Record No. 2013/371 P

THE HIGH COURT

In the matter of the European Convention on Human Rights Act, 2003

BETWEEN

LYDIA FOY

PLAINTIFF

AND

AN T-ARD CHLÁRAITHEOIR, THE MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS, *AMICUS CURIAE*

INTRODUCTION

Background

1. Dr Lydia Foy, the Plaintiff in these proceedings, is a transgender woman who previously issued proceedings challenging the failure of the First Named Defendant to issue her with a birth certificate reflecting and stipulating legal recognition of her acquired gender. In his judgment dated the 19th October 2007, Mr. Justice McKechnie, then of the High Court, found that the Respondent State

was in breach of its positive obligations under Article 8 of the European Convention on Human Rights (hereinafter "the Convention"). McKechnie J decided to grant the first ever Declaration of Incompatibility of Irish law with the Convention pursuant to Section 5 of the European Convention on Human Rights Act, 2003 (hereinafter "the 2003 Act"). Pursuant to the Declaration, Sections 25, 63 and 64 of the Civil Registration Act, 2004 were held as incompatible with the State's obligations under the Convention "*by reason of their failure to respect the private life of* [Dr Foy] *as required by Article 8 of the said Convention in that there are no provisions which would enable the acquired gender identity of the applicant to be legally recognised in this jurisdiction*".[1]

2. The Plaintiff has now brought proceedings challenging what she considers to be an ongoing failure to enact legislation to allow for recognition of her female gender identity. Draft Heads of a Gender Recognition Bill were published in July 2013 and subsequently revised; however, to date, no actual Bill has been published or introduced in the Oireachtas.

3. On the 16th December 2013, Counsel on behalf of the International Commission of Jurists (hereinafter the "ICJ") appeared before this Honorable Court to apply for leave to intervene by way of *amicus curiae* in these proceedings in order to assist this Court in the determination of certain points of law arising in the case. On the 20th December 2013, Mr Justice Gilligan granted the ICJ's application for leave to intervene, by way of appointment as *amicus curiae*, and to make submissions in these proceedings for the purpose of assisting the Court on

[1] *Foy v An t-Ard Chlaraitheoir* [2007] IEHC 470; [2012] 2 IR 1.

the legal issue of the right to an effective national remedy under the Convention.

Summary of Submissions on behalf of the ICJ

4. As foreshadowed in the affidavit of Livio Zilli, Senior Legal Adviser at the ICJ in Geneva, on which the ICJ's application of leave to intervene before this Court as *amicus curiae* was grounded, in these submissions the organisation intends to address the right under international law including, in particular, under the Convention, to an effective national domestic remedy. As previously indicated, the organisation will endeavour not to duplicate the arguments of the parties or to make submissions on matters of fact that may be in dispute between them.[2] It may be noted, however, that at the date of drafting, the ICJ has not yet had sight of the Defendants' submissions.

5. The ICJ's submissions are principally based on the case-law of the European Court of Human Rights (hereinafter "the ECtHR") which has interpreted and construed the substantive requirements of the right to an effective remedy before a national authority under Article 13 of the Convention. In summary, the organisation's submissions address:

A. The requirement that a remedy before a national authority be effective in law and practice, namely, that it must be accessible and enable the enforcement of the substance of the rights and freedoms that the Convention guarantees

[2] Livio Zilli's affidavit, paragraphs 4, 18 and 21.

before a national authority capable of granting an appropriate relief, and offering reasonable prospects of success;

B. The relationship between the effectiveness of the domestic remedy and delay in the context of Article 6 of the Convention; and

C. The adequacy of the national remedy under Article 13 and Article 35 of the Convention.

A. The substantive requirements of an effective remedy before a national authority

6. Article 13 of the Convention provides that: "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

7. In its case-law, the ECtHR has interpreted and construed the right to an effective national remedy under Article 13 of the Convention as requiring that individuals must be able to assert and subject to real review the substance of their Convention rights and freedoms before a national authority; and, when the latter finds in their favour, as entitling them to an appropriate relief.[3] Thus, as early as 1978, in ***Klass v. Germany***, the ECtHR had clarified that Article 13 "must be

