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# Local Authorities and the European Convention on Human Rights Act 2003

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## Introduction

This article discusses the impact of the European Convention on Human Rights Act 2003 (ECHR Act) on local authorities in Ireland. The Act creates a new framework for the representative, regulatory, agency and service provision roles of these “organs of the State”. Judicial review — with its many limitations — remains the ultimate legal method of evaluating compliance with these obligations. Interpreting the concepts of respect for human rights, positive obligations, reasonableness and proportionality from European Court of Human Rights precedents within Irish jurisprudence may bring some interesting outcomes. The Irish courts have already held that some local authorities failed to comply with their obligations under the ECHR Act. The Act could yet have a significant impact on the actions, obligations and judicial review of local authorities, but there are significant political, cultural, social and other barriers to its implementation.

## The European Convention on Human Rights Act 2003

The ECHR Act has created a new framework for the operation of organs of the State in Ireland since 31 December 2003,<sup>2</sup> arising from the commitments in the Good Friday /Belfast Agreement.<sup>3</sup>

The main Articles of the European Convention on Human Rights are reproduced in Schedule 1 of the ECHR Act<sup>4</sup>:

Article 1 — obligation to respect human rights

Article 2 — right to life

Article 3 — prohibition of torture

Article 4 — prohibition of slavery

Article 5 — right to liberty and security

Article 6 — right to a fair trial

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<sup>2</sup> See Kilkelly, U. (ed.) *ECHR and Irish Law*, (2<sup>nd</sup> edition), (Bristol, Jordans, 2008). See also: O’Connell, D., Cummiskey, S., and Meenaghan, E. with O’Connell, P., *ECHR Act 2003: A Preliminary Assessment of Impact* (Law Society of Ireland and Dublin Solicitors’ Bar Association, 2006).

<sup>3</sup> Under the Good Friday /Belfast Agreement of 1998, two Human Rights Commissions have also been established, charged with promoting and protecting human rights in their respective jurisdictions. See Harvey, “Governing after the Rights Revolution” (2000) 27(1) *Journal of Law and Society* 61.

<sup>4</sup> Council of Europe, The European Convention on Human Rights, Rome, 4 November 1950. Available at <http://www.hri.org/docs/ECHR50.html>.

Article 7 — no punishment without law  
 Article 8 — right to respect for private and family life, home and correspondence  
 Article 9 — right to freedom of thought, conscience and religion  
 Article 10 — right to freedom of expression  
 Article 11 — right to freedom of assembly and association  
 Article 12 — right to marry  
 Article 13 — right to an effective remedy  
 Article 14 — prohibition of discrimination  
 Article 15 — derogations  
 Article 16 — exemption for political activities of aliens  
 Article 17 — prohibition of abuse of rights  
 Article 18 — limitations on permitted restrictions of rights  
 Article 1 of Protocol 1 — right to property  
 Article 2 of Protocol 1 — right not be denied education

A person who has suffered injury, loss or damage as a result of a breach of this statutory obligation may, if no other remedy in damages is available, institute proceedings in the High Court and the Court may award damages as it considers appropriate.<sup>5</sup> It remains to be seen what other forms of relief, if any, are available for breaches of the statutory duty contained in section 3.<sup>6</sup>

However, there is a provision for courts to make a declaration of incompatibility where existing law is incompatible with the Act. Section 5 states:

- (1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as “a declaration of incompatibility”) that a statutory provision or rule of law is incompatible with the State’s obligations under the Convention provisions.
- (2) A declaration of incompatibility—
  - (a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made, and (b) shall

<sup>5</sup> ECHR Act, s 3(2). In *O’ Donnell v South Dublin County Council* [2007] IEHC 204, Laffoy J awarded damages of €58,000 to cover the cost of providing a mobile home, where a breach of the ECHR Act was found.

<sup>6</sup> It was held in *Pullen v Dublin City Council*, High Court, 28 May 2009, that even where a local authority did not comply with its obligations under the ECHR Act in performing its functions in a manner compatible with the State’s obligations under the Convention, nevertheless, the court had no jurisdiction to grant relief other than an award of damages, and not the injunctive relief sought. Irvine J stated: “To grant an injunction would be to grant relief not provided for in s.3(2) of the ECHR Act 2003 and would be an order that would conflict with the clear provisions of s. 3(2), would offend the doctrine of the separation of powers and would be against the canons of construction already referred to.” Previously, in *Byrne v Dublin City Council* [2009] IEHC 122 an interlocutory injunction (with conditions as to the family members who could occupy the property) was granted by Murphy J to restrain a breach of the section 3 duty.

not prevent a party to the proceedings concerned from making submissions or representations in relation to matters to which the declaration relates in any proceedings before the European Court of Human Rights.

- (3) The Taoiseach shall cause a copy of any order containing a declaration of incompatibility to be laid before each House of the Oireachtas within the next 21 days on which that House has sat after the making of the order.

Thus, the ECHR Act will only generate a declaration of incompatibility where no other remedy exists.<sup>7</sup> Where a declaration of incompatibility is made the Government in their discretion may make an *ex gratia* payment of compensation to that party who has suffered loss as a result of the incompatibility. Clearly, this will not lead to any rewriting of laws by the courts, but requires the Government to amend the law as they see fit.

## Domestication of the ECHR

The domestication or “patriation” of an international human rights instrument, like the ECHR, though legislation such as the ECHR Act, presents novel challenges to the legal system, as well as to political and administrative culture.<sup>8</sup> The Convention has been incorporated into Irish law at sub-constitutional level, and the long title of the Act describes it as an Act “to enable further effect to be given, subject to the Constitution, to certain provisions of the European Convention on Human Rights and Fundamental Freedoms....”. Those familiar with the Convention viewed it as a welcome addition to the corpus of Irish law.<sup>9</sup> Others have been critical of the minimalist approach of the legislation.<sup>10</sup> Hogan points out that there is a vast and continuing constitutional jurisprudence in Ireland involving fundamental rights, aside from any references to the ECHR Act.<sup>11</sup> He points out that a proper comparison of its constitutional relevance is to be found in the German context. There, the ECHR has the status of a federal law at sub-Constitutional level, but is

<sup>7</sup> At the time of writing a number of High Court cases have found that organs of the State have been in breach of the ECHR Act and three cases have resulted in declarations of incompatibility. See *Foy v An t-Ard Chláraitheoir & Ors* [2007] IEHC 470; *Donegan v Dublin City Council*, [2008] IEHC 288; *Dublin City Council v Gallagher* [2008] IEHC 353.

<sup>8</sup> See *Celebrating the European Convention on Human Rights Act 2003*. (Dublin: Independent Law Centres Network, 2004).

<sup>9</sup> See Keane, CJ. “Issues for the Judiciary in the application of the ECHR Act 2003”. Paper to the Human Rights Commission and Law Society of Ireland Conference on New Human Rights Legislation. October 2003.

<sup>10</sup> See, for example, O’Connell, D. “The ECHR Act 2003: A Critical Perspective”, chapter 1, in Kilkelly, U. (ed.) *The ECHR and Irish Law*, (Bristol, Jordans, 2003); Egan, S. “The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Rights legislation” (2003) 25 DULJ 230.

<sup>11</sup> Hogan, G. “The European Convention of Human Rights Act 2003,” *European Public Law*, Volume 12, Issue 3. 331-343. These are cases largely in relation to traditional liberal civil and political rights, rather than socio-economic rights, except in the family and property related cases. Some of the positive obligations on the State, such as to respect human rights, to prohibit discrimination and to protect and vindicate certain minimum Convention rights have no directly corresponding base in the Irish Constitution, except perhaps in relation to a very limited number of precedents developed before 2000 under Articles 40-43.

treated as a guide to the interpretation of the Basic Law or Constitution. A similar approach in Ireland might cross-fertilise the constitutional jurisprudence here with developing Strasbourg interpretations of human rights.<sup>12</sup>

However, Mr Justice McKechnie pointed out in the *Foy* case, where a declaration of incompatibility was issued that:

It is misleading to say that the Convention was incorporated into domestic law. It was not. The rights contained in the Convention are now part of Irish law. They are so by reason of the 2003 Act. That is their source. Not the Convention. So it is correct to say, as I understood in this way, that the Convention forms part of the law. The method employed by the Oireachtas was the interpretative method. Section 2 of the 2003 Act, compels this court to interpret and apply any and every statutory provision and rule of law, insofar as is possible in a manner compatible with Ireland's obligations under the Human Rights Convention.<sup>13</sup>

Yet, in the first study of the early impact of the ECHR Act in 2006, O' Connell *et al* point out that: "it would be incorrect to say that the Convention has in any sense displaced the Constitution or other sources of Irish law as the main basis upon which actions in judicial review are maintained."<sup>14</sup> It remains to be seen how the Irish Constitution, with its inherent difficulties in relation to equality and other matters will become a barrier to the development of a rights culture, arising from the ECHR Act, in the courts and in public administration generally.<sup>15</sup>

### Local Authorities and Statutory Provisions

The ECHR Act is an important legal development for local authorities in Ireland.<sup>16</sup> It integrates a human rights perspective within the legal, policy-making and operational functions of Irish local authorities.<sup>17</sup>

<sup>12</sup> See Hogan, G. 'The Value of Declarations of Incompatibility and the Rule of Avoidance', (2006) DULJ 408a Cases and Comment.

<sup>13</sup> *Foy v An t-Ard Chláraitheoir & Ors* [2007] IEHC 470 at para. 93. This case is on appeal to the Supreme Court at time of writing.

<sup>14</sup> See O' Connell, D. *et al*, *ECHR Act 2003:— A Preliminary Assessment of Impact* (Law Society of Ireland and Dublin Solicitors' Bar Association) *op cit* at p.15.

<sup>15</sup> See Doyle, O. *Constitutional Equality Law*. (Dublin, Thomson Round Hall, 2004).

