

THE HIGH COURT

JUDICIAL REVIEW

[2017 540 J.R.]

BETWEEN

KAREN MIDDLETON AND LUKE MIDDLETON (A MINOR) SUING BY HIS MOTHER AND NEXT FRIEND, KAREN MIDDLETON
APPLICANTS

AND

CARLOW COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 14th day of August, 2017.

Background

1. The first named applicant is unemployed and of no fixed abode. She is the mother of the second named applicant, who was born on 5th November, 2010. The second named applicant has sensory difficulties and behavioural and emotional issues. He has been referred into the children services, HSE South, Carlow and is currently undergoing assessment.

2. Until March, 2017, the applicants were living in Dublin with the first named applicant's partner. It was an abusive relationship and the first named applicant obtained a protection order from the District Court in June, 2017. The applicant returned to her native Carlow with the second named applicant on 22nd March, 2017.

3. Initially the applicants stayed with the first named applicant's sister and her family until 10th April, 2017, when she was asked to leave. The applicants then moved to her parents' house where they stayed until 26th April, 2017.

4. The first named applicant sought, but was refused, emergency accommodation on 26th April, 2017; however, on 28th April, 2017, the respondent provided the applicants with emergency accommodation for a week in a Carlow guesthouse. At the end of that week, on 4th May, 2017, the first named applicant was informed that they had to leave this accommodation immediately and were, again, refused further emergency accommodation.

5. Over this period of time the first named applicant had a difficult relationship with the respondent which apparently necessitated the involvement of An Garda Síochána on several occasions.

6. The first named applicant received some financial support from the Department of Social Protection to cover three nights on a bed and breakfast basis. However, on 8th May, 2017, the first named applicant was informed that no further funds would be provided so she and the second named applicant returned to the respondent and sat in in their offices. Following intervention by the gardaí she was arrested but released shortly thereafter. Members of the public paid for her accommodation on the night of 8th May, 2017.

7. The following day the first named applicant was in contact again with the respondent who gave bed and breakfast emergency accommodation in a Carlow guesthouse from 9th May to 12th June, 2017.

8. In that period there were a number of contacts between the first named applicant and the respondent. In particular, there was a meeting on 24th May, 2017, involving the first named applicant, a representative of the respondent's housing department, a representative of Focus Ireland and a further person who was present to support the first named applicant. In the course of this meeting a review was carried out of the first named applicant's housing history in relation to a number of properties which she had resided in and the reasons for her leaving such accommodation. In the course of the meeting the health and educational status of the second named respondent was reviewed in detail and the first named applicant submitted a report from the HSE. The first named applicant expressed concern regarding living with her family as her mother and father were unwell and did not want the applicants staying with them. As regards her siblings, the first named applicant stated that she did not speak with some of them and that they did not have accommodation that could facilitate her staying with them.

9. Arising out of that meeting the first named applicant was required to submit, by 1st June at the latest, a list of rented properties and landlord/agent names, any further reports regarding the second named applicant and a consent in writing to contact Focus Ireland and agencies on her behalf. As will be seen, this was an important meeting in the context of these proceedings.

10. The first named applicant did not provide the further list as requested but did provide a written consent to the respondent to contact Focus Ireland and letting agents on her behalf. The first named applicant did furnish a number of reports concerning the second named applicant. These reports consisted of, *inter alia*, medical and educational reports.

11. On 12th June, 2017, at the expiry of the bed and breakfast emergency accommodation the first named applicant attended at the respondent's offices but was denied entry. The first named applicant was informed that there was going to be no further emergency accommodation given. Arising from this, the first named applicant staged a sit-in with volunteer workers from the Carlow Housing Network. Again, there was intervention by the gardaí and the first named applicant was arrested, taken to a garda station, charged and released.

12. The first named applicant has stated that she has actively sought private accommodation for both her son and herself but to no avail. In her grounding affidavit she deposes that she is now homeless and has been residing in a tent outside the respondent's offices since 12th June, 2017. The second named applicant has not been residing with her but he has been staying, on a night to night basis, with distant friends and extended family members of the first named applicant.

