

**The European Convention on Human Rights Act, 2003
Five Years On**

**The Use of the ECHR Act in the Courts to Assist
the Vulnerable and Disadvantaged**

Michael Farrell, Solicitor, Free Legal Advice Centres

To many people the European Convention on Human Rights may seem to be primarily about criminal law and rather bizarre privacy claims by the rich and famous. What can it do for the vulnerable and disadvantaged? Not forgetting, of course, that many of the people involved in the criminal justice and prisons systems are also vulnerable and disadvantaged, but I want to concentrate here on the non-criminal law dimension of the Convention.

Human rights are often divided into first and second generation rights. First generation rights are civil and political rights like fair trial, freedom of the press and the right to vote. Second generation rights are economic, social and cultural rights.

The European Convention on Human rights was drafted as a charter of first generation, or civil and political rights but the distinction is artificial and increasingly unworkable in modern society where every area of life is governed by laws and regulations. The European Court of Human Rights (the Strasbourg Court) has been struggling with this question in recent years and has delivered a number of judgments that have broadened the interpretation of the Convention to include protection for the disabled, the homeless and the destitute.

Every so often the Strasbourg Court pulls back a bit from this expansive approach but there has been a significant development of what one might call “protection creep” over the last number of years. This has been increasingly reflected as well in the decisions of the UK courts in the ten years since the European Convention was brought into UK domestic law by the Human Rights Act, 1998, during which period it has had a major impact on the whole legal system.

The effect of the Convention has been less noticeable here, partly because it has only been “incorporated” for five years now, and because there seems to have been more resistance to it by the judiciary here than in the UK.

But a trickle of decisions relying on the Convention has begun to come through here as well and they show signs of having been influenced by the more socially engaged views of the Strasbourg Court in recent years.

The key provisions of the Convention from the point of view of vulnerable and disadvantaged people are Articles 3 (prohibition of torture, inhuman or degrading treatment); Article 6 (right to a fair hearing/trial); and Article 8 (respect for private and family life and home).

(I have not listed Article 14 (prohibition of discrimination) here because it is not as effective as it should be. It is limited to prohibiting discrimination in relation to other Convention rights and generally plays only a secondary role. A new Protocol to the Convention (Protocol 12) creates a free-standing prohibition on discrimination by public bodies on a wide range of grounds. It would potentially be more effective but neither Ireland nor the UK have ratified it.)

The Strasbourg Court has widened the meaning of Article 8 to include protection of personal dignity, bodily integrity and personal autonomy. It has broadened the meaning of degrading treatment under Article 3 to include treatment that involves severe hardship and deprivation.¹ And it has also expanded Article 6 to require fair procedures in administrative decisions concerning housing, social welfare and other benefits as well as actual trials. The Court has held as well that Articles 3 and 8 can in certain circumstances impose positive obligations on public authorities to avoid inhuman or degrading situations or destitution from occurring.

This expanded view of the Convention's provisions by the Strasbourg Court is important because Section 3 of the European Convention on Human Rights Act, 2003 (the ECHR Act) requires all organs of the State to perform their functions compatibly with the Convention and Section 4 of the Act requires courts here to take account of the judgments of the Strasbourg Court when interpreting and applying Convention provisions.

There is one other, rather technical, but important way in which the Convention may influence decisions here that affect service provision. The main method of challenging administrative decisions in this jurisdiction is by Judicial Review, but the courts here have taken a very restrictive view of their role in Judicial Review applications. The classic position is that Judicial Review concerns the procedure for taking decisions, not the merits of the decisions themselves, unless they are completely outlandish.²

¹ See *Pretty v United Kingdom* 35 EHRR 1, 33, paragraph 52

² See *O'Keeffe v An Bord Pleanala* [1993] 1 I.R.

