, nor should any enforcement proceedings, including a section 160 order, normally be stayed simply because of such a step (section 162(3)). Consequently, this demonstration of intent must always be given its justifiable position in the court’s evaluation of the section 160 exercise.

89. In addition, it must be borne in mind that a breach of planning law will previously have been established and that the defaulter is seeking the indulgence of the court as to what resulting consequences he should face. As such, it must be that the interests of the public will be ever present on the enforcing side. Whilst the importance of that interest and the weight which it must be given, having regard to what is previously stated, will vary on a vertical scale by reference to a number of influencing factors, nonetheless it will always exist and most likely will stand first in the queue for consideration. Such was expressly acknowledged in the passage above quoted from *Morris v. Garvey*, as is evidenced by the lead-in requirement that any excusing factors must be found within “exceptional circumstances”. Equally so with *Forest Fencing Ltd*. Such is and has been recognised as an important factor.

Factors to be Considered:

90. What, then, are the factors which play into the exercise of the Court's discretion?

From a consideration of the case law, one can readily identify, *inter alia*, the following considerations:

(i) The nature of the breach: ranging from minor, technical, and inconsequential up to material, significant and gross;

(ii) The conduct of the infringer: his attitude to planning control and his engagement or lack thereof with that process:

- Acting in good faith, whilst important, will not necessarily excuse him from a s. 160 order,

- Acting *mala fides* may presumptively subject him to such an order;

(iii) The reason for the infringement: this may range from general mistake, through to indifference, and up to culpable disregard;

(iv) The attitude of planning authority: whilst important, this factor will not necessarily be decisive;

(v) The public interest in upholding the integrity of the planning and development system;

(vi) The public interest, such as:

- Employment for those beyond the individual transgressors, or

- The importance of the underlying structure/activity, for example, infrastructural facilities or services.

(vii) The conduct and, if appropriate, personal circumstances of the applicant;

- (viii) The issue of delay, even within the statutory period, and of acquiescence;
- (ix) The personal circumstances of the respondent; and
- (x) The consequences of any such order, including the hardship and financial impact on the respondent and third parties,

91. The weight to be attributed to each factor will be determined by the circumstances of a given case. Some, because of their importance, may influence whether an order is or is not in fact made: others, the scope, nature or effect of that order. This list is not in any way intended to be exhaustive, and it may well be that other matters might require consideration in an appropriate case. For example, in *Pierson v. Keegan Quarries Ltd.* [2010] IEHC 404, Irvine J took account of the hardship which demolition might cause to third parties, and referred also to the possible effect of the developer having relied in good faith on professional advisers. The jobs of non-related members of the public...featured in *Stafford v. Roadstone Ltd* and *Dublin County Council v. Sellwood Quarries Ltd* [1981] ILRM 23. There are many other examples. However, the above list is generally representative of the type of factors which the judge will normally be called upon to consider.”

76. McKechnie J went on then to address the merits of the case. In 2006 the defendants constructed a very large 588 sq.m. house which itself was situate on a site of 1.675ha. and had done so entirely without planning permission. A somewhat more modest – albeit still large – application for the development of a 288 sq.m. house had previously been refused by the planning authority just a few months previously.

77. Against that background it was scarcely a surprise that this Court affirmed the decision of Edwards J. in the High Court to grant an order pursuant to s. 160 of the Act requiring the demolition of the property. As McKechnie J observed ([2018] 1 IR 189 at 243-244):

“Their actions in building nonetheless were cited by the learned judge as being “particularly flagrant and completely unjustified on any basis”, a description one could hardly quarrel with. To have constructed the size and scale of the structure which they did is, in such circumstances, difficult to comprehend. A more reckless disregard for the rule of law is difficult to discern.

That both the prohibitory and mandatory orders made by the High Court will cause considerable hardship for the appellants, including financial loss, has been acknowledged, but the same was eminently foreseeable and directly proximate to their culpable behaviour. Their background connection with the area, their own individual family circumstances and those of their wider families, their integration into the local community, and of course the fact that they have three school going children, have all been recognised. Each and any other factor of relevance and materiality was fed into the equation. Having considered all of those personal factors as against the nature of the breach, Edwards J. felt that a restraining order on its own would be an inadequate response and that the same should be supported by a ‘removal and restoral’ order. To permit them to make the necessary arrangements in this regard, a stay of two years was placed on the execution of the order.