Steps Taken Prior to Proceedings

13. The first named applicant has been on the Carlow "housing list" for approximately seven years. The relevant statutory provisions in respect of this list are set out in the Housing (Miscellaneous Provisions) Act 2009 ("the Act of 2009") and the various regulations made thereunder. The first named applicant's various requests for emergency accommodation were made pursuant to the Housing Act 1988 ("the Act of 1988"). I will deal in more detail with these statutory provisions in later paragraphs.

14. The first named applicant instructed her solicitor, Mercy Law Resource Centre, to act on her behalf. Her solicitor wrote a detailed letter to the respondent dated 21st June, 2017. The letter set out the background to the first named applicant's homelessness together with certain statutory provisions, in particular, s. 2 of the Act of 1988 which defines, for the purpose of the Act, the term "homeless". The letter further stated:-

"We therefore request that the decision to refuse this family emergency accommodation be reconsidered immediately and that the family be provided with accommodation (whether pursuant to s. 10 of the 1988 Act, by way of social housing support provided under the Housing Miscellaneous Provisions Act 2009 or by any other means) as a matter of utmost urgency. From the instructions taken to date, it appears that a refusal to consider this family's application for emergency accommodation is unlawful having regard to the statutory scheme, properly construed, and having regard to the Council's duties as a matter of administrative law, particularly in circumstances where the Council does not appear to have disputed that the family are homeless within the meaning of s. 2 of the 1988 Act."

15. In response, by letter dated 27th June, 2017, the respondent stated that the housing needs of the first named applicant had been the subject of assessment on a number of occasions and that her current housing status was the subject of a meeting on 24th May, 2017. A memo of this meeting was attached to the letter. The letter further stated:-

"Carlow County Council, in all cases is obliged to implement the terms of the social housing regulations and has deemed that Karen and her son could reasonably be expected to use alternative accommodation (attached) until such time as she can rent a property."

Attached to the letter was a list of addresses of accommodation in which members of the applicant's family were residing.

16. On 3rd July, 2017, the applicants obtained leave by way of an application for judicial review for:-

(i) An order of *certiorari* quashing the respondent's decision under the Social Housing Assessment Regulations 2011 (S.I. No. 84 of 2011) that the applicants could reasonably be expected to use alternative accommodation until such time as the first named applicant can rent property.

(ii) An order of *mandamus* directing the respondent to consider forthwith the applicants outstanding application for emergency homeless accommodation, whether pursuant to s. 10 of the 1988 Act, by way of social housing support provided under the Housing (Miscellaneous Provisions) Act 2009 or by any other means as made by letter of 21st June, 2017.

Relevant Statutory Provisions

17. Social Housing Assessment Regulations 2011 (S.I. No. 84 of 2011) ("the Regulations of 2011") were passed pursuant to ss. 3, 20 and 32 of the Act of 2009.

18. Regulation 3 provides:-

"'alternative accommodation' means, in respect of a household applying for social housing support, accommodation other than the accommodation currently occupied by the household and, in cases where one or more than one household member is currently living apart from the household, includes the accommodation currently occupied by such member of members"

19. Regulation 22 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.

(2) A household 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 –

(a) such accommodation is vacant, or

(b) if such accommodation is let, the tenancy may be terminated on the grounds specified in paragraphs 3 or 4 of the Table to section 34 of the Residential Tenancy Act 2004..."

20. Section 2 of the Act of 1988 provides:-

"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..."

21. Section 10 of the Act of 1988 provides:-

"(1) A housing authority may, subject to such regulations as may be made by the Minister under this section –

(a) make arrangements, including financial arrangements, with a body approved of by the Minister for the purposes of section 5 for the provision by that body of accommodation for a homeless person,

(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.

...

