

## COUNTRY REPORT: IRELAND

### Inviolability of the Dwelling, Planning Enforcement Actions and Miss Fortune: An Analysis of the Cases Between the County Council of Wicklow and Fortune

SEAN WHITTAKER\*

#### Introduction

In Ireland, the fundamental rights of citizens are guaranteed by *the Irish Constitution*,<sup>1</sup> which aims to protect rights valued within modern societies.<sup>2</sup> The Irish planning regime<sup>3</sup> operates under the overarching framework provided by these rights, and any actions taken under the regime's authority must not breach the rights protected by the Constitution. This Country Report will focus on the recent series of cases between the County Council of Wicklow and Miss Fortune,<sup>4</sup> which has revealed a tension between the individual rights enshrined by the Constitution and the aims of the planning regime, which centre on the community.<sup>5</sup>

#### The Facts of County Council of Wicklow v. Fortune (No.1)

The case of *Fortune (No.1)* concerned a chalet that was used as a dwelling by Miss Fortune, a single mother who was "effectively destitute."<sup>6</sup> The chalet was built on land owned by Miss Fortune, but was erected without planning permission - contrary to the Irish planning regime.<sup>7</sup> The County Council wished to demolish the dwelling, and was granted leave to do

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\* PhD Candidate, University College Cork, Ireland.

<sup>1</sup> Constitution of Ireland, Articles 40-44.

<sup>2</sup> J Casey, *Constitutional Law in Ireland* (3<sup>rd</sup> edn, Round Hall Ltd, 2000), 386.

<sup>3</sup> Planning & Development Act 2000.

<sup>4</sup> *County Council of Wicklow v. Fortune (No.1)* [2012] IEHC 406 (hereafter referred to as "Fortune (No.1)"), *County Council of Wicklow v. Fortune (No.2)* [2013] IEHC 255 (hereafter referred to as "Fortune (No.2)") and *County Council of Wicklow (No.3)* [2013] IEHC (hereafter referred to as "Fortune (No.3)").

<sup>5</sup> C Miller, "Places or People: What is the Point of Town and Country Planning?" (2005) *Journal of Planning and Environment Law*, 434, 439.

<sup>6</sup> *Fortune (No.1)*, para 4.

<sup>7</sup> n.3, s.32.

so by the Circuit Court after Miss Fortune failed to obtain retention planning permission.<sup>8</sup> Miss Fortune appealed the decision of the Circuit Court, arguing that demolishing her dwelling would interfere with the inviolability of her home, a right protected under the Irish Constitution.<sup>9</sup>

The significance of this series of cases stems from the High Court's decision not to grant an order to demolish the dwelling. The High Court held that demolishing the chalet was not proportionate and did not justify interfering with Miss Fortune's constitutional rights.<sup>10</sup> In using the proportionality approach, the High Court has followed a similar test applied by the European Court of Human Rights (ECtHR). However, the application of the proportionality test differs from that of the ECtHR. In addition to this divergence, the *Fortune* cases may have a negative impact on future planning enforcement measures, undermining the aims of the Irish planning regime. As *Fortune (No.3)* cannot be appealed to the Supreme Court,<sup>11</sup> the decision in the *Fortune* cases will impact the operation of Ireland's planning regime and is an important series of cases from which to analyse the interplay between the constitutional rights of the citizen and the protection of the community's interests.

### **The Irish Planning Regime and the *Fortune* Decisions**

The Irish planning regime, similar to the UK, is a plan-led system where development plans are used as a framework to direct future development.<sup>12</sup> To be granted planning permission by the planning authority, which is necessary for a development to be lawfully executed,<sup>13</sup> developers must have regard to the development plan.<sup>14</sup> If a development has not obtained planning permission, it can be subject to enforcement measures by the planning authority.<sup>15</sup> This acts to deter citizens from breaking planning laws, ensuring that all developments have a minimal environmental impact,<sup>16</sup> are harmonised with pre-existing developments and provide certainty to other developers and the general public.

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<sup>8</sup> n.6, para 4-6.

<sup>9</sup> n.1, art 40.5.

<sup>10</sup> *Fortune (No.2)*, para 32.

<sup>11</sup> Courts of Justice Act 1936, s.39

<sup>12</sup> n.3, s.10(1).

<sup>13</sup> *Ibid*, s.32(1).

<sup>14</sup> *Ibid*, s.34(2).

<sup>15</sup> *Ibid*, s.151.

<sup>16</sup> N Collar, *Planning Law* (3<sup>rd</sup> edn, W Green, 2010), 12.

