[2020] IEHC 176

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 112/JR]

BETWEEN

BRENDAN COFFEY AND SANDRA O'BRIEN AND A.B (A MINOR) AND C.D. (A MINOR) SUING BY HIS FATHER AND NEXT FRIEND BRENDAN COFFEY

APPLICANTS

AND

KERRY COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Heslin delivered on the 25th day of March, 2020

Background

1. This case comes before the court in circumstances where the applicants were granted leave to seek an order of *certiorari* quashing the decision of the respondent dated 24th January 2019, which appears in a letter of that date from the respondent to the applicants' solicitor, on the grounds set forth at E in the applicants' amended statement of grounds dated 16th January 2020.

2. It is not in dispute that the first named applicant was involved in an incident of violent disorder, contrary to s.15 of the Public Order Act, 1994, on 8th August 2012. As appears from para. 5 of the applicants' statement of grounds, he, together with three other men, used violence against a brother of one of the co-accused and caused him to fear for his safety. The incident occurred in the curtilage of a house let by the respondent, where the injured party had previously resided up to 2009.

3. As appears from para. 6 of the statement of grounds, the applicant's co-accused were charged with assault and possession of articles contrary to s.11 of the Firearms and Offensive Weapons Act 1990, since in the course of the violence, certain articles were produced, namely a shovel handle and a golf club. According to para. 7 of the statement of grounds, when the prosecution evidence was outlined to the court, it was accepted by the prosecution that the applicant had a lesser role in the offence, compared with the other co-accused.

4. According to para. 8 of the statement of grounds, there was a significant prosecutorial delay and the first named application was not arraigned until 18th November 2015, when he pleaded guilty to the offence. The matter was not finalised however until 7th July 2016 when the first named applicant received a two-year sentence suspended and was bound to the peace for a period of two years.

5. On 28th February 2019, the first named applicant swore an affidavit in which he averred that inter alia as follows:

> *"So much of this statement as relates to my own acts and deeds is true, and so much of it as relates to the acts and deeds of any and every other person I believe to be true."*

6. No issue is taken with the facts set out in the statement of grounds insofar as they concern the 8th August 2012 incident, the first named applicant's role in the offence, the prosecutorial delay, the arraignment on 18th November 2015, the guilty plea and the sentence of 7th July 2016.

Housing Support

7. It is not in dispute that the applicants had qualified to receive social housing support and are on the Council's housing list, social housing support being housing provided by a local authority to applicants who cannot afford housing from their own resources.

Anti-Social Behaviour

8. Section 14(1) of the Housing (Miscellaneous Provisions) Act 1997 ("the 1997 Act") provides as follows:

> "(1) Notwithstanding anything contained in the Housing Acts, 1966 to 1992, or in a scheme made under section 11 of the Housing Act, 1988, a housing authority may refuse to make or defer the making of a letting to a person where –
>
> (a) the authority considers that the person is or has been engaged in anti-social behaviour or that a letting to that person would not be in the interest of good estate management."

9. The meaning of the terms "*anti-social*" behaviour and "*estate management*" are set out in s.1 of the 1997 Act which provides, *inter alia*, as follows:

> "'*anti-social behaviour' includes either or both of the following:*
>
> (a) the manufacture, production, preparation, importation, exportation, sale, supply, possession for the purposes of sale or supply, or distribution of a controlled drug (within the meaning of the Misuse of Drugs Acts, 1977 to 2007),
> (b) any behaviour which causes or is likely to cause any significant or persistent danger, injury, damage, alarm, loss or fear to any person living, working or otherwise lawfully in or in the vicinity of a house provided by a housing authority under the Housing Acts, 1966 to 2014 or Part V of the Planning and Development Act 2000 or a housing estate in which the house is situate and, without prejudice to the foregoing, includes –
> (i) violence, threats, intimidation, coercion, harassment or serious obstruction of any person,
> (ii) behaviour which causes any significant or persistent impairment of a person's use or enjoyment of his or her home, or
> (iii) damage to or defacement by writing or other marks of any property, including a person's home;"
>
> "'estate management' includes –
>
> (a) the securing or promotion of the interests of any tenants, lessees, owners or occupiers, whether individually or generally, in the enjoyment of any house,

building or land provided by a housing authority under the Housing Acts 1966 to 2002 or Part V of the Planning and Development Act 2000,

(b) the avoidance, prevention or abatement of anti-social behaviour in any housing estate in which is situate a house provided by a housing authority under the Housing Acts 1966 to 2002 or Part V of the Planning and Development Act 2000 or a site;"

Paragraph 6 of the Respondent's Anti-Social and Nuisance Behaviour Policy

10. It is not in dispute that the respondent has a policy regarding anti-social and nuisance behaviour ('the Policy'), which employs the same definitions of "anti-social behaviour" and "estate management" as appear in the 1997 Act. Paragraph 6 of the respondent's policy provides as follows:

> *"Where an applicant, or any member of the applicant's household, is or has been convicted of anti-social behaviour, or where there are reasonable grounds for believing any member of the applicant's household is or has being (sic) involved in anti-social behaviour in the previous five years, they may not be considered for any form of social or affordable housing for a period of two years after any conviction, including any period of custodial/suspended sentence, or incident, on good estate management grounds".*

11. The fact that the respondent enjoys a discretion under its Policy is not, as I understand it, in dispute between the parties. I note that paragraph 6 of the Policy uses the words "…*may not be considered*…" (emphasis added) not the words "…*shall not be considered*…" (emphasis added). In my view, the proper interpretation of paragraph 6 is to confer a wide discretion on the respondent, insofar as a decision to suspend from consideration a party's housing application is concerned, subject only to the requirement that the Council's decision, whatever it may be, must be made on *"good estate management grounds".*

Analysis of communication – Findings of fact

12. On 24th January 2019, the respondent wrote to Mr. Patrick Daly, solicitor for the applicants and set out the decision which the applicants challenge in these proceedings. In that letter, the decision maker stated, inter alia: "*I have therefore decided that the decision to suspend your clients housing application from consideration until July 6th, 2020 would be confirmed*". The said letter was the last item in a series of exchanges and, to better understand the context in which it was sent, it is appropriate to look at the relevant communication in chronological order. In looking closely at the relevant communication, I identify relevant findings of fact, as follows.

21st February 2018 Kerry County Council Letter

13. By letter dated 21st February 2018 Mr. Teddy O'Connor of the Housing Section Kerry County Council wrote to the first and second named applicants as follows: -

> *"Housing Application No. 4318-TTC*

Dear Ms. O'Brien & Mr. Coffey,

With reference to your above housing application, I wish to confirm that Kerry County Council has carried out a Garda check in accordance with Section 15 of the Housing (Miscellaneous Provisions) Act 1997.

As a result of this Garda check, on Brenda (sic) Coffey, I therefore wish to advise that your housing application is not to be considered for any form of social housing support until July 2020 and the time accrued by you on the waiting list will be re-assessed and reduced in line with Kerry County Council's Anti-Social and Nuisance Behaviour Policy.

Yours faithfully"

14. It is not in dispute that the effect of the respondent's 21st February 2018 decision was to suspend the applicants' housing application until 6th July 2020. This is clear from para. 2(i) of the respondent's amended statement of opposition. The decision to suspend consideration of the applicants' social housing application until 6th July 2020 was in circumstances where the District Court conviction was handed down on 7th July 2016 and the two-year suspended sentence imposed by the court continued up to 6th July 2018. It was from 6th July 2018 that the Council suspended consideration of the applicants' social housing application for a two-year period and this was done in reliance on para. 6 of the respondent's Policy.

