



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 206

Record Number: 267/2017

**Dunne J.
Peart J.
Hogan J.**

BETWEEN:

**ELIZABETH MULHARE (A PERSON OF UNSOUND MIND NOT SO FOUND ON INQUIRY), SUING BY HER MOTHER AND NEXT FRIEND
BARBARA MULHARE) AND BARBARA MULHARE**

APPLICANTS/APELLANTS

- AND -

CORK COUNTY COUNCIL

RESPONDENT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 2ND DAY OF JULY 2018

1. This is an appeal from the order of the High Court (Baker J.) made on the 23rd May 2017 refusing an order of *certiorari* to quash a decision of the respondent council contained in its letter dated the 17th November 2015 to the applicants' solicitor, effectively refusing the applicants' request to be re-housed in premises suited to, or adapted to, their particular needs (particularly those of the first named applicant), and situated within five miles of Cork University Hospital and their GP's surgery.
2. The second named appellant ("Mrs Mulhare") lives with and cares for her 29 year old daughter, Elizabeth, in a house in Fermoy, Co. Cork, which she occupies under a tenancy from Cork County Council (previously Fermoy Town Council) since 23rd September 2011. They had previously resided at Ballyvolane, Cork under a tenancy from Cork City Council until September 2011.
3. Elizabeth suffers from cerebral palsy. She has significant needs, and is totally dependent on Mrs Mulhare for her care, support and well-being. In addition, Elizabeth has a severe and persistent respiratory tract infection for which she receives regular treatment both as an out-patient at Cork University Hospital, and from her General Practitioner, Dr O'Regan.
4. Unlike their previous house at Ballyvolane within the functional area of Cork City Council, both the hospital and Dr O'Regan's surgery are some 43 kms from where they now live in Fermoy. When they moved from Ballyvolane to Fermoy in September 2011, Mrs Mulhare accepted the offer of that tenancy by letter dated the 23rd September 2011. In that letter, notwithstanding the distance from the hospital and from Dr O'Regan's surgery, she stated that she was very grateful to the Council for the allocation of the house. After they had moved into the Fermoy premises the Council carried out works to the house with which Mrs Mulhare also expressed her satisfaction at the time.
5. As noted by the trial judge, the house is no longer of a suitable standard for the particular needs of Elizabeth. It lacks level access to a shower and taps, and the bedroom doors are of insufficient width for a wheelchair. In addition there is mould and dampness. Accepting that these problems exist, the Council has indicated its willingness to carry out works that have been recommended in a report by an occupational therapist. But the applicants seek instead a different house altogether, namely one within a five mile radius of the Cork University Hospital and Dr O'Regan's surgery. Apart from the fact that the Council says that it does not have such a house available, it seems to be the case, as noted by the trial judge, that the location in which the applicants wish to be provided with a suitable house, is actually in the functional area of the Cork City Council, and outside that of the respondent Council.
6. It should be said that Dr O'Regan expressed serious concerns about the unsuitability of the Fermoy premises in his medical report dated the 17th July 2014 provided to the applicants' solicitor. In that report he stated, *inter alia*:

"A major issue in our discussion today was her present housing situation and total lack of basic facilities.

This house, which appeared to be suitable when it was first issued, has come to our realisation to be totally unsuitable.

As you will know from my previous report to you, that I believe that neither the City nor the County Councils have ever taken this young adult's needs seriously as judged by the fact that if one takes the ideal but basic living conditions required for a severely disabled adult, confined to a wheelchair and dependent on her mother/carer for all of her daily needs, she has never been offered suitable accommodation.

You will know that last winter was a serious one for Elizabeth where she developed respiratory infection after respiratory infection, required hospital admissions and eventually required bowel surgery for total obstruction, due in some part to the poor toilet facilities available to Elizabeth and her mother.

Throughout all of this, Mrs Barbara Mulhare took the best care she could of her daughter.

I would insist that Elizabeth should not spend another winter in these damp conditions and have suggested that Mrs Mulhare should again explore the possibility of private rental with financial support from the relevant bodies until such time as a suitable house, designed and planned by a professional Occupational Therapist can be made available"

7. An occupational therapist provided a report in November 2014 which again confirmed that the Fermoy premises were unsuitable and it made recommendations for refurbishment and adaptation to the needs of Elizabeth. This report recommended either that the house be suitably refurbished and adapted or that they be re-housed closer to Cork city so that they can be closer to the hospital and to Dr O'Regan's surgery.

