

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Cooleys' (Annette and Rosaleen) Applications [2013] NIQB 31

IN THE MATTER OF APPLICATIONS BY ANNETTE COOLEY &
ROSALEEN COOLEY FOR JUDICIAL REVIEW

and

IN THE MATTER OF DECISIONS OF THE POLICE SERVICE OF NORTHERN
IRELAND

TREACY J

Introduction

1. The applicants in this case are mother and daughter who each own a dwelling house on Mountpottinger Road, Belfast. Neither lives there. Their houses are located in a recognised sectarian interface area, which has seen serious sectarian disorder and violence in recent years. Each has suffered criminal damage to their property, and repeated sectarian abuse and threats.

2. Both made application under the NIHE's *Scheme for the Purchase of Evacuated Dwellings* (SPED). Their applications were unsuccessful because of the refusal of the PSNI to issue a Chief Constable's Certificate in relation to SPED in respect of 100 and 106 Mountpottinger Road. This decision was taken by Assistant Chief Constable Jones on 24 November 2011.

3. The applicants' challenge the rationality of the PSNI conclusion that – although it is accepted that they have been directly or specifically threatened or intimidated – they are not at risk of death or serious injury (whether physical or psychological) if they continue to reside in 100 Mountpottinger Road and/or 106 Mountpottinger Road. This conclusion is the reason for the refusal of a Chief Constable's Certificate in respect of each applicant's application to SPED.

Grounds of Challenge

4. The applicants' grounds of challenge relied upon at the hearing are:
 - (a) In reaching the impugned decision the PSNI erred in law in failing to recognise that the award of intimidation points by the NIHE under Rule 23 (2) of the Housing Selection Scheme (on receipt of advice from the PSNI) denotes that the criterion for eligibility for a Chief Constable's Certificate is met in the applicants' cases.
 - (b) In reaching the impugned decision the PSNI erred in law in failing to recognise that risk of serious injury or death is a phrase readily comparable with the concept of risk of serious harm in criminal justice (which as defined in Article 3 of the Criminal Justice (Northern Ireland) Order 2008 encompasses risk of death or serious personal injury, whether physical or psychological), and in so doing failed to avert to the risk of serious psychological injury presented by continued residence at 100 Mountpottinger Road and/or 106 Mountpottinger Road.
 - (c) In reaching the impugned decision the PSNI acted in a procedurally unfair manner, in that the decision maker appealed from was improperly involved in a task of gathering all relevant information in respect of the appeal (letter dated 27th July 2011).
 - (d) In light of the information available to the PSNI the decision that the applicants, although specifically or directed threatened or intimidated, are not at risk of death or serious injury (whether physical or psychological) if they continue to reside in 100 Mountpottinger Road and/or 106 Mountpottinger Road, is unreasonable and irrational.

Background

5. Rosaleen Cooley is 69 years of age. Her General Practitioner describes her as an elderly lady with a serious mental health problem. Her daughter Annette, with whom she now lives, cares for her. Writing on Annette Cooley's behalf to the Chief Constable on 14 October 2010, Alasdair McDonnell MP described her situation as follows:

“At the front of her home, all windows are covered by steel grids, and all windows both front and back are triple glazed for extra reinforcement against missile attacks. The front door has heavy drop bars installed to protect against attacks, although for many years this door simply has not been used as it is too risky to do so. All visitors enter and exit the house via the back door, and in fact the front section of the house is barely used at all. Annette, her family and any guests remain in the kitchen at the back instead of the living room at the front. Lights cannot be put on at this side of the house at all during the night, because this is an indication that there is someone inside, and very often a precursor to a barrage of missile attacks”.

6. In a letter dated 18 October 2010 from the applicant, Annette Cooley’s doctor, Dr Clements, he states that the applicant:

“... suffers from anxiety and sleeplessness as a result of recurring problems over the past 13 years on the interface where she lives.

Miss Cooley suffers from considerable stress, anxiety and broken sleep because of verbal threats and abuse over the past 13 years and these have been a lot worse over the past 5 years.

She has retreated to her house and is afraid to go out especially in the evenings or at night ...

This ongoing situation is affecting her health. The pressures have been ongoing and persistent, and her mental health is being affected. I am concerned that her health is being very adversely affected and could deteriorate further if the situation regarding housing move is not resolved for her”.

7. Further information relating to the health of Rosaleen Cooley is found in a letter dated 27 June 2011 from Dr McCreesh, indicating that the applicant:

“... is an elderly lady with a serious mental health problem. She lives alone. I feel that the constant fear that she has to endure is very detrimental to her health”.

