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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY ALI SWIDANI
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF
THE NORTHERN IRELAND HOUSING EXECUTIVE

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Dennis Hamill (instructed by Housing Rights) appeared for the applicant
Aidan Sands (instructed by Northern Ireland Housing Executive Legal Services) appeared for the proposed respondent

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SCOFFIELD J

Introduction

[1] This is an application for leave to apply for judicial review by Mr Ali Swidani – although in reality it is brought on his behalf and on behalf of his wife, Nibal Bany Almargah. The applicant and his family are originally from Syria but fled in 2013 after civil war broke out there. They came to Northern Ireland in 2018 and have been accommodated by the proposed respondent, the Northern Ireland Housing Executive, under the Vulnerable Persons' Relocation Scheme in a property in Enniskillen.

[2] This application relates to a claim made to the Housing Executive for 'primary social needs' (PSN) points under rule 43 of the Housing Selection Scheme. The application was based on the fact that the applicant and his wife are suffering flashbacks and, in particular, the applicant's wife is suffering nightmares as a result of being accommodated in a house with stairs, which brought back traumatic memories of their time in Syria. The assertion is that the family lived in a property with stairs in Syria (likely, an apartment block) and that specific traumatic events

related to stairs (namely, having to step over dead bodies on the stairs) mean that this particular feature in their current accommodation is triggering.

[3] The challenge is directed to a decision of the Executive dated 2 August 2021, whereby it was determined that the applicant was not entitled to an award of PSN points under rule 43 of the Housing Selection Scheme, following an initial decision to this effect on 4 June 2020 which was then subject to a two-stage complaint process.

[4] Mr Hamill appeared for the applicant; and Mr Sands appeared for the proposed respondent. I am grateful to both counsel for their helpful written and oral submissions.

Consideration

[5] There are a number of grounds on which I consider the applicant has clearly not surmounted the threshold for the grant of leave. For instance, I do not consider that the applicant has discharged the evidential burden which arises (even at the leave stage: see *Re SOS (NI) Ltd's Application* [2003] NIJB 252) to show that the respondent has left material considerations out of account in terms of the medical evidence provided on the applicant's behalf dealing with his wife's circumstances. On the contrary, it seems plain to me that the medical evidence *was* considered by the Executive. The issue is that the applicant is not content with the Executive's conclusion, having considered the medical evidence. I accordingly refuse leave on ground (ii) in the applicant's Order 53 statement.

[6] I also do not consider that there is an arguable case with a reasonable prospect of success (see *Re Chuinneagain's Application* [2021] NIQB 79, at [14]-[15]; and *Re O'Murchu's Application* [2022] NIQB 13, at [55]) in relation to the pleaded ground of breach of substantive legitimate expectation. The applicant is unable to point to any clear or unequivocal representation made to him or his wife which is engaged in this case. Insofar as the particulars provided under the heading of substantive legitimate expectation relate to the decision-making *process,* they are duplicative of grounds pleaded elsewhere. The one exception to this is perhaps the contention that there was a failure to properly investigate the application for PSN points. However, I do not consider that the Housing Executive was under an obligation to conduct some form of investigation other than to give conscientious consideration to the information which was provided to them by the applicant both in the initial application and in the course of the complaints process, which it plainly did. I accordingly refuse leave on ground (v) in the applicant's Order 53 statement.

[7] Turning back to the ground of illegality, pleaded at ground 5(i), I further refuse leave to apply for judicial review on the contention of unlawful discrimination at para 5(i)(c). There is a significant lack of particularity in this allegation in terms of the legal prohibition which is said to have been breached, the protected status relied upon (other than a reference to "refugees fleeing from war torn countries") and/or any appropriate comparator. Even leaving that aside,

however, I do not consider that an arguable case of unlawful discrimination has been made out. The relevant provision of the Housing Selection Scheme applies to all equally and, accordingly, a case of unlawful discrimination could only be mounted on the basis that there was indirect discrimination or *Thlimennos*-type discrimination by reason of the failure to treat different cases differently. I do not consider that there is sufficient evidential foundation for either such suggestion and it cannot simply be assumed that refugees will be disproportionately affected by the provision at issue in these proceedings. Indeed, the rule is designed to ensure that some priority is given to housing applicants with a particular difficulty related to their *current* accommodation, in circumstances where in many cases, albeit refugees may have suffered considerable trauma *in the past*, when they have come to Northern Ireland they will be in a place of relative safety.