November 2018 letter from Patrick Daly & Co. Solicitors

15. An undated letter was sent by Patrick Daly, solicitor for the applicants in November, 2018 and it is not in dispute that this letter was received by the respondent on or about 15th November, 2018. The letter was addressed to Mr. Tim Brosnan of the Housing Department, Kerry County Council and stated the following:

"Re: Brendan Coffey, 137 Shanakill, Tralee

Dear Sirs,

We confirm that on today's date the above named pleaded guilty to a charge of possession of drugs only and was fined the sum of €250. Kindly confirm that his application for social housing is no longer on hold and he will be considered forthwith for any available housing.

Yours faithfully"

16. It is certainly true to say that nowhere in this letter does the applicant's solicitor use the words that he wishes to appeal against the respondent's 21st February, 2018 decision or that he wanted the said decision to be reviewed. That, however, is not the end of the analysis. In my view, the letter does two things. Firstly, it conveys certain new information to the respondent, namely that the first named applicant has very recently pleaded guilty to a charge of possession of drugs and was fined €250. The second thing

the letter does is to request the respondent's confirmation that Mr. Coffey's application for social housing "*is no longer on hold and he will be considered forthwith for any available housing"*. There is no evidence that the applicant's solicitor, Mr. Daly, was unaware of the fact or contents of the respondent's 21st February, 2018 decision and, having regard to the evidence, I am satisfied that he was, in fact, aware of it. That being so, if the respondent was to provide the confirmation sought by Mr. Daly, it would necessarily require the respondent to carry out some form of review of its 21st February, 2018 decision. I am satisfied that, as a matter of fact, this letter from the applicants' solicitor called on the respondent to alter the position it had adopted in its 21st February 2018 letter.

20th December 2018 letter from Patrick Daly & Co. Solicitors

17. By letter dated 20th December 2018 the applicants' solicitor wrote again to the respondent. The letter was addressed to Martin O'Donoghue, Director of Services, Housing Department, Kerry County Council and was in the following terms: -

> *"Re: Bre ndan Coffey, 137 Shanakill, Tralee,*
>
> *Dear Sirs,*
>
> *By letter 21 February 2018, my client was informed, inter alia, that:*
>
> *'As a result of this Garda check (on Brendan Coffey) I therefore wish to advise that your housing application is not to be considered for any form of social housing support until July 2020 and the time accrued by you on the waiting list will be re – assessed and reduced in line with Kerry County Council's anti – social and nuisance behaviour policy.'*
>
> *Please set out in detail what behaviour is being relied upon by the council forthe delay in considering the application until July 2020.*
>
> *I wrote to Tim Brosnan on the 15th November 2018 in the Housing Department, a copy of which we enclose, and confirmed that our client pleaded guilty to a charge of possession of drugs on that date and was fine the sum of €250 by the District Court. To date I have received no response to this letter.*
>
> *If this offence is being relied upon, please set out in detail how this constitutes anti – social behaviour in accordance with the Policy.*
>
> *Kindly confirm the date upon which my client will be considered for social housing support.*
>
> *Please reply to this correspondence within 3 weeks of today's date. Failure to reply will be taken as tantamount to a refusal and this office will take whatever action is necessary including seeking the protection of the courts. This letter will be produced f it becomes necessary to affix you with any costs in relation to same.*
>
> *Yours faithfully".*

18. Plainly, this is a more detailed letter than the one received by the respondent on 15 November 2018 and at least the following can be said in relation to it: (1) specific reference is made to the respondent's 21st February 2018 decision; (2) the respondent is asked to detail what behaviour "*is being relied upon*" (emphasis added) by the respondent in relation to the decision not to consider the housing application until July 2020; (3) the letter does not ask the respondent to detail what behaviour was relied upon in February 2018 and the applicants' solicitor specifically asks if the drug possession offence "*is being relied upon*" and, if so, requests details as how this constitutes anti – social behaviour under the respondent's policy; (4)specific reference is made to the 15th November 2018 letter when the respondent was told about the drugs possession fine.

19. Having regard to its contents, I am satisfied, as a matter of fact, that this letter could not fairly be characterised as simply a request for the reasons upon which the respondent made its 21st February 2018 decision. Rather, coming soon after a 15th November 2018 letter which provided new information, I am satisfied that, as a matter of fact, it asks the respondent to explain the then up-to-date position with regard to what behaviour was, at that point in time, in December 2018, being relied upon by the council, including whether the new information concerning the drugs possession fine was then being relied on. The letter specifically asks what behaviour "is" being relied upon (not what behaviour *was*, as of 21st Feburary 2018, relied upon). It goes on to ask that, if the very recent drug offence "*is*" being relied upon, reasons be given as to why that constitutes anti-social behaviour.

20. Specific reference is also made in the 20th December 2018 letter to the fact that no response had yet been received to Mr. Daly's 15th November 2018 letter. I am satisfied that, as a matter of fact, no concession is made on 20th December 2018 that a response to the 15th November 2018 letter is not required.

21. Nor is it conceded in the 20th December 2018 letter that the suspension by the respondent of the consideration of the applicants' housing application shall remain in force until July 2020. On the contrary, knowing that the foregoing had been decided on 21st February 2018, Mr. Daly asked the respondent to "kindly confirm the date upon which my client will be considered for social housing support". Again, it is perfectly true that nowhere in the letter is the word "*appeal*" or the word "*review*" used, but the substance of the letter can fairly be summarised as (1) referring to recently supplied new information, (2) referring to a recent letter which requested confirmation that the application for social housing is no longer on hold, (3) making a request to know what behaviour was currently being relied upon and (4) making a request that the respondent confirm a date, other than July 2020, upon which the application for social housing support would be considered. In light of the foregoing, I am satisfied that, in order to deal properly with the various issued raised in the 20th December 2018 letter would require some form of a review to be carried out by the respondent, unless, that is, the respondent was to respond to say that nothing raised by the applicants' solicitor in the 15th November 2018 or 20th December 2018 letters was going to be considered by the respondent. The respondent did not take the latter stance.

Respondent's 8th January 2019 letter

22. On 8th January 2019 Teddy O'Connor of the Housing Section, Kerry County Council, wrote to the first and the second named applicants in a letter which stated the following: -

> *"Housing Application No. 4318 – TTC*
>
> *Dear Ms. O'Brien & Mr. Coffey,*
>
> *With reference to your above housing application, I wish to confirm that Kerry County Council has carried out a Garda check in accordance with s. 15 of the Housing (Miscellaneous Provisions) Act, 1997.*
>
> *As a result of this Garda check (on Brenda (sic) Coffey) I therefore wish to advise you that your housing application is not to be considered for any form of social housing support until November 2020 and the time accrued by you on the waiting list will be re – assessed and reduced in line with Kerry County Council's anti – social and nuisance behaviour policy.*
>
> *Yours Faithfully".*

23. This was not a reply to the letter from Mr. Patrick Daly, solicitor for the applicants, received by the respondent on 15th November 2018 in which he informed the respondent of Mr. Coffey's guilty plea to a charge of drugs possession and €250 fine and also sought confirmation from the respondent that the social housing application "*is no longer on hold*". It is, however, clear that the reference to "November 2020" stems from the fact that the drugs possession conviction was in November 2018, being two years earlier. Plainly, the 8th January 2019 letter from the respondent to the applicants does not provide the confirmation which the applicant's solicitors sought in his letter which was received by the respondent on 15th November 2018.

Respondent's 10th January correspondence

24. On 10th January 2019, Martin O'Donoghue, Director of Housing & Human Resources of the respondent wrote to the applicants' solicitors as follows: -

> *"Re: Brendan Coffey 137 Shanakill Tralee,*
>
> *Dear Mr. Daly,*
>
> *I acknowledge receipt of your letter dated the 20th December 2018, received in my office on the 3rd January 2019. The contents of which have been noted.*
>
> *I am currently and will revert back to you in due course. reviewing the issues raised in your correspondence*
>
> *Yours faithfully"* (emphasis added)

25. Mr. O'Donoghue also wrote to Ms. Karen Lynch, SCO Housing, in the following terms: -

"*Please review the correspondence received from Mr. Patrick Daly, solicitors for the up to date position, for reply by the Director of Housing".* (emphasis added)

26. As previously explained, I am satisfied, as a matter of fact, by sending the 20th December 2018 letter, the applicants' solicitor was seeking to know the most up to date position being adopted by the respondent and was not merely seeking reasons for the position adopted by the respondent as of 21st February 2018. In light of the contents of Mr. O'Donoghue's 10th January 2019 correspondence, I am also satisfied that the respondent decided to review the issues raised, being those raised in his 20th December 2018 letter and in his 15 November 2018 letter which was referred to in his 20th December 2018 letter.