<sup>16</sup> While the planning function is typically high on the local authority and public agenda, there is insufficient space to deal fully with this here. See Kenna, P. 'Land Law, Property, Housing and the Environment' in Kilkelly, U. (ed.) *ECHR and Irish Law*. (2<sup>nd</sup> edition) (Bristol, Jordans, 2008). See also Quinn, A. (2001) 'Third-Party Appeals and the Human Rights Convention,' *Irish Planning and Environmental Law Journal* – Vol. 8, No. 3, pp. 96-102; McGarry, P 'The European Convention on Human Rights Act 2003; Implications for local planning and housing authorities.' 2006 13 (1) IPELJ, 3-14.

<sup>17</sup> See Kenna, P. 'Will the European Convention on Human Rights Act 2003 affect Local Government in Ireland', *The Irish Journal of European Law*, Vol. 11, No. 2, 2004. In *O' Reilly and Others v Ireland*. Application No. 54725/00, Judgment 29<sup>th</sup> October 2004, where the applicants had brought proceedings in the Irish courts to compel the local authority to repair public roads, the European Court of Human Rights (ECtHR) held that the delay in processing their claims, and the failure to resolve the issue of costs, constituted a failure on behalf of the State to deal with the case in a reasonable time, contrary to Article 6.

Section 3(1) of the Act provides:

Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.<sup>18</sup>

An organ of the State includes:

a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised.<sup>19</sup>

This amounts to a new tortious action (where no other remedy exists) for breaches of statutory duty by organs of the State, for which damages or equitable relief can be granted.<sup>20</sup> There is also the provision for a declaration of incompatibility described above, which may lead to an *ex gratia* award of damages, in line with the moderate levels awarded by the Strasbourg court.

Local authorities in Ireland are clearly within the range of organisations termed "organs of the State". Article 28A of the Constitution introduced by way of constitutional amendment in 1999 recognises "the role of local government in providing a forum for the democratic representation of local communities, in exercising and performing at local level powers and functions conferred by law and in promoting by its initiatives the interests of such communities."<sup>21</sup>

Local authorities in Ireland carry out their delegated, agency and inherent regulatory, representative and service provision functions under many statutory provisions.<sup>22</sup> A statutory provision is defined in the ECHR Act as

any provision of an Act of the Oireachtas or of any order, regulation, rule, licence, bye-law or other like document made, issued or otherwise created thereunder or

<sup>18</sup> Hogan states that ultimately the State's only obligations are set out under Article 46(1) ECHR "to abide by the final judgement of the Court [ECtHR] in any case to which they are the parties". But s 4 of ECHR Act, on the requirements of judicial notice of the Convention provisions and any declaration, decision, advisory opinion or judgment of the ECtHR, effectively binds the Irish courts to the corpus of ECtHR case law. See Hogan, G. "The Value of Declarations of Incompatibility and the Rule of Avoidance", (2006) DULJ 408a Cases and Comment.

<sup>19</sup> ECHR Act, s 1.

<sup>20</sup> See *O'Donnell v South Dublin County Council* [2007] IEHC 204; See also Lowry, A. 'Practice and Procedure under the European Convention on Human Rights Act 2002', *Bar Review*. November 2003. pp. 183-185.

<sup>21</sup> Twentieth Amendment of the Constitution Act, 1999.

<sup>22</sup> Local Government Act, 2001 (No. 37 of 2001), s 10(1). Schedule 12 of the 2001 Act sets out some eighty areas of legislation which establish various local authority functions. These encompass such diverse areas as housing, planning, air pollution, control of horses, sanitary services, gaming, lotteries and air raid precautions. See Canny J. *The Law of Local Government*. (Dublin, Round Hall, 2000).

any statute, order, regulation, rule, licence, bye-law or other like document made, issued or otherwise created under a statute which continued in force by virtue of Article 50 of the Constitution.<sup>23</sup>

Significantly s 2(1) of the Act provides that:

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.

This effectively means that in a judicial review of a local authority action under a statutory provision (which covers practically all local authority actions), the interpretation and obligations of that provision must be in line with Convention provisions. These are defined in the Act as Articles 2 to 14 of the ECHR and its protocols (subject to any derogation which the State may make pursuant to Article 15 of the Convention). Clearly, there is now a new standard in the implementation of statutory provisions by local authorities influenced by this overarching interpretative obligation.

But even in the absence of a statutory provision, there may still be a breach of the ECHR. This was highlighted in *O' Donnell v South Dublin County Council*,<sup>24</sup> 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.<sup>25</sup>

## The Local Government Act 2001

The Local Government Act 2001,<sup>26</sup> comprising some 240 sections, represents a complete restatement of local government law in Ireland. This encompasses the representative, regulatory, agency and service provision roles of local authorities.<sup>27</sup> It also consolidated into law many recent developments in "participatory democracy,"<sup>28</sup> as well as "new public management" (NPM) approaches to local

<sup>23</sup> ECHR Act, section 1(d).

<sup>24</sup> [2007] IEHC 204

<sup>25</sup> *O' Donnell v South Dublin County Council* [2007] IEHC 204.

<sup>26</sup> No. 37 of 2001.

<sup>27</sup> See Callanan, M. - The Role of Local Government — chapter 1 of Callanan, M. and Keogan, J.F. (eds.) *Local Government in Ireland - Inside Out*. (Dublin, IPA, 2003)

<sup>28</sup> See Parts 7 & 13 of the 2001 Act. Part 13 provides that "a local authority may take such steps as it considers appropriate to consult with and promote effective participation by the local community in local government."

government.<sup>29</sup> Part 9 of the 2001 Act contains a general statement of the functions of local authorities, while s 63 sets out the general functions of local authorities.

Section 63(3) of the Act of 2001 states that “[s]ubject to law, a local authority is independent in the performance of its functions”.<sup>30</sup> Thus, while many local authority operations are guided by Government Department Guidelines and Circulars, the local authority must perform its functions in a manner compatible with the Convention. Indeed, in circumstances where there is no statutory obligation to act, or where it does not breach other existing legislation, an indifferent local authority can breach the ECHR Act, in circumstances which give rise to a positive obligation.<sup>31</sup> Indeed, vicarious and or joint liability may also attach to a Government Department, where the local authority in breach of the ECHR Act is carrying out a delegated Departmental function, or acting according to Departmental Circulars or Guidelines.

### Corporate Plans

The Local Government Act 2001 also requires each local authority manager to prepare a corporate plan.<sup>32</sup> In preparing its corporate plan a local authority shall comply with sections 69, 71 and 129 of the Act and:

... shall take account of such policies and objectives in relation to any of its functional programmes as are set out in any other plan, statement, strategy or other document prepared by it under any other provision of this or of any other enactment.<sup>33</sup>

Clearly, the ECHR Act is a relevant enactment for the purpose of the preparation of the corporate plan under the Local Government Act. It is therefore incumbent on local authority managers and, indeed, local councillors, to take account of the requirements of the ECHR Act in preparing corporate plans. It is significant, therefore, that after the ECHR Act came into force Ministerial Guidelines on the preparation of local authority corporate plans for 2004-2009 make no reference to the obligations on local authorities under that Act.<sup>34</sup> The “core values” or key principles proposed in the Guidelines emphasise corporate governance and other approaches, but there is no explicit reference to human rights or the provisions of the ECHR Act:

Some values identified in existing local authority corporate plans in Ireland which may be relevant, have included: supporting the democratic process and

<sup>29</sup> See Barzelay, M. *The New Public Management*. (University of California, 2001). NPM is widely accepted as a form of economic rationalisation or ‘economism’ in public service provision.

<sup>30</sup> See Keane on *Local Government*. (Butler, P.A., (ed.) (Dublin, First Law, 2003) p. 45).

<sup>31</sup> See *O’Donnell v South Dublin County Council* [2007] IEHC 204; Kenna, P. Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights, EHRLR 2008, 2, 193-208.

<sup>32</sup> Local Government Act 2001, s 134(3)(a).

<sup>33</sup> Local Government Act 2001, s 134(7).

<sup>34</sup> Department of the Environment, Heritage and Local Government. *Guidelines of Local Authorities in the Preparation of Corporate Plans for 2004-2009*. (Dublin, The Stationery Office, 2004).



civic leadership; a customer and citizen focus; partnership, participation and inclusiveness; community development; empowerment of staff to improve potential; and corporate governance issues such as openness and transparency, accountability, ethics, probity and risk management.<sup>35</sup>

Clearly, a local authority's obligations to carry out its functions in a manner compatible with the Convention should be reflected as a core value in the Corporate Plan.

### Contracting Out of Functions

Contacting out of services and operational functions is a common feature of local government practice in Ireland. Indeed, the Local Government Act 2001 provides that:

A local authority may enter into an agreement in writing with a recognised association for the carrying out by the association on behalf of the local authority of certain functions of the authority which in its opinion may be satisfactorily carried out by the recognised association, subject to such terms, conditions, restrictions and other requirements as the authority considers necessary and specifies in the agreement.<sup>36</sup>

This NPM approach is growing in all areas of local authority activity and poses major difficulties for judicial review and rights enforcement.<sup>37</sup> The role of the local authority is to be an "enabling authority", mobilising, guiding and stimulating other public, private and voluntary agencies to provide services and carry out the functions of the authority.<sup>38</sup> The focus has shifted from probity and due process in meeting statutory and other obligations, to performance, (financial) competitiveness, contractual and managerialist approaches in public services.<sup>39</sup> One of the consequences of this has been to blur the distinction between the role and responsibility of the State and those of other organisations that may be carrying out some local authority functions.

The Minister who introduced the ECHR Bill in 2001 argued that the definition of "organ of the State" for the purpose of s 2 of the Bill was drawn as widely as possible

<sup>35</sup> *ibid*, p. 22.

<sup>36</sup> Local Government Act 2001, s 128(2)(d).

