THE HIGH COURT

JUDICIAL REVIEW

[2018/988 JR.]

BETWEEN

G.A. & K.A.

(A MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND G.A.

APPLICANTS

AND

FINGAL COUNTY COUNCIL

AND

HEALTH SERVICE EXECUTIVE

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on the 7th day of May, 2019

Introduction

1. This matter was heard by me on the 11th of April, 2019 following an order of Mr. Justice Noonan on the 3rd of December, 2018, directing the leave application of the first named applicant be heard on notice to both Fingal County Council and the Health Service Executive. Mr. Justice Noonan made a further order of the 29th of January, 2019 in which the second named applicant was joined as a co-applicant and the HSE (hereinafter "the HSE") was joined as a co-respondent. There was liberty to the first named applicant to file a replying affidavit within four weeks. In the events the first named applicant did file a substantial twenty-five-page replying affidavit on the 4th of March 2019. The *ex parte* application was before Mr. Justice Noonan on the 3rd of December, 2018 and accordingly insofar as time limits in relation to the matters referred to in the statement of grounds are concerned, the time was up until the 12th of December, 2018.

2. In the statement required to ground the application the reliefs sought are an order of certiorari setting aside the Fingal County Council's (hereinafter "Fingal") decision to apply a position of no.1555 to the applicant's housing application and a declaration that there was a failure or refusal by Fingal to accord medical disability priority to that application which the applicants say is unfair, irrational, disproportionate and unlawful. There is also an application for an Order directing Fingal to elevate the applicants to a priority list with immediate effect and/or an order compelling both Fingal and the HSE to offer suitable accommodation as soon as possible to the applicants or compelling them to consider purchasing alternate accommodation if they do not have immediately available accommodation that would suit the applicants.

3. The applicants are also looking for substantial compensation including for emotional distress and distress generally.

4. Ground number 1 in the statement of grounds is that the method of handling the applicants' application for an assessment of the second named applicant's needs under the Disability Act 2005 was a direct denial of reasonable and timely performance and a legitimate expectation arose in favour of the applicants because of a letter of 30th April, 2009, which I will return to.

5. This ground is directed at the HSE and in arguments, and indeed in the second affidavit of the applicants it is argued that because of s.7 of the Disability Act 2005 where "health service" is defined as including a personal social service, the applicants say that this includes housing needs.

6. The further grounds which are directed at Fingal are that Fingal abused its discretionary power in failing to conduct an oral interview or a request for more written representation. In oral submissions it was acknowledged by the applicant that an oral interview was not sought and what would be sought in ground no. 2 was either an oral interview or written representation so the matter has proceeded on the basis that further written representations should have been requested by Fingal in accordance with its discretionary power and it was also claimed that not to assign the application for housing priority status on the grounds of the second named applicant's disability is irrational and constitutes a deliberate violation of constitutional rights.

7. It was also stated that Fingal acted *ultra vires* in refusing to accord priority status when one looks at part 7 of the housing application form which was tendered by the applicants on the 5th May, 2017. It is argued in oral submissions that part 7 triggered an obligation to seek further information from the applicants.

8. It is also suggested that para. 9 of the explanatory note on the housing application form also triggered an obligation on Fingal, albeit framed in discretionary terms, requiring it to seek further documentation before it determined an allocation to the applicants.

9. There are further reliefs claimed however in oral submissions in which the Applicants agreed that there was effectively a repetition of para. 2 & 3 in para. 4 save in para. 4 of the grounds there is an assertion that there is a clear breach of statutory duty. However, the relevant statutory provision, when or in what manner this statutory duty arose has not been identified and therefore it does appear to me that the grounds as against Fingal are comprised in grounds 2 & 3 of the statement of grounds.

Background

10. By way of background the second named applicant was born in 2003 and an assessment was sought of the HSE, by his parents on the 19th of May, 2008.

11. The assessment report issued on the 30th April, 2009 and on the same day a letter was sent by the HSE to Fingal advising it that a housing need of the applicants was identified.

12. A service statement of the HSE issued on the 22nd of May, 2009 and between that service statement and the final service

statement there were two intervening service statements. The last service statement is that of the 26th of May, 2011.

13. In the first two service statements it is recorded and advised to the applicants that the letter that was dispatched by the HSE to Fingal of the 30th April, 2009 was to assist them in an application for social housing.

14. In the first service statement of the 22nd of May, 2009 it is indicated that the service statement was specifying the health services which would be provided in respect of the needs identified and the resources available. In the penultimate paragraph it is stated that –

> "*During the course of the assessment a housing need was identified. In order to help you with your application a letter has been sent to Fingal County Council by …..*" (an individual within the HSE).