[8] It is entirely legitimate and proportionate in my view for the Executive to adopt a scheme which provides additional priority to those who require a move from the accommodation they are *currently* living in by reason of trauma suffered there, rather than elsewhere or previously. Considering relative priority between those entitled to social housing in this jurisdiction by reference to the suitability of the social housing in which they currently reside in this jurisdiction is an entirely rational approach. The key question in this case is not whether the rule is unfairly discriminatory in this regard but merely whether it was properly applied. I therefore propose to refuse leave on ground 5(i)(c). For similar reasons, I also refuse leave to apply for judicial review on the irrationality ground pleaded at para 5(iii).

[9] I also intend to refuse leave on the Convention challenge at ground 5(i)(d) for the reasons set out in Mr Sands' skeleton argument at paras 11-16. Indeed, Mr Hamill did not press his Convention arguments to any degree at the leave hearing. I do not consider that the failure to award PSN points itself interferes in any material respect with the applicant's rights under article 1 of the First Protocol ECHR, nor indeed his wife's article 8 rights. As McCloskey J's decision in *Re EM and CM's Application* [2017] NIQB 111 notes at [60], the housing authority, in establishing a housing selection scheme and a system of prioritisation for housing needs, is entitled to a wide margin of discretion. Like the position in that case (outlined at [52]-[53]), the family's family life has continued unabated in their current property. I entirely accept that the applicant and, in particular, his wife have suffered distressing flashbacks and resultant difficulties but that has not been caused by the failure to award additional PSN points and, indeed, the evidence suggests that even with the award of those additional points, the applicant would not secure three bedroom ground floor housing any time soon. In summary, I do not consider that there is an arguable case with a realistic prospect of success that the failure to award these additional points is a breach of the applicant's human rights. I therefore refuse leave on ground (i)(d).

[10] It appears to me that the nub of this case really lies in sub-paras (a) and (b) of the applicant's pleaded ground at section 5(i) of his Order 53 statement, namely whether – having regard to the medical evidence in the case – the Housing Executive

failed to properly apply the relevant rules (that is to say, rule 43(4) and 43(8)) by either wrongly concluding that the applicant did not satisfy rule 43(4) or by misdirecting itself or fettering its discretion in the application of rule 43(8). The same issue is captured by the breach of statutory duty grounds set out at para 5(iv) of the Order 53 statement.

[11] The relevant portions of rule 43 provide as follows:

> "Primary Social Needs points (see Schedule 4) will be awarded in the following circumstances:
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> …
>
> (4) Where the Applicant, or a member of the Applicant's household, is experiencing or has experienced distress / anxiety caused by recent trauma which has occurred in the Applicant's current accommodation.
>
> …
>
> (8) In circumstances analogous to those listed in sub-paragraphs 1) to 7) above."

[12] The key issue is whether it can be said that the applicant, or more relevantly his wife, can be said to have experienced distress or anxiety (which I accept they plainly have) caused by *recent* trauma which has occurred in their home in Enniskillen. In turn, that depends on whether the negative experiences in their home represent recent *trauma* (or, as the applicant asserts, re-traumatisation) or, on the other hand, merely distress or anxiety caused by trauma which happened many years ago, far away in Syria. Although the proposed respondent has emphasised its sympathy for the applicant's family, its analysis reflects the second of these two approaches.

