[2020] IEHC_233

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 257 JR]

BETWEEN

ELIZABETH CRUMLISH

APPLICANT

AND
DONEGAL COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 28th day of April, 2020

Background

1. The applicant, a member of the travelling community, is aged 66 and is a mother of two adult children and has a number of grandchildren. For much of her adult life, the applicant pursued a nomadic lifestyle as do her children now. Her adult children and their families continue to maintain a nomadic lifestyle and visit the applicant regularly while travelling.

2. The applicant first applied to the respondent local authority for inclusion on its housing list in or around 2003, seeking a scheme allocation and listing three areas of preference, being: (1) Bridgend, (2) Burnfoot, and (3) Buncrana. The applicant indicated to the respondent that her preference was for a small family halting site. She was informed at the time that this was not realistic and so, with reluctance, applied for a house but asked specifically it not be in a housing estate. The provision of a permanent halting site for the applicant was included in the Donegal Traveller Accommodation Programme, 2009-2013.

3. The applicant updated her application between 2003 and 2005, which included changes to her area of preference. The applicant was living in Letterkenny at the time.

4. In 2008, the applicant amended her application and reiterated to the respondent her preference for a permanent halting site in the Bridgend area of County Donegal. The applicant has historical family links to the Bridgend area and wished to return to there. The respondent made plans to provide a permanent halt for the applicant in the Donegal Traveller Accommodation Programme, 2009-2013. However, during that period no progress was made in either sourcing or developing a suitable halting site for the applicant. The provision of a permanent halt for the applicant was not included in the Donegal Traveller Accommodation Programme, 2014-2018 by the respondent.

5. The applicant has been living in privately rented accommodation in Letterkenny with the assistance of the Housing Assistance Payment since approximately 2008 up to the present whilst awaiting an allocation from the respondent. The house is a three-bedroomed house, which facilitated visits from her family. However, the applicant was served with a notice of termination in April, 2018.

6. The respondent offered the applicant a one-bedroom property at No. 3 Beechwood Road, Letterkenny, County Donegal on 23 November 2018. The applicant did not accept this allocation as it did not meet her accommodation needs as she had identified, in that the property offered was: -

(i) Not in the area of preference which she had identified;

(ii) Not a halting site or single instance dwelling as identified in previous housing applications; and

(iii) Not of a size or with space that would allow her family members to visit.

7. Following this refusal, the respondent offered the applicant another house, a few doors away, No. 6 Beechwood Road, on 17 January 2019. This house was identical in size and, obviously, was in the same location as the first offer. For the same reasons, the applicant did not accept this offer.

8. The respondent made a decision to suspend the applicant's housing application for a period of one year on the basis that she had refused two "reasonable offers" of accommodation. The suspension of an application is provided for in the respondent's Housing Allocation Scheme, 2011 in circumstances where a person has refused two reasonable offers of accommodation. It is now necessary to look at the relevant statutory provisions.

Statutory provisions

9. Section 22 of the Housing (Miscellaneous Provisions) Act, 2009 (the "*Act of 2009*") provides, *inter alia*: -

"(2) A housing authority may allocate a dwelling under this section to a household in accordance with a scheme made under *subsection (3*).

(3) A housing authority shall, not later than one year after the coming into operation of this section, in accordance with this section and any regulations made thereunder, make a scheme (in this Act referred to as an "allocation scheme") determining the order of priority to be accorded in the allocation of dwellings to…

…

(7) Notwithstanding the generality of *subsection (2),* a housing authority may disregard the order of priority given to a household under an allocation scheme where the household is being provided with social housing support—

(a) …
(b) arising from specified exceptional circumstances, including…"

10. The "*Social Housing Allocation Regulations, 2011*" (SI No. 198 of 2011), passed pursuant to s. 22 of the Act of 2009, provides, *inter alia,* as follows: -

"12.(1) …

(2) Following the coming into force of the first allocation scheme made under section 22 of the Act of 2009 and subject to paragraph (4), where a qualified household refuses 2 reasonable offers of the allocation of different dwellings

made by one or more than one housing authority in the relevant application area in any continuous period of one year commencing on the date of the first refusal, the said household shall not, for the period of one year commencing on the date of the second refusal, be considered by any housing authority for the allocation of a dwelling to which section 22 of the Act of 2009 applies and the latter period shall not subsequently be reckonable in any way for the purposes of determining the relative priority of that household for a dwelling allocation.

