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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **27/10/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY CRAIG THOMPSON FOR JUDICIAL REVIEW

Sean Devine (instructed by Finucane Toner) for the Applicant
Aidan Sands (instructed by NIHE Legal Services) for the Respondent

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HUMPHREYS J

Introduction

[1] By this application for judicial review, the applicant challenges the failure of the proposed respondent, the Northern Ireland Housing Executive ('NIHE') to grant him intimidation points within its scheme for housing selection.

[2] The applicant states that he has been and remains under a credible and verified threat to his life from a paramilitary organisation, the UDA.

[3] The decision to refuse the award of points was communicated via telephone to the applicant's solicitor on 25 August 2022. A pre action letter was sent on 29 August 2022 and following the lack of a substantive response, proceedings were issued on 6 September 2022.

[4] When the matter came on for a leave hearing on 8 September, I directed that the application be dealt with as a 'rolled-up' hearing and the NIHE was afforded an opportunity to adduce evidence relevant to the decision making process.

The Housing Selection Scheme

[5] Under Article 22 of the Housing (Northern Ireland) Order 1981 the NIHE is obliged to allocate dwellings in accordance with a scheme approved by the

Department for Communities. The existing Housing Selection Scheme ('the scheme') was approved in January 2014. It is based on a points system with properties allocated to applicants on the basis of the number of points held, calculated in line with established criteria.

[6] Rule 23 of the scheme provides that an applicant will be awarded intimidation points if one of the two following circumstances apply:

(i) Where the applicant's home has been destroyed or seriously damaged as a result of terrorist, racial or sectarian attack, or because of an attack motivated by hostility because of an individual's disability or sexual orientation; or as a result of an attack by a person who falls within the scope of the NIHE's statutory powers to address neighbourhood nuisance or other similar forms of anti-social behaviour; or

(ii) The applicant cannot reasonably be expected to live or to resume living in his home because if he were to do so there would, in the opinion of the Designated Officer, be a serious and imminent threat that the applicant would be killed or seriously injured as a result of terrorist, sectarian or racial attack, or because of an attack by a person who falls within the scope of the NIHE's statutory powers to address neighbourhood nuisance or other similar forms of anti-social behaviour.

[7] An applicant meeting this test is awarded 200 points, which effectively will mean that applicant will gain priority over all overs (save for those also qualifying for intimidation points).

[8] The Designated Officers within the NIHE who make Rule 23 decisions will follow the Guidance Manual dated August 2021. Chapter 3.3.3 states the procedure to be adopted in the case of intimidation assessment:

(i) The applicant is interviewed;

(ii) A written report should be sought from the PSNI;

(iii) Information may be sought from Base 2 if the applicant consents;

(iv) Information may be sought from other sources;

(v) Managers in local offices may, in their discretion, accept applicants as intimidated on the basis of local knowledge.

[9] Base 2 is a project sponsored by the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO) which uses a network of contacts to ascertain the validity of threats to individuals living in public housing.

The Application

[10] The applicant recites a history of paramilitary beatings from the UDA. In the past he has applied for and been awarded intimidation points. Most recently the applicant was rehoused in February 2021 following the award of intimidation points.

[11] There have been three distinct events this year:

(i) On 22 April 2022 he states that he was involved in an altercation with a UDA commander which resulted in a threat to shoot him and burn his property;

(ii) On 25 July 2022 he received a fresh death threat and this was followed by a visit from police officers the following day stating that his life was in danger and that he had 48 hours to leave the property;

(iii) On 10 August 2022 a man carrying a gun pulled up to his property. On 15 August 2022 the applicant was issued with a TM1 form by the police which stated:

> "Police are in receipt of information that states Craig Thompson has been given 48 hours to leave the area. If he doesn't leave, he will be attacked by loyalist paramilitaries. The use of firearms cannot be ruled out."

[12] On each occasion the applicant's application for intimidation points was refused.

The Grounds for Judicial Review

[13] The applicant's claim is essentially threefold:

(i) The NIHE has committed an error of law in complying with its statutory duty under article 22 of the 1981 Order by failing to award him intimidation points;

(ii) The NIHE failed to take into account material considerations, namely relevant evidence on the question of risk; and

(iii) The refusal to award points is irrational in light of the evidence.

The Evidence Before the Decision Maker

[14] In relation to the threat allegedly made in April 2022, the matter was reported to NIHE on 16 May. Enquiries were commenced with the PSNI and Base 2 pursuant to the Rule 23 procedure. The PSNI response on 17 May 2022 was that a 'self-reported threat' had been reported to the effect that two males had spoke to him

and told him to get out of the country, and he believed these persons to be paramilitaries.

[15] The response from Base 2 was:

(i) There was a paramilitary threat in the South Belfast area;

(ii) Base 2 had concerns for the safety of the client if he were to remain in the area;

(iii) The threat covered the South Belfast and North Down areas.

