[2020] IEHC 250

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 426 JR]

BETWEEN

V.H AND M.H.

APPLICANTS

AND

SOUTH DUBLIN COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Michael MacGrath delivered on the 12th day of March, 2020.

1. On 1st July, 2019, the applicants were granted leave to seek an order of mandamus compelling the respondent, a statutory housing authority within the meaning of the Housing Acts 1966-2014, to comply with its statutory obligations under s. 20(2) of the Housing (Miscellaneous Provisions) Act 2009 (" *the Act of 2009*") and/or Regulation 12(1) of the Social Housing Assessment Regulations 2011 (S.I. 84/2011) ("*the Regulations*") and in particular to carry out an assessment and/or deal with and/or issue a decision in respect of the applicants' application for social housing support submitted to the respondent on the 14th January, 2019. The applicants also seek damages.

2. At the commencement of the hearing the court made an order pursuant to s. 45 of the Courts (Supplemental Provisions) Act 1961 and s. 21 of the Civil Law (Miscellaneous Provisions) Act 2008 prohibiting the publication, or broadcasting, of any matter, which would or could identify the applicants.

3. Before considering the facts and basis of the challenge, it is relevant to an understanding of the issue to outline at this stage the relevant statutory provisions which are central to the issues in this case.

Relevant statutory provisions

4. Section 19(1) of the Act of 2009 provides:-

> *"A housing authority may, in accordance with the Housing Acts 1966 to 2009 and regulations made thereunder, provide, facilitate or manage the provision of social housing support."*

5. Section 20(2) of the Act of 2009 provides:-

> *"(2) Where a household applies for social housing support, the housing authority concerned shall, subject to and in accordance with regulations may for the purpose of this section carry out an assessment (in this Act referred to as a "Social Housing Assessment" of the household's eligibility, and need for social housing for the purpose of determining-*
>
> *(a) whether the household is qualified for such support and*
>
> *(b) the most appropriate form of any such support.*

(3) …

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

(a) the form and manner in which a social housing assessment shall be carried out and

'(b) the period within which an application for social housing support shall be dealt with by a housing authority and

(c) notification by the housing authority of the making of a decision in respect of an application for social housing support.

6. Regulation 12 provides:-

"12.(1) Subject to proper completion of the application form by the household and to paragraph (2), the housing authority of application shall deal with the application within a period of 12 weeks of receipt or, where the authority has requested additional information for the purpose of verifying information relating to the application, within 6 weeks of the receipt of such additional information.

(2) Subject to paragraph (4), where the housing authority of application is unable to deal with an application within the relevant period specified in paragraph (1), the authority shall, before the expiration of the period concerned, notify the household accordingly, specifying the reason therefor and the further period within which the authority expects to deal with the application.

(3) Subject to paragraph (4), a housing authority of application may, where necessary and for stated reasons, extend the further period referred to in paragraph (2) and shall notify the household accordingly.

(4) Any extension to a period granted by a housing authority under paragraph (2) or (3) shall expire on or before the effluxion of 14 weeks following the expiry of the relevant period referred to in paragraph (1)."

Background

7. The applicants are a married couple, born outside the jurisdiction and have resided in Ireland since 2006. They are not in employment. They rented a property in Tallaght, County Dublin from 1st January, 2011 to March, 2018. Their tenancy was terminated by the landlord. They maintain that in consequence they were rendered homeless. Between April and May, 2018, they availed of night to night emergency accommodation provided by the respondent. It is contended that they were unable to cook for themselves or to maintain proper hygiene in the hostel facilities provided and that they were required to vacate the accommodation each morning and return each evening.

8. Both applicants have medical conditions. The first applicant suffers from epilepsy and has undergone treatment for throat cancer. The second applicant underwent a lobectomy of her right lung in 2014 with the result that she has a compromised respiratory system. Both also have experienced spinal injuries. They maintain that since June, 2018, they have been accommodated by relatives on an *ad hoc* basis.

9. On the 12th December, 2018, the applicants completed an application form seeking assessment for housing support under the Act of 2009 and the Regulations. They retained the services of a free legal advice centre ("*FLAC*") who made the application on their behalf under cover of letter dated 14th January, 2019. No formal acknowledgment was received by them to this application.

10. On the 5th April, 2019, a staff member in the office of the solicitor's representing the applicants, Mr. Bowes, made telephone contact with the respondent and was advised that the application was under review. It is contended that he was notified that a decision would be issued in April 2019, but none issued. On the 17th April, 2019, FLAC sent a further letter stating that as no additional information had been sought, the respondent ought to make an immediate decision on the application. It was also alleged that the respondent had not complied with the statutory time period within which to make such assessment. By letter dated 10th May, 2019, the respondent was notified that, absent a decision, proceedings would be instituted.

The proceedings

11. The applicants plead that the respondent is statutorily charged with the provision of housing assistance under the Housing Acts and is empowered to provide social housing assistance including financial assistance and support to persons who are assessed as eligible to receive same. They contend that this is not only a statutory right but also a Constitutional right and that as the respondent is an organ of State within the meaning of s. 3 of the European Convention on Human Rights Act 2003, it is obliged to exercise its powers and discharge its functions in accordance with the Convention rights of the applicants, particularly those protected by Articles 3, 8 and 14.