By the application of conventional principles, which is the correct approach, the decision of the learned judge could not be set aside on any of the grounds argued before this Court.”

78. So far as the Article 8 ECHR issue was concerned, McKechnie J considered ([2018] 1 IR 189 at 233) that it was “probable that the ECHR does not add to what Article 40.5 of the Constitution ordains.” The judge concluded by referring to the decision of the European Court of Human Rights in *Chapman v. United Kingdom* (2001) 33 EHRR 18 saying:

“In that case the Court addressed a situation in which a Gypsy who lived in a caravan on her own land was refused planning permission, after which an enforcement notice was issued. She alleged that the refusal of planning permission and the enforcement measures amounted to breaches of Articles 6, 8 and 14 of the ECHR. In holding that the Convention had not been violated, the Court stated as follows at paragraph 102 of the judgment:

“Where a dwelling has been established without the planning permission which is needed under the national law, there is a conflict of interest between the right of the individual under Article 8 of the Convention to respect for his or her home and the right of others in the community to environmental protection ... When considering whether a requirement that the individual leave his or her home is proportionate to the legitimate aim pursued, it is highly relevant whether or not the home was established unlawfully. If the home was lawfully established, this factor would self-evidently be something which would weigh against the legitimacy of requiring the individual to move. Conversely, if the establishment of the home in a particular place was unlawful, the position of the individual objecting to an order to move is less strong. The Court will be slow to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site. For the Court to do otherwise would be to encourage illegal action to the detriment of the protection of the environmental rights of other people in the community.””

79. Following the decision of this Court in *Murray*, it can be said that although an illegally constructed dwelling still enjoys constitutional protection for the purposes of Article 40.5, the force of that protection will generally be greatly diluted in such circumstances: the general presumption remains very much in favour of the enforcement of the planning laws and the granting of an order pursuant to s. 160 providing for demolition of such a dwelling. In addition,

where a landowner brings proceedings qua owner seeking the demolition of an illegally constructed dwelling on his land or requiring persons illegally occupying the property as trespassers to vacate the site one may anticipate that orders of this kind will be made, not least as the landowner's property rights and the right to peaceful enjoyment of that property also enjoy a high level of protection, both by virtue of Article 40.3.2 of the Constitution and Article 1 of the First Protocol ECHR.

80. It is next necessary to consider a series of decisions of the European Court of Human Rights in respect of illegally constructed dwellings, often involving members of the travelling, Roma or Gypsy communities. We may start with the decision in *Yordanova v. Bulgaria* [2013] ECHR 1768 in which the European Court examined the conformity with Article 8 ECHR of a decision by Bulgarian municipal authorities to expel a sedentary Roma community from land that they had been occupying for many years in Sofia.

81. In that case the Court noted that while the authorities were in principle entitled to remove the applicants, who were illegally occupying municipal land (paragraph 120), they had not taken any steps to that end for several decades and had, therefore, *de facto* tolerated the unlawful settlement. The Court consequently took the view that this was a highly pertinent fact which should have been taken into consideration. While, admittedly, the unlawful occupants could not claim any legitimate expectation to remain on the land, the authorities' inactivity had resulted in their developing strong links with the place and building a community life there. The Court concluded that the principle of proportionality required that such situations, where a whole community and a long period were concerned, be treated as being entirely different from routine cases of removal of an individual from unlawfully occupied property (paragraph 121).

82. This conclusion was reached by the Court because primarily it took into account the fact that, on the one hand, the municipal authorities, relying on the applicable domestic legal framework, had not given reasons in the eviction order other than to state that the applicants occupied the land unlawfully, and in the judicial review proceedings the domestic courts had expressly refused to hear arguments about proportionality and the lengthy period during which the applicants and their families had lived there undisturbed (§ 122).