[3] See, inter alia, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, paragraph 288.

interpreted as guaranteeing an "effective remedy before a national authority" to everyone who claims that his rights and freedoms under the Convention have been violated".[4]

8. As the Grand Chamber of the ECtHR held, inter alia, in ***Kudla v. Poland***, "the remedy required by Article 13 must be "effective" in practice as well as in law".[5] In this context, effectiveness means either a remedy capable of "preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred".[6]

9. It is submitted that, in this context, the effectiveness of the national remedy should be guaged and construed in the light of the relationship between Article 35 of the Convention, which, inter alia, addresses the obligation to exhaust domestic remedies, and the obligations of Contracting Parties under Article 13. In this respect, the ECtHR in ***Kudla*** emphasized that:

"[t]*he purpose of Article 35 § 1, which sets out the rule on exhaustion of*

[4] *Klass v. Germany*, Application no. 5029/71, paragraph 64. In particular, in *Klass* the ECtHR clarified that Article 13 must not be construed literally; there is no prerequisite for its application that the Convention be in fact violated. That means that individuals are not only entitled to a national remedy when a violation of their rights has already occurred, but also, that Article 13 entitles those who consider that they are, or would be prejudiced by certain measures in breach of the Convention, to a remedy before a national authority so that they can have their claim determined and, if appropriate, obtain redress (paragraph 64). See also ***Silver v. the United Kingdom*** where the ECtHR held that Article 13 requires that, "where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress", *Silver v. the United Kingdom*, Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, paragraph 113, recalling the judgment in *Klass*.

[5] *Kudła v. Poland*, Application no. 30210/96, paragraph 157.

[6] *Kudla*, paragraph 158.

domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court.... The object of Article 13, as emerges from the travaux préparatoires (see the Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights, vol. II, pp. 485 and 490, and vol. III, p. 651), is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court."[7]

10. The scope of the Article 13 obligation to provide an effective national remedy varies depending on the nature of the complaint under the Convention.[8] At a minimum, however, the Convention requires the availability of national remedies to enforce the substance of the rights and freedoms that the Convention guarantees in whatever form they may be secured within the domestic legal order. In order for the national remedy required by Article 13 to be "effective", it must be available in practice as well as in law.[9] Further, the requirement under Article 13 that the domestic remedy be available in theory and in practice necessitates, in turn, that it be accessible, capable of providing redress and capable of offering reasonable prospects of success.[10]

[7] *Kudla*, paragraph 152.

[8] *İlhan v. Turkey* [GC], Application no. 22277/93, paragraph 97, ECHR 2000-VII.

[9] *de Souza Ribeiro v. France* [GC], Application no. 22689/07, paragraph 80.

[10] *McFarlane v. Ireland* [GC], Application no. 31333/06, paragraph 114.

11. In light of the foregoing, it is submitted that Article 13 of the Convention requires Contracting Parties to make available domestically, in law and in practice, a domestic remedy endowed with the abovementioned characteristics so as to ensure that the protection of the rights enshrined in the Convention be practical and effective. Anything less would render these rights theoretical and illusory.[11]

12. While Contracting Parties are afforded some discretion as to the manner in which they conform to their Convention obligations under Article 13, they are obliged to ensure that domestic remedies be capable of dealing with the substance of an "arguable complaint" under the Convention and, if so warranted, "**to grant appropriate relief**".[12]

13. The right to an effective remedy and reparation is well established under international law. As a general principle of public international law, any wrongful act arising from the breach of an international legal obligation gives rise to a correlative obligation to make reparation for such wrongful act.[13] The

[11] In *El-Masri v. "the former Yugoslav Republic of Macedonia"* [GC], Application No. 39630/09, the Grand Chamber of the ECtHR reiterated that "the Convention is an instrument for the protection of human rights and that it is of crucial importance that it is interpreted and applied in a manner that renders these rights practical and effective, not theoretical and illusory", paragraph 134.

