[2019] IEHC 863

THE HIGH COURT

JUDICIAL REVIEW

2018 No. 1059 J.R.

BETWEEN

ANDRZEJ ZABIELLO
TERESA ZABIELLO

APPLICANTS

AND

SOUTH DUBLIN COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 19 December 2019

INTRODUCTION

1. These judicial review proceedings involve a challenge to a decision made by South Dublin County Council ("*the Housing Authority*") to the effect that the Applicants are ineligible for social housing support. The Applicants, who are husband and wife, are Polish nationals and have emigrated to Ireland. The rationale for the decision appears to be that the Applicants had previously owned a flat in Poland. The position of the Housing Authority appears to be that had the flat been sold for value, then the sale proceeds could have "assisted" the Applicants with their housing needs. In the event, the flat was not sold, but instead gifted to the Applicants' son. The impugned decision states that, having gifted their property to their son in Poland, the Applicants are not eligible to apply for social housing.

2. The Applicants contend that the approach of the Housing Authority does not accord with the relevant legislation and is disproportionate and irrational. They point out that the value of the flat at the time of the gift in 2014 was approximately €12,000, and that their son had previously expended a sum in the order of €5,000 in refurbishing the flat. It is said that given the limited value of the Applicants' equity in the flat (estimated at €7,000), the proceeds of any sale of the property would not have enabled the Applicants to purchase alternative accommodation in Ireland nor to defray the costs of renting accommodation for more than a short period of time.

3. The resolution of the dispute in these proceedings turns on the correct interpretation of the Social Housing Assessment Regulations 2011 (as amended). In particular, it will be necessary to consider the manner in which the Regulations require capital assets to be assessed in determining eligibility for social housing support.

FACTUAL BACKGROUND

4. The Applicants, who are husband and wife, are Polish nationals and emigrated to Ireland in 2007. The Applicants had previously purchased a flat from the Polish State in 2005 for a sum equivalent to €2,218. Following the Applicants' departure for Ireland, their son stayed on in, and refurbished, the flat at his own expense. The cost of this refurbishment is estimated at €5,000.

5. The Applicants currently reside in a one-bedroom apartment in Clondalkin, and pay rent of €988 per month.

6. The Applicants made an initial application for social housing support in February 2015 (*"the first application"*). It appears that at that time the first named applicant was in receipt of disability allowance and the second named applicant was unemployed.

7. The application was made on a *pro forma* application form as prescribed under the schedule to the Social Housing Assessment Regulations 2011. Part 11 of the application form posed a series of questions under the heading "Other Property/Land Information".

8. Insofar as relevant to these proceedings, the following information had been provided by the Applicants.

> "Other Property
>
> Do you or any member of your household currently own or have a financial interest in property/land in Ireland or any other country?
>
> If property, is it vacant?
>
> NO
>
> [...]
>
> Did you or any member of your household ever own or have a financial interest in property/land in Ireland or any other country?
>
> YES
>
> [The address of the property is then stated]
>
> Amount you received on the disposal of any property or land [please submit documentation/affidavit as to how the proceeds from the sale of the land/property were disposed of.]
>
> ZERO"

9. The documentation provided in the application included a copy of a residential tenancy agreement dated 26 January 2015 which indicated that the Applicants were paying rent of €750 per month. The application was also accompanied by a certified translation of the Deed of Gift as between the Applicants and their son. The value of the flat is stated as PLN 50,000.

10. The application was refused by decision dated 12 March 2015. The decision-letter reads as follows.

> "Non-acceptance of Housing application made to South Dublin County Council
>
> Dear Applicants,
>
> I refer to your application for housing with South Dublin County Council.

> I wish to inform you that your application for housing cannot be accepted, in accordance with the Housing (Miscellaneous Provisions) Act 2009, for the following reasons–
>
> As you have voluntarily given a gift of your property to your son. If this property was sold for a monetary value it could have assisted you with your housing needs."

11. Thereafter, the Applicants consulted a charity known as Cross Care Housing & Welfare Information ("*Cross Care*"). Cross Care made a representation to the Housing Authority by letter dated 11 May 2015. This letter set out in some detail the circumstances of the purchase and sale of the flat in Poland. The following submission was then made.

