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Land Law, Property, Housing and the Environment

Padraic Kenna[#]

Introduction

This chapter considers the possible impact of the European Convention on Human Rights Act 2003 (ECHR Act) on Irish law in selected areas of land and property, planning, housing and environment law¹ - areas associated with enormous recent wealth gain. The existing Irish constitutional provisions balancing the common good and private property rights, within the doctrine of proportionality and system of compensation, broadly reflect European Court of Human Rights (ECtHR) jurisprudence, although the widening Strasbourg definition of possessions may reveal limitations on the rights contained in the 1937 document. Articles 3 and 8 of the European Convention on Human Rights (ECHR), with their positive obligations on the state to act, create a new scenario, where recent judicial review cases are elaborating the nature and extent of the obligations involved. Planning and environmental law must also attune to the requirements for fair procedures arising from Articles 6 and 13 ECHR, while environmental impacts on homes must be harmonious with Article 8 precedents. Non-discrimination in the implementation of the growing corpus of ECHR legal rights could form significant legal argument in the areas of land, property, housing and environmental law.

Property Rights in the Convention

Land, property, housing and environmental law, and human rights in the modern sense, have not always been perceived as natural bedfellows. As Lord Reid pointed out in 2001, '[h]uman rights after all, are about the protection of individuals against the state – something of interest perhaps to immigration lawyers, family lawyers, and criminal lawyers. Surely there is not much in this area that is relevant to the property lawyer?'² However, it is a widely accepted view in liberal capitalist societies that the right to own private property is at the basis of, and relies on, the rule of law and individual civil rights and liberties.³ Modern analysis of property law has refined the concept of property ownership to understanding it as a power relationship - a 'relationship of social and legal legitimacy existing between a person and a valued resource (whether tangible or intangible)'.⁴

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¹ There is not sufficient space to consider in detail intellectual property in this chapter, but see Chapman, A 'The Human Rights Implications of Intellectual Property Protection,' (2002) 5 *Journal of International Economic Law* 861.

² The Hon Lord Reid, 'Under the Microscope – Human Rights and Property Law.' *Human Rights and UK Practice*. February 2001 p. 2

³ The rule of law contains a notion of property which does not treat capital in a different way to land. Thus the law treats the capital/labour relationship as a free contract, ignoring the social and economic power of capital owners over those who rely on regular employment and wages to live.

⁴ Gray, K & Gray, SF *Elements of Land Law*. (London: Butterworths, 2001) p 95. For a discussion on the Hohfeldian origin of this approach and a critique for its failure to recognise its institutional base see Coban, A.R. *Protection of Property Rights within the European Convention on Human Rights*. (Aldershot: Ashgate, 2004) 14-24.

Article 1 of the First Protocol to the ECHR provides that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.⁵

Article 1 involves three distinct rules. Firstly, the principle of peaceful enjoyment of property is set out. Secondly, the deprivation of possessions is subject to certain conditions and thirdly, states are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose.⁶ The guarantee of the peaceful enjoyment of property or possessions provides the background for the other two rules.

⁵ This Protocol was introduced after the Convention itself was adopted, since at the time there was a need to reconcile the rights of private property and the nationalisation of utilities and other commercial areas in the public interest by states such as Sweden and the UK - see Harris, O'Boyle and Warbrick *Law of the European Convention on Human Rights*. (London: Butterworths, 1995) p 516. Portugal expressed a reservation which provided that expropriations of large landowners, large property owners and entrepreneurs or shareholders may be subject to no compensation under the conditions to be laid down by law. This reservation was withdrawn in 1987.

⁶ See *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35.

Contemporary Land, Property and Wealth in Ireland

Addressing land and property rights under the ECHR requires some contextual examination of the nature and extent of contemporary wealth. In 2008, a Report by Investec Private Bank pointed out that some €1bn was added to the collective wealth of the richest 450 people in Ireland over the past three years.⁷ What the report calls 'quiet wealth' of around €1bn was generated by farmers and other landowners from the sale of land for property and infrastructure, such as roads. It is estimated that there are some 450 people with more than €10m in investable assets, excluding their primary home, holding wealth of some €7bn. Four out of 10 made their fortune through involvement with the construction industry or property deals.

Property in housing is now the central repository of personal wealth with a nominal value which rose from €9.1bn in 1981 to €53.5bn in 2005.⁸ In 2007, the Bank of Ireland Report, *Wealth of the Nation*, showed that property (residential and commercial) is the dominant asset class, accounting for 72% of all assets. Residential property accounts for 97% of all property assets. Equities accounted for 15% of total assets, bonds 3% and cash 10%.⁹ This Report also states that the asset base (defined as gross assets minus residential property) of the top 1% of the population increased from €6bn in 2005 to €100bn in 2006.¹⁰ The effect of this is that the stakes are high in any actions affecting land, housing or property.

Controls on Property Rights in the Irish Constitution

The All Party Oireachtas Committee Report on Private Property in 2004 pointed to the dominant and pervading rural ethos on Irish understandings of landed property, rural and urban development.¹¹ This derives in part from a natural rights Lockean approach to land, where the labour of the farmer/frontiersman mixed with the land entitled him to an almost sacred right to property ownership.¹² The State must protect that property at all costs, and any actions that affect property owners must be strictly controlled.¹³

Articles 40 and 43 of *Bunreacht na hEireann* set out both the natural and positive law origins of property rights. Whilst Article 43 is the principal provision of the Constitution dealing with property rights, it must be read in conjunction with the

⁷ *The Irish Times*, 8 May 2008. The report was written by DKM Economic Consultants for Investec.

⁸ See O'Donnell, N, 'Housing Wealth and Consumption' (2007) *Central Bank Quarterly Bulletin* 119-136.

⁹ Available at: <http://www.finfacts.ie/biz10/WealthNationReportJuly07.pdf>

¹⁰ At p 12. An OECD report in 2006 showed that the level of wealth distribution in Ireland is among the lowest in the developed world. The OECD has ranked Ireland 27th out of its 30 member countries when it comes to so-called 'social transfers.' See *The Irish Times*, 12 October 2006.

¹¹ *The All-Party Oireachtas Committee on the Constitution. Ninth Report. Private Property* (Dublin: The Stationery Office, 2004) p 67.

¹² Of course, the British Exchequer through the Land Acts and Land Commission created the system of widespread ownership of land in Ireland between the 1880s and 1920s.

¹³ "Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his *property*." Second Treatise of Government by John Locke (1690) Section 26. Available at <http://oregonstate.edu/instruct/phl302/texts/locke/locke2/locke2nd-a.html#CHAP.%20V>. Andreasson points out that Locke was in reality justifying the colonial processes of dispossession of property by force, within the conception of private property rights. See Andreasson, S. 'Stand and Deliver: Private Property and the Politics of Global Dispossession' (2006) 54 *Political Studies* 3-22.

'fundamental rights' provisions contained in Articles 40-44, in particular, Article 40.3, which outlines 'personal rights.'

As a developing urban and industrial society from the 1960s, the Irish State has needed to interfere in property, and particularly land ownership rights. This was and continues to be necessary for the acquisition (sometimes compulsorily) of land for buildings, roads, bridges, railways, sanitation, water supply, regulation of nuisances and removal of dangerous buildings. Housing legislation dating from 1890 to date¹⁴ has enabled the State to acquire land and build homes for those excluded from the housing market. This includes the requirement under Part V of the Planning and Development Act 2000 to make up to 20% of development sites available at use value to the state for housing.¹⁵ The growth of development plans, zoning, individual planning permissions and the administrative powers of planners have led to enormous limitations on the concept of freedom of property rights. In more recent times, many EU Directives have placed mandatory restrictions on land use which affects the environment, including zoning of special areas of environmental interest impeding development.¹⁶ Of course, the levying of inheritance tax, capital gains tax and rates on property marks further state action over land and property rights.¹⁷ There is a long line of Irish cases balancing constitutional property rights with state regulation and appropriation of property for the common good.¹⁸ Indeed, in the Planning and Development Bill Reference, pre-ECHR Act, the Supreme Court accepted that in addition to the Irish Constitution the decision of the ECtHR in *James v United Kingdom*,¹⁹ was relevant. According to the Court:

'Article 1 (of The First Protocol) does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest' such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of full market value. Furthermore, the court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this domain.'²⁰

The Irish Constitution, and the court system, with its legal liberalist approach to the formal equality of legal persons, treats individual people and wealthy corporations as

¹⁴ See Housing of the Working Classes Act 1890, and Housing Act 1960.

¹⁵ See *In Re Article 26 Part V, Planning and Development Bill 1999* [2000] 2 IR 321; [2001] 1 ILRM 81.

