Neutral Citation no [2004] NICA 7

Ref: **COGC4059**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: 20/02/04

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

____

IN THE MATTER OF AN APPLICATION BY WILLIAM McDONNELL FOR JUDICIAL REVIEW

and

IN THE MATTER OF AN APPLICATION BY NORA LILLY FOR JUDICIAL REVIEW

____

Before: Carswell LCJ, Nicholson LJ and Coghlin J

____

COGHLIN J

[1] These two appeals were heard together by the Court since they involve common questions of law. After a full hearing of the issues Kerr J dismissed the application by William McDonnell on 12 April 2002. The application of Nora Lilly came on for hearing before Kerr J just after he had delivered judgment in William McDonnell's application and Mr Hill QC, who appeared with Ms McKee for the applicant, accepted that the decision in the McDonnell case governed the case that he wished to make on behalf of Miss Lilly and, accordingly, Nora Lilly's application was dismissed on consent. Kerr J anticipated that appeals would be pursued in respect of both applications.

[2] For the purposes of the hearing before this court Mr McDonnell was represented by Mr Larkin QC and Mr Murphy while Ms Lilly was again represented by Mr Hill QC and Ms McKee. In both cases Mr McCloskey QC and Ms Gibson appeared on behalf of the Northern Ireland Housing Executive (hereafter referred to as "the respondent" or "the Executive"). The Court wishes to acknowledge the assistance that it received from the helpful skeleton arguments and oral submissions advanced by each set of counsel.

BACKGROUND FACTS

William McDonnell

[3] Mr McDonnell is now aged 79 years and, since 12 July 1982 he has resided at 9 Colinbrook Park, Poleglass, Dunmurry, a residential property comprising a ground floor, two-bedroom bungalow the property of the Executive. The tenancy of this property was granted to the appellant and his wife jointly at a time when the appellant was 58 and his wife 61 years of age. Since the death of his wife in 1992 the appellant has occupied the dwelling as sole tenant.

[4] In May 1993 the Executive brought into effect a scheme ("the scheme") regulating the offer for sale or lease to its secure tenants of the dwelling houses occupied by such tenants in accordance with Article 3(1) of the Housing (Northern Ireland) 1983 ("the 1983 Order"). This scheme was formally approved by the Department of the Environment ("the Department") and was subsequently revised in September 1997.

[5] The material part of Article 3(1) of the 1983 Order, as substituted, provides as follows:

> "3(1) The Executive shall prepare and submit to the Department a scheme to offer for sale or lease to its secure tenants the dwelling houses occupied by those tenants.
>
> (2) A scheme submitted under paragraph (1) may contain such provision as the Executive considers appropriate …
>
> (4) The Department may approve a scheme submitted under paragraph (1) with or without modifications.
>
> (5) The Executive shall comply with a scheme approved by the Department under paragraph (4)."

[6] The scheme devised by the Executive and subsequently approved by the Department contained the following provision:

> "3 Exceptions to Entitlement to Buy

> 3.1 Under the scheme any dwelling house may be sold with the exception of:
>
> *(a)* Sheltered dwelling units; and
>
> *(b)* Any single storey property or ground floor accommodation with no more than two bedrooms which was let to the tenant or to a predecessor in title of his for occupation by a tenant who was aged 60 or more when the tenancy commenced."

[7] On 24 December 2000 the appellant wrote to the respondent indicating his wish to purchase the dwelling which he occupied. On 29 January 2001 the Chief Executive of the respondent replied informing the appellant that he was precluded from purchasing the premises by virtue of paragraph 3 of the scheme.

[8] The Law Centre (NI) corresponded with the respondent on behalf of the appellant and a number of other tenants and this correspondence eventually produced a reply from the Chief Executive dated 9 January 2001 which contained the following passage:

> "The intention of this exclusion, which reflects the Right to Buy legislation in Great Britain, is to retain suitable accommodation in the social housing stock and ensure that such accommodation remains available for letting to those over 60."

Nora Lilly

[9] From 1969 to 1989 this appellant occupied three dwellings of the Executive in succession, either as a legal tenant in her own right or in circumstances in which her late husband was the tenant.

[10] On 19 October 1989 the appellant, then aged 65, became the legal tenant of a bungalow owned by the Executive at 33 Hillview Park, Enniskillen which was a two-bedroom dwelling. In May 1990 the appellant and her daughter became joint tenants of these premises and, since 12 October 1998, the appellant has been the sole legal tenant. This appellant's application to buy the freehold of her bungalow was rejected upon similar grounds by the respondent on the 29 March 2001.

