THE HIGH COURT

[2021] IEHC 205

RECORD NUMBER: 2019 846 JR

BETWEEN

AB, TB, JB (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, AB) AND MB (A MINOR SUING BY HER MOTHER AND NEXT FRIEND, AB)

APPLICANTS

AND

WEXFORD COUNTY COUNCIL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTY

JUDGMENT of Ms. Justice Niamh Hyland delivered on 19 March 2021

Introduction

1. This is an application brought by Ireland and the Attorney General (the "State respondents") seeking a direction that this matter be heard by modular trial, such that the constitutional challenge in these proceedings be heard, if necessary, only after a determination of the matters in issue against Wexford County Council (the "Council"). The application is opposed by the applicants.

2. For the reasons set out herein, I do not think a modular trial would save time or costs. It has the potential to prejudice the applicants by exposing them to two trials rather than one. Most significantly, the case involves the interpretation of two statutory provisions. The constitutionality of both sections is challenged. It would very likely to be of assistance to the court to have submissions from the State on the constitutional interpretation of those sections at the same time as submissions are being made by the other parties on that point. Were the State submissions on the constitutionality of the sections only to be made in the second module, after the court had determined the correct interpretation of the sections, the court might at worst be obliged to revisit the question of interpretation. Even if this were not the case, to split out the submissions in relation to the constitutional interpretation of the sections on the one hand, and the constitutionality of those self-same sections, on the other hand, is likely to make the task of the court more difficult and time-consuming, thus undermining the administration of justice. For all those reasons, I refuse the application for a modular trial.

Background

3. In short, this case concerns a decision by the Council of 29 August 2019 to suspend the applicants, a family of travellers, consisting of a mother, father and two children, from the Council housing list, by reason of the conviction of Mr TB (the husband of Ms AB and the father of JB and MB both minors) for two minor public order offences.

4. The Council assert that they were entitled to so do because of the combined provisions of s. 14(1)(a) of the Housing (Miscellaneous Provisions) Act 1997 (the "1997 Act") and of s. 35 of the Housing (Miscellaneous) Provisions Act 2009 (the "2009 Act"). Section 14(1)(a) permits the Council to refuse to make or defer the letting of a dwelling to a person where the authority considers the person has, *inter alia*, been engaged in anti-social behaviour. Section 35 gives powers to a housing authority to adopt an anti-social behaviour strategy.

The Council adopted the *Wexford County Council Anti-Social Behaviour Strategy 2018-2024* (the "Strategy") pursuant to s.35. The Strategy refers to the right of the Council under Section 14(1) to refuse to let, or to defer the letting of a dwelling, where a Garda report confirms the applicant's conviction.

5. The applicants allege that those sections, properly construed, do not provide a legal basis for the decision made. They challenge the application of the Council's Strategy to their circumstances, as well as putting in issue the legality of the Strategy. They assert, *inter alia* that the decision was in fact motivated by other factors. They also argue that a decision had already been made to award them a specific house and that decision was rescinded by reason of the suspension. (The Council hotly contest that any such award had been made to them). The applicants assert that the first named respondent discriminated against them and acted *ultra vires* its powers under s. 14 and/or s. 35, or, in the alternative, pleads that those provisions are repugnant to the Constitution and/or incompatible with the State's obligations pursuant to the ECHR.

Arguments of the parties in respect of application for modular trial

6. As pointed out by counsel for the State respondents, unusually for judicial review proceedings, there are a significant number of factual issues that will require to be determined in these proceedings, including but not limited to what happened at the meeting of 29 August 2019 between Mr and Mrs B and various persons employed by the Council, where the suspension and/or rescission decisions (if the latter exists) were made and communicated orally to the applicants. One surprising feature of this case (and the source of some of the factual disputes) is that no written decision was provided to the applicants in this respect.