¹⁶ See Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora; Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

¹⁷ The ECtHR held in *Burden v UK* [GC] Hudoc judgement of 29 April 2008, that the inheritance tax exemption for married and civil partnership couples pursued the legitimate aim of promoting stable homosexual and heterosexual relationships and did not amount to discrimination under Article 14 coupled with Article 1 of Protocol 1.

¹⁸ See for example, *Buckley v AG* [1950] IR 67; *Blake v AG* [1982] IR 117; *Dreher v Irish Land Commission* [1984] ILRM 94; *State v An Bord Pleanala* [1989] ILRM 98 and others; *In re: Article 26: Part V, Planning and Development Bill 1999* [2000] 2 IR 321. [2001] 1 ILRM 81. In the case *In the Matter of Article 26 of the Constitution and the Health (Amendment) (No 2) Bill 2004*, [2005] 1 ILRM 401, the Supreme Court found that the right of action to recover the monies paid out (nursing home charges unlawfully levied) amounted to a property right.

¹⁹ (1986) 8 EHRR 123.

²⁰ [2001] 1 ILRM 81 at 110.

the same before the law.²¹ It does not distinguish the special position of power of corporate legal persons, which are increasingly asserting constitutional and 'human rights' to protect commercial and property assets. The constitutional protection of corporate property rights in development land, often owned by offshore trusts, on the same formal legal basis as people's individual gardens has become an absurdity in contemporary society.²²

Possessions

Article 1 of the First Protocol refers to 'possessions' – a wide concept which includes both real and personal property.²³ Naturally, the term includes all property, chattels and acquired rights, such as leasehold interests.²⁴ The concept of possessions in Convention law is not confined to ownership of physical goods, and has an autonomous meaning outside any definition in domestic law. Possessions have been discerned in the case law of the ECtHR to include company shares,²⁵ alcohol licences,²⁶ goodwill in a business,²⁷ a licence to extract gravel,²⁸ fishing rights,²⁹ planning permission,³⁰ a repairing and a restrictive use covenant,³¹ rights flowing from tenancies,³² ownership of a debt³³ and even a claim for negligence.³⁴ The failure to honour an option to renew a lease, where there was a legitimate expectation, was held to be a breach of Article 1 of the First Protocol.³⁵ Intellectual property rights constitute possessions within the meaning of the Convention.³⁶ Yet, copyrights, patents, trademarks, designs and other intellectual property have not formed a large part of ECtHR decisions as yet. Recently, the application for a trade-mark by Anheuser-Busch Inc, where it had a legitimate expectation of obtaining it, was held to be a possession under Article 1 of the First Protocol.³⁷

Charles Reich set out the emerging forms of wealth and possessions arising from actions of the burgeoning US State in the 1960s.³⁸ Through its licensing, franchising, contracting, welfare benefits, employment, services and subsidies, as well as supports for industry, the State creates wealth for many people, and this wealth is regularly held as private property. There is a long line of ECtHR cases showing that

²¹ *Macauley v Minister for Posts and Telegraphs* [1966] IR 345; *Quinn's Supermarket v Attorney General* [1972] IR 1.

²² Contrast Article 19(3) of the German Constitution of 1949 on Restriction of Basic Rights, which states: *The basic rights apply also to corporations established under German Public law to the extent that the nature of such rights permits.*

²³ See Coban, AR, *Protection of Property Rights within the European Convention on Human Rights* (Aldershot: Ashgate, 2004).

²⁴ *James v United Kingdom* (1986) 8 EHRR 123.

²⁵ *Company S-T v Sweden* (1987) 50 DR 121.

²⁶ *Tre Traktorer Aktiebolag v Sweden* (1991) 13 EHRR 309.

²⁷ *Van Marle and others v Netherlands* (1986) 8 EHRR 483.

²⁸ *Fredin v Sweden* (1991) 13 EHRR 784.

²⁹ *Baner v Sweden* (1989) 60 DR 128.

³⁰ *Pine Valley Developments v Ireland* (1992) 14 EHRR 319.

³¹ *S v UK* (1984) 41 DR 226.

³² *Mellacher v Austria* (1990) 12 EHRR 391.

³³ *Agneessens v Belgium* (1988) 58 DR 63.

³⁴ *Pressos Compania Naviera v Belgium* (1996) 21 EHRR 301.

³⁵ *Stretch v UK*, judgment of 26 June 2002.

³⁶ See *Smith Kline & French Laboratories Ltd. v Netherlands* (1990) 66 DR 70; *Lenzing AG v UK* (Application no. 38817/97).

³⁷ *Anheuser-Busch Inc. v Portugal* [GC] date of judgment/EHRR reference?.

³⁸ See Reich, C 'The New Property', (1964) 73(5) *The Yale Law Journal* 733-787.

entitlements to social assistance can amount to a property right, engaging the protection of Article 1 of the First Protocol.³⁹ In *X v Sweden*⁴⁰ the European Commission of Human Rights held that although there is no right to a pension as such, the payment of contributions to a pension fund may in certain circumstances create a property right to 'derive benefit' from the fund.⁴¹ In *Gaygusuz v Austria*⁴² the ECtHR held that an emergency payment from a contributory employment insurance fund formed a pecuniary right for the purposes of Article 1 of the First Protocol.

A number of cases have had the effect of extending Article 6 (fair trial rights) to disputes in connection with non-contributory welfare schemes.⁴³ In ECHR states like Russia, where a right to housing is enshrined in law, an order of the court guaranteeing the right to housing becomes effective as a property right. A recent line of cases in relation to delays in the allocation of social housing, once the entitlement had been judicially established, demonstrates the ECtHR acceptance of such housing rights as property rights, that are subject to Article 6 in relation to the state's duty to uphold them without delay.⁴⁴

Whether an illegal temporary shelter constituted a 'possession' was considered in *Öneryıldız v Turkey*.⁴⁵ The Grand Chamber considered that although the applicant had occupied state land for approximately five years, it could not confer on him a right that could be regarded as a 'possession'. However, it considered that the applicant had been the owner of the structure and fixtures and fittings of the dwelling he had built and of all the household and personal effects which might have been in it, notwithstanding the fact that the building had been erected in breach of the law.⁴⁶ The Grand Chamber accordingly concluded that the dwelling built by the applicant, and his residence there with his close relatives, represented a substantial economic interest, which the authorities had allowed to subsist over a long period of time, and amounted to a 'possession' within the meaning of Article 1 of the First Protocol. The Court reiterated that the concept of 'possessions' in Article 1 of the First Protocol has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law. The issue which needs to be examined is whether the circumstances of the case, considered as a whole, may be regarded as having conferred on the applicant title to a substantive interest protected by that provision.⁴⁷

³⁹ See *Muller v Austria* (1975) 3 DR 25; *Gaygusuz v Austria* (1996) 23 EHRR 364; *Feldbrugge v The Netherlands* (1986) 8 EHRR 425; *Koua Poirrez v France* Hudoc (30 September 2003).

⁴⁰ (1986) 8 EHRR 252.

⁴¹ See also *Muller v Austria* (1975) 3 DR 25.

⁴² (1996) 23 EHRR 364.

⁴³ See *Feldbrugge v The Netherlands* (1986) 8 EHRR 425; *Salesi v Italy* (1993) 26 EHRR 187; *Memitto v Italy* (2000) 34 EHRR 1122. On the application of Article 6 in civil proceedings see further Brown, Chapter X in this volume.

⁴⁴ See *Shevchenko v, Russia*. judgment of 10 April 2008; *Novikov v Russia*. judgment of 3 April 2008; *Burdov v Russia* (2004) 38 EHRR 29; *Nagovitsyn v Russia*. judgment of 24 January 2008; (entitlement on grounds of disability); *Subochevo v Russia*. judgment of 15 November 2007; (entitlement because of earthquake); *Ponomarenko v Russia*. judgment of 15 February 2007; (eligible for social housing); *Sypchenko v Russia* judgment of 1 March 2007; *Lykov v Russia*. judgment of 12 July 2007; *Telyatyeva v Russia*. judgment of 12 July 2007.

⁴⁵ [GC] hudoc 31 November 2004.

⁴⁶ [Ibid., paras 122-124.

⁴⁷ *Ibid.*,

Deprivation of possession or control on use

Article 1 of the First Protocol involves three distinct rules, as set out in detail in *Sporrong and Lonnroth v. Sweden*.⁴⁸

The first rule, which is of a general nature, enunciates the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers the deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.⁴⁹

The guarantee of the peaceful enjoyment of property or possessions in the first rule provides the background for the other two. The second and third rules are thus intimately connected, since similar actions may constitute either deprivation or control on use, but only actions which amount to deprivation require compensation.⁵⁰

Deprivation involves expropriation or rendering land useless for any purpose. In *Pine Valley v Ireland*⁵¹ outline planning permission on the applicants' land had been annulled, and they claimed a deprivation of their possessions. They could still use the land for agricultural use, but not for the industrial purposes they had planned, and its value had diminished significantly. The ECtHR held that there was no deprivation, as the site was not rendered worthless, and they still retained ownership of the site.