12. The applicants also contend that the respondent's failure and/or refusal to assess the application amounts to a breach of statutory duty, is irrational and/or unreasonable. It is alleged that the respondent has failed to comply with its mandatory statutory obligations by not dealing with the applicants within the prescribed 12 week statutory period. It is also contended that in the exercise of its statutory obligations, the respondent failed to have regard to relevant factors, including the applicants' ill – health, their ages and vulnerabilities, and lack of accommodation.

13. The application is grounded on the affidavit of the first applicant. The statement of grounds is verified and supported in the affidavit sworn by him on the 28th June, 2019. Medical certificates have been exhibited. Neither of the applicants speak English.

The applicants' evidence

14. The first applicant deposes that he previously made an application for social housing support in March, 2017 to which a reply, being a refusal, was received from the

respondent on the 8th January, 2018. He maintains that the respondent's reason for its decision was that neither of the applicants had a record of 52 weeks' employment in the State. As will be seen, this is most contentious because the respondent maintains that it has not made a decision on that application and that it is not permissible for the applicants to make a second application while the first is extant.

15. An affidavit has also been sworn in support of the application by Ms. Sinead Lucey, the applicants' solicitor. She did not represent the applicants, nor was she involved in the March, 2017 application. She wrote a letter to the respondent on the 14th December, 2018 outlining the unsuitability of the emergency hostel accommodation which the applicants had been occupying, detailed their living circumstances, referred to medical reports and requested that the applicants be placed in emergency accommodation at a certain place where their son and daughter in law and their children have been placed.

16. Shortly thereafter, having reviewed the correspondence, Ms. Lucey noticed that medical reports had not been sent with her letter and these were then forwarded to the respondent by email on 17th December, 2018.

17. It seems clear from Ms. Lucey's affidavit and from her letters of 14th December, 2018 and 14th January, 2019 that both she and the applicants were of the view that the earlier application had been refused. Ms. Campbell in a reply of 2nd January, 2019, had requested the applicants to present themselves to the homeless unit of the local authority for homeless assessment, but beyond this, nothing in the correspondence from the local authority suggests that the earlier application had *not* been refused. Further, Ms. Lucey's letter of 14th January, 2019, with which she submitted the application completed by the applicants on 12th December, 2018, was not formally responded to and she was not disabused of any impression which she may have had, and which she communicated to the respondent, that the previous application had been refused. Ms. Lucey had highlighted that, in her letter, she was addressing the nature of the emergency accommodation then being provided and the applicants' general medical condition. She also stated that she was of the opinion that the basis of the previously refusal was incorrect; that their employment history was wholly irrelevant to their entitlement to social housing support. No formal reply was received this letter.

18. On 5th April, 2019, Mr. Christopher Bowes, legal officer with FLAC, was advised by an officer of the respondent that the application had been received and was being reviewed by a more senior officer of the respondent. The respondent also advised that a decision in respect of the application would be issued in the week beginning 8th April, 2019, although it is not entirely certain that this referred to the more recent, or earlier, application. However, no formal acknowledgment or notification of decision was received, nor was additional information sought.

19. On the 17th April, 2019 Ms. Lucey sent a further letter to the respondent again inquiring as to the status of the application and highlighting the 12 week statutory period for assessment as specified in the Regulations. She sought an immediate decision on the application. This letter was not acknowledged. On 10th May, 2019, by way of further

letter, Ms. Lucey emphasised that as the respondent had not sought additional information its failure to assess or issue a decision was in breach of the provisions of the Regulations. Once again she stressed the applicant's vulnerability and the distress caused to them by the failure to assess their application, or to issue a decision. As at the date of the swearing of her affidavit on the 28th June, 2019, no formal acknowledgment had been forthcoming.

The respondent's case

20. The respondent places significant emphasis on an earlier application made by the applicants in 2017 which, it is contended, remains under assessment. They also maintain that it is not permissible for the applicants to make a second application at this time. In this regard, reliance is placed on the undated and unsigned application for housing support made by the applicants on the 13th March, 2017 and to a follow-up over the counter meeting which took place at its offices on 8th January, 2018.

21. The respondent also contends that the application was not processed at that time because of the volume of applications it had received, staffing changes and because it was awaiting clarification, arising from legal proceedings, regarding the interpretation of a Department of Housing Planning and Local Government Circular 41/2012 ("*the Circular*"), which addresses the accessing of social housing by non – Irish nationals. The Circular provides guidelines for dealing with applications from a number of categories of persons and brought about changes in the assessment of the social housing support requirements in respect of persons from Bulgaria and Romania, who are now considered similar to other EEA nationals. Paragraph 5 of the Circular, which addresses the position of EEA nationals, states that such nationals may be considered for assessment for social housing support from housing authorities if, *inter alia*, they are recorded as involuntarily unemployed after having been employed for longer than a year and are registered as job seekers with the Department of Social Protection and FÁS. Legal proceedings had been issued concerning the Circular. They were compromised without judicial determination on the 4th July, 2018.

