Neutral Citation No: [2025] NIKB 1 *Judgment: approved by the court for handing down (subject to editorial corrections) **	*Ref:* **SCO12692** *ICOS No:* **22/107112/01; 23/001836/01** *Delivered:* **10/01/2025**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATIONS BY
(1) FELIX CURLEY AND (2) WILLIAM WILMONT
FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF
THE NORTHERN IRELAND HOUSING EXECUTIVE

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Ronan Lavery KC and Fionnuala Connolly (instructed by the Housing Rights Service) for the applicant in the first case
Sean Devine (instructed by Finucane Toner Solicitors) for the applicant in the second case
Aidan Sands KC (instructed by NIHE Legal Services) for the respondent in each case

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SCOFFIELD J

Introduction

[1] This judgment deals with two cases which raise the same or similar issues. Each case concerns the non-award of 'intimidation points' by the Northern Ireland Housing Executive (NIHE) ("the Executive"); and the primary issue in each case is the meaning and effect of rule 23 of the NIHE's Housing Selection Scheme (HSS) ("the Scheme").

[2] In the first case, brought by Mr Curley, I granted leave on three grounds of challenge. The first ground was that the respondent had arguably erred in law as to the meaning of rule 23 of the Scheme and, in particular, the meaning of the phrase "serious and imminent risk." The second ground was that the decisions made by the Executive (at the initial and first-stage complaint phases) were irrational in light of the evidence available at the time. The third ground has been referred to as 'the timing issue', that is to say, a challenge to the fact that there was no process for

expedited decision-making in cases where a complaint about a decision refusing the award of intimidation points was pursued.

[3] The Curley case became academic shortly after the grant of leave, since the applicant was offered permanent accommodation by the respondent with which he was content. How this came about is outlined in the affidavit of Ms Grainia Long, the Chief Executive of the NIHE; although the specific details are not relevant for present purposes. From that point, however, the non-award of intimidation points to the applicant in the first case no longer continued to have any practical effect. Nevertheless, the applicant submitted that, even if the case was then academic as between the parties (which he did not accept, particularly in relation to the delay issue), the court should nonetheless proceed to consider and determine it, exercising the discretion to do so which was explained in *R v Secretary of State for Home Department, ex parte Salem* [1999] 1 AC 450 (and discussed more recently in this jurisdiction in *Re Cahill and Others' Application* [2024] NIKB 59, at paras [13]-[22]). The respondent did not oppose this course.

[4] In the second case, brought by Mr Wilmont, after a contested leave hearing Colton J granted leave on two grounds. The first was, again, that the respondent had erred in law in respect of its interpretation of the phrase "serious and imminent risk." The second was that the respondent's decision that the applicant did not satisfy the test in rule 23 was irrational or *Wednesbury* unreasonable. He directed that this case should be heard alongside the Curley case. In the Wilmont case, I have also been informed that the issue in the litigation no longer causes housing issues for the applicant. Nonetheless, there remains interest in the outcome of the case, particularly in relation to the first ground.

[5] The applicant in the first case was represented by Mr Lavery KC and Ms Connolly. The applicant in the second case was represented by Mr Devine. In each case, the respondent was represented by Mr Sands KC. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[6] The factual background to the first application is set out in detail in the leave ruling in that case: see *Re Curley's Application (Leave Stage)* [2023] NIKB 11. I do not propose to repeat it here. This judgment should be read in conjunction with that earlier judgment and, in particular, paras [6]-[18] setting out the factual background to the case.

[7] The facts of the second case are similar in some respects and are summarised briefly below. At the time of the application, Mr Wilmont had 110 housing points (70 points for Full Duty Applicant (FDA) status; 20 points for harassment/fear of violence; and 20 points for complex needs).