[12] *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], Application no. 47848/08, para. 148, emphasis added.

[13] *Factory at Chorzow*, *Jurisdiction,* judgement n° 8, 1927, P.C.I.J., Series A, no. 17, p. 29 ; *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184 ; *Interpretation des traités de paix conclus avec la Bulgarie, la Hongrie et la Romanie, deuxième phase*, avis consultatif, C.I.J., Recueil, 1950, p. 228. See also Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: Every internationally wrongful act of a State entails the international responsibility of that State. (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001 ("ILC draft Articles on State Responsibility"). See also Principles no. 3 and 9 and their Legal Commentary.

recognition in international law that individuals have right to an effective remedy and remedy for violations of their internationally protected human rights is a particularised application of this principle first developed in the context of inter-state responsibility. This principle is reflected in myriad international treaties and other instruments.[14] It is fundamental that for remedies to be effective they must be prompt, accessible, available before an independent body, and leading to cessation of the wrongdoing and to reparation.[15]

14. In 2005 the UN General Assembly, adopted, by consensus, the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law

[14] See among others: *Universal Declaration of Human Rights* (Art. 8), *International Covenant on Civil and Political Rights* (Art. 2(3), Art. 9(5) and 14(6)), *International Convention on the Elimination of All Forms of Racial Discrimination* (Art. 6), *Convention of the Rights of the Child* (Art. 39), *Convention against Torture and other Cruel Inhuman and Degrading Treatment* (Art. 14), *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 24), *Rome Statute for an International Criminal Court* (Art. 75), *American Convention on Human Rights* (Arts 25, 68 and 63(1)), *African Charter of Human and Peoples' Rights* (Art. 21(2)). See also: UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; *UN Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and serious violations humanitarian law;* UN *Declaration on the Protection of all Persons from Enforced Disappearance* (Art. 19); UN *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 20); UN *Declaration on the Elimination of Violence against Women*; Recommendation (85) 11 E, of the Committee of Ministers of the Council of Europe, *on the position of the victim in the framework of criminal law and procedure* (28 June 1985); *Guidelines on the Protection of Victims of Terrorist Acts* adopted by the Committee of Ministers of the Council of Europe (2005*); Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa* of the African Commission on Human and Peoples' Rights (2003); and *Council Framework Decision on the standing of victims in criminal proceedings* of the Council of European Union (2001).

[15] The Right to a Remedy and to Reparation for Gross Human Rights Violations – A Practitioners' Guide, International Commission of Jurists, Geneva, December 2006, available online at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/08/right-to-remedy-and-reparations-practitioners-guide-2006-eng.pdf, last accessed on 24 October 2014.

and Serious Violations of International Humanitarian Law.[16] This instrument covers not only gross human rights violations, but also sets out and clarifies the general principles for all international human rights violations, including the obligation to provide effective remedies, and in particular, reparations to victims.[17] Such reparations include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[18] Further, in 2011 the Committee of Ministers of the Council of Europe adopted a set of Guidelines on eradicating impunity for serious human rights violations.[19] In addressing reparation, Guideline XVI calls on states to take all appropriate measures, including "measures of rehabilitation, compensation, satisfaction, restitution and guarantees of non-repetition."

15. Article 13 must also be interpreted and construed in a manner consistent with Ireland's other human rights treaty obligations as a State Party to each of the international human rights treaties establishing the right to an effective remedy and reparation, including under Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR), Article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or

[16] United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147, 16 December 2005, in particular Principles 18-23.

[17] *Ibid*, Principle 3(d).

[18] *Ibid*, Principles 18-23.

[19] Council of Europe's Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, adopted by the Committee of Ministers on 30 March 2011.

Punishment, as well as under general international law.[20]

16. In light of the foregoing, it is submitted that obligations under Article 13 require consideration of the full scope of measures necessary to redress violations of the Convention to ensure that the relief is adequate. Thus, it is further submitted that, in order for national remedies to be truly effective, they must be comprehensive so as to entail restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as appropriate.