This statement of the purpose of the letter of the 30th of May, 2009 was repeated in the next service statement. In the most up to date service statement of the 26th May, 2011, the services identified as necessary to provide for the second named applicant by the HSE were identified and there is no mention whatsoever of a housing provision included in that statement.

15. The applicants did submit a housing application to Fingal on the 5th of May, 2017. The application form starts with a page that says –

> " *Important, please read the following information carefully.*"

At para. 1 it is stated that –

> *"If you are unsure how to answer any of the questions in the application form please an officer in the Housing Section or the local Citizens Information Centre to help you".*

At para. 3 it is stated –

> *"If you do not fully answer all the questions relevant to you, you might not get the correct priority for housing or else we may have to return the form to you. Only fully completed applications will be processed".*

This paragraph is important because in the published document by Fingal concerning housing allocation, which the applicant says he did not receive until it was exhibited in the affidavit of January, 2019, there is a statement as to the allocation scheme and that incomplete applications might be returned. In submissions it is argued that as the application was not returned, that gave rise to a new relief in the Applicants' favour, not known to the Applicants when the original Statement of Grounds was prepared, and accordingly the Applicants wish to amend the statement of grounds to include a complaint of the fact that the application was not returned when it could or should have been because it was incomplete; although no basis or argument was put forward as to how such complaint would support one or more of the reliefs claimed in the statement of grounds.

16. Insofar as that application form is concerned at para. 5 it is stated –

> *"You must supply the relevant supporting documents."*

This fact is also referred to in the checklist within the body of the application form and further para. 7 requires the inclusion of a consultant's certificate.

In para. 9, which the applicants are satisfied creates a justiciable discretion which should have been exercised by Fingal it is stated –

> *"Please ensure that you have supplied all the relevant information and supporting documentation to process your application. However, be advised that the Housing Authority may ask for further supporting documentation at a later stage".*

17. In these proceedings Fingal had entered a replying affidavit on 18th January, 2019 from Ms. Hennessy, in which the complaint is made that the applicants' judicial review is out of time because of a letter dispatched to the applicants of the 18th of July, 2017.

18. Thereafter, there is an affidavit of Mr. Tully on behalf of the HSE to the effect that an assessment doesn't create an entitlement to services as the assessment takes place without regard to costs or the possibility of providing services. This affidavit also raises the time limits because of the letter of the 18th of July, 2017.

19. In the response of the first named applicant of the 4th of March 2019, the applicant deals initially with the assertion that he is out of time when he brought the application before Mr. Justice Noonan on the 3rd of December 2018 and he then goes on to say that the council deliberately failed to request further supporting documents. He refers to para. 33 of the HSE letter dated the 30th April, 2009 supporting his claim for housing on exceptional medical grounds and for the purposes of entry into category 1 of the housing list.

20. It is the case that when he completed his application in May, 2017 the only documents by way of medical evidence that were enclosed was the HSE letter of the 30th of April, 2009 which was then eight years old. I find it very difficult to foresee any possible circumstances in which a letter then eight years of age was to sustain an application for a priority status eight years late.

21. I note that in para. 46 of this replying affidavit a telescoped hearing was sought by the applicants. The reality however is that Judge Noonan's order was that the application for leave would be on *notice* and the matter proceeded in that manner. When I queried at the hearing of the on *notice* application as to whether it was an application for leave on *notice* or a telescoped hearing, I was advised by Fingal that it was a leave application only and the applicants did not demure in this regard and accordingly the matter before this court is confined to an application for leave on *notice*.

22. The Applicants were already conversant with this requirement by reason of para. no. 3 of the first page of the application form, so the allocation scheme that was published in 2011, which the applicants say did not come to their attention until January, 2019, was not the first time the Applicants were advised that only fully completed applications would be processed. Accordingly the application to amend the Statement of Grounds in this regard is refused, no reason for the delay having been put before the court.

23. The claim is made by the applicants that the Housing Authority should have asked for supporting documentation at the initial stage when the application form came to it without the relevant supporting documentation. This argument of course does not engage

with the fact that the Housing Authority has an entitlement rather than an obligation by reason of the wording of para. 9 and reference is made to "*at a later stage*", not at an initial stage.

24. Furthermore, it is clear that Fingal were satisfied that the application was complete because they processed it and allocated to the applicants, based on an entitlement to be placed on the housing list, the priority which they saw fit because of the application which was before them.