<sup>37</sup> The Strategic Management Initiative (SMI) for the Irish Public Service of 1994 has created significant changes in public service management. Major developments at local government level include the launching of *Better Local Government: A Programme for Change* (1996), a major initiative on local government and local development leading to the creation of county / city development boards; and the publication of the Local Government Act, 2001. See Boyle, R. & Humphries, P., *A New Change Agenda for the Irish Public Service*, (Dublin, IPA, 2003).

<sup>38</sup> See Callanan, M. & Keogan, J.F., (eds.) *Local Government in Ireland - Inside Out*. (Dublin, IPA, 2003).

<sup>39</sup> See Halliday, S. *Judicial Review and Compliance with Administrative Law*. (Oregon, Hart Publishing, 2004), Chapter 6.

to ensure that the maximum number of organisations would be embraced by it.<sup>40</sup> Clearly, local authorities are included in the definition but, under an NPM approach, integrating ECHR Act obligations into the duties of contracted-out operations will not be without difficulty. The equivalent definition in the UK Human Rights Act 1998 of a “public body” has led to some litigation, especially in establishing whether non-government, private and charitable bodies providing government services are acting as public bodies.<sup>41</sup> There is still considerable uncertainty in England and Wales in relation to the extent of the obligations under the Human Rights Act 1998 where an organisation “stands in the shoes of the State”.<sup>42</sup>

In *YL v Birmingham CC, Southern Cross Healthcare, OL, VL and Secretary of State for Constitutional Affairs*<sup>43</sup> the House of Lords in a 3:2 split, held that a private care home, providing care and accommodation to the elderly, which had been arranged by the local authority under the National Assistance Act 1948, was not carrying out functions of a public nature. Lord Neuberger listed seven factors to determine if a non-State body under a contract with the State was performing a “function which is public in nature”.<sup>44</sup>

It is established in Strasbourg jurisprudence, to which the Irish Courts must pay “due regard”, that the State cannot evade its obligations to safeguard Convention rights by delegation to private bodies or individuals.<sup>45</sup> A State or public body cannot escape liability simply by asserting that an individual or body entrusted with public

<sup>40</sup> The then Minister for Justice, Equality & Law Reform, Mr. John O’ Donoghue, T.D., introducing the *European Convention on Human Rights Bill*, Second Stage. *Dail Debates*, 2001, Vol. 538. para. 303 said: “It includes tribunals or any other body – other than the President, the Oireachtas, either House of the Oireachtas, a committee of either House, a joint committee of the Houses or a court – which is established by law, or through which any of the legislative, executive or judicial powers of the state are exercised. The courts are excluded from the definition on the basis that they are already under a duty to administer justice in accordance with the law and the Constitution. The definition of organ of the state is drawn as widely as possible to ensure that the maximum number of organisations will be embraced by it.”

<sup>41</sup> See, for example, *R (on the application of Heather) v Leonard Cheshire Foundation* [2002] EWCA. Civ. 366. 2 All E.R. 936 (CA); *Parochial Church Council of the Parish of Aston Cantlow, Warwickshire v Wallbank* [2004] 1 A.C. 546. See also Sachdeva, V. ‘The Scope of Hybrid Public Authorities within the HRA 1998,’ *Judicial Review* [2004] 43-48; Denney, A. ‘Utility Companies and the Public/Private Divide,’ *Judicial Review* [2005] 65-71.

<sup>42</sup> House of Lords, House of Commons, Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (London, HMSO, 2004), p 16.

<sup>43</sup> [2007] UKHL 27.

<sup>44</sup> [2007] UKHL 27 at para. 154. Neuberger considered that each factor, at least if taken individually, would be insufficient to render the provision of care and accommodation by Southern Cross in its care home to Mrs YL a ‘function of a public nature’. However, it must be right to consider the effect of the various factors together, and, indeed, in the broader policy context.

<sup>45</sup> See, for example, *Van der Musselle v Belgium* (1983) 6 EHRR. 163; *Costello-Roberts v UK* (1993) 19 EHRR. 112.

functions acted *ultra vires*,<sup>46</sup> or where the State has facilitated or colluded in acts breaching the ECHR.<sup>47</sup> In the case of *A v France*<sup>48</sup> the Commission observed that the responsibility of the State under Convention law may arise for acts of all of its organs or servants.<sup>49</sup>

## Judicial Review and the ECHR Act

The ECHR Act could lead to some important changes in the nature and practice of judicial review.<sup>50</sup> Section 2(1) of the Act requires — in so far as is possible and subject to any other rule of interpretation — all courts to interpret and apply any statutory provision or rule of law in a manner compatible with the State's obligations under the ECHR. Traditional approaches to judicial supervision of administrative bodies in the common law, such as local authorities, are widely attributed to the influence of Dicey.<sup>51</sup> Indeed, nineteenth-century legal theorists may have had more than a passing experience of public administration based on undue political influence, discriminatory and discretionary administrative decisions and the “contracting” out of public functions to private corporations and companies. Some would see the recent growth of quasi-autonomous, non-government organisations or “quangos” as something of a return to this type of public magisterial or “grand jury” type of governance with Ministers appointing members of bodies through patronage with these bodies in turn being accountable only to the Minister.<sup>52</sup> It has been shown that one-third of the quangos in the Irish State do not have a statutory basis, which may enable them to evade judicial review.<sup>53</sup>

<sup>46</sup> See Oliver, D. ‘The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act,’ *Public Law*, Autumn 2000. pp. 477-493.

<sup>47</sup> *Lopez-Ostra v Spain* (1995) 20 EHRR 277.

<sup>48</sup> (1993) 17 EHRR 462.

<sup>49</sup> The UK Audit Commission in Human Rights — Improving Public Service Deliver (London: Audit Commission, 2003) states (at p.12): ‘In order to minimise breaches of human rights by service providers, public bodies should, when negotiating contracts, require the service provider to undertake to protect the human rights of service users. This will bind service providers to the Act. If an individual’s human rights are breached by a service provider who has entered into a contract that guarantees service users rights, an individual may bring a claim directly against the service provider using the Act. If a public body enters into a contract in this way it will have endeavoured to protect the rights of service users’.

<sup>50</sup> See de Blacam, M. *Judicial Review*, (Dublin, Tottel, 2007); Delany, H. “Significant Themes in Judicial Review of Administrative Action”, (1998) 5(1) *DULJ* 73.

<sup>51</sup> See generally: Hogan, G. and Morgan, D. (1998) *Administrative Law in Ireland*. (Dublin, Round Hall, 1998); Bradley, C. *Judicial Review*. (Dublin, Round Hall, 2000); Delany, H. *Judicial Review of Administrative Action — A Comparative Analysis*. (Dublin, Round Hall, 2001); de Blacam, M. *Judicial Review*. (Dublin, Butterworths, 2007). See also Law Reform Commission, *Consultation Paper of Judicial Review Procedure*. (LRC CP 20-2003).

<sup>52</sup> The growth of agencies in Ireland established by the Executive, some with statutory basis and some without, where a Minister controls their objectives, selects the members of the ‘Board’, defines the contacts and consultation processes etc. outside the control of the Parliament and creating a major dilemma as to the legal obligations of such agencies acting as ‘organs of the State’. See Clancy, C. & Murphy, G. *Outsourcing Government: Public Bodies and Accountability*. (Dublin, tasc, 2006).

<sup>53</sup> See McGauran A-M et al, *The Corporate Governance of Agencies in Ireland Non-Commercial Agencies* (Dublin, IPA, 2005).

The actions of public bodies must not be *ultra vires*, i.e., they must not exercise powers beyond those which they are legally or statutorily entitled to exercise.<sup>54</sup> The Government cannot make regulations giving powers which are not within the “principles and policies” contained in the parent statute,<sup>55</sup> but, of course, many Statutory Instruments are transpositions of EU law and these can amend existing statutes.<sup>56</sup>

Administrative discretion by State agencies must be exercised fairly and reasonably in line with *Wednesbury* principles.<sup>57</sup> This concept of “unreasonableness” was developed by the Irish courts in *State (Keegan) v Stardust Compensation Tribunal*.<sup>58</sup> Henchy J set out the situations where administrative decisions would be quashed by the court as “irrational”. This involved situations where the decisions were fundamentally at variance with reason and common sense, or indefensible for being in the teeth of “plain reason and common sense”. A court must be satisfied that the decision-maker had breached his obligation, where it must not flagrantly reject or disregard fundamental reason or common sense in reaching the decision. The scope of judicial review on administrative discretion in decision-making was considerably limited in the case of *O’Keeffe v An Bord Pleanála*<sup>59</sup> where Finlay C.J. stated:

I am satisfied that in order for an Applicant for Judicial Review to satisfy a Court that the decision making authority has acted irrationally in the sense which I have outlined above so that the Court can intervene and quash it’s decision, it is necessary that the Applicant should establish to the satisfaction of the Court that the decision making authority had before it *no relevant material* which would support it’s decision.<sup>60</sup> (author’s emphasis)

This means, effectively, that if a local authority has any relevant material before it, on which to base a decision, it will not be found by a court to be unreasonable.

The orthodox grounds of judicial review based on illegality, unconstitutionality, irrationality or procedural impropriety have now, however, been supplemented by

<sup>54</sup> But the LG Act 2001 s 65 gives a local authority power to do anything which is “ancillary, supplemental or incidental to or consequential on or necessary to give full effect to, or is conducive to the performance of, a function conferred on it by this or any other enactment”. Section 66 permits a local authority to provide assistance in money or in kind as it considers necessary or desirable to promote the interests of the local community.

<sup>55</sup> *Cityview Press Ltd v An Comhairle Oilúna* [1980] IR 381.

<sup>56</sup> As a result of Article 29.4.10 of the Constitution. See *Meagher v Minister for Agriculture* [1994] 1 IR 329. There are some 300-600 Statutory Instruments each year, with a significant proportion derived from EU law.

<sup>57</sup> See *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *East Donegal Co-op v A.G* [1970] IR 317.