THE LEGAL SUBMISSIONS

[11] Counsel on behalf of both appellants conceded that neither appellant could establish a substantive breach of either Article 8 or Article 1 of the First Protocol to the Convention. In the course of their helpful skeleton arguments both Mr Larkin QC and Mr Hill QC relied upon breaches of Article 14 in conjunction with Article 8 and Article 1 of Protocol 1 to the Convention although, before this Court, neither developed the argument in relation to Article 1 of Protocol 1 and both relied primarily upon Article 8 in conjunction with Article 14. In addition, Mr Larkin QC submitted that the absence of any specific reference to Article 14 in board paper number 454/11(1) in relation to "sales of OPDs" (Old Persons Dwellings) vitiated the respondent's policy and the decision to refuse the appellants the right to buy the premises which they occupied, relying upon R(Madden) v Berry Metropolitan PC [2002] EWHC (Admin) 1882. In addition to arguments derived from the Convention Mr Hill QC referred to Section 75 of the Northern Ireland Act 1998, submitting that the respondent's decision was in breach of this legislation in so far as it promoted an opportunity for the young which was denied to the aged, disabled and females. This submission had not been advanced before Kerr J nor was it developed in any great detail before this court.

[12] On behalf of the respondent Mr McCloskey QC argued that the letters written by the respondent to the appellants in January and March 2001 did not involve the exercise of any degree of discretion or judgment but merely confirmed the application of the scheme devised by the respondent and approved by the Department on 11 May 1993. In such circumstances, Mr McCloskey QC submitted that, in reality, it was the scheme which was the focus of the appellant's complaints and, consequently the appellants could not rely upon alleged breaches of the Convention since the Human Rights Act 1998 did not come into operation until 2 October 2000 and was not retrospective in effect. In support of this argument Mr McCloskey QC relied upon Section 6(1), Section 7(1) and Section 22(4) of the Human Rights Act 1998 ("HRA") together with the decisions in R v Lambert [2001] 3 All ER 577, R v Kansal (No 2) [2002] 1 All ER 257 and Wilson v First County Trust [2003] 4 All ER 97. Mr McCloskey QC further submitted that neither of the appellants had established any breach of Article 8, Article 1 First Protocol or Article 14 of the Convention.

THE RELEVANT CONVENTION ARTICLES

[13] **"Article 8**
Right to respect for private and family life"

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

[14] **"Protocol 1 Article 1**
Protection of Property.

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[15] **"Article 14**
Prohibition of Discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

RETROSPECTIVITY

[16] We are not persuaded by the argument advanced by Mr McCloskey QC under this heading. In each case the appellants made individual applications to the respondent expressing a wish to buy the property which they occupied and, in each case, the relevant "act" was the decision by the respondent, which is a public authority within the meaning of the HRA, that

the scheme of May 1993 should be applied to the relevant application. Both decisions were reached in 2001 and, consequently, in our view, must comply with the relevant provisions of the Convention.

ARTICLE 8

[17] While it was conceded by both counsel that neither appellant had established a substantive breach of Article 8, the main thrust of the argument advanced upon their behalf before this Court was based on Article 14 in conjunction with Article 8 and, therefore, it may be of assistance to refer to some recent judicial observations relating to the latter Article.

[18] In Harrow London Borough Council v Qazi [2003] 4 All ER 461 Lord Bingham said, at page 465 [para 6]:

> "I would respectfully question whether Arden LJ was quite right to define the issue in terms of `a right to a home', since the European Court of Human Rights had made clear that Article 8 does not in terms give a right to be provided with a home and does not guarantee the right to have one's housing problem solved by the authorities …"

And, at page 466 [para 8], he confirmed that Article 8 was not directed to the protection of property interests or contractual rights.

In the same case Lord Hope observed, at page 485 [para 69]:

> "The description of the right in issue in this case as a `right to a home' must, I think, be taken to have been a slip of the pen. Article 8(1), as the Strasbourg Court has repeatedly said does not guarantee a right *to a home*. What it guarantees to the individual is *respect for his home,* which is an entirely different concept."

Lord Hope, at page 479 [para 47], also referred with approval to the vivid passage from the dissenting judgment of Sir Gerald Fitzmaurice in Marckx v Belgium (1979) 2 EHRR 330 dealing with the nature of Article 8.

In the course of his judgment, at page 491 [para 89], Lord Millett said:

> "Rights of property are protected by the First Protocol to the Convention, not by Article 8.

> Although added by a later Protocol the heading to Article 8 indicates its essential thrust. It is not directed to the individual's right to property but to his right to be left alone to live a normal family life without arbitrary interference by the public authorities: see Marckx v Belgium (1979) 2 EHRR 330 at 342. In Article 8 an individual's `home' is not defined by the particular building which he owns or occupies. The Strasbourg Court has repeatedly stated that Article 8 does not give anyone a right to a home or `an unconditional right to remain' in any particular home: see P v UK App No N14751/89 (12 December 1990, unreported). A person's `home' is rather the place where he and his family are entitled to be left in peace free from interference by the State or agents of the State. It is an important aspect of his dignity as a human being, and it is protected as such and not as an item of property."