25. In the application form at para. 7 it is set out that –

> *"Applications for accommodation on medical or disability grounds and if you are making an application of such please provide the following details:*
>
> > *The nature of the medical condition or disability and noting whether the condition is degenerative. Consultant certificate to be submitted in support of an application."*

All that is included insofar as this section of the application is concerned is a handwritten statement to the effect that -

> *"brain damage with diagnosis of autism".*

Degenerative is not addressed nor a consultant's certificate.

26. In due course it appears that because of a data protection application the applicants became possessed of an internal email between two individuals which said that Fingal did not have any medical report available to it. This came to the applicants' attention on the 21st December, 2018 who thereafter communicated with the Applicants' GP and who in turn issued a report apparently on the 8th of March, 2019 which was furnished to Fingal on the 21st March, 2019.

27. The applicant suggests that it was this exchange of email secured under the data legislation that alerted him to the need for medical information. However, this argument is unsustainable when one has regard to the application form completed and outlined above.

28. In the allocation scheme it is provided at para. 5 that "*a date in need*" is actually somewhat of a variable in that initially it is defined as the date when the council first determines qualification for housing but a date in need may actually be moved if an applicant is moved into a higher category. It is clearly the case that although the applicants are in one particular category, the furnishing of the documentation to Fingal on the 21st of March of this year may well result in a category variation, because for the first time Fingal will have medical information before it.

29. At para. 19 there is provision for an appeal within 28 days. This appeal procedure has not been availed of. On the one hand the first named applicant says he wasn't aware of this document until January, 2019, however, on the other hand, in oral submissions he indicated that he did anticipate that there was such an appeal but never went on to explain why that appeal was not pursued.

DECISION

30. Insofar as the HSE is concerned the HSE has made a number of arguments as to why it is not appropriate to grant leave to the applicants. However, aside altogether from the substantial grounds mentioned on behalf of the HSE the reality is that the basis of looking for judicial review as against the HSE arises because of its letter of the 30th April, 2009 which apparently gives rise to a legitimate expectation. In the final service statement of 2011 it is clear that the HSE is not providing housing to the applicants and therefore at the very latest it was 2011 that the time began to run as against the applicants in respect of looking for judicial review against the HSE.

31. In *De Róiste v. Minister for Defence* [2001] 1 IR 190, a case before the Supreme Court, it is provided that –

> *"A late applicant must explain his delay and show that the delay was justified".*

In a case of *Sfar v. Revenue Commissioners* [2016] IESC 15, another decision of the Supreme Court in 2016, it is provided that –

> *"The timely pursuit of this public law remedy is an indispensable requirement when engaging in this type of judicial review."*

32. Under statutory instrument no. 691 of 2011, o.84, r.21 of the Rules of the Superior Court is set out and sub-rule 3 provides that the period within which judicial review might be brought is three months from the date when the grounds for the application first arose. This period might be extended however, it is provided that –

> *"but the court shall only extend such period if it is satisfied that there is good and sufficient reason for doing so and the circumstances that resulted in the failure to make the application for leave within the period mentioned were outside the control of or could not easily have been anticipated by the applicant for such extension."*

Under sub-rule 5 it is provided that –

> *"such an extension is to be grounded upon an affidavit sworn by or on behalf of the applicant and to set out the reasons for the applicant's failure to make the application within the prescribed period."*

33. There is no such application either in respect of the HSE or indeed any amendments to the statement of grounds as against Fingal based upon the indication that applications which are incomplete will be returned and therefore there is no basis whatsoever before the court to extend time as under the rules the court is precluded from extending time without the necessary proof that is not available in this case.

34. Insofar as the standard which the applicant must establish his claim at this time, the applicant in a two-page document furnished to the court says that it is for the court to determine whether it is the higher or lower threshold. No argument is made other than the lower threshold as provided by the Supreme Court in the *G. v. D.P.P.* [1994] 1 IR 374 decision is appropriate. In that case the Supreme Court held that an applicant applying for leave to apply for judicial review must make out a *prima facie* case to satisfy the court:

a. that the applicant has sufficient interests (which is acknowledged)

b. that the facts aver to support a stateable ground for the reliefs sought

c. on those facts an arguable case can be made that the applicant is entitled to the relief sought.

d. the application must be made promptly and within the time limit provided by o.84 and

e. the only effective remedy which the applicant could obtain would be an order by way of judicial review.

There is in my view no possibility of a satisfactory claim being made out at this time against the HSE because of the delay and therefore I refuse leave in respect of the application as against the HSE.

35. In respect of Fingal the council argues that alternate remedies are available, namely:-

a. one can be moved from one category of allocation to another by providing relevant information notwithstanding the initial categorisation of the unit looking for housing and -

b. (as the first named Applicant has acknowledged that he did anticipate) there was an appeal available to him in respect of his allocation at 1555 but this remedy was not pursue.

