THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 348 J.R.]

BETWEEN

P. T.

AND

A. T. H. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND P. T.)

APPLICANTS

AND

WICKLOW COUNTY COUNCIL

RESPONDENT

JUDGMENT of Ms Justice Faherty delivered on the 30th day of May, 2017

1. On 9th May, 2017, the applicants were granted leave by the High Court (Noonan J.) to apply for judicial review for:

> (1) an order for *certiorari* quashing the decision of the respondent of 4th April, 2017 (subsequently affirmed in writing by the respondent on 11th April, 2017 and 20th April, 2017) refusing the application of the first named applicant on her own behalf and on behalf of the second named applicant seeking emergency homeless accommodation pursuant to s. 10 of the Housing Act 1988 ("the 1988 Act");
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> (2) A declaration that the refusal of the respondent to provide emergency homeless accommodation was:
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> > (a) based on an error of law and thus *ultra vires*;
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> > (b) irrational and unreasonable and based on irrelevant considerations;
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> > (c) based on a material error of fact and for that reason unlawful;
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> > (d) constituted a failure to vindicate the applicants and each of them as protected under Articles 40.1, 40.3 and/or 42 A of the Constitution and/or their fundamental rights protected under Articles 3 and/or 8 and/or 14 of the European Convention on Human Rights (ECHR);
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> (3) Damages for breach of their Constitutional and/or ECHR rights;
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> (4) Such interim and interlocutory relief restraining the respondent from further limiting the applicants constitutional and ECHR rights; and
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> (5) Such interim and/or interlocutory order as is necessary for the vindication of the applicants' rights pending the determination of the within proceedings including an order requiring the respondent to identify, make available and provide financial assistance to secure accommodation to the applicants pending the determination of the judicial review proceedings.

2. The grant of leave was in circumstances where having been put on notice of the *ex parte* application by the Court, the respondent neither objected nor consented to the leave application save to state that they would be fully contesting the judicial review and contesting the application for interlocutory relief.

3. It is the application for an interlocutory order requiring the respondent to identify, make available and provide financial assistance to secure accommodation for the applicants pending the determination of the within judicial review proceedings which forms the subject of this judgment.

4. At this juncture it is apposite to set out the grounds upon which leave was granted. These are:

The refusal the respondent to provide emergency homeless accommodation was based on an error of law and was for that reason *ultra vires* and unlawful. In particular:

> (i) the respondent failed refused and/or neglected to assess the housing needs of the applicants' household, including the urgency of that need, adequately or at all;
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> (ii) the respondent failed to properly construe its powers pursuant to s. 10 of the 1988 Act in accordance with Article 40.3 and Article 42A of the Constitution and/or in accordance with Article 3 and/or 8 ECHR;
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> (iii) by leaving the first named applicant at real and immediate risk of being totally without shelter and sleeping rough, the respondent failed to exercise its statutory functions in a manner compatible with the first named applicant's rights pursuant to Art.40.3 of the Constitution;
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> (iv) by leaving the second named applicant, a child and therefore inherently vulnerable, at real and immediate risk of being totally without shelter and sleeping rough, the respondent failed to exercise its statutory function in accordance with Article 40.3 and Article 42A of the Constitution;

(v) the respondent failed to construe its statutory functions pursuant to s. 10 of the 1988 Act in a manner compatible with ECHR.

5. It is also pleaded that the refusal of the respondent to provide emergency homeless accommodation was irrational and unreasonable by the failure to assess the urgency of the situation, making a decision that flew in the face of fundamental reason and common sense, failing to have regard to relevant factors, having regard to unnecessary factors, in particular the first named applicant's mother's housing situation in Malaysia and failing to have regard to the level of vulnerability of the applicants.

6. It is further pleaded that the refusal of the respondent to provide emergency homeless accommodation was based on a material error of fact and was for that reason unlawful by the respondent:

(vi) proceeding to make a decision in respect of the applicants' application for emergency homeless accommodation based on the assumption that the first named applicant had access to a pension fund in Malaysia which the first named applicant does not in fact have access to;

(vii) proceeding to make a decision in respect of the applicants application based on the assumption that the first named applicant had access to funds from a family business in Malaysia when the family business has in fact ceased trading;

(viii) failing to have any or any adequate regard to the information provided by the first named applicant on 4th April, 2017;

(ix) failing, refusing and/or neglecting to confirm the accuracy of the purported information upon which the refusal to provide emergency homeless accommodation was based; and

(x) failing, refusing and/or neglecting to have any or any adequate regard to documentation subsequently provided by the first named applicant through her solicitor which set out the true picture of her means.

7. It is pleaded that the respondent's refusal to provide emergency homeless accommodation, contrary to its obligations to the Constitution and ECHR has:

(xi) increased the applicants risk of rough sleeping;

(xii) failed to take account of the risks facing the second named applicant, a child;

(xiii) treated the applicants less favourable than applicants who had not previously resided outside of the State;

(xiv) treated the first named applicant less favourably then an Irish national; and

(xv) amounted to discrimination against the applicants on grounds of ethnicity and/or nationality.

Background and chronology

8. The first named applicant is a national of Malaysia. The second named applicant is also a Malaysian national but is entitled to Irish citizenship by reason of her father's Irish nationality. The father resides in Malaysia. In June 2016, the applicants moved to Ireland. According to the first named applicant's grounding affidavit, prior to that move, the applicants lived with the first named applicant's mother in Malaysia, where the first named applicant also worked in her family's business. She ceased employment in that business in January, 2016 and she states that the business is no longer trading. Following their arrival in the State, the applicants travelled around the country staying in bed and breakfast accommodation. Ultimately, they travelled to a town in Co. Wicklow and resided in bed and breakfast accommodation for a period of time. The second named applicant was duly enrolled in school. Subsequently they moved to another town in Co. Wicklow and again, the second named applicant was enrolled in the school which she currently attends.

9. Following their arrival in the State, the applicants funded their accommodation needs and living expenses from the first named applicant's savings of approximately €10,000. During the time they were staying in bed and breakfast accommodation the first named applicant tried to source private rented accommodation which proved unsuccessful.

10. In or about February, 2017, the first named applicant's savings were running low and in order that she might save money for private rented accommodation, she and the second named applicant resorted to sleeping in the first named applicant's car. The first named applicant avers that after approximately sixteen or seventeen days their living circumstances came to the attention of An Garda Siochana, who put them in touch with Bray Women's Refuge. They stayed at the Refuge for approximately a month but had to leave because they did not meet the criteria for that specific accommodation. It was at this time that the second named applicant transferred to the school where she is presently enrolled.

Application for emergency accommodation

11. The first named applicant avers that in or about the middle of February, 2017, she presented as homeless at the offices of the respondent in Bray. This was the first of a number of attempts to speak with personnel in the respondent. Her endeavours were assisted by an email sent on 24th February, 2017 from Crosscare Refugee Service in Dublin to Ms. Noeleen Roche, Staff Officer with the respondent, in the hope that the respondent could accommodate the applicants within the Wicklow area.

12. On or about 8th March, 2017, the first named applicant submitted an application to be placed on the respondent's housing list.

13. The first named applicant's position is that on or about 31st March, 2017, her savings ran out completely and she presented as homeless to Focus Ireland who was unable to find accommodation for her and her daughter. Over the weekend of 31st March, 2017, the applicants were forced to stay in Pearse Street Garda Station in Dublin for two nights. On the nights of 2nd and 3rd April, 2017, they stayed at a guest house funded by Focus Ireland.

