THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 62 J.R.]

BETWEEN

LISA KINSELLA

APPLICANT

AND

DÚN LAOGHAIRE RATHDOWN COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 31st July, 2012

1. This application for judicial review raises a net question of some importance concerning the interpretation of the Housing (Miscellaneous Provisions) Act 2009, namely, may a person who is in receipt of social housing in one local authority area legitimately apply to another local authority for such housing? The issue arises in the following way.

2. The applicant is a 34 year old lady who suffers from epilepsy. Since October, 2007 she has resided at 5A Ormond Square, Ormond Quay, Dublin 7, along with her five year old daughter. 5A Ormond Square is a Dublin City Council tenancy. There is, unfortunately, a good deal of anti-social behaviour in the general area of Ormond Square. This is something which affects the applicant to a greater degree than most, since verbal abuse, late night noise and, on one occasion, an assault, all have serious implications for the applicant's medical condition. A singular feature of the applicant's case is that she suffers upwards of ten seizures a week and this is the result that her daughter is left alone with any source of support or supervision.

3. Against that particular background it is perhaps no surprise that the applicant would wish to move to an area where family members would be in a position to help. The applicant's only family members in the Greater Dublin region are an aunt and uncle who live in Sallynoggin (which is within the functional area of the respondent, Dún Laoghaire/Rathdown County Council). As it happens, the applicant resided there until she was fifteen and in September, 2011 she applied to the respondent for social housing based on her medical need, and mentioning her connection with that local authority area.

4. By letter dated the 9th November, 2011, the respondent refused to accept this application stating:-

> "Unfortunately, this application cannot be accepted and is returned herewith. Ms Kinsella is already housed by Dublin City Council and therefore, in accordance with the Housing (Miscellaneous Provisions) Act 2009, is not eligible to apply to another local authority for housing."

5. The applicant's solicitor, Ms. Wall, persisted and in another letter of the 25th November, 2011, stressed the applicant's medical need and her local connection with the Dún Laoghaire area. In early December Ms. Wall then received a further letter from the respondent's housing section stating:-

> "Ms. Kinsella currently holds a tenancy with Dublin City Council and therefore is not eligible to apply for social housing support under the Housing (Miscellaneous Provisions) Act 2009, and the Social Housing Regulations 2011, to another local authority.
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> The Social Housing Support Regulations 2011, refer only to persons making application for social housing support and not existing tenants of any local authority. Ms. Kinsella should contact Dublin City Council with regard to housing transfer options, as she is a tenant with that local authority. The only transfer options available to Ms. Kinsella should she wish to transfer to another local authority administrative area is a mutual transfer."

6. The applicant's case is, in effect, that the respondent acted *ultra vires* by turning down the application *in limine* without having considered it on its merits. The respondent ripostes by contending that the relevant legislation must be understood in its proper context and that it should not be understood as conferring a right on a person already in receipt of social housing in one local authority area to apply for such housing to another housing authority. Before examining this question, it is necessary to set out the details of the relevant legislation.

The provision of social housing: the applicable legislation

7. The provision of social housing is governed by Chapter 3 of Part II of the Housing (Miscellaneous Provisions) Act 2009, ("the Act of 2009"), and the Social Housing Assessment Regulations S.I. No. 84 of 2011 ("the 2011 Regulations"). Section 19(1) of the Act of 2009 provides:-

> "A housing authority may in accordance with the Housing Acts 1966- 2009 and regulations made thereunder, provide, facilitate or manage the provision of social housing support."

Section 20(2) of the 2009 Act provides:-

> "Where a household applies for social housing, the housing authority concerned shall, subject to and accordance with the regulations made for the purpose of this section, carry out an assessment (in this Act referred to as a "social housing assessment") of the household's eligibility, and need for social housing support for the purposes of determining-

(a) that the household is qualified for social support,

(b) the most appropriate form of any such support."

8. Article 14 of the 2001 Regulations provides:-

> "In carrying out a social housing assessment, the housing authority if application shall, in the first instance, assess the household's eligibility for social housing support, and if the authority determines that the household is not eligible for such support, the authority shall not proceed to assess the household's need for such support."

9. Section 20(5) of the Act of 2009 contains the only express limitation of eligibility for social housing support in that Act. This provides:-

> "(5) A household shall not be eligible for social housing support where-
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> (a) at any time during the 3 years immediately before the carrying out of the social housing assessment, the household or a member of the household was in arrears of rent for an accumulated period of 12 weeks or more in respect of any dwelling or site let to them by any housing authority under the Housing Acts 1966 to 2009 or provided under Part V of the Planning and Development Act 2000, and
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> (b) the housing authority has not entered into an arrangement under section 34 with the household or the member concerned for the payment of the moneys due and owing to the housing authority in respect of those arrears."

10. Finally, it remains to consider Part 4 of the 2011 Regulations. Articles 17-21 concern themselves with income limits and the calculation of income and are not directly relevant to the present issue. Article 22 however provides:-

> "(1) A household shall be ineligible for social housing support if it has alternative accommodation that the household could reasonably be expected to use to meet its housing need, either by occupying it or by selling the accommodation and using the proceeds to secure suitable accommodation suitable for the household's adequate housing.
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> (2) Households shall be deemed to have alternative accommodation of the type referred to in paragraph (1) if the accommodation is owned by a household member, and
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> (a) such accommodation is vacant, or
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> (b) such accommodation is let, the tenancy may be terminated on the grounds specified in paragraphs (3) or (4) of the Table to section 34 Residential Tenancies Act 2004...or
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> (c) such accommodation is occupied by a person other than a person -
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> (i) whose marriage to a household member has been dissolved,
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> (ii) is married to a household member but was separated from him or her under an order of court competent jurisdiction providing a separation, or
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> (iii) civil partnership, within the meaning of civil partnership and certain rights and obligations of the Cohabitants Act 2010, and whose legal relationship of a kind referred to in section 3(b) of the said Act, with the household member has been dissolved.
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> (3) In determining whether an alternative accommodation would meet a household's housing need, if the household were to occupy it, the housing authority of application shall have regard to the matters referred to in paragraphs (b) to (d) of Regulation 23 in respect of that accommodation."