17. Further, it is submitted that, in its interpretation and application of Article 13 rights in the present case, this Court may find it instructive to have regard to the United Nations Human Rights Committee's authoritative interpretation of the nature of the general legal obligation imposed on State Parties to the ICCPR by Article 2 of the Covenant, which includes the requirement to ensure accessible and effective remedies to vindicate Covenant rights.[21] The Human Rights Committee has stressed that even where a State's legal system is formally endowed with what may seem on the surface to be appropriate avenues for seeking a remedy, such remedies must "function

[20] See General Comment No. 3 of the Committee against Torture on the Implementation of article 14 by States parties to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/GC/3, 19 November 2012, "The Committee considers that the term "redress" in article 14 encompasses the concepts of "effective remedy" and "reparation". The comprehensive reparative concept therefore entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition and refers to the full scope of measures required to redress violations under the Convention", paragraph 2. "Reparation must be adequate, effective and comprehensive. …. the provision of reparation has an inherent preventive and deterrent effect in relation to future violations", paragraph 6.

[21] Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, paragraphs 15 to 20.

effectively in practice." In other words, such remedies must be "accessible, effective and enforceable"[22] if they are to satisfy the requirements of Article 2(3) of the Covenant. Further, the Human Rights Committee has clarified that the right to an effective remedy under Article 2(3) of the Covenant

> *"…requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation… the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged… the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices…"*[23]

18. The Human Rights Committee has also emphasized that "the purposes of the Covenant would be defeated without **an obligation** integral to article 2 **to take measures to prevent a recurrence of a violation of the Covenant**" and that, in certain circumstances, there is a "need for **measures, beyond a victim-specific remedy**, to be taken **to avoid recurrence** of the type **of violation in question. Such measures may require changes in the State**

[22] See e.g., *George Kazantzis v. Cyprus*, Comm. No. 972/2001, UN Doc CCPR/C/78/D/972/2001, paragraph 6.6 (Aug. 7, 2003); *Yasoda Sharma v. Nepal*, Comm. No. 1469/2006, UN Doc CCPR/C/94/D/1469/2006, paragraph 9.6. (Oct. 28, 2008).

[23] Human Rights Committee, General Comment No. 31, paragraph 16.

Party's laws or practices".[24]

19. The Recommendation (2004)6 of the Committee of Ministers of the Council of Europe to member states on the improvement of domestic remedies recalls that, pursuant to Article 1 of the Convention, the rights and freedoms enshrined therein should be protected and applied in the first place at national level by national authorities; and that Contracting Parties should ensure the effectiveness of national remedies in law and in practice, including by their being capable of resulting in a decision on the merits of a complaint, as well as adequate redress for any violation found.[25] The Appendix to the Recommendation underlines that **the Contracting Parties are encouraged "to examine their respective legal systems in the light of the case-law of the Court and to take, if need be, the necessary and appropriate measures to ensure, through legislation or case-law, effective remedies as secured by Article 13**" (emphasis added).

20. The ICJ also wishes to draw the Court's attention to the authoritative interpretation of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provided by the Committee against Torture. In elucidating the content and scope of State parties' obligations under Article 14 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the

[24] *Ibid*, paragraph 17, emphasis added.

[25] Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies *(adopted by the Committee of Ministers on 12 May 2004, at its 114th Session)*, preamble.

Committee against Torture has clarified in its General Comment No. 3 that for "restitution to be effective, efforts should be made to address structural causes to the violation, including **any kind of discrimination related to, for example, gender,** sexual orientation, disability, political or other opinion, ethnicity, age and religion, and all other grounds of discrimination".[26]

B. The relationship between the effectiveness of the domestic remedy and delay in the context of Article 6 of the Convention

21. The ECtHR's case-law concerning the obligation under Article 13 of the Convention to secure an effective national remedy has also emphasized the need to pay particular attention to "the speediness of the remedial action itself, it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration".[27] In ***de Souza Ribeiro v. France***, the ECtHR reiterated that "it is not inconceivable that the adequate nature of the remedy can be undermined by its excessive duration".[28]

22. In this context, it is worth recalling that the Convention, as an instrument for the protection of human rights, requires that the Contracting Parties' obligations, including those under Article 13, be interpreted and construed in a manner that ensures that their protection is practical and effective, and not

[26] General Comment No. 3 of the Committee against Torture, paragraph 8, emphasis added.