> "If the [Applicants] had sold the flat for monetary value, the profit from the sale would have been of about €12,300. However, the [Applicants] would have had to pay their son for the refurbishment of the house which could have been estimated at about €5000, so the profit would have been at about €7,300. This profit would enable them to access alternative accommodation for a limited period and would not resolve their long-term housing need.
>
> Given all the above I believe that Mrs Zabiello and her husband, both former EU workers, have got the right to social housing support as their housing need is not met here in Ireland and they cannot provide for accommodation costs from their own resources.
>
> Therefore, on behalf of the [Applicants] I would like to ask you to revise your decision and accept their application for social housing."

12. This submission was responded to by way of letter dated 22 October 2015 from the Housing Authority as follows.

> "In this regard I wish to advise that this application has been reviewed and the Council has decided that by disposing of their property in such a manner they have rendered themselves homeless. Unfortunately, Mr and Mrs Zabiello cannot be considered for social housing. Should you have any further queries in this regard please do not hesitate to contact the undersigned at […]."

13. Several years later, the Applicants submitted a fresh application for social housing support ("*the second application*"). It is this second application that is the subject-matter of these judicial review proceedings. The second application is date stamped as having been received by the Housing Authority on 3 August 2018. The Applicants confirmed in response to a question on the *pro forma* application form that they had a previous application with the Housing Authority (see page 5 of the form). The application was also accompanied by a copy of the decision-letter of 12 March 2015 in respect of the first application.

14. Part 11 of the application form is similar to that in respect of the first application.

"Other Property

Do you or any member of your household currently own or have a financial interest in property/land in Ireland or any other country?

NO

If property, is it vacant?

NO

Did you or any member of your household ever own or have a financial interest in property/land in Ireland or any other country?

YES

[The address of the property is then stated]

Amount you received on the disposal of any property or land [please submit documentation/affidavit as to how the proceeds from the sale of the land/property were disposed of.]

0

Any other relevant information

HOUSE WAS GIFTED TO MY SON"

15. The application included a copy of a residential tenancy agreement dated 26 January 2018 which indicated that the Applicants were paying rent of €988 per month.

16. The second application was refused by decision-letter dated 4 September 2018 in the following terms.

> "I refer to your application to South Dublin County Council for social housing support, be advised that as you have gifted your property to your son in Poland, you are not eligible to apply for Social Housing.
>
> If your circumstances have changed please provide details of this."

LEGISLATIVE FRAMEWORK

17. The dispute between the parties to these proceedings centres on the manner in which the availability of "alternative accommodation" is to be assessed in determining eligibility for social housing support.

18. The Applicants are entitled to the same rights as nationals in accordance with Article 9 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, as follows.

Article 9

1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs.

2. A worker referred to in paragraph 1 may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such lists exist, and shall enjoy the resultant benefits and priorities.

   If his family has remained in the country whence he came, they shall be considered for this purpose as residing in the said region, where national workers benefit from a similar presumption.

19. An application for social housing support falls to be determined by reference to Regulations made by the Minister for Housing, Planning and Local Government. The source of the power to make Regulations is to be found under section 20 of the Housing (Miscellaneous Provisions) Act 2009 (as amended) as follows.

   (4) The Minister may make regulations providing for the means by which the eligibility of households for social housing support shall be determined including, but not necessarily limited to, the following:

   (a) the maximum income threshold based on a household comprising one person;
   (b) the methodology according to which the threshold referred to in paragraph (a) shall be adjusted for households comprising more than one person;
   (c) the manner in which a housing authority shall set the income threshold, having regard to the market rent in respect of, and the average purchase prices for, dwellings in its administrative area, which in any case shall not be more than the maximum income threshold referred to in paragraph (a) ;
   (d) the procedures to be applied by a housing authority for the purposes of determining a household's eligibility by reference to income;

   (e) the availability to the household of alternative accommodation that would meet its housing need; *

   (f) social housing support previously provided by any housing authority to the household which may be taken account of by a housing authority in making a determination as to F18 [an appropriate form] of social housing support for that household;
   (g) the period for which a household F19 [member] is required to be in receipt of the supplement referred to in subsection (3).