The decision taken by the respondent

11. Turning now to the merits of the present application, it should be stated immediately that it seems impossible to characterise the letter of the 5th November, 2011, as being anything other than a decision that Ms. Kinsella was deemed to be ineligible on an *ex ante* basis simply by reason of the fact that she was already housed by Dublin City Council. This is also borne out by the terms of the December, 2011 letter, which also uses the same language ("...is not eligible..."). The only difference between the two letters is that the former based the ineligibility on the Act of 2009, whereas the latter invoked both the Act of 2009 and the 2011 Regulations.

12. In this respect, however, both the Act of 2009 and the 2011 Regulations are quite clear. Section 20(2) of the Act of 2009 obliges the authority to which an application is made to carry out an assessment of the household's "eligibility, and need for, social housing support" for the purposes of determining whether the household is qualified for such support. The sub-section further recites that the application shall be determined "subject to and in accordance with regulations made for the purposes of this section." Article 14 of the 2011 Regulations provides that:-

> "In carrying out a social housing assessment, the housing authority of application shall, in the first instance, assess the household's eligibility for social housing support and if the authority determines that the household is not eligible for such support, the authority shall not proceed to assess the household's need for such support."

13. These provisions thus demonstrate beyond peradventure that the task of a housing authority is, first, to determine eligibility and, assuming that the answer is in the affirmative, then, second, to proceed to the assessment of the question of need. Counsel for the respondent, Mr. Connolly S.C. argued that it was illogical that a housing authority should be obliged to assess the eligibility and need of an applicant for social housing support in circumstances where the applicant was already in receipt of social housing support from another housing authority. He invited me to construe the terms of s. 20 by reference to the underlying objectives of the 2009 Act in effect by holding that the Act already contained in an implied prohibition to this effect. For good measure, Mr. Connolly SC urged me to adopt a purposive interpretation of this section which would reflect this implied limitation, with recourse, if needs be, to s. 5(1) of the Interpretation Act 2005 ("the Act of 2005").

14. Section 5(1) of the Act of2005 provides:-

> "In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)-
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> (a) that is obscure or ambiguous, or
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> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of [the Oireachtas]....the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

15. In my view, however, the scheme of the Act of 2009 is too plain to admit of an implied exception of this kind, even if it were legitimate for me to interpolate such an implied limitation in that Act. It cannot be said that the provision is obscure or ambiguous within the meaning of s. 5(1)(a) of the Act of 2005 and, moreover, the wording seems to reflect a clear intention on the part of the Oireachtas to have a two stage assessment process, namely, eligibility and then need.

16. Here it may be recalled that at its root the issue presented here goes straight to the policy choices confronting the legislative and executive branches with regard to the allocation of scarce resources in the area of social housing, rather than any particular question of statutory interpretation *as such*. Some may think it desirable for reasons of administrative convenience and general cost control that tenants allocated such housing by one local authority should not be able to apply to another authority for what amounts to a housing transfer. Others may think that it would promote a desirable degree of social mobility and flexibility if tenants could so move.

17. It goes without saying that the judicial branch cannot choose as between these policy perspectives, still less could I reject the latter interpretation because, for example, I deemed it to be to be unreasonably broad or even an absurd policy choice. If - as is the case here - a particular policy choice is expressed in clear and unambiguous language by the Oireachtas, then it is task of the judicial branch to give effect to it. That policy choice cannot be emasculated or stifled under the guise of statutory interpretation.

18. All of this is perhaps another way of saying that the only *ex ante* restrictions on applications for housing support are those prescribed by the Oireachtas in s. 20(5) of the Act of 2009. Even if due allowance is made for the fact that it has not actually yet been commenced, the sub-section nonetheless reflects a legislative choice that certain type of applicants should be precluded from even applying for such support. The logical corollary of this restriction is that all other applicants not coming within these categories of exclusions may nonetheless in principle apply for such support.

19. It is agreed that Ms. Kinsella does not come within either of these categories. Yet, if the implied limitation contended for by Mr. Connolly SC were to be upheld by me, it would be tantamount to adding a further *ex ante* limitation on who could apply for housing support over and above those limitations stipulated by the Oireachtas in express terms by the provisions of the (as yet uncommenced) provisions of s. 20(5) of the 2002 Act. This would clearly be an usurpation of the exclusive legislative power of the Oireachtas, contrary to Article 15.2.1 of the Constitution: *cf* here by analogy the reasoning of Keane C.J. in *Dunne v. Donohoe* [2002] IESC 35, [2002] 21.R. 533, 543.

Conclusions

20. In conclusion, therefore, I am obliged to conclude that Ms. Kinsella was entitled to apply to the respondent for a transfer and was not disqualified by law in so doing. Because, however, the respondent wrongly took the view that she was disentitled by law so to apply, it follows, therefore, that I must quash the decision of the respondent as refused to entertain her application.

21. I propose, therefore, to remit the application to the respondent so that it can now proceed to adjudicate on the merits of the application.