22. On 8th January, 2018 the applicants attended at a public counter at the respondent's offices inquiring of their application. They were given a letter which confirmed that the respondent was unable to carry out a full assessment at that time. It was stated that the application for social housing support, in accordance with the Act of 2009 and the Regulations, and accompanying guidelines may be considered once they provided details of a record of 52 weeks' employment in the State. Thus, it is contended that the assertion in the statement of grounds that the applicants did not receive formal acknowledgment, or a request for additional information, is unfounded.

23. It is pleaded that the applicants are not entitled to the reliefs claimed because they did not seek to challenge the decision of the respondent made on the 8th January, 2018.

24. In so far as an issue of timing of the application is concerned, it is pleaded that the applicants have failed to set out any grounds as to why time should be extended pursuant to the provisions of O. 84 of the Rules of the Superior Courts for a challenge to the

decision of the 8th January, 2018 and that the 2019 correspondence does not constitute a new decision for the purposes of O. 84 of the Rules of the Superior Courts. On 27th June, 2018 the applicants were informed in writing that they remained ineligible to be included on the housing list as they did not have a record of 52 weeks' employment in the State. They were also informed that their details would be kept on file and that if there were any changes in eligibility requirements they would be contacted. In January, 2019, clarification was still being sought about the Circular.

25. It is accepted that on the 5th April, 2019, a telephone call was received from Mr. Bowes in which he inquired about the status of the application and he was advised by a member of staff that the application was still under review and that a decision would be issued the following week. The respondent had understood that clarification concerning the Circular would issue at or around that time. At the time of delivery of the statement of opposition on 29th August, 2019 clarification had not yet been received from the Department regarding the Circular. It is pleaded that the respondent was at all times bound to have regard to the Circular when assessing applicants for social housing support from non – Irish nationals.

26. Finally, it is pleaded that the respondent was at all times exercising a statutory discretion, in a *bona fide* manner.

Ms Byrne's affidavit

27. The statement of opposition is verified by Ms. Anne Byrne, an officer in the respondent's housing department. In her affidavit sworn on the 29th August, 2019. She states that in carrying out its statutory functions, the respondent balances the needs and interests of all eligible housing applicants, tenants and the interests of the community generally having regard to the available stock of housing of various types in particular locations at any given time. This requires differentiating between eligible applicants according to their assessed accommodation needs. She outlines the procedures which must be complied with in order for a valid application to be submitted and completed. Ms. Byrne refers to the letter of 25th October, 2017 and emphasises that on 8th January, 2018 the applicants were informed that their application could not be progressed as they failed to meet the requirements of the guidelines and that the application would be reviewed on production of necessary documentation. She states that the respondent's decision of 8th January, 2018 informed the applicants that the respondent was unable to carry out a full assessment at that time for the reasons outlined in the Circular. The respondent had thus decided that the applicant's application for social housing support failed to meet the requirements of the Circular and that the application would be reviewed upon production of necessary documentation. This was reiterated in a letter of 27th June, 2018 to the applicants in which it was stated that "*at this time you're still not eligible to be included on the housing list as you do not have a record 52 weeks employment at the State*."

28. Finally, Ms. Byrne confirms that at the date of the swearing of her affidavit clarification about the Circular had not been received from the Department of Housing, Planning and Local Government.

The applicant's reply and information received in response to a Freedom of Information Act request

29. In an affidavit sworn by Ms. Lucey on 18th September, 2019 in response to Ms Byrne's affidavit, she acknowledges her awareness of the issue regarding the Circular. She states that other housing authorities have assessed applicants to be eligible for housing support without the requirement to demonstrate 52 weeks employment in the State. However, she maintains that these proceedings only concern the respondent's failure to assess the application submitted on 14th January, 2019. What the applicants seek is a reasoned decision on their application.

30. Ms. Lucey refers to information obtained from the respondent pursuant to a Freedom of Information Act request reveals and avers that internal communications suggesting that the status of the applicants' first application had been changed to "*refused*" on 23rd May, 2017 and repeated in an undated communication in 2018. However, an entry on 25th October, 2017 concerning the letter written at that time, also recorded that the applicants were advised that the application was still under review. A further entry records a deadline of 8th January, 2018 as having been met and that the inquiry was closed. The message continues:- "*Spoke to Niamh in housing, advised file is on refused, Niamh advised we can give letter saying refused on the basis of not having 52 weeks employment*." Another internal message which appears to be dated 21st January, 2019, states that the second application had been received but the applicant was still not eligible on the 52 weeks employment requirement.

Submissions of the applicant

31. The applicant submits that two issues arise. First, whether they are legally entitled to a decision in respect of the application of the 14th January, 2019 and, if the answer is yes, whether the respondent has unlawfully breached that entitlement by failing and/or refusing to assess their application and issue a decision thereon. Counsel for the respondent, Ms. Phelan S.C., argues that the applicants do not seek to challenge any substantive decision made by the respondent, because no such decision has been made which is capable of challenge. It is the failure to make the decision within the statutory time period, which is the subject of the proceedings.

