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John O'Reilly and Others v Limerick Corporation, Minister for the Environment, Minister for Health, Minister for Education, Ireland and the Attorney General

1987 No. 10319

High Court

3 May 1988

[1989] I.L.R.M. 181

(Costello J)

3 May 1988

Constitution—Housing—Members of the traveller community—Unauthorised sites—Whether defendant corporation under a statutory duty to provide serviced sites for plaintiffs—Whether Minister under statutory duty to provide such sites—Whether State under a constitutional duty to provide such sites—Whether court jurisdiction to entertain a claim for damages for alleged breach of constitutional duty—Mandatory injunction—Duty of corporation to review its building programme so as to include proposals for provision of serviced sites—Constitution of Ireland—Housing Act 1966 (No. 21) ss. 53, 54, 56, 58, 60, 111.

Facts

The plaintiffs were members of the traveller community residing in caravans on unofficial sites in the city of Limerick in conditions of considerable poverty and deprivation. They did not desire to be rehoused by the corporation but what they needed were sites with hard surfaces on which their caravans could be placed, toilet facilities, running water and a regular refuse collection. They sought a mandatory injunction directing the corporation to provide them with adequate serviced halting sites, claiming that the corporation had a duty to do so under the Housing Act 1966. They also claimed that the State should pay them damages for past sufferings which they had undergone. This latter claim was based on an allegation that the conditions which the plaintiffs had been required to endure amounted to a breach of their constitutional rights.

Held, by Costello J refusing to grant an order directing the defendant corporation to provide serviced sites, rejecting the plaintiffs' claim for damages but granting a declaration that the defendants were obliged to review the building programme:

> (1) The Housing Act 1966 does not impose a duty upon a housing authority to provide serviced halting sites. The Act does impose a duty to 'prepare' and adopt a 'building programme', but does not oblige an authority to give effect to every proposal contained in a programme which they had adopted.
> (2) If the existence of special needs for serviced sites was established, then the Housing Authority was under a duty to include proposals to meet those needs if (a) the authority's financial resources would permit the work to be carried out, (b) the sites were available, (c) the sites were suitable, and (d) the provision of the sites would not conflict with other statutory duties of the corporation or other statutory objectives laid

down in the Act.
(3) After a programme had been adopted, if it is established that there are housing needs in the area in respect of which no proposals are made, the authority has a duty to review its programme and vary it by the insertion of proposals to remedy these needs subject to the above-mentioned conditions.
(4) In seeking damages, the plaintiffs claimed that they had a constitutional right to be provided by the State with certain physical resources and services. For a court ***182** to adjudicate on this claim, it would have to consider the fairness of the manner in which the organs of the State had administered public resources. The courts, however, were a wholly inappropriate institution for the fulfilment of this role and were not empowered by the Constitution to make the adjudication sought by the plaintiffs.

Cases referred to in judgment

McDonald v Feely Supreme Court, 1980 No. 196, 23 July 1980
McNamee v Buncrana UDC [1983] IR 213; [1984] ILRM 77

Representation

Dermot Kinlen SC, Mary Robinson SC and Michael Fitzgibbon for the plaintiffs
Daniel O'Keeffe SC and Michael McMahon for the first-named defendant
Fergus Flood SC and Donagh McDonagh for the second-to sixth-named defendants

O'HANLON J

delivered his judgment on 3 May 1988 saying: The plaintiffs are members of the traveller community residing in caravans on unofficial sites in the city of Limerick. They and their children (of which there are 150 under the age of 16) live in conditions of great poverty and deprivation. They have no running water or toilet facilities; no hard surface on which to place their caravans; no means for storing their domestic refuse and no service for its collection. They are the persons referred to by the city manager in a report to the city council of 4 December 1987 as 'living in totally unacceptable conditions without basic facilities'.

The plaintiffs' wants are comparatively modest. They do not demand that they be rehoused by the corporation; what they need are serviced halting sites, that is, sites with hard surfaces on which their caravans could be placed, toilet facilities, running water and a regular refuse collection. Their principal claim is for a mandatory injunction directing the corporation to provide such sites claiming that the corporation have a duty to do so under the Housing Act, 1966. Their second principal claim is that the State should pay them damages for the suffering, inconvenience and mental distress which they have undergone, a claim based on an allegation that the conditions which they have been required to endure amounted to a breach of their constitutional rights.

