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	Delivered: **2/3/21**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JR103 FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE NORTHERN IRELAND HOUSING EXECUTIVE

Mrs Orla Gallagher (instructed by KRW Law) for the Applicant
Mr. Aidan Sands (instructed by NIHE Legal Services) for the Respondent

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COLTON J

Introduction

[1] The background to this case is unusual. The factual matrix is complicated and the history of the legal proceedings is unfortunate.

[2] Because, as will appear, the applicant has been the subject matter of threats and intimidation her name has been anonymised in these proceedings. Nothing should be reported in relation to this application which would identify the applicant.

[3] The dispute centres on a bungalow at an address known to the court in the Belfast area. Throughout this judgment the bungalow will be referred to as "the premises."

[4] It is the applicant's evidence that she purchased the premises in September 2007 after returning to Northern Ireland in 2006 with her husband and her 4 year old son. Her husband was disabled following a brain haemorrhage and the premises were purchased due to its wheelchair accessibility.

[5] In the course of these proceedings the applicant has served a number of affidavits setting out her use of the premises since its purchase. In truth the history is not entirely clear but in short form at this stage it is sufficient to say that it is her evidence that the premises were lived in by the family on and off since their

purchase. The premises has been leased out to tenants for significant periods. As a result of various attacks at the premises, believed to be by loyalist paramilitaries, she or her family did not feel safe there. As a consequence she has also lived at an address in Crawfordsburn. An additional factor was that throughout this period her husband was in hospital for significant periods of time during which periods the premises were rented out.

[6] It is her case that she moved back into the premises in the summer of 2013. On 18 September 2013 there was an arson attack on the premises. Thereafter, the premises were unoccupied. Rather than accept a cash payment from the insurance company in relation to the premises she avers that the family decided to rebuild the premises as a family home. She avers that in July 2014 she attended the premises with an architect to start the rebuild. The rebuild commenced and was completed by the start of July 2015. Her evidence is that on 31 July 2015 she had the oil tank filled and began moving back into the premises that day. Over the weekend of 1/2 August 2015 the hot water tank and radiators were stolen. The premises were directly targeted and as a result she again vacated them on 3 August 2015 to return to live in alternative premises.

[7] Thereafter, she put the premises on the market but efforts to sell were frustrated by ongoing acts of intimidation by persons believed to have loyalist paramilitary connections in the area.

[8] In the meantime sadly the applicant's husband died in August 2016.

[9] The applicant applied to the Northern Ireland Housing Executive (NIHE) for the purchase of her home under the Scheme for the Purchase of Evacuated Dwellings (SPED) on 6 March 2017. In that application she indicated that the premises was her home until August 2016. That application was rejected because the PSNI refused to issue a Chief Constable's Certificate which is a requirement under the scheme.

[10] The applicant then submitted a second application on 22 April 2018, with the assistance of her solicitors. Again, the applicant indicated that the property was vacated in August 2016. Again, a Chief Constable's Certificate was refused. The applicant judicially reviewed the decisions of the PSNI and the NIHE and the decision was quashed by consent.

[11] In those proceedings a replying affidavit was filed on 8 July 2019 by Paul Reid on behalf of the NIHE. In his response at paragraph 32 onwards Mr Reid averred as follows:

> "***NIHE Position***
>
> *32. These proceedings have brought new information to the Housing Executive's attention, which is clearly pertinent to*

eligibility criterion 1, i.e. whether the house owned by the applicant was her principal residence. There is a reference in the papers to the house being owned jointly by the applicant and her mother having been bought from her late uncle's estate. There is also reference to the house having been rented to tenants for significant periods of time.

33. In her affidavit evidence the applicant has given no clear account of when she and her family did or did not actually live in the house as their principal residence. The status of the address at … Crawsfordburn is unclear. Clearly it was the applicant's principal residence for a considerable period of time, but the extent of this has not been clarified. These are all matters which would require further investigation by the Housing Executive and any reconsideration of this application.