8. As the trial judge noted in her judgment, correspondence between the applicants' solicitor and the Council continued for almost a year after that report was provided. That correspondence included a letter from these solicitors dated the 24th April 2015 in which the Council was called upon "to confirm within two weeks of even date that it will take appropriate practical steps, within a reasonable period, to provide our said client and her mother with suitably adapted accommodation closer to the aforesaid hospital". The letter went on to say that what was requested was a house that was suitably adapted (the specifications of which were to be agreed between the parties' respective experts) to be provided within six months and within a radius of five miles of Cork University Hospital.

9. A letter dated the 19th May 2015 from the council to the applicants' solicitor set out the council's position in response. It stated:

"Dear Sir,

I refer to my letter of the 24th February 2015 and your response dated 24th April 2015 (received 29th April 2015).

I am instructed that your clients previously resided at 5 Meadow Park Grove, Ballyvolane, Cork, being a property provided and adapted to your clients by Cork City Council.

Your clients subsequently resided at 1 Bridget Terrace, Rathcormac, Co, Cork, and 2 Cluain na Ri, Clondulane, Fermoy, Co. Cork.

Barbara Mulhare applied to Fermoy Town Council for housing accommodation in full knowledge of the distance between Fermoy and Cork University Hospital.

Your clients were notified of the offer of a tenancy in the property on the 22nd of September 2011 and by letter dated the 23rd September 2011. Barbara Mulhare accepted the offer stating:

'I am very grateful & thankful to your dept for all you've done for my daughter Elizabeth and myself. Both my daughter and myself are very thankful and happy to accept this property at No. 4 Lios Oir, Fermoy, Co. Cork on behalf of my daughter as well.'

As previously stated, Cork County Council endeavours to address the needs of all its tenants. It is however constrained by lack of availability of suitable accommodation. As previously stated, my client is ready willing and able to immediately carry out the works suggested by the Occupational Therapist and to address any works necessary to address the dampness in the property.

In my letter of the 24th February 2015 I suggested that your clients might consider making an application to the City Council for a transfer to a house within the City Council area.

Please advise whether your clients have made this application given the vicinity of the City Council to Cork University Hospital.

Please take your clients' instructions and revert as soon as possible.

Yours faithfully [etc]."

10. In fact the applicant took up the suggestion that she might make an application for housing to Cork City Council. However, that application was unsuccessful for reasons set out in a letter from the City Council dated the 7th October 2015 which explained that in accordance with the council's Scheme of Letting Priorities, as there were arrears of rent outstanding in the amount of €2,527.80 from their previous tenancy at Ballyvolane, and she had abandoned those premises, the council was not in a position to assess her housing need and place her on the housing list until such time as those arrears of rent were discharged, or an agreement to pay was put in place.

11. Finally, the Cork County Council solicitor wrote the letter dated the 17th November 2015 containing the "decision" that the applicant seeks to quash in these proceedings, and to which I referred at para. 1 of this judgment. This letter stated:

"I refer to yours of the 16th and 21st of October 2015. My clients have now reverted with their instructions. The position has not changed from my letter of 19th of May 2015. I would reiterate that at all times my client has been ready, willing and able to immediately carry out the works suggested by occupational therapist and to address any work necessary to re-dress dampness in the property.

Unfortunately the Council does not have any suitable alternative accommodation available for your client in the city hinterland or elsewhere.

Your faithfully [etc].

12. This letter is what is characterised by the applicants as a decision refusing to re-house them in suitable accommodation, and which they seek to have quashed. They seek also an order of mandamus requiring the respondent council to promptly provide suitable housing, not only as to its internal and structural adaptation but as to its geographical location i.e. "within a 5 mile radius of the bounds of Cork City".

13. The trial judge noted the extensive number of grounds relied upon in the statement of grounds filed, and also that an order was made by Mr Justice Noonan on the 3rd October 2016 allowing an additional ground to be relied upon, namely that the council had failed to take account of, or give sufficient weight to Elizabeth's physical condition, that irrelevant considerations were engaged, and that the decision was not reached in accordance with the requirements of natural and constitutional justice. These latter grounds relate to the contents of the letter from Cork City Council dated the 7th October 2015 regarding the arrears of rent and the

abandonment of the previous house at Ballyvolane, and to other background facts averred to in an affidavit sworn on the 29th April 2016 by Paul Sutton of the council in relation to certain District Court barring applications brought by Mrs Mulhare against another daughter. It is contended that these factors were taken into account by the council when deciding to refuse the present application to re-house the applicants, and therefore that the reasons appearing in the said letter dated the 17th November 2015 are neither the true reasons, nor the entire of the reasons for the decision. This is said to render the decision void.