The plaintiffs are, as I have said, travellers. It is accepted by all the parties to these proceedings that this is an identifiable group in Irish society and for the purposes of these proceedings I will use the phrase as it was defined in the Report of the Travelling People Review Body of February, 1983 in which (at paragraph 1.6) members of the traveller community are described as

> an identifiable group of people, identified both by themselves and by other members of the community (referred to for convenience as the 'settled

> community') as people with their own distinctive life style, traditionally of a nomadic nature but not now habitual wanderers. They have needs, wants and values which are different in some ways from those of the settled community. More than half of those in the group now have a place to live either in houses or on serviced sites. Some take to the road occasionally or seasonally. The majority of those not yet provided with accommodation desire a fixed place of abode, and many of them are, in fact, encamped in locations with reasonable permanence. However, there is still a substantial number of transient families.

There is another part of this report which is relevant to these proceedings. The ***183** opinion of the review body was that the vast majority of traveller families wished to be accommodated in houses, but its report went on to point out that

> There is, however, a considerable number whose long-term accommodation needs cannot be met by housing, especially families who have spent so much of their lives on the road that the transition to housing would be too difficult for them and who wish to spend the remainder of their lives in caravan dwellings.

These families had special needs and the report recommended (paragraph 10.0) that

> serviced sites for their caravans must be provided for such families as an alternative to housing.

This recommendation is important and relevant to the issues in these proceedings. The evidence in the case established that the corporation did in fact offer to re-house some of the plaintiffs and would if required re-house them all (a fact which distinguishes this case from McDonald v Feely Supreme Court 1980 No. 196, 23 July 1980). But the evidence also establishes that the plaintiffs' claim that they are part of that minority of the traveller community whose housing needs cannot be met by housing is accepted by the corporation and it is one of the striking features of this case that both the city manager and city council have acknowledged that these plaintiffs have special needs which are different to those of the members of the settled community or indeed to some other travellers.

The sequence of events which led up to the institution of these proceedings can be briefly re-told. Five of the plaintiff families (identified in the helpful report prepared for these proceedings by Mr Gordon the social worker employed by the Limerick Corporation to care for the needs of travellers) have been living in caravans for upwards of eight years on a site owned by Limerick Corporation on Childers Road near its junction with the main Dublin Road. They have been there illegally and as trespassers. As a result of commercial development at

the junction and attendant traffic problems it was decided to build a roundabout at the junction. The plaintiffs' caravans directly impeded the proposed works. Apprehensive as to what was to happen to them they instructed a solicitor to look after their interests. He threatened injunction proceedings unless the corporation provided an alternative serviced site for his clients. Negotiations to this end fell through (mainly as a result of successful picketing by residents living in the vicinity of the proposed new site). When it became apparent that matters were reaching a crisis point these proceedings were instituted at the end of last year. At the hearing of a motion for interlocutory relief a without-prejudice agreement resulted in the plaintiffs moving their caravans away from the proposed road works. These plaintiffs still, however, maintain their claim for an injunction to restrain their removal from the site until adequate alternative serviced sites have been provided for them. They have been joined in this action by the other members of the traveller community, although it is accepted that no immediate threats to remove any of the plaintiffs from their unofficial sites have been made, other than those on the Childers Road site to which I have referred.

I now turn to deal with the steps taken by Limerick Corporation to provide in its functional area serviced halting sites for members of the travellers community.

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In 1970 a policy to provide halting sites was approved by the city council and three sites were nominated, one at Clonglong, one at Rhebogue and one at Watch House Cross. Eight mobile homes were installed, four at Clonglong and four at Rhebogue and a terrapin building put up at Watch House Cross. The eight mobile homes quickly deteriorated and the building at Watch House Cross was destroyed by fire. In 1974 a policy to provide durable homes at the halting sites was approved and four bungalows were built on the Rhebogue site, two at Clonglong and two at Watch House Cross. As a result there were no official sites available on which travellers could place their caravans. In 1980 a proposal was made to consider the provision of three further sites but this came to nothing. In June 1983 the Conference of St. Martin of the Society of St. Vincent de Paul became involved. At its request the Limerick Council of Trade Unions organised four meetings at which the problems of accommodating travellers was discussed. In 1984 the Conference organised another meeting on the subject and as a result a working party was set up to prepare a detailed report on the matter. An official of the Corporation as well as representatives of the travellers, the Limerick Council of Trade Unions, the Society of St. Vincent de Paul and a representative of the diocesan Catholic clergy and a member of the Salesian Sisters comprised the working party. Its report, a model of its kind, proposed an action plan of two phases, one containing proposals for immediate action and the second proposals for action in the medium term. In relation to existing unofficial sites it recommended the immediate provision of water, sanitary facilities, and the provision of skips for domestic refuse and the provision of animal enclosures. In connection with phase two it recommended in relation to the forty families which it identified as in need of special help that ten serviced sites should be provided. It pointed to the existence of six sites which could be made available immediately.