32. Insofar as the respondent submits that the letter of the 8th January, 2018 constitutes a decision or a request for further information, the applicants maintain that it lacks specificity. The application of the 14th January, 2019 is a new application which falls to be considered within the 12 week statutory time period. It is suggested that this is acknowledged at para. 15 of the statement of opposition where it is pleaded that:-

> *"In this regard, and by way of example, on the 14th January 2019, FLAC sent to the respondent a completed application form for housing support in respect of the applicants together with signed consent forms."*

It is therefore submitted that the letter of the 8th January, 2018 has no bearing on these proceedings.

33. The applicant submits that Article 12 of the Regulations provides for two narrow and limited exceptions to the legal obligation placed on the respondent to deal with the application within a period of 12 weeks and emphasises the mandatory nature of the obligation as indicated by the use of the word "*shall*" in the Regulations. Thus, while there are a number of limited legal exceptions which might entitle the respondent to delay issuing a decision, none of them apply in this case. That the respondent has been seeking clarification from a government department is not an exception and cannot displace the respondent's mandatory obligation to assess the application within the 12 week period.

34. It is submitted that information obtained through the Freedom of Information request serves to undermine the respondents' arguments. The evidence demonstrates that the respondent viewed the application of the 14th January, 2019 as separate and distinct from the earlier application, that the respondent considered that it had to be dealt with and that it would be disingenuous for the respondent to rely on the letter of the 8th January, 2018 as a request for additional information. The internal communication and correspondence shows that the respondent took a different view than that pursued in the proceedings. The records reveal that the respondent had a view that the application was being rejected and that this is evident from recorded messages on an internal system. It is submitted that Regulation 21(1) envisages that a request for additional information must be made before the expiration of the 12 week period in order for the local authority to benefit from the additional time, which was clearly not the case here.

35. Even if the applicants are deemed to have made an earlier application, it is submitted that there is nothing in the statutory regime to prohibit the submission of a further application. Further, the applicant highlights differences in circumstances between the 2017 application, such as it is, and the 2019 application, including the change in accommodation status of the applicants. The letter of the 14th January, 2019 was accompanied by a letter which addressed the fact that the applicants were not in a position to provide evidence of 52 weeks' employment in the State. It was contended that it was not necessary, as a matter of European law, for them to so do.

36. Counsel for the applicant, Ms. Phelan S.C. submits that the starting point for any exercise of statutory interpretation is to consider the meaning of the particular phrase within the context of the legislation as a whole. In *Fuller v. Minister for Agriculture* [2005] 1 I.R. 529, McGuiness J. observed:-

> *"It is the duty of the court to construe section 16 [of the Civil Service Regulations Act 1956] in the light of the plain meaning of the words used and also in the contextual light of the surrounding provisions of the statute."* (Emphasis added)

37. In Dodd, *Statutory Interpretation in Ireland* (1st ed., Bloomsbury, 2007) the logic that underpins such an approach to statutory interpretation is discussed. Thus, consideration of an enactment as a whole may, when expressions are repeated in the same Act and more especially in a particular part of the same provision in which they appear require otherwise, and examining where a word or phrase appears in the rest of an enactment can assist in identifying the intended meaning. Further, consideration of the enactment

as a whole may be required to determine to whom a provision is directed and an examination of the remainder of the Act or other provision in the Act can reveal deliberate differentiation of a particular provision from the remainder of the Act. Also bearing in mind that the interpretation of the regulations should be informed by corresponding primary legislation, counsel argues that the phrase "*deal with*" means different things in different context, which may lead to some difficulty in applying one definite meaning to the words.

38. Regarding the meaning of "*to deal with*" the applicants refer to Collins, English Dictionary that "*when you deal with something or someone that needs attention, you give your attention to them, and often solve a problem or make a decision concerning them*". Adopting this approach would result in the respondent being required under the regulations to make a decision to either grant or refuse the application, rather than to delay the making of a decision until such time as the respondent wishes to so do. It is further submitted that a purposive approach should be applied which will ensure that the provision is not devoid of any practical effect. As a matter of law and public policy, legislative provisions must have some effect and purpose. The applicants call in aid *dicta* of Gilligan J. in *Boyne v. Dublin Bus/Bus Átha Cliath* [2008] 1 I.R. 92 where he stated:-

> *"Indeed, in any question of statutory interpretation the court is bound to have in mind the purpose of a statutory rule or the mischief at which it is directed, so far as such purpose or mischief can be ascertained. That is not to say, of course, that the court can simply give effect to that purpose, but where the court has to make a judgment about the proper meaning of a statute it is likely to want to consider whether it can by the process of interpretation given effect to its purpose or the mischief to which the statute is directed."*

39. In *O'Donnell v. South Dublin County Council* [2015] IESC 28, MacMenamin J. described the Housing Act 1966 as a remedial statute It is argued that the same understanding should be adopted in respect of the Act of 2009 and the regulations made thereunder; the purpose of the regulation being to provide support to those in need of housing assistance and/or to alleviate the consequences of homelessness which is a social wrong.