14. By email dated 3rd April, 2017, Focus Ireland wrote to the respondent on the applicants' behalf, explaining their situation. The said email outlined, *inter alia*, that the first named applicant's tourist visa had run out and that she was awaiting a decision on the second named applicant's application for an Irish passport so that she could apply for a stamp 4 visa. The respondent was advised that while Focus Ireland had provided accommodation for the applicants on 2nd April 2017, they were not in a position to do so again. They also advised that staying with the second named applicant's grandparents was not an option for the applicants and that they had no

other family or friends to support them. The view was expressed that there were no provisions in legislation that limit access to emergency accommodation only to those who are documented and that the "bottom line" was that the family were homeless and that the respondent had a responsibility and duty to care to place them in emergency accommodation.

15. On 4th April, 2017, the first named applicant attended a meeting at the respondent's offices in Bray to discuss her then situation. In her grounding affidavit, sworn 26th April, 2017, she avers as follows:

> "I was asked about my previous circumstances in Malaysia and explained that I have a retirement fund in Malaysia that I cannot access as I am not yet at retirement age and I do not fulfil any of the criteria to access it early, that I was previously in an employee with the family business but had never held any shares or financial interest in the company, had no income from it and that it had ceased trading, and that my mother had sold the house that we had lived with her in and downsized to a smaller house that is in the process of being renovated. I said that it would be renovated to a five bedroom house. I did not indicate that those renovations were complete. I was informed by Council Officials that no accommodation was available for my daughter and me. I was not given any oral or written decision regarding my eligibility for emergency accommodation. Instead I was given a hand written list of B&Bs and told to find and pay for my own accommodation. I made it clear to the officials that I could not afford to pay for B&B accommodation, but was not offered anything else".

16. According to the first named applicant, on the night of 4th April, 2017, the applicants accessed a bed for the night through the "Cold Weather Initiative". On the night of 5th April, 2017, the second named applicant stayed with a school friend and the first named applicant stayed at the cheapest hotel she could find which was paid for out of a €100 emergency needs payment which had been received from the Department of Social Protection on 3rd April, 2017. On 6th April, 2017 they stayed in a guest house paid for by Focus Ireland. On 10th April, 2017, they presented as homeless at the respondent's offices and were advised that no staff were available to meet with them and that no emergency accommodation would be provided. On the same date, the first named applicant was advised that the Department of Social Protection could not assist, nor could the Wicklow Child and Family Project, to which the first named applicant had been directed by the Department of Social Protection. The applicants spent the night of 10th April, 2017 at Pearse Street Garda Station.

17. On 7th April, 2017, the applicants' solicitor wrote to the respondent requesting that they be provided with emergency accommodation as a matter of the utmost urgency as they were facing the prospect of sleeping rough. The purpose of the letter was for the respondent to reconsider the decision to refuse emergency accommodation. The respondent was advised that there was no possibility of Focus Ireland funding accommodation for the applicants going forward and that they were at a real and continued risk of rough sleeping. While it was accepted that they were not yet on the registrar of qualified households for the purposes of social housing support, albeit they had an active application pending, it was contended that "an assessment of their entitlement to emergency accommodation is a distinct and separate assessment to their entitlement to social housing support" and in that regard the respondent was referred to the provisions of the 1988 Act. The solicitor noted that a point that may be at issue was the family's immigration status and whether or not this status can be a lawful basis for refusing the family emergency accommodation. It was contended that there was no obligation contained in the relevant legislation that an applicant must have a specific and valid permission to reside in the State in order to be eligible for emergency accommodation. The respondent was advised that the imposition of any residence requirements did not provide a lawful basis for the refusal of emergency accommodation. The letter continued:

> "We would highlight the particular circumstances and vulnerabilities of this family that the housing authority is obliged to consider when assessing the application for emergency accommodation and that we contend are particularly relevant in the assessment of this application. It is accepted that Ms Tee does not have a current valid residency stamp. Her case however falls to be assessed together with that of her daughter, who has an entitlement to Irish citizenship and who is clearly financially and emotionally dependent on her mother who is her primary carer. Furthermore, Ms Tee is making every effort to resolve the outstanding immigration issues and it (sic) has a reasonable expectation that all matters will be resolved in the near future. It is incumbent on the Council to take account of her particular circumstances in assessing her application for homeless accommodation".

18. On 11th April, 2017, the applicants' solicitor wrote to the respondent again requesting that they be provided with access to emergency accommodation and enclosing a letter from An Garda Siochana confirming that they had slept in Pearse Street Garda Station on 10th April, 2017. The letter warned that the within proceedings would be instituted if no adequate response was received.

19. By email dated 11th April, 2017, Miss Jackie Carroll, of the respondent, wrote to the applicants' solicitor, advising as follows:

> "On Tuesday 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, 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 5 bedroom 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."

20. In her response on 12th April, 2017, the applicants' solicitor addressed the issue of the €40,000 and the issue of the applicants' family in Malaysia:

> "Our client instructs that these funds are not accessible until she reaches the age of 55 years – she is currently 42 years old. Our client instructs that she is permitted to access thirty percent of the fund prior to reaching 55 years in specific circumstances including: should she purchase a property in Malaysia; should she enter further education, neither of which our client can currently do due to absence of funds. Our client instructs that there is provision to draw down some of the fund on the basis of leaving country, but this obliges the applicant to show they have surrendered their Malaysian passport, which our client cannot do as it would render her stateless. Our client instructs she provided full details of the fund in the meeting with the Council on 4th April 2017…
>
> The email states that our client's family has a business that she has resided in the family home prior to coming to Ireland. Our client instructs that the family business ceased trading in or around the end of 2015 and is the process of being legally wound up, which is nearly finalised. Our client instructs that she has no share in the business and received no income from the business. Our client instructs that she currently has 5.73 Malaysian Ring (which is the equivalent of €1.22) in her bank account and I enclose copies of her statements for the period 16th January 2017 to 28th March 2017.

> Our client instructs that her mother previously made some emergency transfers but is not in a position to continue to provide financial support and that her transfers ceased on 4th March 2017. Our client instructs that her family are not in a position to support her financially and that she has exhausted all support available to her from her family. Our client instructs that a transfer was made by her daughter's father in the sum of 2,000 Malaysian Ring on 21st March 2017 to cover the cost of the passport application and all of these funds have now been expended."

21. According to the first named applicant, between 13th and 18th April, 2017, their accommodation was funded by Focus Ireland. She avers that their accommodation on the night of 18th April, 2017 was funded by passers-by whom the applicants encountered while making their way to Pearse Street Garda Station.

22. On 20th April, 2017, the applicants' solicitor wrote again to the respondent advising that the applicants remain homeless and without any emergency accommodation. The manner in which the applicants had been accommodated in the days preceding the letter was outlined to the respondent.

23. The response on 21st April, 2017, was that the respondent's position remained unchanged from what had been outlined in the email of 11th April, 2017.