The Strasbourg Court takes a different view when reviewing claims that Convention rights have been violated. Some Convention rights, e.g. Article 8 (but not Article 3) are not absolute and may be restricted to protect the rights of others. But in considering whether such restrictions are justified, the Strasbourg Court is not confined to checking whether the proper legal forms have been observed. It considers whether the interference with the right in question is proportionate in the circumstances. It is arguable that in judicially reviewing administrative decisions, at least where Convention rights are at issue, the courts here will now have to consider proportionality as well as procedure. This would lead to a more thorough and searching scrutiny of decisions involving Articles 3 and 8 of the Convention in particular.

We have time now only to consider a few examples of cases dealing with the rights of vulnerable people.

Two of the small number of cases in this jurisdiction where breaches of the Convention have been found so far have concerned Traveller families in the South Dublin County Council area. Both families were called ***O'Donnell*** and both cases involved disabled family members living in severely overcrowded and unsuitable mobile homes.

In the first case³, decided in 2007, Judge Mary Laffoy found that the Council had breached the Article 8 rights of three severely disabled members of the family by not providing or helping them to obtain a second, properly adapted mobile home to ease the overcrowding and provide proper facilities for the disabled family members. The case was decided on the disability issue,

³ Mary O'Donnell (a minor) v South Dublin County Council [2007] IEHC 2004

rather than because the family were Travellers. However, there had been some suggestion that the Council might provide the family with a house rather than mobile homes, and the Judge took note of a number of decisions of the Strasbourg Court that indicated that there was an obligation on public authorities to respect the Traveller way of life and that where they qualified for publicly provided accommodation, it should be provided in a form acceptable to them.⁴

In the second Traveller case,⁵ decided in January 2008, Judge John Edwards held that the same Council was in breach of Article 8 by not providing the family, who had a daughter with cerebral palsy, with more suitable accommodation. He did not, however, specify that the accommodation provided should be in a second mobile home.

On the other hand, there have been other cases about Traveller accommodation recently where the courts have held that there was no breach of the European Convention. In one case an elderly couple in poor health lived in a mobile home in very poor condition and in another case a family were removed from an unauthorised site but the council involved did not provide any alternative site for them to go to.⁶

The critical point in the cases that succeeded was the presence of disabled family members, but these cases also leave open the question of local authority responsibility where the conditions in which non-disabled Travellers are living reach or approach the level of degrading treatment under Article 3 of the Convention (see the discussion of the *Limbuela* case below). And the

⁴ Buckley v UK (1996) 23 EHRR 101; Chapman v. UK (2001) 33 EHRR 399; Connors v. UK (2004) ECHR 223

⁵ Mary O'Donnell v South Dublin County Council, 1339JR/2006, 11 January 2008

⁶ Doherty & Another v. South Dublin County Council [2007] IEHC 4; Lawrence v. Ballina Town Council, 5813P/2003, 31 July 2008

successful cases of course indicate that other disabled persons living in severely sub-standard public authority housing could also assert their right to appropriate and suitable accommodation. This has been successfully done in the UK, notably in the case of *Bernard v. Enfield Borough Council*.⁷

In another accommodation case in this jurisdiction recently (*Donegan v. Dublin City Council*),⁸ Judge Laffoy granted a declaration that a section of the law allowing councils to evict tenants for anti-social behaviour was incompatible with Article 8 of the Convention. Section 62 of the Housing Act, 1966 gives a person who is threatened with eviction no opportunity to challenge the allegations against him/her before a court or impartial tribunal. The judge held that this was disproportionate where the applicant stood to lose his home.

Unfortunately, a declaration of incompatibility under Section 5 of the ECHR Act does not change the law and people can still be lawfully evicted under this procedure despite Judge Laffoy's decision. However, it seems likely the law will be amended in this instance to avoid a clash with the Strasbourg Court which reiterated the need for fair procedures where someone's home is at risk in the case of *McCann v United Kingdom*⁹ in May of this year. Hopefully, from now on people who are wrongly accused of anti-social behaviour and threatened with the loss of their homes will have a chance to put their side of the story before a court or a proper tribunal.

