

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 348 J.R.]

BETWEEN

PEGGI TEE AND AISHLING TEE HANN (A MINOR SUING BY HER MOTHER AND NEXT FRIEND PEGGI TEE)

APPLICANTS

AND

WICKLOW COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 15th day of September, 2017

1. In these proceedings, the applicants seek to challenge by way of judicial review a decision of the respondent ("the Council") to refuse to provide the applicants with emergency homeless accommodation on the 4th April, 2017.

Background Facts

2. The first named applicant (Ms. Tee) travelled with her fourteen year old daughter, the second named applicant (Aishling) from Malaysia to Ireland on the 23rd June, 2016. Up to that time, the applicants resided with Ms. Tee's mother in Malaysia. Both applicants are Malaysian citizens. Aishling's father is an Irish citizen who resides in Malaysia and she is thus entitled to Irish citizenship. She has recently received an Irish passport since arriving in this country.

3. Ms. Tee appears to be a highly educated woman. English is her first language. She graduated from Bond University, a prestigious third level institution in Australia, with a degree in business. Her family ran a distribution business in Malaysia in which she was employed as a sales manager although she ceased her employment there in January, 2016 when the business closed. When initially interviewed by the Council, Ms. Tee gave as her home address a house which is described in an affidavit of Joseph Lane, the Council's Director of Housing and Corporate Estate, sworn on the 15th May, 2017. Mr. Lane avers that he searched Google Maps for this address and it disclosed that the address backs onto a golf course and is within a gated and affluent community. Ms. Tee avers that her mother has now sold this house in order to downsize to a 4,000 sq. ft. house which is currently being renovated so that it will have five bedrooms. It would appear that since the applicants left Malaysia, Ms. Tee's mother lives alone.

4. Ms. Tee avers that the reason she came to Ireland was to secure suitable second level education for Aishling, which she considers is not available to persons of her ethnicity in Malaysia. When Ms. Tee arrived in Ireland, she had available to her €10,000.00 on a credit card. She decided to settle initially in Arklow, Co. Wicklow because Aishling's paternal grandparents reside in Arklow. However, they appear to have no contact with either applicant. Aishling was initially enrolled in a school in Arklow in August 2016, but Ms. Tee decided to move to Bray subsequently and Aishling now attends school there.

5. Since coming to Ireland, the applicants have lived in bed and breakfast accommodation as Ms. Tee says she was unsuccessful in securing private rented accommodation. Ms. Tee says that her funds began to run out in February 2017, and as a result, she and Aishling resorted to sleeping in her rented car. This continued for about sixteen or seventeen days until they came to the notice of An Garda Síochána who put them in touch with a woman's refugee in Bray. Since that time (early February) the applicants have been accommodated by a variety of NGOs and charitable institutions. They have had to sleep in a Garda station on a number of occasions.

6. One of these organisations put Ms. Tee in touch with the Council in February 2017, for the purpose of seeking accommodation. Ms. Tee applied to be put on the Council's housing list. Ms. Tee says that since the middle of February, she presented as homeless at the Council's offices on several occasions. Eventually, a meeting took place between Ms. Tee and Council officials at the Council's offices on the 4th April, 2017. The meeting lasted approximately an hour and was attended on behalf of the Council by Ms. Noeleen Roche, a Staff Officer in the Homeless Outreach Section of the Housing and Corporate Estate Department and Ms. Winifred Kelly who was working in the Council's Homeless Section pursuant to a service level agreement with the Dublin Simon Community.

7. What transpired precisely at this meeting is a matter of dispute between the parties. A contemporaneous note of the meeting was made by Ms. Roche. In her first affidavit, Ms. Tee avers that she told the Council at the meeting that she had a retirement fund in Malaysia but she could not access it either until retirement age or if earlier, on certain conditions which did not arise. She says that she was told by the Council officials that there was no accommodation available for her and was given a list of bed and breakfast accommodation in the area.

8. After the meeting, lengthy correspondence ensued between various parties representing Ms. Tee, including her solicitor, and the Council. In particular, Ms. Tee's solicitor, Ms. Keatinge, wrote a long letter on the 7th of April, 2017, to the Council setting out the factual background and the legal basis upon which the applicants claimed to be entitled to have emergency accommodation provided to them by the Council. The letter contended that the Council had a statutory obligation to provide such accommodation under the terms of the Housing Act 1988 and further that the applicants had a right to such accommodation by virtue of the provisions of the Constitution and the European Convention on Human Rights Act 2003.

9. In a letter of the 11th of April, 2017, sent by email, the Council gave its reasons for refusing:-

"On Tuesday the 4th April, 2017, during assessment at County Buildings, Wicklow, Ms. Tee stated she had sufficient funds to self-accommodate.