24. On the nights 21st to 23rd April, 2017, Focus Ireland again provided accommodation for the applicants.

25. By letter dated 24th April, 2017, the respondent was apprised of the applicants' continuing difficult situation and that as of that date, the first named applicant had €3 in cash remaining from the exceptional needs payment of €100 which she had received two weeks earlier from the Department of Social Protection. The respondent was advised that the first named applicant's bank balance remains at 5.73 Malaysian Ring. The respondent was also advised that the first named applicant had applied for and was refused an exceptional needs payment by the Department of Social Protection on the previous Friday. The applicants' solicitor enclosed a letter from the Department of Social Protection dated 24th April, 2017 which advised that save for the once-off emergency payment already made, the Department could not offer any further help with the situation. The respondent was also apprised of a letter which had been received from Focus Ireland on 24th April, 2017, to the effect that while that body had made the decision to pay for the applicants accommodation, "recognising the inappropriateness of the alternatives", that was "an exceptional circumstance and something that Focus Ireland [were] not funded for and [did] not have the means to continue".

26. Further to the first named applicant application for social housing, she attended a meeting with the respondent in this regard on 27th April, 2017. The first named applicant avers that at that meeting she was advised that unless she had proof of residency status in Ireland she would not be included on the social housing list.

27. At paras. 33 to 34 of her grounding affidavit, the first named applicant concludes, as follows:

> "I am now in a desperate situation. I have no funds available to me and no place to sleep for myself or my daughter. My own mental health has been significantly affected and I have been prescribed anti-depressants and anti-anxiety medication. My daughter Aishling, who is only fourteen years of age, has been suffering from panic attacks and has to attend at youth mental health services in relation to these. We have no family or friends to support us, financially or otherwise, and are extremely vulnerable. Focus Ireland are no longer in a position to fund accommodation for us and so we have no where to go.
>
> My daughter and I are on the point of becoming completely destitute without access to any accommodation of any source or funds to support ourselves… Even if I wished to return to Malaysia with my daughter, which I do not, I have no funds with which to do so and no means of accessing any. When Focus Ireland are no longer in a position to provide accommodation, which I expect to occur within days, we will be forced to sleep rough and will have no means of supporting ourselves".

28. In her supplemental affidavit sworn 8th May, 2017, Ms Keating exhibits two reports from the applicants' General Practitioner which outline their respective mental health difficulties.

The respondent's response on affidavit

29. In response to the application for interlocutory relief, three affidavits have been sworn on behalf of the respondent.

30. In her affidavit sworn 15th May, 2017, Ms Roche, describes her meeting with the first named applicant on 4th April, 2017 as one where the first named applicant had described her travels around Ireland, her ultimate relocation to a town in Co. Wicklow, her attempts to secure private rented accommodation and her decision to overnight in her car while she waited to be contacted about property which she hoped to rent. Ms Roche avers that the first named applicants position was that after her sojourn in Bray Women's Refuge to which she had been directed by the Gardai, she had reverted to staying in hostel accommodation but had become unhappy with that arrangement when it became too expensive after "prices went up when football matches started". According to Ms. Roche, the first named applicant advised that she was not looking for assistance "but just education for her child" and that with the assistance of Bray Women's Refuge and Crosscare she had started the ball rolling in terms of applying for a PPS number and making a passport application for the second named applicant. Ms Roche further avers:

> "During that meeting, I made several inquiries about her access to resources as it was evident that she had been paying for bed and breakfast accommodation for more than six months. The First Named Applicant informed me that she had independent financial means and that she had been supporting herself and her daughter financially since they had come to Ireland. She stated that if the Gardaí had not taken them to Bray Womens Refuge she would not have sought any help and that she had contacted [a] prospective landlord, the owner of [a] flat behind Main Street Arklow, to see if he had accommodation she could avail of, but was told that he was unavailable as he was having eye surgery.
>
> The First Named Applicant stated that her family in Malaysia owned their own business and were continuing to provide her with financial support. She also mentioned that her brother had a bed and breakfast established in Bali. The Applicant did not say that this business was no longer trading. She mentioned that she had majored in business and psychology in an Australian college as well as doing English as a second language. She stated that she also **has** access to Employees Fund Money which has in the region of €40,000…[W]hen I asked her specifically whether she could access the fund she stated that she has current access to the fund which could be used for education and housing. I recall her commenting when we spoke about the fund about the poor rate of exchange between the Euro and the Malaysian currency. We discussed the cost of cheaper bed and breakfast accommodation in Wicklow, *which might better suit her need*. I mentioned to her that accommodation for a week in the Beehive costs €80. Her daughter had transferred to [a school] in Bray. I also researched

and furnished her with relevant contact details for accommodation providers … that might better meet her budget and access to her daughter's school.

During the meeting the First named Applicant confirmed that she resided with her mother [at a named address] before coming to Ireland and that her mother had bought a smaller house of approximately 4,000 square feet which was being renovated and that when those renovations were completed it would have five bedrooms. She confirmed that she had not made any accommodation arrangements prior to coming to Ireland."

31. In his affidavit sworn 15th May, 2017, Mr Joseph Lane, Director of Housing and Corporate Estate with the respondent, avers *inter alia* as follows:

"5. I say and believe from the information available to me that [the] First –

named Applicant has had no legal entitlement to reside in Ireland since in or about the 24th September 2016 having overstayed her visa … What is clear [from information provided by Focus Ireland to the respondent] is that the First named Applicant is and was fully aware prior to making this judicial review application that she is unlawfully in the State and that she does not currently have permission to reside in the State and that she has not disclosed or exhibited any communications she may have had with or from INIS [Irish Naturalisation and Immigration Service], the Department of Justice and Equality and the Garda National Immigration Bureau since coming to Ireland in her grounding affidavit".

32. Mr. Lane goes on to aver that there will be a dispute as to the facts set out by the first named applicant in her affidavit as to the places where she has resided since arriving in Ireland and that her connections with the respondent's administrative area were "tenuous". He further avers that the applicants' current circumstances appear to have arisen by reason of the first named applicant's decision to move herself and the second named applicant from Malaysia without proper planning; the applicants having over stayed their tourist visa in circumstances where the second named applicant's paternal grandparents were not willing to offer the applicants any form of support and where the first named applicant has no family or friends in Ireland to offer support or accommodation. It is further averred that she had insufficient funds with her in Ireland to obtain accommodation or support herself and the second named applicant on a long term basis. It is also contended that the first named applicant appears to have significant supports in Malaysia, including accommodation and access to €40,000.

33. Mr Lane further avers:

"10. In relation to the reliefs sought in the [interlocutory application] the Respondent as Housing Authority for the County of Wicklow has had vested in it particular functions and duties and discretion in relation to the assessment of need and allocation of resources between the completing demands present for housing within the County of Wicklow. I say that the Council has limited resources available to it for the provision of assistance or accommodation to homeless persons. I say further that there are already significant demands on the resources available to the Council to provide housing assistance to people requiring same. As a housing authority, the Respondent has to make an overall assessment as to need in order to determine how best it can deploy those limited resources to persons presenting as homeless. The Respondent, having fully and properly considered the circumstances of the Applicants herein was not satisfied that the First Named Applicant did not have the financial means to provide for the accommodation for herself and the Second- Named Applicant and, furthermore, was not satisfied that there is no accommodation available which the Applicants can reasonably occupy.

