**THE HIGH COURT**

**[2016 No. 142 J.R.]**

**BETWEEN**

**IVAN ENEV**

**APPLICANT**

**AND**

**DUBLIN CITY COUNCIL**

**RESPONDENT**

**COSTS RULING of Mr Justice Donald Binchy delivered on the 22nd day of January, 2018**

1. These proceedings settled on the first day of hearing. The parties were unable however, to reach agreement on the question of costs and rather than have the matter proceed to a full hearing for the purpose of determining same, the parties left it to me to review the submissions of counsel and the pleadings in the case and, having done so, to determine the applicant's claim for the costs of the proceedings.

2. The applicant sought leave to have his two children added to his social housing application so that they could stay overnight with him when he is allocated accommodation by the respondent. He made this application, orally, on 10th February 2015. As he did not have overnight access to his children, the application was refused.

3. On 18th February, 2015, he presented to the homeless services section of the respondent. He was placed in temporary emergency accommodation and given priority on the housing list because he had now become homeless.

4. On 25th May, 2015, the applicant again attended at the homeless services section of the respondent applying for accommodation suitable to accommodate his children overnight. This request was not granted but he was advised to get a letter from his solicitor or a court order demonstrating that if he did have a place to accommodate his children, that "joint access" would be granted. The reference to joint access is an error insofar as the applicant did have joint access, but it was clearly intended to refer to an entitlement of the applicant to overnight access by his children. This is recorded in what appears to be a file note of the respondent which was exhibited by the applicant in his grounding application to these proceedings.

5. The applicant had obtained a court order in April, 2015, whereby he was awarded joint access, together with his wife, to their two children. He was not however granted overnight access, but para. 9 of the order stated "such further and other access as may be agreed between the parties". This appears to leave it open to the parties to agree that the applicant may have overnight access to his children.

6. According to the respondent the applicant presented the District Court order to the respondent on 3rd June, 2015. On 19th June, 2015, when attending at that the offices of the respondent, the applicant brought with him and gave to the respondent an affidavit setting out his circumstances. In that affidavit he avers:-

> "I say and believe that I am currently homeless and reside in a homeless hostel and as a result I am unable to have overnight access to my children. I have access to my children every Friday, Saturday and Sunday during the day as per aforementioned order attached. (para. 8)
>
> I say and believe that if I have a suitable two or three bedroom apartment I can appeal said order and gain overnight access to my children. Therefore I request that Dublin City Council include my two children on my social housing support application so that I can access an increased rent supplement that will allow me to reunify with my children and gain overnight access." (para. 9)
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> "I say that your deponent had a reliable prospect of overnight access to my children. I say that the district judge made it clear to your deponent that if and when I have suitable accommodation I could apply for overnight access to my children. I say that court had no objection in principle to overnight access save for the fact that I did not have suitable accommodation in place. "(para.15)
>
> "I say that had I been given suitable accommodation by the respondent I would have been given overnight access to my children by the court and the only barrier to this was the decision of the respondent to refuse my application" (para. 16).

The application was again refused by the respondent, orally, and on the same day, because he did not have overnight access to his children.

7. In July, 2015, the applicant sought a reasoned written decision for the decision of the respondent. He was told that if he required a written decision he should make that request in writing, but he did not do so and the respondent did not issue a decision in writing. Mr Darren Ryan, project estate officer of the respondent, avers in an affidavit sworn in response to this application dated 6th May, 2016, that the applicant made this request, on 15th July, 2015, of a Ms Celestine Duff, of the Council's homeless services section. Mr Ryan avers that because this was a matter for the Council's housing allocations section (rather than homeless services), Ms Duff contacted the applicant's key worker at Crosscare (where the applicant was then residing) and advised that it would be necessary for somebody to contact the allocations section of the respondent to seek written reasons for the decision. This does not seem to have occurred. While this is unfortunate, it is not in any way determinative of this application.

8. There was however some communication between the applicant's key worker in Crosscare, and Ms Mary Lee Jones, as the applicant, in a supplementary affidavit exhibits an email from a Mary Nugent of the respondent to Ms Jones, dated 7th December, 2015, which states:-

> "we find it difficult to get single units as all the agencies have singles to house. Do any of the clients have access to their children as we get a few one and two bedroom units."

The applicant relies on this email to suggest that his application was still under consideration by the respondent in December, 2015, in

the context of considering time limits applicable to this application.

9. The applicant maintains that the decision that he seeks to quash was made on an unknown date between 1st and 29th February, 2016, when he was informed orally by the respondent that he would be considered a single person for the purposes of any accommodation. He makes this averment in a supplementary replying affidavit sworn on 21st October, 2016. It is difficult to know why he claims that decision that he impugns was made in February 2016. It is clear that the applicant was refused a place on the two bedroom list on 10th February, 2015, 25th May, 2015 and 19th June, 2015. On each occasion the decision was the same. Even if he did make another request in February, 2016, nothing had changed; it was the same request and the same decision.