In 1986 the city manager brought the subject formally before the city council in a report headed 'Report on Travelling Families in Limerick City and County'. He pointed out that Limerick Corporation was the statutory authority responsible for the re-settlement of the travelling people, that the corporation in acknowledging this responsibility had adopted a three pronged approach (1) the allocation of corporation dwellings, (2) the provision of dwellings on designated sites and (3) 'the provisions of approved halting sites', adding that although there had been considerable success in the implementation of its policies 'it is fair to say that its endeavours to date in relation to the provision of purpose built dwellings and halting sites has been less than satisfactory'. The city council acknowledged the special needs of the travellers in a motion which it passed in April 1986 which approved in principle the establishment of eight serviced halting sites within the city boundary, two for each ward, to facilitate the accommodation of travellers who did not wish to be accommodated in conventional local authority housing. But nothing happened to give effect to this resolution. However, at a meeting of the council on 7 September 1987 the council agreed that the city manager would meet the members of the council on a ward by ward basis to seek agreement on eight suitable places for the location of halting sites.

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The ward meetings met with only limited success. On 15 September the members of Ward 4 agreed to the provision of one site on the Dock Road near the racecourse. A meeting of the representatives of Ward 1 was held the next day but adjourned without a decision. A meeting of the representatives of Ward 3 on 21 September agreed to an additional site adjacent to the Industrial Estate at Clonglong. Meetings of the representatives of Ward 2 were adjourned without decision on three different occasions. Eventually a joint meeting of the representatives of Wards 1 and 2 agreed on a site at Cooperage 'subject to acceptance of the local residents and the St. Mary's RFC.' The city council discussed the subject again on 13 January of this year (after these proceedings had been instituted) and it then formally nominated three sites for use as halting sites. Only two of these, however, are presently in the ownership of the council.

Limerick Corporation, like other housing authorities, is under statutory duty to adopt a building programme and to review it from time to time and it is relevant to record that the last programme adopted by its council was in 1985 and that whilst it contained proposals for the erection of dwellings in the year 1985 and the following years to 1989, it contained no proposals for the provision of serviced halts for travellers. It is, however, also relevant to note that when it had prepared and adopted this programme the working party had not yet issued its report on the special needs of the travellers in the area and the need for serviced sites was not as clearly established as it was later to become.

The evidence establishes the following facts:

(a) Limerick Corporation has acknowledged that it has the statutory responsibility and power to provide serviced halting sites for members of the travelling community.

(b) In 1986 both the city manager and the city council acknowledged that there were members of the travelling community in their functional area who had special housing needs and that to meet them serviced halting sites should be provided. It was then acknowledged that the provision of eight sites would be required to meet those special needs.

(C) Steps have been taken to provide only two serviced sites. Priority in the provision of serviced sites will be given to the plaintiffs on the unofficial site at the junction of Childers Road and the Dublin Road.

(d) The needs of something less than half of the plaintiffs in these proceedings will be met by the provision of two sites.

The Housing Act 1966

To succeed in their main claim in this action the plaintiffs have to establish (a) that Limerick Corporation as a housing authority under the Housing Act 1966 has a duty (as distinct from a statutory power exercisable at its discretion) to provide them with halting sites and (b) that this is a proper case in which the court should make a mandatory order directing them to carry out that duty. They rely principally (but not exclusively) on s. 55 of the Act. Examination of their claim involves however a consideration of most of Part III of the Act and to that I will now turn.

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Part III of the Act is entitled 'Provision and Management of Dwellings'.

S. 53 is the first section to impose in this part a *statutory duty* on the corporation; as a housing authority it is under a duty to *inspect* houses in its functional area and having regard to the information which it receives to *assess* the adequacy of the supply of housing and the future demand for housing and to *report* thereon. S. 54 also imposes a statutory duty, that is a duty at specified times to *prepare and review* the costs of its housing services. S. 55 again imposes statutory duties on the corporation this time in relation to what is called a 'building programme'. As this section is crucial to the issues in this case I must quote it in full.

The first subsection imposes a duty to prepare a building programme in the following words:

> Subsection (1).
>
> It shall be the duty of a housing authority, within such period after the commencement of this section as may be specified by the Minister and thereafter either at least once in every five years or at such intervals, being less than five years, as the Minister may direct from time to time, to prepare and adopt a programme (in this Act referred to as a building programme) setting out the works which they propose to undertake having regard to the housing needs of their functional area.

I draw attention to the fact that the duty is to *prepare* and *adopt* a building programme, and that in carrying out this duty it is to have regard to the 'housing needs' in its functional area.