<sup>58</sup> [1986] IR 642.

<sup>59</sup> [1993] 1 IR 39.

<sup>60</sup> [1993] 1 IR 39, at p. 72.

another set of grounds for the review of administrative action. These derive from the ECHR Act. Section 4 provides:

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.

Clearly, the curial examination of discretion and local authority decision-making in the form of judicial review requires a fresh perspective in the light of the ECHR Act. An authoritative English case highlights this contemporary situation:

The *Wednesbury*, test, for all its defects, had the advantage of simplicity, and it might be thought satisfactory that it must now be replaced (when human rights are in play) by a much more complex and contextually sensitive approach. But the scope and reach of the [UK] Human Rights Act is so extensive that there is no alternative.<sup>61</sup>

Bamforth points out, in reviewing the UK Human Rights Act 1998 after five years, that it has brought about some significant changes in the methods in which cases are determined. This is most obvious in the open recognition by the UK courts that proportionality is now to be used in judicial review or statutory interpretation cases where Convention rights are involved. But the use and impact of ECHR arguments has been relatively tightly controlled and there has been no explosion of human rights litigation.<sup>62</sup> Other UK writers have pointed out that the unreasonableness test in judicial review is now outdated and:

... struggling to survive as a coherent and useful ground of review. Its days are surely numbered as a tool for dealing with Convention rights claims; proportionality or merits review look set to step in (according to the nature of the Convention right engaged).<sup>63</sup>

## What is Judicially Reviewable?

While the contemporary contours of what amounts to a body administering justice have been examined recently in the Irish cases arising from Tribunals of Inquiry

<sup>61</sup> Lord Walker in *R (Pro-life Alliance) v BBC* [2003] UKHL 23.

<sup>62</sup> Bamforth, N. 'Understanding the Impact and Status of the Human Rights Act 1998 within English Law.' *Global Law Working Paper* 10/04. Hauser Global Law Program, NTU School of Law, New York. p. vi.

<sup>63</sup> Le Sueur, A. 'The Rise and Ruin of Unreasonableness,' [2005] *Judicial Review*, 25-51 at p. 43.

such as *Goodman International v Hamilton (No. 1)*,<sup>64</sup> *Haughey v Moriarty*,<sup>65</sup> *Lawlor v Flood*,<sup>66</sup> *F. Murphy v Flood*,<sup>67</sup> and *Maguire v Ardagh*,<sup>68</sup> a more complex question arises in relation to what is actually justiciable, or open to judicial review.

Which actions of the State, as carried out by local authorities, are subject to judicial review? Setting budgets, acting as agents of the central Departments of State, making corporate plans, making payments, grants and fines, awarding contracts, dealing with appeals and allocating through licensing and other non-financial means the largesse of the State, are all part of the work of local authorities.<sup>69</sup> Indeed, local authorities in Ireland operate under a myriad of statutes and statutory instruments on a daily basis. Most of the policies and established practices of local authorities have never been judicially reviewed. Judicial review cases appear to largely involve planning, licensing and issues connected with the compulsory purchase of land, although the housing of members of the Traveller Community also generates many cases.<sup>70</sup>

In order to establish a right of action for an alleged breach of the ECHR Act a plaintiff must frame the issue as a legal issue. Thus, it must be distinguished from a political issue which would be within the exclusive remit of the Legislature or, in limited cases, the elected body of the local authority itself. Secondly, the matter must not be a purely bureaucratic one that is seen as, essentially, a management issue, or one that is entirely within the area of administrative discretion. Defining what is justiciable has been based, among other things, on the criteria required for something to be a “justiciable controversy.” Kenny J, in *McDonald v Bord na gCon*<sup>71</sup> stated that a justiciable controversy was one which as a matter of history has been capable of litigation in the courts, but that is a rather circular formulation of justiciability.

The courts have eschewed judicial intervention on such issues as State spending on Traveller accommodation,<sup>72</sup> binding a Minister to published timescales for the

<sup>64</sup> [1992] 2 IR 542; [1992] ILRM 145.

<sup>65</sup> [1999] 3 IR 1.

<sup>66</sup> [1999] 3 IR 107.

<sup>67</sup> [1999] 3 IR 97.

<sup>68</sup> [2002] 1 IR 385.

<sup>69</sup> In *Hempenstall v Minister for the Environment* 1994 2 IR 20 at 28, Costello J pointed out that licences by State bodies can be revoked or reduced in value. “Property rights arising in licences created by law (enacted or delegated) are subject to the conditions created by law and to an implied condition that the law may change those conditions. ... an amendment of the law which by changing the conditions under which a licence is held cannot be regarded as an attack on the property right in a licence-it is the consequence of the implied condition which is an inherent part of the property right in the licence”.

<sup>70</sup> Reasons for the lack of development of judicial review of other local authority functions in Ireland may be based on the very limited access to legal aid, the nature of local authority functions historically, and perceptions of judicial deference to State bodies generally. See *Access to Justice: A Right not a Privilege*. (Dublin, FLAC, 2005).

<sup>71</sup> [1965] IR 217.

<sup>72</sup> *O’ Reilly and Others v Limerick Corporation* [1989] ILRM 181.

provision of services for homeless children,<sup>73</sup> requiring a local authority to repair roads in County Cavan,<sup>74</sup> requiring a Minister to provide education for persons with disabilities over 18 years,<sup>75</sup> obliging the State to implement international legal instruments signed by the State<sup>76</sup> and reviewing the nomination of a former judge to the European Central Bank.<sup>77</sup>

There is clearly a reluctance to tread too closely to some “recognised” demarcation set out in the separation of powers doctrine, enshrined in a limited and rather descriptive form in Article 6.1 of the Constitution which provides:

All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.

However, while the courts have treated all constitutional provisions as *prima facie* justiciable,<sup>78</sup> embedding a breach of human rights, as defined by the ECHR Act, into the criterion of a justiciable controversy has not yet developed to any great degree in constitutional case law.

The courts have sought to examine closely the decisions of public bodies to differentiate issues of public law, which are reviewable (by way of judicial review), in contrast to issues of private law, such as contractual relations, which are not. However, there is much judicial deference to the operations of local authorities and the tests of reasonableness just discussed can operate as a proverbial litigation “wet blanket”. Writers such as Hogan and Morgan describe the historical difficulties in developing administrative law in Ireland and in trying to reconcile classical separation of powers doctrines with the “fused executive-legislature” system in Ireland.<sup>79</sup> There has been a notable reluctance by the Irish courts to compel the Executive to comply with constitutional or statutory obligations for the benefit of citizens.<sup>80</sup> This has been justified – sometimes interchangeably — by reference to a particular understanding of the doctrine of separation of powers, Aristotlean

<sup>73</sup> *DB (A minor, suing by his Mother and Next Friend) v The Minister for Justice, the Minister for Health, the Minister for Education, Ireland and the Attorney General and the Eastern Health Board* [1999] 1 IR 29; [1999] 1 ILRM 102.

<sup>74</sup> *Brady v Cavan County Council* [1999] 4 IR 99.

<sup>75</sup> *TD v Minister for Education and Others* [2001] 4 IR 259.

<sup>76</sup> *Re O’Laighleis* [1960] IR 183; *Kavanagh v Governor of Mountjoy Prison* [2002] 2 ILRM 81; *Hogan v An Taoiseach* [2003] 2 ILRM 357.

<sup>77</sup> *Riordan v Ireland* [2000] 4 IR 537.

<sup>78</sup> See Hogan, G. and Whyte, G. (2004) *Kelly’s — The Irish Constitution*. (Dublin, Butterworths, 2004) at 6.1.42.

<sup>79</sup> Hogan and Morgan. *Administrative Law in Ireland* (3rd edition), (Dublin, Round Hall, 1998), p. 10.

<sup>80</sup> “The really troubling area is where the Court is called on to make an order against the State or its legislative or executive organ which carries with it financial implications”. See Byrne & Binchy. *Annual Review of Irish Law 2001*. (Dublin, Round Hall, 2002), p. 110.



conceptions of commutative and distributive justice and the almost sacrosanct but largely symbolic status of Dáil approval of the annual Finance Acts.<sup>81</sup> This model of judicial deference was exemplified by Hardiman, J in the seminal 2001 Supreme Court decision of *Sinnott v Minister for Education and others*.<sup>82</sup> Referring to the possibility that a court could order a State body to carry out a constitutionally guaranteed education service he said:

Such an order... could only be made as an absolutely final resort in circumstances of great crisis and for the protection of the constitutional order itself. I do not believe that any circumstances which justify the granting of such an order have occurred since the enactment of the Constitution sixty-four years ago.<sup>83</sup>

Standard justifications by the State for failure to meet legal and human rights obligations include local budgetary constraints, lack of funds from the Government and the questionable justification of such expenditure.<sup>84</sup> However, in *Hoey v Minister for Justice*,<sup>85</sup> the lack of resources argument, preventing a Minister from carrying out a statutory duty (repair and maintenance of a court house), was found to be based on “a misconception of powers, duties and functions of the executive in regard to the implementation of legislation enacted by the Oireachtas”.<sup>86</sup>

### ECHR Act and Local Authorities

In relation to judicial review Section 3(1) of the ECHR Act integrates the jurisprudence on the European Court of Human Rights (ECtHR) into the relevant law relating to the functions of local authorities as “organs of the State”. It provides:

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

<sup>81</sup> See *O’ Reilly and Others v Limerick Corporation* [1989] ILRM 182: *TD v Minister for Education and Others* [2001] 4 I.R. 259; *Sinnott v The Minister for Education, Ireland and The Attorney General*, [2001] 2 IR 545. The State has of course, bound itself to many multi-annual funding agreements, such as public private partnerships and leases over 20 or more years, which would seem to conflict with the doctrine that all State expenditure must be approved annually, espoused by some commentators on the separation of powers doctrine. The archaic nature of this legal reasoning is apparent from the legally enforceable but unknown commitments given by the State in the NAMA legislation, which bind future Oireachtas fiscal and spending decisions into the future, as well as the EU Stability and Growth Pact, whereby Members of the Eurozone countries have committed to an annual budget deficit no higher than 3% of GDP and a national debt lower than 60% of GDP or approaching that value.

