Neutral Citation No. [2014] NIQB 6 | *Ref:* **TRE9132**

Judgment: approved by the Court for handing down | *Delivered:* **22/01/2014**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

Doherty's (Frances) Application [2014] NIQB 6

IN THE MATTER OF AN APPLICATION BY FRANCES DOHERTY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION TAKEN BY THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

_____

TREACY J

Introduction

[1] The applicant challenges a decision by the PSNI whereby it refused to grant a Chief Constables Certificate ("CCC") certifying that the applicant was eligible for the Scheme for the Purchase of Evacuated Dwellings ("SPED scheme").

Background

[2] The applicant owns a property at an address in North Belfast. In November 2011 she witnessed an assault in which Theresa Lavelle assaulted and threatened to kill Natasha McAuley. In August 2012 the applicant gave evidence on the part of the Crown in respect of the incident for which Theresa Lavelle was convicted.

[3] After the conviction the applicant alleges Theresa Lavelle's family commenced a campaign of intimidation and harassment against the applicant which included the posting of threats on 'Facebook' and acts of violence and aggression in and around the applicant's property.

[4] In September 2012 Patricia McAuley, the mother of Natasha McAuley and next door neighbour of the applicant, was moved out of her home by her landlord,

the Northern Ireland Housing Executive ("NIHE"), away from the area of intimidation.

[5] The most serious of the acts of violence and aggression occurred on 28 September 2012, 29 September 2012, 15 October 2012, 23 October 2012 and 28 November 2012. All of these incidents were logged by the PSNI the details of which are as follows:

(i) 28 September 2012: applicant's home attacked with ball bearings leading to broken windows in rear bedrooms and bathroom.

(ii) 29 September 2012: applicant's car 'keyed'.

(iii) 15 October 2012: Crowd gathered outside applicant's property and directed abuse and threats of violence towards the applicant and her daughter.

(iv) 23 October 2012: applicant subjected to intense personal abuse, including threats to kill on the street near her property. After this incident, the applicant's daughter refused to return to their home and was prescribed medication for anxiety caused by the attacks. The applicant's daughter appears to have continued with this prescription until at least June 2013;

(v) 28 November 2012: Five of the front windows of the applicant's property smashed. After this incident, the applicant returned to her property only intermittently.

[6] According to her medical records the applicant first presented with anxiety problems in October 2012 and these persisted until at least August 2013. In September 2012 various Facebook postings were made involving direct or indirect threats to the applicant.

[7] On 19 September 2012 the applicant applied for accommodation with NIHE as a homeless person. This application was refused because the applicant was deemed not to have 'intimidation points'.

[8] At the end of November 2012 the applicant consulted with her solicitor who in turn consulted with Community Restorative Justice ("CRJ") on 12 December 2012. By letter dated 21 December 2012 to the applicant's solicitor CRJ asserted that the applicant had been subject to a campaign of intimidation and that her home had been attacked. It was during this time that the applicant received notification that she had fallen into arrears with her mortgage payments

[9] On 7 January 2013 the applicant made an application to NIHE for admission to the SPED scheme.

[10] On 14 February 2013 the NIHE changed its decision about 'intimidation points' and the applicant was given rented accommodation at an alternative address.

[11] By letter dated 13 March 2013 the NIHE advised the applicant that the Chief Constable had refused to provide a certificate for the purposes of SPED and the NIHE would not be purchasing her house at market value.

[12] In April 2013 pre-action protocol correspondence was entered into and on 4 April 2013 the applicant received formal notification that repossession proceedings against her had been commenced.

[13] On 6 June 2013 the applicant received a further letter from NIHE which stated that the PSNI had reviewed the impugned decision of March 2013 but confirmed that a certificate would not be issued. Leave to challenge this refusal by the Chief Constable was granted on 11 June 2013.

[14] On 18 September 2013 the PSNI again reviewed the refusal decision in the light of fresh evidence about the return of the Lavelles to the area and the applicant's medical condition but the refusal to certify was again confirmed.

[15] A further letter from Community Restorative Justice was sent to the applicant's solicitor asserting that she was the subject of a campaign of intimidation.

Order 53 Statement

[16] The applicant sought the following relief:

> "(a) An order of certiorari quashing the decision of the Police Service of Northern Ireland whereby it refused to certify, for the purposes of the Northern Ireland Housing Executive's Scheme for the Purchase of Evacuated Dwellings (SPED), that it is unsafe for the applicant to live in her home at [an address in North Belfast].
>
> (b) A declaration that the said decision of the Police Service of Northern Ireland is unlawful, ultra vires and of no force or effect.
>
> (c) An order of mandamus requiring the Police Service of Northern Ireland to retake its decision in relation to the applicant.
>
> ..."