[8] The central factual feature of the claim relates to an incident on 3 February 2021. There is a police report (dated 1 March 2021) of criminal damage to a privately rented property on that date which confirms that the applicant was present at his home in Coleraine with a friend when shots were fired at the property, damaging windows, the front door and internal walls. There is also a statement from the property owner dated 12 April 2021 in this regard, which appears simply to recount what she had been told about the incident by Mr Wilmont. A certificate of criminal damage to property was also later issued on behalf of the Chief Constable on 14 April 2021 under Article 5(2) of the Criminal Damage (Compensation) (Northern Ireland) Order 1977 confirming damage to the property as a result of a "gun attack on dwelling house." That certificate also confirms that the shooting was "committed maliciously by a person acting on behalf of or in connection with an unlawful association." The certificate was provided to the applicant's landlord in April 2021.

[9] In May of that year, Mr Gregory Campbell MP wrote to the applicant indicating that he had passed on information regarding Mr Wilmont to the police in September 2020. The details in this letter are very limited since Mr Campbell considered himself bound by data protection regulations; however, the applicant avers that the information concerned a threat to him. The letter appears to represent part of a series of correspondence, the totality of which has not been disclosed in these proceedings. Mr Campbell was also at pains to point out that it was for the investigating authorities to assess "whether the information has any validity."

[10] As appears further below, additional information in relation to the February 2021 incident was provided by the applicant, or on his behalf, after he had approached the respondent for re-housing. A significant feature in the second case, however, is that Mr Wilmont did not approach the Executive at, or even shortly after, the time of the February 2021 incident. Rather, he made a new housing application over a year later, on 22 February 2022. In the meantime, the applicant had been served with a notice to quit by his landlord, although this was subsequently extended. The delay from February 2021 to February 2022 is significant because, when the issue came to be considered by the respondent, it addressed the question of whether the test for the award of intimidation points was met at (or after) the time of his housing application in February 2022. The fact that he had continued to live in the property without incident or complaint for some time afterwards was then a significant feature of the respondent's consideration.

[11] The initial decision in Mr Wilmont's case was ultimately made on 12 May 2022. The process in relation to this is described in the affidavit of Ms Jennifer Hawthorne, the Director of Housing Services within NIHE, who made the final stage decision in the second case and who is the respondent's deponent for the purpose of that application. The housing application made in February 2022 recorded that the applicant had been shot at three times and was living in fear of violence. It also recorded that Mr Wilmont did not consider that he needed temporary accommodation or certain other forms of assistance. The respondent sought further information from the applicant in relation to the incident, which was provided by a

community advice services adviser (Ms McCaughan) on the applicant's behalf. Throughout the period relevant to this application, the applicant was being assisted by Mid & East Antrim Community Advice Services (CAS). The applicant's adviser also informed the NIHE housing officer dealing with the case (Ms Maguire) that, before the shooting incident, a list of names had been given to the Police Service of Northern Ireland (PSNI) (including the applicant's name) but, despite this, the PSNI had not issued him with a threat warning. She also said that enquiries with other potential landlords had resulted in refusal of tenancies because of the shooting incident.

[12] On 1 March 2022 Ms Maguire sought information from the PSNI. A police constable replied on 28 March 2022 indicating that the February 2021 incident had been reported to the police but that no offender had been made amenable in respect of it and that there was no known active threat against the applicant.

[13] Mr Wilmont was accepted as a person who was homeless or threatened with homelessness and in priority need in a decision letter from the NIHE Area Manager of 28 March 2022. This meant that he was registered as a Full Duty Applicant and received homelessness points. The applicant's adviser queried this on 30 March 2022, asking why he had not been awarded intimidation points. She then submitted the criminal damage certificate from the PSNI and the letter from Mr Campbell MP and asked for a reconsideration. Ms Maguire emailed the PSNI on 28 April seeking further information. The police responded on 6 May 2022 indicating as follows: "There was no threat intelligence at the time. Threat management was considered after the incident and there was insufficient information that resulted in a threat message being passed. Reassurance patrols were put in place." This response would not add to the criminal damage certificate in terms of who may have been responsible for the attack.