8. The Northern Ireland Housing Executive (NIHE) has now provided the applicants with accommodation. This followed the NIHE's acceptance (on receipt of advice from the PSNI) that Annette was unintentionally homeless and was a Full Duty Applicant entitled to Intimidation points under the Housing Selection Scheme.

Statutory Framework

SPED Scheme

9. The statutory basis for the operation of SPED by the NIHE is set out in Art 29 of the Housing (NI) Order 1998 ("the 1998 Order") which provides:

"Scheme for purchase of evacuated dwellings

29.-(1) The Executive shall submit to the Department a scheme making provision for the Executive to acquire by agreement houses owned by persons who, in consequence of acts of violence, threats to commit such acts or other intimidation, are unable or unwilling to occupy those houses.

(2) A scheme submitted under paragraph (1) may include provision as to-

- (a) the circumstances in which the Executive a house under the scheme;
- (b) the manner in which the purchase price is to be determined;
- (c) the fittings which the Executive may purchase when acquiring a house under the scheme;
- (d) the disposal of such houses; and
- (e) such other matters as the Executive considers appropriate."

10. On 11 May 1989 the NIHE submitted a scheme which was approved by the Department in accordance with Art 29(6) of the 1988 Order. The amended scheme sets out the eligibility conditions at para 2.1 as follows:

"2.1 All of the following conditions must be satisfied before an application will qualify for acceptance within SPED.

- (i) The house must be owner-occupied and must be the applicant's only or principal home.
- (ii) A certificate signed by the RUC Chief Constable, or authorised signatory, must be submitted to the Executive, stating clearly that it is unsafe for the

applicant or a member of his/her household residing with him/her to continue to live in the house, because that person has been directly or specifically threatened or intimidated and as a result is at risk of serious injury or death.

- (iii) The applicant must qualify for A1 (Emergency) status under the Executive's Housing Selection Scheme."

[See Judgment of Morgan J (as he then was) in Re Watt's Application [2005] NIQB 35, para 11]

Housing Selection Scheme: Intimidation

11. Art 22(1) of the Housing (Northern Ireland) Order 1981 ("the 1981 Order") requires the NIHE to submit a scheme for the allocation of housing accommodation to the Department for Social Development (and by virtue of Art 22(3) must comply with such a scheme as approved (with or without modifications)). Rule 23 of the NIHE Housing Selection Scheme provides that:

"An Applicant will be entitled to Intimidation points (see Schedule 4) if any of the following criteria apply in respect of the application:

- 1) The Applicant's home has been destroyed or seriously damaged (by explosion, fire or other means) as a result of a terrorist, racial or sectarian attack, or because of an attack motivated by hostility because of an individual's disability or sexual orientation, or as a result of an attack by a person who falls within the scope of the Housing Executive's statutory powers to address neighbourhood nuisance or other similar forms of anti-social behaviour.

- 2) The Applicant cannot reasonably be expected to live, or to resume living in his / her home, because, if he or she were to do so, there would, in the opinion of the Designated Officer, be a serious and imminent risk that the Applicant, or one or more of the Applicant's household, would be killed or seriously injured as a result of terrorist, racial or sectarian attack, or an attack which is motivated by hostility because of an individual's disability or sexual orientation, or as a result of an attack by a person who falls within the scope of the

Housing Executive's statutory powers to address neighbourhood nuisance or other similar forms of anti-social behaviour."

Applicants' Submissions

12. The applicant referred to a considerable number of incidents of which the PSNI were aware in support of their application. A document entitled "Civilian SPED Appeal - Ms Annette Cooley 100 Mountpottinger Road" dated 25 May 2011 noted that the applicant had reported a significant catalogue of incidents to police, but also indicated that police were not aware of any specific threats made to the applicant. The document further records that one round of ammunition was found in the hallway. The applicant submitted that this was a direct and specific threat of serious injury targeted at the applicant in her home.

13. Further the document records the views of the DCU/Area Commander that there was no information to suggest that the applicant or a member of the household had been specifically threatened or intimidated, or was at risk of serious injury or death and based on the information provided there was nothing to suggest that it was unsafe for the applicant or a member of the household to continue living at the address. The applicant submitted that these conclusions could not rationally be reached on the information available.

14. By letter dated 11 April 2011 police advised the NIHE of the applicant's report of finding a round of ammunition in her hallway. By letter dated 12 April the NIHE informed the applicant Annette Cooley of her Full Duty Applicant status. The applicant submits that the award of Intimidation points by the NIHE was made under Rule 23(2) set out above.