40. Applying these principles to the facts of this case, the applicant contends that not alone has the application of the 14th January, 2019 not been acknowledged, it has not been *dealt with*. It is not legally permissible for the respondent to maintain that an application has been and remains under consideration for a period of almost three years. Further, on the one hand the respondent described its letter of 8th January, 2018 as a decision, and yet on the other hand resists any attempt to characterise it as a refusal. By so doing, it is submitted, the respondent has attempted to escape the facts which underpin the case and that on a proper analysis of the documentation exhibited in the affidavits, it is clear that there was in fact a refusal of the first application by the respondent. The applicant contends that the regulations envisage that a respondent may take limited actions on receipt of a completed application form. It must either make a decision to accept or refuse the application or it may make a request for additional information.

41. The applicant also points out that since the initial application in March, 2017, there has been a change in circumstances. The applicants are now homeless, which was not the case at the time of the first application in March, 2017. It is submitted that such change in circumstances cannot be ignored as it entitles them to a far "*greater suite of housing support*" than might have been the case in 2017. There are material differences between the applications. Such change of circumstances, it is submitted, undermines the logic of the respondent's contention that it is entitled to keep the earlier application under review and to ignore the later one. The applicant also disputes the rationality of the respondent's approach to now access the applicants' requirements on the basis of an application submitted in March, 2017 and it is contended that there is nothing to preclude an applicant from submitting a fresh application.

42. While it is accepted that the fact that the applicants had not evidenced 52 weeks' employment in the State may be a ground upon which the respondent relies in order to justify refusal, it does not justify *not* making a decision.

Submissions of the respondent

43. Counsel for the respondent, Mr. Bradley S.C., submits that in truth this application for judicial review centres on the decision taken by the respondent on the 8th January, 2018, and that the applicants seeks to ignore it. It is contended that it is inherently contradictory for the applicants to seek as their primary relief an order of mandamus in circumstances where the Council have already made such a decision; one which has not been challenged and which it is now too late to challenge. It is argued that the applicants cannot ignore the decision of the respondent of the 8th January, 2018 and seek a second decision simply to come within the time limits for challenge. That is a decision which has legal consequences. A decision which is a reiteration of a previous decision is not a new decision. Reliance is placed on the decision of Carroll J. in *Finnerty v. Western Health Board* [1998] IEHC 143 as applied by Binchy J. in *Enev v. Dublin City Council* [2018] IEHC 73. Further, in *Shell E & P Limited (Ireland) v. McGrath* [2013] IESC, Clarke J. (ash he then was) stated:-

> *"The underlying reason why the rules of court impose a relatively short timeframe in which challenges to public law measures should be brought is because of the desirability of bringing finality to questions concerning the validity of such measures within a relatively short timeframe. At least at the level of broad generality there is a significant public interest advantage in early certainty as to the validity or otherwise of such public law measures… "*

44. The decision of the 8th January, 2018 enjoys a presumption of validity, as described by Charleton J. in *Weston v. An Bord Pleanala* [2008] IEHC 255 and these proceedings constitute an impermissible collateral challenge to that decision. The respondent relies upon the principle of legal certainty which underpins the collateral challenge doctrine.

45. It is also submitted that an important principle of public law is that the court must look to substance over form. In this regard, in *Krupecki v. Minister for Justice and Equality (No. 2)* [2018] IEHC 538, Humphreys J. stated:-

"The courts should be concerned with the substance of a decision rather than the form in which it emerges. There is no necessary doctrine that reasons have to be given in a decision itself. They could be given in an accompanying document or even a subsequent document. That is consistent with the recent Supreme Court decision in M.A.K. v. Minister for Justice and Equality [2018] IESC 18 (Unreported, Supreme Court, 13th March, 2018) in a somewhat different context that a decision does not necessarily have to be a self-contained document and can refer either expressly or impliedly to another, related document."

46. The respondent submits that it is clear that the decision taken on the 8th January, 2018 specifies that the application for social housing support would be considered upon receipt of details or evidence of a record of 52 weeks' employment in the State. The letter of 8th January, 2018 confirms that the decision was taken pursuant to the provisions of the Act, the Regulations and the accompanying guidelines. It is alleged that when making its decision of the 8th January, 2018, the respondent fulfilled its statutory duty by giving effect to relevant Ministerial policy. The Minister has a function to determine policy and the Local Government Act, 2001 s. 69 provides that the respondent should have regard to Ministerial policy objectives. The Minister is not party to these proceedings and it is submitted that the applicant cannot seek to visit on the respondent responsibility for provisions in the Circular without joining the Minister.

47. The respondent submits that, put simply, any assessment is subject to and must be in accordance with the 2011 Regulation. In this regard, emphasis is placed on the fact that the Council informed the applicant on the 8th January, 2018, that they were unable to carry out a full assessment "*at this time*" therefore, accordingly the application for social housing support, in accordance with the Regulations and accompanying guidelines was appropriately responded to, that it "*may be considered when you can provide details/evidence of the following (as you do not have a record of 52 weeks' employment in the state)*". The respondent maintains that the wording "*deal with*" means to treat or to process and points to a number of references to the words "*deal with*" in the Regulations. It is submitted that under Regulation 12, the processing, treating or dealing with the application is conditional, such conditionality being captured by the phrase in Regulation 12(1) "*subject to proper completion of the application form by the household*". The decision of the 8th January, 2018, it is submitted, makes this perfectly clear. It is submitted that the use of words in the letter of 8th January, 2018 such as "*at this time*", "*may*" and "*when*" are important. They illustrate that the processing, treating or dealing with the application will occur when the application form is properly completed upon receipt of the necessary details of employment. It is submitted that this interpretation is supported by the terms used in Regulations 11 and 12 and that the "*relevant periods*" therein have not yet been triggered.