[27] *Doran v. Ireland*, Application No. 50389/99 (2006) 42 EHRR 13, 31 July 2003, paragraph 57.

[28] *de Souza Ribeiro v. France*, paragraph 81.

theoretical and illusory.[29] The Appendix to the Recommendation (2004)6 of the Committee of Ministers of the Council of Europe to member states on the improvement of domestic remedies notes that "the "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant; but it implies a certain minimum requirement of speediness."[30]

23. This is particularly true for the guarantees enshrined in Article 6 of the Convention in view of the prominent place held in a democratic society by the right to a fair trial.[31] In this context, the ECtHR observed in ***Kudla*** that,

> "*…the right of an individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim first to a national authority; and the requirements of Article 13 are to be seen as reinforcing those of Article 6 § 1, rather than being absorbed by the general obligation imposed by that Article not to subject individuals to inordinate delays in legal proceedings.*"[32]

24. In this context, in ***Burdov v. Russia (no. 2)***, ECtHR has also held that "the right to a court protected by Article 6 would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. Execution of a judgment

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[29] See, for example, *El-Masri v. "the former Yugoslav Republic of Macedonia"*, cited above, paragraph 134.

[30] Appendix to Recommendation Rec(2004)6, cited above, paragraph 1.

[31] *Scordino v. Italy*, Application No. 36813/97, paragraph 192.

[32] *Kudla*, cited above, paragraph 152.

given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6".[33] In ***Hornsby v. Greece***, the ECtHR found that it

> "*would be inconceivable that Article 6 para. 1… should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 (art. 6) as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention… Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6.*"[34]

25. Further, in ***Burdov (no 2)***, the ECtHR held that

> "*in cases concerning non-enforcement of judicial decisions, any domestic means to prevent a violation by ensuring timely enforcement is, in principle, of greatest value. However, where a judgment is delivered in favour of an individual against the State, the former should not, in principle, be compelled to use such means* […]*: the burden to comply with such a judgment lies primarily with the State authorities, which should use all means available in the domestic legal system in order to speed up the enforcement, thus preventing violations of the Convention*".[35]

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[33] *Burdov v. Russia (no. 2)*, Application no. 33509/04, paragraph 65.

[34] *Hornsby v. Greece*, Application No. 18357/91, paragraph 40.

[35] *Burdov No. 2*, paragraph 98.

26. By analogy therefore, it is submitted that the Recommendation 2010(3) on effective remedies for excessive length of proceedings is also relevant, including, in particular, the recommendation that member states "take all necessary steps to ensure that effective remedies before national authorities exist for all arguable claims of violation of the right to trial within reasonsable time". [36]

C. The adequacy of the national remedy under Article 13 and Article 35 of the Convention

27. As the ECtHR observed in ***Kudla***,

> "*The object of Article 13, as emerges from the travaux préparatoires ... is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court.*"[37]

28. It is submitted that if the national remedy is truly effective, then it would be much less likely that applicants would deem it necessary to resort to the ECtHR to vindicate their Convention rights.[38] Conversely, where the national

[36] Recommendation CM/Rec(2010)3 of the Committee of Ministers of the Council of Europe to member states on effective remedies for excessive length of proceedings adopted by the Committee of Ministers on 24 February 2010, Recommendation 5.

[37] *Kudla*, paragraph 152.

[38] The last preambular paragraph of Recommendation CM/Rec(2010)3, cited above, makes the following point in respect of promptness "the introduction of measures to address the excessive length of proceedings will contribute, in accordance with the principle of subsidiarity, to enhancing the protection

remedy is generally ineffective, the ECtHR will be more likely to consider that applicants have discharged their Article 35 obligations. This is particularly the case when the national remedy is either unlikely to provide effective relief or is unnecessarily prolonged. *A fortiori* when it is both.