(10) A housing authority may, while making enquiries to enable them to determine if a person is homeless, exercise the powers provided for in subsection. (1)."

Submissions of the Applicant

22. The applicants submit that they meet the definition of being "homeless" as provided for in s. 2 of the Act of 1988 and thus are eligible for emergency accommodation pursuant to s. 10 of the said Act.

23. In attacking the decision of the respondent of 27th June, 2017, not to provide further emergency accommodation they argue that the respondent has "conflated" the provisions of the Regulations of 2011 and the Act of 1988 by adopting the definition of "alternative accommodation" as provided for in Regulation 3 the purposes of determining whether the applicants are "homeless" under s. 2 of the Act of 1988. They submit that the definition of "alternative accommodation" under the Regulations is the appropriate definition for determining whether a person is entitled to "social housing" under the Act of 2009 and not for emergency accommodation as provided for in the Act of 1988.

24. The applicants further rely upon the terms of a letter dated 28th April, 2017, written by a social worker on behalf of the respondent, which refers to the first named applicant as being "currently homeless". The applicants maintain that the terms of this letter are inconsistent with the decision of 27th June, 2017, and evidence that they meet the definition of being "homeless" as provided for in s. 2 of the Act of 1988.

25. The applicants submit that the respondent acted in breach of its duty to give reasons and/or in breach of constitutional justice for the decision contained in the letter of June 27th, 2017.

26. Finally, the applicants submit that the position taken by the respondent is in breach of their right to family life under Article 40.3 of the Constitution and their right to respect for family life under Article 8 of the European Convention of Human Rights.

Submissions of the Respondent

27. The respondent denied that it had "conflated" the provisions of the Regulations and the Act of 1988. In support of this, they referred to the wording of the letter containing its decision of 27th June, 2017. It points to the paragraph in the letter which states, *inter alia*, that "... and has deemed that Karen and her son could reasonably be expected to use alternative accommodation (attached) until such time as she can rent a property ..." this, it is maintained, is a clear reference to s. 2 of the Act of 1988.

28. Further, the respondent submits that the letter of 27th June, clearly distinguishes between an application for social housing under the Regulations and an application for emergency accommodation under the Act of 1988. Thus, the respondent maintains that there has been no "conflation".

29. The respondent maintains that the applicants' request for emergency accommodation was fully considered by the respondent as were the special needs required by the second named applicant. This it says, is evidenced by the contents of the memo of 24th May.

30. The respondent submits that the applicants cannot, as a matter of fact and law, rely on the terms of the letter written by its social worker dated 28th April, 2017.

31. In its submissions to the court, the respondent adverted to the limited resources available to it in dealing with applications both for emergency accommodation and social housing.

32. By way of legal submission, the respondent maintained that the jurisdiction of this Court to review, interfere with or substitute its own decision for that of the respondent is very limited. In this regard, the court was referred to a number of authorities which I refer to later.

Issues for the Court to Determine

33. Though issues concerning the Constitution and the European Convention of Human Rights were mentioned in the course of argument it seems to me that, for the purposes of determining this application, there were two issues which have to be addressed:-

(i) In reaching its decision of 27th June, 2017, did the respondent "conflate" the two statutory regimes referred to; and

(ii) Is there a basis for this Court to quash the said decision.

34. Dealing with the first issue, it is easy to see how the issue of a possible "conflation" arose. The letter from the applicant's solicitor of 21st June, requested the respondent to:-

"...insist that you immediately reconsider the decision to refuse emergency accommodation and immediately provide such accommodation to this family (whether pursuant to s. 10 of the 1988 Act, by way of social housing support provided under the Housing (Miscellaneous Provisions) Act 2009, by other means as a matter of the utmost urgency..."

35. In effect, the respondent was being asked to consider either emergency accommodation under the Act of 1988 or social housing under the Act of 2009.