34. A substantial amount of new evidence has now become available to NIHE, including a credit check and details of when the premises was rented out. This information was not before the decision-maker at the time of the second application. The totality of the evidence now available would tend to suggest that the `principal residence' test was not satisfied.

35. For these reasons, the Executive has proposed a fresh consideration of the application by a different decision-maker who would review all the matters and information including those which have become available within this judicial review. It is likely the applicant would want to make additional representation on these matters."

[12] In light of the contents of this affidavit understandably the matter was disposed of by way of a quashing of the decision with an agreement that a fresh decision would first be made by the NIHE, upon receipt of any new representations that the applicant wished to make.

[13] Arising from this outcome the applicant submitted a fresh application on 29 July 2019 which was refused by David Dunn, an official working in the NIHE, on 30 August 2019.

[14] It is this decision which is challenged in these proceedings.

Legal Context

[15] The reference to the paragraphs from Mr Reid's affidavit touch on the relevant scheme which is in play in this application. What is referred to as the SPED scheme has a statutory underpinning in Article 29 of the Housing (Northern Ireland) Order 1988, the statutory purpose being to "*acquire by agreement houses owned by*

persons who, in consequence of acts of violence, threats to commit such acts or other intimidation, are unable or unwilling to occupy those houses." The scheme arose out of the conflict in Northern Ireland and there is no equivalent scheme anywhere else in the United Kingdom.

[16] The scheme established in accordance with Article 29 sets out the necessary criteria for an application. The most recent iteration (approved in February 2014) provides:

> *"2.1 All the following conditions must be satisfied before an application will be eligible for acceptance under SPED.*
>
> *(i) The house must be owner occupied and must be the applicant's only or principal home.*
>
> *(ii) There must be evidence (substantiated by the PSNI) that it is unsafe for the applicant or a member of his/her household residing with him/her to continue to live in the house, because that person has been directly or specifically attacked or intimidated and as a result is at risk of serious injury or death. A certificate stating this clearly, signed by the Chief Constable of the Police Service of Northern Ireland, or authorised signatory, must be provided to the Housing Executive."*

[17] In this case the Northern Ireland Housing Executive has decided that the applicant has not satisfied the criterion at 2.1(i).

Grounds of Challenge

[18] In the amended Order 53 Statement the applicant's grounds of challenge are as follows:

> *"(i)* ***Illegality.*** *The applicant contends that the impugned decision was unlawful in the following respects:*
>
> *(a) In their decision the NIHE explicitly accepted that 'it was the applicant's stated intention to move into (an address known to the court) as her principal home at 31/07/15' and 'the property was vacated on 03/08/15 following an arson attack.' These conclusions should have led to the NIHE accepting that criterion 2.1 was satisfied. The decision consequently serves to frustrate Article 29 of the Housing (Northern Ireland) Order 1988.*

(b) The NIHE incorrectly refused the application because the decision-maker 'does not accept that it is the applicant's principal home at the date of the application received on 02/08/19'. That was not the test to be applied. The reason that the applicant was not in occupation was because of intimidation, something that must frequently occur for applications under the SPED scheme. Their decision consequently serves to frustrate Article 29 of the Housing (Northern Ireland) Order 1988.

(c) In their decision the respondent relied upon the fact that the applicant did not reoccupy the property after the act of intimation on 3 August 2015 to conclude that she did not satisfy criterion 2.1(i). Their decision consequently serves to frustrate Article 29 of the Housing (Northern Ireland) Order 1988.

[19] At (iv) of the amended grounds the applicant also alleges procedural unfairness in the following respects:

"(a) In their decision, the respondent obtained from CISU and took into account a variety of material without informing the applicant that they were doing this or providing the applicant with an opportunity to comment on that material or its significance. This also amounted to a change of procedure without notice, as the respondent did not obtain this material when they had previously considered the applicant's SPED application.