14. The trial judge stated that she was not deciding the application on the basis of the practical difficulty she saw arising from the fact that the applicants were seeking to be re-housed within a five mile radius of the bounds of Cork City, and that even if she were to make the order of *mandamus* sought, the respondent council would be unable to comply given that this area would be outside its functional area. She then stated:

"Leaving aside that practical consideration, the specificity in the nature of the relief sought highlights the fact that the applicants in truth are seeking that they be considered outside the statutory scheme of allocation of housing".

15. Having noted that the applicants did not wish to remain in Fermoy and that they say that their needs can be met only by being provided with housing nearer Cork city, and also that the council's position was that it had no house available that would meet their needs, the trial judge then examined the statutory provisions relevant to the council's functions as a housing authority. She considered s. 20 of the Housing (Miscellaneous Provisions) Act 2009, and s. 22 thereof which provides that a local authority must adopt a scheme of priorities in order to determine "the order of priority to be accorded in the allocation of dwellings to households" deemed eligible. She noted that under the scheme adopted by the respondent on the 13th June 2011 the applicants were in the sixth category in the order of priorities set out therein, namely "(vi) applicants in need of housing on disability, medical, compassionate or similar grounds".

16. The trial judge went on to note that these priorities could be disregarded by the council where it considered that there were specified exceptional circumstances or exceptional or compassionate grounds. She stated that while there was no doubt that such a power existed, a more difficult question was whether the court could interfere with the council's choice in that regard.

17. The trial judge was satisfied on the authorities that a failure by the housing authority to provide the type of accommodation that applicants sought and wanted was not a breach of statutory duty: (*McDonagh & ors v. Clare County Council* [2004] IEHC 184 – Smyth J.). In that case, Smyth J. stated:

"... there is ... no obligation on the housing authority to provide immediately such specified accommodation – it must not only assess needs and priorities but have regard to all other persons who have needs and to its availability of accommodation. It is the function of the housing authority to adjudicate on the claims of the applicants, not that of the Court".

18. She also referred to my own judgment in the High Court in *Fingal County Council v. Gavin & ors* [2007] IEHC 444 in which I stated that where a reasonable offer of accommodation was made by the authority and rejected the persons could not be regarded as being homeless within the meaning of the relevant statutory provisions, and that to decide otherwise would in effect be to give them a veto on the accommodation offered.

19. She was satisfied from these authorities that the legislation could not be interpreted as giving the applicants an unfettered right to veto a rational choice made by the housing authority, or to choose accommodation. She referred again to the said judgment of Smyth J. in *McDonagh & ors v. Clare County Council* in the context of the council's resources when he stated as follows:

"It cannot have been the intention of the legislature that at all times and in all circumstances the Housing Authority would have available and vacant and ready for occupation either conventional permanent or conventional emergency accommodation ... It is for the Housing Authority to prioritise the building programme necessary to house those entitled under the Acts – and to prioritise those whom it considers entitled to such accommodation under the TAP and/or on the Housing List."

20. The trial judge referred also to the judgment of Charleton J. in *Doherty v. South Dublin County Council & Others (No. 2)* [2007] IEHC 4, [2007] 2 I.R. 696, and that of Laffoy J. in *Ward v. Dublin South County Council* [1996] 3 I.R. 195 referring to the extent to which it is the function of the local authority to manage its resources and to set the priorities, and that the authority's obligation to consider an application for housing must be made in the context of the resources available.

21. In relation to the order of *mandamus* sought, the trial judge then concluded as follows:

"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."

22. The trial judge went on to consider the submissions made in relation to the application for an order quashing the decision of the council in its letter dated the 17th November 2015 on the basis that it was void and *ultra vires* by failing to take proper account of the physical needs and condition of Elizabeth and/or that the council took into account irrelevant considerations and/or was made in breach of fair procedures.

23. It was argued that the physical needs of Elizabeth, including her medical needs, are such as to have required that their application to be re-housed be considered based on a higher priority on the Housing List Priorities than was done. In that sense it was argued that insufficient consideration was given to her needs both in terms of physical accommodation and its proximity to Cork city.