Lord Scott at page 499 [para 125] said:

> "To hold that Article 8 can vest property rights in the tenant and diminish the landlords contractual and property rights would be to attribute to Article 8 an effect that it was never intended to have …"

Protocol 1 Article 1

[19] In our view the law is equally clear in relation to Article 1 of the First Protocol. In Marckx v Belgium (1979) 2 EHRR 330 the Strasbourg Court stated at paragraph 50 of the judgment:

> "The Court in fact excludes Article 1 of Protocol No 1 (P1-1): like the Commission and the Government, it notes that this article (P1-1) does no more than enshrine the right of everyone to the peaceful enjoyment of `his' possessions, that consequently it applies only to a person's existing possessions and that it does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions."

In Rudzinska v Poland (App No 45223/99), a case in which the applicant's special housing savings account with the State bank had been significantly depleted by inflation, the Court confirmed that Article 1 of Protocol 1 did not

recognise any right to become the owner of property. The Court stated that the Article comprised three distinct rules and recorded that the applicant had not been deprived of her possessions nor had the State exercised control over her property or violated her right to peaceful enjoyment of her possessions. The Court confirmed that the Convention case law did not support the proposition that a right to purchase housing within the framework of the State-supported housing cooperative scheme in Poland could be derived from Article 1 of the First Protocol.

ARTICLE 14 IN CONJUNCTION WITH ARTICLE 8

[20] The Strasbourg Court has repeatedly emphasised that Article 14 does not have an independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by the Convention. In Rasmussen v Denmark (1985) 7 EHRR 371 the Court went on to explain, at paragraph 29 of the judgment, that "although the application of Article 14 does not necessarily presuppose a breach of those provisions – and to this extent it has an autonomous meaning -, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter."

[21] The learned trial Judge accepted that the appropriate test was whether the case came "within the ambit" of either Article 8 or Article 1 of the First Protocol and, in so doing, he referred to the decision in Rasmussen v Denmark. He then went on to say:

> "The present case concerns the applicant's home where he has lived since 1982. It is to do with the circumstances in which he lives there – whether as a tenant or as owner. In my view, it is, therefore, `within the ambit' of Article 8."

The learned trial Judge was less certain that the matter came within the ambit of Article 1 of the First Protocol but accepted that it did so for the purposes of the application.

[22] The relevant portion of the definition of the word "ambit" in the Shorter Oxford dictionary refers to "the confines, bounds, or limits of a district etc …" and also refers to the "extent, scope, sphere" of a matter. In the Strasbourg case law it has been said that the test will be satisfied if the "subject-matter of the disadvantage [complained of] … constitutes one of the modalities of the exercise of a right guaranteed" (National Union of Belgian Police v Belgium(1975) 1 EHRR 632 [para 39])or the measures complained of are "linked to the exercise of a right guaranteed" (Kroon v Netherlands (1995) 19 EHRR 263).

[23] The "ambit" test has been generated by the jurisprudence of the Strasbourg Court and, therefore, it is to that jurisprudence to which the Court should resort in the first instance both naturally and in accordance with its obligation under Section 2(1)(*a*) of the Human Rights Act 1998 ("HRA"). In R (Alconbury Developments Ltd) v Secretary of State for the Environment [2003] 2 AC 295 Lord Slynn said, at paragraph 26:

> "In the absence of some special circumstances it seem to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights."

[24] At this stage in the development of the Strasbourg jurisprudence it is rather difficult to discern any coherent, clear or consistent principles relating to the application of the "ambit" test.

[25] In X v Germany (1976) 19 Year Book 276 the Commission examined the case under Article 14 on the basis that … "it is sufficient that the `subject matter falls within the scope of the Article in question' " and in Schmidt & Dahlstrom v Sweden (1979-80) 1 EHRR 632, after finding that, in themselves, they did not violate any Convention rights, the Court held that the challenged measures were "linked" to the Article 11 right of trade unions to protect their members' interests and, therefore, it was legitimate to examine the question of discrimination. In Petrovic v Austria (2001) 33 EHRR 14 the words "ambit" and "scope" seemed to be used interchangeably by the court in its judgment.

