

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **29/01/2003**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY SHAY DONNELLY FOR
JUDICIAL REVIEW OF A DECISION OF THE NORTHERN IRELAND
HOUSING EXECUTIVE MADE ON 20 DECEMBER 2001**

WEATHERUP J

Introduction.

[1] The applicant is a tenant of the Northern Ireland Housing Executive (NIHE) and lives with his wife. Their neighbours include the Gamble family comprising husband and wife and young daughter and Mrs Gamble is also a tenant of NIHE. Both the Donnelly family and the Gamble family comprise children who formerly lived in the respective premises but are now resident elsewhere. The applicant contends that for many years he and his family have been subjected to intimidation by members of the Gamble family. The applicant requested NIHE to take proceedings to recover possession of the Gamble premises. By letter of 20 December 2001 NIHE outlined the reasons for its decision not to undertake proceedings for possession of the Gamble premises and the applicant seeks judicial review of that decision.

[2] The applicant's grounding affidavit indicates that he and his family have been resident in the premises for 12 years. During that time they have been subjected to both verbal and physical intimidation involving in excess of 100 incidents. The police have been notified of this intimidation on 64 occasions and there have been 7 successful criminal prosecutions of members of the Gamble family. 16 separate incidents of intimidation have been reported to NIHE.

The decision.

[3] Correspondence on behalf of the applicant was entered into with NIHE requiring action to be taken in relation to the Gamble family. NIHE held meetings with the applicant and with the police. By letter of 20 December 2001 NIHE stated -

“As you will be aware, in deciding whether to commence proceedings for possession against any particular tenant, the Executive must not only be satisfied that there are reasonable prospects for success in any such proceedings; the Executive must also be satisfied that it is appropriate, in all the circumstances, to seek an order for possession.

In this case, in considering the question of appropriateness, the Executive had regard to the following:

- Mr and Mrs Donnelly’s views in this connection.
- The disadvantages to the Donnelly family if the Executive decided not to commence proceedings.
- Potential for mitigating any disadvantages to the Donnelly family arising from any omission to take proceedings.
- Tenant safety issues, including issues relating to the personal safety of the Donnelly family in the event of proceedings being taken, and in the event of proceedings not being taken.
- Issues relating to the personal safety of Executive Officers.

As you know, the Executive gave very careful and detailed consideration to this matter. Ultimately, with considerable regret, the Executive has decided that, having regard to all the circumstances of this case, it is not appropriate to commence proceedings. The Executive’s decision is mainly based upon the following considerations. In this case, it has been clear from the outset that there was an issue as to whether there would be a serious risk to the safety of Executive officers if these proceedings were to be commenced. The Executive carried out a careful assessment of that risk, based on all the information available to it. That information came from both internal and external sources. You will appreciate that, having regard to the confidential nature of that information, the Executive is unwilling to provide details in respect of it. In the light of that information, the Executive was not satisfied that, in this case, proceedings could be taken without

serious risk to the personal safety of Housing Executive Officers.”

[4] The NIHE solution to the harassment involved the applicant electing to move elsewhere. The letter of 20 December 2001 concluded by proposing a meeting between the NIHE and the applicant “in order to consider what Housing Executive assistance might be appropriate and proportionate in these circumstances.” That meeting did not take place but by a further letter of 3 May 2002 the NIHE set out its proposal for appropriate and proportionate assistance to the applicant if he and his wife should decide to relocate, namely:

1. Priority over all other applicants for their area of choice
2. The payment of an amount equal to the home loss payment that would have been due if they had met the eligibility requirements under the Land Acquisition and Compensation (NI) Order 1973, which sum was estimated at £1500.00.
3. A non-statutory payment equal to the amount of disturbance payment which would be due under the 1973 Order had they met the eligibility criteria, which sum was estimated at £500.

[5] In a supplementary affidavit filed by the applicant it appears that harassment by the Gamble family has continued since the NIHE decision and incidents occurring in September 2002 are outlined. The police are carrying out investigations in relation to the further incidents and criminal proceedings may result. Counsel for the applicant and the respondent informed the Court that the conduct of members of the Gamble family was of a sectarian and paramilitary nature and that members of the Gamble family were considered to represent a threat to others. The applicant classified the conduct of members of the Gamble family as coming within the definition of “terrorism” provided by section 1 of the Terrorism Act 2000. In November 2002 the applicant obtained an injunction against members of the Gamble family under the Protection for Harassment (NI) Order 1997.

