

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION FOR JUDICIAL REVIEW BY
JOANNE O'NEILL

WEATHERUP J

[1] This is an application for judicial review of a decision of the Northern Ireland Housing Executive (NIHE) of 13 August 2007 refusing to purchase the applicant's property at 8 Old Throne Park, Belfast under the Scheme for the Purchase of Evacuated Dwellings (SPED) and the related decision of the Police Service of Northern Ireland (PSNI) refusing to issue a Chief Constable's Certificate in connection with the SPED application. Mr Larkin QC and Mr Scoffield appeared for the applicant, Mr Hanna QC and Mr Dunlop for the NIHE and Mr Dunlop for the PSNI.

The application under the SPED scheme.

[2] The applicant and her former partner are the owners of a dwelling house at 8 Old Throne Park, Belfast. Old Throne Park is described as an "interface" area where the mainly Catholic owners of the dwellings were under regular attack by stones and petrol bombs and abuse from Loyalists. On 7 February 2007 the applicant and her former partner applied to NIHE under the SPED scheme for the purchase of the dwelling. The applicant and her partner had separated at an earlier date and in September 2006 the applicant and her children had vacated the premises as a result of incidents in the area. The applicant referred to there having been numerous incidents at the property but relied on three main incidents which had occurred on 17 June 2005, 6 August 2006 and 20 August 2006.

[3] In the incident of 17 June 2005 three houses had been attacked and oil tanks were set on fire. On 6 August 2006, after an attack on a neighbour of the

applicant, Loyalists had issued threats to the residents, including a threat to the applicant that her house would be burnt down. Whilst the incident was not logged as having been reported by the applicant, the police had been present at the scene. On 20 August 2006 the oil tank at the applicant's next door neighbour had been set on fire causing fire damage to the applicant's property. In addition Loyalists had thrown petrol bombs and bricks had been thrown at the back windows of the applicant's house.

[4] On 8 May 2007 NIHE informed the applicant that a Chief Constable's certificate would not be issued in respect of her application and that the applicant did not meet the criteria under the SPED scheme. After a review the decision was confirmed on 13 August 2007.

The terms of the SPED scheme.

[5] The Housing (Northern Ireland) Order 1988 section 29 provides for a scheme for the purchase of evacuated dwellings as follows:

“(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) The scheme submitted under paragraph (1) may include provision as to -

(a) the circumstances in which the Executive may acquire 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.

(6) The Department may approve a scheme submitted under paragraph (1) with or without modifications.

(7) The Executive shall comply with a scheme approved by the Department under paragraph (6).

(10) The powers of the Executive shall be deemed always to have included power to make and operate a scheme making provision corresponding to that mentioned in paragraph (1)."

[6] The SPED scheme approved by the Department sets out eligibility conditions as follows:

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

- (i) The house must be owner-occupied and must be the applicant's only or principal home.
- (ii) A certificate signed by the PSNI 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 reside 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 have been awarded intimidation points under Part 3 of the house allocation scheme operated by the Executive under Article 22 of the Housing (Northern Ireland) Order 1981."

The grounds for judicial review.

[7] The applicant's grounds for judicial review against the PSNI are:

"(a) The PSNI's decision that the applicant did not meet the criteria for the issue of a Chief Constable certificate is irrational in the Wednesbury sense

and/or a conclusion not open to the PSNI on the evidence before it.

(b) The PSNI has failed to give any or adequate reasons for its decision not to issue a Chief Constable's certificate.

(c) The Chief Constable has not lawfully delegated the exercise of his functions in relation to the granting of Chief Constable's certificates for the SPED scheme to the civilian members of staff who made the decision in the applicant's case."

The applicant's grounds for judicial review against NIHE are:

"(d) The Housing Executive has unlawfully fettered its discretion by requiring an applicant to the SPED scheme to satisfy it (by means of a Chief Constable's certificate) that it is unsafe for the applicant or a member of his household residing with him to continue to live in the property because that person has been specifically or directly threatened or intimidated and as a result is at risk of serious injury or death.

(e) The terms of the SPED scheme, as presently framed, are ultra vires the power conferred by Article 29 of the Housing (Northern Ireland) Order 1988.

(f) The Housing Executive has erred in law and/or unlawfully fettered its discretion by concluding that it has no discretion to allow an application to the SPED scheme in the absence of a Chief Constable's certificate."

The processing of the SPED application.