[26] It might be thought that cases in which a breach of a substantive article, such as Article 8, has been established but held to be justified under one of the qualifying paragraphs of the Article, such as 8(2), would be likely to produce appropriate circumstances for a finding that an Article 14 claim came within the "ambit" of the substantive article. However such cases tend to be fact specific and applicants have encountered considerable difficulties in establishing a breach of Article 14 in such circumstances since the factors constituting compliance with the qualifying sub-section are likely to be considered by the Court as also providing sufficient justification to prevent a successful claim under Article 14 – see for example, Chapman & Ors v United Kingdom [2001] EHRR 18. On the other hand in Sahin v Germany [2003] ECHR 30943/96 the Court agreed with the parties that the refusal of access to the applicant's child amounted to an interference with his right to respect for his family life, as guaranteed by Article 8(1), but then went on to hold that the German court's procedural approach was reasonable in the circumstances, having regard to the State's margin of appreciation, and that, consequently, the refusal of access had been "necessary in a democratic society" and there had been no breach of Article 8. Nevertheless, at paragraph 90 of the judgment the court recorded that it was necessary to determine whether the

interference with the applicant's right to family life, which was in itself permissible under paragraph 2 of Article 8, had occurred in a discriminatory manner contrary to Article 14. The Court concluded that there had been a breach of Article 14.

[27] In Botta v Italy (1997) 26 EHRR 241 the Strasbourg Court held that the complaint made by the applicant, who was a disabled person, that the State had failed to compel authorities responsible for a private beach some distance from the applicant's home to install disabled facilities had no conceivable direct link with the guarantee to respect for private life afforded by Article 8. Mr Botta also relied upon Article 14. The Court confirmed the ambit test but went on to observe succinctly that:

> "As the Court has concluded that Article 8 is not applicable, Article 14 cannot apply to the present case."

However, even if no breach of the particular Convention article is established, there is a series of Strasbourg cases in which the court has held that Article 14 extends not only to the guarantees afforded by substantive Convention rights but also to additional aspects of those rights which the State chooses to guarantee, without being obliged to do so by the Convention – see the example of discrimination in the system of criminal appeals given by the Court in the Belgian Linguistics case (No 2) (1979-80) 1 EHRR 252 and the right of non-national men to bring a new family into the country in Abdul Aziz, Cabales & Balkandali v United Kingdom (1985) 7 EHRR 471. This is particularly the case when the relevant measures are taken by the state with the intention to promote the rights guaranteed by a particular Article (Petrovic v Austria) (2001) 33 EHRR 14 at paragraphs 26 to 29).

[28] Mr Larkin QC relied particularly upon the decision of the Strasbourg Court in Larkos v Cyprus (1999) 30 EHRR 597. In that case the applicant alleged breaches of Articles 8 and 14 on the basis that, as a tenant of the Government, he was not afforded the statutory protection of tenure which was afforded to private tenants. At paragraph 28 of its judgment the court observed that:

> "Mr Larkos has not contended that there has been a breach of Article 8 on account of the fact that, being a Government tenant, he is faced with the threat of eviction from his home. However, it suffices for the purposes of the application of Article 14 that the facts relied on in the instant case fall within the ambit of Article 8 and the relevance of that Article cannot be denied in view of the judgment of the District Court of Nicosia ordering

> Mr Larkos to leave his home. (See mutatis mutandis Inze v Austria (1987) 10 EHRR 394 at 404 (para 36))."

The Court held that, in the circumstances, there had been a violation of Article 14 in conjunction with Article 8.

[29] The difficulties arising from the lack of clear guidance as to the application of the "ambit" may be illustrated by two cases, one European and one domestic. In Schmidt v Germany (1994) ECHR 13580/88 the applicant alleged breaches of Articles 4(3)(*d*) and Article 14 arising out of the requirement by local German domestic law that it was compulsory for men, but not for women, to either serve in the Fire Brigade or pay a financial contribution. Article 4 prohibits any person from being required to perform forced or compulsory labour and Article 4(3) provides that:

> "For the purpose of this Article the term `forced or compulsory labour' shall not include:
>
> … (*d*) any work or service which forms part of normal civic obligations."

The Court made findings that the compulsory Fire Service which was the subject of the proceedings was one of the "normal civic obligations" envisaged in Article 4(3)(*d*) and that the financial contribution was a "compensatory charge" in respect of such service but then went on to hold that the charge fell within Article 4(3)(*d*) and that Article 14 applied in conjunction. However, it is the dissenting opinion of Judge Bonnici which is instructive. After recording his view of the facts he went on to make the following remarks:

> "2. I do not think that anyone can subscribe to the applicant's claim. However, since it is combined with what is laid down in Article 14, the majority have found a violation. To this I cannot subscribe for if no substantive provision of the Convention or of the Protocols has been found to be applicable, before looking at Article 14, then the latter provision does not even come into consideration.
>
> 3. In my opinion this is the logical and juridically correct approach for a reading of Article 14 (I refer in particular to the judgments and opinions expressed in the Marckx case (Marcks v Belgium judgment of 13 June 1979, series A no 31).