Discussion

48. The applicants claim that the respondent is in breach of its obligations under Regulation 12(1) of the Regulations. The nature and extent of those obligations require to be considered. At the heart of the debate is whether the application of January, 2019 is to be

regarded as a valid application for the purposes of the statutory regime. While the applicants accept that they submitted an earlier application for housing support, it is said that it was done without the benefit of legal advice and that it must be contrasted with the application of the 14th January, 2019, in both a legal and practical sense. The respondent maintains that an applicant is only entitled to make one application at a time and that this applicant for judicial review amounts to a collateral attack on a decision of the respondent made on the 8th January, 2018. The respondent also maintains that the application which was the subject of the decision dated the 8th January, 2018 remains extant.

49. In *The State (Elm Developments Ltd.) v An Bord PLeanala* [1981] ILRM 108, Henchy J. observed at p. 110:-

> *"Whether a provision in a statute or a statutory instrument, which on the face it is obligatory (for example, by the use of the word 'shall'), should be treated by the courts as truly mandatory or merely directory depends on the statutory scheme as a whole and the part played in that scheme by the provision in question."*

In *Kelly v. Minister for Environment* [2002] IEHC 38, McKechnie J. observed that the ultimate aim of every primary approach to the interpretation of legislation is to identify the will of the Oireachtas. He continued at para. 25:-

> *"this obligation equally applies even when it is necessary to invoke any of the secondary aids to interpretation. If the intention of the Oireachtas can with confidence be readily found and identified, then the courts in my view are bound to ascribe the word in question that and only that meaning. Having done so part of the court's function is happening"*

It seems to me, therefore, that the court should approach the interpretation of the obligation imposed on the respondent by reference to the scheme as a whole and within the overall statutory context, bearing in mind that the Act may be called in aid to assist in the construction of the Regulations. See *Fox v Lawton* [1974] A.C. 803 per Diplock L.J. and *Frascati Estates v Walker* [1975] I.R. 77, that "*It is legitimate to use the Act as an aid to the construction of the Regulations. To do the converse is to put the cart before the horse."*

50. Regulation 12(1) provides that, subject to proper completion of the application form and to the provisions of para. 12(2), the housing authority "*shall*" deal with the application within a period of 12 weeks. On the face of it, this appears to impose on the authority a mandatory obligation to " *deal with*" an application within a period of 12 weeks of its receipt, or where additional information has been requested "*for the purpose of verifying information relating to the application*", within six weeks of receipt of that information. It is to be recalled that this obligation arises in the context of the statutory regime addressing, in so far as is possible, the important social objective of assisting the homeless and those without or in need of housing, and within the requirements and limits of that statutory framework. It is not without some significance that time limits and time

requirements appear with frequency throughout the Act and the Regulations. This is to be expected in the context of such legislation where, in many cases, the requirement for reasonably immediate action will be obvious.

51. In *Kinsella v. Rafferty* [2012] IEHC 344, Hogan J. considered the provisions of s. 20(2) of the Act of 2009, which, he read in conjunction with Article 14 of the Regulations and stated:-

> *"In this respect, however, both the Act of 2009 and the 2011 Regulations are quite clear. Section 20(2) of the Act of 2009 obliges the authority to which an application is made to carry out an assessment of the household's "eligibility, and need for, social housing support" for the purposes of determining whether the household is qualified for such support. The sub-section further recites that the application shall be determined 'subject to and in accordance with regulations made for the purposes of this section.'"*

52. Having recited the provisions of Article 14 of the Regulations, Hogan J. observed that the provisions demonstrated "*beyond peradventure*" that the housing authority is first to determine eligibility and, assuming that the answer is in the affirmative, then second to proceed to the assessment of the question of need.

53. The obligation is one "*to deal with*". It seems to me that this expression should not be interpreted in isolation but should be viewed in the context of the Regulations as a whole, and subject to the provisions of its parent legislation, the Act of 2009.

54. Thus, s. 20 of the Act provides as follows:-

> *"Where a household applies for social housing support, the housing authority concerned shall, subject to and in accordance with regulations made for the purposes of this section, carry out an assessment (in this Act referred to as a "social housing assessment") of the household's eligibility, and need for, social housing support for the purposes of determining—*
>
> *(a) whether the household is qualified for such support, and*
>
> *(b) the most appropriate form of any such support."*

55. When viewed in context, in my view, Regulation 12 imposes an obligation on the housing authority, once the criteria specified in the Regulations are fulfilled, to make a decision to either accept or refuse the application. While a housing authority may seek clarification of matters arising on such application, when such clarification is sought, it must be for the purposes which are specified in the Regulation, i.e. for the purposes of "*verifying information relating to the application.*"

56. The applicants on the face of it, do not seek to challenge what occurred to their application submitted in 2017 and upon which the respondent says a decision was made on 8th January, 2018. The respondent maintains that this is what the applicants are

seeking to do, in an impermissible and collateral way. On the other hand, the respondent also maintains that that application is still before the local authority; and that only one such application is permitted at any one time. This begs the question as to what, if any, decision was taken on 8th January, 2018, which it is contended has a presumption of validity and which cannot be challenged in an impermissible manner.

