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Legal Briefings

Travellers

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Legislation

Section 56 of the **Housing Act 1966** gave power to the local authorities to provide dwellings and it formed the basis of the legal duty under statute on local authorities to provide accommodation for Travellers for over twenty years.

However, the first Act referring directly to Travellers was the **Housing Act 1988** (HA 1988). Section 9(2) states that the housing authorities must have regard to the housing needs of certain categories of people, including Travellers, and must carry out an assessment of their needs every three years. This Act also initiated specific local authority obligations to make arrangements for the accommodation of a homeless person, give the person assistance, or arrange for accommodation or lodgings for him/her. Section 6 of the **Housing (Miscellaneous Provisions) Act 1992** (HA 1992) updates this assistance of local authorities to the homeless to include, among others, sites for caravans.

The most important Act in recent times concerning members of the Traveller Community is the **Housing (Traveller Accommodation) Act 1998** (HA 1998).¹ It amended section 13 of the HA 1988 by allowing the local authorities to provide and maintain residential caravan sites for Travellers and provide a wide range of support services. Travellers are described in the HA 1998 as those belonging to the class of persons who traditionally pursue or have pursued a nomadic way of life.

Local authorities are obliged to carry out an assessment of Traveller accommodation needs, and to draw up and adopt a new Traveller Accommodation Programme (TAP) every five years, which details these needs and how the local authority will address them. The local authority must take reasonable steps to ensure that the accommodation programme is implemented.²

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In making an assessment under the HA 1998, the local authority must take into account the need for halting sites in its *functional area* (the area it is responsible for). It may implement this by directly providing accommodation, assisting Travellers in the provision of accommodation (either by the local authority or a voluntary body), buying land for a halting site (plus the cost of construction to set up the site), or providing loans for the purchase of caravans and the repair of caravans. The local authority should manage, improve and control its site as well as carry out any works incidental to this duty, such as providing services to the site.³ It was held in *O'Reilly v Limerick County Council* that the County Council's development plan was incomplete as 'on its face' it did not include any intentions for the use of particular areas in providing Traveller accommodation.⁴

The local authority must also examine the need for transient sites, i.e. sites for Travellers with limited facilities for use other than where they normally live (or while waiting for permanent accommodation).⁵

A local authority must appoint a Local Traveller Accommodation Consultative Committee to advise on providing and managing the accommodation of Travellers. This also provides a forum for co-operation between Travellers, members of the local authority and the general public. Consultation with Travellers plays a central role in the preparation and implementation of the local accommodation schemes.⁶ The HA 1998 also provides for a National Traveller Consultative Committee to advise the Minister.

Section 24 of the HA 1998 deals with the powers of the Manager of a local authority in an emergency situation. The Manager must report to the elected members before any works are carried out or a commitment is made to expenditure. However, this section does not stop him/her from dealing without delay with an emergency situation, i.e. where the works concerned are urgent and necessary.⁷

The powers of the City or Council Manager in an emergency situation have been challenged on a number of occasions. In *Ward v Donegal County Council*,⁸ the applicants argued that the local authority had failed to consider their needs for accommodation in line with its statutory duties. While an accommodation programme under the HA 1998 had been drawn up, it could not be implemented since there was no specific provision for Traveller accommodation in the draft development plan. The court held that the County Manager had retained his emergency powers to provide emergency accommodation in breach of the development plan for the area, but the failure to consult with local residents made the emergency action unlawful.

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In *Byrne v Fingal County Council*,⁹ when using his emergency powers under the Traveller accommodation scheme, the County Manager also did not comply with a condition in the County's development plan that local communities be consulted in all Traveller accommodation projects. The court held that this amounted to a material contravention of the Fingal Development Plan.

The case of *Jeffers v Louth County Council* held that a county Council could not develop a proposed halting site¹⁰ unless and until, among other requirements, full and meaningful consultation had taken place with the public.¹¹

The local authorities have the power to evict Travellers from temporary halting sites. The **Local Government (Sanitary Services) Act 1948** allows the local authorities to make bye-laws to regulate the use of caravans in their functional area. It allows for prohibition orders to be made to prevent caravans being kept in certain areas where they cause a nuisance of some kind.