> It can only come into operation after one of the substantive provisions on which the applicant bases his claims has been found to be applicable. In the present case Mr Schmidt was not required to perform forced or compulsory labour, as prohibited by Article 4(2), for the reason that what was required of him was a service which forms part of normal civic obligations, which is expressly exempted by the same Article 4 in paragraph (3)(*d*). Once this is established, the principal claim of the applicant appears to me to be completely unfounded and therefore Article 14 does not come into play."

[30] In Carson & Reynolds v Secretary of State for Work and Pensions [2003] EWCA Civ 797 the Court of Appeal considered whether breaches of Article 1 of the First Protocol in conjunction with Article 14 had been established in circumstances in which a person living abroad had not received the annual upgrade to her pension payable to pensioners living in the United Kingdom and in relation to a disparity in the weekly rate payable in respect of Job Seekers Allowance in so far as higher rates were payable to persons over 25. Laws LJ found that no breach of Article 1 of the First Protocol had been established since it was quite clear from the wording of the Article itself and the Strasbourg jurisprudence from the Marckx case onwards that the Article did not guarantee a right to acquire possessions. In relation to Article 8 Laws LJ confirmed that the Strasbourg jurisprudence does not require the State to provide a home, citing Chapman v UK (2001) 33 EHRR 18, nor does it impose any positive obligation to provide financial assistance to support a person's family life or to ensure that individuals may enjoy family life to the full or in any particular manner. He then referred to the Court's approach to those cases in which a State had established a system or regime to comply with the Convention obligation which included elements that were not strictly required by the Convention, noting that, in such circumstances, the distribution of the "supererogatory" rights must comply with Article 14. He then went on to reject the argument based on Article 14 in conjunction with Article 8 but gave some further consideration to Article 14 in conjunction with Article 1 of the First Protocol. After considering a number of examples in which Article 14 might apply in conjunction with other substantive Articles Laws LJ made the following observations at paragraph 36:

> "In each of these examples, and one could generate many others, the enjoyment of the substantive Convention rights is engaged on the facts of the case fair and square. My difficulty was in seeing how that could be so in these present appeals. In neither case was there any interruption of the

> appellant's peaceful enjoyment of her possessions. Nor is there any question of either appellant having been deprived – let alone unjustifiably deprived – of any of her possessions. Each appellant has had in full measure what the domestic law entitles her to have. The complaint of each, in contrast, is that the domestic law should have given her more. It is plain that Article 1 of the First Protocol provides no such entitlement whatever; I have dealt with the argument for a violation of Article 1 of the First Protocol taken on its own. In those circumstances I was unable to see how on the facts there could be any complaint of Article 14 taken with Article 1 of the First Protocol. Such a complaint might arise if the State offered differential justification as between persons or classes for measures of deprivation of property. That would be analogous to the first example given above relating to Article 10; but nothing of that sort remotely arises in these appeals."

[31] Laws LJ then went on to consider the facts of Gaygusuz v Austria (1996) 23 EHRR 364 and the line of Strasbourg authority which favours the "longer reach" of Article 14. In doing so, he expressed a good deal of unease in so far as this seemed to represent an extension of the Article to the point of providing it with a life of its own – beyond the enjoyment of the substantive Convention rights as such. He contrasted this result with the freestanding Article 1 of Protocol 12 which has not yet been ratified by the United Kingdom. Ultimately, however, Laws LJ, after a careful analysis of the relevant authorities, reached the conclusion that the policy of the Strasbourg cases was … "that while States are in general free to grant, amend or discontinue Social Security benefits and to change the conditions for entitlement to them as they please without any ECHR constraint, yet where contributions are exacted as a price of entitlement the contributor should be afforded a measure of protection: it has, so to speak, cost him something to acquire the benefit." - See paragraph 47 of the judgment.

[32] In both of the appeals which we have to consider the relevant authorities seem clear. Each of the appellants currently enjoys security of tenure and there is no evidence of any disruption or potential disruption of their current home or family life. There is no threat of actual or pending eviction nor is there any evidence of a lessening of the degree of security of tenure which each appellant currently enjoys (Ghaidan v Mendoza [2002] 4 All ER 1162) nor can either appellant realistically be described as having been deprived of any benefit to which he or she has contributed. Chapman v UK