<sup>82</sup> [2001] 2 IR 545.

<sup>83</sup> *Sinnott v The Minister for Education, Ireland and The Attorney General* [2001] 2 IR 545 at 559.

<sup>84</sup> See, for instance, *Brady v Cavan County Council* [1999] 4 IR 99.

<sup>85</sup> [1994] 3 IR 329.

<sup>86</sup> *ibid.* at 343.



There are a number of areas of European Court of Human Rights (ECtHR) jurisprudence that are particularly relevant.<sup>87</sup> Clearly, the representative, agency, regulatory and service provision roles of local authorities will need to be carried out in a manner compatible with Convention obligations. The machinery of decision-making, appeals and policy-making must also be Convention-compatible, with the concept of proportionality which already existed in Irish law gaining new importance.<sup>88</sup> However, the major impact of the ECHR Act is likely to be in the culture shift required to accept that local authorities now have “positive obligations” to ensure that Convention rights are secured. The doctrine of positive obligations requires States to protect individual persons from threats to their Convention rights or to assist them to achieve full enjoyment of those rights.<sup>89</sup> Under Article 1 ECHR there is an obligation to respect human rights and to secure to everyone within the jurisdiction the rights and freedoms contained in the Convention. Equally, it is long established that Convention rights must be guaranteed not in a theoretical or illusory way, but in a practical and effective manner.<sup>90</sup>

### **Article 3 Issues Relating to ‘Inhuman and Degrading Treatment’ and Local Authorities**

In relation to Article 3 ECHR which states in quite absolutist terms that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment” there are specific obligations on organs of the State encompassing a wide range of matters.<sup>91</sup> While this applies to local authorities in their dealings with people there is also an obligation on all State organs to prevent such treatment by others. The ambit of such treatment has been clarified in *Pretty v United Kingdom*:

Where treatment humiliates or debases an individual showing lack of respect for, or diminishing his or her human dignity arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance it may be characterised as degrading and also fall within the prohibition of Article 3.<sup>92</sup>

<sup>87</sup> See Barton, S, ‘*The ECHR Act 2003 — A Practitioner’s perspective*’, Paper presented to Irish Human Rights Commission and Law Society of Ireland Conference on European Convention on Human Rights Act 2003 Review and Human Rights in Committed Relationships, Conference 16 October 2004. See also Kenna, ‘*Implications for Local Authorities of the ECHR Act 2003*’, Paper presented to Irish Human Rights Commission and Law Society of Ireland Conference on European Convention on Human Rights Act 2003 Review and Human Rights in Committed Relationships, Conference, 16 October 2004.

<sup>88</sup> See Leigh, I. ‘Taking Rights Proportionately: Judicial Review, The Human Rights Act and Strasbourg.’ [2002] *Public Law*, Summer, 265-287.

<sup>89</sup> See Kenna, P. Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights, *EHRLR* 2008, 2, 193-208; Mowbray, A. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, (Oxford, Hart, 2004).

<sup>90</sup> *Airey v Ireland* [1979] 2 EHRR 305; [1981] 3 EHRR 592.

<sup>91</sup> *Price v United Kingdom* (33394/96) [2001] ECHR 453 (10 July 2001); *R (Q) v Secretary of State* [2003] 2 All ER 905.

<sup>92</sup> *Pretty v UK* (2002) 35 EHRR 1. at para. 52. It should be noted, however, that no violation of Article 3 ECHR was declared in this case.

In the case of *Limbuella*<sup>93</sup> a homeless asylum-seeker sought State assistance, citing Article 3 ECHR in support of this claim.<sup>94</sup> The House of Lords found that the State had positive obligations to such destitute asylum-seekers.<sup>95</sup> The case raised, in its starkest form, to the question of what level of abject destitution to which individuals must sink before their suffering or humiliation reached the minimum level of severity to amount to “inhuman or degrading treatment” under Article 3 ECHR.<sup>96</sup> 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.<sup>97</sup>

In *Marzari v Italy*<sup>98</sup> Article 3 obligations were considered to place an obligation on public authorities to provide assistance to an individual suffering from a severe disability because of the impact of such refusal on the private life of the individual. The ECtHR stated that: “State has obligations of this type where there is a direct and immediate link between the measures sought by the applicant and the latter’s private life”.<sup>99</sup>

Although the emphasis in Article 3 cases is on minimum levels of State support for individuals in adverse circumstances, combined with the obligations under Article 8 ECHR this may lead to significant positive obligations for the State of a nature completely unfamiliar to Irish local authorities, particularly for people with disabilities.

### Article 6 ECHR and Local Authorities

Article 6 obligations in relation to fair hearings by independent and impartial tribunals involved in the determination of civil rights and obligations will create many difficulties for Irish local authorities.<sup>100</sup> The range of civil rights and

<sup>93</sup> *R. (on the application of Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66; [2006] 1 A.C. 396.

<sup>94</sup> See also *Anufrijeva v Secretary of State* [2003] EWCA 1406.

<sup>95</sup> *R. v Secretary of State for the Home Department ex parte Adam (FC) and others.* [2005] UKHL 66.

<sup>96</sup> Same case as *Limbuella* at Court of Appeal. *R. ex parte Adam and others v Secretary of State for the Home Department* [2004] EWCA Civ. 540. at para 84.

<sup>97</sup> [2005] UKHL 66, at para. 8.

<sup>98</sup> *Marzari v Italy* (1999) 28 EHRR CD 175.

<sup>99</sup> *ibid.* at 179.

<sup>100</sup> See Lowry, A. ‘Practice and Procedure under the European Convention on Human Rights Act 2002’, *Bar Review*. November 2003. pp. 183-185.

obligations involving local authorities is broad and largely indeterminate.<sup>101</sup> Local authorities exercising statutory functions are involved in dispensing the largesse of the State in zoning development land; awarding grant funding and licences; appointing selected providers and suppliers; and enhancing the value of property through “betterment” of certain locations.<sup>102</sup>

In exercising such statutory and regulatory powers all public bodies must comply with the substantive and procedural requirements flowing from Article 6 ECHR, such as hearing both sides within a reasonable time, “equality of arms,” offering an independent and impartial tribunal established by law for appeals, procedural protection, adequate time and facilities for preparation of defence, etc.<sup>103</sup>

The summary possession procedures under Section 62 of the Housing Act 1966 have already been found to breach Article 6 ECHR.<sup>104</sup> The absence of any opportunity to defend summary possession proceedings in relation to the home was considered by the ECtHR in *Connors v UK* in 2004.<sup>105</sup> The Court held that Article 6 was breached where the applicant was unable in the summary possession proceedings to challenge the Council’s allegations whether by giving evidence himself or calling witnesses. There was no equality of arms and he was denied any effective access to Court against this very serious interference with his home and family.

Historical judicial deference to the Executive and Legislature in these areas will not be sufficient to ensure compatibility with the ECHR Act.<sup>106</sup> In judicial supervision of the operation of public and housing legislation, there is now a new climate.

That a court should presume that the myriad of rules of domestic landlord and tenant law can be given a clean bill of jurisprudential health for Article 8 purposes seems in one sense a cavalier approach to judicial law-making, in that the court is eschewing its traditional role to reach legal conclusions in reaction to specific, micro-problems posed by litigants in favour of making sweeping macro-level policy statements.<sup>107</sup>

## Article 8 ECHR and Local Authorities

Article 8(1) protects the right of individuals to “respect” for their private life, family life, “home” and correspondence. There is a right of access to, occupation of, and

<sup>101</sup> See *König v Germany*, (judgment of 28 June 1987, Series A. No. 27, p. 30, § 89). Whether or not a right is to be regarded as civil within the meaning of that term in the Convention must be determined by reference not only to its legal classification but also to its substantive content and effects under the domestic law of the State concerned.

<sup>102</sup> See Kenna, P. ‘Land Law, Property, Housing and Environment’ in Kilkelly, U. (ed.) *ECHR and Irish Law*. (2<sup>nd</sup> edition) (Bristol, Jordans, 2008).

<sup>103</sup> Council of Europe. *Short Guide to the European Convention on Human Rights*. (1998) pp. 38-50.

<sup>104</sup> *Pullen v Dublin City Council* [2008] IEHC 379.

<sup>105</sup> *Case of Connors v UK*. (2004) 40 EHRR 189.

<sup>106</sup> See Edwards, R. (2002) ‘Judicial Deference under the Human Rights Act,’ 65 MLR. 859.

<sup>107</sup> See Loveland, I. ‘The Impact of the Human Rights Act on Security of Tenure in Public Housing,’ [2002] *Public Law*, Autumn, pp. 594-601 at p. 608.

peaceful enjoyment of the home. “Home” is an autonomous concept under the ECHR and does not depend for classification by domestic law.<sup>108</sup> Article 8(2) provides that there shall be no interference by a public authority with the exercise of the right set out in Art 8(1) except in accordance with law and necessary in a democratic society. There is extensive jurisprudence on the nature and extent of such permitted restrictions on Article 8 rights.<sup>109</sup>

Although there is a margin of appreciation allowed to States in the interpretation and application of Convention rights, the ECtHR jurisprudence in relation to evictions from home affords States a narrow margin of discretion. In *Buckley v United Kingdom* where a Traveller family was evicted from an unauthorised site, the offer of alternative accommodation, even where there was a fear of violence, was held to justify the interference with the applicants’ Article 8 rights.<sup>110</sup>

But in *Stankova v Slovakia*,<sup>111</sup> the eviction by the relevant municipality interfered with the applicant’s “home,” but was found to be in accordance with law. The only point at issue was whether that interference was justifiable as “necessary in a democratic society” to achieve the legitimate aim pursued by the eviction. This notion of necessity implies a “pressing social need”. In particular, the measure employed must be proportionate to the legitimate aim pursued. The municipality was in charge of public housing, and under an obligation to assist the town’s citizens in resolving their accommodation problems. 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 ECHR.