[6] It is apparent from the NIHE letter of 20 December 2001 that the NIHE decision not to commence proceedings for possession of the Gamble premises was primarily, if not exclusively, based on concerns for the serious risk to the personal safety of NIHE staff.

Private law proceedings.

[7] The respondent contends that the issues that arise are private law matters. There is limited scope for a private law action against NIHE as landlord in the circumstances of a case such as the present. In Hussain v Lancaster City Council [1999] 4 All ER 125 the plaintiffs were the owners of premises who commenced proceedings in nuisance and negligence against the defendant alleging they were the victims of racial harassment from persons gathering outside their premises

who were tenants of the defendant or persons living with other tenants. The defendant had not taken action against the tenants under their statutory powers under the highway and housing legislation. The Court of Appeal held that a landlord could not be responsible for acts of nuisance committed by a tenant unless the landlord had specifically authorised those acts and the council could not be liable in negligence except for irrationality in the exercise of discretionary statutory powers or where the policy of the statute required compensation to be paid to those who had suffered loss because of power that had not been exercised.

[8] In Mowan v Wandsworth London Borough Council [2001] 33 HLR 56 the Court of Appeal considered the landlord's liability in nuisance and negligence for the conduct of tenants in the light of Article 8 of the European Convention, although the events occurred before the Convention was brought into force. It was contended that the applicable law of nuisance and negligence was incompatible with the right to respect for private and family life and that the common law should be interpreted so as to provide an effective remedy against the defendant. The Court of Appeal affirmed the existing position in relation to the liability of the landlord. However the Court of Appeal did identify alternative remedies for the applicant in the form of an injunction against the party responsible for the offending conduct and public law proceedings against the defendant Council with the suggestion that in deciding not to pursue proceedings for possession of the offender's flat the Council might well have taken into account not only property management considerations as landlord but also social services considerations.

The applicant's grounds.

[9] The grounds relied on in this application for judicial review relate, in the first place, to the improper performance of the duty of NIHE under Article 29 and Schedule 3 of the Housing (NI) Order 1983 and the contention that the safety of NIHE staff was an irrelevant consideration in making a decision to recover possession of premises; secondly to non-compliance with certain provisions of the European Convention on Human Rights, namely Articles 2, 3, 6, 8 and Article 1 of the First Protocol, and thirdly to the NIHE decision being contrary to the applicant's legitimate expectation and being *Wednesbury* unreasonable.

The statutory scheme.

[10] NIHE is the statutory housing authority and its statutory functions include the provision of housing accommodation. A tenancy under which a dwelling house is let by NIHE is a secure tenancy under Chapter 11 of the Housing (NI) Order 1983. Article 29 of the 1983 Order provides that the Court will not make an order for the possession of a dwelling house except on one or more of the grounds set out in Part 1 of Schedule 3 and in relation to Ground 2 the Court shall not make an order unless it considers it reasonable to do so.

Ground 2 arises where the tenant or any person residing in the dwelling house has been guilty of conduct that is a nuisance or annoyance to neighbours. The Gambles have been guilty of conduct that amounts to a nuisance or annoyance to the Donnellys and there are reasonable prospects that a Court would make an order for possession of the Gamble dwelling house under Article 29 of the 1983 Order. By letter of 20 December 2001 NIHE accepted that there are such reasonable prospects for success in proceedings for possession but decided that it was not appropriate to apply for an order for possession by reason of the serious risk to the personal safety of NIHE staff, a consideration that the applicant contends is irrelevant.

Relevant considerations.

[11] An NIHE decision to seek an order for possession arises from the exercise of a statutory power concerning a matter of housing management. In exercising that power NIHE must not have regard to irrelevant considerations and the identity of that which is relevant must be ascertained from the statutory context. In making a decision on housing management, or any other of its functions, the general issue of staff safety must be a relevant consideration. The administration of NIHE functions involves NIHE not only as a statutory housing authority but also as an employer subject to civil and criminal responsibilities for the general health and safety of employees.

[12] However the present case does not concern general health and safety matters because at the heart of the issue is the safety of staff in the context of a perceived threat to the personal security of staff concerning a party affected by the decision being considered. The applicant submits that if regard is to be had to matters of staff safety involving such a risk, public administration could be rendered ineffective. It is submitted that public authorities should not be entitled to divest themselves of their obligations by relying on such a risk to public officials. An analogy is drawn with the House of Lords rejection of duress as a defence to murder in R v Howe [1987] 1 AC 417 where Lord Hailsham (at page 432B) considered that the availability of such a defence “withdraws the protection of the criminal law from the innocent victim and casts the cloak of its protection upon the coward and the poltroon in the name of a concession to human frailty.”