…

12. I say that the First Named Applicant was interviewed by officials within the Housing Department of Wicklow County Council … in relation to her application for Social Housing Support on or about the 27th day of April 2017…

I say that … the First Named Applicant has confirmed her intention to return to Malaysia in July, and that her mother lives alone and confirmed that she has access to the fund of €40,000 which is a retirement fund but which she can get access to for housing assistance and education. …

13. I further say that I have carried out a search on Google Maps of the address for the applicant [in Malaysia] given on her bank statement … the Google Maps street view … appears to show that the address in question is within a gated and affluent community... I further say that the bank statement exhibited by the Applicant shows, in addition to the transfer of 2000 ringgit referred to by the applicant from the father of the Second Named Applicant further transfers into the account since the 15th January of 5,000, 1,900, 1,700 and 100, totalling 8,700 Ringgit … up to the end of March …which appears to have a value, based on the Applicants affidavit … of €1,831.35 and the sources of which have not been disclosed by the First Named Applicant herein. The First Named Applicant has furthermore not explained from what sources she believed she would be able to save money for private rented accommodation as referred to in paragraph 11 of her affidavit.

14. In the circumstances aforesaid it is the opinion of Wicklow County Council, as housing authority, that the Applicants herein are not homeless.

…

20. I say that it is the intention of Wicklow County Council to fully contest the application for Judicial Review herein and I further say and believe that the First Named Applicant, in making the *ex parte* application for Judicial Review has been economical with the truth and has failed to disclose to this Honourable Court the full circumstances that pertain and which led to the decision of Wicklow County Council that she and the second named applicant seek to judicially review. I say that, in circumstances where the Applicants are seeking a mandatory injunction herein that the Council contends that it has a very strong defence to the application herein and that the balance of convenience is against the granting of the reliefs sought herein given the adverse effect that same would have on other households reliant upon the Council herein who require housing services from the Respondent and who have genuine needs which are of more pressing importance than those of the Applicants herein."

34. In his affidavit sworn 16th May, 2017, Mr Damien Marah, Clerical Officer in the Housing and Corporate Estate Section of the respondent, who, together with another colleague, Ms Culkin Grant, carried out the interview on 27th April, 2017, with the first named applicant in respect of her application for social housing, avers that at no time during that meeting did the first named applicant request financial assistance. According to Mr Marah, during the meeting the first named applicant made it clear that she had financial

resources available to her through the fund of €40,000 which was identified as a retirement fund but from which she had indicated that she was in a position to draw funds if required for housing assistance and/or education. Mr Marah goes on to aver:

> "She also indicated that she was getting between €300 and €400 per month from her family in Malaysia. The First Named Applicant informed us of her intention to return to Malaysia in July 2017 for the identified purpose of assisting her mother in moving into a new house and for a holiday (she identified the house as having 3 bedrooms though her affidavit refers to it as having five bedrooms) and indicated that no other person lives with her mother. The First Named Applicant did not indicate she would have any difficultly in purchasing tickets for her travel to Malaysia. I assumed from her that the Second Named Applicant would also, be probably travelling with her to Malaysia."

The relevant statutory provisions

35. Section 2 of the 1988 Act provides:

> "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."

36. Section 10 (1) makes the following provision:

> "10.—(1) A housing authority may, subject to such regulations as may be made by the Minister under this section…
>
> (b) provide a homeless person with such assistance, including financial assistance, as the authority consider appropriate, or
>
> (c) rent accommodation, arrange lodgings or contribute to the cost of such accommodation or lodgings for a homeless person."

Interlocutory applications in judicial review proceedings

37. Order 84, r. 20 (8) (a) and (b) of the Rules of the Superior Courts (RSC) outlines the Court's discretionary powers to grant interim relief or the staying of the proceedings, order or decision to which the application for judicial review relates:

> "(8) Where leave to apply for judicial review is granted then the court, should it consider it just and convenient to do so, may, on such terms as it thinks fit-
>
> (a) grant such interim relief as could be granted in an action begun by plenary summons,
>
> (b) where the relief sought is an order of *certiorari* or prohibition, make an order staying the proceedings, order, or decision to which the application relates until the determination of the application for judicial review or until the Court otherwise orders."

The relevant test

38. It is agreed by counsel that the seminal judgment of the Supreme Court in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152 outlines the relevant applicable legal test to be applied by the Court in interlocutory applications in judicial review proceedings. In *Okunade* it was observed that the underlying principle to be applied when considering an application for interlocutory relief was that the court should put in place a regime that minimises the overall risk of injustice, subject to the applicant establishing an arguable case.

39. At para. 104 of his judgment, Clarke J. set out the test in the following terms:

> *"[104] As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations:-*
>
> *(a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;*
>
> *(b) the court should consider where the greatest risk of injustice would lie. But in doing so the court should:-*
>
> *(i) give all appropriate weight to the orderly implementation of measures which are prima facie valid;*
>
> *(ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,*
>
> *(iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;*
>
> *but also,*
>
> *(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.*
>
> *(c) in addition the court should, in those limited cases where it may be relevant, have regard to whether damages*

are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,

(d) in addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."

The applicants' submissions

40. Counsel for the applicants submits that the first part of the test has been established as leave has been granted to the applicants. The applicants have been unlawfully refused homeless assistance by the respondent. It is submitted that the respondent is obliged to exercise its powers under s. 10 (1) of the 1988 Act in a rational manner, which was not the case here. In this regard, counsel cites Flood J. *in County Meath Vocational Educational Committee v. Joyce* [1997] 3 I.R. 402, at pg. 413:

> *"In my opinion the County Council, as housing authority, has a duty to perform its functions under the Housing Acts in a rational and reasonable manner and to provide accommodation for persons defined as homeless in the Act of 1988 which, in my opinion, undoubtedly includes the travellers on this site."*

41. The factual matrixes as presented by the applicants was such that the respondent could not rationally or reasonably conclude that they were not in need of emergency accommodation or financial assistance for such accommodation. Furthermore, at the substantive hearing it will be contended that pursuant to Article 42A of the Constitution, the respondent has a duty to ensure that the second named applicant should not be homeless or obliged to sleep in Garda stations.

42. Reliance is also placed on the decision of the House of Lords in *R.(Limbuela) v. Secretary of State for the Home Department* [2006] 1 AC 396. In that case, financial support had been withdrawn from failed asylum seekers in the UK. This was in circumstances where they were prohibited from obtaining employment which resulted in their having to resort to charity. It was held that their circumstances were such that Art. 3 ECHR was engaged. In the course of her judgment, Baroness Hale stated:

> *"It might be possible to endure rooflessless for some time without degradation if one had enough to eat and somewhere to wash oneself and one's clothing. It might be possible to endure cashlessness for some time if one had a roof and basic meals and hygiene facilities provided. But to have to endure the indefinite prospect of both, unless one is in a place where it is both possible and legal to live off the land, is in today's society both inhuman and degrading. We have to judge matters by the standards of our own society in the modern world, not by the standards of a third world society or a bygone age. If a woman of Mr Adam's age had been expected to live indefinitely in a London park, without access to the basic sanitary products which any woman of that age needs and exposed to the risks which any defenceless woman is exposed on the streets at night, would we have been in any doubt that her suffering would very soon reach the minimum degree of severity under article 3. I think not."* (at para.78)

43. Whilst the respondent maintains that the first named applicant has access to her €40,000 pension fund in Malaysia they do not appear to dispute that she does not have access to it in this State or that the applicants have had to seek assistance from Focus Ireland. Nor is it disputed that she is not in receipt of social welfare payments. While there is a factual dispute as to what the first named applicant apprised the respondent on 4th April, 2017, her evidence that she cannot access her pension fund is borne out by the fact that she has had to seek assistance from Focus Ireland and resort to sleeping in Pearse Street Garda station when such assistance is not available.