In addition, she stated she has current access to monies from an employee's fund in the amount of €40,000.00, which can be used for education and housing.

Ms. Tee's family has a business in Malaysia and she resided in the family home prior to coming to Ireland. Her mother has recently purchased a five bedroomed property.

It is the opinion of Wicklow County Council therefore that Ms. Tee does not satisfy the criteria for eligibility for emergency

homeless accommodation, at this time.

I trust this clarifies the situation.”

10. On the 15th of May, 2017, Ms. Roche swore an affidavit in reply to the affidavit of Ms. Tee. Ms. Roche says that she asked Ms. Tee if she was in receipt of any State payments and she replied that she was not looking for payments or assistance as she had just come to Ireland to seek education for her daughter. She avers that Ms. Tee told her that her family in Malaysia owned their own business and were continuing to provide her with financial support.

11. With regard to the averments in Ms. Tee’s affidavit that she was unable to access her pension fund, Ms. Roche avers that at the interview, Ms. Tee stated that she has current access to the fund which could be used for education and housing. Clearly, there is a significant divergence of recollection on this important point between Ms. Tee and Ms. Roche.

12. Although not directly relevant to the decision taken by the Council on the 4th of April, 2017, it is notable that Ms. Tee was again interviewed on the 27th of April by another council official, Mr. Damien Marah, who has also sworn an affidavit and exhibited a memo of the interview. In the memo, Mr. Marah noted that Ms. Tee told him that she would be returning to Malaysia in July to assist her mother with moving house and also to take a small holiday. She advised Mr. Marah that she was not receiving any social welfare but that she got €300.00 to €400.00 per month from her family in Malaysia and also has access to a fund of €40,000.00 for housing assistance and education.

13. In a further replying affidavit sworn on the 3rd of July, 2017, Ms. Tee contests the correctness of the averments made by Ms. Roche and Mr. Marah. She suggests that the reference to the family business and support she received from the family were all in the past, not present, tense and that she had made it clear that these sources of funding were not available to her. She also exhibits a significant number of documents for the purpose of, inter alia, demonstrating that the position as she outlines it is the correct one.

14. In the affidavit to which I have already referred sworn by Mr. Lane, he refers to the fact that the Council, as housing authority, has particular functions, duties and discretion vested in it in relation to the assessment of need and allocation of resources between competing demands for housing in Co. Wicklow. He avers that the Council has limited resources for the provision of accommodation to homeless persons and that there are already significant demands on those resources. He says that the Council has to make an overall assessment of need in order to determine how best to deploy these limited resources and having fully considered the applicants’ circumstances was not satisfied that Ms. Tee did not have the financial means to provide for the accommodation for herself and Aishling, and furthermore was not satisfied that there is no accommodation available which they could reasonably occupy. Mr. Lane was referring to Ms. Tee’s mother’s house in Malaysia in that latter regard.

The Housing Act 1988

15. The most directly relevant provision of the 1988 Act to these proceedings is to be found in section 2:-

“2.— A person shall be regarded by a housing authority as being homeless for the purposes of this Act if —

(a) there is no accommodation available which, in the opinion of the authority, he, together with any other person who normally resides with him or who might reasonably be expected to reside with him, can reasonably occupy or remain in occupation of, or

(b) he is living in a hospital, county home, night shelter or other such institution, and is so living because he has no accommodation of the kind referred to in paragraph (a),

and he is, in the opinion of the authority, unable to provide accommodation from his own resources.”

16. Section 10 of the Act then goes on to empower the housing authority to make appropriate arrangements for the accommodation of a homeless person as defined.

17. It is clear therefore that in order for a person to qualify for emergency accommodation under s. 2, that person must satisfy both criteria in the section. He must have no accommodation available to him and be unable to provide such accommodation from his own resources. In both instances, it is the housing authority that must form the requisite opinion.

The Applicants’ Case

18. The applicants impugn the Council’s decision on four broad grounds. First, the applicants say that the decision was based on errors of law which vitiate it. These legal errors include a failure by the Council to assess the applicants’ housing needs, to construe the relevant provisions of the Housing Act 1988 correctly and in accordance with the requirements of the Constitution and the European Convention on Human Rights.

19. Second, the applicants contend that the Council’s decision was irrational and unreasonable and based on irrelevant considerations. The only considerations that are specifically identified by the applicants are that the Council had regard to Ms. Tee’s mother’s housing circumstances in Malaysia and they failed to have regard to the applicants’ vulnerability.