(3) For the purposes of this Regulation, an offer of a dwelling allocation by a housing authority shall be deemed to be reasonable where the allocation of that dwelling would, in the opinion of the authority, meet the accommodation needs and requirements of the qualified household concerned and, except in the case of a dwelling allocation offered under section 22(7)(b) of the Act of 2009, the dwelling is situated in an area of choice specified by the household in accordance with Regulation 8 or 9 of the Social Housing Assessment Regulations 2011.

…"

Application for judicial review

11. On 13 May 2019, the position of the applicant was that she had been made two offers of accommodation, being: No. 3 and then No. 6 Beechwood, Letterkenny, County Donegal on 23 November 2018 and 17 January 2019, respectively. The applicant refused both offers on the grounds that the properties offered did not meet her accommodation needs as had been identified to the respondent. As the applicant had refused two offers, the respondent, in accordance with Regulation 12, set out above, decided that she had refused two "*reasonable offers*" and so suspended her from the housing list for a period of one year, commencing from 28 January 2019.

12. By order of the High Court, dated 13 May 2019, (Noonan J.), the applicant was granted leave to apply by way of an application for judicial review for, *inter alia,* the following reliefs: -

(i) An order of *certiorari* quashing the decision of the respondent of 28 January 2019 to suspend the applicant's housing application;

(ii) A declaration that the said decision of the respondent was: -

(a) Made without statutory authority and/or a lawful basis and was for that reason *ultra vires*; and/or
(b) Resulted from an unlawful fettering of a statutory discretion;
(c) Irrational and unreasonable and/or based on irrelevant considerations;
(d) Constituted a failure to vindicate the constitutional rights of the applicant and/or her fundamental rights under the European Convention on Human Rights, in particular, those rights protected under Article 8 and Article 8 read together with Article 14 of the European Convention of Human Rights as

incorporated into the law of this State by the European Convention on Human Rights Act, 2003.

Course of proceedings

13. Due to a family bereavement, the application for judicial review was opened to the court, and adjourned, on 1 May 2019, some days after the expiration of the time allowed by the Rules of the Superior Courts. The respondent made no point on this.

14. Having been granted leave to bring judicial review proceedings, the applicant was given a return date of 16 July 2019. The proceedings were adjourned until 8 October 2019 with the respondent's Statement of Opposition to be filed by 16 September 2019. The Statement of Opposition was not filed until 25 October 2019. The application was allocated a hearing date of 27 November 2019 in the Cork High Court, Non-Jury List. Unfortunately, due to a lack of judicial resources, these sittings in Cork were cancelled and a new date was fixed for hearing, namely, 21 January 2020. The application concluded the following day on 22 January 2020.

15. The applicant's suspension from the respondent's housing list expired on 27 January 2020, some five days after the conclusion of the hearing. In these circumstances, the issue as to whether the proceedings are now "*moot*" arises.

Mootness

16. Ms. Siobhan Phelan SC, on behalf of the applicant, submitted that the application was not moot, notwithstanding the applicant's restoration to the housing list at this stage, as the year during which her application was suspended will not be counted towards her time on the list for the assessment of her priority. Further, Ms. Phelan submitted that the question as to whether her application is to be assessed as one for traveller specific and/or suitable accommodation and the principles that apply to such assessment will require to be determined in an ongoing manner.

17. As to the first of these issues, Mr. Conor Dignam SC, on behalf of the respondent, submitted that the twelve months of the suspension will not be counted for the purposes of reckoning her priority on the housing list as the applicant already has the maximum points that can be allocated for social housing as she has already been on the list for so long. This point was factually verified by a document titled "*Donegal County Council – Allocation Scheme*" which was exhibited in the applicant's grounding affidavit. Thus, the applicant will suffer no detriment as a result of the suspension.

18. As to the second matter, namely, how any future application by the applicant for traveller specific and/or suitable accommodation is to be assessed, Mr. Dignam relied upon a number of passages in the judgment of the Supreme Court in *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] 4 I.R. 274. This decision clearly set out the principles which a court should apply when an application is made that an issue is now moot. In her judgment, Denham C.J. stated: -

> "General Policy

(13) The current proceedings, insofar as they relate to the deportation order against the third appellant, are moot, as that deportation order has been revoked.

(14) As the deportation order has been revoked, there is no basis upon which to proceed. Furthermore, any decision by this court would be based on a hypothesis, and would be an advisory opinion. It has long been the jurisprudence of this court that it will not give advisory opinions, except in exceptional circumstances, such as under Article 26 of the Constitution, or as identified in the case law of the court.