83. The case with perhaps the greatest similarity to present case is the subsequent decision in *Winterstein*. It is probably fair to say that the appellants' entire defence to these proceedings rests on their arguments regarding this particular case.

84. In that case the twenty-five applicants were French nationals who were also members of the Roma travelling community ("gens du voyage") who had been evicted from lands which they had illegally developed in breach of French planning requirements. The applicants had been living, some for many decades, on sites which were designated as protected natural zones and as unsuitable for development.

85. Pointing to the requirements of the French planning code, the French courts had ordered the applicants to leave the land within three months and to pay a penalty ("astreinte") of €70 a day for every day after that deadline they stayed. That fine does not, however, appear to have been enforced. Some steps were taken with a view to relocating the applicants, either through social housing or the creation of different, approved sites. A few families were re-housed in social housing, some remained (or left and returned to) the area, and some left the region. The European Court held that the eviction of the applicants amounted to a breach of Article 8 ECHR.

86. The European Court first noted that the applicants had all been residing for between five to thirty years at that locality. It then observed (at paragraph 69) that "the applicants had

sufficiently close and continuous links with the caravans, cabins and bungalows on the lands occupied by them for this to be considered their ‘home’, regardless of the question of the lawfulness of the occupation under domestic law.”

87. Having so concluded that the applicants could establish that their occupation of the site in question constituted a “home” for the purposes of Article 8 ECHR, the European Court then proceeded to conduct its own proportionality analysis. Drawing on previous case-law of the Court, it stressed (at paragraph 148) that:

“the vulnerable position of Roma and travellers as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases (see *Chapman*, cited above, § 96, and *Connors*, cited above, § 84); to this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the way of life of the Roma and travellers (see *Chapman*, cited above, § 96, and the case-law cited therein).”

88. The Court then continued by saying that the present case was similar to that in *Yordonova* in that the reasons given (at paragraph 152 of the judgment) by both the municipality in seeking the order and the French courts in granting it was that this constituted a form of land use which violated French planning laws in that the applicants’ presence on the land “was in breach of the land-use plan.”

89. The Court then continued by saying (at paragraphs 155-157):

“The Court reiterates that the loss of a dwelling is a most extreme form of interference with the right to respect for one’s home and that any person at risk of being a victim thereof should in principle be able to have the proportionality of the measure determined by a court. In particular, where relevant arguments concerning the

proportionality of the interference have been raised, the domestic courts should examine them in detail and provide adequate reasons (see the case-law cited in paragraph 148 (δ) above). In the present case, the domestic courts ordered the applicants' eviction without having analysed the proportionality of this measure (see *Orlić*, cited above, § 67, and *Yordanova and Others*, cited above, § 122). Once they had found that the occupation did not comply with the land-use plan, they gave that aspect paramount importance, without weighing it up in any way against the applicants' arguments (contrast *Buckley*, cited above, § 80, and *Chapman*, cited above, §§ 108-109). As the Court emphasised in *Yordanova and Others* (§ 123), that approach is in itself problematic, amounting to a failure to comply with the principle of proportionality: the applicants' eviction can be regarded as "necessary in a democratic society" only if it meets a "pressing social need", which is primarily for the domestic courts to assess. In the present case, this question was all the more important as the authorities had not proposed any explanation or argument as to the "necessity" of the eviction, whereas the land in question had already been classified as a natural zone (zone ND) in the previous land-use plans (see paragraph 16 above), it was not municipal land earmarked for development (contrast *Yordanova and Others*, cited above, § 26) and there were no third-party rights at stake (see *Orlić*, cited above, § 69). The Court thus finds that the applicants did not, in the eviction proceedings, have the benefit of an examination of the proportionality of the interference in compliance with the requirements of Article 8."