20. Third, the applicants argue that the decision was based on errors of fact. These errors are said to include that Ms. Tee had access to a pension fund and to funds from the family business. They submit that both of these factors were clearly incorrect by reference to what Ms. Tee told the Council at interview on the 4th of April, 2017. Of note in the context of this ground, the applicants claim that the Council failed to have regard to documentary evidence concerning Ms. Tee’s means which was provided to it subsequent to the interview on the 4th of April, 2017.

21. Fourth, the applicants complain that the Council failed to vindicate their rights under Articles 40.1, 40.3 and 42A of the Constitution and Articles 3, 8 and 14 of the ECHR. This failure is said to have arisen from the Council not taking cognisance of the increased risk to the applicants of rough sleeping and in particular the risks to Aishling as a child. It is also pleaded that the Council treated the applicants less favourably than Irish nationals or others who had not resided outside the State. It is alleged that the applicants were discriminated against on grounds of ethnicity and/or nationality.

Discussion

22. This case is concerned solely with the Council’s decision of the 4th of April, 2017, and the reasons for that decision, subsequently given in writing on the 11th of April, 2017. It seems to me therefore that events subsequent to the 4th of April, 2017, cannot be

regarded as material to that decision. The fact that further evidence supporting the applicants' claim was furnished to the Council at a subsequent date and indeed put before the court at an even later date cannot form the basis for criticism of the decision. The lawfulness of that decision can only be determined by reference to the information available to the Council when it took the decision on 4th April. Of course if further relevant information became available or the applicant's circumstances had changed, it was always open to them, and remains so, to make a further application to the Council for emergency homeless accommodation. They have not done so to date.

23. The first criterion to be satisfied by the applicants is that they are homeless. A person is homeless if he or she has nowhere to live. There is no dispute about the fact that the applicants can live with Ms. Tee's mother and had a home with her until June 2016 when Ms. Tee chose to leave that home and come to Ireland to further Aisling's education. Does the fact that the applicants have no home in Ireland require the Council to form the opinion that they are homeless? I think not. It would clearly be absurd, for example, to suggest that a person who enjoys the benefit of a comfortable residence a few miles across the border in Northern Ireland is homeless because he or she has nowhere to live in the State. It could hardly be suggested that every tourist who comes to Ireland and has the misfortune to run out of money while here is entitled to emergency homeless accommodation, be they an Irish citizen or not.

24. Of course it must be remembered that the court's view as to what may or may not render a person homeless is entirely irrelevant. The only view that is relevant is that of the Council as s. 2 of the 1988 Act makes plain. That in itself does not confer an unfettered discretion on the local authority but a discretion nonetheless. The discretion must be exercised within well settled norms as explained in cases such as *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39 so that it must not be exercised in an arbitrary or capricious manner or in a manner that flies in the face of fundamental reason and common sense. Absent that however, the court cannot interfere with the Council's determination.

25. The court equally has no function to perform in cases involving the allocation of resources by public bodies facing competing claims on those resources. In a passage from the judgment of Laffoy J. in *Ward v South Dublin County Council* [1996] 3 I.R. 195 approved by Faherty J. in her judgment in the interlocutory application in the within proceedings delivered on 30th May, 2017, Laffoy J. observed (at p. 203):

"It is not the function of this court to direct a local authority as to how it should deploy its resources or as to the manner in which it should prioritise the performance of its various statutory functions. These are matters of policy which are outside the ambit of judicial review."

The court must also bear in mind that in dealing with issues such as the homeless crisis, which has sadly become an ever present problem, the Council dedicates particular officers to dealing with this issue on a daily basis who clearly possess significant expertise in this area to which the court should extend considerable deference.

26. In the present case, the Council concluded that the applicants are not homeless because they have a home, albeit not in this jurisdiction. There is nothing to my mind about that decision which could be said to be at variance with fundamental reason and common sense. Nothing in s. 2 of the 1988 Act requires the Council to ignore the fact that an applicant for homeless accommodation has a home outside the State.

27. The applicants argue on this point that the fact that they have a home that is outside the EU is significant. They say that the effect of the Council's decision is to force Aishling, an EU citizen, to leave the Union and thus be deprived of the benefit of being a citizen of the EU, contrary to the decision of European Court of Justice in *Zambrano v. Belgium* Case C- 34/09. That case concerned Article 20 of the Treaty on the Functioning of the European Union which "precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union."

28. Mr. Zambrano was a Columbian national who fled that country's civil war and sought asylum in Belgium. While in Belgium, his wife gave birth to two children who thereby acquired Belgian nationality. He then applied for residency in Belgium and a continuation of his work permit but both were refused. The CJEU held that a refusal to grant a right of residence and a refusal to grant a work permit to Mr. Zambrano had the effect of depriving his EU citizen children of the enjoyment of their rights as citizens of the Union insofar as their effect was that Mr. Zambrano and his wife and children would have to leave the EU. The court concluded therefore that the refusals were invalid.