[16] Clarification was sought from Base 2 as to whether this stemmed from a previous threat of February 2021. The response was:

> "Base 2 receives confirmation about current threat, seldom will organisations be specific about dates. But in Craig's case he has a long standing threat which has occurred at a number of addresses now and follows him."

[17] On 26 July 2022, the PSNI confirmed that a threat had been issued but they were not aware of its source or level. On further enquiry the PSNI stated:

> "After speaking to Sgt and Insp the threat is still low level. Unaware of the area it relates to. 48 hours to leave."

[18] A report was received from Base 2 on 29 July addressing the same three issues as the April threat:

(i) There was a paramilitary threat in South Belfast;

(ii) Base 2 had concerns about the safety of the client if he remained in the area;

(iii) The threat covered the South Belfast and North Down areas.

[19] Following the delivery of the TM1 on 15 August, PSNI confirmed that they did not know the source or level of the threat. Base 2 commented:

> "We carried out a check in South Belfast on 16 July and had threat confirmed from the UDA. Another check on 27 July from the same source confirmed. And police have delivered a further one in the last few days.
>
> There is a long standing threat from Newtownards…But there was also incidents in South Belfast independent

> from that which have generated separate threats from the UDA come from a high level we are told."

The Impugned Decision

[20] In her evidence, the Designated Officer states (at paragraph 58):

> "I determined that the circumstances did not fully meet the criteria for an award of points under Rule 23. I carefully considered all the information before me. Whilst I was satisfied the causation test was met and that the applicant was at risk, I was not satisfied that the necessary threshold of risk had been met in that I did not consider the applicant was at serious and imminent risk of being killed or seriously injured...
>
> While Base 2 had reported there was a present threat and that the source of the threat was a proscribed organisation, the response to a direct question on each occasion as to whether there was a serious and imminent risk was that they would have 'concern' for the applicant's safety. They did not say that the risk was so acute there was a serious and imminent risk of the applicant being killed or seriously injured."

[21] The Designated Officer did not therefore consider that this met the 'high threshold' required for Rule 23.

[22] It has subsequently come to light that the NIHE had in its possession a report from Base 2, dated 18 August 2022 which was not taken into consideration in the decision to refuse to award intimidation points. It states as follows:

> "Base 2 would have *serious* concerns for the client's safety in loyalist areas of Belfast " [emphasis added]

[23] Having now considered the content of this report, the Designated Officer accepts this was relevant information not taken into account but states that this would have made no difference to her decision since she accepted that the risk was 'serious' but determined that it was not 'imminent.'

[24] This assertion, made after the event, stands in stark contrast to the specific averment in the original affidavit evidence quoted above. There is no averment to the effect that the risk was considered at that stage to be *serious* but not *imminent* until the omitted evidence was brought to her attention.

Consideration

[25] The scheme is clear in that there is no discretion vested in the decision maker. If the criteria for the award of intimidation points are met, then there is a legal obligation to award them. The NIHE now accepts that there is a serious threat that the applicant could be killed or seriously injured due to terrorist attack. It has, however, declined to award intimidation points solely on the basis that such risk, whilst serious is not imminent.

[26] 'Imminent' simply means 'likely to happen soon.' The phrase 'serious and imminent' has an obvious read across into the language of article 2 of the ECHR and its test of 'real and immediate risk to life.' In *Re C* [2012] NICA 47, Girvan LJ held that a 'real and immediate risk' was one which was not remote or fanciful and which is present and continuing.

[27] The evidence in this case reveals:

(i) The applicant had a history of being subject to paramilitary threats;

(ii) He had been told in July that he had 48 hours to leave the country;

(iii) The threat was confirmed to be from the UDA, a notorious paramilitary organisation with the capability to carry out its threats;

(iv) The use of firearms could not be ruled out;

(v) The threat comes from a 'high level';

(vi) This gave rise to 'serious concerns' for Base 2.

[28] A court exercising its supervisory jurisdiction will aways show an appropriate level of regard for the margin of appreciation afforded to a decision maker to whom the legislature has ascribed responsibility. However, decisions must be made applying the appropriate legal test and taking into account the relevant and available evidence. In *Re Doherty's Application* [2014] NIQB 6 Treacy J stated, in relation to the SPED scheme:

> "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 judgment in an area where the decision maker has special expertise are not to be lightly interfered with by a court." [para 63]

[29] However, in this case, the NIHE has failed to properly consider the legal threshold of 'serious and imminent risk.' Merely to describe it as 'high' without any analysis of what the words actually mean puts the decision maker at grave risk of falling into error. In my judgment, the proper test to be applied by a Designated Officer operating this scheme is identical to the test for the engagement of an article 2 right, namely that there is a risk of death or serious injury which is not remote or fanciful and which is present and continuing.

[30] Had the Designated Officer applied this test, the outcome of the decision making process may well have been different. As a result, the NIHE has committed an error of law which vitiates this decision making process.