The respondents' 24 January 2019 letter

27. The decision which the applicants seek to impugn is contained in the respondent's letter to their solicitor dated 24th January 2019 which reads as follows: -

"Re: Mr. Brendan Coffey, 137 Shanakill, Tralee

Dear Mr. Daly,

I refer to your letter dated the 20th December 2018 regarding the above named and further "without prejudice" email of 15th January on the same matter.

Mr. Coffey is a joint applicant of the social housing application of Ms. Sandra O'Brien.

I have considered and reviewed the Kerry County Council decision to exclude these applicants from consideration under Council policy considering the matters raised in your correspondence by way of appeal and mitigation.

The relevant policy in this matter is Kerry County Council's anti – social behaviour policy and specifically paragraph 6 of the policy.

> *'Where an applicant, or any member of the applicant's household, is or has been convicted of anti – social behaviour, or where there are reasonable grounds for believing any member of applicant's household is or has being (sic) involved in anti – social behaviour in the previous five years, they may not be considered for any form of social or affordable housing for a period of two years after any conviction, including any period of custodial/suspended sentence, or incident, on good Estate Management grounds".*

As is normal, as part of the procedural and administrative arrangements for consideration of applications/applicants and in accordance with section 15 of the Housing (Miscellaneous Provisions) Act 1997 as Amended, Kerry County Council requested Garda clearance for Mr. Coffey on January 31st 2018. The information returned outlined that Mr. Coffey received a two – year suspended sentence at Tralee District Court on July 7th 2016. The offence/s clearly fall within the anti –

social behaviour classification and in accordance with the Policy outlined above, the housing application was deemed to stand suspended from consideration.

The period of the suspended sentence expired on July 6th 2018. Consequently, Mr. Coffey's social housing application was suspended for two – years from July 6th, 2018 until July 6th, 2020. This is in line with para. 6 of the Policy as quoted above.

A further Garda clearance request was sent by Kerry County Council on November 16th 2018. A new conviction was listed by An Garda Siochána for Mr. Coffey at Tralee District Court on November 14th, 2018 – unlawful possession of drugs. This resulted in the social housing application being reviewed further. A decision was made to further extend the housing application suspension until November 14th, 2020, two years after the latest conviction date. I have reviewed both decisions.

Taking the later one first, I have reviewed the issues you raised in mitigation and your position in relation to the conviction in November 2018.

Your client was convicted for unlawful possession of drugs based on information available to me, while charges for intent to supply and obstruction were struck out. I accept your stated position that the charges struck out are not relevant – although, I qualify this somewhat by saying that the policy of the Council does allow for considering reasonable grounds for believing that there may be involvement in anti – social behaviour. Having charges proffered in the supply of drugs could be considered relevant. However, on the basis of the case made by you in writing and your discussions with me, I am prepared to accept that as the charges were struck out, that they should not be considered under the council policy. In addition, notwithstanding the conviction was drugs related, I accept you and your client's position that thus (sic) related to personal use and should not be classified as anti – social behaviour. Therefore, I have decided to amend the decision to further extend the exclusion period due to the November conviction. I am overturning this decision and nullifying it.

In relation to the July 2016 conviction, I am satisfied that this is anti – social behaviour and is a conviction which reasonably meets this broad scope and definition. You have raised in mitigation the length of time this case took coming to court and that your client in (sic) being unfavourably disadvantaged by this. I cannot accept this in mitigation and notwithstanding my decision in respect of the November conviction, it does impact on my consideration of mitigation you have raised. There is nothing which would warrant overturning the decision made and overturning or ignoring council policy in this area. I have therefore decided that the decision to suspend your client's housing application from consideration until July 6th, 2020 will be confirmed.

I note from your letter, that you included a copy of an undated letter from your office to Mr. Timmy Brosnan, administrative officer, housing in Kerry County

Council, which you said was sent on November 15th, 2018. Mr. Brosnan has no record of receipt of same and there is no copy on file.

I trust this clarifies the matter for you and if you require any further information please do not hesitate to contact me.

Yours sincerely"

28. The first paragraph of this letter refers to a "without prejudice" email of 15th January. The court has not had sight of this and is unaware what it contained. It is, however, plain from the first paragraph of the letter that the said email was *"on the same matter*". This places the court at some disadvantage and it is not known what the "without prejudice" email contained. Nevertheless, the fact that it was sent is plain and evidences further communication between the applicants' solicitor and the respondent prior to the respondent's 24th January 2019 decision. The fact that it concerned the same matter is not in doubt.

29. Having carefully considered the contents of this letter, I am satisfied that it evidences that the respondent did, as a matter of fact, carry out a review in response to the letters from the applicant's solicitors dated 20th December 2018 and 15th November 2018 (a copy of the latter being enclosed with the former). I am also satisfied that, as a matter of fact, this review by the respondent took place at some point between 10th January 2018, (when Mr. O'Donoghue informed Mr. Daly that he was ". . . *currently reviewing the issues raised in your correspondence...*" and also asked Ms. Karen Lynch, SCO Housing, to *"Please review the correspondence received from Mr. Patrick Daly, solicitors, for the up to date position . . .")* and 24th January 2019, when Mr. O'Donoghue sent the letter on behalf of the respondent. I am also satisfied that, as a matter of fact, the review carried out by the respondent between 10th and 24th January 2019 considered matters raised by the applicant's solicitor under two headings, namely "*by way of appeal and mitigation" (*emphasis added), as appears from the third paragraph of the 24th January 2019 letter.

30. In light of the contents of the 24th January 2019 letter, I am satisfied that what might be termed a "fresh" review was carried out by the respondent in January 2019, as a result of which review, the respondent reached decisions which reflected the then up-to-date position being adopted by the respondent as of the 24 January 2019. The said letter communicated those decisions to the applicant's solicitor.

31. It is inappropriate to parse a letter as if it were a piece of legislation, yet it is entirely appropriate in my view to have regard to what the respondent plainly said it had done. The respondent did not say, in the 24th January 2019 letter, that it was not going to look again at its 21st February 2018 decision or that it could not review same, notwithstanding the issues raised by Mr. Daly. Rather, in unambiguous terms, the respondent's letter states inter alia: -

"I have considered and reviewed the Kerry County Council decision to exclude these applicants from consideration under Council policy considering the matters raised in your correspondence by way of appeal and mitigation". (emphasis added)

32. I am also satisfied that as a matter of fact, the review carried out by the respondent concerned two separate decisions. The first in time was the respondent's 21st February 2018 decision to the effect that the applicants' housing application would be suspended from consideration until 6th July 2020, being two years after the end of the two - year suspended sentence handed down by the District Court on 7th July 2016 in respect of the offence committed by the first named respondent on 8th August 2012. The second in time was the decision, communicated to the applicants by letter dated 8th January 2019 to the effect that consideration of their housing application would be suspended until November 2020 as a result of the possession of drugs offence to which the first named respondent pleaded guilty and received a €250 fine in November 2018. Having made reference to both decisions, Mr. O'Donoghue was unambiguous about what he did in respect of them. In a separate paragraph on the second page of the letter he stated the following very plainly: -

"I have reviewed both decisions"

33. Mr. O'Donoghue then went on to explain the respondent's conclusions in respect of the review of the later decision, concerning the unlawful possession of drugs. He is explicit about what decisions the respondent has come to, as of 24th January 2019. They include, inter alia, the following: -

"Having charged proffered in the supply of drugs could be considered relevant. However, on the basis of the case made by you in writing and your discussions with me, I am prepared to accept that as the charges were struck out that they should not be considered under the Council policy . . .";

". . . notwithstanding the conviction was drugs related, I accept you and your client's position that [this] related to personal use and should not be classified as anti – social behaviour . . ..";

"I have decided to amend the decision to further extend the exclusion period due to the November conviction. I am overturning this decision and nullifying it".