[14] In answer to an email dated 12 May 2022, the housing officer confirmed that NIHE management had reviewed the case and there was not enough evidence to award intimidation points. Mr Wilmont was not content with this, and his adviser later sent through a report from Base2 dated 22 June 2022. This confirmed that "there would be a paramilitary threat against the client in the Coleraine/Bushmills area" and that "Base2 would have serious concerns for the client's safety if he was to remain in the area." The respondent has referred to this as an unsolicited report, since it was not requested by the NIHE and was procured by the applicant's CAS adviser directly. Base2 used the standard form which it would use had the NIHE requested this information, although it had not done so in this case.

[15] This prompted the respondent to contact the PSNI again on 20 July 2022 to ask whether there had been any change since the police's previous response. The PSNI replied on 22 July 2022 to the effect that there was no further information from the position previously stated in May (see para [13] above).

[16] On 1 August 2022 a housing officer had a telephone call with the applicant's adviser in which she advised that the applicant could make a complaint. The respondent's evidence is that he was also re-offered temporary accommodation and furniture storage, which was declined (although the applicant takes issue with this). On 4 October, the applicant made a complaint about the initial decision and requested a review of the decision to decline to award him intimidation points. There appears to have been some confusion up to then as to the availability of an avenue, or the means by which, to challenge the initial decision; but, in any event, a first-stage complaint was pursued at this time.

[17] There followed some ongoing communications between the respondent and Base2, which was supporting the applicant's request for a review. Further input was also received from the PSNI on 17 October 2022. This again indicated that police did not put any threat management in place after the February 2021 incident, although police actions were taken to minimise any risks. Police were not in receipt of any new information regarding any new threat. In further contact with Mr Maxwell of Base2 around that time, who had been in contact with the applicant, he indicated that he would speak to the police "to see if they will look again at the level of threat." This appears to have been motivated, at least in part, by the applicant having indicated that he had to move out of his property in the next few weeks.

[18] The outcome of the first-stage complaint process was provided on 24 October, upholding the original decision. This correspondence indicated that the writer (Ms Kelly) had completed an investigation regarding the issue but that "on the basis of all information, including PSNI reports" she was satisfied that the case had been assessed correctly and that the Executive was "not in a position to award intimidation points on the basis of current evidence." The correspondence also advised the applicant of his right to make a final-stage complaint and of the availability of temporary accommodation for him.

[19] On 1 November 2022 CAS wrote to the respondent seeking a new decision in the applicant's favour and relying upon the judgment in *Re Thompson's Application* (see further below) which had then very recently been given. This correspondence also stated that the applicant was "on a UDA Hit List", which had been handed to a prominent Member of Parliament some months before the February 2021 attack, who then handed it to the police. (This appears to be the interaction which was the subject of correspondence between the applicant and Mr Campbell MP referred to above. The papers also disclose that the applicant is pursuing a claim and/or Ombudsman's complaint against the PSNI for failing to warn him about his personal safety after having received this information.)

[20] Further correspondence between CAS and the respondent continued over the following weeks, with the respondent confirming that it would not be in a position to issue a response for some weeks since an investigation was ongoing and cases such as this required detailed investigation. This is because a second-stage

complaint involves a fresh investigation of the matter. The further investigation included follow-up enquiries with both the PSNI and Base2.

[21] The PSNI provided a further reply on 27 January 2023. With regard to the February 2021 incident, it stated (inter alia) as follows:

> "Wilmont was the subject of a gun attack on 3/2/21 and had a vehicle belonging to another person, burnt at this home on 25/3/22. Based on the information and intelligence available to Police, the Duty Inspector did not assess that there was an ongoing (i.e. future) risk to life. Police advised Wilmont of this and provided him with a "Protect yourself booklet" and the offer of a referral to the Crime Prevention Officer. He was informed that this assessment could change as the investigations progressed or new information/intelligence was received."

[22] As to the current level of threat, if any, the PSNI response was that:

> "If Police have information about an ongoing threat to the life of William Wilmont we are duty bound to tell him. Police have not been in contact with Wilmont about his personal security since March 2022. We can't say he is not under threat, merely that we have non [sic] information or intelligence to suggest same."