The second subsection sets out what the building programme is to contain. It reads:

> Subsection (2).
>
> A building programme shall be in such form as the Minister may from time to time direct and shall include the proposals of the housing authority, as respects the period to which the programme relates, for the provision of houses, amenities, buildings and *other land together with the ancillary works or services to be provided in connection therewith* , together with the proposals of the authority for the assistance of persons providing houses for their own occupation, and for the execution of repair works, together with such other information as the Minister may require, and the housing authority may, if they think fit, include in the programme, an order of priorities relating to any one or more of the following:
>
> (a) particular projects;
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> (b) projects in particular areas;
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> (c) *projects to provide housing accommodation for particular categories of persons* .

I have drawn attention (by underlining) to the words 'other land together with the ancillary works or services to be provided in connection therewith' because a question to which these words are relevant arises as to whether the building programme which a housing authority is required to prepare and adopt may contain proposals for the supply of serviced halting sites, and I have also underlined for the same purpose the words in sub-paragraph (c) which indicate that projects to provide housing accommodation for particular categories of persons may be given priority in the programme. The third subsection places a duty on the housing authority to have regard to certain objectives when carrying out its duty in preparing a building programme. It reads:

> Subsection (3):
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> In preparing a building programme, a housing authority shall have regard to the following ***187*** objectives:
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> (a) the repair, closure or demolition of houses which are unfit or unsuitable for human habitation;
>
> (b) the elimination of overcrowding;
>
> (c) *the provision of adequate and suitable housing accommodation for*

persons (including elderly or disabled persons) who, in the opinion of the authority, are in need of and are unable to provide such accommodation from their own resources ;

(d) the provision of adequate housing accommodation to meet needs arising from the obsolescence of dwellings or the prospective increase in the population;

(e) the provision of adequate and suitable sites for building purposes;

(f) the securing of the objectives contained in a development plan under the Local Government (Planning and Development) Act, 1963, for the area which comprises or includes, as the case may be, the functional area of the authority;

(g) the encouragment by the authority of the provision by persons of houses for owner-occupation by the owner or for letting.

I have underlined the sentence contained in sub-paragraph (c) of this subsection again because it is relevant to the issue as to the contents of the programme. I have quoted the entire subsection in full to draw attention to the wide range of matters to which a housing authority must have regard when preparing its programme.

Subs. (4) places a further duty on housing authorities, this time to review their building programmes. It reads:

Subsection (4):

Where a housing authority have prepared and adopted a building programme they shall review the programme from time to time as the *Minister or occasion may require* and make in it and adopt any variation which they consider proper.

I have underlined the words 'as the Minister or occasion may require' to draw attention to the fact that a statutory duty to review a building programme arises not only if the Minister directs that it be done but also if circumstances require it to be done.

The last subsection imposes the duty of adoption and review of a building programme on the city council of a local authority which is a housing authority. It reads:

Subsection (5):

The adoption under this section of either a building programme or a variation in a building programme shall each be a reserved function.

The sections which follow s. 55 are all permissive in form. S. 56 provides that a housing authority 'may erect, acquire, purchase, convert or reconstruct, lease or otherwise provide dwellings (including houses, flats, maisonettes and hostels) and such dwellings may be temporary or permanent'. And s. 56(2) provides that a housing authority 'may, in connection with dwellings provided, to be provided or which … will in the future require to be provided … provide … other buildings or land and such other works or services, as will … serve a beneficial purpose either in connection with the requirements of the persons for whom the dwellings are provided or in connection with the requirements of those persons and of other persons'. S. 57 enables housing authorities to provide sites for building purposes, s. 58 deals with the management of houses provided by a housing authority, s. 59 with the definition of 'dwelling' in the Local Government (Rates on Small Dwellings) Act 1928 and s.60 ***188*** with the duties of housing authorities in relation to priorities in lettings. As some reliance has been placed on this latter section I should examine it briefly. It imposes a statutory duty on housing authorities to make at specified times 'a scheme determining the priorities to be accorded to categories of persons specified in the scheme in the letting of dwellings provided by the authority under this Act and of which they are the owner', and the remaining subsections make more detailed provisions for such matters as the Minister's role and the matters to which regard is to be had when preparing a scheme. The remaining two sections of this part are not relevant to the issues in this case.

I must, however, refer to s. 111 because part of the claim against the Minister for the Environment is based on that section. It is a section dealing with a situation in which the Minister forms the opinion that a housing authority has failed to perform any of its functions under the Act. When he reaches such a conclusion then he *may* (and I underline the word 'may') by order require the authority to perform the function and the manner and time in which the function is to be performed. What I am required to consider is whether I can order the Minister to exercise his s. 111 powers, Limerick Corporation having failed, it is claimed, to exercise its statutory functions in regard to the plaintiffs' needs.

I have the following comments to make of these sections.