34. I am satisfied that the foregoing comprised what can fairly be called fresh decisions made, as of 24th January 2019, in respect of the drugs possession issue, overturning the respondent's earlier decision, made on 8th January 2019, concerning the same issue.

35. I am satisfied, as a matter of fact, that the third-last paragraph in the 24th January 2019 letter communicates the decisions come to by the respondent following its review, between 10th and 24th January 2019, of the respondent's 21st February 2018 decision. It is clear from what Mr. O'Donoghue says in this paragraph that the 21st February 2018

decisions has been looked at afresh, as of 24th January 2019. This is clear from the first sentence of that paragraph which reads: -

> "*In relation to the July 2016 conviction, I am satisfied that this is anti – social behaviour and is a conviction which reasonably meets this broad scope and definition".* (emphasis added)

The respondent then acknowledges that the applicants' solicitor has raised issues in mitigation, namely: -

> *". . .the length of time this case took coming to court and that your client [is] being unfavourably disadvantaged by this".*

It is clear from the letter that the respondent has considered the foregoing and come to decisions, namely: -

> *"I cannot accept this in mitigation…" ;*
>
> *" …notwithstanding my decision in respect of the November conviction, it does impact on my consideration of mitigation you have raised.*
>
> *There is nothing which would warrant overturning the decision made and overturning or ignoring Council policy in this area.*
>
> *I have therefore decided that the decision to suspend your client's housing application from consideration until July 6th 2020 would be confirmed*". (emphasis added)

36. As can be seen from the above, Mr. O'Donoghue is perfectly clear about the fact that it is he (on behalf of the respondent) who has made decisions. I am satisfied that, as a matter of fact, these were fresh decisions taken by the respondent in January 2019 and these were communicated to the applicants' solicitor in the 24th January 2019 letter. This is clear from the words used by Mr. O'Donoghue, highlighted above, including the unambiguous statement: *"I have therefore decided."*

37. In light of the evidence, I am satisfied that, as a matter of fact, the respondent as of 24th January 2019 was at liberty (1) to decide to overturn entirely the 21st February 2018 decision or (2) to decide to amend the 21st February 208 decision or (3) to decide that the 21st February 2018 decision should be confirmed. I am satisfied, as a matter of fact, that the respondent decided on the third option. This was an option available to the respondent and there is no suggestion that the respondent lacked the power to make such a decision, but it was just one of at least three options and I am entirely satisfied that, in taking it, the respondent came to a fresh decision, as of 24th January 2019, this being the decision which the applicants seek to impugn in the present proceedings.

38. The penultimate paragraph of the 24th January 2019 letter states that Mr. Brosnan has no record of receiving the letter from the applicants' solicitors sent on or about 15th

November 2018. I am satisfied that nothing turns on this in circumstances where a copy of the said letter was enclosed with the 20th December 2018 letter from the applicants' solicitors, a fact acknowledged by the respondent.

39. I am satisfied that, as a matter of fact, the 24th January 2019 letter comprised the decisions made by the respondent after it considered, firstly, the open correspondence sent by the applicant's solicitor (being the 20 December and 15 November letters) as well as, secondly, the without prejudice email from the applicant's solicitor dated 15 January 2019 and, thirdly, discussions between the applicant's solicitor and Mr. O'Donoghue. The 20th December and 15th November 2018 letters are referred to, as is a without prejudice email of 15th January and Mr. O'Donoghue also refers to Mr. Daly's discussions with him. I am also satisfied that, taken together, the foregoing constituted what could fairly be described as the "*case*" put forward by Mr. Daly to argue for what he wanted the respondent to do, namely to change both earlier decisions, being those of 21st February 2018 and 8th January 2019, respectively.

40. It is a matter of fact that the decision maker did not say, in the 24th January 2019 letter, that the applicants or their solicitor did not address any issue arising from anti–social behaviour. It is a fact that nowhere in the 24th January 2019 letter does the decision maker assert that no new issue was put forward by Mr. Daly such as would require or justify a review. It is a fact that nowhere does Mr. O'Donoghue state in the 24th January 2019 letter that the applicants' solicitor failed to put forward any change in circumstances, such as would justify a review, nor did the decision maker suggest that a review was impermissible because no new issue or no change in circumstances had been put forward by Mr. Daly. Leaving aside the question as to whether the respondent could have taken such a stance, the evidence establishes the fact that it took no such attitude but plainly carried out a review of both decisions. I am satisfied that, as a matter of fact, Mr. O'Donoghue did what he said he did, namely "reviewed both decisions".

41. It is also a fact that the decision-maker did not suggest that anything put forward by Mr. Daly could or should have been raised at an earlier stage. It is also a fact that Mr. O'Donoghue did not state or suggest, on 24th January 2019, that anything offered by way of mitigation or that the specific mitigation raised by Mr. Daly (namely what Mr. O'Donoghue refers to as "*the length of time this case took coming to court and that your client [is] being unfavourably disadvantaged by this"*) had already been considered by the respondent council at an earlier stage, be that prior to taking the 21st February 2018 decision, or otherwise.

42. It is also a fact that Mr. O'Donoghue did not say that a review was impossible, absent a change in the respondent's policy or legislation or that any such change was necessary before the respondent could amend or overturn the 21st February 2018 decision. Plainly, no such considerations prevented the respondent from overturning and nullifying the 8th January 2019 decision. It is also a fact that Mr. O'Donoghue does not say, on 24th January 2019, that a review was impossible or inappropriate or was not carried out by virtue of any failure on the part of Mr. Daly to invoke a formal appeal mechanism under

the respondent's Policy. On the contrary, the respondent carried out a review of both prior decisions and the respondent said it carried out such a review and the 24th January 2019 letter communicated to the applicants' solicitor the decisions which had been made by the respondent following that review.

Affidavit evidence by the decision maker

43. Mr. Martin O'Donoghue swore a verifying affidavit on behalf of the respondent on 21st June 2019, prior to the applicants amending their statement of grounds such that the decision of the respondent dated 24th January 2019 (rather than 8th January 2019) is the decision impugned. In his 21st June 2019 affidavit Mr. O'Donoghue says nothing of substance concerning his 24th January 2019 letter.