(b) The NIHE initially (by implication) accepted that the applicant had provided sufficient evidence to show she satisfied criterion 2.1(i) of SPED (in relation to her applications in March 2017 and April 2018). The respondent did not advise the applicant they considered she had provided insufficient evidence to support her application until their most recent determination. This delay has prejudiced the applicant's ability to obtain evidence that further supports her application, and inevitably had prejudiced the applicant in her ability to produce such evidence. That delay renders their process unreasonably unfair."

[20] Finally, at paragraph (vii) of the amended Order 53 Statement the applicant contends that the impugned decision is vitiated by the proposed respondent's failure to comply with the following statutory duty/requirements:

> "*(a) For the reasons set out in 5(i) the decision frustrates the statutory obligation in Article 29 of the Housing (Northern Ireland) Order 1998 which requires the Executive to submit a scheme to the department making provision for the Executive to acquire by agreement houses owned by persons who, in consequences of acts of violence, threats to commit such acts or other intimidation, are unable or unwilling to occupy those houses. The manner in which the Executive are purporting to apply the scheme in the present case ensures it will not operate effectively, and will instead frustrate the purpose of this provision."*

The Decision Under Challenge

[21] The respondent provided the applicant with a fully reasoned and written decision on 30 August 2019.

[22] The decision is supported by an affidavit from the decision-maker. The decision's structure sets out the SPED eligibility conditions and refers to and reviews all the material available to the decision-maker at the relevant time. This included the previous SPED applications and all the information provided in the bundles submitted in respect of the previous application for judicial review. It also included new evidence sought from NIHE Corporate Investigation and Security Unit (CISU). This is the department which the NIHE would normally use in order to establish and substantiate property occupancy credentials.

[23] The written decision then goes on to set out in tabular format all the evidence taken into account in respect of the purported occupancy of the premises. The table has four columns, namely the date or period under consideration, the applicant's statement re occupancy, the evidence provided for the period and the decision-maker's conclusion on the evidence.

[24] Having considered and analysed the material the decision-maker concluded as follows:

> "***Conclusion***
>
> *Having reviewed the materials above, the Housing Executive would conclude that the evidence provided by the applicant is insufficient to establish the premises as owner occupied and her principal or only home prior to 31 July 2015. Further the balance of evidence collated by CISU along with PSNI witness*

statements indicates that the applicant's principal home prior to 31 July 2015 was (an address in Crawsfordburn).

The Housing Executive accepts that it was the applicant's stated intention to move into (the premises) as her principal home on 31 July 2015 and the applicant's statement that the property was vacated on 3 August 2015 following an arson attack. However the applicant did not reoccupy the property after this date and the balance of evidence collated by NIHE CISU indicates that (an address in Crawsfordsburn) has been her principal home. The Housing Executive therefore does not accept that (the premises) was the applicant's principal home at the date of her first SPED application, 06/03/17, and does not accept that it is the applicant's principal home at the date of the application received on 02/08/19.

Accordingly the Housing Executive cannot accept this application under the SPED scheme as it does not meet the first criterion of the scheme, namely:

> *'The dwelling must be owner occupied and must be the owner's only or principal home.'"*

It will be seen that there is an apparent error in the conclusion in that the property was not vacated on 03/08/15 as a result of an arson attack but as a result of acts of vandalism and intimidation. As has been set out above the arson attack occurred on 18 September 2013.

[25] I propose to deal firstly with the ground based on procedural unfairness. The basis for this ground is the failure of the decision-maker to provide the applicant with an opportunity to respond or comment on material it received from the CISU. The document dated 7 August 2019 states:

> *"Although we are providing our conclusion based on the evidence uncovered during this investigation, the final decision rests with land and regeneration services.*
>
> ***Recommendation:** I do not believe that the applicant qualifies for the SPED scheme for the above reasons (based on credit check information) however I would recommend that you discuss our findings with the applicant to allow her the chance to respond."*

[26] The applicant was not given an opportunity to respond and the decision-maker proceeded to make the decision.