44. Given what appears to be accepted by the respondent on affidavit, the applicants' circumstances fall completely within the scenario described by Baroness Hale in *R. (Limbuela).* Furthermore, the plight of the second named applicant should be taken as comparable to the circumstances which arose in *O' Donnell v. South Dublin County Council 2015* [IESC] 28, which led MacMenamin J. to conclude that that the local authority in that case had a duty to interpret and apply "may" as it arises in s.10(1) of the 1988 Act as an absolute obligation to provide for the accommodation needs of a particular infant in that case. As regards this submission, the Court notes that in O'Donnell, the learned judge's *dictum* was in the context where there was no issue but that the infant applicant's circumstances satisfied the criteria set out in s.2 and s.9 of the 1988 Act. I also regard it as noteworthy that the reliefs granted in O'Donnell were declaratory in nature. It is further submitted by counsel for the applicants that the respondent has no role in immigration matters and that the provisions of s. 10 (1) of the 1988 Act do not impose an obligation on the applicants to have any particular status from the point of view of immigration in order to avail of emergency assistance. This is particularly in circumstances where the second named applicant, as a child of an Irish citizen, is entitled to citizenship and where, following upon her obtaining a passport, the first named applicant will be in a position to regularise her own status in the State.

45. Although there is essentially a factual dispute between the parties as to the applicant's ability to access her pension fund and while it is alleged that the first named applicant has been economical with the truth (which allegations will be refuted at the hearing of the substantive proceedings), the question for the Court in the context of the interlocutory application has to be determined by reference to the test in Okunade. It is submitted that the Court should give the first named applicant the benefit of the doubt vis-à-vis any factual dispute. Counsel submits that by reason of all of the foregoing, the applicants have established an arguable case to be tried.

46. In response to the Mr Marah's evidence to the effect that the first named applicant advised him on 27th April, 2017, that she intended to return to Malaysia in July, 2017 for a short holiday and to assist her mother with her house move, that, counsel says, will only occur if the first named applicant can secure the necessary funds to do so. In any event, it is submitted that it is not her intention to return to live in Malaysia permanently as she intends to seek employment here in circumstances where her child is entitled to citizenship and pursuing her education in the State.

On the question of where the balance of justice lies, it is submitted that the applicants' circumstances are such that the greatest risk of injustice lies in their not being granted interlocutory relief in this case.

The respondent's submissions

47. It is contended, in the first instance, that s. 10 of the 1988 Act empowers a housing authority to provide a homeless person with assistance if it determines that such a person is homeless for the purposes of the Act. The applicants do not meet the criteria under s. 10 because the respondent has reasonably determined that they do not qualify as homeless for the purposes of either of the tests in s. 2 of the 1988 Act. Counsel submits that central to the within application is the definition of homelessness as provided for in s. 2. The question of whether the applicants are homeless is a matter of the opinion of the respondent, as opposed to any objective test.

48. It is submitted that the fact that the first named applicant does not have recourse to her pension funds in this jurisdiction is irrelevant for the purposes of the respondent determining whether she has resources available to her. Were the position otherwise, there would be nothing to prevent applicants for emergency assistance from putting their finances off shore and then declaring that they are without funds in this jurisdiction. Counsel for the applicants has not put forward any authority which supports the proposition that the resources to be considered for the purpose of deeming someone homeless are only those which are accessible within the State. Furthermore, it was relevant for the respondent in assessing the question of homelessness to take account of the fact that the applicants are Malaysians citizens and are domiciled in Malaysia.

49. It is also submitted that the statements which the first named applicant made in the course of two meetings (which were minuted) with the respondent, namely that she had access to funds in Malaysia are entirely relevant in the context of her now testimony that she does not have access to such funds.

50. The averments which the first named applicant now makes in her grounding affidavit namely that she is without access to funds, without family and vulnerable, are contradicted by the respondent's affidavit evidence of what she stated in the course of her interviews on 4th April, 2017 and 27th April, 2017. Specifically, her averment that she has no access to resources and is without family or friends is contradicted by the contents of her bank statement, which she exhibits in her grounding affidavit (and which was furnished previously to the respondent). As deposed to in Mr Lane's affidavit, between January, 2017 and 31st March, 2017, the first named applicant had recourse to 8,700 Ringgits by way of transfers to her account. Moreover, she has not advised the Court of the status of her bank account as of the date of the within application.

51. The respondent reasonably concluded that the first named applicant was not homeless and communicated that decision to her orally and in writing. While the applicants' solicitor advised on 24th April, 2017 that the first named applicant instructed that she had access to portion of the funds in Malaysia only for education or housing purposes, it remains the case that she has not denied by way of replying affidavit what Ms Roche and Mr Marah have deposed to on affidavit as to what was said to them over the course of two meetings. In those circumstances, it cannot be said, applying the test in *O'Keeffe v. An Bord Pleanala* {1993] 1 I.R. 39, that the respondent's decision was so unreasonable as to be irrational.

52. It is thus submitted that the applicants cannot establish on the evidence that they have a reasonable case to be determined, much less one of sufficient strength to warrant a mandatory injunction of the nature now being sought. Given the nature of the interlocutory relief sought, the applicants have an even higher threshold to establish than that set out in *Okunade*. In this regard, reliance is placed on *Allied Irish Banks Plc & Ors. v. Diamond & Ors*. [2012] 3 I.R. 549 and *O'Brien v. Dromoland Castle Owners Association Ins & Ors* [2012] IEHC 407.

53. It is the respondent's contention that the principles set out in these cases apply to the present application. This is so given that the Court is being asked to direct the respondent's housing division, an arm of local government which pursuant to statute has been given a discretion to act as a housing authority, to expend its resources in a particular manner, at the expense of the respondent's other priorities, as deposed to by Mr Lane. It is submitted that in such circumstances it would not be appropriate to for the Court to interfere with a discretionary power which is vested by statute in the respondent.

54. The present case is entirely distinguishable from the situation which pertained in *County Meath Vocational Education Committee v. Joyce.* What was under consideration in that case was a mandatory requirement that the authority in question "make a scheme [for homeless travellers] determining the order of priority to be accorded in the letting of dwellings".

55. It is submitted that s. 10(1) of the 1988 Act empowers the respondent where in its opinion a person is homeless to determine what relief to afford to such persons. However, the section does not impose any obligation on the respondent to do anything in particular.

56. Furthermore, the first named applicant avers that she has no means by which to return to Malaysia, yet on 27th April, 2017, she is recorded as stating that she intends to return to Malaysia for a holiday and to assist her mother. While the applicants' counsel is now instructed that the trip to Malaysia is dependent on the first named applicant securing funding, in the course of the referred-to interview there was no indication to that effect.

57. What is being sought in the within application is to convert a discretion which is vested in the respondent as an expert housing body into a mandatory injunction, without any consideration of the impact on other homeless persons or on the allocation of the respondent's resources. This is in circumstances where the respondent was not satisfied that the first named applicant did not have the financial means to provide accommodation for herself and her daughter and where the respondent was not satisfied that there was no accommodation available to the applicants which they could reasonably occupy.

58. It is also the case that the first named applicant has not disputed the respondent's opinion that the applicants have accommodation available to them in Malaysia with the first named applicant's mother. Nothing in s. 2 of 1988 Act limits what can be determined by the respondent as accommodation which is reasonably available to an applicant, particularly in circumstances where the applicants lived there until June, 2016.

