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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **27/03/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR153
(A PERSON UNDER A DISABILITY) BY HER MOTHER AND NEXT FRIEND
FOR JUDICIAL REVIEW

JR153 (2)

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Mr P McLaughlin KC with Mr S McQuitty KC (instructed by Worthington Solicitors) for the Applicant
Mr A Sands KC (instructed by NIHE Legal Services) for the Respondent

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O'HARA J

Introduction

[1] The applicant in this case is a young woman in her 20s who is under a disability. To put it more accurately, she suffers from a range of disabilities so that she has been described as having a complex interaction of needs. In order to protect her from public discussion about those needs she has been granted anonymity as has her mother who acts as her next friend for the purposes of these proceedings. The applicant will be called Nora for the purposes of this judgment.

[2] Nora lives in a cottage in Seeconnell Private Village in Castlewellan County Down. Her status there is at the heart of this case because in her name an application was made by the "landlord" to the respondent, the Northern Ireland Housing Executive ("the Executive") for a Disabled Facilities Grant ("a DFG"). The purpose of the DFG was to pay for adaptations to the cottage where Nora lives. DFGs are provided for in Part III of the Housing (Northern Ireland) Order 2003 ("the 2003 Order"). It is the correct interpretation of the 2003 Order which is in dispute because the Executive which pays DFGs contends that Nora does not meet the eligibility criteria specified in Article 50.

[3] On Nora's behalf proceedings were initially brought against a Health and Social Care Trust. That case was brought on the basis that the Trust was the only public body with a legal duty to ensure that Nora's accommodation benefited from the necessary adaptation works. However the Trust's position was that such works should be funded by the Executive by way of a DFG. It was when the Executive refused to award such a grant that this second application for judicial review was initiated against the Executive.

[4] As initially formulated the application included claims that the Executive decision was wholly unreasonable and that it breached Nora's rights contrary to the Human Rights Act 1998. Those claims have been abandoned. The case now advanced for Nora is that she is a tenant or licensee within the meaning of Article 50 of the 2003 Order and that the cottage in which she lives is a dwelling for the purposes of the same provision.

[5] As well as being the biggest landlord in Northern Ireland, the Executive has a number of distinct statutory duties and powers, all of which are housing related. The making of private sector housing grants is one such function. The power to make these grants is set out in Part III of the 2003 Order. The overall purpose of the grants scheme is that they are designed to ensure the improvement of housing standards in the private sector and to help vulnerable people including those with disabilities to live safely in their own homes. One of the underlying principles of the 2003 Order is to focus assistance on bringing properties up to the fitness standard and target resources to those most in need of financial assistance. In the absence of such grants, disabled people would be required to fund the building works themselves.

[6] The duties and powers of the Executive in Part III of the 2003 Order do not extend to carrying out the works themselves. That obligation lies entirely with the householder who must obtain his/her own architect and building contractor to do the work. The role of the Executive is to approve the application and then provide the grant money.

Arrangements in Seeconnell Village

[7] It is important to analyse Nora's living arrangements in the cottage in the context of the Seeconnell development in order to understand the circumstances in which her application for judicial review is to be assessed.

[8] Corriewood Estates owns the village/development and is the landlord. Corriewood Private Clinic is a registered and regulated domiciliary care agency which provides carers. Corriewood Estates provides the accommodation. The RQIA regulates both Corriewood entities but for different purposes.

[9] Within Seeconnell Village there is a residential care home which is separate from the cottages. The home is the responsibility of the private clinic.

[10] Nora's placement in a cottage in Seeconnell was organised by the Trust in December 2017. This was on the basis that Nora was a tenant of Corriewood Estates in one of its cottages. No agreement was signed until October 2019 when Nora's mother signed the tenancy agreement on her behalf. In March 2019 an occupational therapist employed by the Trust recommended that remedial works be carried out to the cottage, including structural changes. This is what led in February 2020 to the application to the Executive for a DFG, the refusal of which has prompted this application for judicial review.

[11] It is not certain that Nora will stay indefinitely in the cottage in Seeconnell where she has lived since 2017. Despite that, I granted leave and rejected the submission advanced by Mr Sands that the case is academic. It seemed to me that there is a possibility that, in Nora's own circumstances and those of others, similar issues might arise in the future, potentially making this ruling of some value.

[12] Nora's needs are such that she requires two care workers to be with her at all times. In part this is to manage her challenging behaviours. It appears that she cannot live or be alone. The cottage was adapted for her before she moved in, in 2017, with the works being paid for by Corriewood.