36. In respect of the time period because of the letter of the 18th of July, 2017 I am satisfied that there is no evidence before the court that the applicants received this letter and in any event as the applicants argue that letter didn't identify the allocation place and therefore did not give rise to difficulties as was the case by virtue of the letter of September, 2018 when the Applicants were first advised of the position on the list as being that of 1555 and accordingly insofar as the grounds within the existing statement of grounds are concerned the application is not out of time.

37. In respect of the additional grounds which the applicants have referred to in both the affidavit of the 4th of the March, 2019 and submissions before the court on the 11th of April, 2019 the first named Applicant was aware of the facts which he intends to rely on in that regard since the 5th of May, 2017 and accordingly he is out of time. There is nothing in his affidavits, either the grounding affidavit or the affidavit of the 4th of March, 2019, which addresses any delay save the asserted delay by reason of the letter of the 18th of July, 2017.

38. By reason of the fact of alternate remedies, namely, an appeal and a prospect of securing the same relief by a different mechanism namely finally addressing the need to furnish Fingal with medical documentation, it appears to me that in accordance with the decision of the Supreme Court the within application for leave cannot succeed because it is not the only effective remedy.

39. Further arguments are raised by Fingal to the effect that the grounds stated are not in fact sufficient to secure relief on an arguable basis and I am satisfied that this argument by Fingal is well made.

40. I do not see anything in para. 9 of the Housing Application that could be suggestive of a statutory duty or an obligation to seek out documents. I accept that the Supreme Court test mentioned in *O'Keeffe v. An Bord Pleanala* [1993] 1 IR 39 cannot possibly arise in relation to the discretion available to look for more documents if Fingal deemed same necessary.

41. There is absolutely nothing irrational identified in Fingal's allocation given the documentation available - the only document which the applicants choose to furnish to Fingal was a document of the 30th April, 2009 and under no stretch of the imagination could it be said that it is arguable that that document furnished in an application of the 5th of May, 2017 could be to support an urgent application for priority in 2017.

42. The applicants have argued that the onus of proof has shifted to the respondents and this apparently arises because of an EU Directive of 2004 which deals with the equal treatment between men and woman in the supply of the goods and services. The Directive simply does not arise in these proceedings and accordingly there is no basis put before the court to suggest that the burden is on the respondents and not the applicants.

43. In the written document presented to the court by the applicants a number of matters are identified and I will just go through those for the sake of completeness.

44. In para. 1 the Applicants are seeking leave of the court to file a response to the affidavit of Ms. Hennessy of the 26th of March, 2019. It is not necessary to file any further response because that affidavit deals with the letter of the 18th of July, 2017 which I have now resolved in favour of the applicants. It also refers to an email of the 2nd of August 2017 to the effect that the first named applicant was aware that he was successful in his housing application by then but again there is no need to respond to that because in fact in the affidavit of the 4th of March, 2019 the first named applicant exhibited that particular email.

45. Insofar as the leave to amend the statement of grounds is concerned I have already said that there are no grounds to extend the time and therefore that application is refused because at this stage all such applications are outside the three-month period provided for by o.84.

46. Insofar as correcting errors on the affidavit are concerned I see no difficulty in granting that order. I do see that the date sworn is expressed to be the 4th August, 2019, however, it is clear that the affidavit was in fact filed on the 4th of March, 2019 and clearly this is a typographical error and no consequences flow from that and therefore the leave to correct that error is afforded.

47. An application is made to present Loreto Hennessy at the trial for cross-examination, however, again given the matters already outlined above, this does not arise.

48. Insofar as in camera proceedings are concerned in fact the matter has been dealt with in private and the parties are anonymous in this written judgment.

49. Insofar as paras. 6&7 are concerned these relate to permission to notify of subsequent hearings and as leave has been refused these reliefs do not arise.

50. Paragraph 8 is liberty to join the Minister for Housing and the Minister for Health as respondents with absolutely no ground put

forward and in any event in the circumstances of the conclusion of the matter today this does not arise.

51. The threshold point is resolved in favour of the normal conventional threshold as per *G. v. DPP* which is relied upon by the applicants.

52. The issue as to the burden of proof shifting has been dealt with - there is no evidence before me that the EU Directive applies.

53. Whether the social housing application process is or is not subject to judicial review challenge does not arise as the leave application is denied because the applicants do not reach the low threshold required for leave.

54. In conclusion I am refusing the applicants' application for leave to judicially review either the HSE or Fingal.