Firstly, I think it is relevant in construing the duties imposed and the powers granted to bear in mind the overall objectives which the Act was designed to achieve, and in this connection I draw attention to what the Chief Justice said in McNamee v Buncrana UDC [1983] IR 213, at 217:

> The Housing Act 1966, was a major legislative measure aimed at tackling, in a planned manner, the persistent problem of bad and inadequate housing — not only in the large centres of population but throughout the country. It envisaged the launching of a new and sustained housing drive, financed by loans and grants-in-aid to local bodies and handled by these bodies, as housing authorities, under the supervision of the Minister concerned.
>
> An examination of part III discloses the thinking policy behind the Act. In the

first place, the magnitude of the problem was to be assessed by an inspection by each housing authority of all the houses in its functional area. This was to be done in accordance with a time scale specified by the Minister and was aimed at ascertaining in each area the existing extent of poor housing and overcrowding. In the second place, housing authorities were required to review the cost of their existing and proposed building programmes so that the Minister could be fully informed as to existing or contemplated expenditure. It was further required that all housing authorities should draw up long-term building programmes, having regard to the ascertained needs in relation to housing in their functional areas. These needs were to be considered in relation to the replacement of unsuitable houses, the elimination of overcrowding, and the number of persons unable to provide for themselves; and housing authorities were to have regard to various other social objectives set out in s. 55, sub-s. 3, of the Act.

Secondly, I cannot accept the argument that a *duty* to provide serviced halting sites is to be found in s. 55. The section imposes a duty to *prepare* and *adopt* a 'programme', but does not contain any power to carry it out. It is, as the Chief Justice observed in McNamee, an important part of the machinery for the achievement of the overall objectives of Part III of the Act, but it would be quite inconsistent with the general statutory scheme to suggest that each housing authority was obliged by law to give effect to every proposal contained in the ***189** programme they had adopted. The power to give effect to its programme, which as the Chief Justice pointed out, is subject to ministerial approval, is to be found in s. 56. Counsel for the Minister accepts that this section is broad enough to empower the provison of serviced halting sites by housing authorities but as it is permissive only it cannot be relied on by the plaintiffs to support a claim for an order to the housing authority to supply serviced halting sites if no provision for them is contained in their building programme.

Thirdly, I cannot accept the argument that a duty to provide serviced halting sites is to be found in s. 60. This is a secton exclusively relating to schemes of priorities for the *letting of dwellings* of which the housing authority is owner and it does not contain any reference to the duty which the plaintiffs assert has been imposed on Limerick Corporation by the statute.

Fourthly, it seems to me that s. 111 is merely an enabling section and does not impose any duty on the Minister which the court could order him to perform. The Minister has, I would have thought, evidence on which he could come to the conclusion that Limerick Corporation has failed to perform the function of fulfilling the housing needs of members of the traveller community in its functional area because of the failure to provide serviced halts but this Court has no power to order him to come to such a conclusion or to exercise the undoubted powers which the Oireachtas bestowed on him to deal with the very situation which has occurred in this case.

I now come, fifthly, to some further conclusions on the Corporation's s. 55 powers and duties

which are relevant to the present claims and relate to the adoption of building programmes.

(a) A question arises under the section as to whether the Corporation in preparing and adopting a building programme under the section is *empowered* to include in it proposals for the provision of serviced halting sites. I think it is. Subs. (2) makes specific reference to proposals for the provision of land together with ancillary services and to priorities to be given in its proposals to projects for housing accommodation for particular categories of persons. Although the main programme will be concerned with the provision of dwelling houses, bearing in mind (i) the provisions of subs. (2) and (ii) the duty under subs. (3) to have regard to the provision of adequate housing accommodation for persons in need of such accommodation and who are unable to provide it from their own resources it seems to me that the section would allow a housing authority to make such proposals in its building programmes.

(b) The next question that arises is whether there are circumstances in which it can be said that a housing authority is under a *duty* to include in its building programmes proposals for the provision of such sites. A housing authority is under a duty to have regard to the provision of suitable housing accommodation for persons who are in need of it and who are unable to provide it from their own resources. If therefore it is established that there are a group of persons whose need is for housing accommodation in caravans which are situated on serviced sites because their needs cannot be met by the provision of ordinary dwelling houses ***190** then the housing authority must have regard to the needs of those persons. This does not mean that having considered them they may then ignore them. Bearing in mind the overall objectives of the statute it seems to me that once the existence of the special needs to which I have referred is established then the housing authority is under duty to include proposals to meet those needs in its building programme if the following conditions exist—

> (i) that financial resources would permit the work involved in the proposals to be carried out;
>
> (ii) that sites are available, that is that they are either in the possession of the Corporation or are capable of being acquired by them;
>
> (iii) that the sites are suitable bearing in mind the reasonable needs of the travellers and the reasonable needs of members of the settled community, as well as the responsibilities and duties of the Corporation as planning authority in the area;
>
> (iv) that the provision of serviced sites would not conflict with the achievement of other statutory objectives laid down in the Act or other statutory duties of the Corporation which in their opinion should reasonably take precedence.