   *Emphasis (italics) added.

20. The principal regulations in force are the Social Housing Assessment Regulations 2011 (S.I. No. 84 of 2011) (as amended) ("*the 2011 Regulations*").

21. A housing authority is required to carry out its assessment in two stages as follows. First, it must assess the household's eligibility. Secondly, in the event that the household is determined to be eligible, then the authority proceeds to assess the household's need for housing support. This sequencing is provided for under regulation 14 as follows.

Sequencing of assessment

14. In carrying out a social housing assessment, the housing authority of application shall, in the first instance, assess the household's eligibility for social housing support and if the authority determines that the household is not eligible for such support, the authority shall not proceed to assess the household's need for such support.

22. The eligibility criteria are then set out under Part 4 of the 2011 Regulations, and the housing need criteria are set out under Part 5.

23. The legal test for determining whether "alternative accommodation" is available to a household is to be found in Part 4, at regulation 22 as follows.

22.(1) A household shall be ineligible for social housing support if it has alternative accommodation that the household could reasonably be expected to use to meet its housing need, either by occupying it or by selling the accommodation and using the proceeds to secure suitable accommodation suitable for the household's adequate housing.

(2) A household shall be deemed to have alternative accommodation of the type referred to in paragraph (1), if the accommodation is owned by a household member and—

(a) such accommodation is vacant, or
(b) if such accommodation is let, the tenancy may be terminated on the grounds specified in paragraphs 3 or 4 of the Table to section 34 of the Residential Tenancies Act 2004 (No. 27 of 2004), or
(c) such accommodation is occupied by a person other than a person—

(i) whose marriage to a household member has been dissolved,
(ii) who is married to a household member but who is separated from him or her under an order of a court of competent jurisdiction or by a deed of separation, or
(iii) whose civil partnership, within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (No. 24 of 2010), or whose legal relationship of a kind referred to in section 3(b) of the said Act, with a household member has been dissolved.

(3) In determining whether alternative accommodation would meet a household's housing need, if the household were to occupy it, the housing authority of

application shall have regard to the matters referred to in paragraphs (b) to (d) of Regulation 23 in respect of that accommodation.

24. There are two aspects of the wording of regulation 22 which are directly relevant to the dispute in these judicial review proceedings. First, the regulation is worded in the present tense, and appears to envisage that the household currently owns alternative accommodation. Secondly, the regulation envisages that the proceeds of sale of the alternative accommodation would be sufficient "to secure" accommodation suitable for the household's adequate housing. I discuss each of these two aspects in further detail under separate subheadings below.

(i). Time at which alternative accommodation must be available

25. Regulation 22(1) is worded in the *present* tense: "household … has alternative accommodation that the household could reasonably be expected to use". The two contingencies provided for under regulation 22(1), i.e. the occupation or the sale of the accommodation, are predicated on *current* ownership. The deeming provision at regulation 22(2) is also worded in the present tense: "the accommodation is owned by a household member".

26. Regulation 22 appears, on its ordinary and natural meaning, to envisage that—in order to constitute "alternative accommodation"—the accommodation must be in the current ownership of a member of the household. This interpretation is consistent with the parent legislation. More specifically, section 20 of the Housing (Miscellaneous Provisions) Act 2009 authorises the Minister to make regulations providing for the means by which eligibility shall be determined including *inter alia* the availability to the household of alternative accommodation that would meet its housing need. This indicates that the alternative accommodation must be available, i.e. within the current ownership of the household, at the time the application is made. A property which had previously been owned cannot be said to be "available" to the household. The 2011 Regulations must be read by reference to the parent legislation. It would be *ultra vires* for the Minister to purport to prescribe criteria which go beyond what is permitted under section 20.