7. The claims against the State respondents are considerably more limited in nature. In short, the reliefs sought against them may be found at paragraphs 13 to 16 of the Statement of Grounds as follows:

> *13. A Declaration by way of judicial review that, in the event that s. 14 (1) (a) of the 1997 Act as properly constructed [sic] permits account to be taken of previous criminal convictions imposed on Mr. [B], in particular minor offences, and on that basis permits the Council to refuse a house to a family including innocent children and their mother, it does not accord with the principle of proportionality and/or is repugnant to the Constitution, in particular Article 38.1, 40.1,40.3, 41.1 and 42A.*
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> *14. A Declaration by way of judicial review that, in the event section 35 of Housing (Miscellaneous Provisions) Act 2009 as properly constructed [sic] permits the adoption of the Anti-Social Behaviour Strategy through which the Council prescribes conditions for eligibility for social housing supports whereby the family of a person convicted of minor offences may be excluded from eligibility for social housing, on vague terms or at all and/or without any recourse to an independent decision maker, then the said provision is unlawful as contrary to Articles 15.2 and/or 38.1, 40.1, 40.3, 41.1 and/or 42A of the Constitution;*

15. *A Declaration by way of application for judicial review, pursuant to section 5(1) of the ECHR Act 2003 that, in the event section 14(1)(a) as properly constructed [sic] permits account to be taken of previous criminal convictions imposed on the Second Named Applicant in arriving at its Decision and, in particular minor offences tried by courts of summary jurisdiction, and on that basis permits the Council to refuse a house to a family, including innocent children and their mother and/or without recourse to an independent decision maker, the said legislation is incompatible with the State's obligations pursuant to the ECHR (and in particular Articles 6,8, 13 and/or 14 thereof);*

16. *A Declaration by way of application for judicial review, pursuant to section 5(1) ECHR Act 2003 that, in the event section 35 of Housing (Miscellaneous Provisions) Act 2009 as properly constructed [sic] permits the adoption of the Anti-Social Behaviour Strategy through which the Council prescribes conditions for eligibility for social housing support whereby the family of a person convicted of minor offences may be excluded from eligibility for social housing supports and/or without recourse to an independent decision maker, then the said provision is unlawful as contrary to Articles 6 and/or 7 and/or 8 and/or 14 of the ECHR;*

17. *Damages (including damages for breach of constitutional rights and/or breach of duty causing foreseeable distress and harm arising from a relationship of proximity and/or misfeasance and/or pursuant to section 3 of the European Convention on Human Rights Act 2003);*

8. The State respondents submit that the court enjoys an inherent jurisdiction to regulate its own procedures, and that the fundamental question for this court is whether directing a split trial would likely result in a net benefit when taking a broad and realistic view of what is just and convenient, and what would avoid unnecessary time and costs. They argue that, should the applicants be successful in any of their claims against the first respondent, that would be dispositive of the proceedings against the State respondents.

9. They say the arguments against them cannot be determined until the factual controversy between the applicants and the Council are resolved, and that the legal issues between the applicants and the Council, which must also be resolved before the constitutionality of the sections is determined, may resolve the matter. They say they should not be required to be present for a fact-finding mission in which they have no interest. It is in those circumstances that they bring the motion for a modular trial.

10. The applicants strongly resist such an application arguing that they will be prejudiced by same, that both the length of the trial and the legal costs will be increased, that a modular trial may result a court being obliged to produce two separate judgments, with possible issues arising in respect of two appeals and, most significantly of all, that the issues cannot be separated in the way the State respondents suggest. In respect of the commonality of issues, they argue that the constitutional interpretation of the relevant sections will require to be determined and that the State respondents will have important submissions in that regard. They submit that, on the State respondents' suggestion, the

court will be required to decide upon a constitutional interpretation of the sections in the absence of the State respondents. If the constitutionality of those sections then requires to be determined, the trial judge may have to revisit his or her conclusions in respect of the correct interpretation of those sections, having regard to the submissions made by the State respondents in that second module. They say that this will inevitably lead to delay and that additional court time will be required if matters proceed in two modules rather than in a unitary fashion.