In the case of *Cosic v Croatia*,<sup>112</sup> involving the eviction of a teacher tenant from the State flat where she had lived for 18 years the ECtHR stated that the central question was whether the interference complained of was proportionate to the aim pursued and thus “necessary in a democratic society”.<sup>113</sup> The ECtHR again pointed out that the loss of one’s home is a most extreme form of interference with the right to respect for the home.

Any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness 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, his or her right of occupation has come to an end (see *McCann v the United Kingdom*, no. 19009/04, § 50, 13 May 2008).<sup>114</sup>

<sup>108</sup> *Chapman v UK* (2001) 33 EHRR.

<sup>109</sup> See Ovey, C. & White, R., Jacobs and White: *The European Convention on Human Rights* (4th edition), (Oxford, OUP, 2006).

<sup>110</sup> *Buckley v UK* (1996) 23 EHRR 101.

<sup>111</sup> 7205/02 [2007] ECHR 795 (9 October 2007).

<sup>112</sup> *Cosic v Croatia*, (Application No 28261/06) European Court of Human Rights, Judgment of 15 January 2009.

<sup>113</sup> *ibid*, para. 20

<sup>114</sup> *ibid*, para. 22.

The landmark ECtHR decision under Article 8 is *Botta v Italy*.<sup>115</sup> Mr Botta, who was physically disabled, was on holiday at a seaside resort in Italy in 1990 when he discovered that the bathing establishments were not equipped with the facilities to allow people with disabilities to access the beach and the sea. Specifically, the resort lacked special access ramps, lavatories, and washrooms in breach of Italian legislation. In March 1991, Mr. Botta asked the local mayor to remedy these shortcomings and when he returned to the resort later in 1991, he found no changes. Taking legal action, he claimed the impairment of his private life and development of his personality resulting from the Italian State's failure to remedy the omissions at this private bathing establishment breached the Convention obligations on the Italian State. Before the ECtHR it was established that a State had a positive obligation towards people with disabilities to enable them to enjoy, so far as possible, a normal private and family life. The ECtHR, in defining the scope of the positive obligation, stated that there "must be a direct and immediate link between the measures sought by the applicant and the latter's private and family life".<sup>116</sup>

Under the UK Human Rights Act 1998 damages of £10,000 were awarded against a local authority in relation to the provision of inadequate housing. In *R. (Bernard) v Enfield L.B.C.*<sup>117</sup> the High Court found that the authority had acted unlawfully and incompatibly with Article 8 ECHR in failing for over two years to provide suitable accommodation for a family. The mother was severely disabled and confined to a wheelchair and was housed in temporary accommodation by the authority which meant that she was effectively confined to a single room. The conduct of the authority not only engaged, but breached Article 8 obligations, since it condemned the claimants to living conditions which made it virtually impossible to have any meaningful private or family life in the sense in which that right was protected by that article. However, the part of the claim for breach of Article 3 ECHR failed on the ground that the authority's "corporate neglect" was not intended to deliberately inflict such suffering. The judgment relied on the abovementioned *Botta* case and reasoned:

... Respect for private and family life does not require the State to provide every one of its citizens with a house. However, those entitled to care under section 21 [of the relevant UK Act] are a particularly vulnerable group. Positive measures have to be taken (by way of community care facilities) to enable them to enjoy, so far as possible, a normal private and family life. The Council's failure to act . . . showed a singular lack of respect for the claimants' private and family life. It condemned the claimants to living conditions which made it virtually impossible for them to have any meaningful private or family life for the purposes of Article 8.

<sup>115</sup> *Botta v Italy* (1998) 26 EHRR 241.

<sup>116</sup> (1998) 26 EHRR 241 at para. 34. However, 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.

<sup>117</sup> [2002] EWHC 2282 (Admin).

In the case of *Zehnalova v Czech Republic*<sup>118</sup> the positive obligations on a local authority under Article 8 were again considered. The local authority did not comply with local technical requirements which would have made public buildings and buildings open to the public accessible for people with impaired mobility. In this case Article 8 ECHR was found to entail a positive obligation on the authority to ensure that people with impaired mobility enjoyed adequate access to and use of public buildings but a breach of the article would only be found where there was a special link between the lack of access and the particular needs of the individual claiming a breach in respect of their private life. It would apply when the failure to carry out a positive obligation interfered with the complainant's right to personal development and to establish and maintain relationships with the outside world.<sup>119</sup>

Some other cases have raised essentially environmental issues under Article 8. For example, the duty of State bodies to protect home and private life under Article 8 were violated in the case of *Lopez-Ostra v Spain*<sup>120</sup> where a family were forced to move from their home as a result of smells and nuisance from a waste treatment plant.

The case of *Hatton v UK* in the Grand Chamber of the ECtHR had to decide whether in implementing a policy on night flights at Heathrow airport, a fair balance had been struck between the competing interests of the individuals affected by the night noise and the community as a whole. The ECtHR held that the economic value of night flights as part of the economic interest in maintaining a full service to London from distant airports was sufficiently important in the Government decision, and that within its margin of appreciation a fair balance had been struck.<sup>121</sup>

In *Geurra v Italy*<sup>122</sup> the ECtHR held that the direct effect of toxic emissions emanating from a chemical factory, which had resulted in one hundred and fifty families being hospitalised for arsenic poisoning, breached Article 8. In *Moreno-Gomez v Spain*<sup>123</sup> the failure by the State to tackle night-time noise disturbances caused by nightclubs breached the positive obligation to guarantee the applicants right to respect for her home as guaranteed by Article 8. In the case of *Fadeyeva v Russia*,<sup>124</sup> 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. However, 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.<sup>125</sup>

<sup>118</sup> ECtHR Admissibility Decision 38621/97, 14 May 2002.

<sup>119</sup> In this case the plaintiff did not establish such a link.

<sup>120</sup> (1991) 14 EHRR 319.

<sup>121</sup> (2003) 37 EHRR 28.

<sup>122</sup> (1998) EHRR 357.

<sup>123</sup> (2005) 41 EHRR 40.

<sup>124</sup> (2005) 45 EHRR 10.

<sup>125</sup> *ibid.*, para. 68.

The right to receive and impart information on environmental issues is protected by Article 10 ECHR. In *Steel and Morris v UK*<sup>126</sup> (the so-called *MacLibel* 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.

### Article 14 ECHR (Non-Discrimination) and Local Authorities

In *Larkos v Cyprus*<sup>127</sup> a tenant of the state enjoyed less security than he would have had under domestic law had he been a tenant of a private landlord. This engaged both Articles 8 and 14. The Court held that no reasonable and objective justification had been given by the State for not extending these protections to State tenants. In Ireland, local authorities are now using the Rental Accommodation Scheme (RAS), to meet their social housing obligations in line with the Housing (Miscellaneous Provisions) Act 2009, creating a different set of tenancy terms to their other (and current) social housing tenants. Both sets of tenants are subsidised by the State and in similar financial circumstances. Yet, RAS tenants have access to an independent and impartial body to deal with disputes — the Private Residential Tenancies Board, as well as increased security of tenure.<sup>128</sup>

Different treatment by local authorities in relation to same-sex and opposite-sex couples in the area of housing could possibly be in breach of Article 8 read with Article 14.<sup>129</sup> In *Mendoza v Ghaidan*<sup>130</sup> the UK Court of Appeal ruled that a same-sex partner of a deceased statutory tenant was entitled to succeed to a statutory tenancy and to treat him differently than a survivor of a heterosexual couple would be an impermissible discrimination under Article 14.<sup>131</sup> The definition of “private life” will have major implications in relation to family law tenancy agreements.<sup>132</sup>

### Article 1, Protocol 1 and Local Authorities

Local authorities are regularly involved in expanding and controlling the value of property through zoning, planning and compulsory purchase.<sup>133</sup> The issues arising under Article 1, Protocol 1 were considered in detail in the Article 26 reference of the Planning and Development Bill 1999.<sup>134</sup> The justification for State interference

<sup>126</sup> Application no. 68416/01. Judgment, 15 February 2005.

<sup>127</sup> (1999) 30 EHRR 597.

<sup>128</sup> See Housing (Miscellaneous Provisions) Act 2009, s 25. The same argument could apply to those social housing tenancies provided by Housing Associations which are 100% State capital funding.

<sup>129</sup> See Fergus Ryan, ‘Sexuality, ideology and the Legal Construction of ‘Family’; *Fitzpatrick v Sterling Housing Association*’, *I.J.F.L.* 3. pp. 2-9.

<sup>130</sup> [2002] EWCA Civ. 1533.

<sup>131</sup> See also *Wandsworth LBC v Michalak* [2002] EWCA Civ. 271.

<sup>132</sup> *Karner v Austria* (2004) 38 EHRR 24; *Dudgeon v UK* (1981) 4 EHRR 149; *Norris v Ireland* A 142 (1988)

<sup>133</sup> See for example The Land Clauses Consolidation Act 1845; Public Health (Ireland) Act 1878; Housing of the Working Classes Act 1890; Housing Act 1960; Local Government Act 2001, Section 21.

<sup>134</sup> *In re: Article 26: Part V, Planning and Development Bill 1999* [2000] 2 IR 321. [2001] 1 ILRM 81.



with property rights was set out in terms that were resonant with Convention requirements:

[I]t must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test.