[27] The applicant takes particular issue with the fact that the credit check information contained in this material from CISU did not identify any link to the premises in question. In her submissions Ms Gallagher refers to all the material submitted by the applicant in support of the application which also included credit checks which did identify a link to the premises as well as the address in Crawfordsburn. She also pointed to all the other materials submitted which she says demonstrated the applicant met the criteria in 2.1(i).

[28] She says in any event that the failure to permit the applicant to make representations on the findings of the CISU material renders the procedure unlawful.

[29] Article 29 of the 1998 Order sets down no procedural requirements relating to an application and therefore in considering this matter the applicable standards of fairness are those of the common law, a duty described by Lord Mustill in the well-known case of **Doody v Secretary of State for the Home Department** [1994] 1 AC 531 as an "*intuitive judgment*" having regard to all the material circumstances of the situation. Requirements of procedural fairness will vary according to the context.

[30] In this regard I refer to the paragraphs in the affidavit filed by the NIHE in the first judicial review by Mr Reid.

[31] That affidavit clearly set out the concerns the respondent had in relation to the application and the nature of the issues she would need to address.

[32] The final page of the application form contains a serious of paragraphs providing information to applicants about the process, followed by a declaration that all applicants must sign. In the body of the declaration it is stated:

> *"(a) I am owner/occupier of the house as described in 2 overleaf and hereby apply to the Northern Ireland Housing Executive (NIHE) to consider the purchase of my house.*
>
> *(b) I understand that I am not entering into any legal commitment by submitting the application.*
>
> *(c) The dwelling described in 2 overleaf is my only or principal home.*
>
> *(d) I understand that in order to verify my occupancy of the dwelling described in question 2 overleaf the NIHE may confirm my personal data using a credit records agency and I give my explicit consent to this being carried out."*

[33] This application form was personally signed by the applicant on 24 July 2019 at a time when she already received legal advice.

[34] Natural justice requires that the applicant has the right to participate in the process and the right to be heard. In my view the process adopted in this particular case provided for this. The applicant had the fullest possible opportunity to make meaningful and focused representations. It can be seen that the applicant was fully aware of the evidence that would be required. She was fully aware of the concerns of the Executive and the issues relevant to the consideration of the application. She herself had obtained credit checks in the past and she was aware that the respondent might confirm what she was claiming by obtaining its own credit report. There can be no issue that the obtaining of the report itself was entirely fair.

[35] A decision to accept or refuse an application under the SPED scheme is not a judicial or quasi-judicial decision; it is administrative in nature. It does not involve the imposition of a penalty or sanction, nor does it deprive the applicant of her property. In the circumstances of the case I do not consider that fairness required the respondent to revert to the applicant before making the decision.

[36] As per the affidavit of Mr Dunn the decision-maker reasonably took the view in the circumstances of this case that the applicant had been given the opportunity to make the fullest possible representations on the key issues of which she was already fully aware.

[37] Given the character of the decision it was not "*one that requires the deployment of the full adjudicative panoply*" as was said by Kerr LCJ in the case of **Re Mullan's Application** [2007] NICA 47 at [32] which was considering a decision of the Parole Commissioner – dicta which has been repeatedly referred to in this jurisdiction in assessing the requirements of fairness in particular cases.

[38] Although the respondent could have reverted to the applicant upon receipt of the CISU report, the fact that he did not do so does not in the court's view invalidate the decision.

[39] In coming to this conclusion I am particularly influenced by the fact that despite the very extensive material that has been submitted already by the applicant nothing was identified in the course of the hearing on behalf of the applicant to suggest that she would be in a position to submit any additional evidence to the Housing Executive. She had already submitted a significant body of material and I cannot see what difference it could possibly have made had the respondent gone back to the applicant on this issue.

[40] I turn now to the decision itself.

[41] Properly analysed the applicant sets out the following grounds of challenge:

(a) The conclusions reached by the respondent on the facts should have led it to decide that criterion 2.1 was satisfied;

(b) The respondent applied the wrong test in that it refused the application because it concluded that the premises was not the applicant's principal home at the date of her application;

(c) The respondent wrongly relied on the fact that the applicant did not reoccupy the premises after the intimidation of 3 August 2015.