57. The respondent's contention that it could not deal with the January, 2019 application because of the existence of an extant application, was not something that was communicated to the applicant prior to the institution of these proceedings. This approach became apparent only after their commencement. Before then, there was no formal acknowledgement of the application or explanation that the making of this second application was misplaced. Neither was it explained to the applicant or to their legal advisers, at that time, that the application made in January, 2019 could not be dealt with until such time as evidence of employment was provided in response to the first application; or that the respondent felt precluded from dealing with it *at all*.

58. In my view, it is apparent from the form required to be completed by an applicant that it is anticipated that other applications might be made or that they may have been made in the past. Thus, at p. 5 of the application form completed by the applicants in December, 2018 and submitted in January, 2019, the questions which were asked and answered were as follows:-

> *"Do you have a previous application with this local authority? – Yes.*
>
> *Do you have a current application with another local authority? – No."*

59. It is to be noted that in the March, 2017 application neither of these boxes is ticked either yes or no; and there is nothing to suggest the housing authority sought clarification of these particular answers in any subsequent correspondence.

60. One can readily appreciate that it is important for a housing authority to be apprised of previous applications made to it, or applications which may have been made to an adjoining or other housing authority, but it does not appear to follow that an affirmative answer means that only one application is permitted, or that the application ought to be rejected on that sole ground. This is particularly so where there has been a change in circumstances. It may very well be that any attempt to "*flood*" a local authority with applications, or indeed to improperly seek to gain an advantage by submitting multiple applications, might be legitimately resisted on the basis that such a course of action by an applicant may undermine the process or detract from the ability of the local authority to comply with the statutory requirement to deal expeditiously with applications. It also seems to me, however, that the processing of an application in the manner and within the times provided in the statutory framework may reduce the potential for any such abuse. It does not appear to me, however, that such considerations arise on the facts of this case.

61. I do not believe that the provisions of the Act or the Regulations, when viewed in their entirety and in context preclude the consideration of fresh application and particularly an application made where circumstances have changed. In my view, the authorities upon which the applicants rely support this proposition; see for example *Sheehan v. Minister for Social Welfare* [2010] IEHC 4, *Agha (A Minor) v. Minister for Social Protection and Ors* [2018] IECA 155 and *M.D. v. Minister for Social Protection* [2016] IEHC 70 where emphasis was placed by Baker J. on the requirement for reasons in decisions of this nature, as to provide such reasons enables an applicant to address those reasons in any fresh application that he or she might wish to make. In my view there is merit in the submission made by counsel for the applicants that an obligation is imposed by the Regulations on a housing authority to provide a reason for its decision, demonstrates that applications should not be left open ended or remain under consideration indefinitely. Regulation 15(2) provides that:-

> *"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 case, set out the reason therefor."*

62. The respondent maintains that this application involves a collateral challenge to the decision which was made by the respondent on 8th January, 2018. While conscious of the limited nature of the challenge made by the applicants in these proceedings, nevertheless, in the context of the respondent's defence, I believe it is legitimate to *consider* what occurred on 8th January, 2018. But what was this decision? On the face of it, it was a decision to seek further information. But, on any analysis, in my view, it was not one which sought information "*for the purpose of verifying information relating to the application*." At no stage did the applicants represent that they fulfilled the work requirements as stipulated in the guidelines contained in the Department Circular. It seems to me that no amount of verification could, at that time, alter that position. The respondent's stated position as outlined in the letter of 8th January, 2018 was to place the obligation on the applicants to bring forward information which could not then be obtained in circumstances then prevailing. What appears to have occurred is that a *decision* was taken by the respondent to *defer a decision* on the application until such time as the applicants' circumstances or the criteria as outlined in the circular was reassessed.

63. While the applicant maintains that the respondent had effectively refused their application, and point to internal communications in support, the respondent denies that the application was refused. From the applicant's perspective, it may be difficult to decipher a practical or effective difference between the stated response and a refusal because of the absence of a record 52 weeks employment within the country. Perhaps it may also be said that what the respondent did, and also perhaps from the best of motives, was rather than refusing the application, was to leave it open for reconsideration once the terms for fulfilment of the necessary requirements were complied with or issues concerning the Circular were addressed. This much is evident from the letter of 8th

January, 2018 from the respondent to the applicant's informing them that the respondent was unable to carry out a full *assessment at this time*. They were advised that the application may be considered when they could provide details/evidence of 52 weeks employment in the State.