[8] Tom Carson of the PSNI Emergency Housing Unit reported to the Director of Human Resources on civil SPED applications. On receipt of the application from the applicant Mr Carson sought a report on the security/intelligence aspects of the application. The response was that the PSNI was not in possession of intelligence to indicate the existence of a specific threat against the applicant or her partner. Further Mr Carson sought a report from the local District Commander on the issue of a Chief Constable's certificate. The District Commander directed PC Costley to investigate the SPED application. PC Costley examined the incident records

relating to the applicant. Of the three main incidents referred to by the applicant, only that of 20 August 2006 had been reported to police by the applicant. PC Costley referred to six other incidents in the previous two years involving the stoning of the applicant's house and one incident of a threat to the applicant's son. PC Costley concluded that "there is no record of Ms O'Neill having been directly or specifically threatened at her home and therefore on the basis of the information before me I am of the opinion that this application does not fulfil the criteria for issue of a Chief Constable's Certificate." The District Commander recommended that a Chief Constable's Certificate should not be issued.

[9] Upon receipt of the reports Mr Carson prepared a report for the Director of Human Resources. He noted the absence of intelligence to indicate the existence of any specific threat against the applicant or her partner. Mr Carson referred to the three main incidents relied on by the applicant. He referred to the only incident likely to cause serious injury or death as being that of 20 August 2006. Mr Carson had initiated enquiries in relation to the relative positions of the applicant's and the neighbour's houses. In a previous incident where an oil tank had been set on fire on one property, the relative positions of three properties was such that the police concluded that the attack on the first property and the movement of the resulting 'lake of fire' was such that it was treated as a direct threat to all three houses. Having examined the scene Mr Carson was satisfied that the same conclusion could not be reached in respect of the applicant's property as a result of the events of 20 August 2006. Mr Carson concluded that there was no evidence that could sustain the application for a Chief Constable's certificate. The Director of Human Resources agreed and decided that no certificate would be issued.

[10] The applicant called for a review of the decision and Mr Carson sought further reports on the security/intelligence aspects and from the local District Commander. The intelligence report was negative. The District Commander's report of 19 July 2007 confirmed the absence of intelligence, expressed sympathy for the plight of the family and concluded by stating that while there was no intelligence specifically regarding the applicants being "directly or specifically threatened or intimidated" he was unable to make a judgment as to whether it was safe for them to remain in the house. Mr Carson further reported to the Director of Human Resources that there was no new evidence, save for a letter from Paul Goggins, Parliamentary Under Secretary of State at the Northern Ireland Office, dated 2 May 2007 indicating that conditions at Old Throne Park were such that a 25 foot heavy grade mesh fence remained necessary to protect the lives of people living in Old Throne Park. Mr Carson did not believe the letter to be of any significance in relation to the review. The Director of Human Resources decided that a Chief Constable's certificate should not be issued.

Directly or specifically threatened or intimidated.

[11] The eligibility conditions for the SPED scheme include a requirement for a Chief Constable's certificate 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". The ingredients are -

- (1) it is unsafe for a person to continue to live in the house,
- (2) the reason it is unsafe is that the person has been directly or specifically threatened or intimidated,
- (3) that person is at risk of serious injury or death as a result of the threats or intimidation.

[12] Much of the consideration of the case by the police has been directed to whether the applicant has been directly or specifically threatened or intimidated. One aspect of the approach to this ingredient was to examine the available intelligence, but there was no intelligence indicating any direct or specific threat or intimidation. Another aspect of the approach to this ingredient was to examine the nature of the incidents that had occurred in order to determine whether the applicant had been directly or specifically threatened or intimidated. While of course there may be attacks that are intended to be made on particular individuals in their homes, the general nature of incidents at interface areas may be more in the nature of attacks on the homes of residents within reach, based on a sectarian view of those residents. Such attacks may be undertaken by or on behalf of an illegal organisation, although that was stated by police not to be the present case, but there may be other instances where individuals have carried out their own attacks. The attacks will be made on all properties within range on the other side of the interface. Thus the threat or intimidation involved in targeting a group of houses will arise because of their proximity to a particular location or the convenience of a point of attack and will be based on sectarian hostility to the occupiers of such houses. This is capable of being a direct or specific threat or intimidation of the occupier, even though it is any house within range that is being targeted. 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] The assessments that were made in the present case indicated the finding that there was an absence of evidence that the applicant was directly or specifically threatened at her home. On the contrary, that there is such evidence is clear. The police incident log of events reported by the applicant

includes repeated stoning of the applicant's house, mainly from the grounds of the adjacent school to which the attackers were able to gain access. One of the main incidents relied on by the applicant that was reported to police was that of 20 August 2006 where there was an attack on the oil tank of the next door neighbour. At that time the applicant reported stoning of the windows at the back of her house. She had plastic coverings fitted to the windows to protect the windows from breakages.