15. The applicant submits that the issues raised by this application require comparison of the criteria for the issue of a Chief Constable's Certificate under the SPED scheme and the award of points in respect of Intimidation by the NIHE (on receipt of advice from the PSNI) under Rule 23(2) of the Housing Selection Scheme. The applicant submits that the criteria are not identical, but overlap. In particular, the applicant submitted that where the NIHE's conclusion that Rule 23(2) Intimidation points are appropriate is made on the basis of police advice and input, the criteria for the issue of a Chief Constable's Certificate may be satisfied.

16. ACC Jones averred at para 27 that he was concerned to understand the criteria employed by the NIHE for the award of Intimidation points and was provided with a brief prepared by the Department for Social Development before making his decision. This brief was entitled "**Clarification as to how the criteria for SPED differs from that for intimidation points under the Common Selection Scheme both in principle and in practice.**"

17. The applicant submitted that it was clear from comparison of the tests applicable to each scheme that there was considerable general overlap in the access criteria for Intimidation points and for SPED in that both schemes contained a threshold of risk and required that it was unsafe for the occupier or a member of their household to continue to live in the house because he / she had been directly or specifically threatened or intimidated and as a result was at risk of serious injury or death.

18. ACC Jones avers at para 28 that he was satisfied that the PSNI input into the NIHE's decision-making was simply to provide factual information, the evaluation and assessment of which was a matter for the NIHE. The applicant asserts this conclusion is difficult to reconcile with the evidential material exhibited submitting that the input of Strandtown police was not simply the provision of factual information, but extended to the expression of professional opinion as to risk when it stated: *Confirmed bullet through the door. [CI Davidson] was convinced the situation was genuine and escalating.*

19. In relation to the medical evidence the applicant referred to the determination of ACC Jones dated 24 November 2011 in which he stated:

“ ... there does not appear to be any evidence that the applicant is at risk of serious injury or death. Although the medical condition of the applicant is recognised, in consideration of ‘psychological injury’ this does not correlate with a risk of serious injury or death as a result of threats or intimidation for the purpose of a Chief Constable’s Certificate being issued”.

20. The applicant submitted that ACC Jones recognised that the question was not whether serious psychological injury is disclosed by the evidence, but whether the evidence disclosed a *risk of* serious psychological injury.

21. The applicant submits that in light of the decision in Re O’Neill’s Application [2008] NIQB 80, the PSNI must accept that the applicants have been directly or specifically threatened or intimidated and even though a bullet was posted through the door of the applicant Annette Cooley the PSNI considers that there does not appear to be any evidence that the applicants are at risk of *serious* physical or psychological injury or death the applicant.

Respondent’s Submissions

22. The respondent prefaced its submissions with the comment that the applicants appear to contend that on the basis that a different decision-making body (NIHE) has awarded the applicants intimidation points pursuant to Rule 23(2) of the Housing Selection Scheme the PSNI acted in error in failing to recognise that the award of intimidation points effectively decided the issue of the grant of a CCC.

23. The respondent contended that the test for issue of a CCC is not a direct read-across from the test for the award of intimidation points.

24. They submitted that the applicants' argument is flawed in that had the PSNI adopted that approach it would have, in effect, been delegating the decision that falls to the Chief Constable to an alternative decision-maker outside of the PSNI. It is asserted that that is outwith the terms of the SPED scheme and would not be in furtherance of the purpose of the PSNI's involvement in the SPED Scheme by way of a grant of a CCC.

25. The respondent submitted that the notable difference between the scheme for the grant of intimidation points and the scheme for the grant of SPED and the CCC within SPED is that in the former, the PSNI's role is the provision of information to an external decision-maker. In the latter the decision falls to be made by a senior police officer in the exercise of a professional policing judgment.

26. The respondent further pointed out that the SPED scheme established by NIHE provides that there must be a CCC (2.1.ii) and **that the applicant must qualify for A1 emergency status under the housing selection scheme (2.1.iii)**. They submitted that if, as argued by the applicants, the CC's decision were to be pre-ordained where the A1 status is granted by the NIHE then the need for a CCC under 2.1.ii as required by the scheme would be rendered superfluous. In this respect the Court was referred to Re Joanne O'Neill's Application [2008] NIQB 80 at para 18. The respondent also noted that the decision-maker in the present case, ACC Jones, averred that he was aware of the intimidation point scheme, took account of it and the police input into that in the making of his own decision in relation to the SPED/CCC (see Jones paras 27-29).

27. So far as the second ground of challenge summarised at para [4] (b) above is concerned the respondent submitted that the applicants are operating under a misapprehension of the correct context on which the decisions were made by the respondent in their cases. They pointed out that ACC Jones averred at para 31 of his affidavit that in reaching his decision he accepted, for the purposes of the applicants' applications that "serious injury" includes serious psychological injury.