(c) And a further question arises as to whether there are circumstances in which a housing

authority is under a duty to *review* a building programme already adopted so as to include in it proposals for the provision of serviced halting sites. There is a *duty* to review a programme if the Minister should so require. But there is also a *duty* to review should circumstances so require, and it seems to me that if after a programme has been adopted it is established that there are housing needs in the corporation's functional area in respect of which no proposals are made in an existing programme then, unless those needs are being met informally and by some other means the authority is under a duty to review its programme and vary it by the insertion of proposals to remedy these newly ascertained needs once the conditions mentioned at (b) can be shown to exist.

I must now apply the conclusions I have reached concerning the duties of the corporation to review their building programme under s. 55 to the facts of this case.

Firstly, it has not been established that in 1985 when the corporation adopted its building programme under the section that it was then under a duty to include in it proposals for the provision of serviced halting sites. It would be a mistake to minimise the extent of the problems involved in adopting the proper policies to meet the needs of the traveller community. At the time the Corporation were prepared to offer travellers housing accommodation in their housing estates and had had considerable success in settling members of the traveller community who wished to settle in the community. The working party had not yet reported and the special needs of the group of travellers living in their functional area were not then clearly established. But, secondly, the situation after the programme had been adopted changed materially. The city manager recognised that special housing needs existed which could only properly be met by the provision of serviced sites and he drew attention to these needs in his report of 1 October 1985. The city council acknowledged the existence of these special needs in April 1986 and considered that eight sites should be provided to meet them, but took no decision as to where those sites should be. Since 1986 therefore the Corporation has recognised the existence of the plaintiffs' special housing needs. Do the conditions now exist which ***191** give rise to a statutory duty to review the building programmes? I think they do.

(a) Financial considerations permit its review in the manner suggested in that the Minister is prepared to give a 100 per cent grant to the corporation towards the provision of serviced sites. (b) There are sites available and (c) There are suitable sites available in their functional area. I think these conclusions (b) and (c) are warranted by the fact that the working party was able to identify the existence of at least six sites. The city manager strongly urged the provision of an adequate number of sites and he would not have done so had suitable sites not existed. And by its decision to provide eight sites the city council acknowledged that it was probable that that number of sites could be provided. (d) It has not been suggested that the provision of sites would in any way conflict with any other duties which the Corporation may have either as planning authority or otherwise. In my opinion, therefore, the city council is under a statutory duty under the section to review its building programme, less formal steps to meet the housing needs of the traveller community having failed.

Whilst the plaintiffs are not entitled to an order directing the Corporation to provide them with serviced sites they are entitled to a declaration that the defendants are obliged to review the building programme adopted by the council in 1985 and to vary it so as to include proposals relating to the work it proposes to undertake to provide serviced sites for the members of the travelling community in its functional area. It has not been established to my satisfaction that I should make a mandatory order in this connection as I cannot assume (a) that the city council will neglect to perform the statutory duty which has now been shown to exist or (b) that if it should fail to do so that the Minister would not exercise his s. 111 powers in the light of the court's order. I will, however, adjourn the application for mandatory relief and give liberty to the plaintiffs to apply.

Before leaving the Housing Act there is one further issue in relation to it to which I should refer. The report of the working party recommended in relation to existing unofficial halting sites that improvements should be made by the provision of a water supply of *potable* water, and the provision of temporary-type water closets, the provision of a skip to hold domestic refuse and arrangements for regular removal of refuse and the provision of an animal enclosure. The recommendation was in line with the review body's report. It was urged on the plaintiffs' behalf that pending the development of serviced sites the Corporation was under a statutory duty to make such provision and that I should order it to do so. I can find nothing in the 1966 Act from which such a statutory duty can be inferred and I have not been referred to any other statutory provision which would justify the order which the plaintiffs seek. At the same time I should make it clear that if the corporation is empowered to provide such facilities (as they accept they are) then it could do so in respect of unofficial sites without prejudicing in any way its claim that the plaintiffs are trespassers on them or its rights to recover possession of them. If I am asked to make a declaratory order to that effect I will hear submissions on the matter.

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The claim for damages

The plaintiffs' claim for damages is not based on an allegation that they suffered loss due to past breaches of the corporation's statutory duty, but that they are entitled to damages against the State for past breaches of their constitutional rights. It is this part of the plaintiffs' claim that I must now turn to consider.