[17] The grounds on which this relief was sought included:

"(a) The PSNI acted unreasonably in refusing to certify that it was unsafe for the applicant to live in her home at [an address in North Belfast];

(b) The PSNI failed to take into account all relevant considerations when refusing to certify that it was unsafe for the applicant to live in her home at [an address in North Belfast].

(c) The PSNI, in refusing to certify that it is unsafe for the applicant to live in her home at [an address in North Belfast], has acted in breach of its positive obligations under Art8 ECHR, as read with s6 of the Human Rights Act 1998.

(d) The PSNI, by refusing to certify that it is unsafe for the applicant to live in her home at [an address in North Belfast], has acted in breach of its positive obligations under Art 1 of Protocol 1 ECHR, as read with s6 of the Human Rights Act 1998."

Relevant Law

[18] Art 29 of the Housing (NI) Order 1988 (" the 1988 Order") states:

"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 may acquire a house under the scheme".

[19] The SPED scheme provides in material part as follows:

"Any homeowner can apply for SPED provided it is their only or main home and the following criteria apply:

- The dwelling must be owner-occupied and must be the owner's only or principal home.

- There must be evidence (substantiated by the PSNI) that it is unsafe for you or a member of your household who lives with you 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. A certificate stating this clearly, signed by the Chief Constable of the Police Service of Northern Ireland, or authorised signatory, must be provided to the Housing Executive."

[20] S6 of the Human Rights Act 1998 states:

> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right…
>
> (3) In this section "public authority" includes -
>
> (a) a court or tribunal

[21] Art 8 ECHR provides that:

> (i) Everyone is entitled to respect for his private and family life, his home and his correspondence.
>
> (ii) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[22] Article 1 of Protocol 1 ['A1P1'] - Protection of Property states:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Arguments

Applicant

Public Policy

[23] As a point of public policy per Swinney & Anor v Chief Constable of Northumbria Police Force [1996] EWCA Civ 1322 that there should be protection of informants, differences from the applicant in the present case and the applicant in Swinney are not so pronounced as to allow the court to distinguish the Swinney judgement. Failure to protect the applicant in this case may lead to a 'chilling effect' on future witnesses

Unreasonableness

[24] The *Wednesbury* threshold is met based on the pronouncement in Re O'Neill's Application [2013] NIQB 80 that an 'inappropriately restrictive approach' to the relevant criteria has been adopted. In particular the distinction between threats made to the applicant's person and property is unduly narrow. The range of instances, coupled with the Swinney policy should have led to the grant of a certificate and failure to do so was *Wednesbury* unreasonable.

[25] Judicial restraint ordinarily associated with *Wednesbury* would be inappropriate in the instant case as the High Court will be invited to consider under Art 8 whether a minimum 'level of severity' has been met. This exercise will overlap with the assessment of fact that the Chief Constable has already made. As the court has to make a value judgement of its own, a restrictive approach is not appropriate.

Failure to take into account relevant consideration

[26] As there was no distinction made between threats to person and property, the deciding officer did not take heed of the relevant consideration of when and how property damage may result in personal injury. Thus the PSNI failed to request and/or consider information from Community Restorative Justice. Further, the PSNI failed to consider the Lavelle's capacity to move freely within the vicinity of the applicant's property. Despite the fact that the Lavelle family moved out of the area there is evidence of attacks after the date that they moved out. The PSNI failed to have regard to the fluidity of the Lavelle family when assessing that there is now less scope for attacks on the applicant's home.

[27] The PSNI failed to take into account the Swinney policy, ie the importance of protecting Crown witnesses.

Breach of the State's positive obligations under Article 8 ECHR

[28] The applicant submitted that ECHR rulings in relation to nuisance support the following propositions namely that where the state is aware that one private individual (the first individual) is making it intolerable for another private individual (the second individual) to live in his or her home, the State can be under a positive obligation to take reasonable steps to safeguard the Article 8 rights of the second individual. The State's positive obligations will be engaged where the interference with the rights of the second individual satisfies a minimum 'level of severity' threshold.

[29] Whether the minimum level of severity threshold is satisfied in a given case is a question of law and fact to be determined by the relevant court.