27. If, as appears to be the case, the correct interpretation of regulation 22 is that the alternative accommodation must be in the current ownership of a member of the household, then there appears to be a lacuna in the 2011 Regulations. All of the other eligibility criteria under Part 4 are directed to the assessment of a household's *income*. Regulation 22 appears to be the only provision which has regard to a household's *assets*, albeit confined to assets in the form of residential property. If regulation 22 only applies to *current* ownership, then a hypothetical household who had sold property *prior* to the making of an application for housing support would not have the sale proceeds reckoned for the purposes of determining their eligibility. This would be so even if the sale proceeds were measured in the hundreds of thousands of euros.

28. The wording of the 2011 Regulations is to be contrasted with other statutory schemes which involve a financial means assessment. For example, the financial means

assessment under the Nursing Homes Support Scheme Act 2009 (as amended) has regard both to income and assets in determining eligibility. Express provision is also made to address the contingency of an applicant having previously transferred assets for consideration which is less than 75 per cent of the estimated market value of the applicant's interest in the asset. This provision applies to any transfer within the period of five years prior to the making of the application for support. The eligibility criteria under the 2011 Regulations are far less sophisticated.

29. Notwithstanding this potential lacuna in the 2011 Regulations, neither party invited the court to depart from the literal wording, and instead to give regulation 22 a purposive interpretation. Neither party sought to invoke section 5(2) of the Interpretation Act 2005 which authorises a departure from a literal interpretation that would be absurd or would fail to reflect the plain intention of the statutory instrument.

30. The reticence of either party to argue for a purposive interpretation is entirely understandable. For the court to "read in" some form of anti-avoidance provision would go well beyond statutory interpretation and would involve the court rewriting the secondary legislation. For the court to do so would represent a breach of the separation of powers. The crafting of an anti-avoidance provision necessitates the making of policy choices. For example, even if the court could be satisfied that the previous ownership of property should be taken into account, a choice has to be made as to how far back in time any "look back" period should go. The Nursing Homes Support Scheme Act 2009, for instance, provides for a "look back" period of five years prior to the making of the application for support. The value of any asset which has been transferred for consideration which is less than 75 per cent of the estimated market value is imputed to the applicant for the purposes of the financial needs assessment. It is a matter for the Minister, and not the court, to decide whether a similar period should be applied in the case of applications for social housing support.

31. I have concluded, therefore, that in order to constitute "alternative accommodation" for the purposes of regulation 22 of the Social Housing Assessment Regulations 2011, the accommodation must be in the current ownership of a member of the household.

(ii). Proceeds of sale to secure suitable accommodation

32. The second aspect of regulation 22 of direct relevance to the dispute in these judicial review proceedings concerns the interpretation to be given to the phrase "to secure" accommodation suitable for the household's adequate housing.

33. A household will be ineligible for social housing support if it has alternative accommodation that the household could "reasonably be expected to use" to meet its housing need. Regulation 22 envisages that the alternative accommodation might be used in one of two ways: (i) the occupation of the accommodation, or (ii) the sale of the accommodation and the use of the proceeds of sale "to secure suitable accommodation suitable for the household's adequate housing". The term "secure" suggests, perhaps, a level of permanence. It would not appear to be enough that the sale proceeds could be

used to defray the cost of accommodation for a short period of time, for example, by discharging monthly rent.

DISCUSSION AND DECISION

34. It will be recalled that the only rationale for finding that the Applicants were ineligible to apply for social housing support stated in the decision-letter of 4 September 2018 is as follows.

> "I refer to your application to South Dublin County Council for social housing support, be advised that as you have gifted your property to your son in Poland, you are not eligible to apply for Social Housing.
>
> If your circumstances have changed please provide details of this."

35. As explained under the next heading below, I have concluded that this terse uninformative statement fails to comply with the Housing Authority's duty to state reasons. The Housing Authority has since elaborated upon its rationale in the context of these judicial review proceedings, and I propose to address the substantive issues first, before addressing the procedural failure to state reasons.

36. The position adopted by the Housing Authority in its pleadings is that the decision of 4 September 2018 is a repetition and/or reiteration of its earlier decision of 12 March 2015 refusing the first application. The implication being that the rationale stated for the earlier decision can be read across to the decision of 4 September 2018. It appears to follow, therefore, that the Housing Authority operates regulation 22 of the Social Housing Assessment Regulations 2011 on the assumption, first, that it applies to both current and historic ownership of residential property, and, secondly, that the term "to secure" suitable accommodation means no more than that the proceeds of a sale of the residential property could have "assisted" with the household's housing needs.