As I understand the plaintiffs' argument it is this. Each individual in society requires a certain minimum standard of basic material conditions to foster and protect his or her dignity and freedom as a human person; the right to be provided with these conditions is one of the unenumerated personal rights embraced by Article 40.3.2° of the Constitution; the State's duty to respect and as far as practicable to defend and vindicate this unenumerated right has been broken by permitting the plaintiffs to live in conditions without water and sanitary services, and the plaintiffs are entitled to damages for this breach. It is further submitted that damages can be claimed under Article 41.2. By virtue of this sub-article the State is under a duty to protect the family in its constitution and authority and it is urged that there is implied

in this obligation a right that the State will provide to each family certain minimum standards of basic material conditions to sustain the constitution and authority of the family, that each member of a family is entitled to the benefit of this right and that by permitting each of the families in which each of the plaintiffs are members to live in conditions without water and sanitary services the State has committed a wrong which entitles each plaintiff to recover damages. I decided that I should hear legal submissions before hearing evidence in relation to these issues. Should I conclude the legal issues in the plaintiffs' favour it would then be necessary to hear each individual plaintiff so that a proper award of damages could be made.

An analysis of these claims can begin by pointing to the jurisdiction which they require the court to exercise. In actions where plaintiffs assert that they enjoy a consitutionally guaranteed right which is not explicitly enumerated in the Constitution the court is asked to determine either that the asserted right is an 'unspecified right' within the meaning of Article 40.3.1° or that it is a right which can be inferred from a textual analysis of some other article. In both instances it will be submitted that either the asserted right is one of those basic human rights which inhere in the citizen because of the particular concept of man enshrined in the Constitution or because it is one of those fundamental civil or social rights which inhere in the citizen by virtue of the particular political regime which the Constitution has established. Usually the claim relates to a wrongful interference in some activity which the plaintiff seeks to protect. In this case an entirely different kind of claim is advanced; the court is asked to consider a claim that the plaintiffs have a constitutionally protected right to be provided by the State with certain physical resources and services. As all rights which are constitutionally protected involve correlative constitutionally-imposed duties it will help an analysis of the validity of their claim if I look at the duty correlative to the asserted right. It will be then seen that what is involved in the plaintiffs' case is an assertion that the State has a duty to provide them with the resources and services they lack and the ***193** adjudication the court is asked to make is that the State has failed in that duty and to award damages because of it. That this claim raises a problem concerning the court's jurisdiction is, I think, tacitly accepted by the plaintiffs' advisers. The claim for mandatory relief is based on an allegation of breach of statutory duty but although a breach of constitutional duty is also alleged no claim for mandatory relief based on such breach is advanced. This seems to me to imply an admission that the court would not have jurisdiction to make such an order and to raise the question why if the court lacks jurisdiction to make a mandatory order for the present breach of a constitutional duty it has jurisdiction to award damages for past breaches?

Whilst the matter was not broached in argument I will assume for present purposes that if the plaintiffs' claim is sustainable that they are entitled to damages for what they have suffered over the past six years. It is relevant then to point out that if the court has jurisdiction to entertain the present claims then it must have jurisdiction to entertain similar claims not only on behalf of the 150 children of the plaintiffs now living in similar conditions to those of the plaintiffs but also claims by the travellers on the roadside on unofficial and unserviced sites elsewhere throughout the State (numbering 1,149 families in 1980 according to the Report of

the Travelling People Review Body). And if the court has jurisdiction to adjudicate on a claim by travellers that the State has breached a duty to make adequate provision for their welfare there is no reason why it should not have jurisdiction to entertain similar claims by other deprived persons in our society. To take but two examples; it is a notorious fact that there are many homeless people who have not even a caravan in which to live and whose needs have not been met by any State authority, and it is well established that there are many young people whose lives are in danger of being permanently blighted because the educational and welfare services available are not adequate for their needs. It is certainly at least open to argument that the personal freedom and dignity of which the Constitution speaks cannot be adequately achieved without the provision of certain basic services for (a) the homeless and (b) deprived young people. If this is so and if the plaintiffs are right then the court has jurisdiction to entertain a claim (a) that the State was under a duty to provide services for the homeless and deprived young persons which they reasonably require; (b) that the State had breached that duty; and (c) to order that damages by way of compensation be paid them. I would agree that in a case such as the present one the floodgates argument is somewhat suspect and I am not employing it; I am merely pointing to the nature of the jurisdiction the plaintiffs say the courts can exercise. The question raised by their claim is this; can the courts with constitutional propriety adjudicate on an allegation that the organs of Government responsible for the distribution of the nation's wealth have improperly exercised their powers? Or would such an adjudication be an infringment by the courts of the role which the Constitution has conferred on them?