64. But even if I am incorrect in this, nowhere in the legislation do I see a prohibition on a fresh application being made in new or changed circumstances, even when an existing application is before the housing authority. I am satisfied that the Regulations provide for the assessment of the housing needs of persons at a particular time of their lives and, in my view, there is nothing contained in them precluding the making of a fresh application where circumstances have changed. Here, there is a stated change in circumstances. In the 2017 application it was stated that the applicants were residing in rented accommodation. In the 2019 application the applicants are described as homeless. This change in circumstances may have required verification but whether verified or not, the circumstances of the applicants as described in the applications had altered. The same may also be said of the state of their health as described in the application forms. In my view, therefore, the application which was made on 14th January, 2019 required to be addressed by the respondent in accordance with its statutory obligations.

65. There is significant merit in counsel for the applicant's submission that parallels are to be drawn between this legislation and the Housing Act 1966, which was described by MacMenamin J. in *O'Donnell*, as a remedial statute. If the respondent's interpretation of their obligation under the Regulation is correct, it would seem to follow that a decision could be deferred indefinitely.

66. I have taken into account the respondent's reference to the various sections of the regulations which describe the singular "*an application*" but I do not think that the use of that expression precludes a second or subsequent application. The singular expression is employed in Regulations 4(1), 4(2), 5, 82(a), 82(b). Regulation 12(1) refers to the "*proper completion of the application form*." The regulations upon which reliance is placed, which refers to "*an application*" stipulates what is to occur to the particular application which is made at any one time but in my view, they do not go so far as to prohibit, either expressly or by implication, the making of a further application, or one made in changed circumstances. Such an interpretation, in my view, would run contrary to the purpose and intent of the legislation, concerning as it does, housing needs, a need which evokes a sense of immediacy rather than deferral, and the consideration of circumstances then prevailing.

67. It seems to me that this reasoning is consistent with the reasoning of Simons J. in *Zabiello v. South Dublin County Council* [2019] IEHC 863, who spoke of the dynamic nature of decision-making under the Act of 2009 and the Housing Support Regulations 2011. He observed, in the context of the Regulations at issue in that case, that the legislation expressly recognises that a household's housing needs may evolve over time. I see no reason why decisions made under the Regulations in issue in these proceedings should not also be described as dynamic in nature.

68. I also believe that court's interpretation is supported by a contextual examination of certain other provisions of the Regulation. I have already referred to Regulation 15.

69. Regulation 16 provides:-

> *16. A household shall be deemed to be entered on a housing authority's record of qualified households on the date that the housing authority of application determines that the household is qualified for social housing support, except that-*
>
> *(a) where the housing authority of application did not seek additional information from the household under Regulation 11 and did not determine the household's qualification for social housing support within the period of 12 weeks from the date of receipt of a properly completed application form, the household shall be deemed to be entered on an authority's record of qualified households on the date of expiry of the said period of 12 weeks, or*
>
> *(b) where the housing authority of application sought additional information from the household under Regulation 11 and did not determine the household's qualification for social housing support within the period of 6 weeks from the date of receipt of such additional information, the household shall be deemed to be entered on an authority's record of qualified households on the date of expiry of the said period of 6 weeks."*

The Regulations therefore imposes an obligation on the local authority to make a determination. This appears consistent with the obligation imposed on a housing authority by the parent legislation. Section 20 of the Act provides that where a household applies for social housing support, the housing authority:-

> *"shall, subject to and in accordance with regulations made for the purpose of this section carry out an assessment (in this Act referred to as a social housing assessment) of the household's eligibility, and a need for social housing for the purpose of determining;*
>
> *(a) whether the household has qualified for such support; and*
>
> *(b) the most appropriate form of any such support."*

Albeit stated to be *subject to and in accordance with the Regulations*, in my view s. 20 is mandatory in its terms. It seems clear to me that the primary purpose and intent of the legislation under which the Regulations have been made, is to ensure that an assessment is carried out and determination made as to whether the household qualifies for such support. To leave the period of assessment open indefinitely, would appear to run contrary to this purpose.

70. Further, given the potentially dynamic nature of the relationship between a housing authority and an applicant, I do not believe that it can be said that the applicant made in January, 2019 constitutes a collateral challenge to any decision made by the respondent

in January, 2018, and does not fall foul of the sentiments expressed by Clarke J. in *Sweetman v. An Bord Pleanala* [2018] 2 I.R. 250 that:-

> *"The rationale behind the collateral attack jurisprudence is clear. A party who has the benefit of an administrative decision which is not challenged within any legally mandated timeframe should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision on the basis that the earlier decision was invalid. Like consideration would apply to a State decision maker who has rejected an application or other similar decisions."*

71. It is not contended that the form has not been properly completed. In the circumstances I am satisfied that there has been a failure by the respondent to comply with its obligation under the Regulation 12 to deal with the application, submitted to the respondent on 14th January, 2019, within the specified period.

Conclusion

72. In the circumstances, I am satisfied that the applicants have established that the respondents had been in breach of its obligations under the Regulations, particularly Regulation 12, to deal with their application of the 14th January, 2019, within the requisite time period, but I will discuss with counsel, the appropriate form of relief which should be afforded to them.