⁷ R (Bernard) v. London Borough of Enfield [2002] EWHC Admin 2282

⁸ Donegan v. Dublin City Council & Others [2008] IEHC 288

⁹ McCann v. United Kingdom, Application No. 19009/04, 13 May 2008

So far, the cases referred to have all been in the High Court and are liable to appeal. However, there has been at least one case where the Supreme Court has held that there was a breach of the convention. It was in the related cases of *Oguekwe* and *Dimbo v. Minister for Justice, Equality and Law Reform*.¹⁰ The Supreme Court upheld the quashing of deportation orders made by the Minister against foreign nationals who were parents of Irish citizen children. The reason for quashing the orders was that the Minister had failed to give specific consideration to the rights of the Irish citizen children under the Convention and the Constitution.

This case might have succeeded under the Constitution alone but the obligation on the Minister under Section 3 of the ECHR Act to take account of the Article 8 rights of the children must at the least have reinforced the court's views on the Constitutional position as well.

The circumstances of the *Oguekwe* and *Dimbo* decisions were very particular to those cases and the IBC05 scheme under which the parents had applied to remain in Ireland. They are unlikely to be repeated, but the decision will hopefully be authority for arguing that in any other decisions that affect the rights of children, there is an obligation to give specific consideration to the Convention and Constitutional rights of the children as well as their adult family members.

I would also like to mention here a UK case which could have important implications for this jurisdiction as well.

¹⁰ *Oguekwe v. Minister for Justice, Equality & Law Reform* [2008] IESC 25; *Dimbo v. Minister for Justice, Equality & Law Reform*, [2008] IESC 26

The UK Nationality, Immigration and Asylum Act, 2002 provides that if asylum-seekers did not make their asylum claims as soon as practicable after arriving in the UK, they would be deprived of all state support or benefits unless this would lead to a breach of their rights under the European Convention.

In the *Limbuela* case in November 2005 the House of Lords considered what would constitute a breach of the prohibition of inhuman or degrading treatment under Article 3 of the Convention. Lord Bingham, giving the lead judgment, said: “A *general public duty to house the homeless or provide for the destitute cannot be spelled out of Article 3. But I have no doubt that the threshold may be crossed if a late applicant [for asylum] with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life.*”¹¹

The House of Lords held that, in the circumstances, withholding benefit from the applicant would involve a breach of his rights under Article 3 and so payment should be restored. Lord Bingham and his colleagues were influenced by the fact that asylum-seekers in the UK, as in this jurisdiction, are not allowed to work, with the result that if the state withdrew its support, they were left penniless and unable to support themselves.

¹¹ R (Limbuela) v Secretary of State for the Home Department [2005] UKHL 66. Lord Bingham went on to say: “It is not in my opinion possible to formulate any simple test applicable in all cases. But if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would in the ordinary way be crossed.”

The *Limbuela* decision, with its definition of what constitutes degrading treatment and its acceptance that the state had a responsibility to intervene to prevent Mr Limbuela and others from complete destitution and having to sleep in the streets, would be relevant to asylum-seekers expelled from direct provision – and was cited in a recent case involving someone in that situation, which was quickly settled. And by analogy, it could be applied to migrant workers who lose their jobs or become undocumented, or other people in situations of destitution if it could be shown that public authorities had contributed to their situation.

The last case I want to mention is that of *Lydia Foy*¹², which was taken by Free Legal Advice Centres (FLAC). It dealt with the rights of transgendered persons, a small and vulnerable group with very little public awareness, never mind support, for their situation. It is a good example of added value from the ‘incorporation’ of the European Convention.