(2001) 33 EHRR 18 confirms that Article 8 does not require the State to provide a home and in Strunjak v Croatia (App No 46934/99, 5 October 2000) the Strasbourg Court reiterated that the rights guaranteed under Article 8 of the Convention do not include a right to buy property, such as a home, but only protects a person's right to respect for his present home. The latter proposition was also emphasised by Lord Hope in Harrow London Borough Council v Qazi [2003] 4 All ER 461 at paragraph 69. In the course of his own judgment in Harrow London Borough Council v Qazi Lord Millett drew attention to the fact that the Strasbourg Court had repeatedly stated that Article 8 does not give anyone a right to a home or "an unconditional right to remain" in any particular home. Lord Millett pointed out that rights of property are protected by Article 1 of the First Protocol and referred to Marckx v Belgium. As noted earlier in this judgment Marckx v Belgium is authority for the proposition that Article 1 of the First Protocol applies only to a person's existing possessions and does not guarantee a right to acquire possessions (confirmed in Rudzinska v Poland). In such circumstances we cannot see how the scheme devised by the respondent and subsequently approved by the Department could be fairly or reasonably described as having been produced in order to comply with or further any actual or perceived positive obligation arising under either of the relevant Articles. In order to properly secure and effectively protect human rights the Convention must remain both dynamic and flexible. This need is reflected in concepts such as the "purposive" or teleological canon of interpretation and the doctrine of the Convention as a "living instrument". No doubt this may also help to explain why any search for clearly articulated principles according to which the "ambit" test should be applied is likely to prove somewhat chimeric especially in a situation where there is no freestanding prohibition of discrimination. However, in addition to flexibility and dynamism, clarity is also a vital element in any legal structure and we believe that it is important to bear in mind that the Convention serves not only as a guarantee but also as a guide to public authorities seeking to comply with its provisions. After carefully reviewing the relevant jurisprudence neither appellant has persuaded us that their claims fall within any reasonable interpretation of the "ambit" of either Article 8 or Article 1 of the First Protocol and, accordingly, we find that Article 14 has no application in either case.

The substantive Article 14 issue

[33] As a result of the conclusions which the court has reached in the preceding paragraphs it is not strictly necessary to consider this issue. However, in deference to the submissions of counsel we propose to set out our views.

[34] In Wandsworth LBC -v- Michalak [2002] 4 All England Reports 1136, Brooke LJ in the course of giving judgment in the Court of appeal stated that it would usually be convenient for a court considering an Article 14 issue to

approach the task in a structured way within a general framework of four questions and this approach has been subsequently cited with approval by Lord Woolf CJ in A, X and Y and Others -v- Secretary of State for Home Department [2002] UK HRR 1141 at 1163.

[35] The first of the questions suggested by Brooke LJ related to "ambit" which we have dealt with in the course of the preceding paragraphs. It was accepted by both sides in these appeals that there was a relevant difference in treatment, that there were comparators in an analogous situation to that of the appellants and that the aim pursued by the respondent was legitimate. That aim was set out in the letter from the Executive to the Law Centre of 9 January 2001 in which the Executive stated that:

> "The intention of this exclusion, which reflects the 'Right to Buy' legislation in Great Britain, is to retain suitable accommodation in the social housing stock and ensure that such accommodation remains available for letting to those over 60."

In such circumstances, the debate between the parties focused on whether the respondent had established that the differential treatment, the exclusion of those over 60, bore a reasonable and objective relationship of proportionality to the aims sought to be achieved.

[36] On behalf of the respondent Mr McCloskey QC emphasised the need to preserve a stock of suitable accommodation for occupation by persons over the age of 60 and he referred to section 4 of the respondent's Board paper of 10 November 1994 which provided:

> "4. The exclusion of old persons' dwellings
>
> 4.1 The Board at its meeting on 1 March 1993 had felt strongly that such properties defined as being suitable for letting to Old Age Persons should not be sold, irrespective of whether or not the property was required for letting to that age group.
>
> 4.2 The concern was that such properties were always in high demand from elderly persons on the waiting list and continuing reduction in those potentially available for letting to the elderly would reduce the ability to meet that need. Also, acknowledging the legislative and budgetary constraints vis-à-vis new build, the Board decided such property should be retained in Executive stock."

The same paper concluded by noting that the stock of dwellings suitable for letting to the elderly was not capable of meeting their total housing needs in the foreseeable future nor was such need likely to be met by the level of new build provision nor the re-let rate of such properties. Consequently, the restrictive policy on the sale of suitable ground floor accommodation to elderly tenants was regarded as necessary to sustain that dwelling stock. However, Mr McCluskey QC accepted that, at the time of the relevant decisions, there was nothing to prevent persons aged less than 60 who were tenants of this type of accommodation from exercising the right to buy and thereby reducing the stock available to persons over the age of 60. In other words, there was no attempt to "ring-fence" the appropriate housing stock. This situation has now been changed as a result of a recommendation to the Board of the respondent Executive which was accepted in June of 2001 as a result of which the relevant exclusion was amended to provide that:

> "Under the Scheme, any dwelling-house may be sold with the exception of:
>
> *(a)* Sheltered dwelling units; and
>
> *(b)* any ground floor dwelling (other than a flat) with no more than two bedrooms to which either of the following conditions applies:
>
> *(i)* the tenancy of the current tenant, or of that tenant's predecessor in title as tenant, began on or after 1 January 2002, or
>
> *(ii)* the tenancy of the current tenant, or of that tenant's predecessor in title as tenant, began on a date prior to 1 November 2000 and the letting (to the current tenant or to a predecessor in title) was a letting for occupation by a person who was 60 or more when the letting commenced."