[23] There was further communication both by telephone and email with Mr Maxwell of Base2. This disclosed that Base2 was first approached in May/June 2022 by CAS and asked to confirm details of the February 2021 attack. In turn, it approached contacts in the area who confirmed that the incident had occurred, that it was a paramilitary threat, and that there would be a risk towards the applicant. At this time, however, Base2 was not aware that the applicant had remained at the property and so had not queried this during the verification process. If Base2 had known this, they indicated that they would have raised more queries about the then current risk (i.e. in mid-2022); but they were not sure they would have received further information from their source in relation to that. They had not been asked by anyone to carry out any checks about current risk to the applicant.

[24] On 6 February 2023 the outcome of the second stage appeal was provided, with the original decision again being upheld. The respondent provided a detailed response letter from Ms Hawthorne on 6 February 2023, which constitutes its final decision superseding the earlier refusals dated 12 May 2022 and 24 October 2022. This letter sets out a wide range of factors and evidence which had been considered and the decision-maker's views on the issues which arose in the case.

[25] The correspondence of 6 February 2023 contains the following passage, of which the applicant is heavily critical, explaining the respondent's conclusion that the first limb of the rule 23 test (namely that the individual's "home has been destroyed or seriously damaged (by explosion, fire or other means) as a result of terrorist… attack") was not met:

> "At this stage, for the purposes of completeness, I would point out that I note that Mr Wilmont's home was damaged as a result of three gunshots being fired into it in February 2021. However, in reviewing the case and your complaint I am satisfied his home was not destroyed or seriously damaged to the extent required to satisfy Rule 23(1). In coming to this decision I have taken into account the nature of the attack and the fact he continued to live there after it occurred. I do not consider the damage associated with three gunshots would be of the nature and extent of the damage to satisfy Rule 23(1)."

[26] In relation to the second limb of rule 23, some key passages in the letter of 6 February 2023 are as follows:

> "You are contending that there is a threat on Mr Wilmont's life and you argue this is evidenced by the shooting incident of 3rd February 2021. For Intimidation points to be awarded there must be serious and imminent risk that the applicant will be killed or seriously injured within the relevant time under consideration by the Housing Executive. In this instance the relevant time is from the 22nd February when Mr Wilmont made his housing application. For clarity, I am not considering whether Mr Wilmont's circumstances would have satisfied the requirements of Rule 23 in February 2021, I am considering whether his circumstances satisfy the threshold of risk condition from the 22nd February 2022 onwards.
>
> Connected to this, I note that following the gun attack of 3rd February 2021 Mr Wilmont continued to live in his property for a period of over one year without further incident or without approach to the Housing Executive for housing assistance. Rather, Mr Wilmont only approached us after his landlord had issued him with a Notice to Quit meaning that the property in question would no longer be available to him to reside in. You set great store in a shooting incident which occurred over a year prior to Mr Wilmont applying for housing. However, given the

> passage of time without incident, it is reasonable for the Housing Executive to proceed on the basis that the weight to be attached to the risk connected to the incident diminishes over time. Whilst I am considering solely any risk to Mr Wilmont from the 22nd February 2022 onwards, I also note that the PSNI confirm that no contemporary threat management was opened around the time of the shooting incident. This is significant because following the subject incident the PSNI completed enquiries and came to an informed conclusion that the evidence did not support an assessment that there was an ongoing risk to Mr Wilmont. Whilst not ignoring this incident of February 2021, it is reasonable to give more weight to the contemporary threat reports detailing any risk present from February 2022 onwards."