29. I do not think *Zambrano* assists the applicants' case here. They are not being forced to leave the jurisdiction. If the applicants for example had a home in France, they would still on their own argument be homeless in this jurisdiction but not entitled to rely on *Zambrano*. This would have the rather extraordinary consequence that if they had a home within the EU, the Council would be entitled to refuse them accommodation but not if their home was outside the EU. On that argument, Ms. Tee, as a non EU citizen, would be entitled to preferential treatment by the Council over an EU citizen, clearly an untenable proposition.

30. I am therefore satisfied that the applicants have not established that the determination of the Council that they are not homeless is ultra vires. Since the applicants must satisfy both limbs of the test in s. 2, the application falls at the first hurdle.

31. However, even if I were to be wrong in reaching that conclusion, the applicants have not satisfied me that the Council's decision that Ms. Tee was not unable to provide accommodation from her own resources was unlawful. As I have noted, in this regard there is a significant conflict of evidence between Ms. Tee and the Council as to what she told them at interview. If the version of events deposed to by the Council in its affidavits is correct, then it could not be said on any view that Ms. Tee had demonstrated that she was unable to provide accommodation from her own resources when her own statements were to directly contrary effect. Here again the fact that subsequent information and documentary evidence emerged is not material.

32. It is axiomatic that the court cannot resolve conflicts of evidence on affidavit. Such a resolution can only be achieved by cross-examination of the deponents and there has been none here. In *Civil Procedure in the Superior Courts* (3rd Edition), the authors Delaney and McGrath observe at para. 20-91:

"It should be noted that a court is not obliged to accept evidence given on affidavit even if the deponent is not cross-examined if there is conflicting evidence given on affidavit or orally that the court accepts. However, where there is a conflict of evidence on affidavit and the deponents are not cross-examined, the court may resolve the issues of fact against the party that bears the onus of proof."

28. I accept this as a correct statement of the law. In judicial review, as in all forms of civil litigation, the onus of proof remains at all times on the applicant. As noted in de Blacam's *Judicial Review* (3rd Edition) at p. 842:

"It is a matter for the applicant for review to establish by evidence the matters of which he complains. So if the affidavits in the case raise material questions of fact, the applicant should seek to have those issues resolved by cross-examination of the appropriate deponents, as the court will not proceed only on the basis of his version of events."

29. Suffice it to say from the foregoing that having regard to the conflicts of evidence about what was said at the meeting of 4th April, 2017, the applicants have not discharged the onus of proving that the facts they allege are the correct ones. In that event, it must follow the applicants have failed to discharge the burden of proving that the Council proceeded to take its decision on an erroneous factual basis. Consequently the application must fail on this ground also.

30. In the course of her submissions, counsel for the applicants argued that the applicants enjoy what she described as a right to shelter both pursuant to the provisions of the Constitution and also Articles 3 and 8 of the ECHR as incorporated into Irish law by the European Convention on Human Rights Act 2003. Counsel sought to draw a distinction between this alleged right and rights which could more properly be described as socio-economic rights such as a right to permanent housing which counsel conceded was non-justiciable. It was contended that the decision of the Council had failed to vindicate this right and it should for that reason alone be set aside.

31. If such a right does exist, a point upon which I express no view, it seems to me that it cannot be a matter for the Council to vindicate that right in circumstances where it is constrained by the terms of the 1988 Act to apply the provisions of that Act. If those provisions, correctly applied, fail to vindicate a constitutional right of the applicant, then the appropriate remedy is for the applicant to challenge those provisions on notice to Ireland and the Attorney General.

32. The applicants neither sought nor were granted liberty to bring such a challenge in these proceedings and therefore the correctness of the applicants' submission that they possess such a right must in my view await determination in a case in which it is properly raised. This case is therefore not concerned with any alleged right to shelter or to any particular type of accommodation and the authorities referred to by the applicants on this issue are for that reason not material.

33. For completeness, I should refer to the fact that submissions were made by both parties concerning whether the applicants and in particular Ms. Tee were lawfully in the State at any material time and further regarding the issue of whether Ms. Tee had been entirely truthful about the circumstances surrounding her arrival in the State and other matters. I do not consider these issues to be particularly relevant for the reason that the Council made clear in its letter of 11th April, 2017, what the reasons for refusal were and those reasons alone seem to me to be the ones that are relevant to this case.

34. For these reasons therefore, I will dismiss this application.