In line with this thinking, previous case law has emphasised that courts should only refrain from taking action against unlawful developments in “exceptional circumstances.”<sup>17</sup> However, this wide approach has been significantly narrowed in subsequent cases, which have held that it is only in circumstances where planning law has been breached, either through developing without planning permission or executing a development that is in material breach of planning permission, that the court may take action against an unlawful development.<sup>18</sup> The court can decide not to utilise its discretion when the breach is minor<sup>19</sup> or was performed in good faith.<sup>20</sup> Despite this narrowed approach, whether the development was the individual’s dwelling was not considered to be a relevant factor.<sup>21</sup>

The judgments in the *Fortune* cases have departed from the previous case law. This is due to these cases being the first to rely on Article 40.5 of the Irish Constitution within the context of the planning regime.<sup>22</sup> In applying the constitutional provision in *Fortune (No.1)*, the High Court held that the County Council had to show that demolishing the dwelling was a proportionate and fair method of achieving the aims of the planning regime to justify interfering with the inviolability of the dwelling.<sup>23</sup> In setting this test, the court made it clear that Article 40.5 did not provide an absolute protection for unlawful dwellings,<sup>24</sup> striking a balance between individual rights and community values.

In *Fortune (No.2)* three justifications were set out by the County Council of Wicklow to argue that demolishing the dwelling was proportionate and fair: the dwelling would undermine the planning regime’s ability to protect the environment;<sup>25</sup> the dwelling would set a precedent for future planning permission decisions;<sup>26</sup> and the dwelling negatively impacted the area and the nearby Natura 2000 conservation site.<sup>27</sup> However, the High Court held that these reasons did not justify an interference with the constitutional right to the inviolability of the dwelling. The court considered that the unlawful status of the dwelling, which would prevent it from being sold or used as a security, would deter other persons from building unlawful

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<sup>17</sup> *Morris v. Garvey* [1983] I.R. 319, 324.

<sup>18</sup> See *Wicklow County Council v. Forest Fencing* [2007] IEHC 242, para 50 and *Lanigan v. Barry* [2008] IEHC 29, para 45.

<sup>19</sup> *Grimes v. Punchestown Develop Co.* [2002] 1 I.L.R.M. 409.

<sup>20</sup> *Dublin Corporation v. McGowan* [1993] 1 I.R. 405, 412.

<sup>21</sup> *Meath County Council v. Murray* [2010] IEHC 254, para 44.

<sup>22</sup> n.6 para 32.

<sup>23</sup> *Ibid*, para 42.

<sup>24</sup> *Ibid*, para 40.

<sup>25</sup> n.10 para 13.

<sup>26</sup> *Ibid*, para 14.

<sup>27</sup> *Ibid*, para 21.

dwelling and thus ensure the effective operation of the planning regime.<sup>28</sup> This point was further emphasised in *Fortune (No.3)*<sup>29</sup> and it plays a substantive role in the court's attempt to protect the fundamental aims of the planning regime. The High Court also noted that because the dwelling was unlawful, it could not be taken into account in granting planning permission for future developments in the area, minimising the potential for the dwelling to set a precedent.<sup>30</sup> Finally, in analysing the impact on the conservation area, the High Court noted that there was no evidence of any negative impact to the Natura 2000 site<sup>31</sup> or to the area's amenities.<sup>32</sup> As such, the court held that the County Council had failed to meet the proportionality test and that Miss Fortune's dwelling, despite being unlawful, was protected from being demolished under Article 40.5 of the Constitution.

### The Proportionality Test in the European Court of Human Rights

While the use of the right to the inviolability of the dwelling is novel in the context of Irish planning law, the ECtHR has heard various cases challenging planning decisions under Article 8<sup>33</sup> and Article 1 of *Protocol 1*<sup>34</sup> of the *European Convention on Human Rights*. Much like the court in the *Fortune* cases, the ECtHR has applied a proportionality test as a method of balancing the rights of the individual and the needs of society. However, the application of the proportionality test differs between the High Court and the ECtHR, which impacts the extent to which local authorities can interfere with the rights of an individual.

Pursuant to the ECtHR case law, few rights guaranteed by the ECHR are absolute.<sup>35</sup> If limiting a right is necessary for the general public interest or protecting the rights of others and is proportionate in achieving this legitimate aim, then the limitation does not violate the protected right.<sup>36</sup> This ensures that an excessive burden is not imposed on any single person.<sup>37</sup> In applying the proportionality test, the ECtHR emphasises the importance of environmental protection as a community need,<sup>38</sup> its legitimacy as an aim which can justify

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<sup>28</sup> *Ibid*, para 13.

<sup>29</sup> *Fortune (No.3)* para 29.

<sup>30</sup> n.10, para 17.

<sup>31</sup> *Ibid*, para 22.

<sup>32</sup> *Ibid*, para 8.

<sup>33</sup> Article 8 guarantees the right of respect for private and family life, the home and correspondence.