It will, I think, help to answer these questions if I refer briefly to certain aspects of the traditional academic distinction which is made between the two different types of justice which should exist in a political community, distributive justice and ***194** commutative justice and to the different concepts involved in this distinction. There is an important distinction to be made between the relationship which arises in dealings between individuals (a term which includes dealings between individuals and servants of the State and public authorities) and the relationship which arises between the individual and those in authority in a political community (which for convenience I will call the Government) when goods held in common for the benefit of the entire community (which would nowadays include wealth raised by taxation) fall to be distributed and allocated. Different obligations injustice arise from these different relationships. Distributive justice is concerned with the distribution and allocation of common goods and common burdens. But it cannot be said that any of the goods held in common (or any part of the wealth raised by taxation) belong exclusively to any member of the political community. An obligation in distributive justice is placed on those administering the common stock of goods, the common resource and the wealth held in common which has been raised by taxation, to distribute them and the common wealth fairly and to determine what is due to each individual. But that distribution can only be made by reference to the common good and by those charged with furthering the common good (the Government); it cannot be made by any individual who may claim a share in the common stock and no independent arbitrator, such as a court, can adjudicate on a claim by an individual that he has been deprived of what is his due. This situation is very different in the case of

commutative justice. What is due to an individual from another individual (including a public authority) from a relationship arising from their mutual dealings can be ascertained and is due to him exclusively and the precepts of commutative justice will enable an arbitrator such as a court to decide what is properly due should the matter be disputed. This distinction explains why the court has jurisdiction to award damages against the State when a servant of the State for whose activity it is vicariously liable commits a wrong and why it may not get jurisdiction in cases where the claim is for damages based on a failure to distribute adequately in the plaintiffs' favour a portion of the community's wealth.

I must of course apply the law of the Constitution to the plaintiffs' claims and if there was anything in the Constitution which would require me to ignore the principles which I have just outlined I should have to do so. But there is not; indeed I think they accord well with the constitutional text. The State (against whom damages are sought) is the legal embodiment of the political community whose affairs are regulated by the Constitution. The powers of Government of the State are to be exercised by the organs of the State established by it. The sole and exclusive power of making laws for the State is vested in the Oireachtas; the executive power of the State is exercised by or on the authority of the Government; and justice is to be administered in courts established by law. In relation to the raising of a common fund to pay for the many services which the State provides by law, the Government is constitutionally responsible to Dail Eireann for preparing annual estimates of proposed expenditure and estimates of proposed receipts from taxation. Approval for plans for expenditure and the raising of taxes is given in the first instance by Dail Eireann and later by the Oireachtas by the enactment of the ***195*** annual Appropriation Act and the annual Finance Act. This means that questions relating to raising common funds by taxation and the mode of distribution of common funds are determined by the Oireachtas, although laws enacted by the Oireachtas may give wide discretionary powers to public authorities and public officials (including Ministers) as to their distribution in individual cases. It is the Oireachtas or officials acting under the authority of the Oireachtas which under the Constitution determine the amount of the community's wealth which is to be raised by taxation and used for common purposes and the Oireachtas or officials acting on its authority determine how the nation's wealth is to be distributed and allotted. The courts' constitutional function is to administer justice but I do not think that by exercising the suggested supervisory role it could be said that a court was administering justice as contemplated in the Constitution. What could be involved in the exercise of the suggested jurisdiction would be the imposition by the court of its view that there had been an unfair distribution of national resources. To arrive at such a conclusion it would have to make an assessment of the validity of the many competing claims on those resources, the correct priority to be given to them and the financial implications of the plaintiffs' claim. As the present case demonstrates, it may also be required to decide whether a correct allocation of physical resources available for public purposes has been made. In exercising this function the court would not be administering justice as it does when determining an issue relating to commutative justice but it would be engaged in an entirely different exercise, namely, an adjudication on the fairness or otherwise of the manner in which other organs of State had administered public resources. Apart from the fact that

members of the judiciary have no special qualification to undertake such a function, the manner in which justice is administered in the courts, that is on a case by case basis, make them a wholly inappropriate institution for the fulfilment of the suggested role. I cannot construe the Constitution as conferring it on them. So I must hold that I am not empowered to make the adjudication which the plaintiffs ask me to make. I should add that I am sure that the concept of justice which is to be found in the Constitution embraces the concept that the nation's wealth should be justly distributed (that is the concept of distributative justice), but I am equally sure that a claim that this has not occurred should, to comply with the Constitution, be advanced in Leinster House rather than in the Four Courts.

I must conclude therefore that I cannot award damages to the plaintiffs.

Representation

Solicitor for the plaintiffs: Shaun Elder
Solicitor for the first-named defendant: Michael O Floinn
Solicitor for the second to sixth-named defendants: Chief State Solicitor

Shane Murphy Barriser