In *Listowel UDC v McDonagh*, the defendant challenged a bye-law by the Council prohibiting the erection of temporary dwellings. The court refused to accept that the Council was motivated by anti-Traveller bias when it made the bye-law in question as the Council had ample evidence to come to an informed opinion that the temporary dwellings in the area covered by the bye-law were unsanitary.¹²

The HA 1992 also allows local authorities to remove Travellers who are camped unofficially, to an official site anywhere within an 8km radius. This may occur where the housing authority believes that the site for the temporary dwellings is unfit for human habitation; is likely to interfere with services, either public or private; or may represent a large health or safety risk.

The **Roads Act 1993** provides that any person who parks a caravan on a national road, bus way, motorway or protected road shall be guilty of an offence. A Garda may remove the caravan, store it until claimed by its owner, or if it is not claimed after a period, it can be disposed of.

Section 24 of the **Housing (Miscellaneous Provisions) (No. 2) Act 2002** criminalises trespass on public land for the first time. It makes trespass on land with an 'object', a term which includes a caravan, a criminal offence. The provision empowers the Gardaí to ask a Traveller camped on public land to leave that land and remove all objects on the land immediately on foot of a complaint. If this is not complied with the individual is guilty of an offence and the Gardaí can confiscate and impound caravans and arrest a person without warrant.¹³

Case Law

The local authorities' obligations to Travellers have been examined on a number of occasions by the Irish courts. In *University of Limerick v Ryan*,¹⁴ the court said that the duty of the local authority under the HA 1998 to provide for the needs of Travellers extended to providing caravan sites, and not only dwellings or houses.

In *County Meath Vocational Education Committee v Joyce*,¹⁵ it was held that the local authority has a duty to provide for the needs of Travellers and this duty must be performed in a reasonable and rational manner and involve the adoption of a fair and coherent system of allocating housing/sites to persons included in the assessment of needs.

In recent years, many challenges have been taken by Travellers claiming that the local authority has failed to provide suitable accommodation and has breached its statutory duty under the Housing Acts. The case of *O'Donoghue v Limerick Corporation* concerned judicial review proceedings where the applicants claimed that the respondent was obliged to provide halting site accommodation.¹⁶ The applicants were moved to a halting site which was extremely unsuitable and unhygienic, with no facilities, and they therefore camped on an unauthorised site instead. They were offered housing accommodation by the local authority, which they refused.

The court agreed with the applicants and ruled that the local authority was obliged to provide Traveller accommodation under the HA 1998. While the court agreed that it did not have the power to order the provision of halting sites, the local authority here had determined its priorities (in its TAP) but had not made an attempt to meet these requirements. The applicants had a right to refuse housing accommodation rather than site accommodation. No evidence was given that the respondent was lacking resources to meet the urgent need of the applicants for a temporary site with limited facilities. The respondent had therefore failed in its statutory obligation to provide a site for the caravans of the applicants.

In *McDonagh v Clare County Council*,¹⁷ the requirement that Travellers live in the area of the Council to qualify for local authority housing was examined. It was held that the three-year residency requirement here was lawful, as long as it was not applied so strictly as to become a bar to considering an application for assistance.

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It also held that while the local authority is obliged to keep an open mind as to who is entitled to housing, it need not ignore forms of accommodation that were available to the applicant in the past. While the applicant may express a preference for a type of accommodation, there is no obligation to immediately provide this type of accommodation, as the local authority must also have regard to all other people who have housing needs.

In *Doherty & Anor v South Dublin County Council and Ors*¹⁸ Charleton J refused to find a breach of the ECHR obligations 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 of a two-bedroomed ground floor apartment.

However, in *O' Donnell v South Dublin County Council*¹⁹ Laffoy J found that there had been a breach of ECHR art. 8 obligations where the local authority had failed to provide a second caravan for three severely disabled Traveller children living in a mobile home on a temporary site. The Court ordered that the local authority provide a wheelchair accessible caravan, with indoor and wheelchair accessible shower, toilet, sanitary facilities and central heating. Laffoy J distinguished this case from *Doherty* on the grounds of the level of disability and dependency of the children, the degree of care and supervision required, and the appalling housing conditions in which they were living. The court held that even in the absence of a statutory requirement, a local authority may be found to have acted (or failed to act) in breach of art. 8. Balancing the general interest and the cost of providing this second mobile home at €58,000, the court felt that this did not impact on the economic well-being of the State. However, it was pointed out that this case did not lead to a requirement on the State to provide two de luxe mobile homes for every Traveller family.