<sup>34</sup> Article 1 of protocol 1 guarantees the right to the peaceful enjoyment of possessions.

<sup>35</sup> A Boyle, "Human Rights and the Environment: A Reassessment", 20, UNEP

<http://www.unep.org/environmentalgovernance/Portals/8/documents/Events/HumanRightsEnvironmentRev.pdf> Accessed 09/10/13.

<sup>36</sup> *Chapman v. United Kingdom* App No. 27238/95 (ECHR 18 January 2001), para 90.

<sup>37</sup> *Brosset-Triboulet and Others v. France* App No. 34078/02 (ECHR 29 March 2010), para 86.

<sup>38</sup> *Turgut and Others v. Turkey* App No. 1411/03 (ECHR 22 September 2009), para 90.

the limitation of human rights<sup>39</sup> and the role of planning regimes as an instrument to protect the community interest.<sup>40</sup> This emphasis places the evidential burden on the individual to prove that the burden imposed by the limitation of their rights is excessive, which provides greater protection for the community interest. This contrasts with the proportionality test applied in *Fortune*, which places the evidential burden on the public authority requiring them to justify the proportionality of their actions. As a result, this application of the proportionality test confers greater protection on the rights of the individual. This difference in approach results in different outcomes between cases with similar facts.

Notwithstanding the contradictory judgments between the two courts, the different applications of the proportionality test are justified by the language used in the ECHR and the Irish Constitution. The wording used to enshrine the right of the dwelling is “inviolable”, which, according to European constitutional tradition, confers a greater degree of protection than the similar right granted by the ECHR, which only provides that the right shall be “respected.”<sup>41</sup> Since the level of protection granted by the Irish Constitution is greater, it follows that the application of the proportionality test in Irish courts would place greater emphasis on protecting these individual rights. As such, it is difficult to criticise the use and application of the proportionality test as the foundation for the judgment in the *Fortune* cases.

### **The Impact of the *Fortune* cases in Ireland**

Despite the soundness of the proportionality test underpinning the *Fortune* cases, the judgment has not been favourably received by the Irish Planning Institute.<sup>42</sup> This is because the judgments, while protecting the inviolability of the dwelling, have undermined the key aims of the planning regime without providing an adequate defence against potential abuses. Additionally, the reasoning underpinning the cases can be criticised for not considering international instruments beyond the ECHR.

The first issue with the decision in the *Fortune* cases is that it, in essence, rewards Miss Fortune by allowing her to keep her unlawful dwelling despite ignoring the planning regime. This could influence others to do the same, undermining the planning regime and its goals.

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<sup>39</sup> n.36, para 82.

<sup>40</sup> *Pine Valley Developments Ltd and Others v. Ireland* App No. 12742/87 (ECHR 29 November 1991) para 57.

<sup>41</sup> n. 10, para 36 and *E.A v. Minister for Justice and Equality* [2012] IEHC 371, para 39.

<sup>42</sup> M Hilliard, “High Court Ruling on Retention of Wicklow Home sets an ‘Unhappy Precedent’” (*Irish Times*, 17 June 2013) <http://www.irishtimes.com/news/environment/high-court-ruling-on-retention-of-wicklow-home-sets-an-unhappy-precedent-planners-1.1429084> Accessed 09/10/13.

While the High Court considered that the unlawful status of the dwelling would act as an effective deterrent against others following Miss Fortune's example,<sup>43</sup> this is arguably not the case. It is likely that individuals who live nomadic lifestyles and who wish to settle down will benefit most from this decision, as they are likely to place a permanent dwelling without obtaining planning permission.<sup>44</sup> As many pre-existing sites are unsuitable for those living such lifestyles,<sup>45</sup> the unlawful status of their dwelling is unlikely to deter them from settling down in their chosen location.

Another issue arising from the court's reasoning is the further conflict between the planning regime and this extension of the inviolability of the dwelling. As the concept of a dwelling is not restricted to a certain type of building<sup>46</sup> it is possible that homeless people living in disused buildings may be able to claim that the building is their dwelling and protect it from being demolished.<sup>47</sup> While such buildings are unlikely to pass the proportionality test set out in *Fortune*, as disused buildings are likely to have an impact upon the environment and amenities in the area, the possibility still exists. This can be problematic for both the needs of society, as it may contradict the underlying aims of the planning regime, and the individual residing inside the building, it is likely detrimental to their health.

