Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

Clare County Council v. McDonagh

On appeal from: [2020] IECA 307

The Supreme Court has today allowed an appeal brought against a decision of the Court of Appeal to affirm High Court orders made which required the appellants to remove, without delay, their caravans, property and associated vehicles from land owned by the respondent County Council. The effect of today's decision is to discharge the mandatory interlocutory orders granted by the High Court.

Composition of Court

Dunne, O'Malley, Baker, Woulfe, Hogan JJ

Background to the Appeal

The appellants are members of the Traveller community who have been subject to numerous proceedings brought by the respondent County Council in respect of the unlawful occupation of various sites owned by the County Council. The appellants had previously resided as tenants of the respondent County Council in a Traveller-specific housing development known as Ashline between March 1998 and November 2012. After a fire destroyed the Ashline site, the appellants lived in privately-rented accommodation until September 2017. The appellants thereafter lived on certain lands owned by the respondent on and around the Ashline site. The site subject to these proceedings is situated in Folio 50734F at Cahercallamore.

The High Court granted the respondent's application for interlocutory relief. The Court of Appeal dismissed the appellants' subsequent appeal. The Court of Appeal held that the appellants had not shown that their caravans, vehicles and associated property constituted a "home" within the meaning of Article 8 of the European Convention on Human Rights so that a judicially-conducted proportionality analysis was not required. The Court placed particular emphasis on the fact that the caravans had not been in their current location sufficiently long to satisfy the "close and continuous links" test set out in the European Court of Human Rights decision in *Winterstein v. France* [2013] ECHR 984.

Judgment

The Supreme Court allowed the appeal, with all of the judges agreeing that the High Court and Court of Appeal had erred in holding that the appellants had not raised a fair case in the context of an interlocutory injunction.

Reasons for the Judgment

In the only judgment in this appeal Hogan J first considered the fact that the appellants had exclusively relied on Article 8 ECHR (which guarantees "respect" for the home) before the High Court and Court of Appeal. Hogan J held that the High Court and the Court of Appeal were not entitled to approach this matter without regard to and engaging with the corresponding constitutional provision, Article 40.5, which guarantees the "inviolability" of the dwelling. This is because the ECHR does not enjoy the same status enjoyed by EU law in domestic law by reason of Article 29.4.6 of the Constitution. Hogan J drew attention to earlier case-law of the Supreme Court which had held that the ECHR does not enjoy direct effect in Irish law and that it had been enacted at sub-constitutional level by the European Convention of Human Rights Act 2003. So far as the present appeal was concerned, Hogan J held that this meant that Article 40.5 could not "be treated as if it did not exist": it must be "properly considered and addressed." Any other conclusion would mean, in effect, that the courts had yielded a sort of constitutional primacy to the ECHR so that it thereby acquired a form of quasi-constitutional status which it has never been accorded.

Hogan J considered next whether the appellants had raised a fair case as to the existence of a "dwelling" for the purposes of Article 40.5 of the Constitution or a "home" for the purposes of Article 8 ECHR. In the first instance Hogan J emphasised that while a "home" under Article 8 ECHR requires an occupier to show "close and continuous links" with a specific place, it is sufficient in respect of a "dwelling" under Article 40.5 for a person simply to show that they reside in a specific place. In the present appeal Hogan J held

not only that the caravans and mobile homes occupied by the appellants were clearly "dwellings" for the purposes of Article 40.5, since it is a place where, as a matter of fact, they actually reside, but also that the Court of Appeal were wrong to consider that the appellants had not also raised a fair question as to whether the caravans and mobile homes constitute a "home" under Article 8 ECHR. On this latter point Hogan J noted that the current site of the appellants' caravans and mobile homes is only about 1km away from the Ashline site where the appellants had previously resided for some years. In these circumstances Hogan J held that it is least arguable that the appellants can satisfy the "specific and continuous links" test articulated by the European Court of Human Rights in *Winterstein*.

Hogan J then considered whether the appellants had an arguable case that the removal of their caravans mobile homes, and associated property by mandatory interlocutory order would be disproportionate in the circumstances, a question a court is obliged to consider in circumstances where the loss of one's "dwelling" or "home" is at stake. From the outset it is recognised that the determining question is the extent to which those who unlawfully occupy land can enjoy either constitutional or ECHR protection. On this critical issue Hogan J held that, following the decision of the Supreme Court in *Meath County Council v. Murray* [2017] IESC 25, it can be said that those who unlawfully occupy land or engage in unauthorised development can still enjoy constitutional (and, following *Winterstein*, ECHR) protection. He pointed out, however, that in such circumstances the force of that protection is greatly diluted, such that there very much remains a presumption in favour of enforcement of planning laws and the granting of an order pursuant to s. 160 of the Planning and Development Act 2000 restraining unauthorised use of those lands. This being so the next question considered by the Court was whether this presumption may be discharged in the particular circumstances of this case, particularly in light of the decision of the European Court of Human Rights in *Winterstein*, which was not referred to in *Murray*.

The first point that was emphasised is that this case involved an application for a mandatory interlocutory injunction, a kind of relief that should be a stepping stone towards a trial and not, in practice, treated as a means of obtaining a summary judgment. In conducting a proportionality analysis, therefore, in the context of a mandatory interlocutory order, a court need only be persuaded that there are factors that exist that raise a fair question as to whether such an order would be disproportionate. In this case Hogan J considered that there were several such factors. The first was that the application concerned the rights of a vulnerable minority group who have struggled for recognition of their cultural identity and way of life, particularly as it fits in with planning law and land use. The second critical factor was that this case concerned an application brought by a Council in its role as a landowner and planning authority. In this respect it is noted that the appellants raised an arguable point that the Council had failed in its duty as a housing authority to offer suitable accommodation to the appellants, having regard in particular to Ms. McDonagh's medical needs and the fact that accommodation previously offered had raised "compatibility issues". The final factor emphasised by Hogan J was that if a mandatory interlocutory injunction were to be granted, the appellants would have nowhere else to go without necessarily trespassing on the lands of another party.

Drawing the threads of these points together, Hogan J concluded that while a Council would normally be entitled to orders restraining trespass and/or the unauthorised use of their lands under s. 160 of the 2000 Act, in the particular circumstances of the present appeal, the appellants had raised fair arguments by way of defence at this juncture. He accordingly held that a mandatory interlocutory injunction should not be granted. Hogan J, however, also noted that this decision might have been different had the unlawful occupation and unauthorised development posed any immediate threat to the amenities of others, public safety or any other similar pressing consideration. He also noted that if the situation had involved a purely private party, as opposed to a public authority, then the case for granting interlocutory relief would have been almost unanswerable. The County Council, however, was not such a party, and therefore different considerations had to be taken into account in determining whether to grant such relief.

Note

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Case history

16th December 2021	Oral submissions made before the Court
[2021] IESCDET 100	Supreme Court Determination granting leave
[2020] IECA 307	Judgment of the Court of Appeal (subject to appeal)
[2019] IEHC 662	Judgment of the High Court