29. The ICJ wishes to draw the Court's attention to the fact that the ECtHR has held in a number of cases that declarations of incompatibility under section 4 of the United Kingdom's Human Rights Act, 1998, which corresponds to Section 5 of the 2003 Act, could not be "regarded as an effective remedy within the meaning of Article 35 § 1" of the Convention.[39] In addition, in ***Burden v. the United Kingdom***, the Grand Chamber of the ECtHR found that "it would be premature to hold that the procedure under section 4 of the Human Rights Act **provides an effective remedy to individuals complaining about domestic legislation**".[40]

30. Finally, it is submitted that this Honorable Court will find the judgment of

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of human rights in member states and to preserving the effectiveness of the Convention system, including by helping to reduce the number of applications to the Court".

[39] *Burden v United Kingdom* [GC], Application no. 13378/05, paragraph 40, referring in turn to *Hobbs v. the United Kingdom*, *Dodds v. the United Kingdom*, *Walker v. the United Kingdom*, *Pearson v. the United Kingdom*, *B. and L. v. the United Kingdom* and *Upton v. the United Kingdom*.

[40] *Burden v United Kingdom*, paragraph 41 (emphasis added). However, in the same judgment, it then went on to hold that "The Grand Chamber agrees with the Chamber that it cannot be excluded that at some time in the future the practice of giving effect to the national courts' declarations of incompatibility by amendment of the legislation is so certain as to indicate that section 4 of the Human Rights Act is to be interpreted as imposing a binding obligation. In those circumstances, except where an effective remedy necessitated the award of damages in respect of past loss or damage caused by the alleged violation of the Convention, applicants would be required first to exhaust this remedy before making an application to the Court", paragraph 43.

the Grand Chamber of the ECtHR in ***A, B & C v. Ireland*** particularly instructive in the determination of the present case. In that case, the ECtHR considered that:

> "*In any event, a declaration of incompatibility would place no legal obligation on the State to amend domestic law and, since it would not be binding on the parties to the relevant proceedings, it could not form the basis of an obligatory award of monetary compensation. In such circumstances, and given the relatively small number of declarations to date (see paragraph 139 above) only one of which has recently become final, a request for such a declaration and for an ex gratia award of damages would not have provided an effective remedy to the first and second applicants (see Hobbs v. the United Kingdom (dec.), no.63684/00, 18 June 2002, and Burden, cited above, §§ 40-44)*."[41]

CONCLUSIONS

31. In conclusion, the present case exemplifies the need to ensure that domestic legislative and administrative mechanisms are in place to ensure the effective implementation of obligations under international law. The ICJ understands that under Section 2(1) of the European Convention of Human Rights Act 2003, a court shall interpret and apply any statutory provision or rule of law in a manner compatible with the State's obligations under the provisions of the Convention. It is respectfully suggested that the principles addressed in these submissions on the right to an effective national remedy, as they emerge from the jurisprudence of the

[41] *A, B & C v Ireland*, Application no. 25579/05, paragraph 150.

ECtHR and from general international law, are crucial to any deliberation on the State's obligations under the Convention.

32. As set out in these submissions, it is not sufficient for a national remedy to be available in merely formal terms; it must be effective in law and in practice and not merely theoretical or illusory. Furthermore, the effectiveness of such a remedy implies a certain minimum requirement of speediness and it is possible for the adequate nature of a remedy to be undermined by its excessive duration. In this respect, the right to an effective remedy ought to be interpreted in the light of Article 6 of the Convention. Finally, it is well-established that declaratory relief, which does not place a legal obligation on the State to amend domestic law and which does not form the basis of an obligatory award of damages, is inadequate for the purposes of the Convention.

33. Finally, it is submitted that in its determination of this case, this Honourable Court will wish to have regard to all aspects of the right to an effective remedy and reparation, namely, compensation, just satisfaction, restitution, rehabilitation, gurantees of non-repetition, as well as to need to ensure the cessation of ongoing violations.

24th October, 2014

Gráinne Gilmore BL