[13] The 2019 changes proposed by the occupational therapist include specific provisions for staff which illustrate the unavoidable fact that their needs must be catered for in a way which matches those of Nora. Nora is dependent on them.

[14] This fact is advanced by the Executive as one of the obstacles to Nora's claim. For instance the Executive challenges the proposition advanced on Nora's behalf by the Trust in 2020 when the Trust said that Nora is a tenant with a tenancy agreement pursuant to the Private Tenancies (NI) Order 2006. The Trust letter advancing that claim stated:

> "As far as the Trust are concerned, this is a separate dwelling in that it is solely occupied by the tenant and with the requisite tenancy agreement in place."

[15] To that the Executive responds by saying:

(i) Nora is not and cannot be a tenant – she has no legal capacity to enter into a tenancy agreement.

(ii) She does not and cannot occupy the cottage "solely."

(iii) The Corriewood website describes those who live in the cottages as "patients" rather than tenants.

[16] For the Executive it is submitted that the reality is that Nora is living in a full-time residential and nursing care setting. The Executive concedes that a person could possibly live in her cottage as a self-contained unit but contends that she has never done so. In her case it is said to be a residential accommodation in which she receives both board and personal care. In addition the Executive contends that even if she had capacity to enter into a tenancy agreement, the arrangements between the parties do not bear the necessary ingredients of the tenancy. In particular Nora cannot call this cottage her own. She has little or no control over who comes in and out due to the complexity of her needs.

Housing (NI) Order 2003

[17] The key provision of the 2003 Order is Article 50 which provides as follows:

> "**Disabled facilities grants: owner's and tenant's applications**
>
> **50.**—(1) The Executive shall not entertain an application for a disabled facilities grant unless it is satisfied—
>
> (a) that the applicant has, or proposes to acquire, an owner's interest in every parcel of land on which the relevant works are to be carried out, or
>
> (b) that the applicant is a tenant (alone or jointly with others) -
>
> (i) in the case of an application in respect of works to a dwelling, of the dwelling, or
>
> (ii) in the case of a common parts application, of a flat in the building,
>
> and, in either case, does not have or propose to acquire such an owner's interest as is mentioned in sub-paragraph (a).
>
> (2) References in this Chapter to an 'owner's application' or a 'tenant's application', in relation to a disabled facilities grant, shall be construed accordingly.
>
> (3) In accordance with directions given by the Department, the Executive may treat the condition in paragraph (1)(a) as met by a person who has, or proposes to acquire, an owner's interest in only part of the land concerned.

(4) In this Chapter, in relation to an application for a disabled facilities grant—

(a) 'qualifying owner's interest' means an owner's interest meeting the condition in paragraph (1)(a) or treated by virtue of paragraph (3) as meeting that condition; and

(b) 'qualifying tenant' means a tenant who meets the conditions in paragraph (1)(b).

(5) In this Chapter 'tenant', in relation to a disabled facilities grant, includes -

(a) a person who has a protected tenancy or statutory tenancy,

(b) an employee (whether full-time or part-time) who occupies the dwelling or flat concerned for the better performance of his duties, and

(c) a person having a licence to occupy the dwelling or flat concerned which satisfies such conditions as may be specified by order of the Department,

and other expressions relating to tenancies, in the context of an application for a disabled facilities grant, shall be construed accordingly."

[18] It is also relevant to note the provisions of Article 28 of the 2003 Order which is the interpretation clause for Part III. In Article 28 the following two definitions of interest are provided:

"'dwelling' means a building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it …

'tenancy' includes a sub-tenancy and an agreement for a tenancy or sub-tenancy."

Submissions

[19] I am grateful to all counsel for their helpful submissions in this complex and challenging area of law.

[20] For the applicant Mr McLaughlin focussed on the breadth of interpretation which has been given to the legal definition of "tenancy" in various contexts and in various authorities over many years. These authorities illustrate the elasticity with which the term is applied in different settings. If one applies the key questions of identifying the parties, the demised property, the rent and the term, all the tests are satisfied by the 2017 and 2019 arrangements.

[21] Turning then to the issue of licence, Mr McLaughlin acknowledged that the Department has not made any order specifying conditions as to licences as envisaged by Article 50(5)(c). He contended however that in the absence of any such order all licences are included because the Department has not excluded any licences.