Legal principles governing modular trial

11. Very helpfully, the parties agreed the core principles applicable in an application such as this. These are as follows:

- the default position is that a trial is normally unitary;
- the court has jurisdiction to grant a modular trial;
- the legal test is as set out in *McCann v. Desmond* [2010] 4 I.R. 554, (as followed in *Weavering Macro Fixed Income Fund Ltd v. PNC Global Investment Servicing (Europe) Ltd* [2012] 4 I.R. 68), where Charleton J. set out the four factors to be taken into account when considering an application for a modular trial:

> *"(1) Are the issues to be tried by way of a preliminary module, readily capable of determination in isolation from the other issues in dispute between the parties? A modular order should not be made if the case could be characterised as an organic whole, the taking out from which of a series of issues would tear the fabric of what the parties need to litigate, so that the case of either of the plaintiff or the defendant would be damaged through being seen in the isolated context of a hearing on a number of limited issues.*
>
> *(2) Has a clear saving in the time of the court and the costs that the parties might have to bear been identified? The court should not readily embark on a modular hearing simply because of a contention that a saving in time and costs has been identified, but rather it should view that factor in the context of the need to administer justice in the entire circumstances of the case.*
>
> *(3) Would a modular order result in any prejudice to the parties? …*
>
> *(4) Is a motion a device to suit the moving party or does it genuinely assist the litigation by being of help to the resolution of the issues" (paragraph 7).*

- It is agreed between the parties that the motion is not a device to suit the moving party as per the fourth factor identified by Charleton J.;
- Constitutional and European convention issues always fall to be considered last by a court.

12. I would add to those principles the words of Clarke J. in Cork Plastics [2008] IEHC 93, where he observed; "*Experience has shown that the formal separation out of a*

preliminary issue can often make the apparent shortest route, the longest way home" [paragraph 2.3]. Accordingly, in any application for a modular trial, it is necessary to test rigorously whether the proposed modularisation of the trial would in fact save time and costs and advance the interests of justice.

13. Given the live issue in this motion as to whether the issues in this case are interlinked or can be determined separately in consecutive modules, reference to the *dicta* of Clarke J. in *Inland Fisheries Ireland v. O'Baoill* [2015] 4 I.R. 132 seems apposite here. He observed at para. 25:

> *"It would, of course, defeat the purpose of a modular trial if a party could easily and for little good reason seek to reopen matters already determined in an earlier module when the court came to consider later modules. However, it seems to me that a judge hearing a modular trial has much greater room for manoeuvre in doing justice between the parties in the context of the way in which issues which arise at a second or subsequent module are to be dealt with. There is, in my view, no formal res judicata arising out of findings in an earlier module …. The jurisdiction of the trial judge to so permit should, of course, be sparingly exercised. To do otherwise would be to risk procedural chaos and to defeat the purpose of a modular trial in the first place. However, a modular trial remains in being until all modules are concluded, and there is no formal or jurisdictional barrier to a judge allowing a point to be reopened if the justice of the case requires it."*

Case between the applicants and the Council

14. I agree with the analysis of counsel for the State respondents that it is probable there will have to be cross-examination on the affidavits in this case, given the significant factual issues between the applicants and the Council. Eleven affidavits have been filed in total in these proceedings and they raise various issues including but not limited to:

- the duration of the applicants' suspension from the housing list;
- whether the true motivation for the suspension was the objections of residents living in the area where the applicants were proposed to be located;
- whether the council employees were involved in interacting with the residents who are complaining;
- the nature of the reasons given at the meeting of 29 August 2019 for the suspension;
- whether the applicants had already been allocated a specific house, being K, C;
- if so, whether that allocation had been rescinded by the Council.

15. Some of these issues are relevant to the question of the appropriateness of the invocation of s. 14 and the reliance of the Council upon its Strategy. Other relate to different issues. The State respondents will have nothing to say on any of these factual controversies.

Utility of State respondents being present for arguments on interpretation of sections

16. It is fair to say that the applicants' core objection to a modular trial in this case is that a court will need to consider the correct interpretation of s. 14 of the 1997 Act and s. 35 of the 2009 Act and in doing so must consider the constitutional interpretation. It is argued that the presence of the State respondents will be either necessary or at the very least highly relevant to such a discussion and that, if the State respondents are not present, a decision might be made which may later require to be reconsidered following submissions by the State respondents.