90. As it happens the decision in *Winterstein* was not referred to in *Murray*. Now that the former decision has been referred to at great length in argument before us, does that make any difference to the reasoning in the latter case? One can, I think, respond as follows:

91. First, unlike any of the previous cases raising this (or a similar) question (whether in this jurisdiction or before the European Court of Human Rights), the present case involves an application for a mandatory interlocutory injunction. Not only are the principles governing the granting of such interlocutory relief well set out in the decision of this Court in *Merck, Sharpe & Dohme Ltd. v. Clonmel Chemicals Ltd.* [2019] IESC 65, [2020] 2 IR 1 (*i.e.*, fair case, adequacy of damages and balance of convenience), but it is also accepted that an applicant for such mandatory interlocutory relief must generally show that the case is particularly strong and powerful: see, *e.g.*, *Attorney General v. Lee* [2000] IESC 80, [2000] 4 IR 68, *Shelbourne Holdings Ltd. v. Torriam Hotel Operating Co. Ltd.* [2008] IEHC 376; *Herrera v. Garda Commissioner* [2013] IEHC 311 and, most recently, the judgments of this Court delivered respectively by Clarke C.J. in *Charleton v. Scriven* [2019] IESC 28 and Irvine J in *Taite v. Beades* [2019] IESC 92. A further consideration is that, as Irvine J put it in *Taite* (echoing a point previously made by Clarke CJ in *Charleton*), an interlocutory injunction should be “merely a stepping stone” towards a trial and the courts “must ensure that such relief is not, in practice, treated as a means of obtaining summary judgment against the defendant.”

92. Second, it is clear from *Winterstein* that, given the drastic nature of a demolition order in respect of a private dwelling, it is necessary that a proportionality analysis be first conducted by a court prior to the making of such an order. While McKechnie J disagreed with my analysis in the two *Fortune* decisions this was largely because I had given insufficient weight – perhaps it would even be more accurate to say, wholly insufficient weight – to considerations based on the integrity of the planning process and the role of the planning authorities. But he did not, I think, disagree with the conclusion that a proportionality analysis should be conducted before the making of a s. 160 order: where I had erred in *Fortune* was in respect of both the identification and the weighing of these factors.

93. Third, there is, however, one aspect of *Murray* which may have to be re-calibrated slightly in the light of *Winterstein*, namely, the extent to which the courts should defer to the role and judgment of planning authorities and officials in respect of applications of this kind. It is important that this is not in any sense misunderstood: the courts cannot positively interfere with decisions of planning authorities in the sense articulated by Finlay P in *Dublin Corporation v Garland* [1982] ILRM 104 (and approved by McKechnie J in *Murray*: [2018] 1 IR 189 at 238).

94. As this Court has frequently stressed, one fundamental objective governing the grant of interlocutory injunctions is to ensure that the least injustice is done (to the extent that this is possible) pending the determination of the dispute: see, e.g., the frequently approved comments of Clarke J to this effect in *Okunade v Minister for Justice* [2012] IESC 49, [2012] 3 IR 132. In assessing the factors governing the grant of such interlocutory relief, the court is, of course, entitled to take into account factors such as the extent to which, for example, the illegal conduct and the unauthorised structure poses a threat to the amenities and rights of third parties or to public safety.

95. All of this means that the courts must, broadly speaking, make their own independent judgment as to whether the making of an order which had the effect of requiring a respondent to vacate a place where they were living would be proportionate in nature. This, at any rate, is what the European Court of Human Rights expressly stated in *Winterstein*: where arguments concerning the proportionality of the proposed measure have been raised, “the domestic courts should examine them in detail and provide adequate reasons” in respect of their decision. It is unnecessary for present purposes to determine whether local authorities are obliged to conduct any form of proportionality analysis in this sort of case prior to commencing proceedings of this nature: it is sufficient to say that *Winterstein* makes it clear the duty falls upon the courts to perform this particular exercise.

96. There are also two particular features of this case (and *Winterstein*) which merit consideration. First, just as in ECHR decisions such as *Yordanova* and *Winterstein*, one factor which was not present in either *Fortune*, *Kinsella* or *Murray* is that this application concerns the rights of a vulnerable minority group who live in a world far removed from considerations in relation to planning law and land use which are the natural concerns of judges, lawyers and planning officials. As the European Court itself observed in *Yordanova* (at paragraph 133):

“...the underprivileged status of the applicants’ group must 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.”