- (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- (b) impair the right as little as possible; and
- (c) be such that their effects on rights are proportional to the objective.<sup>135</sup>

The level of compensation for compulsory purchase of land has been a regular source of legal challenge both on procedural grounds and in the assessment of the level of compensation.<sup>136</sup> The ECtHR in its consideration of Article 1, Protocol 1 distinguishes between deprivation of property and control on the use of property.<sup>137</sup> But modern governmental activity often involves only the imposition of restrictions on the free enjoyment of property rights. According to Gray:

It simply cannot be the case that all regulatory subtractions from a landholder's user rights necessarily constitute compensable deprivations of 'property'...The progress of civilised society would effectively grind to a halt if every minor regulatory act of the State provoked an immediate entitlement to a carefully calculated cash indemnity for the affected landowner.<sup>138</sup>

While there is, in theory, no explicit rule requiring compensation the question of whether or not compensation has been paid will generally be an important factor in the assessment of the proportionality of the interference with the property right in question.<sup>139</sup> There have been no cases in which the exceptional circumstances leading to failure to pay compensation for the interference with property rights have been justified.

In relation to controls on use, however, there is no equivalent presumption in favour of compensation. State action involving control on use does not, as a rule, contain any right to compensation. The ECtHR has held that controls on use which reduced the value of the applicant's freehold property without compensation was permissible,<sup>140</sup> as was the withdrawal of planning permission without compensation.<sup>141</sup> Problems arise when the State introduces regulatory measures

<sup>135</sup> [2001] 1 ILRM 81 at 110.

<sup>136</sup> See *Butler op. cit.*, Chapters 9 and 10. See also *Murphy v Dublin City Council* [1979] IR 115.

<sup>137</sup> Anderson, D. 'Compensation for Interference with Property,' (1999) EHRLR 543. See also *Former King of Greece v Greece* (2001) 33 EHRR 516.

<sup>138</sup> Gray, K. 'Land Law and Human Rights' in Tee, L (ed) (2002) *Land Law, Issues, Debates, Policy*. (Devon, Willan, 2002), p. 223.

<sup>139</sup> Anderson, *op. cit.* at 549. See also *James v United Kingdom* (1986) 8 EHRR 123.

<sup>140</sup> *James v United Kingdom* (1986) 8 EHRR 123.

<sup>141</sup> *Pine Valley Developments v Ireland* (1991) 14 EHRR 319.



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 and Lonnroth v Sweden*<sup>142</sup> the ECtHR accepted that a regulation on land use may constitute a *de facto* expropriation if it affects the substance of the property that takes away all its meaningful use. But, if the property or land can be used for any purpose, such as farming, then compensation for expropriation may not be payable.<sup>143</sup>

Of course, human rights protections under Article 1, Protocol 1 are not confined to those relating to land. There is a long line of ECtHR cases showing that entitlements to social assistance can amount to a property right engaging Article 1, Protocol 1.<sup>144</sup> Local authorities administering benefits and grants must, in accordance with Section 3 of the ECHR Act, operate in a manner compatible with the Article 1, Protocol 1, and regard such entitlements as “possessions” in certain cases. In the case of *Stretch v UK*<sup>145</sup> the notion of “possessions” included the tenant’s interest in the continuation of a tenancy. Once this pecuniary or possessory right is established then any interference with that right must satisfy the requirements of Article 1, Protocol 1, Article 6 ECHR and Article 14 ECHR.

### **ECHR Act cases involving Irish Local Authorities**

To date, there have been a small number of cases where local authorities have been found to be in breach of the ECHR Act.

In *Dublin City Council v Laura McGrath*,<sup>146</sup> the local authority sought to evict a tenant as part of the redevelopment of Ballymun. The High Court held that the protection afforded by the ECHR Act must be taken into account in an action for an injunction. In the case of *Dublin City Council v Jeanette Fennell*<sup>147</sup> the local authority had issued a Notice to Quit and obtained an order for possession in the District Court. Ms Fennell lodged an appeal to the Circuit Court on 23<sup>rd</sup> December 2003, before the ECHR Act came into force. She pointed out that the proceedings were in motion at the time of the Act’s coming into force on 30<sup>th</sup> December 2003. The Supreme Court held, unanimously, that the appeal to the Circuit Court, although consisting of a *de novo* hearing, did not exist in a vacuum.<sup>148</sup> Mr Justice Kearns, speaking for the Court, said:

The parties’ legal rights and obligations were, in my view, fixed and determined once the wheel was set in motion by the service of a Notice to Quit, an act which triggered the provisions, requirements and consequences of s. 62 of the Housing

<sup>142</sup> (1982) 5 EHRR 35.

<sup>143</sup> *Pine Valley Developments v Ireland* (1991) 14 EHRR 319.

<sup>144</sup> See, for example: *X v Sweden* (1986) 8 EHRR 252; *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* (2005) 40 EHRR 2 ECHR.

<sup>145</sup> (2004) 38 EHRR 12.

<sup>146</sup> [2004] IEHC 111; [2004] 1 IR 216.

<sup>147</sup> [2005] IESC 33.

<sup>148</sup> See *Outline Submissions made on behalf of the IHRC*, which acted as *amicus curiae* in the case on website: <http://www.ihrc.ie/documents>

Act, 1966. That is the moment when the invocation of legal rights determined the applicable law and the position of the parties.

However, while the substantive issue of the compatibility of the procedures under section 62 of the Housing Act, 1966 was not considered in the judgement, Mr Justice Kearns commented, *obiter*, that:

It goes without saying therefore that the position of the tenant of a housing authority compares unfavourably with that of a private law tenant under contract or under the Landlord and Tenant Acts, the Rent Restrictions Acts or a variety of other statutes. It may also be seen that the summary method whereby possession of such dwellings may be recovered, notably in circumstances where the tenant is regarded as having through misbehaviour brought about the termination of his own tenancy and thus forfeited the right to any alternative accommodation, may arguably infringe certain articles of the European Convention on Human Rights, and in particular, Articles 6, 8 and 13 thereof, and also Article 1 of Protocol 1 (Protection of property) of the Convention.

In *McConnell v Dublin City Council and others*<sup>149</sup> the High Court distinguished the statute and statutory framework of the Housing Act 1966 from the (UK) Caravan Sites Act 1968, where similar procedures had been found in breach of the ECHR in *Connors*.<sup>150</sup> In *Gifford and Another v Dublin City Council*<sup>151</sup> 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.<sup>152</sup>

In *Leonard v Dublin City Council*<sup>153</sup> the Council had included 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 instituted. 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 ECHR were satisfied since judicial review provided an adequate procedural safeguard.

In *O' Donnell v South Dublin County Council*<sup>154</sup> the judgment of Laffoy, J. considerably clarified the obligations of local authorities under the ECHR 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, sanitary facilities and central heating.

<sup>149</sup> [2005] IEHC 7.

<sup>150</sup> *Connors v UK* [2004] 40 EHRR 189.

<sup>151</sup> [2007] IEHC 387.

<sup>152</sup> However, in *Byrne v Dublin City Council* [2009] IEHC 122 an interlocutory injunction (with conditions as to the family members who could occupy the property) was granted by Murphy J. This restrained the local authority from implementing the warrant for possession already granted under Section 62 of the Housing Act 1966.

<sup>153</sup> [2008] IEHC 79.

<sup>154</sup> [2007] IEHC 204.

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. As noted above, Article 8 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 UK judgments in *R (Bernard) v Enfield LBC*<sup>155</sup> and *Anufrijeva v Southwark LBC*<sup>156</sup> which involved the provision of services to people with disabilities, and the Strasbourg judgment of *Moldovan v Romania*<sup>157</sup> in relation to the alleged breaches of Articles 3 and 8.

This case was distinguished on the facts from *Doherty v South Dublin County Council*,<sup>158</sup> where Charleton J refused to find a breach of the ECHR Act in circumstances where an elderly Traveller couple in poor health, living in a caravan with only basic electricity, no internal plumbing, toilet or central heating were refused a centrally heated, insulated and plumbed caravan. The elderly couple had refused an offer from the local authority of a two-bed roomed ground floor apartment.

Laffoy J considered that the level of disability and dependency of the children in the *O' Donnell* case, the degree of care and supervision they required, together with the appalling housing conditions and the meagre offer by the local authority distinguished the situation from the *Doherty* case.

While not finding a breach of Article 3, Laffoy, J did find a violation of Article 8, and 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.<sup>159</sup>

Thus, even in the absence of a statutory provision, there may still be a breach of an Article 8 right. She went on to state that if there was no relevant statutory protection, in certain circumstances such a lacuna could represent a failure on the part of the State and its organs to function in a manner compatible with Article 8 ECHR.<sup>160</sup>

<sup>155</sup> [2002] EWHC 2282 (Admin).

<sup>156</sup> [2004] 1 All ER 833.

<sup>157</sup> *Moldovan v Romania* (No. 2) (2007) 44 EHRR 16.

<sup>158</sup> [2007] IEHC 4.

<sup>159</sup> [2007] IEHC 204 at 41.

<sup>160</sup> *O' Donnell v South Dublin County Council* [2007] IEHC 204 at p. 44.

In *Donegan v Dublin City Council*<sup>161</sup>, the procedures under s 62 of the Housing Act 1966 were found to be in breach of Article 8. Laffoy J after considering the relevant Strasbourg case law, stated:

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.

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.<sup>162</sup>

The decision, which is clearly in line with *McCann v United Kingdom*,<sup>163</sup> found that the operation of s 62 the Housing Act 1966 in the manner impugned was incompatible with the ECHR. A declaration of incompatibility under s 5 of ECHR Act was made in this case and also in the case of *Dublin City Council v Gallagher*.<sup>164</sup> In the latter case, which again highlighted the incompatibility of the Housing Act 1966 with the ECHR Act, O'Neill, J found that the facts were analogous to *Donegan*.<sup>165</sup>

In the *Pullen v Dublin City Council*<sup>166</sup> the possession procedures under s 62 of the 1966 Housing Act were again found to breach Article 8 ECHR, contrary to s 3 of the ECHR Act. The interference was disproportionate as the local authority had available to it an alternative procedure to obtain possession under s 14 of the Conveyancing Act 1881. Had this procedure been utilised it would have provided the necessary safeguards under Article 8 ECHR while meeting the requirements of the local authority. The Court also found that the local authority failed to have regard to the plaintiff's rights under Article 6(1) ECHR in performing its functions as an organ of the State.