59. While the applicant's solicitor's letter of 24th April, 2017 and the applicant's affidavit take issue with the respondent's conclusion that the first named applicant had access in Malaysia to her €40,000 pension fund, it remains the case that for the purposes of its decision of 4th April, 2017, the evidence that was before the respondent was that the applicant had access to such funds and that evidence grounded the decision that the applicants were not homeless.

60. While the applicants call in aid Article 42A of the Constitution, its provisions do not impose on the respondent an obligation to construe its powers under s. 10 of 1988 Act as mandatory. Moreover, insofar as the applicants might suggest that the 1988 Act is unconstitutional, that argument cannot be maintained in the within proceedings.

Considerations

61. What the Court is concerned with here is the application for interlocutory relief. The application is grounded on affidavit evidence. There is substantial conflict between the first named applicant and the respondent as to what constituted the applicants' factual circumstances for the purpose of the respondent's decision, as communicated in writing on 11th April, 2017, that the first named applicant did not meet the criteria for eligibility for emergency homeless accommodation. The conflict is clear from the affidavit evidence on both sides. At the substantive stage, a resolution of this conflict in favour of one party or the other will inform (in part at least) the question of the adequacy of the respondent's assessment of the applicants' status pursuant to s. 2(2) of the 1988 Act, the reasonableness or rationality of the respondent's conclusions, and whether the finding that the applicants were ineligibility for financial or other assistance was based on a material error of fact, as contended by the applicants.

62. In *Okunade*, as part of his "*overall test*", Clarke J. envisages the Court placing "*all due weight"* on the strength or weakness of the applicants' case. This, as the learned Judge points out, is subject to the issues in the judicial review *"not involving detailed investigation of fact or complex questions of law"*. Given the factual conflict in this case, it would be unwise for this Court to trespass on a function more properly reserved to the trial judge in the judicial review application. Furthermore, it is not the Court's function at this stage to determine whether the respondent was reasonably entitled to rely on the factors cited in the decision, in concluding that the first named applicant did not meet the statutory threshold for homelessness.

63. There is however one aspect of the submissions concerning the evidential conflict upon which the Court feels it can comment. That is the respondent's contention that the applicant has not put in a replying affidavit taking issue with Ms Roche's and Mr Marah's averments that she advised them that she had access to her pension fund. I am satisfied at least that Ms Roche's contention was addressed by the first named applicant via her solicitor's letter of 12th April, 2017. In those circumstances it cannot be said that the first named applicant has acquiesced to what Ms Roche has deposed to. While no replying affidavit has been put in to counter Mr Marah's averment that the applicant has access to funds, the position is that there is sufficient evidence before the Court to show that the parties are in conflict as to what was said on 4th April, 2017, which was the meeting which led to the decision that the applicants were not homeless.

64. I turn now to the first question with which the Court is concerned in the present application. Do the applicants have an arguable case? The first thing to be observed is that the application for leave to seek judicial review of the respondent's refusal to provide emergency financial assistance to the applicants has been determined by Order of the High Court. *Prima facie*, it has been found arguable that persons such as the applicants without the means or resources to house themselves should be entitled to a finding that they are homeless for the purpose of the 1988 Act and in need of assistance. Therefore, the arguable case threshold has been met in respect of the challenge to the respondent's decision that the applicants are not homeless. It is not for this Court to second guess the determination that has been made in this regard.

65. The next question is where does the balance of justice lie, for or against the grant of an injunction?

66. Of course, central to this application is the nature of the interlocutory relief sought, namely a mandatory injunction directing the respondent to provide emergency funding for the applicants' immediate accommodation needs. Counsel for the respondent, in arguing that the applicants have not met the threshold for a mandatory injunction, referred, in particular, to the *dictum* of Clarke J. in *Allied Irish Banks Plc & Ors. v. Diamond & Ors.* [2012] 3 I.R. 549:

> *"I have already noted that the issue which arises as to whether, given that what is sought in these proceedings is a springboard injunction, there may be a case to be made that the court requires a higher level of assurance that the Plaintiff will succeed by reason of the fact that the granting of an interlocutory injunction in favour of AIB might well amount to a resolution of all of the issues (with the exception of damages) in this case in AIB's favour. As noted earlier, there is an argument to be made to the effect that the court should require a higher level of likelihood that the proceedings will succeed in those circumstances. I have come to the view that there is an obligation on a plaintiff, seeking to obtain an interlocutory springboard injunction, to satisfy the court of a strong arguable case for those reasons."*

67. Counsel for the respondent also cited *O'Brien v. Dromoland Castle Owners Association Ins & Ors* [2012] IEHC 407. In that case, O'Keeffe J. addressed the hurdle for a mandatory interlocutory relief:

> *"36. In relation to the mandatory nature of the primary interlocutory relief which is sought, namely the return of the paintings, the court accepts the general proposition set out in Kirwan Law and Practice of Injunctions, p. 210- 214, that it is generally accepted that is significantly harder to secure a mandatory injunction at an interlocutory stage than a probative (sic)one. The court accepts what was stated by Fennelly J. in Lingam v. Health Service Executive [2005] IESC 89 at 140, who stated in applying for an interlocutory injunction which was in effect mandatory:-*
>
> > *'In such a case it is necessary for the applicant to show at least he has a strong case that he is likely to succeed at the hearing of the action.'*
>
> *37. The court also accepts the principles set out by Clarke J. in AIB v. Diamond, 14th October, 2011, where he said cases involving mandatory injunction require a higher level of likelihood that the plaintiff has a good case, before granting an interlocutory injunction."*

68. In *Maha Lingam*, Fennelly J. also opined that "[i]*t is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory."*

69. In *Okunade*, Clarke J. considered whether in effect a court would have to go on a fact- finding mission to determine whether the higher threshold had been reached. He stated, at para. 80:

> *"In passing it might be noted that it could be said that there is something of a tension between the practical requirements which suggests that the court should not engage in a detailed analysis of the facts (or indeed of complex legal questions) at an interlocutory stage, on the one hand, and the requirement, in categories of cases such as those referred to in Maha Lingam or Diamond, that a higher standard than "fair issue to be tried" be established. Of course, in the majority of cases the straightforward "fair issue to be tried" threshold is all that requires to be met. A determination on that issue does not require a detailed factual or legal analysis. However, even in those cases where a higher threshold may need to be met that requirement does not involve the court in a detailed analysis of the facts or complex questions of law. Rather it obliges the plaintiff to put forward, in a straightforward way, a case which meets the higher threshold. The practical difficulties identified in Diamond would only arise if the court were required to put into the balance a nuanced estimate of the strength of each of the parties' cases."*

70. Clarke J. also opined that the detailed application of the general principles as enunciated in *Campus Oil v. Minister for Industry (No. 2)* [1983] may have to be applied differently in judicial review cases. Accordingly, it seems to me that the mandatory nature of the order sought by the applicants ought to be a consideration to which the Court must give weight in the context of "*the overall test*" for the grant of interlocutory relief.

71. In assessing how best to minimise the risk of injustice in the context of an interlocutory injunction pending trial, the Court is obliged to consider the adequacy of damages as an alternative to interlocutory relief. However, as Clarke J. states in *Okunade*, "*the*

question of the adequacy or otherwise of damages is unlikely to be a significant feature in reaching an assessment of how best to minimise the risk of injustice in the context of an interlocutory application pending trial of judicial review proceedings." I am satisfied that in the present case, damages would not be an adequate remedy were the applicants to succeed in their judicial review. As observed in Okunade, in the vast majority of cases where a decision is quashed on judicial review more often than not that is the extent of the remedy afforded a successful applicant. Moreover, the harm said by the applicants to accrue to them is said to be immediate.