[31] The process adopted is also flawed in that the decision maker failed to take into account a material consideration, namely the Base 2 report of 18 August. The wording of paragraph [58] of the original affidavit submitted by the NIHE makes it clear that the evidence was not sufficient to meet the threshold of 'serious and imminent risk' in the opinion of the Designated Officer. The fact there was evidence specifically directed to the seriousness of risk must have been a material and significant factor in the determination of the Rule 23 application. The attempt to rationalise the decision, *ex post facto*, as relating only to the issue of imminence simply does not pass muster.

[32] As a result, the failure to take this material consideration into account also renders the decision irrational in the broader *Wednesbury* sense.

[33] In *Re McKinney's Application* [2022] NIQB 23 the Divisional Court recently approved the rationality test espoused by Lord Woolf in *R v North and East Devon HA ex p. Coughlan* [2001] QB 213:

> "Rationality, as it has developed in modern public law, has two faces: one is the barely known decision which simply defies comprehension; the other is a decision which can be seen to have proceeded by flawed logic." [para 65]

[34] In *McKinney* Keegan LCJ described this second species of irrationality as:

> "…it simply does not add up or, in other words, there is an error of reasoning which robs the decision of logic." [para 153]

[35] An analysis of the evidence in this case reveals that there was an error of reasoning on the part of the Designated Officer. The applicant was told he had 48 hours to leave the country by the UDA in circumstances where the use of firearms could not be ruled out. In light of this, it is plainly illogical to find that the risk was not imminent. In *McKinney* terms, the decision simply does not add up.

Alternative Remedy

[36] The NIHE contends that the applicant enjoys an effective alternative remedy in the form of its Complaints Procedure, which was not pursued in this case. The policy permits of two stages. Firstly, a complaint is investigated by a local manager who makes his or her own decision on the allocation of points. Secondly, a final stage complaint can be pursued, and a more senior officer will make a fresh decision on the matter. Ultimately, an aggrieved party could pursue the matter to the Northern Ireland Public Service Ombudsman.

[37] The existence of a potential alternative remedy can operate as a bar to the availability of judicial review. Whether or not it does is a matter of judicial discretion. The principles upon which such discretion should be exercised were recently reviewed by the Court of Appeal in *Re Alpha Resource Management Limited's Application* [2022] NICA 27. Keegan LCJ set out as follows:

> "(a) The existence of an alternative statutory machinery will mean that courts will look for 'special circumstances' before granting an alternative remedy.
>
> (b) There are, however, a number of factors which may amount to 'special circumstances', and the court should be astute not to abdicate its supervisory role.
>
> (c) What is the most efficient and convenient method of resolving a dispute should be determined having regard not only to the interests of the applicant and respondent before the court, but also the wider public interest.
>
> (d) Whether the allegedly alternative remedy can, in reality, be equally efficacious to solve the problem before the court, having regard both to the interests of the parties before the court, the public interest and the overall working of the legal system.
>
> (e) In determining the most efficacious procedure, the scope of enquiry should be considered. It may be that fact-finding is better carried out by an alternative tribunal. However, if an individual case challenges a general policy, the relevant evidence may be more readily admissible if the challenge is brought as a judicial review: an allegation that a

prosecution is unlawful because brought in pursuit of an over-rigid policy can scarcely be made out on the facts of one case.

(f) Expense of the alternative remedy or delay may constitute special circumstances." [para 14]

[38] In the circumstances of this case, I accept that the complaints policy could operate to review the decision in relation to intimidation points but I have determined, in my discretion, that the applicant should not be denied relief for the following reasons:

(i) The alternative remedy is not statutory but is an internal process whereby the decision is made by another NIHE officer (contrast the position in *Re SONI's Application* [2022] NIQB 21).

(ii) Secondly, the NIHE failed and refused to put its reasons for the denial of intimidation points in writing. As a result the applicant had no understanding of the reasons behind the decision.

(iii) By way of a rolled-up hearing, the judicial review court was able to hear and determine the case within a matter of weeks of proceedings being issued.

(iv) There is a significant public interest at play in the allocation of social housing and the societal response to the ongoing issue of paramilitary intimidation.

(v) I have found that the Designated Officer applied the wrong legal test and this is a matter which is likely to impact on other decisions in Rule 23 applications. The complaints policy would not be able to afford this legal clarification to decision makers.

(vi) The issue of alternative remedy is properly dealt with at the leave stage. It would be wasteful of costs and contrary to the overriding objective to require an applicant to pursue another remedy following a rolled up hearing when all the evidence and submissions have been considered.

Conclusion

[39] For these reasons, the application for judicial review succeeds and I make an order quashing the decision of the NIHE to refuse to award the applicant intimidation points pursuant to Rule 23 of the scheme.

[40] I will hear counsel on any consequential relief and on the issue of costs.