[42] The respondent says in summary that:

(a) The impugned decision was an entirely rational and reasonable conclusion to reach on the evidence before it. Whilst the applicant may have had an intention to make the premises her principal residence, there was insufficient evidence to demonstrate that she had ever done so;

(b) The respondent's decision was entirely consistent with the statutory purpose of the scheme.

Consideration

[43] There is no basis upon which the applicant can impugn the lawfulness of the scheme or the criteria itself.

[44] Article 29(2)(a) provides the NIHE with a discretion as to "*the circumstances in which the Executive may acquire a house under the scheme.*" There is no statutory requirement to provide for the purchase of all houses of persons who have been threatened in all circumstances and the Executive is entitled to set its own criteria subject to the approval of the Department.

[45] The SPED scheme is not intended to be a compensation scheme for property damage. It is operated by the Housing Executive because it relates to housing, rather than property. This is why the "*principal home*" test is the first criterion. The second criterion requires the applicant to show that it is "*unsafe*" to continue to live in the house due to violence or intimidation.

[46] It must also be remembered that the scheme is only a part of the statutory obligations imposed on the Northern Ireland Housing Executive under the 1998 Order. The Executive routinely provides emergency accommodation, support, advice and assistance to those who have been rendered homeless. The SPED scheme is only one of a much larger package of measures available to help victims of intimidation and violence in the context of housing.

[47] The court's focus therefore is on the actual decision made in this case. In doing so I am conscious that it is not the task of this court to substitute its own view on the merits but rather to audit the legality of the decision under challenge.

[48] Focussing on the arguments raised by the applicant, I agree that the proper test is not whether the premises was the applicant's principal home at the date of her first SPED application or on her final application on 2 August 2019. This is because as the applicant submits someone in her position may well have vacated the premises precisely because of the intimidation and one would anticipate that there will frequently be a delay between the act of intimidation, the vacating of the premises and the submission of a SPED application. It is correct that the delay in this case was very significant but that in itself is not a bar to a successful application. It may well be that the circumstances of the delay and evidence relating to that delay may be relevant in terms of assessing whether or not prior to the act of intimidation relied upon the premises was the applicant's principal home at that time.

[49] I also agree with the applicant that it would be wrong of the respondent to rely on the fact that the applicant did not reoccupy the property after the intimidation of 3 August 2015 as a basis for refusing the application.

[50] However properly analysed I do not consider that this was the effect of the decision nor was it the basis upon which the decision was reached.

[51] In his affidavit in these proceedings Mr Dunn properly accepts at paragraph 24 that:

> *"24. It is entirely correct that a property may be vacant at the date of the application, as the title of the same confirms. It is not uncommon that properties will be evacuated when an application is made and this does not affect eligibility for the scheme."*

[52] Crucially he goes on to aver:

> *"There was, however a lack of evidence that the (premises) was **ever** the applicant's principal home, and this was the conclusion that I reached. At best, the applicant had an intention to live there. When she made her first SPED application on 6 March 2017, even on the applicant's own case, she had not lived in the house for 19 months."*

[53] I intrude here to say that in my view it would be permissible for a decision-maker to look at this delay in the context of whether or not it supports the case made by the applicant that the premises was her principal home prior to the intimidation relied upon.

[54] Mr Dunn goes on to aver at paragraph 27:

> *"… It is correct that Article 29 refers to `persons who … are unable or unwilling to occupy their homes'. The property must nonetheless be the applicant's home, not a future or intended home."*

[55] In my view the key passage in Mr Dunn's affidavit is from paragraph 19 onwards. Having referred to the circumstances in which the premises was purchased he goes on to refer to the applicant's averment that after purchasing the premises "*we intended to live in it."*

[56] He goes on to say at paragraph 19 as follows:

> *"… An intention to live in the property is, however, insufficient to meet the first criterion which requires that the house **must** be owner occupied and **must** be the applicant's only or principal home rather than an intended home."*

[57] I fully agree with this averment.