36. The respondent's reply to this letter, 27th June, 2017, deals with both these requests:-

"Carlow County Council, in all cases is obliged to implement the terms of the Social Housing Regulations and has deemed that Karen and her son could reasonably be expected to use alternative accommodation (attached) until such time as she can rent a property."

37. Where the respondent uses the terms "alternative accommodation" in the above paragraph, I do not believe it is referring to the definition of "alternative accommodation" as provided for in the Regulations. Also, I accept the submissions of the respondent that the wording "reasonably be expected" is a reference to the definition of "homeless" as provided for by s. 2 of the Act of 1988; therefore, I do not accept that there was the "conflation" alleged by the applicants.

38. Turning then to the second issue as to whether there is a basis for the court to quash the respondent's decision to refuse emergency accommodation pursuant to the Act of 1988.

39. First, the wording of both s. 2 and s. 10 of the Act of 1988 is not mandatory in nature. Section 2(a), as set out above, expressly states "in the opinion of the authority" and s. 10, set out above, uses the word "may" in dealing with the provision of accommodation for homeless persons. It, therefore, follows that, in applying the provisions of the Act of 1988, the respondent has discretion.

40. In reviewing this discretion, the role of the court is limited. I refer to the leading decision of *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, where Finlay C.J., referring to the earlier Supreme Court decision in *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 states:-

"In dealing with the circumstances under which the Court could intervene to quash the decision of an administrative officer or tribunal on grounds of unreasonableness or irrationality, Henchy J. in that judgment set out a number of such circumstances in different terms.

They are:-

- '1. It is fundamentally at variance with reason and common sense.
2. It is indefensible for being in the teeth of plain reason and common sense.
3. Because the court is satisfied that the decision-maker has breached his obligation whereby he "must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision"."

41. In the context of decisions taken by housing authorities such as the respondent, this Court was referred to a number of authorities. *Ward v. South Dublin County Council* [1996] 3 I.R. 195, where Laffoy J. stated at 203:-

"It is not the function of this Court to direct a local authority as to how it should deploy its resources or as to the manner in which it should prioritise the performance of its various statutory functions. These are matters of policy which are outside the ambit of judicial review. Moreover, in relation to the function at issue here, the provision of accommodation in the form of halting sites for members of the travelling community to whom a housing authority owes a duty under s. 13, while there may be informed opinions as to how the function would be best performed, which differ from the approach being adopted by the housing authority, it is no function of this Court to adjudicate on the merits between the differing points of view."

42. I also refer to the recent decision of Baker J. in *Mulhare v. Cork County Council* [2017] IEHC 288, wherein she held:-

"40. The allocation of housing by a local authority, therefore, must be done in accordance with the scheme of priorities and based on a reasonable and reasoned consideration of an application. The allocation of housing is a matter within the competence and expertise of the housing authority and it is not the function of the court to direct how that policy is to be applied in any particular case.

41. It seems to me outside my competence, and not a matter for judicial review, to direct that the respondent would provide a house within the narrow geographical radius identified by the applicants as suitable for their needs, as to do so would be to engage in an assessment of the housing stock and of the needs of the applicants which are outside the power of a court.

42. For these reasons, I consider that the application for judicial review in the form of *mandamus* is not one that may properly be brought, is outside the competence of the court, and would be an impermissible interference by the court in the allocation of resources by a statutory body."

43. In the course of argument, other authorities were referred to but I feel that the foregoing authorities set out clearly the extent to which this Court could set aside, amend or substitute its own decision for that of the respondent as regards the provision of emergency accommodation for the applicants. It is clear that the jurisdiction of this Court is limited to reviewing as to whether there was a rational basis for the decision of the respondent in the context of the provisions of the Act of 1988. The contents of the memo of 24th May, 2017, are consistent with an inquiry being carried out as to whether or not the applicants were "homeless" for the purposes of s. 2 of the Act of 1988. Present at this meeting was the first named applicant, a representative from Focus Ireland, a person who accompanied the first named applicant and an officer of the respondent. It was stated that the purpose of the meeting was to discuss the first named applicant's housing needs and inform her of options and processes. There was a review of the first named applicant's housing history in relation to a number of properties and the reasons why she left same. The meeting was informed as to the situation of the second named respondent, the assessments that had been done and his current position. The first named applicant submitted a report from the HSE in this regard and indicated she had other reports which she would furnish.