[37] Mr Larkin QC, while accepting that the respondent's policy had a legitimate aim, namely, preservation of the stock of appropriate accommodation for persons over 60 years of age, put forward four arguments as to why it was not proportionate:

(a) The policy was applied retrospectively to the appellant McDonnell since he had the right to buy at the commencement of his tenancy. This was a reference to the fact that this appellant had originally taken a joint tenancy of the bungalow in or about July 1982 at a time when he was 59 years of age although his wife was 61 years old. This appellant's wife died in November 2000 when he succeeded to the tenancy.

(b) The burden of the policy which was designed to act in the general interest was being borne only by those over 60 years of age.

(c) At the time of the refusal to sell to the appellant there was no "ring-fencing" of OPDs under the existing policy; such houses could be sold to persons under the age of 60 in accordance with the Right to Buy scheme without restriction.

(d) There was no priority in allocating OPDs to persons over 60.

[38] By way of response, Mr McCloskey QC submitted that the distinction was justified because it was desirable to retain a broad parity with the position in England and Wales and it was necessary to preserve the respondent's stock of accommodation which was appropriate for elderly persons. Mr McCloskey QC noted that while those over 65 years of age represented approximately 13% of the total population of Northern Ireland, 31% of the respondent's tenant population were retired and, of those, 21% were lone elderly and 7% two person elderly households.

[39] In dealing with this issue the learned trial judge referred to the high demand for Executive properties deemed suitable for letting to elderly people and noted that it was felt that such houses should not be sold because the continuing reduction of such properties would compromise the Executive's ability to meet the need for such houses from an increasing older population. In answer to Mr Larkin QC's submission that a reasonable relationship of proportionality between the means employed and the aim sought to be achieved had not been established because such houses could be let to tenants who were not disqualified on the grounds of age who would thereby gain the right to buy the learned trial judge observed:

> "This argument rather misses the point of the exclusion. If elderly persons take up a tenancy, they are in the natural order of things unlikely to remain in the rented house for as long as the younger tenant. If they are permitted to buy the property that will be a net loss to the Executive's stock of housing suitable for elderly tenants."

The learned trial judge observed that, in this context, it was relevant to note the bounds of the State's margin of appreciation when dealing with housing policies and he referred to paragraph 45 of the judgment in Mellacher -v- Austria [1989] 12 EHRR 391 at which the court, when referring to Article 1 of the First Protocol, said:

> "In order to implement [housing] policies, the legislature must have a wide margin of appreciation both with regard to the existence of a problem of public concern warranting measures of control and as to the choice of the detailed rules for the implementation of such measures."

[40] The contours of the principle of proportionality have been described by Lord Steyn in the well known passage from his judgment in R -v- Secretary of State ex parte Daly [2001] 3 All England Reports 433 at paragraph 27. Once it is accepted that the measure in question pursues a legitimate aim, as was the case in both of these appeals, the principle of proportionality places the onus upon the State to provide reasonable and objective justification for the adoption of the relevant distinction. In considering whether the State has discharged this onus the court may assess the balance which the decision-maker has struck and, if necessary, give consideration to the relevant weight he/she has accorded to the relevant interest and counter balancing considerations. Factors to be considered include whether the measure is rationally connected to the legitimate aim, whether there is a less restrictive alternative and whether the measure imposes an excessive degree of disadvantage upon the individual/individuals concerned.

[41] In this case, subsequent to a judicial review application brought by a Mrs Mary Byrne, the respondent subjected the exclusion of tenants over 60 from the right to buy to a detailed PAFT analysis in 1998. The respondent recognised that the exclusion constituted prima facie direct discrimination against the elderly and went on to consider the issue of justification noting that PAFT drew attention to the jurisprudence of the European Court of Justice. The respondent concluded that the exclusion was justified on two grounds:

(i) It was desirable to retain a broad parity with the position in England and Wales.

(ii) Households including a person over 60 obtained the benefit of a considerable advantage at the letting stage since such households showing an interest in being housed in an OPD were offered such a tenancy before it was made available to any other household. In such circumstances, the respondent considered that there was broad fairness in restricting the detriment at purchase state to those households which had gained such a potentially important advantage at the letting stage.