[13] In exercising any discretion NIHE is entitled to take into account the impact of its decision on the general health and safety of its staff. If there should be a potential health and safety risk to staff then NIHE would be expected to address that risk before making a final decision and if the risk could not be eliminated to make that final decision in the light of the nature and extent of the outstanding risk. Where the threat to the safety of staff relates to a party concerned with the decision, NIHE should be no less obliged to address that risk, and if it cannot be eliminated to take into account the nature and extent of the outstanding risk in making a final decision. The nature of the threat is such that

the police would be a relevant authority involved in addressing the threat. To acknowledge that NIHE will take account of any outstanding threat is not to permit NIHE to divest itself of its obligations but rather to permit it to have regard to the full scope of its obligations. Accordingly I am satisfied that the risk to the personal safety of NIHE staff from such a source is not an irrelevant consideration.

[14] While the risk to the personal safety of NIHE staff is not an irrelevant consideration, NIHE remains under an obligation not to give undue weight to that consideration in making its decision and to conduct a proper balance of the respective interests in making its decision not to seek an order for possession of the Gamble dwelling house. The traditional approach has been that weight is essentially a matter for a decision maker with the court intervening on the basis of irrationality, although where a fundamental right is affected significant weight should be accorded to that right. With the review being undertaken in the light of the Human Rights Act 1998 the concept of proportionality has introduced a greater intensity of review as illustrated by Lord Steyn in *R(Daly) v Home Secretary* [2001] 2 AC 532 at 547E-F :-

“First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.”

Article 8 of the European Convention on Human Rights.

[15] Issues concerning the weight accorded to the threat and to the other interests and considerations will be addressed in the context of the complaints relating to the European Convention. Article 8 of the Convention provides-

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is 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.”

[16] Article 8 obligations are primarily negative but may also involve positive obligations requiring a public authority to take action if it is to comply with Article 8. The positive requirements of Article 8 were described in Botta v Italy [1998] 26 EHRR 241 at para 33 as follows:-

“In the instant case the applicant complained in substance, not of action but of a lack of action by the State. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference; in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. However, the concept of respect is not precisely defined. In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interest of the individual, while the State has, in any event, a margin of appreciation.”

[17] In the present case the negative obligations arising under Article 8 do not apply as there has been no public authority interference with the applicant’s right to respect for privacy and family life and home. The offending conduct is that of private individuals. However the circumstances may give rise to a positive obligation to take action on the part of the public authority if there is to be effective respect for the applicant’s private and family life and home. This involves consideration of the fair balance between the private interest of the applicant and the public interest in an effective housing management system.

[18] In a number of instances the European Court has applied this fair balance in cases involving neighbour nuisance and has found the State in breach of Article 8. In Lopez Ostra v Spain [1994] 20 EHRR 277 the applicant was affected by a waste treatment plant and had complained to local regulatory authorities and undertaken judicial proceedings. The Court stated that whether the question was analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants rights under Article 8(1), or in terms of interference by a public authority to be justified under Article 8(2), the applicable principles were broadly similar. There had to be regard to the fair balance to be struck between the competing interests of the individual and the

community as a whole. Even with positive obligations the aims stated in Article 8(2) may be of a certain relevance. The Court stated that its task was to establish “whether the national authorities took the measures necessary for protecting the applicant’s right.” The authorities had failed to take effective action and had resisted judicial decisions. The Court considered that the State had not succeeded in striking a fair balance between the interest of the town’s economic well-being in having a waste treatment plant and the applicant’s effective enjoyment of her right to respect for her home and her private and family life.

[19] In Guerra v Italy [1998] 26 EHRR 357 the applicant was affected by a chemical plant. The Court sought to ascertain “whether the national authorities took the necessary steps to ensure effective protection of the applicant’s right.” The national authorities had adopted a safety report prescribing improvements but the local authorities had indicated that inquiries were continuing and that government directions were awaited. The Court found that the authorities had not taken the necessary steps to ensure effective protection of the applicants right to respect for her private and family life as guaranteed by Article 8.

