[2018] IEHC 642

THE HIGH COURT

2017 No. 801 JR

Between:

DARREN FAGAN, SENNA COOGAN (a minor), SCOUTLARUE COOGAN (a minor), AND DARREN COOGAN (a minor), suing by their father and next friend DARREN FAGAN

APPLICANTS

– AND –

DUBLIN CITY COUNCIL

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 19th November, 2018.

1. Mr Fagan and his ex-partner are co-parenting their children. By this the court understands them to mean that like any responsible couple whose cohabitation has ended but who became parents in the course of that cohabitation, they are sharing the duties of rearing their children. Here this co-parenting takes the form of Mr Fagan's enjoying overnight access to his children during the week, the precise level of overnight access seeming to vary. That Mr Fagan engages in such an arrangement with his ex-partner has been known to the Council since, at least, 28.08.2017 when the two of them indicated, in an "*Agreement of Parents*", a standard-form document issued by the Council for completion, that they *"have agreed an Overnight Access Arrangement…for the…child/ren with…their…father"*. There is suggestion in the pleadings that the Council was in any event familiar with the arrangement from its ongoing course of dealings with Mr Fagan and his ex-partner.

2. Consequent upon the separation of himself and his ex-partner, Mr Fagan applied on 13.09.2017 to the Council for social housing. Pursuant to s.20(1)(c) of the Housing (Miscellaneous Provisions) Act 2009, as amended, the Council identified Mr Fagan's household to comprise a single person and determined his housing need was for a 1-bedroom unit. Per s.20(1)-(2) of the Act of 2009:

> *"(1) For the purposes of this section 'household' means – (a) a person who lives alone, (b) 2 or more persons who live together, or (c) 2 or more persons who do not live together but who, in the opinion of the housing authority concerned, have a reasonable requirement to live together. (2) Where a household applies for social housing support, the housing authority concerned shall, subject to and in accordance with regulations made for the purposes 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) whether the household is qualified for such support, and (b) an appropriate form of such support".*

3. Social housing assessment under s.20 is separate from social housing allocation. The latter occurs under an allocation scheme adopted by the Council pursuant, *inter alia*, to s.22(3) of the Act of 2009. Mr Fagan contends that no proper/adequate assessment of him and his children ever took place under s.20, and that what did take place involved a fettering of discretion by the Council. In essence, the within application centres on what is meant by the reference in s.20(1)(c) to *"2 or more persons who do not live together but who, in the opinion of the housing authority concerned, have a reasonable requirement to live together".* [Emphasis added]. Although the underlined text was the focus of contention at hearing, it seems to the court that it is important also to remember, when it comes to s.20(1)(c), that it is the "*opinion of the housing authority*" that is determinative; others may reasonably hold a different opinion to the Council, and doubtless sometimes do; however, so long as the Council's opinion is lawfully reached and held, the opinion of those others, even of this Court, does not matter in law.

4. What then is one to make of the phrase "*have a reasonable requirement to live together*"? It seems to the court that assistance is to be found in this regard in the judgment of the House of Lords in *Holmes-Moorhouse v. Richmond upon Thames Borough Council* [2009] 3 All ER 277. Counsel for Mr Fagan has rightly urged caution on the court in looking to *Holmes-Moorhouse*. Even so, it seems to the court that *Holmes-Moorhouse* is a useful precedent, not for the meaning that the House of Lords ascribed to a particular phrase in United Kingdom legislation (that is a matter for United Kingdom law and lawyers) but rather for some of the reasoning that the House brought to bear in reaching its conclusions.

5. A key focus in *Holmes-Moorhouse* was the reference in s.189(1)(b) of the United Kingdom's Housing Act 1996 to *"a person with whom dependent children reside or might reasonably be expected to reside".* When it came to this phrase, Lord Hoffmann observed, *inter alia*, as follows, at paras.10-12 of his speech:

> *"10 There was some dispute about whether the words 'might reasonably be expected' referred to the expectations of the applicant or those of the council. The Court of Appeal thought it meant that the applicant's expectations had to be reasonable….The council said it referred to what it, as an independent body, would consider reasonable. I think that this is a barren argument because the phrase clearly refers to an impersonal objective standard. It is therefore unnecessary to ascribe the expectation to anyone in particular. That is the point of it being impersonal. The question is rather: what considerations does the Act require or allow to be taken into account in deciding whether one person ought reasonably to be expected to live with another?*
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> *11 The phrase clearly appeals to an objective social norm….*
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> *12 But the social norm must be applied in the context of a scheme for allocating scarce resources. It is impossible to consider only what would be desirable in the interests of the family if resources were unlimited….As Lord Wilberforce said in Din's case, at p 664: "The Act must be interpreted … with liberality having regard to its social purposes, and also with recognition of the claims of others and the nature and scale of local authorities' responsibilities."*

6. It seems to the court that, likewise, when it comes to s.20(1)(c) of the Act of 2009, and the reference therein to "*2 or more persons who do not live together but who, in the opinion of the housing authority concerned, have a reasonable requirement to live together*", what is at play is (1) an impersonal objective standard which appeals to an objective social norm, with (2) the Act falling to be interpreted (i) with liberality having regard to its social purposes, but also (ii) with recognition of (I) the claims of others and (II) the nature and scale of the Council's responsibilities.

7. Turning then to the factors brought to bear by the Council when approaching s.20(1)(c) in the context of Mr Fagan's application,

in its statement of opposition the Council states as follows:

> *"In determining the…reasonable requirement to live together, the Council…had regard to…[1] matters required to be considered under section 20 of the Housing (Miscellaneous Provisions) Act 2009…[2] information relevant to the Applicants' housing need…[3] the purposes of the Housing Acts…[4] the accommodation available and/or to be made available to the minor applicants with their mother…[5] in accordance with s.69 of the Local Government Act 2001, the resources available to or likely to be available to the Council and the need to secure the most beneficial, effective and efficient use of such resources…[6] The prospect of under-utilisation of its housing resources in the event of allocation of bedrooms to the minor applicants in…separate dwellings…[7] The needs of others, including children, on its housing lists for multi-bedroom accommodation".*

8. It seems to the court that, when one has regard to para.6 of this judgment, all that one sees in the just-quoted description by the Council of the approach that it took to its decision-making is but the practical, proper and lawful implementation by the Council of, in particular, point (2) referred to in that para.6. It is true that, *e.g.,* Factors [4]-[7] may also be relevant when it comes to the issue of allocation; however, that, for the reasons offered at point (2) in para.6 above, does not mean that they cannot be of relevance when it comes to s.20(1)(c)-related decisions/decision-making. The court sees no legal deficiency to present in the Council's decision/decision-making when it comes to Mr Fagan's application for social housing.

9. Two further points might usefully be made. First, the Council contended that the court should show due curial deference to the Council's concluded decision. It should. However, no curial deference is owed to the Council when it comes to statutory interpretation. Second, reliance was placed by Mr Fagan on *McCormack v. Minister for Social Protection* [2014] IEHC 489, a rent-support case, to support the proposition that a decision-maker should not take an unduly 'blinkered' approach to the relevant facts in a decision-making process. This proposition is accepted by the court. However, it does not see any deficiency to arise in this regard on the part of the Council on the facts presenting.

10. For the reasons identified above, the court is coerced as a matter of law respectfully to decline all of the reliefs sought of it at this time by Mr Fagan.

11. What looked, from the pleadings, like a wide-ranging application, boiled down at hearing solely to the issue of statutory interpretation that is the focus of this judgment. The court therefore confines itself in this judgment to that aspect of matters.