97. Second, a critical consideration here is that the present case concerns an application brought by a Council in its role qua landowner and planning authority. Yet the Council is also a housing authority which has specific statutory duties *via-a-vis* the appellants. It has – arguably – failed in its duty qua housing authority to offer suitable accommodation to the appellants, having regard in particular to Ms. McDonagh’s medical needs. If, moreover, a mandatory interlocutory injunction were to be granted, it would mean, in effect, that the appellants would have nowhere to go without necessarily trespassing on the lands of another party.

98. These are special and particular considerations which, it is important to stress, would not apply, for example, in the case of a private landowner seeking an injunction to restrain trespass. In that situation any Article 8 ECHR issues would not in strictness even arise by way of possible defence as the litigation would then be between purely private bodies. The courts are not themselves “organs of the State” for the purposes of s. 1(1) of the 2003 Act, save, of course, for the interpretative obligation imposed on the courts by s. 2(1) of that Act to ensure

that, whenever possible, a statutory provision is construed “in a manner compatible with the State’s obligations under the Convention provisions”: see generally, *Kinsella v. Kenmare Resources plc* [2019] IECA 54, [2019] 2 IR 750 at 783, per Irvine J. So far as constitutional considerations are considered, the courts’ first duty would normally be to ensure, in the words of Article 40.3.2, that the property rights of the private landowner to protect his or her own property were adequately vindicated, whether by means of an order restraining trespass or otherwise.

99. Yet the importance of the fact that the Council is also a housing authority is not in itself a new consideration in applications of this kind. It was recognized by this Court over forty years ago in its judgment in *McDonald v. Feeley* (Unreported, Supreme Court, 23rd July 1980). In that case the plaintiffs were members of the travelling community who had ten children ranging from 6 months to 15 years. For the previous fourteen months the plaintiff and her family had lived in a caravan on this vacant plot of ground at Templeogue. This plot was acknowledged to be the property of the County Council and the plaintiff and her family were admittedly trespassers. The family had previously been housed by Dublin Corporation, first, in Coolock and later in Malahide, but were obliged to leave each house because of resentment and intimidation from neighbours. After a period of moving from place to place they came to rest at this particular plot in Templeogue. In the words of O’Higgins C.J: “While there was some local opposition to them it is to be inferred that their presence was initially tolerated by the defendants and their officials, as no objection was raised until a short time before the events which led to these proceedings.” A resolution was then passed by the elected members under s. 4 of the City and County Management (Amendment) Act 1955 requiring the Council to take actions to have the plaintiff and her family removed from this site.

100. In the High Court Barrington J granted the plaintiff an interlocutory injunction restraining the Council from taking action of this nature. That interlocutory injunction was,

however, discharged on appeal to this Court. Critically, however, between the hearing in the High Court and the appeal in this Court, the plaintiff had been offered alternative accommodation with two separate offers of housing from Dublin Corporation. This Court took the view that in these circumstances the alternative housing amounted to a reasonable discharge by the defendants of their duty as a housing authority.

101. The effect of this decision is perhaps best summed up by Carroll J in her judgment in *Dublin Corporation v. McGrath* [2004] IEHC 45, [2004] 1 IR 216 at 222:

“While this case is authority for the proposition that a local authority which fails to consider the housing needs of a person within their jurisdiction is not acting in accordance with its duty and cannot eject a trespasser, it is also authority for the corollary that if there has been reasonable discharge of this duty by considering the housing needs, an authority will not be restrained from moving on a trespasser.”

102. What, then, were the offers of accommodation which the Council made to the appellants in this case? It is clear from the evidence given before Allen J that the Council had previously offered made several offers of accommodation to the appellants (including one four bedroomed house) but these had been refused on the ground that, while suitable for members of the ‘settled’ community, they were not suitable for them. In his *ex tempore* ruling in the present case Allen J summarised the evidence thus:

“...it is clearly evident that there is no Traveller-specific accommodation available for [the appellants]. There is a halting site at Beechpark nearby, which has been offered to Mr and Mrs. McDonagh, but for them to take that up would give rise to so-called compatibility issues with the incumbent family.”