[30] Per Fadeyeva v Russia (2007) 45 EHRR 10, Art 8 will be engaged where the adverse effects attain a minimum level. The assessment of the minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, its physical or mental effects. In order to fall under Art8 the applicant has to show that there was an actual interference with the applicant's private sphere and secondly that a level of severity was attained. Then, when such interference is established, the state's response must be adequate in order to honour their positive obligations under Art 8.

[31] Fadeyeva makes the assessment of the level of severity not just a decision for the PSNI but also one for the Court. In order to ascertain if Art8 has been breached and if the PSNI's responses were adequate it is not sufficient to accept the mere existence of a scheme. In real terms Fadeyeva demands a proportionality review, or closer look review. The Court must look at the facts and decide if the PSNI's response was proportionate.

[32] As the requisite standard of review involves considering the facts in issue, the constitutional objection to closer look review that is often associated with Wednesbury review is rendered redundant. Not only would the conclusion that the minimum 'level of severity' threshold has been satisfied take the Court towards a finding about whether the applicant is 'at risk of serious injury or death' (as per SPED); intensive review of the State's response under Art 8 ECHR would also allow the Court to ask whether a certificate should issue for the purposes of SPED. Seen in this way, the Art 8 ECHR question and reasoning in Fadeyeva suggest that restraint in the context of Wednesbury review may be unnecessary and perhaps inappropriate.

Breach of the State's positive obligations under Article 1 of Protocol 1 of the ECHR

[33] The applicant reiterates and adopts the points in relation to Art8 in support of this argument.

Respondents Arguments

Irrationality / Unreasonableness

[34] The respondent submits that it has acted reasonably and within its discretion in arriving at its decisions. Further the PSNI should be granted a wide degree of space in assessing the security/safety related aspect of the decision under the SPED scheme due to its access to information relevant to the decision and its specialist knowledge, experience, and expertise in assessing and addressing security risks. The Court, the respondent submits, should thus be slow to consider intervening and making a finding of irrationality and thereby in effect making its own decision on the risks posed in the case.

[35] PSNI have no financial interest in the outcome.

[36] The respondent referred to Re O'Neill (1996) NIQB 80 which decided that failure to consider threats to the neighbourhood in general as capable of amounting to direct and specific threats to the applicant. As such it has no direct application to this case.

[37] The PSNI have not adopted too narrow an approach in this case. ACC Hamilton in his affidavit notes that the applicant's home and car had been attacked - it is a non sequitor to say that this means that he considers that such attacks are irrelevant to assessment of risk to the person seeking SPED.

[38] Further, it is incorrect to say that since the applicant gave evidence in a criminal trial there is a public policy imperative to issue a CCC. While this background informs the police assessment, it can only do so against the SPED test. It does not lead to changed criteria.

Relevant Considerations

[39] The respondent argued that the applicant was wrong to say the PSNI failed to take into account information from CRJ since this information was available to the ACCs in reaching their decisions. The content of information supplied by CRJ was already and separately known, and confirmed and accepted by Police. It has plainly been taken into account by the decision-makers.

[40] In relation to the contention that the respondent should have sought further information from the CRJ, the respondent disputes this as follows:

(a) It is for the applicant to provide all details and put her best foot forward.

(b) The applicant was afforded every opportunity to put forward this information.

(c) The applicant never suggested that the CRJ had further information.

(d) The assessment is for the PSNI to make, not the CRJ. The CRJ letter does not address itself to the assessment of risk in the SPED criteria.

[41] Fluidity of movement was considered by the PSNI. It was legitimate to consider that with the passage of time and the lesser direct connection was a relevant consideration. The respondent submitted that it did take account of the need to protect Crown witnesses and ACC Finlay specifically refers to the applicant's role in the trial of Lavelle in his affidavit.

Article 8 ECHR

[42] The state's reaction to an interference with home, family life, bodily integrity which reaches the minimum level of severity must be judged within the context of the margin of appreciation (see Osman [1998] ECHR 101).

[43] Although Osman is applicable there is a difference of emphasis between Art 2 rights (fundamental) and Art 8 rights (qualified right to respect for private and family life, home and correspondence). The obligation on the state cannot be absolute or amount to an impossible or disproportionate burden. Not every claimed risk will give rise to a requirement on the state to take operational measures. The obligation only arises where the state knows or ought to have known of a real risk as opposed to a merely subjective fear. The requirement amounts to the taking of measures within the scope of their powers which might, judged reasonably, have been expected to avoid that risk. There is no prescription as to what those measures might have to be.

