**Using the ECHR - A Community Law Centre's Perspective**

The incorporation of the European Convention on Human Rights (the ECHR) in 2003 was a time of mixed emotion for those of us working in the Northside Community Law Centre (the NCLC). We were naturally excited by the potential of the ECHR Act 2003 (the 2003 Act) in advancing the rights of our clients, those at the margins of society, but disappointed at the method of incorporation at a sub-constitutional level and concerned as to how the Courts would deal with this method of incorporation. In the intervening years and through the decisions provided (in many cases taken by independent law centres - Fennel, Foy & Pullen) a clearer picture is emerging of the impact of the ECHR in Ireland. In this paper I will describe the range of cases where we have raised arguments based on the rights protected in the 2003 Act, and also consider the reliefs sought in each case. This paper will then focus on the Convention arguments advanced in the McCann case, the reliefs sought and the remedies provided and will also consider how the outcome of the case may have been different if the court had decided the matter on purely Convention points. I will then provide a brief analysis of the political commitment and practical implementation of the ECHR from the NCLC's perspective.

We have raised arguments in the Superior Courts based on the rights protected in the 2003 Act in wide range of matters. In the area of social welfare law these have included challenges to the method of financial assessment of a liable relative by the Department of Social Welfare[1] raising Article 8, Article 14 and Article 1 of Protocol No. 1 arguments, challenges to the difference of treatment and residence status and entitlements to support raising Article 8 and Article 1 of Protocol No. 1 arguments.

We have also challenged the lack of entitlement to legal aid in employment appeals tribunal cases raising Article 6, Article 13 and Article 14 arguments. We have challenged the debt enforcement regime (discussed in more detail below), and raised various challenges to the eviction procedures by local authorities under Section 62 of the Housing Act 1966 raising Article 6, Article 8 and Article 13/14 arguments. We have also recently sought leave to review a decision of the Director of Public Prosecutions not to provide reasons where a decision was made not to prosecute on foot of a serious complaint of domestic violence and sexual assault, raising Article 3,4,6 and 8 and Article 13 and 14 arguments.

We also raise arguments on ECHR points in the Lower Courts, in child care proceedings, evictions and any other relevant cases and before various Tribunals, but perhaps most frequently before the Social Welfare Appeals Tribunal.

[1] Now known as the Department of Social Protection

In many of the cases taken by the NCLC before the Superior Courts we have put forward not only ECHR arguments but have paired these with constitutional arguments, the *'belt and braces*' approach described by some commentators. In this paper I will focus on the ECHR arguments raised in the McCann case[2], a case where both Constitutional and ECHR arguments were raised and where the Court ultimately decided the issue with reference to the Constitution. It is important to point out that the special protections afforded by the 2003 Act gave us the confidence to take this case.

Caroline McCann challenged an order committing her to prison and the validity of Section 6 of the Enforcement of Court Orders Act 1940 (the 1940 Act) which allowed for imprisonment of a debtor, in their absence and without representation, for failure to comply with an order of the District Court to repay a debt by instalments. We argued on her behalf that the legislation was invalid having regard to the provisions of the Constitution and also that it was incompatible with the protections afforded to her under the ECHR.

With regard to the ECHR arguments we sought a declaration that Section 6 of the 1940 Act was incompatible with the State's obligation under the provisions of the ECHR and raised arguments under Articles 5, 6 and 7 and Article 1 of Protocol No. 4. The primary basis argued was that Section 6 of the 1940 Act was incompatible with the ECHR and the 2003 Act in that it contravened Article 1 of Protocol No. 4 (Article 1) which provides:

*"No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation".*

The absolute nature of Article 1 was emphasised by Counsel on Ms. McCann's behalf. The nub of the case based on Article 1 was that, as a matter of interpretation of the relevant provisions, Section 6 of the 1940 Act did allow for the imprisonment of a debtor merely on the grounds of the debtor's inability to repay the debt, as exemplified by Ms. McCann's particular financial, family and health circumstances. We adopted a "fall back" position, in that it was submitted that, insofar as it did apply, Section 6 of the 1940 Act was a disproportionate interference with the Ms. McCann's right to liberty under Article 5 and was, therefore, unlawful. It was also submitted that enforcement proceedings for non-payment of a debt constituted criminal proceedings within the meaning of Article 6 of the ECHR when assessed against the criteria set out in the jurisprudence of the European Court of Human Rights (ECtHR) for

[2] McCann v The Judge of the Monaghan District Court & Ors [2009]IECH 276

identifying criminal proceedings, even if classified as civil proceedings under domestic law.

Ms. McCann sought both declaratory relief and injunctive relief to prevent the implementation of the committal order. She also sought an order of *certiorari* quashing the committal order and claimed damages for breach of her fundamental rights under the Constitution and under the Convention.