103. All of this raises the question (which I shall address presently) of whether the Council could be said to be under a statutory obligation to provide traveller-specific housing. In any

event, the appellants contend that at least some of the housing offers which had been made were refused because they were unsuitable for the second-named appellant (Ms. McDonagh's) medical needs. (Ms. McDonagh has mobility problems and cannot use the stairs. It is accepted that she requires the assistance of her son who acts as her carer.) So it may yet transpire that the Council failed in its ordinary Housing Act obligations via-a-vis these appellants.

Application of the *Merck, Sharpe & Dohme* criteria regarding the grant of an interlocutory injunction

104. If we now return to the merits of this application, it is necessary to apply the *Merck, Sharpe & Dohme* criteria and to ask in the first instance whether the appellants have raised an arguable case by way of defence. I put the matter this way because as the occupation of the site is admittedly both illegal (they are trespassers) and unauthorised (there is a clear breach of the planning laws), the Council would normally be entitled to orders restraining trespass on the one hand (see, e.g., *Keating & Co. Ltd. v. Jervis Street Shopping Centre Ltd.* [1997] 1 IR 512) and restraining a breach of the 2000 Act on the other. If in this situation the applicant for such relief was a purely private party, then the case for the granting of interlocutory relief would, at least generally speaking, be almost unanswerable. But the Council is not such a person and, at the risk of repetition, this point must again be emphasised.

105. From what I have already said elsewhere in this judgment, I think it clear that the appellants have raised fair arguments by way of defence to an application brought by a body which is also a housing authority.

106. First, it is clear from decisions such as *Lynch* that the caravans and the mobile home represent the “dwelling” of the appellants for the purposes of Article 40.5 of the Constitution. As such, they are entitled to constitutional protection, even if – as *Murray* makes clear – the force of that protection is diluted by reason of the illegal nature of the occupation. It is

nonetheless a factor to which regard must be had and it is relevant in any consideration of whether to grant the Council an interlocutory injunction, even if it is not generally to be regarded as the overarching, determinative one.

107. Second, while Whelan J concluded that no fair question to be tried had been raised by the appellants so far as the Article 8 ECHR respect for the home issue is concerned, I find myself inclined to the opposite view. I think that for all the reasons I have already discussed the appellants have raised an arguable issue on this point, not least having regard to all that the European Court of Human Rights said in *Winterstein*.

108. Third, the net effect of this is that neither the High Court nor the Court of Appeal performed the formal proportionality assessment regarding the objective necessity for the making of these orders which the European Court had said in *Winterstein* was necessary in a case of this kind and which conclusion would, in any event, be consistent with the reasoning in *Murray*. That task now falls to be performed – albeit on a provisional basis – by this Court in light of the fact that the present appeal concerns an application for an interlocutory injunction.

109. Fourth, the practical effect of the interlocutory injunction(s) granted by the Court of Appeal was that the Council obtained what amounted to summary judgment against the defendants. As this Court has held in both *Charleton* and in *Taite*, an interlocutory injunction should not be used in this way.

110. Fifth, as I have already observed, the court is entitled in a case of this kind to have regard to considerations such as public safety and the legitimate rights (including amenity interests) of private parties or where there was a clear threat to public safety. It is clear, for example, that between January 2018 to August 2018 the applicants were trespassing on a lane which was part of a public road, namely, the R475 Ennis to Kilrush. The immediate and

pressing demands of public safety would have required the making of orders in those circumstances requiring them to have vacated such a site, irrespective of whatever Article 40.5 of the Constitution had said about its inviolable status or the respect to their home which Article 8 ECHR had said was due. While I fully acknowledge that the appellants are trespassers, they are nevertheless doing so on the lands of a *housing authority* and it cannot be said that these acts of trespass *in themselves* currently present a threat to public safety or the amenity interests of third parties or other similar pressing and important considerations.

111. Sixth, since, as the European Court has said in *Winterstein*, the loss of one's home represents the "most extreme form of interference" with this right to the protection of the dwelling, a proportionality analysis requires us to examine whether the making of these orders are actually necessary *at this juncture*: such is the importance of the respective guarantees of "inviolability" in Article 40.5 and "respect" in Article 8 ECHR that no less is required before orders of this kind can properly be made.