17. When one considers the terms of s.14(1)(a) of the 1997 Act and the Anti-Social Behaviour Strategy adopted under s. 35 of the 2009 Act, it cannot in my view be excluded that the court will be required to rule on the constitutional interpretation of s.14(1)(a). Section 14(1)(a), in relevant part, provides:

> *14.— (1) Notwithstanding anything contained in the Housing Acts 1966 to 2014, or in an allocation scheme made under section 22 of the Housing (Miscellaneous Provisions) Act 2009, a housing authority may —*
>
> *(a) refuse to allocate, or defer the allocation of, a dwelling to which subsection (1) of the said section 22 refers, to a household where —*
>
> *(i) the authority considers that any member of the household is or has been engaged in anti-social behaviour or that an allocation to that household would not be in the interest of good estate management, …*

18. The "*Wexford County Council Anti-Social Behaviour Strategy 2018-2024*" dated February 2018 provides at paragraph 6.2 that:

> *"The Council may use its right under Section 14(1) of the Housing (Miscellaneous Provisions) Act, 1997 (as amended) to refuse to let, or to defer the letting of a dwelling where: –*
>
> *a) A Garda report confirms applicant's conviction(s)*
>
> *[The period of deferral will depend on the seriousness of the crime with consideration to client's ability to sustain tenancy satisfactorily – see Appendix 2 note 3 (page 19)].".*

19. Appendix 2, note 3, at page 19 provides as follows:

> *"An applicant for housing support - or a person who forms part of an application for housing support - that has a court conviction must demonstrate a subsequent period crime free, before an allocation of a Social Housing Support can be processed any further (excluding any period of custodial sentence)."*

20. The Strategy makes it clear that a conviction comes within the scope of anti-social behaviour and/or prevents good estate management and that, where a conviction is

treated is such, there is a mandatory period of deferral from the housing list post the conviction.

21. Note 3 at Appendix 2 goes somewhat further and suggests that in every case, where a person has a conviction, that person must demonstrate a subsequent period crime free before further processing of an allocation of the social housing support.

22. If it were accepted that s.14(1)(a), properly interpreted, permitted this approach, that might potentially have implications for the constitutionality of the section. Equally, the narrower question as to whether the reference in s.14(1)(a) to anti-social behaviour encompasses a minor conviction is a question of interpretation that might impact upon the constitutionality of the section.

23. It seems to me that given the complexity of the questions that a court will be faced with in this case, and the multiplicity of alleged causes of unconstitutionality including breach of the principle of double jeopardy, breach of family rights, lack of access to an independent decision maker, impermissible vagueness, relevance of the fact that the offence is minor, it is very difficult at this early stage in the case to conclude that the assistance of the State respondents in respect of a constitutional interpretation of sections 14 and 35 will not be of assistance to the court.

24. The State respondents submit that their presence is not mandatory when the court is considering the correct interpretation of the sections and that in many cases, courts are required to consider the interpretation of sections without the presence of the State.

25. That is of course true: but it is also true to observe that, where the constitutionality of legislative provisions is challenged, often the interpretation of those provisions will also be an issue, and the State parties will normally be present because of the constitutional challenge. Given that, in the instant case, Ireland and the Attorney General are already joined to the proceedings, I must consider whether it would potentially assist the court to have them present when considering the correct interpretation of the disputed legislative provisions. On balance, I consider this to be the case. The applicant pointed to the approach of McKechnie J. in *Reid v. IDA* [2015] 4 I.R. 494 where the Supreme Court, in interpreting certain parts of the Industrial Development Act 1986, approached the question from the point of view of the constitutional protection given to property rights, as well as other principles of construction. This is just one example of the courts considering the constitutional dimension when interpreting legislation.

26. In the circumstances, to extract the State respondents from that part of the trial where the court will be required to construe s. 14 and s. 35, knowing that there may be a constitutional challenge to same depending on the interpretation adopted, seems to me undesirable.