44. Mr. O'Donoghue swore a further affidavit on 16th January 2020 after the amended statement of grounds had been delivered by the applicant. In para.1, he confirmed his position as Director of Housing & Human Resources for the Housing & Social Support Department of the respondent. In para. 2, he confirmed that, having read the amended statement of opposition, so much of same as relates to his own acts and deeds was true and so much of it relates to acts and deeds of any other council officer, he believes to be true. The affidavit is four paragraphs long and in the final two paragraphs Mr. O'Donoghue avers as follows:

> *"3. I say that the decision to suspend the first and second named applicants' housing application until the 6th July 2020 was made on the 21st February 2018 and communicated to them on that date. I say that the applicants did not complain about or contest that decision and nor did he to the said letter. I note that the applicants have not sought to explain why they did not contest that decision or why they waited until December 2018 to seek details of the behaviour relied upon by the Council for deferring their housing application until July 2020. I say that the decision of the 21st February, 2018 remains and has at all relevant times remained in full force and effect and is the decision on foot of which consideration of the first and second named applicants' social housing application (being a joint application) has been and remains suspended (the decision of the 8th of January, 2019) having been made subsequent to same and that decision having been set aside on the 24th of January 2019 while the decision of the 21st of February 2018 was left undisturbed.*
>
> *4. I say that in the letter of the 24th January 2019 I informed Mr. Daly, the applicants' solicitor of my decision not to overturn the decision of the 21st February 2018 and I say and believe that the time for challenging the decision to defer the applicants' housing application by way of judicial review has expired. I say and believe that the applicants on this application have sought to re-open or challenge, by way of a collateral challenge, the Council's decision to defer their housing application under the guise of asserting mitigating circumstances through correspondence in an attempt to circumvent O.84, r. (1) of the Rules of the Superior Courts (Judicial Review) 2011."*

45. Mr. O'Donoghue's averment that *"the decision of the 21st February 2018 was left undisturbed*" ignores the fact that there was a review, in January 2019, of the 21st February 2018 decision and the outcome of that review was a fresh decision which was communicated to the applicants on 24th January 2019. Nowhere in his affidavit does Mr. O'Donoghue deny that he conducted a review of both earlier decisions, namely those of 21st February 2018 and 8th January 2019. Nor does he deny that he came to a decision, in January 2019 in respect of both. Mr. O'Donoghue confirms that the 8th January 2019 decision was "*set aside on the 24th of January*". This sworn statement by Mr. O'Donoghue evidences two points. Firstly, a decision was taken to set aside an earlier decision made by the respondent concerning the drugs possession issue, namely, to "*set aside*" the earlier decision (which had been made on 8th January 2019). Secondly, a decision to set it aside was made "*on the 24th of January, 2019".* Turning to the respondent's decision to defer the applicants' housing application, Mr. O'Donoghue is equally clear concerning two matters of fact. Firstly, that he made a decision (Mr. O'Donoghue explicitly refers to "*my decision").* Secondly, Mr. O'Donoghue is clear as to *when* the applicants were informed of his decision (namely "*…in the letter of the 24th January 2019 I informed Mr. Daly…")*. Thirdly, Mr. O'Donoghue is also clear about *what* he decided in January 2019 (being "*…my decision not to overturn the decision of the 21st February 2018…").*

46. I am satisfied that the foregoing averments by Mr. O'Donoghue are consistent with the contents of the open correspondence which the court has seen and evidence that, as a matter of fact, the respondent looked afresh in January 2019, at his earlier decisions, namely those of 21st February 2018 and 8th January 2019 and that the respondent came to fresh decisions, as of January 2019. As regards the 8th January 2019 drugs possession issue, the decision of 24th January 2019 was to set aside entirely the earlier decision. As to the 21st February 2018 decision to defer the applicants' housing application, the fresh decision as of 24th January 2019 was not to overturn the earlier 21st February 2018 decision. Having carefully considered all the evidence I am entirely satisfied that on the balance of probability that this is a factual situation.

47. It is of course true that Mr. O'Donoghue goes on, in the second half of paragraph 4 of his affidavit sworn 14th January 2020 to assert that the time for challenging the decision to defer the applicants' housing application by way of judicial review has expired. This is, however, an argument not a fact and this is an argument which ignores the factual position, namely that the respondent council took decisions in January 2019, as it was perfectly entitled to do, and communicated those decisions to the applicants. The first of those decisions was in their favour and, understandably, was not the subject of any challenge. The second of those decisions was not and has given rise to the present proceedings. Mr. O'Donoghue finishes his affidavit by characterising the present proceedings as a collateral challenge to the earlier 21st February 2018 decision by the respondent. Again, this is an argument, not a fact and an argument which will be addressed later in this judgment.

The applicant's case

48. The applicants seek to impugn the 24th January 2014 decision by the respondent on a variety of grounds. These can fairly be summarised as follows: -

- That the respondent failed to give proper reasons for the decision;
- That the respondent applied an inflexible policy or unlawfully fettered its discretion;
- That the respondent did not give any or any adequate consideration to the proportionality of its decision;
- That the respondent's decision making process was flawed in that it took an erroneous view of the test which it had to apply when refusing an application for housing support and/or took relevant considerations into account in determining same;
- Regard was not had to the applicants' right under Article 40 and Article 40.3 of Bunreacht na hÉireann, although this was not the focus of submissions

Respondent's case

49. The respondent characterises the present case as a misuse of the judicial review process, amounting to an improper collateral attack on the decision made by the decision making process amounting to an improper collateral attack on the decision made by the respondent on 21st February 2018. The respondent submits that the applicants are attempting to circumvent the three – month statutory time limit for the bringing of judicial review proceedings. Central to the respondent's claim in this regard is the respondent's contention that the applicants are essentially challenging the 21st February 2018 decision by the respondent and the submission that the respondent's 24th January 2019 decision was not, in reality, a fresh or separate decision but merely a restatement of the earlier 21st February 2018 decision. Reliance is placed, inter alia, on the decisions of the Chief Justice in *Sweetman v. An Board Pleanala* [2018] IESC 1 and *Smith & Smith v. Minister for Justice and Equality & Ors* [2013] IESC 4. The respondent submits that the applicants failed to identify any new matter not present when the February 2018 decision was made or any new circumstances which have arisen since that decision. The respondent points out that, under the respondent's policy (which policy has not been challenged in any way) the period of suspension from consideration, of the applicants' housing application is for a period of two years from the end of the suspended sentence. The respondent points out that the applicants' housing application was not suspended until 2018, namely a suspension of two years beginning at the end of the suspended sentence which was handed down to the first named applicant. The respondent submits that the applicants suffered or suffer no more prejudice by having the relevant suspension run from July 2018 than if it had run from an earlier time. The respondent points out that when the period of suspension expires, the period of suspension expires, the period by which the application will be calculated, will be reduced by the period of suspension irrespective of when same commenced or elapsed. The respondent submits that it acted correctly and in accordance with its policy. The respondent characterises what Mr. O'Donoghue was considering in January 2019 as essentially an *ad misericordiam*

application to lift the previous suspension. The respondent submits that Mr. O'Donoghue was entitled to reject such *ad misericordiam* application in the terms stated in his 24th January 2019 letter and the respondent suggests that the complaint of lack of reasons lacks substantial grounds. The respondent further submits that, having regard to what it says is the wide an extensive nature of the council's discretion, general reasons could be given and the respondent submits that Mr. O'Donoghue's letter is perfectly adequate in the circumstances.

50. The respondent takes issue with each and every one of the grounds asserted by the applicants, arguing that the applicants have made no case for any circumstances in which the court could intervene for irrationality. The respondent argues that it was neither perverse nor disproportionate for the council to continue the suspension of the housing application until July 2020. The respondent disputes any claim that the council applied a fixed or inflexible policy which prevented full consideration of the facts and merits of the applicants' case. The respondent denies that it unnecessarily fettered its discretion. The respondent points out that leave was not granted which would permit the applicants to challenge the impugned decision on the basis that extraneous and irrelevant considerations were taken into account. The respondents further submit that no particulars are given as to how it is alleged that the respondent failed to respect the applicants' family or private life. The respondent submits that curial deference should be shown to the decision by the respondent in respect of housing matters and authorities are relied on including *Agamah v. South Dublin County Council* [2015] IEHC 424. The respondent submits that the application should be refused.