112. Seventh, it is important to stress that unlike the situation in *Murray* and, admittedly, to a lesser extent, *Fortune*, the applicants' dwelling(s) do not present an interference with or threat to the amenities of third parties, at least as matters stand. It is true that these illegally occupied lands are presently zoned for public amenity, but it would not seem that there is any immediate pressing public need for it to be so used or developed for that purpose.

113. Eighth, it is true that the applicants showed the same cavalier disregard for the integrity of the planning process as was evident in cases such as *Murray*. This is a vital consideration which, as so properly emphasised in *Kinsella* and *Murray*, would normally justify the making of a s. 160 order in and of itself. While not excusing this behaviour, the fact remains that the context of the present appeal is somewhat different. The defendants in *Murray* elected to build an enormous house without planning permission. They clearly had the financial means to do

this and were fully familiar with the requirements of the planning process which they decided to disregard. By contrast, the applicants here are members of a marginalised and socially vulnerable group. Just as importantly, in contrast to the position in *Fortune, Kinsella* and *Murray*, these temporary dwellings are not – and are not intended to be – permanent structures. The appellants’ long term wish is to have permanent housing available to them. The occupation of these lands arose as a result of the fact that they literally had nowhere else to go within the Council’s functional area.

114. Ninth, again in contrast to the position in *Fortune, Kinsella* and *Murray*, the applicants were persons to whom (arguably, at least) positive duties were owed by the Council in its capacity as a housing authority. It is true that as Baker J observed in *Mulhare v. Cork County Council* [2017] IEHC 288 a housing authority is not obliged to have a specific or tailor-made accommodation available for all purposes. In that case the Council had agreed to a course of works to upgrade the dwelling in order to meet the medical and others needs of the applicant’s daughter who had grown to adulthood. The applicant wished to be closer to the hospital treating her daughter, as it would be more convenient for the many medical procedures and assessments which she needed. It was not that they did not have any suitable existing accommodation.

115. It is also true that in the present case specific offers of accommodation have been made but these were not acceptable to the appellants in that it was said that they were not Traveller-specific or (in some instances, at least) suitable for Ms. McDonagh’s acute medical needs. Here again, however, the situation is quite different to the position in *Mulhare*.

116. Section 10(1) of the 2000 Act provides that each planning authority shall prepare a development plan. Section 10(2) requires each authority to set out certain objectives in the plan, including (s. 10(2)(i)): “the provision of accommodation for travellers and the use of particular areas for that purpose.” It is not in dispute but that the present County Clare

Development Plan does not, as such, specify any such Traveller-specific accommodation. Rather, a use for Traveller accommodation was included in all lands zoned for residential development in the County Development Plan. It is at least arguable that the Council were thereby in breach of their statutory obligations as set out in s. 10(2)(i) of the 2000 Act.

117. Finally, there is the point that if the appellants are required to move their caravans and mobile homes it is not clear where exactly they might move. Unlike the situation in *Murray* and (perhaps less clearly) in *Fortune*, it is not really disputed but that the practical effect of such an order is that they would thereby be rendered homeless and could in reality only move to a place where they would also be trespassers. All of these points suggest that the appellants have raised fair questions by way of defence to the application for a mandatory interlocutory injunction.

118. Turning now to the other two *Merck, Sharpe & Dohme* criteria, it is clear that damages would not be an adequate remedy for either party. So far as the balance of convenience is concerned, I think that it would be inopportune to make any order *at this juncture* – and I emphasise these words – where the effect would be to render the applicants effectively homeless and with nowhere else where they can lawfully go. While I do not in any way condone the illegal occupation of the lands or wish to give succour to those who would treat the planning laws with cavalier disregard, I feel that one cannot ignore the marginalised status of the appellants. The fact is that this is their only home and that they have no alternative land on which to reside. If this situation were to change but the trespass nonetheless wantonly continued, then, of course, different considerations might well come into play so far as the grant of interlocutory relief is concerned.