Considerations of time and cost

27. I am particularly influenced by the fact, as identified by the parties in oral submissions during the hearing of this motion, this case is likely to last a number of days, as opposed

to a number of weeks or of months. For obvious reasons, the case for modularisation is stronger where a trial is likely to be very long and a substantial part of that will not concern a defendant.

28. Further, a unitary trial is the default position for very good reason. A modular trial carries with it the possibility that two separate judgments will be required (depending of course on the outcome of the first module). This takes up valuable court time and raises the possibility of two sets of appeals, depending on how matters proceed. This is undesirable, again for obvious reasons. It is particularly undesirable where, as in the instant case, there is a possibility that the issues that the judge will have to consider in the first judgment will also be relevant to the second judgment, thus depriving the court of the benefit of coming to a decision having heard all relevant arguments from all parties.

29. Counsel for the respondent observed that a court cannot decide upon the constitutional issues until the facts have been decided and that it is unusual in a judicial review that so many facts should be at this point unclear and requiring resolution. I agree with both those propositions, but the advantage of a unitary trial is that, when the court comes to write the judgement, the judge has all factual and legal issues before them and can arrive at the factual conclusions and then proceed to deal with the arguments raised on the constitutional claim, if necessary. I do not therefore consider that a unitary trial poses any logistical problems in this case.

Prejudice

30. Counsel for the applicants argued strongly that prejudice would be occasioned to the B family if the trial was further extended by having it heard in a modular fashion. She identified the considerable delay that has already taken place in this case and the implications of that for Mrs B's health. Mrs B has suffered from mental health issues, including an attempted suicide following the suspension of the applicants from the housing list. I accept that two separate trials – if that is how the matter ultimately plays out – would prejudice the applicants. It would likely be more expensive. It might also take significantly longer to resolve overall, again depending on the outcome of the first module.

31. I accept that some prejudice may be caused to the State respondents if the matter is heard in a unitary fashion, given that, as found above, there are a significant number of factual matters requiring resolution that do not concern the State and there are certain legal questions in which they have no interest either. However, I hope that by case management methods, for example by relieving either both or one counsel for the State respondents of the obligation to attend any cross-examination of deponents, that prejudice may be mitigated. That will be a matter for the trial judge.

Conclusion

32. Ultimately any application for a modular trial involves a balancing of the advantages and disadvantages of same. However, it seems to me that when one applies the principles in *McCann*, the case for a unitary trial is strong in this instance. Taking the first part of that test, the issues sought to be tried by way of a preliminary module are not necessarily

readily capable of determination in isolation from the other issues in dispute. There is a real risk that if the trial judge makes findings as to the interpretation of the relevant sections, those findings might have to be revisited when the State respondents make submissions on the constitutionality of same. Further, it seems to me that it would be potentially of assistance to the trial judge to have the benefit of the State submissions on the constitutionality of the sections when deciding on the correct interpretation of same.

33. Because of this, I do not perceive a clear saving in the time of the course and the costs that the parties might have to bear should a modular trial be ordered.

34. Equally, as identified above, I agree there is a significant potential prejudice to the applicants if a modular trial goes ahead, as opposed to a moderate prejudice to the State respondent if there is a unitary trial. However not only are there measures that may be taken to ameliorate that, it is also the case that, as observed by Barr J. in *Pharmaceutical Assistants Association Company Ltd by Guarantee and ors v. The Pharmaceutical Society of Ireland and ors* [2019] IEHC 663 at para. 22, "*Finally, the court must have regard to the circumstances of the applicants*". I find that the State respondents are better able to manage that prejudice then the applicants, given the circumstances of the applicants and the health issues that have bedevilled Mrs B.

35. For all those reasons I refuse the relief sought.

Costs

36. I propose that the costs of this motion should be borne by the State respondents given that they have been unsuccessful. I propose to stay those costs in the normal fashion pending the trial of the action. If either party wishes to argue for a different decision on costs, submissions should be filed within two weeks of the date of delivery of this judgement. If no submissions are received I will make an order in the terms proposed.