Discussion and decision

51. In the manner explained earlier in this judgement, I am satisfied that, as a matter of fact, the respondent made decisions on 24th January 2019. There were two earlier decisions, namely those of 8th January 2019 and 21st February 2018. I am satisfied that, as a matter of fact, the respondent reviewed both of those earlier decisions and came to a fresh decisions which were communicated to the solicitor for the applicants by letter dated 24th January 2019. The first was in the applicant's favour, in that Mr. O'Donoghue decided to "*amend the 8 January 2019 decision*" by "*overturning*" the said decision and "*nullifying it*". The second of the 24th January 2019 decisions went against the applicants. Rather than decide to overturn, nullify, or amend the 21 February 2018 decision, Mr. O'Donoghue ". . . *decided that the decision to suspend your client's housing application from consideration until July 6th 2020 would be confirmed*". This was, as a matter of fact, a fresh decision. Mr. O'Donoghue could have taken the stance that no review was possible. He could have adopted the attitude that he had nothing to decide, and that the 21 February 2018 decision was not open to review. He could have taken the stance that there was no material put forward by the applicants' solicitor touching on the 21 February 2018 decision. He did not take the foregoing stance. This is entirely apparent from the words Mr. O'Donoghue used, which include the following:

> *"I have reviewed both decisions…*
>
> *….I am satisfied that this is anti–social behaviour…"*

"I cannot accept this in mitigation…"

"…it does impact on my consideration…"

"I have therefore, decided…"

52. For these reasons, I do not accept the respondent's submissions that the respondent did not make a decision on 24 January 2019. Nor do I accept the respondent's submissions that the decision which was, as a matter of fact, made by the respondent and communicated on 24 January 2019 is not amenable to judicial review.

53. In light of my findings of fact detailed earlier in this judgement, I am satisfied that the 24 January 2019 decision is not simply a repetition of the earlier decision. I am satisfied that, as a matter of fact, a review was undertaken by the respondent in January 2019 of the material which had been put by the applicant's solicitor. The court is aware of some of that material, given that I have seen the contents of the "open" correspondence, but the court is also aware that other material was put to the respondent in "without prejudice" correspondence, and still other material was the subject of discussions between the applicant's solicitor and Mr. O'Donoghue, the respondent's Director of Housing & Human Resources, and Mr. O'Donoghue refers to the fact of same in his 24 January 2019 letter. There is no evidence before the court of any consideration by the respondent, prior to the making of its 21 February 2018 decision of the issue of mitigation, nor is there any evidence that if mitigation was considered by the respondent, the respondent considered the specific issue of prosecutorial delay. There is no evidence before the court that Mr. Coffey was responsible for the prosecutorial delay of some four years and there is no evidence of any consideration by the respondent, in advance of making its 21 February 2018 decision of the fact of, the reason for or the disadvantage to the first named applicant caused by the prosecutorial delay.

54. It is accepted by both sides that the decision of 21 February 2018 and the decision of 08 January 2019 were made by the respondent without any advance notice having been given to the applicants and without the opportunity for the applicants to make any submissions or to participate in any way in the decision making process. It is also a matter of fact that there was a process, even if not under any specific term of the respondent's formal Policy, which ultimately resulted in the respondent's 24 January 2019 decision. In light of the evidence, this process involved input by the applicant's solicitor with the aim of trying to change the respondent's mind in respect of the two earlier decisions which the respondent had made and that process involved communication, both written and oral, between Mr. O'Donoghue, representing the respondent, and the applicant's solicitor, prior to a review being conducted by the respondent.

55. Among the authorities opened during the hearing, I find of particular assistance, the following comment by Simons J. from his 19 December 2019 judgment in *Zabiello & Anor v. South Dublin County Council* [2019] IEHC 863: -

> *" . . . . an applicant for judicial review cannot be shut out from challenging a subsequent decision merely by dint of the existence of an earlier decision which did not give rise to the same potential grounds of challenge".*

In light of my findings of fact, I am satisfied that the decision of 24 January 2019 is open to challenge for reasons unrelated to issues arising in respect of the earlier decision of 21 February 2018.

56. I do not consider the applicants' case to involve a collateral challenge to the respondent's 21st February, 2018 decision. Regardless of what this Court decides in respect of the present application, the 21st February, 2018 decision by the respondent, which was not challenged by way of judicial review within the relevant statutory period, remains undisturbed. The respondent argues that the applicants are essentially challenging the 21st February, 2018 decision but, in light of my findings of fact as detailed earlier in this judgment, I am satisfied that this is not the case.

57. Among other things, the respondent argues that the applicants' solicitor did not put forward or seek to rely on any new fact or change in circumstances that had arisen since February, 2018 and the respondent argues that the applicants' solicitor did not seek to address the issue arising from the anti-social behaviour which led to the conviction of the first named applicant. This is not a position which Mr. O'Donoghue adopted in December, 2018 or in January, 2019. It is clear that, as a matter of fact, Mr. O'Donoghue accepted the matters which were put forward on behalf of the applicants as a basis for a review of two earlier decisions which had been taken by the respondent, namely, those of 8th January, 2019 and 21st February, 2018.

58. Having regard to my findings of fact, I am satisfied that the 24th January, 2019 decision by the respondent was more than simply a reiteration of the 21st February, 2018 decision. The outcome may well have been the same, namely, for the respondent to come to the same conclusion if reached on 21st February, 2018, but to characterise what happened as merely a repetition of an existing decision is to ignore the fact that the respondent plainly agreed to carry out a review of both prior decisions and openly confirmed that it had carried out such a review and went on to confirm what decisions it had come to, as of 24th January, 2019, in light of the review which it had carried out.

59. On the evidence, I am satisfied that, as a matter of fact, the respondent made a fresh decision as of 24th February, 2019 with regard to the period of suspension from consideration of the applicants' housing application. On the evidence, I am entitled to conclude that the respondent had at least three options which were available to it after conducting the January 2019 review of the February 2019 decision. Firstly, it could have overturned or nullified the 21st February, 2018 decision (just as it did, on 24th January, 2019, regarding the respondent's 8th January, 2019 decision). Secondly, it could have decided to amend the period of suspension, in that the respondent could have decided that the applicants' housing application could be considered prior to July, 2020 (in other words, the respondent could have decided to reduce the period of suspension from two years to a lesser period). Thirdly, the respondent could have come to the fresh decision

which it came to, namely, to decide, as of 24th January, 2019, that the earlier decision to suspend the applicants' housing application from consideration until 6th July, 2020 be confirmed.

60. I also note the fact that the wording of the 21st Februrary 2018 and the 24 January 2019 decisions is different. The former is in the following terms:-

> "*As result of this Garda check (on Brenda (sic) Coffey), I therefore wish to advise that your housing application is not to be considered for any form of social housing support until July, 2020*…" (emphasis added)

The 24th January, 2019 decision is even more specific, in that it names a particular date in July, 2020, as follows:-

> *"I have therefore, decided that the decision to suspend your clients Housing application from consideration until July 6th, 2020 would be confirmed*." (emphasis added)

61. For the reasons set out in this judgment, I am satisfied that, as a matter of fact, the respondent came to decisions, communicated by letter dated 24th January 2019 following a review carried out by the respondent, between 10th January and 24th January, 2019. I am satisfied that, as a matter of fact, the respondent reviewed two prior decisions, namely, those dated 21st February, 2018 and 8th January, 2019. I am satisfied that the respondent reached fresh decisions, as of 24th January, 2019 and that those decisions (as opposed to the two prior decisions which were reviewed) were capable of challenge by way of judicial review. In the manner explained earlier in this judgment, one of the decisions was in the applicants' favour and no challenge has been brought to it. One was against the applicant. This is the decision impugned in the present proceedings. I am satisfied that the applicants are not out of time to challenge that decision.

62. The applicants submit that, among other things, the respondent's 24th January, 2019 decision recites no reasons. According to the applicants, it comprises a bare recitation of the fact that the applicants' application will not be considered until July, 2020 and that their time accrued on the waiting list will be reassessed and reduced. To assess the applicants' submission, it is necessary to do two things. Firstly, to look at the jurisprudence concerning the obligations on the part of a public law decision maker to give reasons and, secondly, to analyse the extent to which reasons are included in the respondent's 24th January, 2019 decision and whether such reasons as may be included are adequate, having regard to the authorities.