37. Both of these assumptions are incorrect as a matter of law. For the reasons set out in detail under the previous heading above, I have concluded that in order to constitute "alternative accommodation" for the purposes of regulation 22 of the Social Housing Assessment Regulations 2011, the accommodation must be in the *current* ownership of a member of the household. On the uncontroverted facts of the present case, the property in Poland had been disposed of by the Applicants, by way of gift to their son, in 2014. As of the date the second application came to be made, i.e. August 2018, the Applicants did not own any alternative accommodation. The property in Poland was no longer available to them: it could not have been sold by them nor the sale proceeds used to secure suitable accommodation. The decision of 4 September 2018 is, therefore, vitiated by reason of an error of law on the part of the Housing Authority in its interpretation and application of regulation 22. This error can also be analysed as the taking into account of an irrelevant consideration, namely the historic ownership of a property in Poland.

38. Again as discussed under the previous heading above, I am conscious that the court's interpretation of regulation 22 exposes a potential lacuna in the eligibility criteria provided

for under the 2011 Regulations. As it happens, however, even if I were found to be incorrect in my interpretation of this aspect of regulation 22, it would not affect the outcome of these judicial review proceedings. The unusual feature of the present case is, of course, that the market value of the residential property previously owned by the Applicants in Poland is so modest when compared to the price of property in Ireland. It will be recalled that, as of the date of the gifting of the property to the Applicants' son in 2014, the value of the property was estimated at circa €12,000. The Housing Authority's position is that had the property been sold, then the proceeds of sale could have "assisted" with the Applicants' housing needs. Even if one accepts for the purposes of argument that the term "to secure" suitable accommodation can be read as synonymous with the phrase "to assist" with a household's housing needs, there would be a *temporal limitation* on the household's ineligibility. To elaborate: even if the Applicants had been entitled to the full value of the flat in Poland, without having to make any allowance for the refurbishment costs incurred by their son, the sum involved (circa €12,000) would only have been sufficient to pay their rent in Dublin for a period of between 12 months to 18 months. (The rent they were paying at the time of the application in February 2015 was €750 per month, and this had increased to €988 by the time of the application in August 2018).

39. By contrast, the logic of the Housing Authority's position, if followed through to its conclusion, is that prior ownership of residential property will render a household *permanently* ineligible for social housing support. This is so irrespective of how modest the market value of the residential property is. On this interpretation, the Applicants will always be ineligible for housing support notwithstanding the fact that had they sold the property and applied the sale proceeds to defray their rent, the sale proceeds would have been exhausted within a period of between 12 months to 18 months.

40. With respect, this is not the correct interpretation of regulation 22. Even allowing that the Housing Authority might be correct in regarding the phrase "to secure suitable accommodation" as synonymous with the phrase "to assist" with a household's housing needs, a point in time will be reached where the legal effect of a household having actually received sale proceeds (or having the monetary equivalent of the property's open market value *imputed* to them) will be "spent". Irrespective of whether the Housing Authority had been lawfully entitled to refuse the first application on the grounds of ineligibility in March 2015, the Authority certainly acted *ultra vires* in refusing the second application. This is because the legal position was entirely different when the second application came to be made in August 2018. The prior ownership of the flat valued at €12,000 was no longer a relevant consideration. The decision of 4 September 2018 is, therefore, invalid in that it involves both (i) an error of law in the interpretation of regulation 22, and (ii) the taking into account of an irrelevant consideration.

41. It must also be doubtful as to whether the Housing Authority's interpretation of regulation 22—which ignores the present tense, and renders the phrase "to secure" as "to assist"—is correct. It is not, however, strictly speaking necessary for the purposes of this judgment to decide these points.

DUTY TO GIVE REASONS

42. The Social Housing Assessment Regulations 2011 impose an obligation on a housing authority to set out reasons. See, in particular, Regulation 15 (as substituted by S.I. No. 321 of 2011) as follows.