[13] For his part, the applicant relies strongly on a letter from a GPST1 in Psychiatry of 17 January 2020 in relation to his wife which states:

> "Mrs Bany Almargah has suffered substantial trauma secondary to events in Syria and as a result has ongoing symptoms of post-traumatic stress disorder. These include frequent and distressing nightmares, flashbacks and memories. She also describes anxiety symptoms that are impacting directly on her daily life.
>
> Unfortunately, the stairs in her house currently pose a significant issue as they trigger a distressing memory she

> has of witnessing a traumatic scene whilst fleeing down flights of stairs in Syria past a number of casualties. I would therefore support her request for a change of housing."

[14] Mr Hamill emphasises the observation that the applicant's wife "has suffered substantial trauma", which reads as if this has been experienced recently. Mr Sands emphasises that this trauma is "secondary to events" which happened quite some time ago and not in her current accommodation. They amount to distressing memories relating to trauma sustained previously. He has also emphasised, although without seeking to cast any doubt on the distressing nature of Ms Almargah's previous experiences or current difficulties, that the family had previously been seeking a change of accommodation to a property without stairs for wholly unrelated reasons to those now advanced (but, instead, because of concerns about their young children using the stairs and mobility issues: see, for instance, the GP letter of 7 March 2019 in relation to this issue).

[15] My initial inclination was that leave to apply for judicial review should be granted on the grounds mentioned at para [10] above, since there was an issue worthy of further investigation. Ultimately however, I have been persuaded by Mr Sands' submissions (i) that when one carefully considers the medical evidence in this case, it provides very limited support indeed for the premise on which the applicant's case is founded; and (ii) that the case ultimately resolves to a merits challenge which can only succeed if the Executive's approach is *Wednesbury* irrational.

[16] There is no affidavit from the applicant's wife at all, setting out her current condition or experiences. Albeit there is the letter of 17 January 2020 mentioned above, there is a more recent and longer report of 21 January 2021 from a Specialty Doctor in Psychiatry which supports a change to accommodation with no stairs but makes no mention whatsoever of the stairs traumatising effect. Rather, it mentions mobility issues in relation to the stairway; and discusses Ms Almargah's PTSD without reference to the effect of the stairs in this regard. It is concluded that the accommodation is unsuitable for the family but not on the basis of any 're-traumatising' effect related to the stairs.

[17] I have considered whether the applicant ought to be permitted a further opportunity to supplement his evidence in relation to his wife's medical condition, either by way of filing an affidavit sworn by her (the omission of which to date is perhaps surprising given the nature of the case which is made) and/or by seeking to produce some further medical evidence setting out in more detail the nature of her current mental health difficulties, whether or not this actually amounts to further traumatisation or merely reflects stress and anxiety which are secondary to trauma which occurred some time ago, and commenting on the significance or otherwise of the stairs in the applicant's house in this regard. However, on further reflection, it seems to me that to allow additional evidence in this regard to be provided now as a

basis for challenging the Housing Executive's decision would be unfair to the proposed respondent, since the legality of its actions would then fall to be judged on the basis of information not available to it at the time of the decision which is impugned in these proceedings. Put another way, it would simply be to invite the Executive to make a new decision which is not currently the subject of legal challenge.

[18] For these reasons, I consider that the arguability of the applicant's case should be addressed on the limited evidence which is currently before the court. On balance, I accept Mr Sands' submission that the letter provided on 17 January 2020 – particularly when viewed against more recent and more specialist evidence provided by Dr Kelly on 21 January 2021 – does not provide a sufficient basis on which the applicant can mount a case with a reasonable prospect of success that the Housing Executive decision was unlawful. It was entitled to take the view that this case did not fall within rule 43(4). It has a wide discretion under rule 43(8) and was also entitled to take the view that this case did not require to be treated as analogous to a rule 43(4) case, when it did not fall squarely within rule 43(4). Although it might also reasonably have taken a contrary view in relation to the application of rule 43(8), the suggestion that the Executive was irrational in taking the approach which it did in relation to rule 43(8) does not, in my view, have a reasonable prospect of success at full hearing.

Conclusion

[19] By reason of the foregoing, I refuse the application for leave to apply for judicial review. I propose to make no order as to costs between the parties, save for an order for legal aid taxation of the applicant's costs.