10. The applicant complains that he was in a catch-22 situation. He could not get overnight access to his children without the appropriate accommodation and he could not get the appropriate accommodation without being able to prove that he had overnight access to his children. He also complains about the respondent's housing allocation scheme insofar as he says that it does not outline a policy for separated parents who have court ordered custody for access arrangements. He says that other local authorities do have policies in this regard. He gives instances of the policies of South Dublin County Council and Dun Laoghaire-Rathdown County Council.

11. The respondent's case is that it has made it clear to the applicant at all times that if he satisfies the respondent that he is entitled to overnight access to his children then he will be placed on the appropriate housing list. However, he has failed to produce any evidence in this regard, even though he had been requested on a number of occasions to do so.

12. Moreover, the respondent says that for the purposes of judicial review time limits, time ran from the date on which he was first refused his application on 10th February, 2015; alternatively it began running again on 25th May, 2015 when he was secondly refused or alternatively, it began running on 3rd June, 2015, when he was thirdly refused.

13. The applicant submits that the policies of other local authorities in such matters are not relevant; that each local authority has the entitlement and the obligation to adopt democratically its own housing allocations scheme within the scope of its discretion and also having regard to the housing needs assessment particular to its functional area. The respondent also emphasises the discretion enjoyed by housing authorities in allocating their limited resources and refers to a number of decisions which affirm that that discretion is a matter within the competence and expertise of the housing authority concerned, and it is not for the courts to intervene and direct how that policy is to be applied provided that the policy is in accordance with law.

14. It is clear to me that from the moment that he raised the issue, it was made clear to the applicant that the provision of accommodation for the applicant's children could not be considered by the respondent until such time as he clearly demonstrated to the respondent that he had at least occasional overnight access to his children. There is nothing to suggest that the applicant did not understand the respondent's requirements in this regard.

15. The applicant tried to deal with the matter by giving the Council a copy of the District Court order which sets out the extent of his access to the children and makes it clear that the parties are permitted to agree amongst themselves alternative access arrangements, which could include overnight access.

16. While it has been suggested that the applicant was in something of a catch 22 situation, I do not think that this is correct. The applicant could have obtained a letter from his ex-wife confirming her consent to overnight access for the children, in the event that the respondent provided suitable accommodation. That, taken together with the District Court order may have met the requirements of the respondent; if it did not, it would have been open to the applicant to apply to the District Court to vary the order to reflect the consent of his ex-wife to such arrangements. That would have been a far more expedient and proportionate approach then the bringing forward of judicial review proceedings in the High Court. For this reason alone, I do not think it appropriate to award the applicant the costs of this application.

17. In addition however it does appear as though the applicant was out of time to bring forward these proceedings. His application to put his children on his application for housing support was refused on at least two if not three occasions: 10th February, 2015, 25th May, 2015 and 19th June, 2015 and on at least the first two of these occasions it is clear that he was informed as to the reasons why his application could not granted i.e. that he did not have overnight access to his children. That it is clear that the applicant was aware of this the reason is beyond any doubt because the applicant himself exhibited a file note from Dublin City Council in relation to the refusal of 25th May, 2015, which states that the person whom he met on that date (a Mr Denis O'Connor) informed him that he would need a letter from his solicitor or the Court, explaining that if the applicant does have a place of his own that joint access would be granted. The reference to joint access is an error, but the applicant is not suggesting that he did not understand what was being required of him and nor has he asserted in these proceedings that he did not understand what was being required of him.

18. Mr Ryan exhibits an internal document of the respondent headed "Application Notes" which records the applicant attending at the offices of the respondent on 10th February, 2015 and states "cannot add kids at present as does not have overnight access". Another note on 3rd June, 2015, states "courts docs received but do not state overnight access therefore can't add children to application".

19. Although it is clear that the applicant was continuing to deal with the respondent about the matter after June, 2015, it is clear that nothing new happened. No further information was presented to the respondent. The application, the decision and the reasons for the decision remained the same.

20. All of that being the case, I am satisfied that the time for bringing forward this application ran from no later than 19th June, 2016. I have been referred by the respondent to the case of *Finnerty v. Western Health Board* [1998] IEHC 143 in which Carroll J. held in this Court that "a decision which is a reiteration of a previous decision is not a new decision. Time therefore begins to run when the final decision is first made." The respondent also refers to O.84, r.21 of the Rules of the Superior Courts which provides that times runs from "the date when grounds for the application first arose".

21. No application was made for an extension of time and nor were any reasons given as to why the application was not made in time. Accordingly, application for leave should have in my view been sought no later then 19th September, 2015 and it was in fact made in March, 2016 and was therefore brought out of time.