In relation to controls on use, however, there is no presumption in favour of compensation. The ECtHR has held that the UK Leasehold Reform Act 1967, which allowed tenants of long leases to acquire the freehold and which reduced the value of the applicant's freehold property without compensation, was permissible.⁵² Problems arise when the State introduces regulatory measures which reduce the value of property without taking it away, or which comprise a taking of land, without actually being acknowledged as a 'taking.' In *Sporrong*⁵³ where the property was blighted by expropriation permits allowing appropriation at a later date, but not interfering with the property in the interim, it was held by the ECtHR that there was an interference with the 'substance of ownership.' The American distinction in *Lucas v South Carolina Coastal Council*⁵⁴ between 'regulation' (not compensated) and 'taking' (compensable) has been proposed by Gray as a comparative approach.⁵⁵ Establishing the threshold where control of use becomes expropriation has been unsatisfactory.⁵⁶

Comment [UK1]: This is the first mention of this case? What are the rules?

⁴⁸ (1982) 5 EHRR 35.

⁴⁹ (1982) 5 EHRR 35 at para. 61.

⁵⁰ Anderson, D. 'Compensation for Interference with Property'. (1999) EHRLR 543. see also *Former King of Greece v Greece* (2001) 33 EHRR 516.

⁵¹ *Pine Valley Developments v Ireland* (1991) 14 EHRR 319; See also *Kapsalis and Nima-Kapsali v Greece*. Hudoc 23 September 2004.

⁵² *James v United Kingdom* (1986) 8 EHRR 123.

⁵³ *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35,

⁵⁴ 505 US 1003 (1992)

⁵⁵ Gray, K 'Land Law and Human Rights' in Tee, L (ed) *Land Law, Issues, Debates, Policy*. (Devon: Willan, 2002) Chapter 7.

⁵⁶ See *Serghides v Cyprus* (2003) 37 EHRR 44, where although acquisition of property was in conformity with provisions of national law, nevertheless the failure to pay compensation was a breach of Article 1 of Protocol 1, and interest payments were also ordered for delay in compensating.

While there is in theory no rule requiring compensation on controls on use, the question of whether compensation has been paid will be an important ingredient in the assessment in the proportionality of the interference with property.⁵⁷ Yet, in the 2006 case of *Jahn v Germany*,⁵⁸ the ECtHR held that the ‘exceptional circumstances’ surrounding the reunification of Germany, where a number of technically illegal farmers had first been legally granted ownership of their farms and were then obliged to reassign their land to the State without any compensation, did not amount to a breach of Article 1 of the First Protocol.⁵⁹ In *Housing Association of War Disabled and Victims of War of Attica and others v Greece*⁶⁰ the applicant requested the State to exchange its land for land of equal value or expropriate it, following 40 years of planning problems. The ECtHR held that in an area as complex and difficult as that of spatial development, the Contracting States should enjoy a wide margin of appreciation in order to implement their town and country planning policy. Importantly, the legitimate concern of the government to protect the forests did not absolve the State of its responsibility to provide adequate protection to people such as the applicants, who bona fide possessed or owned property.

In the earlier case of *Mellacher v Austria*⁶¹ Italian rent control legislation at various times has involved rent freezes, extensions of leases, suspension of enforcement and staggering of eviction actions. These have been judged appropriate to achieve the legitimate aim of dealing with chronic housing shortages.⁶² But the landlord’s inability to recover possession due to absence of police assistance may amount to a breach of Article 1 of the First Protocol,⁶³ and the inflexibility of the approach may in some cases create an unfair balance between the protection of the right to property and the requirements of the general interest.⁶⁴ Lengthy delays in the proceedings of the Private Residential Tenancies Board may thus engage the jurisprudence of the ECtHR.

Proportionality and Compensation

The ECtHR has reiterated that all interferences with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interests of the community, and the requirements of the protection of the individual’s fundamental rights, ensuring that the person concerned does not bear an individual and excessive burden.⁶⁵ In particular, there must be a reasonable relationship of proportionality between the measures employed and the aim sought to be realised by the measure depriving a person of his possessions, although there is a margin of appreciation open to States.⁶⁶

⁵⁷ See *James v United Kingdom* (1986) 8 EHRR 123; *Holy Monasteries v Greece* (1995) 20 EHRR 1.

⁵⁸ [GC] (2006) 42 EHRR 49

⁵⁹ See McCarthy, F ‘Deprivation without Compensation: The Exceptional Circumstances of *Jahn v Germany*, ‘ (2007) 3 EHRLR295-303. See also *Ouzounoglou v Greece*, Hudoc 24 November 2005.

⁶⁰ Application no. 35859/02. Judgment 13 July 2006.

⁶¹ (1990) 12 EHRR 391.

⁶² *Spadea & Scalabrio v Italy* (1995) 21 EHRR 481. See also *X v Austria* (1979) 3 EHRR 285 & *Mellacher v Austria* (1990) 12 EHRR 391.

⁶³ *Immobilare Saffi v Italy* (App. 22277/93) Judgment 18 July 1999.

⁶⁴ *Tassanari v Italy* Hudoc October 16 2003.

⁶⁵ *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35.

⁶⁶ *Pressos Compania Naviera v Belgium* (1996) 21 EHRR 301.

This balance, in relation to the compatibility of the law of adverse possession, arising from the UK Limitation Act 1980 and Land Registration Act 1925 with Article 1 of the First Protocol, was considered in *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v UK*.⁶⁷ The case involved the legal entitlement of a squatter (Graham) to acquire title, after 12 years, from the paper owner of 57 acres of land with development potential in Oxford. The Grand Chamber held, after a tortuous set of appeals all the way from the High Court in England, that there was no violation of Article 1 of the First Protocol. The Court held by ten votes to seven that the fair balance required in relation to the compatibility of state laws and the Convention was not upset in this case.

The applicant companies contended that their loss was so great, and the windfall to Graham so significant, that the fair balance required by Article 1 of the First Protocol was upset. The ECtHR first noted that, in the case of *James*⁶⁸, it had found that the view taken by Parliament as to the tenant's 'moral entitlement' to ownership of the houses at issue fell within the state's margin of appreciation. In the present case, too, whilst it would be strained to talk of the 'acquired rights' of an adverse possessor during the currency of the limitation period, it must be recalled that the registered land regime in the United Kingdom is a reflection of a long-established system in which a term of years' possession gave sufficient title to sell. Such arrangements fall within the state's margin of appreciation, unless they give rise to results which are so anomalous as to render the legislation unacceptable. The acquisition of unassailable rights by the adverse possessor must go hand in hand with a corresponding loss of property rights for the former owner. In *James and Others*, the possibility of 'undeserving' tenants being able to make 'windfall profits' did not affect the overall assessment of the proportionality of the legislation, and any windfall for Graham must be regarded in the same light in the present case.⁶⁹

This means that the provisions of the Statute of Limitations 1957 of Ireland, where a legal owner is prohibited from taking action for the recovery of land occupied adversely for 12 years (or after 30 years if the owner is a State body), is compatible with the Convention.⁷⁰

The case of *Hutten-Czapska v Poland*⁷¹ has attracted much attention since it involved the issue of whether the property rights set out in Article 1 of the First Protocol can trump state legislation on controlled rents. Here, the state-imposed ceiling on rent levels for private tenants (600,000 to 900,000 tenants benefitted) was found to be too low to enable landlords to recoup their maintenance costs, let alone make a profit. While the ECtHR accepted that the measure to protect tenants was justified, the Polish legislation did not secure any mechanism for balancing the costs of maintaining the property and the income from rent (which covered 60% of these costs). This created a

⁶⁷ [GC] (2008) 46 EHRR 45. See also the original UK case of *JA Pye (Oxford) Ltd v Graham* [2002] 3 All ER 865.

⁶⁸ (1986) 8 EHRR 123.

⁶⁹ [GC] Hudoc, 30 August 2007, para 83.

⁷⁰ See Case Comment (2008) 1 *EHRLR* 132-135. The determination that adverse possession legal rules amount to a 'control on use' rather than a 'deprivation' and 'control on use' became a critical distinction in the case, since there is no inherent right to compensation in situations of 'control on use'.

⁷¹ *Hutten-Czapska v Poland* (2006) 45 EHRR. 4. The Grand Chamber distinguished this case from others where limiting the rights of landlords had been justified and proportionate such as *Spadea and Scalabrino v Italy* (1996) 21 EHRR 482 and *Mellacher v Austria* (1996) 12 EHRR 391.

disproportionate and excessive burden on the applicant and constituted a violation of Article 1 of the First Protocol to the Convention. It was not, however, up to the ECtHR to indicate what a reasonable rent would be. Clearly, deriving profit from rented housing is protected by the ECtHR under Article 1 of the First Protocol.⁷²

Article 3 and Housing Obligations

While Convention rights do not directly oblige states to provide homes for homeless people there are a number of important protections of civil rights which can lead to positive obligations on the State to provide housing. Some of these relate to ensuring that accommodation remains available, as well as the timely provision of measures to avoid inhuman and degrading treatment.