[14] The police assessments appear to concentrate on whether the applicant was "specifically" threatened or intimidated. This seems to be interpreted in the narrow sense of targeting the applicant in particular, as opposed to other residents. In the nature of incidents such as these all those within range are targeted. 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.

[15] Accordingly it is proposed to refer the issue back to the PSNI to determine whether the applicant satisfied the criteria for the issue of a Chief Constable's certificate in accordance with the observations set out above.

Article 29 and the approved SPED scheme

[16] Further, the applicant contends that the terms of the SPED scheme are ultra vires Article 29 of the 1988 Order. Article 29 provides for a scheme to make provision for the purchase of evacuated dwellings from persons who "in consequence of acts of violence, threats to commit such acts or other intimidation, are unable or unwilling to occupy those houses". On the other hand the eligibility conditions for the SPED scheme provide for a Chief Constable's certificate in what the applicant contends are terms that are not compatible with the enabling power, namely that it is unsafe for the applicant or a member of the household residing there 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.

[17] The respondents contend that it is normally the function of statutory schemes to prescribe overall plans for the attainment of objects described in the enabling statute in general terms. Article 29 describes the object of the proposed scheme in the general terms set out above and provides that NIHE shall prepare such a scheme; that it may include provision as to the circumstances in which NIHE may acquire a house under the scheme; that the Department may approve the proposed scheme; that NIHE shall comply with the approved scheme. The SPED scheme is not devised by the

legislation but by the proposal approved by the Department for the purposes of the legislation.

[18] More particularly the applicant contends that the terms of a SPED scheme ought to include an occupier who is “unable or unwilling” to occupy the house in consequence of violence, threats or intimidation. The respondents contend that an Article 29 scheme will necessarily import an objective assessment into its operation, as NIHE liability under an approved scheme cannot be determined merely by the subjective unwillingness of an applicant to remain in the property in the face of violence, threat or intimidation of any nature or degree. Thus, the respondents contend, the inclusion of a Chief Constable’s certificate in the eligibility conditions imports the necessary requirement for an objective element to the assessment of a claim. I accept the respondents’ arguments and am satisfied that in this respect the scheme is compatible with the statutory power. Overall I am satisfied that the existing SPED scheme accords with the objects and purposes of Article 29 of the 1988 Order.

Residual discretion of NIHE

[19] Further the applicant contends that NIHE has a residual discretion to purchase the applicant’s home in the absence of a Chief Constable’s certificate. It is contended that if the applicant falls within the class of persons referred to in Article 29 of the 1988 Order, namely a person unwilling to remain in the property in consequence of violence, threats or intimidation, NIHE may purchase the applicant’s property even if the conditions of the SPED scheme have not been satisfied. This argument was rejected by Morgan J in Watt’s Application [2005] NIQB 35. At paragraph 15 Morgan J distinguished between, on the one hand, a decision maker applying a policy that has been devised to guide the exercise of a statutory discretion and on the other hand a decision maker following a scheme that amounts to a form of subordinate legislation and where there is no residual discretion. The SPED scheme is of the latter type. I agree with Morgan J’s approach. NIHE are not exercising a statutory discretion guided by an adopted policy but are applying a statutory scheme. Where a statutory scheme is introduced there is no residual discretion for the decision maker unless it is provided for in the enabling legislation or in the scheme or by another statutory provision or required to achieve compatibility with European Community law or the European Convention on Human Rights or other legal requirement. None of the exceptions applies in the present case and there is no residual discretion for NIHE to approve applications outside the approved SPED scheme.

Delegation of decision making.

[20] The applicant contends that there was unlawful delegation to the Director of Human Resources of the decision not to issue the Chief

Constable's certificate. The eligibility conditions of the SPED scheme provide that the certificate be signed by the Chief Constable "or authorised signatory". Joseph Stewart, Director of Human Resources, was the authorised signatory who took the decision not to issue the certificate. Mr Stewart is not a police officer, but he is a member of the police support staff employed by the Northern Ireland Policing Board and a senior employee for the purposes of section 4 of the Police (Northern Ireland) Act 2000. The PSNI rely on section 4(5) of the 2000 Act which provides that -

"The following functions of the Board shall be exercised, on behalf of and in the name of the Board, by the Chief Constable -

- (a) the power to direct and control senior employees of the Board and all other powers and duties of the Board as employer of such employees, other than the power to appoint and dismiss."