24. It was argued also that while the lack of a suitable alternative house and the offer to renovate the Fermoy house were stated as the reasons for not re-housing the applicants, the council was improperly influenced by the matters stated by Cork City Council when refusing to consider the applicants' application to be housed within that functional area – i.e. the outstanding rent arrears, the abandonment of the house at Ballyvolane, and also the barring order application in the District Court in respect of another daughter. It was submitted that where these reasons are a consideration in the council's decision, fair procedures required that Mrs Mulhare be given an opportunity to address the council's concerns and explain that background in more detail.

25. The trial judge does not appear to have reached any particular conclusion in relation to whether there was evidence that these allegedly irrelevant considerations were taken into account improperly by the council, thereby rendering the decision void. However, in my view what is contended for by the applicants is purely speculative. In fact, Mr Sutton swore a second affidavit to refute the suggestion that the council had taken these particular matters into account when making the decision which the applicants seek to have quashed. He stated at para. 3 of his second affidavit:

"3. By way of general comment, the affidavit of Ms. Mulhare appears to have misconstrued my earlier affidavit in making erroneous assumptions that certain matters such as the applicants' abandonment of a previous property in 2007 allocated by Cork City Council and a domestic violence application, were taken into account by Cork County Council in its assessment of the applicants' application for housing transfer. This is simply incorrect, as they were not taken into account and did not influence any such decision and/or assessment. It is difficult to understand why and/or how Ms. Mulhare appears to have drawn such an inference as I did not say anything to such effect in my earlier affidavit. My affidavit set out these matters relating to previous housing and indeed the domestic violence application to inform the court by way of full background of the housing history of the applicants. The applicants in these proceedings are making a claim that the Council [is] failing in its duty as housing authority by requiring the applicants to remain in unsuitable accommodation in Fermoy. The applicants' claim, *inter alia*, that the current accommodation is unsuitable (and why they are seeking a transfer to housing closer to Cork City) is because of the geographical distance from Cork University Hospital and her GP. However, in order to understand this claim and to place the matter in context, it is clearly relevant to set out the housing history of the applicants and how they came to be housed in Fermoy. The applicants abandoned the property at No. 5 Meadow Park Grove, Ballyvolane, Cork (which was in the same area as her GP's surgery) and eventually chose to locate in the current accommodation at Fermoy knowing the distance to the hospital and her GP. The fact that these matters were outlined by way of background to explain the current situation does not mean that the abandonment of the property and/or the protection order/barring order issue was a factor held against the applicants in her current application for housing transfer. As a matter of fact and law it was not."

26. While the trial judge did not reach any conclusion based on those particular matters, she did state at para. 55 of her judgment that pursuant to section G of the Housing Scheme the Council may on an application for a transfer take into account arrears of rent, and also that Article 25(b)(i) of the Assessment Regulations 2011 permits the housing authority to refuse to consider provision of social housing supports where a household has incurred arrears of rent for an accumulated period of twelve weeks or more in any period of three years. She went on to state that "this factor could legitimately have influenced Cork County Council, did in fact influence Cork City Council, and was not wholly irrelevant to the application". However, there is no doubt in my mind that what was stated on affidavit by Mrs Mulhare in that regard was purely speculative and has no foundation in fact. As the trial judge noted, Mr Sutton's second affidavit has not been controverted, and he was not cross-examined on its contents. Given what is stated in rebuttal by Mr Sutton, and particularly his categorical statement on affidavit that these matters were not taken into account, there is no basis for an order of *certiorari* on the amended ground.

27. In relation to the other grounds relied upon, the trial judge, having considered the submissions made both in relation to the facts and the legal principles applicable, concluded:

"56. The first principle which bears on my consideration in the present case is that the applicants have not established any statutory basis on which they might be entitled to be housed in a particular house in a particular area. The legislative scheme as interpreted in the case law shows a general duty on the housing authority to assess and meet housing needs in accordance with the scheme adopted for that purpose. A local authority, as housing authority, has a statutory function to manage its housing stock, and great care must be taken by the courts in the making of any order that might pre-ordain the application or direct the decision-making process of a local authority in its management of housing.

57. The local authority has a duty corresponding to its power to manage its housing, and meet and assess the housing needs within its functional area. In the present case, it seems to me that the applicants contend for a position in which the court would direct the local authority with a degree of specificity and concreteness that I do not believe is borne out by the authorities."