In March 2009, in a policy statement on housing, the Irish Human Rights Commission (IHRC) called for law reform based on ECtHR jurisprudence. It stated:

"... the IHRC recommends that the Government takes steps to remedy the current lack of protection of the rights of local authority tenants under Articles 6, 8 and 14 of the ECHR by amending the existing legislation. Pending the

<sup>161</sup> [2008] IEHC 288.

<sup>162</sup> [2008] IEHC 288.

<sup>163</sup> Application no 19009/04. Judgment, 13 May 2008.

<sup>164</sup> [2008] IEHC 354.

<sup>165</sup> [2008] IEHC 288.

<sup>166</sup> [2008] IEHC 379.

introduction of such legislation, the IHRC recommends that local authorities be advised by Government of their statutory obligations under section 3 of the ECHR Act 2003 and of the alternative legal mechanisms available to them in terms of possession proceedings.<sup>167</sup>

Clearly, the ECHR Act is already impacting on the activities of local authorities, in the area of housing. It remains to be seen how long it will take for the Act to impact on other areas of local authority activity.

### **Implementation at Policy Level — Effecting a Paradigm Shift**

The implementation of the ECHR Act, in the sense of giving life and meaning to the provisions of the ECHR, crucially depends on legal implementation, policies, guidelines and training.<sup>168</sup> But it also requires penetrating the internal world — in the institutional and administrative senses — of local government. Since these human rights norms can appear or be made to appear weaker than the prevailing cultural, political, social and managerialist norms, the ECHR Act will require significant emphasis and promotion to be made effective.

It is arguable that implementation of human rights generally has been retreating within the Irish State over the past ten years, despite the development of new institutions and a burgeoning literature on rights. This failure to advance rights-based approaches to public services may be partly attributable to the perspective of political organisations which, like certain charitable bodies, can view legally based entitlements as a threat to the agency relationship that they have fostered with people requiring their assistance.

At another level, perceptions and caricatures of egotism, elitism and intellectual arrogance in relation to human rights advocacy abound. Of course, patronising approaches by human rights advocates to public sector workers who often deal with hugely stressful demands on scarce resources or who are expected to resolve issues largely outside their control, does not advance the issue and can be counter-productive. Indeed, in the absence of any programmatic approach or training, the exposure by local authority staff to the ECHR Act has been mainly through cases of evictions of tenants. Perceptions may well emerge that the Act is being used to frustrate the professional efforts of local authority officials to manage local authority housing and that evictions for anti-social behaviour cannot be secured without engaging a vast array of due process rights. In this way local authority staff experience the ECHR Act in a negative manner from a narrow and threatening legal base. Of course, local authority tenants are entitled to the protections of the Convention but it may appear that that there is no opportunity within broader local government policy-making for the Convention's protections to be integrated meaningfully except in defending expensive and lengthy court cases. In many cases,

<sup>167</sup> See IHRC *Policy Statement on Section 62 of the Housing Act 1966 for the Recovery of Possession of a Local Authority Dwelling* — March 2009. Available at: <http://www.ihrc.ie/documents/documents.asp?NCID=2&L=1>.

<sup>168</sup> See *Human Rights – Improving public service delivery*. (UK Audit Commission Report, 2003), at p. 10.

a conservative political and social barrier exists, denying that people have enforceable human rights in their dealings with local authorities.

It would appear that no formal training has been provided for local authority staff in relation to their obligations under the ECHR Act to date. Equally, there seems to be little evidence that the Act has been considered in policy or decision-making at central or local government level almost six years after coming into force. In a clear illustration of the irrelevance of the ECHR Act to developing State policies on local government, the Green Paper published in 2009, *Stronger Local Democracy – Options for Change*,<sup>169</sup> failed to make any reference to the ECHR Act or, indeed, to human rights at all.

This situation can be contrasted with that in Northern Ireland, where the near equivalent UK Human Rights Act 1998 has prompted the development of a mechanism for human rights-proofing of policy and practice of State agencies.<sup>170</sup> A *Human Rights Act Impact Assessment Proforma* has been prepared which allows those preparing policies or proposals to consider whether and how these engage any of the rights in the HRA.<sup>171</sup> The question of how the policy or proposal interferes with or limits the right is then examined. The proposer must then identify who could be affected by the proposed interference or limitation and explain how they could be affected. The assessment then seeks to identify whether there is a law which allows the interference of the rights identified. Even if the interference or limitation in the policy or proposal is in accordance with law there are further conditions to be met such as demonstrating that it is justifiable as “necessary in a democratic society”. The *Impact Assessment Proforma* requires that the policy proposer identifies how the proposed interference or limitation is proportionate and whether the measure could be discriminatory in relation to the exercise of Convention rights.

Of course, successful legal challenges with all of their associated costs can result in occasional common law and legislative changes. Many human rights lawyers view successful litigation as a key driver of policy and legal change, but it can equally be argued that the narrow sets of circumstances upon which legal decisions are based neglects more fundamental or broader deficits requiring change. Individual cases do little to change the fundamental inequality, lack of social and economic resources and the lack of power or opportunities which often lie behind these cases, especially in the area of housing.

Human rights-based approaches have been promoted to integrate the language of rights into service delivery policies and practices,<sup>172</sup> but the major questions about

<sup>169</sup> Government of Ireland (2009) *Green Paper on Local Government -Stronger Local Democracy Options for Change*. Dublin: The Stationery Office.

<sup>170</sup> See *Getting in on the Act*. The Equality and Human Rights Unit, OFM/DFM, Northern Ireland. See website: <http://www.ofmdfmni.gov.uk/index/equality/human-rights.htm>

<sup>171</sup> The pro-forma is available at: <http://www.ofmdfmni.gov.uk/humanrightsproforma.doc>

<sup>172</sup> See Amnesty International Irish Section, *Building Ireland's Future: A Human Rights Handbook*, available at: <http://www.amnesty.ie/live/irish/article.asp?id=30296&page=00>

control of overall resource allocation in Irish society must also be considered. Of course, the State response the ECHR Act and other rights developments in the future may involve a superficial integration of the language of human rights into local authority and other policy documents, establishing an array of “participation”, “consultation” and “monitoring” mechanisms with selected individuals and groups, in a manner akin to the way the State has managed the social inclusion approach.

Judicial review is useful in identifying breaches of the obligations contained in the ECHR Act but its utility is limited by costs, delay and stress on litigants, not to mention reservations as to its ultimate impact in effecting systemic change. Authoritative research on the enforcement of legal obligations on local authorities through judicial review shows that it has minor or negligible impact on policies or procedures.<sup>173</sup> Indeed, a key issue is whether the ECHR Act will lead to any increase in human rights-consciousness, changes in the policies and practices of organs of the State, or just to a more defensive “bullet-proofing” of decisions.<sup>174</sup> The language of human rights can easily be appropriated within existing policies, procedures and recorded decisions without effecting any real paradigm shift.

## Conclusion

The ECHR Act has been in force for almost six years, and in many ways is the State’s best kept secret. Despite Francesca Klug’s assertion that human rights constitute “values for a godless age”,<sup>175</sup> the domestication of the European Convention on Human Rights raises major issues of implementation of human rights in Ireland today. The test of success in implementation is whether the human rights standards are adopted as authoritative by local authorities and officials in such manner that their practical actions and decisions are in compliance with the rights and freedoms set forth in the ECHR.<sup>176</sup> In other words, can those human rights norms replace existing norms and understandings within institutions of local government that constitute an obstacle to human rights?

<sup>173</sup> Hertogh and Halliday. (eds), *Judicial Review and Bureaucratic Impact* (Cambridge, CUP, 2004); Sunkin, Calvo, Platt and Landman, “Mapping the Use of Judicial Review to Challenge Local Authorities in England and Wales”, [2007] 77 *Public Law* 545. See also Sunkin, Calvo & Platt, “Does Judicial Review Influence the Quality of Local Authority Services?” The Public Services Programme. Discussion Paper Series: No. 0801. March 2008. ESRC, available at: [http://www.publicservices.ac.uk/wp-content/uploads/dp0801\\_final.pdf](http://www.publicservices.ac.uk/wp-content/uploads/dp0801_final.pdf).

<sup>174</sup> This is a practice where State agencies use legal knowledge to immunise their decisions against potential judicial scrutiny. See Halliday, S. *Judicial Review and Compliance with Administrative Law*. (Oregon, Hart Publishing, 2004), Chapter 3. The decision in *O’Keefe v An Bord Pleanála* [1993] 1 IR 39. almost encourages this approach, since including any relevant material as a basis for a decision will satisfy the requirements of judicial review.

<sup>175</sup> See Klug, F. *Values for a Godless Age*. (London, Penguin, 2000).

<sup>176</sup> Galligan, D. & Sandler, D. “Implementing Human Rights” in Halliday, S. & Schmidt, P. *Human Rights Brought Home; Socio-Legal Perspectives on Human Rights in the National Context*. (Oxford, Hart, 2004), p. 29.



To date, the ECHR Act has made little difference to local authorities beyond a few individual housing cases. Implementing human rights within Irish local government raises significant questions about the role, accountability and operational norms of the Irish State at local level. The ECHR Act awards only a limited number of civil and political rights, and as such is limited by the boundaries of legal liberalism. Of course, the diminution and degrading of the status, financial and other support for the public sector, within the current political system, creates enormous difficulties in developing any new approaches. However, the failure to implement even these limited rights effectively clearly demonstrates that the local element of the Irish State cannot promote rights-based empowerment and emancipation. Perhaps the potential of the ECHR Act will only be realised when its rights are successfully integrated into the political process.