[20] In Hatton v United Kingdom [2002] 34 EHRR 1 the applicant was affected by aircraft noise from night flights. The Court repeated the nature of its task as set out above in Lopez Ostra and added that “... States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project.” The investigation required that appropriate and complete information be obtained on the extent of the economic interest in night flights and on the impact on the applicants’ sleep, and in both respects the information was found to be incomplete. The Court held that the steps taken by the Government were not capable of constituting “the measures necessary” to protect the applicant’s position and the State was found to have failed to strike a fair balance between the State’s economic well-being and the applicants effective enjoyment of right to respect for private and family life and home.

[21] In each of the above cases the State was held responsible where the third party interference was not addressed effectively by the national authorities. Under section 6 of the Human Rights Act 1998 the obligation on public authorities is not to act in a manner that is incompatible with European Convention rights. In domestic proceedings for judicial review of the decision of a respondent public authority, the whole range of remedies available from all agencies within the State will not be available to the particular public authority, and compatibility of public authority action with the articles of the European Convention will be assessed accordingly. To achieve a fair balance of public and private interests the necessary measures must be taken to protect an applicant’s rights so as to minimise, so far as possible in the circumstances, the interference

with those rights. That requires consideration of alternatives through a proper and complete investigation based on adequate information concerning the relevant public interest and the relevant private interest. The applicant submits that the inaction of NIHE as a public authority fails to strike a fair balance between the public interest in effective housing management and the applicant's right to respect for privacy and home and family life. Applying the above approach to NIHE as a public authority obliges NIHE to undertake a proper and complete investigation of the respective public and private interests. That would include taking into account the potential consequences of its actions including the consequences for its administration and its individual members of staff arising from any threat to their personal safety. It is by no means desirable that a risk to personal safety of this nature should have to be taken into account in deciding on the appropriate performance of statutory duties. However to do so is not to abdicate responsibilities but to recognise the practical reach of administration in any particular case.

[22] In the circumstances of Northern Ireland with its sectarian and paramilitary influences and local territorial clashes particular problems arise in the area of housing allocation. In the present case NIHE consulted with the police, who would be an appropriate authority to determine the nature and extent of a perceived risk to NIHE staff and to advise NIHE accordingly. NIHE is the relevant public authority with long standing expertise in the management of public housing. A wide discretionary area of judgment ought to be accorded to the decision-making authority in making a decision of this nature.

[23] There has not been disclosure of the information on which the risk assessment was carried out because NIHE contends that such disclosure would also create a risk to the personal safety of others. The applicant contends that there has not been sufficient transparency in the decision making process. The rights of others affected by disclosure have to be balanced against the desirability of appropriate disclosure of information and as the applicant accepts that there are good grounds for recognising a threat to the personal safety of NIHE staff it is not considered to be necessary that further details should be revealed of the information on which the risk assessment was carried out.

[24] Having consulted with the police and assessed the risk to NIHE staff and having balanced the other considerations set out in the letter of 20 December 2001 and having consulted with the applicant, I am satisfied that NIHE has achieved a fair balance in the circumstances, regrettable though the outcome may be. NIHE proposed that if the applicant would agree to move to other accommodation NIHE would facilitate such a move by giving priority and financial support. The applicant contends that such a solution penalises the victim and rewards the intimidator. However, such an alternative arises once it has been decided that an order for possession should not be sought for the reason given, and NIHE have then sought to facilitate that option if it was what the applicant wished to do. Accordingly the proposal was a consequence of the decision not to seek

possession. In a wider setting there are alternative restraints on future harassment that may arise through the police and the courts. There is the prospect of further criminal proceedings arising out of the events in September 2002. In addition the applicant has now secured an injunction against further harassment and that may lead to action for breach of injunction should further harassment occur.

Article 1 of the First Protocol to the European Convention.

[25] Article 1 of the First Protocol to the European Convention provides that every person is entitled to the peaceful enjoyment of his possessions. The applicant submits that NIHE as a public authority is under positive obligation to protect the applicant's right to peaceful enjoyment of his home. Reliance was placed on the decision of the European Court in Antonetto v Italy (20 July 2000). The applicant objected to building development on neighbouring land affecting the enjoyment of the applicant's premises. The building permit was found to be illegal and the regulations required demolition. Ineffective action was taken to secure the demolition of the building and the European Court held that there had been a breach of the applicant's right to peaceful enjoyment of his possessions under Article 1 of the First Protocol as there had been a partial restriction of the view and the light to the applicant's neighbouring property resulting in a decrease in value. The interference with the applicant's right to property could not be justified under a fair balance test because the building permit was illegal and domestic law required demolition and accordingly the interference could not be justified in the public interest.