[58] He goes on:

> *"20. The applicant stated that it was her intention to move into the property on 31 July 2015 and that she vacated on 3 August 2015. She then made her first application under the SPED scheme in March 2017, more than a year and a half later.*
>
> *21. The fact that the applicant had a second home did not render her ineligible to apply under the scheme (*I interpose to say that I also agree with this self-evident proposition*). This is apparent from the wording of criterion 1 which refers to `only **or principal** home'. I considered that there was no evidence that the applicant had ever actually occupied the property or that it had become her principal home. Thus, in my decision I wrote that:*
>
> > *'The Housing Executive accepts that it was the applicant's stated intention to move into the property as her principal home on 31 July 2015 and the applicant's statement that the property was vacated on 3 August 2015 following an arson attack.'*
>
> *I went on to say:*

> *'The Housing Executive is not satisfied that the documentation provided by the applicant constitutes acceptable evidence of her living in the property. Taking this into consideration along with the information assembled by CISU detailed below, the Housing Executive considers on balance that the PSNI Statement of Witness that the applicant never lived in the property is factually correct.'*
>
> *22. Thus, the reason why I refused the application was because the balance of the evidence demonstrated the applicant* ***never*** *lived in the property. At no stage had it become her principal home."*

[59] Armed with this explanation I turn to the written decision of the respondent in this case. I do so again conscious of the appropriate boundaries to be observed by the court. I also acknowledge Mr Sands' enjoinder that I should consider the decision of an experienced decision-maker and read it fairly in *"bonam partem."*

[60] That said I do have a concern that the decision-maker has erred in his approach to the determination.

[61] I turn firstly to the passage in the decision where it says *"on balance that the PSNI statement of witness that the applicant never lived in the property is factually correct."*

[62] The problem with this is that it immediately follows paragraphs setting out material taken into consideration including the PSNI statement to which the decision refers. Importantly that statement was made on 18 July 2014. Although the contents of the statement are disputed by the applicant it is clearly open to the decision-maker to come to the conclusion that this statement was factually correct at the time it was allegedly made. However, this does not exclude the possibility that the applicant did indeed occupy the premises as her principal home in a period subsequent to that date. Crucially it seems to me that if the applicant did, as she avers, move into the premises on 31 July 2015 and vacate the premises on 3 August 2015 as a result of intimidation then she could establish that she meets the criteria under 2.1(i). I am conscious that the decision is not one written by a High Court judge and that I should be wary of an over-textual analysis. However, when I read the actual conclusion of the decision it is not clear to me that the decision-maker has addressed this possibility. It is accepted that it was the applicant's stated intention to move into the premises as her principal home on 31 July 2015. I agree that this does not mean that in fact it was occupied as her principal home. However the decision simply goes on to record that it is accepted that the property was vacated on 3 August 2015.

[63] The decision then goes on to state that the applicant "*did not re-occupy the property after this date*". The use of the word *"re-occupy"* leaves open the possibility

that it was occupied between 31 July 2015 and 3 August 2015. If it was so occupied as her principal home then it seems to me that a different decision could have been reached in this case.

[64] In these circumstances I have concluded that the respondent has indeed erred in determining whether the applicant met criteria 2.1(i) on 3 August 2015. I would add that this demonstrates the need to exercise caution when a decision maker files an affidavit explaining a decision which should be read in its own terms.

[65] I accept that the evidence in support of the applicant's case is problematic. I do not consider that it would be appropriate for the court to substitute its view or indeed to direct any particular finding on behalf of the respondent.

[66] However, the court is sufficiently concerned about this error to persuade it to exercise its discretion and quash the decision of 30 August 2019. The court directs that the matter be reconsidered by a different decision-maker to determine whether or not the applicant meets the criteria.

[67] In the interests of fairness I permit the applicant to submit any additional material to support her application within 2 weeks of the date hereof.