These issues originate from how the inviolability of the dwelling clause in the Irish Constitution has been interpreted in the *Fortune* cases. The ECtHR has recognised that the wording of the ECHR does not extend to allowing individuals to choose where they place their dwelling, but only provides protection to dwellings lawfully placed.<sup>48</sup> While the wording of Article 40.5 of the Irish Constitution grants a greater level of protection than the ECHR, it does not extend the scope of this protection to allow individuals to choose their dwelling place. *Fortune* extends the reach of Article 40.5 to allow individuals to choose dwelling place and, as long as it is their sole dwelling place, protects them from the enforcement actions of the local authority. This distorts the relationship between the right guaranteeing the inviolability of the dwelling and the planning regime, undermining the operation and aims of the planning regime. While this distortion is somewhat limited by the requirement for such

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<sup>43</sup> n.10, para 13.

<sup>44</sup> As was the case in *Chapman v. UK*, n.36.

<sup>45</sup> S Burke, "Over 1,000 Families Still Living in Inhumane Conditions" (11 February 2010) <http://saraburke.wordpress.com/2010/02/11/over-1000-traveller-families-still-living-in-inhumane-conditions/> Accessed 10/10/13.

<sup>46</sup> See *People (Attorney-General) v. Hogan* (1972) 1 Frewen 360 and n.2, 516.

<sup>47</sup> John Considine, "Novel Constitutional Argument Succeeds in s.160 Planning Case Involving a Dwelling" (*LinkedIn*, 2013)

<http://www.linkedin.com/groupItem?view=&gid=28415&type=member&item=252256473&commentID=-1&qid=b4139491-a674-480b-be19-7dcf767fd2c2> Accessed 17/10/13.

<sup>48</sup> n.36, para 113.

dwelling to not inflict damage to the environment, this limitation does not take account of other interests, such as economic development, enshrined by the development plan and the planning regime. This makes the limitation inadequate as a means of protecting the aims of the planning regime and balancing the relationship between an individual's rights and the needs of society.

The final issue with the reasoning behind the *Fortune* cases is how the High Court perceived and applied the definition of environmental harm. As the environmental impact of the dwelling is presented as the sole limitation of the constitutional right at issue, the court took a limited view on what constitutes environmental harm. While not expressly defined in *Fortune (No.2)*, the court analysed the environmental impact on the area where the dwelling was built and the Natura 2000 area separately, and held that because there was no perceivable impact, no environmental harm was caused.<sup>49</sup> By taking this approach to defining environmental harm, the court does not take into account the complexity of biological interactions within ecosystems. This runs contrary to the principles underlying the ecosystem approach enshrined by the Convention of Biological Diversity (which Ireland has ratified) as set out in Decision V/6 of the Conference of the Parties.<sup>50</sup> Principle 8 of COP V/6 recognises that ecosystems operate on a varied temporal scale and any impacts upon the ecosystem may not be seen until long after the damaging event has occurred. As this was not taken into account in the *Fortune* cases,<sup>51</sup> it is possible that the dwelling could have an unseen negative impact upon the Natura 2000 site. This is a defect within the *Fortune* cases, as by not taking this holistic approach the factual analysis of the impact of the dwelling and any future unlawful dwellings may be incorrect, which may result in grant protection to unlawful dwellings that cause environmental damage.

It is these cumulative defects which have led to the judgments of the *Fortune* cases to be badly received by the Irish Planning Institute. The judgments, despite the soundness of the proportionality test, have changed the legal landscape of utilising planning enforcement measures through distorting the balance between individual and community rights without providing adequate safeguards against their potential abuse. This undermines the use of planning permission, which negatively impacts upon the environmental, economic and social concerns embodied through the planning regime

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<sup>49</sup> n.10, para 22.

<sup>50</sup> Hereafter referred to as COP V/6.

<sup>51</sup> n.6, para 2.

## Conclusion

It has been said that when social policies threaten protected human rights, the underlying aims of planning regimes are suspended.<sup>52</sup> In a fair society this is necessary, as the rights of individuals need to be protected against the general public interest to prevent the imposition of excessive burdens. However, it is also necessary to protect the general public interest, as the rights of the individual cannot always take precedence in a just society. This is reflected in the proportionality test used in the ECtHR, which balances the rights of the individual and the common good. While the proportionality test used in the *Fortune* cases attempts to strike this balance, the emphasis on the rights of the individual guaranteed by the Irish Constitution prevent this balance from being obtained.

This distortion in the balance between these interests, the limited definition of environmental harm that was applied in the cases and the resultant extension of the right to the inviolability of the dwelling have resulted in hindering the planning regime's ability to take enforcement action against unlawful dwellings, undermining the regime's operation and its aims. While in this case the harm was limited, as the County Council was able to negotiate with Miss Fortune, it is likely that the precedent set by this case will impact upon future enforcement actions and the operation of the planning regime as a whole. As this case cannot be appealed, until a similar decision reaches the Supreme Court the rights of the individual will prevail in most planning enforcement actions concerning the sole dwelling of the individual, to the detriment of the common good.

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<sup>52</sup> n.5, 439.