The House of Lords in England in the milestone *Limbuela* case considered the State's positive obligations to homeless, destitute and failed asylum-seekers under Article 3.⁷³ The question of when the duty of the State to act arose. Lord Bingham stated that the answer must be:

... when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer deprivation.⁷⁴

In *Moldovan v Romania*,⁷⁵ thirteen Roma houses belonging to the applicants were destroyed and they alleged the involvement of state officials. In invoking Articles 3 and 8, the applicants complained that, after the destruction of their houses, they could no longer enjoy the use of their homes and had to live in poor, cramped conditions. They claimed that the Romanian Government had a positive obligation under Articles 3 and 8 to provide sufficient compensation to restore them to their previous living conditions. In applying the principles to the facts of Mr Moldovan's case and the other applicants, the ECtHR found that there had been a violation of Article 3. There also had been a serious violation of Article 8 of a continuing nature in the hindrance by, and repeated failure of, the authorities to put a stop to the breaches of the applicants' rights.

The implications of this jurisprudence for Irish law means that there is a positive obligation on public bodies charged with the care of people to maintain a minimum

⁷² Emberland points out that the text of the ECHR is intimately informed by the core values of a capitalist system and the values system of the liberal state, and the ECtHR does not regard corporate litigation with suspicion. See Emberland, M, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: OUP, 2006); Grear, A, "Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights" (2007) 7(3) *Human Rights Law Review* 511.

⁷³ *R. (on the application of Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66; [2006] 1 AC 396.

⁷⁴ *R. (on the application of Limbuela)* [2005] UKHL 66, at para 8.

⁷⁵ *Moldovan v Romania* (2005) 44 EHRR 16.

threshold of housing and health care for everyone in the State. There may thus be some scope for litigating this obligation under the ECHR Act 2003.

Respect for private and family life, home and correspondence and housing.

Article 8 ECHR has particular significance in relation to housing with its protection of respect for 'home'. In particular, there is a right of access to, occupation of and peaceful enjoyment of the home. 'Home' is an autonomous concept, which does not depend on classification under domestic law, but the existence of sufficient and continuous links with a place can point to the existence of a home.⁷⁶ The concept of a home is not confined to dwellings or land which is lawfully occupied. The definition of 'home' can include land owned by a Traveller on which he/she wants to park his caravan,⁷⁷ although the occupation of a room in a hotel for less than a month did not qualify.⁷⁸

In Ireland, some legislation appears to view the concept of a 'home' somewhat differently to that established in the ECtHR jurisprudence. The Housing (Miscellaneous Provisions) Act 2002 creates a criminal offence relating to entry on and occupation of land, or bringing onto or placing an 'object' on land without consent.⁷⁹ Significantly, in this instance, the word 'object' includes any 'temporary dwelling' within the meaning of section 69 of the Roads Act, 1993. In that Act a 'temporary dwelling' means any tent, caravan, mobile home, vehicle or other structure or thing (whether on wheels or not) which is capable of being moved from one place to another (whether by towing, transport on a vehicle or trailer, or otherwise), and:

- (a) is used for human habitation, either permanently or from time to time, or
- (b) was designed, constructed or adapted for such use.

Under Article 8 ECHR, the justification for interference with the right to respect for one's home can be found on the grounds that it is 'in accordance with the law,' necessary in a democratic society and generally proportionate to the aim sought to be achieved.⁸⁰ All proceedings for possession of a home engage Article 8. But Article 8 does not interfere with the owner's legal rights to re-possession of his property where these rights are properly exercised. The repossession of a house by a mortgagee after a default on payments was considered in *Wood v UK*,⁸¹ but found to be in accordance with the terms of the loan and the domestic law, and necessary for the protection of the rights and freedoms of the lender. In other housing related cases, interference with the privacy of the home was found to be justified on the grounds of legitimate social and economic policies, and the implementation of social justice, where evictions orders were suspended and rents frozen.⁸²

⁷⁶ For a contemporary analysis of the concept of home within the ECHR in the context of mortgage default proceedings and a contemporary perspective on home see Fox, L. 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29(4) *Journal of Law and Society*, pp 580-610; Fox, L, *Conceptualising Home: Theories, Laws and Policies*.(Hart Publishing, 2006).

⁷⁷ *Buckley v UK* (1996) 23 EHRR 101.

⁷⁸ See *O' Rourke v UK* Hudoc (26 June 2001)

⁷⁹ Section 24 amends the Criminal Justice (Public Order) Act, 1994, by introducing an offence of entering and occupying land or placing an object on land without consent.

⁸⁰ *Buckley v UK* (1996) 23 EHRR 101; *Chapman v UK* (2001) 33 EHRR 413; *Beard v UK* (2001) 33 EHRR 442.

⁸¹ (1997) 24 EHRR CD 69.

⁸² *Spadea and Scalabrino v Italy* (1995) 21 EHRR 482.

There is a positive obligation on states to ensure that Article 8 is effective. In *Botta v Italy*⁸³ a person with disabilities claimed that his private life had been impaired due to the absence of disabled facilities at Italian beach resorts, despite legislation requiring these. The ECtHR defined the scope of the positive obligations to include where there 'must be a direct and immediate link between the measures sought by the applicant and the latter's private and family life'.⁸⁴

Article 8 and Housing

It is established that Article 8 in relation to respect for family life and home does not give an enforceable right against the state to guarantee that a home is provided. In *Marzari v Italy*⁸⁵ the applicant who was recognised as 100% disabled was allocated an apartment which he considered to be inadequate for his needs. He ceased to pay rents while requesting that certain works be carried to make it suitable for him. However, it was held that while Article 8 does not offer a guarantee to have one's housing problems solved by the State, a refusal by the authorities to provide assistance to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8, because of the impact of such refusal on the private life of the individual.⁸⁶ A State has obligations of this type where there is a direct and immediate link between the measures sought by the applicant and the applicant's private life.

There has been an award of damages under the UK Human Rights Act 1998 against a local authority in relation to the failure to act on the provision of adequate housing. In *R (Bernard) v Enfield LBC*⁸⁷ the High Court in England found that the authority had acted unlawfully and incompatibly with Article 8 in failing for over two years to provide suitable accommodation for a family. The judgment relied on the established definitions set out in *Botta*:

While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves... However, the concept of respect is not precisely defined. In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, while the State has, in any event, a margin of appreciation.⁸⁸

⁸³ (1998) 26 EHRR 241.

⁸⁴ (1998) 26 EHRR 241 at para. 34. The ECtHR decided that this case concerned interpersonal relations of such broad and indeterminate scope that there could be no conceivable direct link between the measures the State was urged to take and the applicant's private life.

⁸⁵ *Marzari v Italy* (1999) 28 EHRR CD 175.

⁸⁶ *Ibid.*, at 179.

⁸⁷ [2002] EWHC 2282 (Admin).

⁸⁸ *Botta v Italy* (1998) 26 EHRR 241 at para. 33.

In *R (Madden) v Bury Metropolitan Council*⁸⁹ a local authority's decision to close down a care home had failed to take into account the Article 8 rights of the residents to respect for their homes. In *R (Coughlan) v North East Devon Health Authority*⁹⁰ the closure of a purpose built facility for severely disabled people where a promise of 'a home for life' had been given was considered in relation to a breach of Article 8. The positive obligations under Article 8 in relation to people with profound physical and learning disabilities were also considered in *A & Others v East Sussex County Council*.⁹¹

In *Chapman v United Kingdom*⁹² the ECtHR held that Article 8 did not give a right to be provided with a home, and this was a matter for political and not judicial decision. In *Giacomelli v Italy*⁹³ the ECtHR held that the noise and emissions from a treatment plant treating harmful and toxic waste 30 metres from the applicant's house constituted a breach of Article 8. Significantly, this plant processed 27% of the waste generated in Northern Italy and 23% nationwide, yet the ECtHR did not relent to arguments about the importance of the plant to the region's industry and economy, as had happened in the Grand Chamber decision of *Hatton v UK* concerning the proposed expansion of Heathrow airport.⁹⁴

Article 8 and possession of 'home'

There is a margin of appreciation allowed to states as to how they implement Convention law, but ECtHR jurisprudence in relation to evictions from homes is circumscribing this discretion. For example, in *Buckley v UK*, the offer of other accommodation, even where there was a fear of violence, was held to justify the interference with the applicants' Article 8 rights regarding the eviction of a Traveller family from an unauthorised site.⁹⁵

In *Stankova v Slovakia*,⁹⁶ the Municipal eviction interfered with the applicant's 'home' but it was found to be in accordance with law. The only point at issue, therefore, was whether that interference was 'necessary in a democratic society' for achieving the aim pursued. The notion of necessity implies a pressing social need; in particular, the measure employed must be proportionate to the legitimate aim pursued.⁹⁷ The Municipality was in charge of public housing, and under an obligation to assist the town's citizens in resolving their accommodation problems.⁹⁸ These considerations were sufficient for the ECtHR to conclude that the interference complained of was not 'necessary in a democratic society' and accordingly there was a violation of Article 8.