FLAC had already taken the Foy case – it began in 1997 – to the High Court prior to the passing of the ECHR Act, 2003. It had failed in the High Court based on antiquated legal precedents from Victorian times which could not envisage the possibility of gender change or realignment. However, two days after judgment was given in the High Court here in 2002, the Strasbourg Court found the UK in breach of the Convention because of its failure to recognise the acquired gender of two transgendered UK citizens.¹³

Before the passing of the ECHR Act, the decisions of the Strasbourg Court would have had no direct or binding effect on the courts in this jurisdiction. However, once the ECHR Act came

¹² *Lydia Foy v. An t-Ard Chlaraitheoir & Others* [2007] IEHC 470

¹³ *Goodwin v. UK* (2002) 35 EHRR 18; *I v. UK* [2002] ECHR 592

into effect, we were able to start new proceedings, relying on Article 8 of the Convention and the recent decisions of the Strasbourg Court; and this time we were successful. On the other hand, because the scheme of the 2003 Act does not allow the courts to strike down legislation that is incompatible with the Convention, the only remedy which was available was a declaration of incompatibility.

The High Court duly made a declaration that sections of the Civil Registration Act, 2004 were incompatible with the Convention because they did not allow for recognition of Ms Foy's acquired or realigned gender. That decision, made in October 2007, has been appealed and even if it is upheld by the Supreme Court, after a further long delay, it will still not change the law and in order to get a new birth certificate in her acquired gender, Ms Foy will be dependent on the Government agreeing to amend the law. Otherwise, she will have to go to the Strasbourg Court and wait for several more years for a decision that is now inevitable.

The idea of declarations of incompatibility was copied directly from the British Human Rights Act, 1998. Despite considerable scepticism when the Human Rights Act was passed, the British government has so far acted upon all the declarations of incompatibility which have been made under the Act. However, we do not yet know what the attitude of the Irish Government will be, despite my earlier expression of confidence that they will probably seek to amend Section 62 of the Housing Act, 1996. That was on the basis that allowing someone threatened with eviction for anti-social behaviour access to a court to refute the allegations if they wish to do so would require only a minor amendment to the Act and would not materially affect its operation.

The Government may be slower to act on what they see as more fundamental change. It is not encouraging that a year after judgment was given in the Foy case, the Government has not yet set up a working group to discuss how to bring our law into line with that of every other significant European state except Albania, regardless of the outcome of this particular case.

The effectiveness of the ECHR Act will turn to quite an extent on how Government reacts to declarations of incompatibility. If it respects and responds to them, as Judge McKechnie in the second Foy judgment suggested the courts had a right to expect, the Act could be quite a powerful instrument for change and for bringing our law into line with the changing values and the more tolerant and inclusive ethos of the greater European community of which we are a part. If not it will be a betrayal of the hopes that many people have invested in this Act.

And that fairly neatly leads to the final point I want to make. At its best the ECHR Act will be a valuable tool to help assert the rights of vulnerable and disadvantaged people. But it will be only one tool and a fairly specialised one at that. It can help to achieve change through the law but even then progress will be slow – and very hard work – until the judiciary here internalises and embraces the European Convention as, to their credit, the UK judiciary has largely done.

But social change cannot be achieved through the courts alone, or even mainly. It is achieved through education, awareness raising, lobbying, campaigning and changing attitudes. Legal work and using the European Convention on Human Rights can play its part in that process but it is not a panacea for all our ills.

The current climate is not very encouraging. A Government that is slashing the budget of the Human Rights Commission and the Equality Authority to such an extent as to leave them incapable of doing their jobs and that is effectively closing down the Combat Poverty Agency and the National Consultative Committee on Racism and Interculturalism (NCCRI) is not likely to show much interest in safeguarding or expanding human rights or protecting the vulnerable.

Maybe we were lucky that the ECHR Act was passed when it was. It might not have been introduced in the present climate. Imperfect as it is, we should make as much use of it as we can to protect the vulnerable and disadvantaged in our society. In the current economic and political climate we will need all the tools we can get.

Michael Farrell

7 November 2008