28. The third ground of challenge raised by the applicant summarised at para [4](d) above was in effect an irrationality challenge. The respondent contended that in reaching his decision ACC Jones has taken account of all relevant considerations.

29. The Court was referred to paras 12 and 14 of the judgment in Re Joanne O'Neill's Application where the Court stated:

"12. ... Whether targeting of that nature is such that it is unsafe for the occupier to continue to live in the house and whether the occupier is at risk of serious

injury or death is a matter of judgment for the Chief Constable.

13. ...
14. ... I am satisfied that the assessments have adopted an inappropriately restrictive approach to the issue of whether the applicant was directly or specifically threatened or intimidated. Whether a positive answer to that question leads to the conclusion that it was unsafe for the applicant to continue to live in the house or that there was a risk of serious injury or death are different issues."

Conclusion

30. The first challenge presented by the applicant was that in reaching the impugned decision the PSNI erred in failing to recognise that the award of intimidation points under Rule 23(2) of the Housing Selection Scheme denotes that the criterion for eligibility for a Chief Constable's Certificate is met in the applicants' case. The statutory basis for the SPED scheme is found in Art 29 of the Housing (NI) Order 1988 which has its own set of eligibility conditions which I have summarised earlier in the judgment and that includes most relevantly the requirement at para2.1.ii that to be eligible there must be a certificate from the Chief Constable submitted to the NIHE stating clearly that it is unsafe for an applicant or a member of his household to continue to live in the house because that person "has been directly or specifically threatened or intimidated *and* as a result is at risk of serious injury or death".

31. The issuing by the Chief Constable of the requisite certificate depends on whether or not the Chief Constable has formed the judgment that it is unsafe for the applicant or a member of his household to live in the house "because that person has been directly or specifically threatened or intimidated and as a result is at risk of serious injury or death". That plainly is an exercise of judgment for the Chief Constable subject to *Wednesbury* irrationality.

32. The Housing Selection Scheme is a different scheme established under different statutory provisions and for a different statutory purpose. Whereas in the SPED scheme the issuing of a CCC is a matter for the judgment of the Chief Constable, under the Housing Selection Scheme established under Art 22(1) of the 1981 Order the entitlement to intimidation points arise where the Designated Officer (of the NIHE) has formed the requisite opinion under Rule 23(2) of that scheme.

33. The applicants' argument under this head of challenge is, in my view, plainly fallacious. If the PSNI had proceeded in accordance with the approach inherent in the ground of challenge summarised at para 4(a) above, it would necessarily have

involved the PSNI delegating a decision that falls to the Chief Constable to an alternative decision-maker wholly outside the PSNI. Such an approach would be clearly outside the express terms of the SPED scheme and would be inconsistent with the requirement of a CC's Certificate which the Chief Constable could only issue if he had formed the requisite judgment under para 2.1.ii of the SPED scheme.

34. Under the somewhat analogous provisions of the Housing Selection Scheme established under a different statutory provision, Rule 23(2) only comes into play when the designated officer (of the NIHE) has formed the requisite opinion.

35. The formation of that opinion may well frequently, if not invariably, be informed by the provision of information from the PSNI but the formation of the opinion is that of the designated officer and the role of the PSNI (and others) is the provision of information which will assist the designated officer in the formation or not of the requisite opinion.

36. The SPED scheme established under Art29 of the 1988 Order provides under 2.2.ii that there must be a CCC **and** that the applicant must also qualify for A1 (Emergency) status under the Executive's Housing Selection Scheme. If, as the applicant contended, the Chief Constable's decision was to be effectively pre-determined where A1 status had been granted by the Housing Executive then the need for a Chief Constable's Certificate under 2.1.ii would be rendered superfluous.

37. Accordingly, for the above reasons, I reject the first limb of the applicants' challenge.

38. As regards the second limb of the applicants' challenge the applicants' claim is defeated by the averment of ACC Jones at para31 that in reaching his decisions he accepted, for the purposes of the applicants' applications, that "serious injury" could include serious psychological injury.

39. As regards the irrationality challenge I am satisfied that in reaching his decisions ACC Jones has taken account of all relevant considerations. Whilst he may have reached a conclusion which is contrary to that sought by the applicants, that is plainly not sufficient to render the decision *Wednesbury* irrational. As the Court pointed out in Re Joanne O'Neill's Application at para 12 whether the occupier is at risk of serious injury or death is a matter of judgment for the Chief Constable. Whilst this is subject, in an appropriate case to challenge on irrationality grounds, the high threshold required to make good such a challenge has not been established in the present case.

40. Accordingly, for these reasons, none of the grounds of challenge have been made out and the applications are refused.