[44] The respondent argued that there was insufficient evidence to demonstrate a real and immediate risk of breach of Art 8 rights to the level of severity envisaged by the SPED criteria. The margin of appreciation is wider in the context of positive obligations. Even if Art 8 was engaged the mere fact that a CCC was not issued does not give rise to a breach particularly when other measures are available to protect those rights.

Article 1 Protocol 1

[45] There is a range of options open to the applicant for the vindication of her property rights short of the extreme step whereby the state has to step in and take the property over from her at market value. The applicant has taken no steps to sell the property nor has she deployed the civil law opportunities open to her. Further,

the applicant has failed to engage with the police in relation to the application of crime prevention measures.

[46] The applicant is not seeking positive state action to protect her entitlements to peaceful enjoyment of her possession, ie the house. Rather she wishes to require the state to buy the possession from her. This is not envisaged under A1P1. It is important to note that the applicant's case is not that the Police have failed to act appropriately and lawfully on the ground to protect her and her property from attack.

Discussion

Unreasonableness

[47] The test for unreasonableness is that no reasonable officer, acting reasonably could have come to the impugned decision. In the present case the decision in question is whether the applicant met the requisite threshold which demands the issuing of a CCC to allow her to avail of the SPED scheme. The relevant part of the test is as follows:

> "There must be evidence (substantiated by the PSNI) that it is unsafe for you or a member of your household who lives with you 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. A certificate stating this clearly, signed by the Chief Constable of the Police Service of Northern Ireland, or authorised signatory, must be provided to the Housing Executive."

[48] The three limbs of this test then are that:

(a) It is unsafe for the applicant and / or her daughter to continue to live in the property at an address in North Belfast

(b) BECAUSE the applicant and / or her daughter have been specifically threatened or intimidated

(c) AND AS A RESULT is at a risk of serious injury or death.

[49] The proper order to consider these limbs then is:

(a) To find that there is evidence of specific threats or intimidation against the applicant

(b) WHICH HAVE RESULTED in a risk of serious injury or death

(c) WHICH IN TURN MEANS that it is unsafe for the applicant to continue to live at the property

[50] The applicant's application for SPED was considered three times by PSNI officers. The first decision was made on 5 March 2013; the second on 4 June 2013, and the final decision on 18 September 2013.

The Decision of 5 March 2013

[51] In this decision each limb was answered as follows:

Is there evidence of specific threats or intimidation against the applicant?

[52] In answering this limb, information was provided by District Report of five incidents of alleged intimidation.

(a) 28 September 2012: Rear Bedroom & bathroom windows broken with ball bearings.

(b) 19 September 2012: Car passenger side 'keyed'.

(c) 15 October 2012: Large Crowd gather outside of the applicant s house directing abuse towards the applicant.

(d) 23 October 2012: Applicant subjected to personal abuse in the street.

(e) 28 November 2012: 5 windows in the house broken.

[53] The District Report also notes that the applicant believed that the incidents were in connection with her making a statement to police as a witness to an assault on a friend and in relation to the upcoming court case. In relation to the personal abuse of 23 October 2012 that abuse was allegedly at the hands of the Lavelle and McCartan families, those being the families of the person against whom she was to testify in that case. In the district report of the 4 March 2013 it is noted that 'the court case has now finished' and further that the Lavelle family had moved out of the area. It also states 'Police are not aware of any threats made against Francis Doherty but cannot rule out any form of attack on either her or her property in future. '

[54] On the basis of this information the deciding officer concluded that there was evidence of specific threats or intimidation against the applicant.

Have those specific threats / intimidation resulted in a risk of serious injury or death?

[55] In relation to this limb, the deciding officer decided that as the incidents recorded have taken the form of personal abuse or damage, and as the view of the local police was that 'whilst further incidents cannot be ruled out the potential for such incidents is likely to decrease due to the conclusion of a related court case and the move of another family from the area' he was 'unable to conclude there is evidence to indicate the applicant or a member of the family residing with her are currently at risk of serious injury or death.

[56] In the conclusion of the district report under this question it is stated 'None of the incidents would support a real and immediate risk of serious injury or death toward the applicant. Her home and car were the targets of attack. Although District reports reflect that they could not rule out further attacks there is no evidence of a specific threat… Local police believe that now that a related court case has concluded and with the other family involved having moved away incidents will decrease.

As a consequence, is it unsafe for the applicant or member of the household residing with the applicant to continue to reside at this address?