72. The question also arises as to whether the respondent could be compensated by an undertaking as to damages if an injunction is granted.

73. In response to the respondent's argument that the first named applicant has not given an undertaking as to damages, her counsel advised the Court that she was now be prepared to do so, if it was of value to the Court and to the respondent, and if it was the respondent's contention (as it appears to be) that the first named applicant has access to her pension fund money. Counsel submitted that if the respondent's case was that she has access to such funds, then an undertaking as to damages was sufficient for the respondent in the context of the present application. It was emphasised however that this was in circumstances where the first named applicant has testified that she does not have access to the funds in question. Counsel also argued that it cannot be the case that the first named applicant would be denied access to interlocutory relief solely because she is impecunious.

74. The respondent makes the case that the first named applicant's offer, via her counsel, in the course of the interlocutory hearing, to give an undertaking as to damages was an entirely contradictory position in circumstances where the first named applicant has testified on affidavit that she has no funds. It is contended that her offer begs the question as to where she can obtain such funds, and, if she can obtain such funds, how can this be reconciled with her sworn testimony that she has no access to financial resources (albeit that it is the respondent's position on affidavit that the first named applicant's averment in this regard is contradicted by the transfers to her bank account, as evident from her bank statement).

75. I am inclined to agree with the respondent's argument that the applicant's position is contradictory. But, the Court must bear in mind that, in part at least, the first named applicant's offer may have been prompted by an apprehension that if such an offer was not made, the Court might be unwilling to entertain the interlocutory application. As to the proposed undertaking, in all the circumstances of this case, given the contradiction between the applicant's sworn testimony as to the state of her finances and the offer made on her behalf to the Court, I am not satisfied that any undertaking as to damages as might be given would be sufficient in this case, albeit that, rather unusually, the damages which might accrue to the respondent if the applicant were to be unsuccessful in the judicial review are probably capable of being calculated on a rational basis, given that what is being sought from the respondent in the injunction application is financial assistance. I would however emphasise that the frailty which attaches to the undertaking as to damages now on offer is not the decisive factor in this application.

76. I turn now to the question of the balance of justice. To determine this, the Court must assess the situation having regard to the factors set out by Clarke J. at para. 104 (b) of *Okunade*.

The first three of these requires the Court to:

> *"(i) give all appropriate weight to the orderly implementation of measures which are prima facie valid";*
>
> *(ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,*
>
> *(iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings"*

77. In arguing that the balance of justice lies against the granting of relief, counsel for the respondent emphasises that the Court has before it evidence of the respondent's orderly implementation of its housing responsibilities. This requires that the Court should be slow to interfere with the resources of the respondent. It is submitted the Court cannot mandate that funds would be siphoned off to the applicants, who are the subject of a decision by the respondent (the measure) that they are not homeless, a decision which, it is submitted, is *prima facie* valid.

78. It is contended on behalf of the applicants that the power expressly vested in the respondent to grant financial assistance pursuant to s. 10 (1) of the 1988 Act will not be threatened by the granting of financial assistance to the applicants. Counsel contends that the risk of injustice to the respondent is easy to quantify. If interlocutory relief is granted to the applicants until case finality, and were the respondent to be successful in the judicial review proceedings, then what would have occurred is that the respondent would have had to pay the costs of providing accommodation for the applicants from the date of the interlocutory order until the judicial review proceedings are concluded. It is submitted that there in nothing in the respondent's affidavit evidence to suggest that it would be impeded in carrying out its statutory functions if the order sought were granted: the risk of injustice for the respondent would only arise at the determination of the case, if the applicants were unsuccessful. Counsel also states that it is not the case that the applicants are seeking the expenditure of staff hours by the respondent or the setting up of a committee or the adoption of a particular policy. What is being sought is the payment of money to cover costs of accommodation for a discrete period.

79. Notwithstanding the applicants' submissions, I accept the respondent's contention that the orderly operation of the respondent's functions as a housing authority (including its remit in providing emergency financial funding) is a matter to which the Court must afford due weight. I also accept that there is a public interest in the orderly operation of the respondent's functions as a housing authority. Accordingly, I must have regard to Mr Lane's averment as to the respondent's limited resources for the provision of accommodation or resources to homeless persons and the significant competing demands on the resources available to the respondent. A factor which the Court must also take into account is that as per its legislative remit, the respondent is the body entrusted by the Oireachtas to perform the function of a housing authority, including the provision of emergency accommodation and/or financial assistance to secure it.

80. In *Ward v South Dublin County Council* [1996] 3 I.R. 195, Laffoy J. made the following observations in relation to the performance of functions under the Housing Acts:

> *"This Court will intervene and provide relief by way of mandatory injunction where inactivity on the part of a housing authority in relation to its obligations ... is such to constitute a breach of that housing authority's statutory duty.*

> *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."*

In *Ward*, an order was made directing the local authority to ascertain the requirements of the applicants, who were members of the travelling community, for accommodation and to assess their eligibility for accommodation. In the present case, the applicants' eligibility has been assessed, albeit adverse to them.

81. A factor in the present case also is that it is not about the prohibition of a measure or order of the respondent from being implemented; rather the issue is whether the Court should direct the provision by the respondent of financial assistance to the applicants in circumstances where at its height, their case for judicial review, if successful, will result not in a direction by the Court in the substantive proceedings to provide them with financial assistance, but rather in the quashing of the decision sought to be impugned, and perhaps the making of such declaratory orders as may be appropriate, and if it were warranted in the limited circumstances in which it might arise in judicial review, an award of damages. It seems to me that the Court must weigh this factor in circumstances where the specific relief sought by the applicants at the interlocutory stage requires the Court in effect to direct the respondent to allocate financial assistance to them, which is ordinarily within the discretionary remit of the respondent, subject of course to that discretion being lawfully exercised. This is a weighty factor which would favour the refusal of relief. Contrary to what the applicants contend, in my view, it is not simply a question of injustice accruing to the respondent where the judicial review is lost and where up to that point it had expended its resources, there is undoubtedly the public interest implications of the respondent being without those resources during the currency of any injunction in circumstances where those resources might have been used in assisting persons or families who are deemed by respondent to meet the criteria set out in s.2 of the 1988 Act .