The High Court decided that Section 6 of the 1940 Act was invalid having regard to the provisions of the Constitution and, in particular, the provisions protecting her right to liberty and fair procedures contained in Articles 34, 40.3 and 40.4.1. Consequent to the finding of invalidity in relation to Section 6, the High Court determined that the District Court had no jurisdiction to make the committal order and proceeded to make an order of *certiorari* quashing the committal order and the warrant to enforce it for lack of jurisdiction. Amending legislation was enacted within 4 weeks of the decision.

As pointed out above both Constitutional and ECHR arguments were made in this case, with the Courts decision ultimately being made on the Constitutional protections of liberty and fair procedures and consequently the High Court did not proceed to consider the Convention arguments raised. However for a moment let us consider how the outcome may have been different if the case had been decided upon purely ECHR points incorporated in the 2003 Act. Assuming the Court had decided Ms. McCann's Article 1 (of Protocol 4) rights or in the alternative that her Article 5 or 6 rights were infringed, then what remedy could the Court have afforded her and how effective would this remedy have been? The only remedy available to the High Court under the 2003 Act would have been to declare Section 6 incompatible with the ECHR. This would have left Ms. McCann in the position where she would still face imprisonment as the Court could not strike down the offending legislation, despite a finding that fundamental rights had been infringed. The warrant would have remained and she could potentially have been arrested on her way from Court. The Court would then have had the matter of deciding the issue of damages measured in terms of the ECtHR, which may have allowed her to settle (at least in part) her debt and possibly to avoid imprisonment, but would this decision and settlement have been made in time to prevent her arrest and committal?

The 'belt and braces' approach adopted in the McCann case, advancing both Constitutional and ECHR arguments, demonstrates the underlying weaknesses in the 2003 Act, particularly concerning the remedies available to the successful litigant. Here the litigant succeeding on a Constitutional point had a clearer and surer outcome, walking from the Court without the prospect of imprisonment hanging over her, while had she succeeded on a ECHR point solely a less clear or satisfactory outcome was most likely. Not all cases will raise such pressing concerns, the

impending prospect of imprisonment, however it is difficult to imagine future cases where both Constitutional and Convention points can be raised proceeding on Convention arguments solely.

It is impossible to determine how great (or how little) ECHR arguments have influenced the Courts in determining cases on Constitutional points as happened in McCann. However it is clear that having a further set of arguments to put forward has greatly influenced the cases advanced by those of us working at NCLC.

There are currently cases being argued before the Courts where ECHR points solely arise. These cases illustrate the limitation of the 2003 Act remedies and some clearly show how long it may take for political action on foot of a declaration of incompatibility and that damages are not always a sufficient or adequate remedy.

The political commitment to the Convention in this jurisdiction to me appears lukewarm at best and hostile at worst. The State response in defence of the McCann case that it is "*obliged to defend the constitutional validity of the legislation … and its compatibility [with the Convention]*" is what we would expect of the State in response to such a challenge. However the response by legislators where there has been a declaration of incompatibility does not indicate that compliance features highly on the political or legislative agenda. Similarly the governments lack of 'human-rights proofing' of legislation and in our experience public bodies apparent lack of awareness of convention compliance in the carrying out of their functions (beyond merely stating that they are compliant and without demonstrating how this compliance has been assessed or achieved) reinforces this concern. The decision to impose drastic funding cuts to the Irish Human Rights Commission (IHRC) and Equality Authority as one of the first line responses to reductions in public spending and the decision to amalgamate these bodies raises further serious concerns about meaningful political commitment to the ECHR.

Practically, the implementation of the ECHR has resulted in an increase in the range of arguments to be made before the Courts and other Tribunals; however cases where there is a conflict between Constitutional and Convention protections clearly demonstrate the limitations of the ECHR as a method of advancing rights beyond those protected by the Constitution. The remedies or reliefs available under the 2003 Act have shown themselves to be less than adequate in certain cases. Furthermore, in our experience the Lower Courts and Tribunals lack of engagement with ECHR arguments (with the exception of certain Courts dealing with child care matters)

further brings into question the practical effectiveness of the ECHR in this jurisdiction.

The IHRC, established as a direct consequence of the obligations under the Good Friday Agreement, played a major role in the development of an ECHR culture in Ireland. The IHRC (particularly in its function as *amicus curiae* as it so intervened in the McCann case) has played a significant role in the advancing of ECHR arguments before the Courts, to Government and amongst the wider public. However this important body, and other rights bodies, independent law centres included must be adequately resourced to continue to do this work into the future for a proper rights culture to advance and thrive.

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