In *Fingal County Council v Gavin*,²⁰ the local authority obtained an order restraining the defendant from trespassing on its land. The defendant counterclaimed their eviction on grounds that the local authority was in breach of its statutory duty to provide housing. The court rejected this argument as the plaintiff had in fact offered accommodation to the defendants. The reasonableness of the plaintiff's offer must be seen in the light of the scale of the problem – the extended Gavin family were a large family of eighty, and it was unreasonable to expect the authority to accommodate them all in a single unit (the plaintiff had offered separate sites). The defendants were not entitled to a veto on the form of emergency accommodation required.²¹

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It was not regarded as unjust or discriminatory that the plaintiff had adopted a policy that it would consider applications for Traveller-specific accommodation only from families indigenous to its functional area. The plaintiff was allowed a margin of appreciation in developing its housing policies, including Traveller families, within its functional area. (The ‘margin of appreciation’ is the leeway given by the ECtHR to the Contracting States when it decides whether there has been a violation of the ECHR).²² The fact that the authority must have regard to something in its accommodation programme does not mean that it must take particular steps in relation to it, but it must at least take the matter into account.

In *Gavin v Dublin City Council*,²³ the applicants followed the above ruling with an action against Dublin City Council for failing to provide them with group housing (the applicants were resident in the Dublin City Council area for many years before being forced out by another Traveller family). They claimed that the Council had made representations to them which caused them to expect that they would be provided with housing.

The court was of the view that there was not enough evidence that such a promise was provided giving rise to a legitimate expectation. It held that the respondents were obliged to take the Gavin family into account in preparing their Traveller Accommodation Programme 2005-08, which the evidence proved they did, even if not specifically. The applicants were therefore not entitled to relief.

In *Dooley v Killarney Town Council*,²⁴ the eligible applicants were offered and accepted halting bay accommodation (a chalet), which they argued was on the understanding that it would only be on a temporary basis. The applicants brought a case against the respondent, arguing that the Council had failed to provide them with suitable accommodation and had treated them unfairly due to the fact that they were Travellers.

The court held that the Council must implement the Traveller Accommodation Programme with the sources available to it. Very clear evidence of inactivity by the Council is required before the courts will find a breach of statutory duty to implement the programme.

The court did state, however, that the programme must not be merely aspirational and that the Oireachtas intended that meaningful steps be taken with the available resources to implement it. It does not follow that there is a breach of this statutory duty simply because at the end of the programme’s life there were some families, included in the programme, who had not by that time been accommodated, as may have been planned for. Unforeseen circumstances may arise such as the available financial resources, or emergency situations, e.g. a fire.

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The court ruled that it must always be the case that the Council makes an allocation based on the greatest need, which is not the same as the basis of the length of time on a housing list.

The court also stated that it could not accept the fact that the additional accommodation provision available to Travellers (halting site accommodation) which is unavailable to the settled community constitutes unlawful discrimination against Travellers.

Conclusion

The local authority's housing duties, according to case law, can be summarised as follows:

- The Traveller Accommodation Programme must set out the Council's intentions for Traveller accommodation. There must be proper consultation with Travellers and the general public before a Traveller Accommodation Programme is adopted.
- The local authority is afforded some leeway when developing its housing policies. The courts have recognised that there is a limit to any housing authority's financial resources and available land, and do not impose an undue burden on them. Sometimes this can conflict with individual needs expressed in terms of rights.
- While Travellers are entitled to halting site accommodation and the applicant may express a preference for a type of accommodation, there is no obligation to immediately provide this type of accommodation, as the local authority must also have regard to all other people who have housing needs. There is no veto on the form of emergency accommodation required. Allocation depends on the greatest need, and not the length of time on the waiting list.

Notes

- 1 For a more detailed examination of the 1998 Act, see G. Simons, 'Planning and Travellers: Housing (Traveller Accommodation) Act 1998' (1998) 5(3) *Irish Property and Environmental Law Journal* 98; T.J. McIntyre, 'The Housing (Traveller Accommodation) Act 1998: An Overview' (1999) 4(3) *Conveyancing and Property Law Journal* 57, which deals with the planning aspects of the Traveller Accommodation Programmes.

- 2 For a more detailed analysis of Traveller Accommodation Programmes and what should be included therein, see National Traveller Accommodation Consultative Committee, *Review of the Operation of the Housing (Traveller Accommodation) Act 1998* (NTACC, June 2004), pp. 21ff; Department of the Environment, Heritage and Local Government, *Memorandum on the Preparation, Adoption and Implementation of Local Authority Traveller Accommodation Programmes 2009-2013* (Stationery Office, August 2008). For criticism of the lack of progress with TAPs, see National Travellers Women's Forum, *Submission to the National Traveller Accommodation Consultative Committee* (ITM, November 2007); Irish Traveller Movement, *Discussion Document Progressing the Provision of Accommodation to Facilitate Nomadism* (ITM, November 2007).