The case of *Connors v UK*⁹⁹ involved the eviction of two Traveller families from a caravan site, for alleged nuisance, under a legal procedure which did not provide an

⁸⁹ [2002] EWHC 1882 (Admin).

⁹⁰ [2000] 3 All ER 850.

⁹¹ [2003] EWHC 167 (Admin). [2003] All ER 233.

⁹² (2001) 33 EHRR 18.

⁹³ (2006) 45 EHRR 871.

⁹⁴ (2003) 37 EHRR 28; See Case Comment, (2007) 2 *EHRLR* 190-193.

⁹⁵ See *Buckley v UK* (1996) 23 EHRR 101.

⁹⁶ Hudoc 9 October 2007.

⁹⁷ *Ibid.*, para 58.

⁹⁸ *Ibid.*, para 61.

⁹⁹ *Connors v UK* [2004] 40 EHRR 189. See also *Blecic v Croatia* Hudoc, 29 July 2004.

opportunity for a hearing. The ECtHR held that the absence of procedural safeguards was the central issue and of crucial importance in assessing the proportionality of the interference. In ruling against the UK, the ECtHR took account of the nature of the rights involved in the case, the lack of procedural safeguards available to the individual, the vulnerable position of gypsies as a minority whose way of life member states are positively obliged to facilitate, and the disadvantageous position of gypsies on local authority as opposed to privately-owned sites.¹⁰⁰

In *McCann v United Kingdom*¹⁰¹ the ECtHR held that the termination of a tenancy through a common law notice to quit, issued by the wife of the applicant (at the request of the local authority), the effect of which was to immediately terminate his right to remain in the house, breached his Article 8 rights. Any person at risk of an interference of this magnitude 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, notwithstanding that, under domestic law, his right of occupation has come to an end.¹⁰²

It is now very clear that the development of Irish law in this area must rely on Strasbourg jurisprudence rather than UK precedents. There was tendency in some legal circles to follow the lines of limitation of *Connors* adopted by the UK courts rather than the Strasbourg jurisprudence, and with the case of *McCann v United Kingdom* and the Laffoy J judgment in *Donegan v Dublin City Council*¹⁰³ the position is now clear.¹⁰⁴

¹⁰⁰ *Connors v UK*, *ibid*, at para 95.

¹⁰¹ Hudoc, 13 May 2008.

¹⁰² *Ibid*, at para 50.

¹⁰³ Unreported, High Court, 8th May 2008.

¹⁰⁴ In the UK, the courts had sought to confine the decision in *Connors* to cases of eviction of gypsies and challenges to the law, rather than its application. See *Lambeth LBC v Kay and others*; *Price and others v Leeds CC* [2006] UKHL 10, [2006] All ER (D) 120. See also *Birmingham CC v Doherty* [2006] EWCA Civ 1739 and *Hughie Smith (on behalf of the Gypsy Council) v Maria Buckland* [2007] EWCA Civ 1318 affirming *Lambeth* and *Price* decision, although an amendment of the legislation on Caravan Sites Act 1968 did take place after *Connors*. See Council of Europe, Committee of Ministers. *Supervision of the execution of judgements of the European Court of Human Rights*. 1st Annual Report 2007, p. 141.

Irish Cases on Articles 6 and 8

Cases involving Articles 6 and 8 have been heard in relation to the compatibility of Section 62 of the Housing Act 1966.¹⁰⁵ This section permits a local authority to issue a Notice to Quit without having to specify a reason, and subsequently to secure an order for possession from the Courts. The Courts is bound by the statute to grant the order on the presentation of the Notice, details of the tenancy and certain proofs.¹⁰⁶ These summary procedures originate from Section 86 of Deasy's Act 1860 which allowed for the speedy ejection, among others, of "servants, herdsmen and caretakers".¹⁰⁷ In more recent times the need for such summary procedures has been justified on the basis that:

"... it is important for a housing authority to have a rapid and effective means of recovering possession of dwellings provided by them under the Act, it is not surprising to find that there is a special statutory machinery for that purpose".¹⁰⁸

However, this machinery was created in a different and less equal society where State respect for human and personal rights was not very well developed.¹⁰⁹ Historical judicial deference to the executive and legislature in areas of State agency discretion may not be sufficient to ensure compatibility with the ECHR Act 2003.¹¹⁰ For instance, there is no automatic entitlement to legal aid for tenants, ex-tenants and unauthorised occupants.¹¹¹

In *McConnell v. Dublin City Council and others*¹¹² the Court distinguished the statute and statutory framework of the Housing Act 1966 with the (UK) Caravan Sites Act 1968, where similar procedures had been found in breach of the ECHR in *Connors*.¹¹³ In *Gifford and Another v Dublin City Council*¹¹⁴ the plaintiffs (unsuccessfully) sought an interlocutory injunction restraining the Council from enforcing a warrant for possession under Section 62. The action was taken on the basis that Section 62 was incompatible with Articles 6, 8, 13 and 14 ECHR, and that the Council had failed to perform its functions in a manner compatible with the ECHR Act. In *Leonard v.*

¹⁰⁵ As amended by Section 13 of the Housing Act 1970.

¹⁰⁶ See *The State (O' Rourke) v Kelly and The Attorney General* [1983] IR 58; *Dublin City Council v Hamilton* [1999] 2 IR 486 .

¹⁰⁷ See *Dublin Corporation v McDonnell* [1946] Ir Jur Rep 18. See also Summary Jurisdiction (Ireland) Act 1851 and Landlord and Tenant Amendment (Ireland) Act 1860 [Deasy's Act], sections 86, 87 and 88.

¹⁰⁸ See Keane, *The Law of Local Government in Ireland* (Dublin, Incorporated Law Society of Ireland, 1982), p.130. There is much criticism from local authorities and tenants about ECHR challenges to Section 62, which is seen as a useful way of securing evictions without having to give evidence, thus avoiding potential witness intimidation. On the other hand, human rights advocates often stress that the availability of Section 62 allows local authorities to avoid the structural and social deficiencies in their housing systems, the gross inadequacy of support and assistance to tenants and general treatment of public sector tenants as an underclass.

¹⁰⁹ See Murphy, F. "Housing Rights and the ECHR Act 2003", *Celebrating the European Convention on Human Rights Act 2003 – Airey v Ireland: 25 Years On* (Dublin, Independent Law Centres Network, 2003).

¹¹⁰ See Edwards, RA. "Judicial Deference under the Human Rights Act" (2002) 65 MLR 859.

¹¹¹ *Byrne v Judge Scally and Dublin Corporation*, Unreported, High Court, 12 October 2000; *Kerry County Council v McCarthy*, Unreported, Supreme Court 28 April 1997.

¹¹² [2005] IEHC 7.

¹¹³ *Connors v UK* [2004] 40 EHRR 189.

¹¹⁴ [2007] IEHC 387.

*Dublin City Council*¹¹⁵ the Council had including a condition in a tenancy that if a tenant's son was found in the rented property she would be evicted. He was found in the property and Section 62 proceedings were undertaken. The applicant contended that the summary procedure of Section 62 was incompatible with the ECHR Act. However, the Court held that Article 6 and 8 were satisfied since judicial review provided a procedural safeguard.

The application of the ECHR Act in Irish cases to date has involved the requirement to take Article 8 into account (unsuccessfully) in relation to an injunction for trespass,¹¹⁶ the retrospectivity of the Act in local authority possession proceedings¹¹⁷ and the seminal cases of *O' Donnell v South Dublin County Council*¹¹⁸ and *Donegan v Dublin City Council*.¹¹⁹

In *O' Donnell v South Dublin County Council*¹²⁰ the High Court judgment by Laffoy J considerably clarified the obligations on local authorities under the Act. The plaintiffs were disabled children of a Traveller family living in a mobile home at a temporary halting site in Dublin and they sought a wheelchair accessible caravan with indoor and wheelchair accessible shower, toilet, adequate sanitary facilities and central heating.