[21] The general functions of the Northern Ireland Policing Board include securing the maintenance of the police in Northern Ireland and securing that the police and the police support staff are efficient and effective. The applicant contends that section 4(5) of the 2000 Act does not have the effect of enabling the Chief Constable to authorise Mr Stewart to sign a certificate under the SPED scheme. The applicant contends that the issuing of certificates under the SPED scheme is not a function of the Board and therefore the Chief Constable has no power to direct or control Mr Stewart in relation to such certificates. However the function of the Board with which section 4(5)(a) is concerned is the power to direct and control senior employees of the Board and the Chief Constable may direct and control senior employees on behalf of and in the name of the Board as employer. As the issue of certificates under the SPED scheme is one of the functions of the Chief Constable, he has the power to direct and control senior employees such as Mr Stewart, if it is otherwise lawful to do so.

[22] The delegation issue also came before Morgan J in Watt's Application where the PSNI also relied on section 4(5) of the 2000 Act. Morgan J concluded at paragraph 16 that no question of delegation arose and that in any event Mr Stewart was an appropriate person to carry out the task of signing the certificate. In stating that no question of delegation arose I assume that Morgan J relied on the terms of the SPED scheme that provide for a certificate by an authorised signatory, which Morgan J did not regard as delegation as the scheme envisages an alternative to the Chief Constable signing the certificate.

[23] The SPED scheme provides for an "authorised signatory" to the certificate, which implies authorisation by the Chief Constable. In R (Chief

Constable of the West Midlands Police) v. Birmingham Justices [2002] EWHC 1087 (Admin) a Divisional Court considered a statutory power to apply for anti-social behaviour orders by a 'relevant authority', which meant the council for the local government area or any chief officer of police. The applicant authorised certain senior police officers to apply for anti-social behaviour orders and this was upheld. Sedley LJ referred to the power of delegation classically described by Lord Greene in Carltona Limited v. Commissioners of Works [1943] 2 All ER 560 and stated -

"A Chief Constable similarly is not the employer of the officers under his or her command but is legally answerable for them. The Carltona principle appears to apply readily to such a situation, with two well established qualifications. One is that some functions are such that they cannot, consistently with the statutory purpose, be delegated at all - see R v. Chief Constable of Greater Manchester ex parte Lainton (CA 28 March 2000 unreported), at paragraph 28. The other is that delegation has to be to somebody suitable. As Carltona demonstrates, who is suitable is primarily for the officer holder to decide. Today, however, it is clear that an improper delegation would be a matter for the courts, at least where the discharge of a statutory office is an issue."

[24] Thus in the first place the function must be delegable and that will not arise where the statutory provision granting the power to an office holder requires or implies some personal qualification of the office holder in making the decision. In the present case the SPED scheme provides for an alternative decision maker to the Chief Constable so this is express provision for the power to be exercised by an approved signatory. Secondly the delegee must be suitable to perform the function. In the present case Mr Stewart is a senior employee of the Board and the Director of Human Resources and has the manpower support and resources of the police in making the decision. The applicant objects that the provision for a Chief Constable's certificate is based on the police being best placed to provide the opinion sought and that Mr Stewart is not a police officer. I am satisfied that as Mr Stewart has the manpower support and resources of the police in determining the issue and is a senior employee of the Board and is the Director of Human Resources he is a suitable person to make the decision.

Reasons for the refusal of a certificate.

[25] The applicant contends that the PSNI did not give adequate reasons for the refusal of a Chief Constable's certificate. The applicant received notice from NIHE that her application under the SPED scheme had been rejected because a certificate had been refused by PSNI. The applicant sought reasons from PSNI and was told that the criteria had not been satisfied. The applicant was aware of the requirements for the issue of a certificate. This is essentially a value judgment based on information received by the police.

[26] There is no general duty to give reasons although we may be moving towards such a general duty in public authority decision making. I will assume without deciding that there is a duty on PSNI to give reasons for the refusal of a certificate. The adequacy of reasons was discussed by Lord Brown in South Bucks DC v. Porter [2003] 2 AC 58 at paragraph 36. While the case was dealing with an issue of planning permission the remarks are capable of more general application.

“The reasons for a decision must be intelligible and they must be adequate.... Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision.... A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.”

[27] In the context of a SPED application, where the criteria for the grant of a certificate are made known to an applicant, a notice to the applicant that the criteria for a certificate have not been satisfied would be sufficient to comply with any obligation to give reasons.

[28] In any event all the relevant materials relating to the PSNI decision have become available on the application for judicial review and the reasoning that led to the decision to refuse the certificate is apparent to the applicant.

Conclusion.

[29] I find for the applicant on the first ground relating to the assessment that the applicant was not directly or specifically threatened or intimidated. Accordingly the decisions of PSNI and NIHE will be quashed and new decisions will be taken on the application under the SPED scheme.