[57] As no risk of serious injury or death could be evidenced it was then impossible for the deciding officer to conclude that it was unsafe for the applicant to live there. The Area Commander was of the view that Crime Prevention advice that was offered would have greatly assisted in minimising the risk of these incidents. A security pack was also offered to the applicant to make her home safer.

Appeal Decision of 4 June 2013

[58] In order to allow the appeals officer, George Hamilton, to review the decision of 8 March various papers, including a report summarising the issues, were forwarded to him on 31 May 2013. He was informed that the applicant had left her home on 28 November 2011 and had not lived there since then. Further information in the form of Facebook postings which directly or indirectly threatened the applicant were also supplied.

[59] During the appeal Mr Hamilton reconsidered the original evidence as well as the new evidence in relation to the Facebook postings and concluded that the decision on the first limb remained the same.

[60] In relation to the second limb (ie risk of serious injury or death) Mr Hamilton considered that this remained unsatisfied as there had been no further incidents since the original application and that it had not been possible to identify the source or the dates of the Facebook posts. On the information available at that time he could not conclude that there was a risk of serious injury or death to the applicant or her daughter. As a result limbs 2 and 3 of the test were not satisfied.

Further Review of 20 September 2013

[61] This review was prompted by the medical evidence submitted showing both the applicant and her daughter being treated for anxiety and low mood, and evidence that the Lavelle family had moved back into the area. In relation to the second limb of the test, Mr Hamilton concluded that the new information relating to the other family 'has no bearing on these criteria'. He stated 'I accept that for the purposes of these applications 'serious injury' can include psychological injury, however do not believe that I can conclude that the information before me amounts to 'serious injury'. He noted that at this stage (September 2013) there had been no further incidents within the year. He therefore concluded that the test for 'risk of serious injury or death' was not satisfied even in the light of this new information. As a result limbs 2 and 3 of the test remained unsatisfied.

Were these decisions unreasonable?

[62] The key limb of the test on which the applicant's SPED application failed was in deciding if there was a 'risk of serious injury or death'. Both deciding officers concluded that on the available information there was insufficient evidence to support that there was a currently existing risk of serious injury or death to the applicant or her daughter. Were the decision makers acting reasonably in reaching this conclusion?

[63] Determining whether the relevant risk exists or not is a matter the judgement of which is entrusted to the Chief Constable of the PSNI. It is a precondition for entitlement under the scheme that a certificate signed by him stating "clearly" the requisite matters is provided to the Housing Executive. In this respect the primary decision maker in the assessment of risk is the PSNI. That assessment involves a question of judgement, experience, common sense and prediction. The PSNI are uniquely qualified to carry out this task and that is plainly why that task was entrusted to them. It is for this reason that in situations of this kind the primary decision maker must be afforded a wide margin of discretion. Matters of assessment and judgement in an area where the decision maker has special expertise are not to be lightly to be interfered with by a court. So unless the police acted mala fides, or with gross incompetence, or there is some other reason to suggest that the facts weren't weighed objectively, properly or reliably the court should be very slow indeed to intervene.

[64] There is no definition of what 'serious injury' may be although it is accepted that it may be physical or psychological. Whether there was a risk of such an injury is also a matter of assessment for the PSNI, assisted by any contemporaneous medical records if necessary. They are best positioned to assess as they will have the data relating to what the normal outcome of analogous situations is in terms of injury to the physical and psychological health of those involved. In real terms, the PSNI can't predict what the effect on health of a particular situation will be, but they can make an assessment of what the likely actions of the threatening/intimidating

parties might be and whether those actions are generally sufficient to cause 'serious injury or death'.

[65] In this case, it is clear that the police have, on several occasions, considered the facts against the SPED test and against their operational experience and the historical data. On each occasion they have come to the conclusion that should serious harm or death occur to the applicant or her daughter then this would be an anomalous outcome when compared to other similar situations. I am quite unable to castigate their approach as being irrational or unreasonable. I see no evidence that a reasonable decision maker acting reasonably could not have come to the same decision.

Failure to Consider Relevant Considerations

[66] The applicant advanced four relevant considerations which, it was submitted, the PSNI failed to take into account. I will deal with each of these in turn.