While the High Court did not find a breach of other statutory or constitutional rights, there was a breach of the rights established under the ECHR Act 2003. As noted above, Article 8 of the ECHR gives rise to positive obligations on the part of organs of the state to vindicate a person's right to respect for their private and family life and their home. The local authority contended that Article 8 did not confer any right to be provided with a home or any positive obligation to provide alternative accommodation of an applicant's choosing. The Court considered the judgments in *R (Bernard) v Enfield LBC*¹²¹ and *Anufrijeva v Southwark LBC*¹²² which involved the provision of services to people with disabilities, and the Strasbourg judgment of *Moldova and Others v Romania* in relation to the breaches of Articles 3 and 8.¹²³

Laffoy J did not find a breach of Article 3, but in finding a violation of Article 8, stated:

'The question which arises in determining whether there has been a breach of Article 8 is whether practical and effective respect for the private and family life and of the home of each of the plaintiffs requires the defendant to adopt the measure which the plaintiffs contend is necessary to alleviate the overcrowded and potentially unsafe conditions in which the plaintiffs are living.'¹²⁴

¹¹⁵ [2008] IEHC 79.

¹¹⁶ *Dublin City Council v Laura McGrath* [2004] IEHC 111; [2004] 1 IR 216.

¹¹⁷ *Dublin City Council v Fennell*, 12th May 2005, [2005] IESC 33.

¹¹⁸ [2007] IEHC 204.

¹¹⁹ High Court, 8th May 2008.

¹²⁰ [2007] IEHC 204.

¹²¹ [2002] EWHC 2282 (Admin).

¹²² [2004] 1 All ER 833.

¹²³ Hudoc, 30 November 2005.

¹²⁴ [2007] IEHC 204 at 41.

Even in the absence of a statutory provision, there may still be a breach of an Article 8 right. This was highlighted in *O' Donnell v South Dublin County Council* where Laffoy J pointed out that

'[I]f there is no statutory protection for the plaintiffs in their current predicament which ensures suitable and appropriate accommodation for them having regard to their age, mental condition, disability, dependency and family circumstances, the interstices into which they have fallen must represent a failure of the State and its organs to function in a manner compatible with Article 8.'¹²⁵

In *Donegan v Dublin City Council*¹²⁶ the High Court found that the operation of the Housing Act 1966, section 62, breached Article 8. Laffoy J stated that:

'A statutory regime under which possession of the home of an occupier, whether a licensee or tenant, can be recovered by a public authority which does not embody procedural safeguards whereby the occupier can have the decision which will inevitably result in his eviction from his home reviewed in accordance with Convention recognised fair procedures (as illustrated by the decision in *Tsfayo*), in my view, cannot fulfil the *Connors* test of being fair and affording due respect to the rights protected by Article 8.'¹²⁷

'Accordingly, in the light of decisions of the ECtHR in *Connors* and *Blecic* the procedure provided for in s 62, cannot be regarded as proportionate to the need of the housing authority to manage and regulate its housing stock in accordance with its statutory duties and the principles of good estate management.'¹²⁸

The decision which is clearly in line with *McCann v United Kingdom*,¹²⁹ finds that the operations of section 62 the Housing Act 1966 are incompatible with the ECHR.

Planning and Environmental Issues

Environmental rights may affect individual Convention rights in three ways:

Firstly, the human rights protected by the Convention may be directly affected by adverse environmental factors. In such cases, public authorities may be obliged to take measures to ensure that these rights are not seriously affected by adverse environmental factors. Secondly, adverse environmental factors may give rise to certain procedural rights for the individual concerned. The Court has established that public authorities must observe certain requirements as regards information and communication, as well as participation in decision-making processes and access to justice in environmental cases.¹³⁰ Thirdly, the protection of the environment may also

¹²⁵ *O' Donnell v South Dublin County Council* [2007] IEHC 204 p 44

¹²⁶ High Court, unreported, 8 May 2008.

¹²⁷ High Court, unreported, 8 May 2008, at 47.

¹²⁸ *Ibid*, at 48.

¹²⁹ Application no 19009/04. Judgement 13 May 2008.

¹³⁰ See also *The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (1998) (the Aarhus Convention) was elaborated within the United Nations Economic Commission for Europe (UN/ECE). It has been ratified to date by 26 of the Council of Europe member States. It entered into force in 2001. See: <http://www.unece.org/env/pp/>

be a legitimate aim justifying interference with certain individual human rights. For example, the Court has established that the right to peaceful enjoyment of one's possessions may be restricted if this is considered necessary for the protection of the environment.¹³¹

Article 2 of the Convention obliges the State to take appropriate steps in environmental issues to safeguard the right to life of those within its jurisdiction.¹³² Items considered in this category include pumping raw sewage into a river estuary, particle pollution from oil or coal fired power stations or incinerators and transporting nuclear waste.¹³³

In the case of *Öneryıldız v Turkey*¹³⁴ the ECtHR held that there had been a violation of Article 2 after a methane explosion occurred at a rubbish tip destroying more than ten houses and killing nine people. Where lives have been lost in circumstances potentially engaging the responsibility of the State, therefore, Article 2 entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented, and any breaches of that right are repressed and punished.¹³⁵

In the case of *Budayeva and others v Russia*¹³⁶ where a mudslide destroyed the applicants' homes the ECtHR held that:

'In the present case, however, the Court considers that natural disasters, which are as such beyond human control, do not call for the same extent of State involvement. Accordingly, its positive obligations as regards the protection of property from weather hazards do not necessarily extend as far as in the sphere of dangerous activities of a man-made nature.'¹³⁷

For this reason, the ECtHR considered that a distinction must be drawn between the positive obligations under Article 2 of the Convention and those under Article 1 of the First Protocol to the Convention. While the fundamental importance of the right to life requires that the scope of the positive obligations under Article 2 includes a duty to do everything within the authorities' power in the sphere of disaster relief for the protection of that right, the obligation to protect the right to the peaceful enjoyment of possessions, which is not absolute, cannot extend further than what is reasonable in the circumstances. Accordingly, the authorities enjoy a wider margin of appreciation in deciding what measures to take in order to protect individuals' possessions from weather hazards than in deciding on the measures needed to protect lives.¹³⁸

¹³¹ Council of Europe. (2006) *Manual on Human Rights and the Environment*. Strasbourg: Council of Europe Publishing.5-6

¹³² [GC].(2004) 39 EHRR 12, para. 71

¹³³ Grief, N, 'Convention Rights and the Environment ' in Betten, L (ed) *The Human Rights Act 1998 – What it Means* (The Hague: Kluwer Law International, 1999). p 146.

¹³⁴ [GC] (2004) 39 EHRR 12. On these obligations see further O'Neill, Chapter X, in this volume.

¹³⁵ *Ibid*, para. 91.

¹³⁶ Hudoc, 20 March 2008.

¹³⁷ At para 174.

¹³⁸ At para 175.

There is a duty on the State under Article 3 of the Convention not to permit inhuman or degrading treatment, and in extreme cases it is clear that distress caused by environmental misconduct may violate Articles 3 and 8.¹³⁹

Some recent cases have raised Article 8 issues in the context of the environment and housing. For example, the duty of state bodies to protect the home and private life under the provisions of Article 8 were violated in the case of *Lopez-Ostra v Spain*,¹⁴⁰ where a family were forced to move from their home as a result of smells and nuisance from a waste treatment plant. In *Geurra v Italy*¹⁴¹ the ECtHR held that the direct effect of toxic emissions emanating from a chemical factory which had resulted in 150 families being hospitalised for arsenic poisoning breached Article 8. There was a failure of the State to fulfil its positive obligations to ensure respect for private and family life, by not providing such essential information, and awarded damages. In *Ledyayeva and others v Russia*¹⁴² the applicants had lived in flats in the vicinity of a steel plant within a 'sanitary security zone', intended to act as a buffer between residential areas and the plant. The ECtHR held that the authorities had failed to take appropriate measures to protect the applicants' right to respect for their homes and private lives against serious environmental nuisances. In particular, they had neither resettled the applicants outside the dangerous zone, nor had they provided compensation for those seeking resettlement. Accordingly, there had been a violation of Article 8 of the Convention. In *Moreno-Gomez v Spain*¹⁴³ the failure by the State to tackle night-time noise disturbances caused by nightclubs breached the positive obligations to guarantee the applicants right to respect for her home as guaranteed by Article 8. In the case of *Fadeyeva v Russia*,¹⁴⁴ a violation of a Russian woman's rights under Article 8 was found where the government had failed to prevent or adequately regulate the environmental pollution from a steel plant which adversely affected her quality of life and made her more vulnerable to disease. In *Surugiu v Romania*,¹⁴⁵ the failure by the authorities to take prompt measures to give the applicant possession of his land after illegal trespass violated Article 8 rights.