[27] The conclusion in relation to this issue is set out in the following passage of the correspondence:

> "In considering whether Mr Wilmont is at serious or imminent risk of serious injury or death from 22nd February 2022 I have considered the facts of the case, in particular that Mr Wilmont remained in the property for over a year without further reported incident and presented as homeless further to the Notice to Quit served on him, and the PSNI and Base2 information together in their entirety. Taking all the evidence in the round, I have decided that Mr Wilmont (or a member of his household) would not be at 'serious and imminent risk of being killed or seriously injured' by continuing to live in his property at [address] (at any time on or after 22nd February 2022). Accordingly, the 'Threshold of Risk Condition' required by Rule 23(2) for an award of Intimidation points has not been met."

[28] In a short affidavit from the applicant's solicitor, sworn to explain why the applicant himself had not sworn the grounding affidavit at the commencement of the proceedings, he states that the applicant "would also wish to clarify that on the 25th March 2022, he was the subject of a further attack whereby a car was set alight at his address." This does not appear to have been raised with the NIHE by the applicant during the various exchanges on his behalf. However, it was addressed in an email from the PSNI to the NIHE in January 2023 before the final stage decision (see para [21] above), in which it is noted that there was a vehicle belonging to someone else which was burnt at the property on the above date. This incident is also referred to and considered in the final decision letter from Ms Hawthorne.

Relevant statutory provisions

[29] The Housing (Northern Ireland) Order 1981 ("the 1981 Order") is one of the primary pieces of housing legislation in Northern Ireland which governs the functions of the respondent. Article 22 of the 1981 Order requires the Executive to submit to the Department a scheme for the allocation of housing accommodation held by the Executive to prospective tenants or occupiers. The scheme is approved by the Department; and the Executive is then required to comply with the scheme when allocating housing accommodation held by it. By this means, the HSS is given effect pursuant to statute.

[30] The respondent also emphasises the provisions of Part II of the Housing (Northern Ireland) Order 1988 ("the 1988 Order"), another of the key pieces of legislation in this area, under which the Executive owes certain duties to persons who are homeless. This includes the provision of accommodation to those who are unintentionally homeless and in priority need, regardless of the cause. In the Executive's submissions in each case it confirmed that, where a person presents to the Executive as being subject to a serious and imminent risk of harm in their home (regardless of the cause of that risk) it is addressed by the immediate provision of temporary accommodation as part of the Executive's statutory duty under the 1988 Order.

[31] Homelessness is expansively defined in Article 3 of the 1988 Order and includes where the individual has no accommodation which it would be reasonable for him or her to continue to occupy. In addition, Article 3(5)(b) provides that a person is also homeless if he has accommodation, but it is probable that occupation of it will lead to violence or threats of violence from some other person residing in the property and likely to carry out the threats. A person who is found to be homeless or threatened with homelessness as a result of an emergency is considered to have a priority need for accommodation under Article 5(1)(d) of the 1988 Order; as is a person who satisfies the respondent that he or she has been subject to violence and is at risk of violent pursuit or, if they return home, is at risk of further violence (see Article 5(1)(e)). Not all of these provisions are relevant, of course, in the present cases. However, they are relied upon by the respondent as indicating that it is the 1988 Order which both enables and requires it to provide an operational housing response to issues of immediate threat to life.

[32] Where the Executive is satisfied that a person is homeless (not having become homeless intentionally) and has a priority need, it will owe him or her a duty under Article 10(2) of the 1988 Order to "secure that accommodation becomes available for his accommodation." Such a person is known as a Full Duty Applicant, recognising that the obligation to secure accommodation is the highest housing duty that can be owed. It is also relevant to note that Article 8 of the 1988 Order imposes an interim duty upon the Executive to accommodate an applicant where it has reason to believe that they may be homeless and have a priority need. In such circumstances, NIHE

must secure that accommodation is made available for the applicant's occupation pending a decision as a result of its inquiries.

The Scheme and rule 23

[33] As indicated above, the HSS governs the allocation of non-temporary accommodation by the respondent. It is described as the "single gateway into social housing in Northern Ireland, let on a permanent basis, whether owned and managed by the Housing Executive or any of the Housing Associations operating in Northern Ireland." It is designed to be a comprehensive tool for the allocation of priority as between housing applicants and to promote equitable treatment by using common criteria to assess the housing needs of all applicants. In the respondent's submissions the HSS is described as a set of rules under which Northern Ireland social housing landlords assess the housing needs of applicants and allocate accommodation in accordance with need. Applicants are awarded points and ranked under four headings, these being Intimidation, Insecurity of Tenure, Housing Conditions, and a Health/Social Well-being assessment.