The duty to give reasons

63. In the recent case of *Connelly v An Bord Pleanála* [2018] IESC 31, the Supreme Court looked closely at the duty to give reasons. The Chief Justice's judgment provides a very detailed explanation of the rationale for the requirement to give reasons and gives clear guidance on the extent of the reasons that must be given. In light of its significance and relevance, I quote extensively from the judgment as follows: -

" 5.4 In my view it is of the utmost importance, however, to make clear that the requirement to give reasons is not intended to, and cannot be met by, a form of box ticking. One of the matters which administrative law requires of any decision maker is that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration. It is useful, therefore, for the decision to clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met. But it will rarely be sufficient simply to indicate the factors taken into account and assert that, as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision make clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons.

5.5 Arising out of those general observations there seem to me to be three specific areas of law which it is necessary to address before going on to apply the principles identified to the circumstances of this case. They are:-

(a) The criteria by reference to which a court should assess whether the reasons given are adequate in any particular case;

(b) The identification of the documents or materials which can properly be considered for the purposes of identifying the reasoning of the decision maker as part of the process of determining whether adequate reasons have been given; and

(c) …….

"…The Purpose behind Reasons

6.1 As noted above, what the Court is concerned with here is the criteria by reference to which a court should assess whether the reasons given are adequate in any particular case. It seems to me that it is possible to identify some key principles from the recent case law in this area.

6.2 Mallak v. Minister for Justice, Equality and Law Reform [2012] IESC 59 concerned a refusal by the relevant Minister to grant a certificate of naturalisation to the appellant, a Syrian refugee residing in the State. The Minister's decision did not give any reason for the refusal beyond simply stating that the Minister had exercised his absolute discretion under the relevant legislation…

….

6.9 Therefore, Fennelly J.'s decision in Mallak points to at least two purposes served by the provision of reasons by a decision maker being, first, to enable a person

affected by the decision to understand why a particular decision was reached, but secondly, to enable a person to ascertain whether or not they have grounds on which to appeal the decision where possible or seek to have it judicially reviewed.

6.10 It is possible to cite further recent decisions of this Court in this context to similar effect.

6.11 In Meadows v. Minister for Justice [2010] 2 I.R. 701, Murray C.J. stated:-

> *"An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.*
>
> *Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective."*

6.9 In my judgment in Rawson v. Minister for Defence [2012] IESC 26, I stated at paragraph 6.8:-

> *"As pointed out by Murray C.J. in Meadows a right of judicial review is pointless unless the party has access to sufficient information to enable that party to assess whether the decision sought to be questioned is lawful and unless the courts, in the event of a challenge, have sufficient information to determine that lawfulness. How that general principle may impact on the facts of an individual case can be dependant on a whole range of factors, not least the type of decision under question, but also, in the context of the issues with which this Court is concerned on this appeal, the particular basis of challenge."*

6.13 Similarly, in EMI Records (Ireland) Limited & ors v. The Data Protection Commissioner [2013] IESC 34, I concluded at paragraph 6.5:-

> *"It follows that a party is entitled to sufficient information to enable it to assess whether the decision is lawful and, if there be a right of appeal, to enable it to assess the chances of success and to adequately present its case on the appeal. The reasons given must be sufficient to meet those ends."*

6.14 In Oates v. Browne [2016] IESC 7, Hardiman J. stated at paragraph 47:-

> *"It is a practical necessity that reasons be stated with sufficient clarity that if the losing party exercises his or her right to have the decision reviewed by the Superior Courts, those Courts have the material before them on which to conduct such a review. Secondly, and perhaps more fundamentally, it is an aspect of the requirement that justice must not only be done but be seen to*

be done that the reasons stated must 'satisfy the persons having recourse to the tribunal, that it has directed its mind adequately to the issue before it"."

6.15 Therefore, it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review.

6.16 However, in identifying this general approach, it must be emphasised that its application will vary greatly from case to case as a result of the various criteria identified earlier which might distinguish one decision, or decision making process, from another..." (emphasis added)

64. To see how the foregoing statements of principle interact with the statement by the respondent of its decision and any reasons given to explain it, it is convenient to set out, verbatim, the impugned decision including such reasons as the respondent proffered when communicating it to the applicants' solicitors in the 24th January 2019 letter.

"In relation to the July 2016 conviction, I am satisfied that this is anti – social behaviour and is a conviction which reasonably meets this broad scope and definition. You have raised in mitigation the length of time this case took coming to court, and that your client [is] being unfavourably disadvantaged by this. I cannot accept this in mitigation and notwithstanding my decision in respect of the November conviction, it does impact on my consideration of mitigation you have raised. There is nothing which would warrant overturning the decision made and overturning or ignoring council policy in this area. I have therefore, decided that the decision to suspend your client's Housing application from consideration until July 6th 2020 would be confirmed".

65. In the foregoing manner, Mr. O'Donoghue has stated that he cannot accept, in mitigation (a) the length of time this took coming to court, and (b) that Mr. Coffey is being unfavourably disadvantaged by this. That is a statement of the respondent's attitude. We know from what Mr. O'Donoghue has said *that* the respondent cannot accept the issues raised in mitigation. We do not, however, know *why* this is so. I am satisfied that, as a matter of fact, a reason is not given by the respondent as to why it cannot accept in mitigation the length of time which the relevant case took coming to court and/or that the first named applicant is being unfavourably disadvantaged as a result. There may or may not be a reason. Such a reason may or may not be a satisfactory one. The fact is no reason is proffered. The respondent has made it clear *that* the factors raised by the

applicants' solicitor by way of mitigation cannot be accepted but has not enlightened the applicants' solicitor as to *why* this is so.

66. Insofar as the drugs possession issue is concerned, Mr. O'Donoghue states, inter alia: *"I accept your stated position that the charges struck out are not relevant…"* (emphasis added). Mr. O'Donoghue then states, inter alia, that *"having charges proffered in the supply of drugs could be considered relevant. However, on the basis of the case made by you in writing and your discussions with me, I am prepared to accept that as the charges were struck out, that they should not be considered under the council policy"* (emphasis added). Mr. O'Donoghue then goes on to state *"in addition, notwithstanding the conviction was drugs related, I accept you and your client's position that [this] related to personal use and should not be classified as anti–social behaviour".* (emphasis added)

67. Having confirmed, in the foregoing manner, that charges which had been struck out were (1) not relevant and (2) should not be considered under the respondent's Policy and (3) that the conviction for drugs which related to personal use should not be classified as anti–social behaviour, Mr. O'Donoghue decided that *"it does…impact on my consideration of mitigation you have raised"* insofar as the issue of the suspension from consideration of the applicants' housing application was concerned. The fact *that*, in Mr. O'Donoghue's view, the November conviction did impact on his consideration of mitigation is clear. It is not, however, clear *why* that is so. Mr. O'Donoghue does not explain, with reference to specific reasons, why something he regarded as not being classified as anti–social behaviour impacted on his consideration of mitigation in respect of a prior decision by the council flowing from the July 2016 conviction of the first applicant in respect of what was anti–social behaviour. That consideration of mitigation was carried out in January 2019 in the context of the respondent's review of its 21st February 2018 decision, in circumstances where the incident in question which gave rise to the prosecution and ultimate conviction dates back to 8th August 2012 and the review had been conducted by the respondent six and a half years later in January 2019. If the respondent took the view that charges which had been struck out were not relevant and should not be considered under the council Policy, nevertheless impacted on the respondent's consideration of mitigation in respect of the respondent's prior decision to suspend from consideration the applicant's housing application, I am satisfied that no reasons have been set out by the respondent as to why this is so. There may or may not be reasons and such reasons may or may not be satisfactory. I am satisfied, however, that none are given, other than what amounts to a further statement of the respondent's attitude, as opposed to a reason which would enlighten the applicants, namely "*there is nothing which would warrant overturning the decision made and overturning or ignoring Council Policy in this area".* The foregoing makes it clear that the respondent takes the view that there is nothing which would warrant overturning a previous decision made by the respondent (something the applicants' solicitor was obviously arguing for) and makes it clear that the respondent takes the view that nothing submitted on behalf of the applicants would warrant what the respondent describes as ignoring council policy in this area. The respondent does not explain why this is so. Furthermore, the respondent does not explain what council policy in this area is, which cannot be ignored or overturned. The respondent has a written