119. Unlike, moreover, cases such as *Murray*, there is no obvious and immediate threat to the amenities of third parties or to particular environmental concerns. The existence of at least

an arguable case that the very body which applied for these injunctions is itself in breach of its statutory obligations to provide either “ordinary” accommodation and/or Traveller-specific accommodation is also a factor which weighs heavily against the granting of this form of relief – and I again repeat and emphasise these words – *at this juncture*.

Conclusions

120. If one endeavours to draw the various threads of this diverse and complex case-law together at this stage, it can be said that the judgments in the High Court and Court of Appeal proceeded on the basis that as the applicants were in illegal occupation of these lands and that their placing of the caravans and mobile homes on the Council lands constitute an unauthorised use for the purposes of s. 3 of the 2000 Act such that the Council was entitled to mandatory interlocutory relief requiring the applicants to vacate the site. A key aspect of the judgment of Whelan J for the Court of Appeal was her conclusion that the applicants had not raised any fair case in the context of an interlocutory injunction that caravans etc. did not constitute a “home” for the purposes of Article 8 ECHR, so that a judicially-conducted proportionality analysis was not thereby necessary.

121. This is where I respectfully disagree with the Court of Appeal. In my judgment for the reasons I have already given the caravans etc. do constitute a “dwelling” (“ionad cónaithe”) for the purposes of Article 40.5 of the Constitution for the very simple reason that it is in fact the appellants’ place of residence. Even though as this Court’s judgment in *Murray* makes clear, the force of that constitutional protection is diluted where the occupier of the dwelling is in illegal occupation of that site, the substance of that constitutional guarantee of inviolability would nonetheless be compromised if the making of such an order was not subject in these circumstances to an appropriate proportionality analysis.

122. The same is broadly true of the Article 8 ECHR claim. Contrary to the views of Whelan J, I think that the appellants have raised at least a fair question as to whether the caravans etc. constitute a home for the purposes of Article 8 ECHR in view of their connections with the locality. If it should ultimately transpire that this is indeed the case, then it is clear from the decision in *Winterstein* that there is an obligation on a court asked to make such orders to conduct a proportionality analysis before requiring the applicants to vacate the site.

123. All of this suggests that it would be premature to make mandatory interlocutory orders of this kind precisely because, first, the effects on these marginalised and vulnerable appellants would be catastrophic as there is really nowhere else at present where they could lawfully go and, second, it is not clear that any immediate threat to the amenities of others, public safety or the environment generally or other similar pressing considerations is thereby presented by this particular illegal occupation of Council lands. The present application may accordingly be distinguished in that respect from that made in *Murray* and from other cases concerning applications for *permanent* injunctions to restrain unauthorised development. In such cases the integrity of the planning system, the rights of the planning authority to act against unauthorised development and, indeed, the rights of landowners (whether private citizens or public bodies) to take actions against trespassers and those in illegal occupation of land are justifiably factors of particular importance.

124. It is now over forty years since this Court gave judgment in *McDonald v. Feeley*. Each case of this kind which has arisen in the interval has in its own way presented its own unanswered question: where can these appellants lawfully go? The very fact that this question cannot be immediately answered in the present case, together with the fact that the Council has – and has accepted that it has – an obligation to make provision for their housing needs are, to my mind, the decisive considerations which tip the balance of convenience in favour of these particular appellants *at this juncture*.

125. I would therefore allow the appeal and discharge the mandatory interlocutory orders granted by the High Court and affirmed by the Court of Appeal. For the avoidance of doubt, I wish to make it clear that this judgment relates only to the occupation of the site by Mr and Mrs McDonagh, their young children who live with them and their adult son who resides in a mobile home on the site and who cares for Mrs McDonagh.

126. In terms of next steps, I propose that this matter now proceeds speedily to a full hearing. In this regard I would direct that the Council file a statement of claim within two weeks from this date, with a further two weeks for the appellants to file their defence. To ensure that the matter is indeed progressed quickly, I will further direct that the appellants must then immediately issue a motion for directions returnable before the President of the High Court (or such judge of that Court as she may direct) so that the case can then quickly proceed to a full hearing.