[26] In the present case NIHE has a discretion in relation to the taking of proceedings for possession against the offending neighbour. That which has to be justified in the public interest must be lawful in domestic law. The applicant relies on the judgment in Antonetto to submit that NIHE cannot rely on illegal conduct in seeking to justify its decision. However in Antonetto a decision to retain the offending development could not be justified in the public interest because its existence was unlawful. In the present case the decision not to proceed to recover possession would be within the legal competence of NIHE and accordingly NIHE are not precluded from seeking to uphold the decision in the public interest. The illegality of the offending conduct does not remove the legal competence of NIHE to make a decision not to recover possession of the premises. The fair balance test between the demands of the public interest and the applicant's interest can be applied and I am satisfied that, by reason of the matters referred to above in the discussion of Article 8, the NIHE decision represents a fair balance of the respective interests.

Articles 2, 3 and 6 of the European Convention on Human Rights.

[27] Article 2 of the European Convention provides that everyone's right to life shall be protected by law. I am not satisfied that there is evidence of such a risk to

the applicant's family that brings Article 2 into play. Accordingly, in the circumstances of the present case I am not satisfied that Article 2 is engaged.

[28] Article 3 of the European Convention provides that no one shall be subjected to torture or inhuman or degrading treatment or punishment. The role of the State in relation to the treatment of an applicant accorded by a third party was considered by the European Court in A v U.K. [1998] 27 EHRR 611 in circumstances where the applicant child had been beaten by his stepfather. The treatment must attain a minimum level of severity to fall within the scope of Article 3. The assessment of the level depends on all the circumstances including the nature and context of the treatment, its duration, its effects and the circumstances of the victim. I am satisfied that the nature and context of the treatment of the applicant's family, involving harassment of a neighbour, is not such as to engage Article 3.

[29] Article 6 of the European Convention provides that in the determination of civil rights and obligations everyone is entitled to a fair and public hearing within the reasonable time by an independent and impartial tribunal established by law. In the circumstances of the present case I am satisfied that there was no contestation in respect of which NIHE made a determination of the applicant's civil rights for the purposes of Article 6 and accordingly Article 6 is not engaged.

[30] The applicant relied not only on a breach of the various articles of the European Convention referred to above but also in each case on the failure of NIHE to take into account or give reasons relating to the impact of each article. I am satisfied that, the articles having been drawn to the attention of NIHE in correspondence, they were in the mind of the decision makers, and that the reason for its decision was outlined in correspondence in such a manner that it was not necessary for NIHE to outline its appreciation of the impact of the articles of the European Convention. Article 2 was not drawn to the attention of NIHE but I am satisfied that Article 2 is not engaged in the circumstances of the present case.

Legitimate expectation.

[31] The applicant claimed that NIHE failed to give effect to the applicant's legitimate expectation. The applicant seeks substantive benefit from this reliance on legitimate expectation by way of a decision by NIHE to commence proceedings for possession of the Gamble premises. In order to ground a claim for legitimate expectation it is necessary to establish some promise or practice on the part of the decision maker that the applicant can reasonably expect to continue. No such promise or practice has been identified in the circumstances of the present case and I am satisfied that the applicant can have no legitimate expectation of a decision to commence proceedings for possession.

Irrationality.

[32] Finally the applicant claimed that the decision of NIHE not to commence proceedings for possession was *Wednesbury* unreasonable. The decision has been subjected to a higher intensity of review than irrationality and I have found that, in all the circumstances, it represented a fair balance between the respective interests. I am satisfied that the decision was within the range of reasonable responses of a decision maker armed with the information available in the present case and that the decision cannot be classed as *Wednesbury* unreasonable.

Conclusion.

[33] NIHE has been faced with an unenviable decision. I am not satisfied that any of the applicant's grounds of judicial review set out at paragraph [9] above requires the NIHE decision to be set aside. The threat to the personal safety of staff is not an irrelevant consideration; a fair balance of public and private interests has been struck for the purposes of Article 8 and Article 1 of the First Protocol to the European Convention; the other articles of the European Convention are not engaged; the NIHE decision was not contrary to the applicant's legitimate expectations nor was it *Wednesbury* unreasonable. It is to be hoped that effective police action can be taken to prevent any continuation of this harassment of the applicant's family and that, should any such harassment occur, criminal proceedings and action in relation to any breach of the injunction will be undertaken. However I must dismiss the application for judicial review of the NIHE decision.