Policy and, for convenience, the following is paragraph 6 which is relevant to a decision to suspend a housing application from consideration:

> *"Where an applicant, or any member of the applicant's household, is or has been convicted of anti – social behaviour, or where there are reasonable grounds for believing any member of Applicant's Household is or has been involved in Anti – Social Behaviour, in the previous five years, they may not be considered for any form of Social or Affordable Housing for a period of two years after any conviction, including any period of custodial/suspended sentence or incident, On good Estate Management Grounds".*

68. If, as seems to be the case, the respondent is proffering as a "reason" for its decision the existence of the respondent's written Policy which the respondent is satisfied that it should not ignore or depart from, why this is so is not clear from the 24th January 2019 letter. The respondent's attitude is certainly clear but the basis for adopting it is not, in circumstances where, other than making reference to the respondent's Policy, there is no engagement by the respondent with the facts of the applicants' case. Again, there may or may not be reasons and such reasons may or may not be satisfactory or adequate but I am satisfied that, as a matter of fact, no reasons are given.

69. It is not disputed that it was on 8th August 2012 that the incident took place which gave rise to the prosecution of the first named applicant and his conviction on 7th July 2016 when he received a two–year suspended sentence. It is accepted that there has been no repeat of the behaviour in question and there is no evidence before the court of similar anti-social behaviour since 8th August 2012. That being so, I am satisfied that when conveying to the applicants' solicitor the results of its review, the respondent was under an obligation to give adequate reasons in relation to the decision it had come to. I am satisfied that the applicants were entitled to be furnished with reasons, sufficient to demonstrate the reasoning behind the respondent's decision, so that they could understand not only the fact that the respondent took a certain attitude but why this was so.

70. Under the respondent's Policy, a definition of "*Estate Management*" is given which phrase includes the following: -

> *"(a) the securing or promotion of the interests of any tenants, lessees, owners or occupiers, whether individually or generally, in the enjoyment of any house, building or land provided by a housing authority under the Housing Acts;*
>
> *(b) the avoidance, prevention or abatement of Anti – Social Behaviour in any housing estate in which is situate a house provided by a housing authority under the Housing Acts".*

71. It is clear from what Mr. O'Donoghue has said in his 24th January 2019 letter that, notwithstanding anything furnished to him or said to him by the applicants' solicitor by way of mitigation, the respondent takes the view that there is nothing which would

warrant overturning the previous decision or ignoring council policy. The relevant Policy (from which clause 6 has been quoted) makes it clear that a decision by the respondent to suspend a housing application from consideration is a decision taken on "good estate management grounds". As to what constitutes good estate management, the respondent's Policy is also clear in that good estate management has two objectives, quoted above. The first is to secure or promote the interests of tenants, lessees, owners or occupiers in the enjoyment of any accommodation provided by the respondent. The second is to avoid, prevent or abate anti-social behaviour in a housing estate in which the respondent provides accommodation. Given the fact that the incident of anti-social behaviour which dates back to 2012 and has not been repeated since then, I am satisfied that, insofar as it relies on its Policy, there was an obligation on the respondent to explain why or how its 24th January 2019 decision was on the grounds of good estate management.

72. I am also satisfied that the applicants were entitled to know the reasons why the respondent could not accept, in mitigation, the length of time the particular case in question took coming to court and/or that the first named applicant or the applicants were being unfavourably disadvantaged. This is so in circumstances where (1) the review was conducted by the respondent in January 2019; (2) the original incident which gave rise to the prosecution occurred in August 2012; (3) some four years of prosecutorial delay occurred; (4) there is no evidence that this delay was due to any fault on the part of the first named applicant; (5) there is no evidence of any repeat of the relevant anti-social behaviour in the six and a half years prior to the review, and (6) the respondents' policy, in its own terms, confers wide discretion on the respondent, insofar as a decision to suspend, from consideration, an applicants' housing application is concerned, subject only to the explicit provision in clause 6 of the respondent's Policy that the council's decision is on " *good estate Management Grounds*".

73. There is no evidence whatsoever that the respondent was not acting in good faith. No doubt, Mr. O'Donoghue was doing his very best, having conducted a review of both prior decisions, to convey the outcome to the applicants' solicitor. Nevertheless, having carefully considered what the decision maker has said in respect of the impugned decision, I am satisfied that the basis for it is not sufficiently clear. For example:

- Does the respondent not accept, in mitigation, the length of time this case took coming to court because the respondent does not accept the fact that there has been prosecutorial delay?
- Or is it because the respondent does not regard that delay as relevant?
- Alternatively, in refusing to accept the foregoing in mitigation, is it because the respondent does not regard the applicants as having suffered any disadvantage?
- If so, why does the respondent adopt this position?

- Alternatively, if it the case that the respondent accepts either or both the length of time the case took coming to court and the fact that the first named applicant is being unfavourably disadvantaged, is it the case that the respondent cannot accept this in mitigation because the respondent feels constrained by the relevant Policy?

- If this is the case, in what respect does the respondent feel constrained?

- Alternatively, is it the case that the respondent is satisfied that there is nothing in the Policy which would prevent the respondent from amending the 21st February 2018 decision or overturning it entirely, but feels this is not warranted and, if so, why?

- Furthermore, what is the connection between the Policy's focus on the promotion of good estate management and the decision in the present case, in light of the particular facts?

- Furthermore, given that the decision-maker regarded the charges struck out as not relevant, and not to be considered under the council Policy, on what basis did the decision maker regard the same as relevant to its consideration of mitigation in respect of another decision which had been taken under the same Policy?

- Similarly, in circumstances where the decision-maker accepted that the conviction for possession of drugs for personal use should not be classified as anti-social behaviour, why was something not classified by the respondent as anti-social behaviour apparently taken into consideration on the question of mitigation in respect of a previous decision taken by the respondent on foot of anti-social behaviour (namely behaviour going back to 2012, resulting in a 2016 conviction and giving rise to the respondent's 21 February 2018 decision)?

If the answers to these questions are unclear to the court, I am satisfied that they were and are unclear to the applicants because reasons for the respondent's decision which would address such questions are not contained or are not adequately contained in the 24th January 2019 decision.

Conclusion

74. In light of the foregoing, and having regard to the jurisprudence in relation to the obligation of a decision-maker such as the respondent to give reasons, I am satisfied that the impugned decision does not provide sufficient information to enable the applicants to know why it was reached. I am satisfied that the reasoning behind the conclusions reached by the respondent is not sufficiently clear as to enable the applicants to understand why the respondent came to the decision it reached. That being so, I am satisfied that the impugned decision should be quashed. In the circumstances, I am satisfied that the appropriate order is to remit the matter to the respondent with a direction to reconsider the review which the respondent undertook, in January 2019, based on the submissions made to the respondent by the solicitor for the applicants, such submissions comprising (a) communication in writing which was "open" form, (b) written

communication which was "without prejudice" as well as verbal submissions during discussions. As to the precise wording of the order, I invite submissions.

75. I am conscious that the 6th July 2020 is only approximately four months away. That alone does not appear to me to be a sufficient reason to exercise the court's discretion against making the order of *certiorari* sought by the applicants. The issue of housing and decisions touching on the provision of housing are plainly of significant importance to the applicants. When the respondent made its decision on 24th January 2019, there was still one year and five months to run before the expiry of the suspension, by the respondent, of consideration of the applicants' housing application.

76. In light of my findings above, I do not consider it necessary to make a determination in relation to each of the other grounds upon which the applicants seek to impugn the decision in question.