However, in *Fadeyeva v Russia*,¹⁴⁶ where the applicant lived near a steel plant, and the concentration of toxic elements in the air near her house exceeded safe levels with a resulting deterioration in her health, the ECtHR pointed out that Article 8 is not violated every time that environmental deterioration occurs. In order to raise an issue under Article 8 the interference must directly affect the applicant's home, family or private life.¹⁴⁷

The balancing of the issue of aircraft and other noise between the peaceful enjoyment of individual property rights, and respect for home, and the public interest has been considered in a number of cases. Clearly, this is an environmental issue of growing importance, but also one where the public interest is widely acknowledged and where

¹³⁹ See Colbert, JM 'The Right to Bodily Integrity and the Evolution of a Right to a Healthy Environment,' *Bar Review*. April 2001, pp 367-373.

¹⁴⁰ (1991) 14 EHRR 319.

¹⁴¹ (1998) EHRR 357.

¹⁴² Hudoc 5 October 2006.

¹⁴³ (2005) 41 EHRR 40.

¹⁴⁴ (2005) 45 EHRR 10.

¹⁴⁵ Hudoc 20 April 2004.

¹⁴⁶ (2007) 45 EHRR 10.

¹⁴⁷ *Ibid.*, para 68.

the noise pollution, or at best, inconvenience may be unavoidable. In *Powell and Rayner v UK*¹⁴⁸ the owners of property near Heathrow airport complained of excessive noise in connection with the operation of the airport, and a breach of their rights under Articles 6, 8, 13, and Article 1 of the First Protocol. The ECtHR held that this is an area where the Contracting States enjoy a wide margin of appreciation. Since the UK government had adopted a number of measures as a result of consultation and with due account of international standards there was no breach of Article 8. The fact that the airport occupied a position of central importance in international trade and in the economy of the UK was clearly at issue.

In the somewhat similar case of *Hatton*,¹⁴⁹ a number of individuals whose sleep was affected by night flights out of Heathrow complained of a breach of Article 8. The ECtHR found that mere reference to the economic well-being of the country would not be sufficient to outweigh the rights of others. However, the Grand Chamber overturned the ruling of the Chamber and found that there had been no violation. The economic interest in maintaining a full service from London to distant airports, and the small number of people affected by sleep disturbance meant that the interference could not be regarded as disproportionate. In distinguishing the previous cases of *Lopez-Ostra v Spain* and *Geurra*, the Court pointed out that the element of domestic irregularity was absent in this case.

The right to receive and impart information on environmental issues is protected by Article 10 of the Convention, which states that 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...' In *Steel and Morris v UK*¹⁵⁰ (the MacDonalds case) the ECtHR considered that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively.¹⁵¹

Fair hearing by independent and impartial tribunal in relation to 'civil rights'

Article 6 ECHR on rights to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law are significant in relation to environmental and housing issues. The phrase 'civil rights and obligations' has an autonomous meaning within the Convention.¹⁵² Public bodies must comply with the procedural requirements flowing from Article 6 in civil cases - hearing both sides within a reasonable time, ensuring 'equality of arms,' providing a reasoned decision in public and ensuring an independent and impartial tribunal established by law hears the case. However, there is no recognised right to an oral hearing in Ireland within the procedures of a large number of administrative decision making bodies, and this is clearly an area where developments could take place within the context of the ECHR Act.¹⁵³

¹⁴⁸ (1990) 12 EHRR 355.

¹⁴⁹ *Hatton and others v UK*. (2003) 37 EHRR 28.

¹⁵⁰ Hudoc, 15 February 2005.

¹⁵¹ *Ibid.*, para 89.

¹⁵² See further Brown, Chapter X in this volume.

¹⁵³ See McKechnie, W, 'Article 6 of the European Convention on Human Rights, Administrative Tribunals and Judicial Review Part I' *Bar Review*. October/November 2002, pp 333-334; McKechnie, W, 'Article 6 of the European Convention on Human Rights, Administrative Tribunals and Judicial Review Part II' *Bar Review*. December 2002, pp 364-368.

An important issue for Ireland is the absence of legal aid in civil proceedings; this is despite the fact that the *Airey* and *Golder* cases¹⁵⁴ emphasised that there must be a possibility of access to the courts in civil matters, and that the State must provide legal aid if this is indispensable for effective access to court. In *Golder*, the Court stated that 'one can scarcely conceive of the rule of law without there being a possibility of having access to the Courts.'¹⁵⁵

A significant question is whether public body decision-making in relation to grants, licences, assessments of need and other decisions in the area of housing, land, property and environmental law satisfies Article 6 requirements, since all would be regarded as civil rights.¹⁵⁶ The receipt of social benefits may fall also within the category of civil rights.¹⁵⁷ Since the concept of 'civil rights and obligations' has an autonomous meaning outside the domestic law, it may be that housing support services could be considered in this way also, requiring the appropriate procedural safeguards to comply with the Act. Compliance with Article 6 is thus likely to present the greatest challenges to Irish housing providers.¹⁵⁸

In terms of the application of Article 6 to the planning process, the case of *Bryan v UK*¹⁵⁹ established that planning inspectors had to act fairly, including giving opportunities for a fair hearing and opportunities for appeal.¹⁶⁰ The requirements of an independent and impartial tribunal established by law, involve a set of factors including both subjective and objective tests:¹⁶¹

- (1) the manner of the appointment of the members of the tribunal;
- (2) term of office;
- (3) existence of guarantees of outside pressures;
- (4) an appearance of independence.

Planning decisions are inherently integrated in environmental policy changes, and it is clearly established both in Convention law and within administrative law that impartial and independent appeals systems must be in place.¹⁶² In Ireland, the position of *An Bord Pleanála* as an independent and impartial tribunal, (even if the appointments are made by politicians or the Minister for Environment),¹⁶³ and the

¹⁵⁴ *Airey v Ireland* (1979) 2 EHRR 305; *Golder v UK* (1979-80) 1 EHRR 524.

¹⁵⁵ *Golder v UK* (1979-80) 1 EHRR 524. at para. 34.

¹⁵⁶ Few structures exist for appeals against decisions in these areas in the Republic of Ireland. See Loveland, 'Does Homelessness Decision-making Engage Article 6(1) of the European Convention on Human Rights' (2003) 2 *EHRLR*, 176-204.

¹⁵⁷ *Feldbrugge v Netherlands* (1986) 8 EHRR 425.

¹⁵⁸ See Murphy, F 'Housing Rights and the ECHR Act 2003', *Celebrating the European Convention on Human Rights Act 2003 – Airey v Ireland: 25 Years On* (Dublin, Independent Law Centres Network, 2003); Lowry, 'Practice and Procedure under the European Convention on Human Rights Act 2002' (2003) *Bar Review* 183.

¹⁵⁹ (1995) 21 EHRR 342.

¹⁶⁰ See McGarry, P 'The European Convention on Human Rights Act 2003; Implications for local planning and housing authorities.' 2006 13 (1) *IPELJ* 3-14.

¹⁶¹ See *Findlay v UK* (1997) EHRR 1.

¹⁶² *Alconbury Developments v SSETR*. [2001] 2 WLR 1389.

¹⁶³ The undeclared but widely acknowledged appointments system for public bodies and commissions in Ireland based on reward for political allegiance to the Party in power, and as means of furthering the objectives of the Party, has not been tested in terms of impartiality and independence. But see *NF v Italy*, Hudoc, 2 August 2001.

extensive development of ‘agencies’ carrying out public functions, as well as the patchy development of administrative law in this area may result in Article 6 creating many new precedents.¹⁶⁴ Recent studies have highlighted serious deficiencies in basic accountability mechanisms, compliance with statutory obligations and the process of appointments to agency boards.¹⁶⁵ One-third of Irish State agencies do not have a statutory basis, which may enable them to evade judicial review.¹⁶⁶

In relation to compulsory purchase procedures, the Planning and Development Act 2000 introduced new procedures for those affected by such orders, whereby an oral hearing is conducted by An Bord Pleanála, rather than the previous public hearing. In deciding to confirm or annul a compulsory purchase order the Board is obliged to have regard to the policies and objectives of the government, any relevant state authority, the Minister, planning authorities and any other body which is a public authority and whose functions have, or may have a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural.¹⁶⁷ The Board has a discretion to pay the costs of any person appearing at the hearing.

Delays in proceedings and provision of timely and adequate remedies, particularly in relation to violations of property rights in the planning and regulatory process, have formed the basis of much case law at Strasbourg. In *Scordino v Italy (No 1)*¹⁶⁸ the Grand Chamber agreed with the Chamber’s finding that the applicants had borne a disproportionate burden on account of inadequate expropriation compensation. Even if a remedy allowed for compensation for delays which had already occurred, in order to be effective that remedy had itself to be effective, adequate and accessible. Delays in compensation payments should not generally exceed six months from the date on which the decision awarding compensation becomes enforceable.¹⁶⁹

The impartiality and independence of a rent tribunal was considered in *Langborger v Sweden*.¹⁷⁰ Here, a tenant’s complaint that the make-up of a tribunal on tenancy and rent appeals was not impartial was upheld because it contained representatives of the landlord’s body and the National Tenants Union, who were both affected by the issue. The ECtHR stated:

‘In order to establish whether a body can be considered independent regard must be had, *inter alia*, to the manner of the appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.