[22] On that approach, said Mr McLauglin, the applicant lives in the cottage under a licence which satisfies Article 50. He further submitted that the cottage in which she lives has enough of the necessary characteristics to meet the imprecise meaning of dwelling for the purposes of Article 50(1)(b)(i). Article 28 gives a broad interpretation to the term "dwelling" with good reason and that meaning should not be narrowed to defeat the clear intention of Chapter III of the 2003 Order.

[23] For the Executive, Mr Sands submitted that in no way could the tenancy agreement be interpreted as other than a sham. The applicant by dint of the extent of her unfortunate limitations has no capacity to enter a legal agreement, never mind one such as a tenancy agreement, under which she expressly accepts obligations for such matters as repair. The same would not necessarily apply to all people with complex needs but regrettably it applies to her.

[24] On the issue of licence, Mr Sands relied squarely on the fact that the Department has not made any orders as specified in Article 50(5)(c). That being so, it cannot possibly be correct to contend that all licences are included unless excluded. That is the reverse of the statutory provision.

[25] On Mr Sands' submission that issue is sufficient to bring an end to the case. For completeness however he submitted that the Executive was entirely right to decide in its refusal letter that the cottage in which the applicant lives is not a "separate dwelling" as required by Article 28(1). He contended that on the facts of the case the strong inference to be drawn is that Nora is living in an institutional care setting rather than in her own home. He highlighted the fact that in one of her affidavits Nora's mother had said that the cottage was "a purpose built bespoke placement which was put in place for her by the Trust." It was "designed specifically with reference to [Nora's] needs." The adaptations which were carried

out in 2017 were in fact carried out and paid for by Corriewood Estates Ltd at its own expense according to a letter from the Directorate of Legal Services to the Executive on 21 December 2020. Why that arrangement was put in place is entirely unclear.

[26] Mr Sands also highlighted the fact that according to Corriewood in October 2019 "the entire property has an overall rating as per planning permission for the registered residential home and supported living." I am invited to conclude from this that Corriewood as the owner considered that all of its property, the residential care home and the cottages, were one unit. No part of the premises has ever been subject to residential rates. Had Nora's cottage been privately let residential accommodation then there would have been a residential rating. (As against that however I note that Nora is in receipt of housing benefit which is used to support the rent payments which are made to Corriewood – see DLS letter of 21 December 2020).

Conclusion

[27] I granted leave in this application for judicial review on the basis that my ruling on the issues of tenancy and separate accommodation might be of wider application than just to Nora's case. As the facts and arguments have been developed, I wonder whether that approach was correct.

[28] It has in effect been conceded that Nora lives in the cottage on foot of a licence rather than a tenancy. That adversely affects her case but will not inevitably apply to other cases involving individuals whose needs are different and perhaps less complex. It has not been part of the Executive's case that there can never be a tenancy in such circumstances, just that there is not one here.

[29] I accept the Executive's submission on the issue of Nora's tenancy and status. The Executive was correct in my judgment in rejecting the notion that Nora is a tenant, no matter how broadly that term is developed. Put simply, she lacks capacity to enter into a tenancy agreement. Others with different needs might have that capacity but Nora does not.

[30] I also accept the Executive's submission on the proper interpretation of Article 50(5)(c). In my judgment the approach suggested on behalf of Nora turns the meaning of the statutory words on their head and is quite wrong.

[31] That is enough to dismiss the case but for completeness I should rule on the issue of separate dwellings despite being slightly uneasy about doing so because judicial review is not the ideal forum for conducting a fact finding exercise. In this context, separate does not mean physically separate – otherwise a terraced dwelling or a flat would not qualify. The real question is whether a dwelling is separate in the sense of being distinct from the Corriewood development. I find the rates issue a compelling argument and conclude that in the particular circumstances of this development the cottage in which Nora lives is not a separate dwelling.

[32] I finish by emphasising the following points:

- Unhelpful as it may be, decisions like this are inevitably fact specific and depend on both the needs of the applicant for the DFG and the set-up in the accommodation where he/she lives.

- When the legislation was passed it must have been contemplated that some licences might be specified as envisaged in Article 50(5)(c). It would be of benefit if that issue was reconsidered and addressed as soon as possible by the Department.

- There has been uncertainty about where Nora might live long-term, whether she might stay in the cottage or go to another placement. This judgment might impact on her staying in the cottage, but it is only a decision on a grant application in relation to that cottage and does not dilute in any way the obligations which public bodies have to provide suitable accommodation which would help her (and her mother and others) to live their lives without undue and avoidable stress and uncertainty.