[67] The first is that the PSNI failed to consider how and when property damage can lead to personal injury. The key consideration for the purposes of the SPED test is whether, on the facts at hand, a risk of serious injury or death in fact arose. It is clear from the decisions issued that the deciding officers considered what had actually happened in this case and then considered whether these actual events created a risk of serious injury or death. The PSNI decided that the actual incidents did not create such a risk, partly because the incidents were directed at the applicant's property and not at her physical integrity. This does not mean that the PSNI considered this type of incident could never lead to 'serious injury or death.' It means that in the instant case that did not happen in fact and that in the experience of the PSNI they believed it unlikely that the relevant risk would materialise in the future on the facts as known.

[68] The second relevant consideration argued for on behalf of the applicant was that the PSNI failed to seek further information from CRJ and thus failed to take such information into account. The only material from CRJ that is referred to is the letter to the applicant's solicitor asserting that the applicant had been subject to intimidation and that her house had been attacked. It is clear from all decisions in relation to the applicant's SPED application that the PSNI were aware at all times that the applicant had been intimidated/threatened and that her house had been attacked. Therefore, in relation to this piece of evidence it is clear that it was taken into account. There is no reference in the applicant's skeleton argument as to whether CRJ actually had any other additional information and if so what that information contained.

[69] The third relevant consideration contended for is that the PSNI failed to consider the fluidity of the Lavelle family. Again I cannot find that this is made out. The fact that the Lavelle family had moved out of the area was a relevant consideration for the deciding officer to take into account when making the original

decision. He also took cognisance of the events which occurred after the Lavelles had moved out. It is not unreasonable to assume that more distance between the parties would create less opportunity for mischief. Further, when new information was submitted in relation to the Lavelle family moving back into the area, this fact was expressly considered and found to not upset the decision that there was no risk of serious injury or death.

[70] The fourth relevant consideration argued for is that the PSNI failed to take into account the public policy requirement enumerated in Swinney that there is a duty on the police to protect witnesses. No doubt such a policy exists, however the existence of such a policy does not impose a duty on the PSNI to issue a CCC to allow the applicant to avail of the SPED scheme. The fact that the applicant gave evidence in a criminal trial does not impose any such public policy imperative. It is of course part of the background that informs the police assessment. It can however only do so against the SPED test. It does not lead to changed criteria. In fact the Police did take positive measures to protect the applicant against the threats and intimidation which arose due to her testifying against a member of the Lavelle family. These included the offer of a security pack and the offer of Crime Prevention advice.

Article 8 Obligations

[71] The applicant argued that the PSNI breached their positive obligations under Art 8. Positive obligations on the state under Art 8 will be engaged where the state knew or ought to have known of an interference with the Art 8 rights of the applicant which reached a minimum degree of severity. Once this minimum degree of severity has been reached the state is then under an obligation to take appropriate measures to vindicate its art 8 obligations.

[72] Assuming for a moment that the minimum severity was attained, was there any breach of this obligation? The PSNI were not under any obligation to take any specific operational measures to vindicate the applicant's right. The duty is to take appropriate action only. The PSNI can only take operational measures which they are empowered to do. Under the SPED test the police are only empowered to issue a CCC in circumstances where the three limbs of the test are satisfied which was not the case here. Also the PSNI offered alternative operational support to the applicant in the form of a security pack and crime prevention help.

[73] Finally, the PSNI does not bear the state's positive obligations alone. In this case the state has responded to the applicant's situation by providing her with alternative rental accommodation as she has obtained enough 'intimidation points' to be considered as a 'homeless person' for the purposes of obtaining emergency housing from the NIHE.

Breach of obligations under A1 P1

[74] Similar to above the state may in certain circumstances bear a positive obligation to vindicate the applicant's property rights under A1 P1 where the interference with same reaches a minimum level of severity. The rights in play here are that an individual has a right to peaceful enjoyment of their property and that they will not be deprived of their property except in due course of law.

[75] Clearly the issue is the vindication of the right to peaceful enjoyment of her property. As above the state is under no obligation to take specific operational measures to ensure that the applicant can peacefully enjoy her property. The issue of a CCC is one possible mechanism for protecting these rights in extreme cases where all of the SPED conditions are satisfied. These conditions were not satisfied in the present case but the PSNI offered alternatives that were more appropriate to the assessed risk in this case and that were designed to give back to the applicant her peaceful enjoyment of her home. There were also civil law remedies which could have contributed to the same outcome but these were not pursued by the applicant. For these reasons I cannot find that there has been a breach of A1 P1 by the PSNI in their failure to issue a CCC.

Conclusion

[76] Therefore, for these reasons, I conclude that the applicant is not entitled to the relief sought.