(15) Thus, while the parties had a real dispute when the proceedings were commenced, this is no longer the case.

(16) As has been cited by this court previously, including by Hardiman J. in *Goold v. Collins* [2004] IESC 38 (unreported, Supreme Court, 12th July, 2004), the *dictum* of the Supreme Court in *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342 reflects the law of this jurisdiction where it is stated:-

> 'An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceedings is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercised its discretion to depart from it.'

In this case the issues are moot, and applying the general rule of the court, the appeal would not be heard."

19. As indicated in the foregoing paragraph, a court has a discretion in the matter. As to the extent of this discretion, Denham C.J. stated: -

"(17) There are exceptions to this general rule, when the court will hear and determine issues in a moot appeal. Such exceptions have been described in *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2006] IESC 62, [2007] 1 I.R. 328, in *Okunade v. The Minister for Justice* [2012] IESC 49, [2012] 3 I.R. 152, and in *Irwin v. Deasy* [2010] IESC 35 (unreported, Supreme Court, 14th May, 2010).

(18) In *Irwin v. Deasy* [2010] IESC 35, Murray C.J. said:-

> 'In exceptional circumstances where one or both parties has a material interest in a decision on a point of law of exceptional public importance the court may in the interests of the due and proper administration of justice determine such a question.'

(19) In some cases an exception may arise if the issue determined in the High Court affects many other cases. Thus, in *O'Brien v. Personal Injuries Assessment Board* (No.2) [2006] IESC 62, [2007] 1 I.R. 328, Murray C.J. pointed out at p. 334:-

'(20) …Where, as in this case, a party has a bona fide interest in appealing against a declaratory order of the High Court which is not confined to past events peculiar to the particular case which has been resolved in one way or another, the court should be reluctant to deprive it of its constitutional right to appeal. In this case the respondent continues to be constrained in the exercise of public powers under statute by virtue of the declaration granted in the High Court at the instance of the applicant.'

(20) An exception to the general rule may also arise if it is a test case, and if many other cases have been adjourned pending the decision of the case before the court."

20. In the course of his judgment in *Lofinmakin*, McKechnie J. stated: -

"(59) The rule by which a court will decline to hear and determine an issue on the grounds of mootness is firmly based on the deep rooted policy of not giving advisory opinions, or opinions which are purely abstract or hypothetical…"

and: -

"(61) There is another related but broader consideration which must also be kept in mind: it is that the discharge of the judicial function is best performed where the reference point is focused on resolving defined issues in a concrete legal setting. In that way there is much less danger of inadvertently overstepping the reach of the judicial role as envisaged in Article 34 of the Constitution. In this regard I respectfully agree with the views of Hogan J. in *Salaja v. Minister for Justice* [2011] IEHC 51, (Unreported, High Court, Hogan J., 10th February, 2011) who said at para. 7 that:-

'…the provision by judges of such advisory opinions would not, at least generally speaking, serve the proper functioning of the administration of justice, since if unchecked or not kept within clearly defined limits, it would involve the judicial branch giving gratuitous advice on legal issues to the Oireachtas and the Government, a function which was never conferred on it by the Constitution.'"

21. At the heart of this application is the applicant's contention that the offers of housing made by the respondent in November, 2018 and January, 2019 were not "*reasonable offers*". In my view, as to whether or not an offer of accommodation is reasonable depends upon the particular facts and circumstances of the offer. If the Court were, as requested by the applicant, to state principles that the respondent (or for that matter, any other housing authority) should apply when making offers of traveller specific and/or suitable accommodation, then the Court would, in effect, be giving legal advice. This would clearly be contrary to the principles referred to in the judgements of both Denham C.J. and McKechnie J. in *Lofinmakin*.

22. I acknowledge the strength of the submissions made by Ms. Phelan but do not believe this case comes within the exceptions identified by Denham C.J. This is not a test case, other

cases have not been adjourned pending this decision. As mentioned previously, as to whether or not an offer of accommodation to a member of the traveller community is, or is not, reasonable must depend on the facts of the particular case. A decision in favour of the applicant, if she was still suspended from the list, would be of assistance to her but not necessarily to others as their circumstances may be different.

Conclusion

23. By reason of the foregoing, I will not grant the orders sought as I am of the view that the issues involved are now moot.