44. The applicant expressed concern regarding staying with her family as her mother and father were unwell and did not want her staying. In relation to other siblings, the first named applicant stated that she did not speak to some of them and that they did not have accommodation that could facilitate her staying.

45. The first named applicant was advised that, when the bed and breakfast accommodation expired, she would have to depend on family/friends if her housing needs had not been satisfied. Further, an assurance was given that the rent of the family property would not be affected by her staying with them and the respondent would liaise with her regarding securing accommodation and she should remain looking for private accommodation. Finally, at this meeting, the first named applicant was requested to submit by Thursday, 1st June, a list of properties she had rented and the landlord/agent's name, any further reports regarding the second named applicant and consent in writing to contact Focus and agencies on her behalf.

46. In the course of the hearing, the court was informed that the first named applicant would have available to her a "housing assistance payment" whereby the first named applicant would be paid a sum of money each month to go to rent.

47. As was stated above, a copy of the memo of 24th May, was attached to the letter of 27th June, as was a list of possible accommodation. As matters turned out, the first named applicant did not provide a further list of rental properties as requested.

48. Given the detailed meeting of 24th May, I do not think the decision to refuse further emergency accommodation could be said to

be "fundamentally at variance with reason and commonsense" (as per *O'Keeffe v. An Bord Pleanála*). The respondent was applying the definition of "homeless" as per s. 2 of the Act of 1988 and was also, as was deposed to in the affidavit of Mr. Seamus O'Connor, Director of Services of the respondent, taking the decision in the context of the resources available and other competing demands on those resources. In his affidavit Mr. O'Connor deposed that there are over 150 other persons in the functional area of the respondent who are in similar circumstances to the applicant and the respondent cannot afford any priority to the applicants.

49. The applicants also relied upon the term of a letter dated 28th April, 2017, written by a social worker of the respondent wherein the first named applicant was described as being "currently homeless". I do not believe that this letter can be taken as indicating that the respondent had decided that the first named applicant met the definition of "homeless" for the purposes of s. 2 of the Act. It is important to note that this letter predated the meeting of 24th May, wherein the situation of both applicants was discussed in detail with the respondent. Also, as a matter of law, such a letter, by a servant or agent of the respondent, would not raise an estoppel preventing the respondent from finding that the first named applicant was not "homeless" as the per definition in the Act of 1988. (See Henchy J. in *In re Green Dale Building Co.* [1977] 1 I.R. 256).

50. As to the submission by the applicants that there was a failure to give reasons for its decision, I do not believe that this is supported by the documentation. The letter of 27th June, clearly states that the applicants "could reasonably be expected to use alternative accommodation (attached) until such time as she can rent a property". This conclusion was reached following the meeting of 24th May, and the memo of that meeting clearly sets out the basis for this notwithstanding the concerns which the first named applicant had regarding staying with family and siblings. Further, it was noted that the respondent would liaise the first named applicant regarding her securing accommodation and she should remain looking for private rentals. Therefore, I hold that the respondent did provide adequate reasoning for their decision.

Decision

51. For the reasons stated above, I will not grant an order of *certiorari* quashing the respondent's decision, nor will I give an order of *mandamus* directing the respondent to consider forthwith the applicants' application for emergency homeless accommodation, as sought in the notice of motion. However, this does not preclude the first named applicant from making a further application for emergency accommodation pursuant to the Act of 1988 should further circumstances arise.

52. Also, I think that it is important to point out that, as I have referred to earlier, in the course of the hearing the court was informed that the first named applicant would have available to her a "housing assistance payment" whereby the first named applicant would be paid a sum of money each month to go to rent.