> 15. (1) On determining a household's qualification for social housing support following a social housing assessment, the housing authority of application shall forthwith notify the outcome to the household and each housing authority concerned.
>
> (2) Where the housing authority of application determines that a household does not qualify for social housing support from one or more than one authority in the application area, the notification of the outcome of the assessment shall, in each such case, set out the reason therefor.

43. An equivalent obligation, in the context of a review, is to be found at regulation 30.

44. The purpose of a duty to give reasons has been explained most recently by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453 ("*Connelly*"). The unanimous judgment of the Supreme Court was delivered by Clarke C.J. The Chief Justice identified two purposes which a duty to state reasons serves, as follows. First, to enable a person affected by the decision to understand why a particular decision was reached. Secondly, to enable a person to ascertain whether or not they have grounds upon which to appeal the decision (where an appeal lies) or to seek judicial review.

45. Having identified the purpose of the duty to give reasons, the Supreme Court was then able to formulate the legal requirements against which the adequacy of reasons may be tested. First, any person affected by a decision is entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions, and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to apply for judicial review of a decision. The reasons provided must also be such as to allow a court hearing an appeal or reviewing a decision to engage properly in such an appeal or review.

46. Applying those principles to the facts of the present case, I have concluded that the reasons set out in the letter of 4 September 2018 are inadequate. The decision-letter does not explain to the Applicants why it is precisely that the application has been refused. There is no reference at all to the Social Housing Assessment Regulations 2011, still less any explanation as to the legal basis upon which the prior ownership of the residential property in Poland is being relied upon to find the Applicants ineligible. More fundamentally, the decision-letter does not indicate when, if ever, the Applicants would be eligible to make an application. There is no indication, for example, as to when the legal effect of the prior ownership will be "spent".

TIME-LIMIT POINT

47. The Housing Authority objects that the judicial review proceedings have been taken outside the three month time-limit provided for under Order 84, rule 21. More specifically, it is submitted that the decision of 4 September 2018 is no more than a reiteration of the decision of 12 March 2015. It is submitted, therefore, that the three month time-limit began to run against the Applicants from that earlier date. This submission is supported by reference to an impressive volume of case law in relation to time-limits and collateral challenges.

48. With respect, the Housing Authority's characterisation of the decision of 4 September 2018 as no more than a reiteration of the decision of 12 March 2015 is incorrect. Such a characterisation overlooks the dynamic nature of decision-making for the purposes of the Housing (Miscellaneous Provisions) Act 2009 and the Housing Support Regulations 2011. The legislation expressly recognises that a household's housing needs may evolve over time. For this reason, then, express provision is made under Part 7 of the 2011 Regulations for the update and review of social housing assessments.

49. Given the paucity of reasoning in the decision-letter of 4 September 2018, it is not at all clear as to whether the Housing Authority treated the application of August 2018 as an application for an update or review, or, alternatively, whether the Authority treated it as a fresh application (which seems more likely). In either event, the Housing Authority was required, as a matter of law, to have regard to the change in circumstances since the date of the first application in February 2015. More specifically, the legal effect of the prior ownership of the residential property in Poland was "spent" by the time the second application came to be made. The decision of 4 September 2018 thus represented a fresh decision, and the three-month time-limit began to run again. The proceedings were instituted within this time-limit.

50. To put the matter otherwise, the grounds which are relied upon for the purposes of the challenge to the decision of 4 September 2018 are different and more expansive than those which could have been relied upon in any hypothetical challenge to the decision of 12 March 2015. In particular, the argument that the effect of the transfer of the residential property in Poland in 2014 was "spent" would not have been open in a challenge to the earlier decision. An applicant for judicial review cannot be shut out from challenging a subsequent decision merely by dint of the existence of an earlier decision which did not give rise to the same potential grounds of challenge.

51. More generally, the Housing Authority's objection overlooks the purpose of the three month time-limit under Order 84, rule 21. As appears, from sub-rule 21(4), one of the principal purposes is to protect against prejudice to third parties. This consideration does not arise on the facts of the present case.