28. The applicants also argued that the council had failed to comply with its obligations under Article 8 of the European Convention on Human Rights by failing to provide them with a suitable house. The trial judge concluded that Article 8 does not create a positive obligation on the part of a local authority to provide the applicants with a house, and in that regard referred to the judgment of Charleton J. in *Doherty v. South Dublin County Council & ors* [supra]. She stated also that the failure or refusal to provide such a house does not amount to a breach of Article 8 and in that regard referred to the judgment of McMenamin J. in *O'Donnell v. South Dublin County Council* [2015] IESC 28. The trial judge was satisfied that while there could be circumstances where a refusal to provide suitable housing might raise an issue under Article 8, as stated by McMenamin J. in *O'Donnell*, the Council in the present case had adequately provided for the Article 8 rights of the applicants by agreeing to carry out work to the house in Fermoy as described in the correspondence.

29. The trial judge concluded her judgment by refusing the reliefs sought, and stating:

"For all of these reasons, I refuse to grant the relief sought. That is not to say that I take any view as to the suitability of the accommodation in Fermoy where the applicants currently reside. Elizabeth has been fortunate indeed in having the loving and committed care of her mother, and her mother's task is a demanding and difficult one which she performs with great fortitude. However, the application that I direct that housing to provide the applicants with the house in the area where they choose to live is not one which I may make, and it would be an impermissible breach of the separation of powers for a court to infringe upon the policy decision of the respondent housing authority in circumstances where I am satisfied that the decision made was within its area of competence."

30. The appellants have submitted that the trial judge erroneously treated their application for judicial review as being one primarily for an order of *mandamus*, and to a large extent overlooked the fact that the primary relief sought was an order of *certiorari* to quash the decision to refuse to re-house them nearer to the Cork University Hospital and Dr O'Regan's surgery as notified in the

council's letter dated the 17th November 2015. It is submitted that their application to quash that decision on the grounds of procedural unfairness was largely overlooked by the trial judge.

31. It will be recalled however that Mr Sutton stated in his affidavit that the matters referred to by him were stated by way of general background in circumstances where that background had not been provided by the applicants. He clearly denied that those particular matters were relied upon in any way by the Council when reaching its decision that there was no suitable house within its area in which to re-house the applicants. He was not cross-examined on that affidavit. The applicants did not seek discovery of the Council's file.

32. The onus is on the applicants to establish a firm basis for an order of *certiorari*. They must show that what they classify as the decision to refuse to re-house them which is contained in the Council's letter dated the 17th November 2015 was made in breach of fair procedures. The trial judge clearly rejected their grounds based upon Mr Sutton's averments. She noted that there was no cross-examination of Mr Sutton. She referred also to the arguments made by the appellants in relation to the additional ground permitted to be included by order of Noonan J. dated the 3rd October 2016 at paras. 43 *et seq.* in her judgment. While it is correct to state that there is not in the judgment itself a stated conclusion by the trial judge that she was refusing an order of *certiorari*, that alone is not sufficient to allow this appeal. It is quite clear that the trial judge considered the arguments made, and rejected them. While her conclusions are stated in the context of refusing an order of mandamus, there is no possibility that those same rejections of the arguments made might nevertheless support or justify the granting of an order of *certiorari* to quash the impugned decision.

33. The impugned letter provided a reason for the decision made by the Council. The reason given is that the council did not have a house available in its area which was suitable to meet the needs of the applicants. In so far as the applicants sought to argue that this was not the true reason, based on the additional ground permitted to be argued by Noonan J. in his order, the trial judge clearly rejected these arguments, albeit by stating that she would not grant an order of mandamus.

34. As was expressed by the trial judge, I have considerable sympathy for the position in which the applicants find themselves in. I have no doubt that life is very difficult for them. I equally note with concern what is stated by Dr O'Regan in the report referred to. It is no doubt of the utmost importance for the health and welfare both of Elizabeth and of Mrs Mulhare herself that they live in better conditions. But the Council must perform its statutory function in accordance with the Housing List Priorities. As has been stated by numerous judges over the years, the management of the Council's housing stock is very much a matter for the housing authorities concerned in the first instance, and not for the courts. Unless a clear error in the decision-making process is established by a disappointed applicant for housing or re-housing the courts may not intervene and quash a decision that has led to that disappointment. In my view the applicants have failed to establish an error, and I see no basis for considering that the trial judge fell into error.

35. For these reasons I would dismiss this appeal.