82. Further, *T.D. v. Minister for Education* [2001] 4 I.R. 259 and *Sinnott v. Minister for Education* [2001] 2 I.R. 545 are authority for the proposition that the making of mandatory orders may involve a court carrying out and determining matters that are more properly the function of the Executive. In *T.D.*, Murray J stated;

> *"A mandatory order directing the executive to fulfil a legal obligation (without specifying the means or policy to be used in fulfilling the obligation) in lieu of a declaratory order as to the nature of its obligations could only be granted, if at all, in exceptional circumstances where an organ or agency of the State had disregarded its constitutional obligations in an exemplary fashion. In my view the phrase "clear disregard" can only be understood to mean a conscious and deliberate decision by the organ of state to act in breach of its constitutional obligation to other parties, accompanied by bad faith or recklessness. A court would also have to be satisfied that the absence of good faith or the reckless disregard of rights would impinge on the observance by the State party concerned of any declaratory order made by the court."*

83. In *AMcD v. Minister for Education* [2013] IEHC 175, an application was made for a mandatory interlocutory injunction directing the respondents to provide educational placements for the applicant. The applicant had been out of school since expulsion, albeit having received some home tuition. It was alleged that the lack of a school place was having a severe impact on her social skills and education. O'Malley J. held that the "exceptional" threshold was not met in that case. She stated:

> *"[i]t is not possible for me to find that the very high standard for a mandatory interlocutory injunction against these respondents has been met. The passages quoted above from Sinnott and T.D, while supporting a general proposition that in extreme cases such an order may be made, do not assist this applicant since her situation, bad though it undoubtedly is, is not in the class of case envisaged by the Supreme Court as within the definition of "extreme".. There is no element of bad faith, no matter how it might be described. This is not a situation where the rights of A have been consciously and deliberately disregarded or flouted. Notwithstanding the argument made in relation to the burden of proof at the hearing, nobody involved in her case thinks that she should receive only home tuition and efforts continue to be made to find a school. The case on her behalf is effectively made, without those elements, on the basis that she is entitled to a school place, she does not have one and this is having a harmful effect on her development. That does not suffice for an order of the type sought."*

84. However, mandatory interlocutory injunctions against public bodies directing the expenditure of money are not unheard of. In *Cronin v. The Minister for Education &Ors* [2004] IEHC 255, Laffoy J. was satisfied to grant a mandatory injunction directing the Minister to fund twenty nine hours per week tuition for the infant plaintiff, being satisfied that the balance of convenience favoured such an order where the infant's circumstances required it and his parents could not without serious hardship fund the tuition from their own resources. In that case, Laffoy J. was also satisfied that the Minister was adequately protected by an undertaking as to damages.

85. As provided by para. 104(b)(iv) of *Okunade*, as part of its consideration of the balance of justice, the Court must "*give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful".*

It seems to me that in the present case, this has to be read as what are the consequences for the applicants following the respondent's decision that they are not homeless, where that decision or "*measure*" may ultimately be found to be unlawful.

86. The applicants' case is that if they are refused interlocutory relief and if they are later to be successful in the judicial review proceedings, in the interim they will be left without funding and they will be homeless. Counsel submits that this is in circumstances where it is extremely unlikely that their judicial review will get a hearing before the end of July, 2017. It is argued that even if the earliest possible date is afforded them in October, 2017, the applicants' position in the meantime is that they cannot be assured of financial assistance from Focus Ireland (due to the financial constraints on that body). In those circumstances, the second named applicant, a fourteen year old school child, will at best have to rely on the charity of strangers for accommodation, and the applicants will face the prospect of sleeping rough between now and the conclusion of the judicial review proceedings. It is contended that the balance of justice lies in their favour where their circumstances are "exceptional" in that they do not have recourse to social welfare assistance and where the first named applicant has deposed on affidavit that she cannot access her €40,000 pension fund and has no family or friends to support her. Accordingly, while it is accepted that what is being sought by way of interlocutory order is a mandatory injunction, counsel argues that the injustice for the applicants if interlocutory relief is refused and they are ultimately successful in their challenge is considerable compared to that which might accrue to the respondent. It is thus contended that their circumstances warrant the granting of mandatory relief and that the applicants have met the test set out in *Okunade*. Citing Clarke J., counsel urges on the Court that "*there is a credible basis*" on which to find that if the requested relief is not granted the applicants will have to resort to sleeping on the street.

87. It is also submitted that if the applicants succeed in obtaining *certiorari* and or the declaratory orders sought, then it would be

unlikely that the respondent would so swiftly again refuse to afford emergency relief to them. It is further contended that the court should weigh, in particular, the consequences for the second named applicant if the interlocutory relief is not granted, in like manner as Clarke J. weighed the infant applicant's circumstances in *Okunade* (para. 115).

Decision

88. Having regard to the relevant legal principles and the weighing exercise upon which the Court was required to embark, it seems to me, having regard to the "*overall test*" for the relief which the applicants seek, that the applicants' circumstances, unfortunate as they are, must for the purposes of the present application for a mandatory injunction yield to the weightier factors which prevail on the side of the respondent. This is so in circumstances where *Okunade* states that the court must attach significant weight to allowing the system and processes by which the respondent reached its decision to operate, without undue interference from the Court. In the course of the hearing, counsel for the respondent made the case that the decision under challenge by way of judicial review is not a decision refusing financial assistance to the applicants but rather a decision which found that they were not homeless. Accordingly, it was contended that even if the applicants were to succeed in setting aside the respondent's determination that they are not homeless, it did not follow that they are entitled as of right to financial assistance under s. 10(1) of the 1988 Act, given that it remains within the discretion of the respondent (even following a finding of homelessness) whether or not to grant financial or other assistance. It is thus submitted on behalf of the respondent that the relief sought is without precedence and without a basis in law and that, accordingly, the applicants cannot be said to have established a basis for the grant of a mandatory interlocutory injunction.

89. While the respondent's argument is quite nuanced, I accept the argument that even if the applicants had in fact been deemed homeless by the respondent for the purpose of s. 2 of the 1988 Act, thereafter it is a matter for the respondent's discretion pursuant to s. 10(1) of the 1988 Act to decide the nature of any emergency assistance that would be provided. While it is difficult to conceive how emergency financial or other support such as that envisaged under s. 10(1) of the 1988 Act could be reasonably denied to the applicants if they had been deemed homeless, it remains the case that the decision to grant emergency assistance and the mode of such assistance is entirely a matter for the respondent under the 1988 Act, subject as I have already said to the exercise of that discretion being carried out in a lawful manner. What is effectively sought here is that respondent would expend its resources, *at the Court's direction*, to secure emergency accommodation for the applicants in circumstances where they have been deemed by the respondent not to be homeless and in circumstances where the respondent's orderly assessment process as to whether and in what manner (given the range of options set out in s.10(1)(b) and (c) of the 1988 Act) such emergency assistance should be given will have been bypassed by the Court's direction. That is a salient aspect of this case.

90. I also factor into account that irrespective of the question of its lawfulness or otherwise (yet to be determined), the respondent's decision, *prima facie*, does not appear to indicate a deliberate flouting or disregard of the applicants' constitutional or other rights or that there was bad faith or *mala fides* attached to it such as might have persuaded the Court that an interlocutory mandatory injunction was warranted.

91. That being said, I have enormous sympathy for the applicants' plight and the Court must have particular regard to the plight of the second named applicant, as a child. It is a matter of fact that the applicants have had to throw themselves upon the mercy of Focus Ireland and the Gardaí and indeed other organisations over the course of the last couple of months in order to find accommodation on a nightly basis. While the Court is constrained for the reasons I have outlined from imposing a temporary measure of the type sought by the applicants to cover the situation which is to prevail until the hearing of the action, I propose to direct a timeline for the delivery of a statement of opposition and legal submissions in the judicial review proceedings with a view to ensuring the earliest hearing possible of the judicial review proceedings. I see no reason why a hearing on the substantive application cannot take place in early course. Substantial affidavits have already been filed in the matter by the respondent. I will hear from counsel as to the timeline for the exchange of submissions. I am also directing that counsel should attend before my colleague Judge Noonan on 31st May, 2017, with a view to seeking as early a hearing date as possible before the end of July, 2017.