52. For the avoidance of doubt, lest I be incorrect in my finding that the application for judicial review was made within time, I should add that I would have no hesitation in granting an extension of time had same been required. The criteria governing the grant of an extension of time under Order 84, rule 21 have recently been considered by the

Supreme Court in its judgment in *O'S v Residential Institutions Redress Board* [2018] IESC 61; [2019] 1 I.L.R.M. 149.

> "I have concluded that the case law cited above, insofar as it applies to the extension of the time specified under O. 84 for the bringing of judicial review proceedings, makes clear that the jurisdiction which the Court is to exercise on an application to extend time is a discretionary jurisdiction which must be exercised in accordance with the relevant principles in the interests of justice. It clearly requires an applicant to satisfy the Court of the reasons for which the application was not brought both within the time specified in the rule and also during any subsequent period up to the date upon which the application for leave was brought. It also requires the Court to consider whether the reasons proffered by an applicant objectively explain and justify the failure to apply within the time specified and any subsequent period prior to the application and are sufficient to justify the Court exercising its discretion to extend time. The inclusion of sub-rule (4) indicates expressly that the Court may have regard to the impact of an extension of time on any respondent or notice party. The case law makes clear that the Court must also have regard to all the relevant facts and circumstances, which include the decision sought to be challenged, the nature of the claim made that it is invalid or unlawful and any relevant facts and circumstances pertaining to the parties, and must ultimately determine in accordance with the interests of justice whether or not the extension should be granted. The decision may require the Court to balance rights of an applicant with those of a respondent or notice party. The judgments cited do not, in my view, admit of a bright line principle which precludes a court taking into account a relevant change in the jurisprudence of the courts when deciding whether an applicant has established a good and sufficient reason for an extension of time. Further, the judgments cited above do not envisage any absolute rule in relation to what may or may not be taken into account or constitute a good reason or a good and sufficient reason. The Court, in an application for an extension of time, is exercising a discretionary jurisdiction and in the words of Denham J. in *de Roiste,* '[t]here are no absolutes in the exercise of a discretion. An absolute rule is the antithesis of discretion. The exercise of a discretion is the balancing of factors - a judgment.'"

53. Having regard to the above principles, I am satisfied that the balance of justice would require the granting of an extension of time.

CLAIM FOR DAMAGES

54. The Applicants have included, as part of their statement of grounds, a claim for damages. It was suggested at the hearing before me that any award for damages should be equivalent to the value of the social housing support which the Applicants might otherwise have obtained.

55. It is well established that the mere fact that a public authority has been found to have acted ultra vires does not give rise to an automatic entitlement to an award of damages. Rather, it is necessary for an applicant to demonstrate that the acts of the public

authority represented an actionable tort and/or involved a breach of statutory duty which sounds in damages. The Applicants in the present case have not surmounted this hurdle. The refusal of a benefit to which an applicant might otherwise be entitled is not per se tortious. Moreover, it must be recalled that the effect of this judgment is merely to find that the Applicants were not ineligible to apply for social housing support by dint of their having previously owned property in Poland. This judgment has nothing to say as to whether the Applicants might not be found to be ineligible on some other ground, still less does the judgment address the second stage of the assessment, namely the housing needs assessment. Put shortly, this judgment does not amount to a finding that the Applicants have been deprived of social housing support to which they were inevitably entitled.

CONCLUSION AND FORM OF ORDER

56. The Housing Authority *acted ultra* vires in purporting to find the Applicants ineligible to apply for social housing support by dint of their having previously owned a modestly valued property in Poland. More specifically, the Housing Authority both (i) erred in its interpretation of the Social Housing Assessment Regulations 2011, and (ii) took into account irrelevant considerations in determining the application.

57. The Housing Authority’s decision is also invalid on the additional ground that the Authority did not comply with its statutory duty to set out reasons for its decision.

58. The decision of 4 September 2018 will, therefore, be set aside by an order of *certiorari*, and the application for social housing support will be remitted to the Housing Authority for reconsideration pursuant to Order 84, rule 27(4). I will hear counsel as to any additional directions which may be required in this regard, e.g. in terms of the making of furthest submissions on the application by the Applicants. I will also hear counsel on the question of costs.

59. For the reasons set out under the previous heading, the claim for damages is dismissed.