- 3 T. Robinson, 'Planning and Development of Halting Sites' (2007) 14(1) *Irish Planning and Environmental Law Journal* 14, at 15.

- 4 Unreported, High Court, 29 March 2006, McMenamin J. Another case which concerned a failure to deliver on the commitments of the TAP was *Carthy and Ors v Kildare County Council*, unreported, 1 May 2005, High Court. For summary, see A. Nolan, 'Litigating Housing Rights: Experiences and Issues' (2006) 13(1) *DULJ* 145, at 148.

- 5 The Government has issued some guidelines on the matter; see Department of the Environment, Heritage and Local Government, *Guidelines for Accommodating Transient Traveller Families* (Stationery Office, 1998). Other Guidelines include, DoELG, *Guidelines for Residential Caravan Parks for Travellers* (Stationery Office, 1998); DoELG, *Guidelines for Traveller Accommodation, Basic Services and Facilities for Caravans Pending the Provision of Permanent Accommodation* (Stationery Office, 1998).

- 6 For more detail on the method of consulting Travellers for the TAP, see Consultation Working Group, *Final Draft Report: Guidelines on Consultation Mechanisms Concerning a Traveller-Specific Accommodation Project* (National Traveller Accommodation Consultative Committee, April 2008); Irish Traveller Movement, *Submission to the Development of the Traveller Accommodation Programme 2009-2013* (ITM, 2008), at 4.

- 7 See E. Hughes, 'The Provision of Emergency Accommodation for Travellers' (2000) 5(4) *Conveyancing and Property Law Journal* 90.

- 8 Unreported, High Court, 30 November 2000, Ó Caoimh J.

- 9 [2002] 2 *ILRM* 321. Unreported, High Court, 2 August 2001, McKechnie J.

- 10 Unreported, High Court, 19 December 2003, Gilligan J.

- 11 For more on *Jeffers, Byrne, O'Reilly and Ward*, see T. Robinson, *op cit*, note 3, pp.16-7;19-20. See also E. Hughes, *op cit*, note 7; and P. Kenna, *Housing Law and Policy in Ireland* (Clarus Press, 2006), pp. 96-7.

- 12 [1968] *IR* 312. See G. Whyte, *Social Inclusion and the Legal System* (Institute of Public Administration, 2002), at 220.

- 13 See *A Briefing Document on the Housing (Miscellaneous Provisions) Act 2002* (ITM, 2003); D. Joyce, 'The Historical Criminalisation of Travellers in Irish Law' (2003) 13(4) *IJL* 14, pp.18-9; S. Airey, 'Go, Move, Shift: Travellers, the Housing (Miscellaneous Provisions) Act 2002 and the European Convention on Human Rights – Contravention or Permissible Criminalisation?' *Thesis at National University of Ireland, Galway*. There is much discussion of changes in the law and the ostracism of Travellers or 'Gypsies' in the UK; see S. Spencer, 'Gypsies and Travellers: Britain's Forgotten Minority' (2005) 4 *European Human Rights Law Review* 335; *Report by Mister Alvaro Gil-Robles on his Visit to the UK* (2005) 41 *EHRR* SE9; J. Richardson, 'Talking about Gypsies: the Notion of Discourse as Control' (2006) 21(1) *Housing Studies* 77.

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- 14 Unreported, High Court, 21 February 1991, Barron J. For detailed consideration, see G. Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA, 2002), pp. 227-8.
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- 15 (1997) 3 IR 402.
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- 16 (2003) 2 IR 93.
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- 17 (2002) 2 IR 634, [2003] ILRM 36.
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- 18 (2007) IEHC 4.
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- 19 (2007) IEHC 204.
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- 20 Unreported, 14th December 2007, High Court, Peart J.
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- 21 For a summary of the case, see ILT, "Digest of Legislation and Superior Court Decisions" (2009) 27 *Irish Law Times* 37, at 43.
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- 22 Taken from B. Tobin, 'EB v France: Endorsing Un-"Convention"-al Families?' (2008) 11(4) *Irish Journal of Family Law* 78, at 78.
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- 23 Unreported, 10 June 2008, High Court, Peart J.
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- 24 Unreported, 15 July 2008, High Court, Peart J.

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