[42] On 1 November 2000 the Common Selection Scheme came into force as a result of a process of negotiation and consultation between the respondent, the Department and various housing associations. Under the provisions of this scheme the respondent did not have any power to offer the tenancy of an

OPD to an elderly applicant if a non-elderly applicant had greater points than the elderly applicant. Tenants aged over 60 years who were allocated to OPDs between 1 November 2000 and 1 April 2002, who had not enjoyed the advantage of any priority at the letting stage, were permitted by the respondent to exercise the right to buy. The respondent subsequently prepared a draft Equality Scheme which was submitted to the Equality Commission and consultation documents were circulated to a large number of relevant individuals and bodies. As a result of this review the policy of the respondent with effect from April of 2002 has been to exclude the sale of any ground floor accommodation with no more than two bedrooms to any tenant, regardless of age, if allocated after 1 April 2002.

[43] The respondent Housing Executive, in conjunction with the Department, is the body charged with the primary responsibility for the development and administration of public housing policy in this jurisdiction and, in the course of doing so, the respondent is required to take into account the varying interests of the different categories of those who are dependent upon public housing. The particular element of the "right to buy" policy to which these appeals relate was the need to preserve an appropriate stock of accommodation for those who were over 60 which the respondent sought to achieve by striking a balance between the exclusion of such persons from the policy and the priority which they were afforded at the letting stage. The affidavits and exhibits filed on behalf of the respondent confirm that, since its conception, the respondent has remained sensitive to the potential adverse impact of the policy upon those over 60 and has developed and adapted the policy to respond to a changing situation. After carefully reviewing all the circumstances, including the helpful and illuminating submissions of counsel, we have reached the conclusion that the respondent has discharged the burden of establishing reasonable, objective and proportionate justification for the policy that it has adopted.

R (Madden) -v- Bury Metropolitan BC [2002] EWHC (Admin) 1882

[44] During the course of his submissions Mr Larkin QC drew the attention of the court to the fact that the respondent had reviewed its policies, including the Right to Buy scheme, for Human Rights compliance but that, in doing so, no reference had been made specifically to Article 14 in relation to OPDs. Article 8 and Article 1 of Protocol 1 were noted to be relevant in relation to such sales. In the absence of such a specific reference Mr Larkin QC relied upon the following excerpt from the judgment of Richards J:

> "[68.] Against the background of what is common ground to the effect that Article 8 was engaged in this case and its implications had to be considered, it seems to me important that such consideration

> requires a clear recognition of the interests at stake under Article 8 and of the matters relied on by way of justification of an interference with those interests, with an appropriate balancing exercise to ensure that the principle of proportionality is observed. This can be done on a relatively generalised basis looking at the interests of residents as a whole and does not, in the absence of specialist circumstances, require an individualised balancing exercise by reference to an assessment of the needs of each individual resident. The detailed individual assessment can follow. It may well be that in a situation of this kind, the balancing exercise does not need to be elaborate, and that its outcome is reasonably predictable, especially given the existence of what are plainly substantial public interest considerations in favour of closure.
>
> [69] The fact remains that the point needs to be addressed. There is no evidence in this case that it was addressed. One Committee report does refer to the requirement to observe the relevant provisions of the Human Rights Act, but nothing more specific is said on the topic. There is some correspondence on the point after the decision, but that is simply an officer's view and does not show the members of the council addressing their minds to the point. It was not drawn to their attention. It cannot in my judgment be inferred from the evidence as a whole that the requisite exercise was gone through. The evidence may indicate the likely result if it had been gone through, but that is not a substitute for proper consideration of the point by the actual decision-maker."

Mr Larkin QC submitted that, in the absence of a specific reference to Article 14 in the respondent's decision-making process, the court should be slow to observe any significant degree of judicial deference.

[45] It does not seem to us that this argument assists the appellants in the circumstances of this particular case for a number of reasons:

(i) Paragraph [65.] of the judgment of Richards J clearly establishes that his views relating to Article 8 of the Convention were not strictly necessary for his decision.

(ii) While the absence of a specific reference to Article 14 might be a factor to which the court would wish to attach some weight when considering whether the possibility of discrimination had been considered or, when relevant, the extent of any judicial deference that might require to be observed, ultimately, the court is concerned with the substantive decision rather than any simple recital of individual articles.

(iii) The affidavits and the exhibits thereto furnished by the respondent indicate that the respondent did consider the exclusion of persons over 60 from the scheme and whether there was any objective justification for such exclusion (see, for example, the PAFT analysis).

Section 75 of the Northern Ireland Act 1998

[46] The allegation of discrimination contrary to Section 75 on behalf of Ms Lilly would appear to raise an issue of domestic law which was neither specified as a ground in that appellant's amended Order 53 statement dated 12 October 2001 or brought to the attention of the learned trial judge. In such circumstances we did not consider it appropriate for us to deal with the matter.

[47] Accordingly, for the reasons set out above, both appeals will be dismissed.