¹⁶⁴ See Quinn, A, ‘Third-Party Appeals and the Human Rights Convention, (2001) 8(3) *Irish Planning and Environmental Law Journal* 96-102.

¹⁶⁵ Clancy, G & Murphy, P, *Outsourcing Government: Public Bodies and Accountability* (Dublin: TASC, 2006).

¹⁶⁶ McGauran A-M et al, *The Corporate Governance of Agencies in Ireland Non-Commercial Agencies* (Dublin: IPA, 2005).

¹⁶⁷ Galligan, E ‘Compulsory Purchase of Land,’ (2002) 9(2) *Irish Planning and Environmental Law Journal* 67-79.

¹⁶⁸ Hudoc 1 July 2005 and [GC] Hudoc 18 January 2006. There were a number of similar Italian cases concerned with the retrospective effects of the ‘Pinto’ Act.

¹⁶⁹ *Odysseos v Cyprus* Hudoc 15 February 2007; *Hellborg v Sweden* Hudoc 15 February 2007.

¹⁷⁰ (1989) 12 EHRR 416.

There are significant implications for Article 13 rights on fair procedures and access to courts in relation to planning and objections to environmental measures.¹⁷¹ The independence and impartiality of Bord Pleanála members may well come into focus in relation to this developing jurisprudence.

Prohibition of discrimination and housing

Article 14 of the ECHR states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

This provision applies only to non-discrimination in relation to the rights and freedoms set out in the Convention. The different treatment by the State in relation to access and conditions for housing tenure and planning permission may be considered under both Articles 8 and 14. In *Larkos v Cyprus*¹⁷² the different treatment in relation to State and private tenancies in law was found to breach Article 14. Protocol 12 to the ECHR contains an independent prohibition of discrimination and extends the protection from discrimination beyond 'enjoyment of the rights and freedoms' set forth in the Convention.¹⁷³

The *Gillow* case¹⁷⁴ held that it was legitimate to show a certain preference for persons who had strong attachments to the area or were engaged in employment essential to the community, when considering whether to grant licences to occupy premises let at a modest rent.¹⁷⁵

It is for an applicant to 'clearly establish' any lack of proportionality in a decision in relation to this Article. Programmes designed to favour or promote the interests of disadvantaged groups are permitted under this provision in certain areas.¹⁷⁶ Of course, some particular situations are not likely to be repeated, where such claims are made regarding residency restrictions across the single market and non-discriminatory Europe, some eighteen years after *Gillow*.

The ECHR Act raises many important questions for public administration, particularly in relation to housing and property law and policy in Ireland. While Local Authority housing providers are clearly public bodies within the terms of the Act, the question as to whether contractors, public/private partnerships, housing associations and other providers of housing are, in fact, 'public bodies,' performing a public function, and subject to the Convention, will raise important issues in relation to procedures followed.¹⁷⁷ The recent case of *Weaver v. London and Quadrant Housing*

¹⁷¹ Council of Europe, *Manual on Human Rights and the Environment*. Strasbourg: Council of Europe Publishing, 2006, 67-69.

¹⁷² (1999) 30 EHRR 597.

¹⁷³ *Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*. Rome, 4. XI. 2000. See further O'Conneide, in this volume.

¹⁷⁴ *Gillow v UK* (1986) 11 EHRR 335.

¹⁷⁵ *Ibid*, para 54.

¹⁷⁶ *Belgian Linguistics case* (1968) 1 EHRR 252.

¹⁷⁷ See UK case of *Donoghue v Poplar Housing and Regeneration Company & the Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 595. *R (on the application of*

*Trust*¹⁷⁸ held that an independent social landlord, with its own board and shareholders was a 'public body' since it was part of a sector which was subject to detailed regulation and permeated by state control and influence, in line with the government's aims for affordable housing. The nature and extent of public subsidy, the fact that some local authority housing had been transferred to it and the statutory obligations of the body to co-operate reasonably with the local authority were crucial factors. Were this precedent applied in Ireland, it is clear that practically all housing agencies and associations would come under the scope of the ECHR Act.

In Irish housing policy the term 'family' is widely used, with regular statements by Ministers concerning increased housing provision by the state for families and protection for partners in the event of relationship breakdown. In Convention terms, the definition of 'family' has been given a wide interpretation, encompassing co-habitees and others with a sufficiently close personal link.¹⁷⁹ Of course, this will present difficulties for Irish courts which have interpreted the term 'family' as a relationship based on marriage.¹⁸⁰ Local authority rules on succession of tenancies by same-sex partners would be considered as possibly in breach of Article 8 and Article 14. In *Karner v Austria*,¹⁸¹ the ECtHR accepted that the principle of proportionality between the means employed and the aim to protect the 'family' did not mean it was necessary to exclude homosexual couples from the scope of the succession law. The definition of 'private life' also has major implications in relation to family law tenancy agreements.¹⁸²

Conclusion

The influence of the Irish State in property, planning, environmental and housing issues in all urbanised and industrialised countries is enormous. So far, only public housing law has felt its transformative impact, but other areas will gradually absorb the evolving jurisprudence of the Convention. Whether this will result in a plethora of precedents arising from corporations and wealthy landowners asserting their 'human rights' remains to be seen.

Clearly, the ECHR Act is already impacting on the obligations of local authorities. Public bodies must adapt their policies and laws to address the safeguards of the Act. The positive minimum obligations inherent in Article 3 require such bodies to consider the consequences of their actions or omissions. However, the notion of positive obligations on public bodies to act to vindicate human rights is a novel one in Ireland.¹⁸³ This concept surpasses in its complexity and scope the old tort law concepts of misfeasance and non-feasance for local authorities. Indeed, the scope of the duties imposed on an organ of the State by s 3 of the ECHR Act was considered in

Heather v Leonard Cheshire Foundation [2002] EWCA Civ 366. 2 All E.R. 936 (CA). Some areas of work may be public functions and some not so.

¹⁷⁸ [2008] EWHC 1377 (Admin)

¹⁷⁹ *Marckx v Belgium* (1979) 2 EHRR. 330; *Johnson v Ireland* (1986) 9 EHRR 203; *X, Y & Z v UK* (1997) 24 EHRR 143; *Fitzpatrick v Sterling Housing Association* [1999] 3 WLR 1113.

¹⁸⁰ See Ryan, F, 'Sexuality, ideology and the Legal Construction of 'Family'; *Fitzpatrick v Sterling Housing Association*, 3 (2000) *IJFL* 2-9. See further Kilkelly, Chapter X in this volume.

¹⁸¹ [GC] Hudoc, 24 July 2003 .

¹⁸² *Dudgeon v UK* (1981) 4 EHRR 149. *Norris v Ireland* Series A 142 (1988). See further Harris, O'Boyle and Warbrick, *op cit*.

¹⁸³ See Kenna, P, 'Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights' (2008) 2 *EHRLR* 193-208.

the immigration case of *Bode v Minister for Justice, Equality and Law Reform*.¹⁸⁴ Finlay Geoghegan J, quoting from ECtHR jurisprudence, pointed out that it is not enough for the State to refrain from deporting the person concerned. It must also, by means of positive measures if necessary, afford him/her the opportunity to exercise the rights in question without interference. As the *O'Donnell* case shows, in the absence of a statutory provision, there may still be a breach by a public body of the ECHR Act where an Article 8 right is breached.¹⁸⁵

It is in the role and exercise of functions of the Irish State, with its many discretionary and loosely defined powers, that the impact of the ECHR Act may be significant. Indeed, the first analysis of relevant cases, by O'Connell and others, shows that the vast majority of ECHR cases related to administrative procedures, largely involving the immigration and asylum process.¹⁸⁶ The need for due process and access to independent impartial appeal systems where the State creates and interacts with property rights, environment, planning and housing, will become more significant. However, the respect for home and family life is also likely to provide a fertile area of ECHR rights development as so many environmental, property and housing law issues affect home, private and family life. The dynamic between personal human rights protection in Ireland and the needs of a developing economy will continue to present the courts with many challenges. Convention law could be one valuable (though minimalist) barometer for the State, as it attempts to cope with the competing priorities of human rights developments for its citizens and the enormous structural demands inherent in attracting and sustaining global capital investment.

¹⁸⁴ [2006] IEHC 341.

¹⁸⁵ *O' Donnell v South Dublin County Council* [2007] IEHC 204, at 44

¹⁸⁶ See O'Connell et al *ECHR Act 2003: A Preliminary Assessment of Impact*. (The Dublin Solicitors Bar Association and the Law Society of Ireland, 2006). See also O'Connell, Chapter X in this volume.