[34] Rule 23 of the current Scheme provides as follows:

> "An applicant will be entitled to Intimidation points (see Schedule 4) if any of the following criteria apply in respect of the application:
>
> 1. The applicant's home has been destroyed or seriously damaged (by explosion, fire or other means) as a result of a 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 Housing Executive's statutory powers to address neighbourhood nuisance or other similar forms of anti-social behaviour.
>
> 2. The applicant cannot reasonably be expected to live, or to resume living in his/her home, because, if he or she were to do so, there would, in the opinion of the Designated Officer, be a serious and imminent risk that the Applicant, or one or more of the applicant's household, would be killed or seriously injured as a result of terrorist, racial or sectarian attack, or an attack which is 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 Housing Executive's statutory powers to

> address neighbourhood nuisance or other similar forms of anti-social behaviour."

[35] It is accepted by all parties that, as the system currently operates, the award of intimidation points (which currently stand at 200 housing points) effectively means that the individual will gain priority over all others, save for those others who have also been awarded intimidation points. The respondent's submissions note that this is sometimes described as being granted "super-priority." (Those who qualify will also, in most cases, receive an intimidation grant of over £750.)

[36] The HSS operated largely unchanged between 2000 and 2023, at which stage the first stage of changes was introduced under the respondent's Fundamental Review of Allocations. It is the pre-2023 version of the Scheme which is relevant in each of the present cases. In 2005, rule 23 was extended so the destruction or serious damage of one's home or a serious and imminent risk of death or serious injury need not arise only from a terrorist, racial or sectarian attack but also included attacks motivated by hostility due to an individual's disability or sexual orientation.

[37] Unlike the duty to accommodate homeless persons in priority need under the 1988 Order (discussed above), the HSS deals with the allocation of points for ranking those seeking accommodation, in accordance with Article 22 of the 1981 Order, for the purposes of allocating available, permanent accommodation. It is obviously an advantage to have additional points in terms of securing a permanent property in the applicant's housing area of choice. However, the award of intimidation points by no means guarantees the immediate allocation of a house if, for example, no property is available in the relevant area or areas at that time. Unfortunately, permanent social housing remains an extremely scarce resource. As such, no level of points, including intimidation points, can guarantee immediate permanent rehousing. Recent litigation in the Judicial Review Court (see *Re Morris's Application* [2024] NIKB 96 and especially the court's comments at para [79]) provides an example of this.

[38] Even with a high level of housing points, applicants will need to wait until a suitable property in their area or areas of choice becomes available. There are a variety of features which affect the suitability of a property, particularly where the applicant has complex needs, mobility issues and/or other family members to be accommodated. Many housing areas have low stock, low turnover or both. There can be an absence of suitable properties, therefore; or another applicant who also has intimidation points and other housing points may take priority. The Scheme itself additionally makes provision for an individual's level of points not to be determinative of an allocation, either because the applicant is not a "relevant applicant" for the purposes of the property in issue or because, exceptionally, it is appropriate to depart from the general rule in relation to allocation (see the *Morris* case cited above, at paras [22]-[29]).

[39] The respondent's evidence is that, as a result, the duty to rehouse under the 1988 Order is commonly discharged on a phased basis, with the initial provision of temporary accommodation which removes the applicant from any risk. In the Scheme homelessness falls under the heading of Insecurity of Tenure and a FDA is entitled to an award of 70 points under rule 24(1) and such other points as may be applicable under Housing Conditions and Health and Social Well-being. Decisions relating to duties owed under the homelessness legislation are also subject to a statutory right of appeal to the county court.

[40] Guidance for housing officers on assessing applications for intimidation points is provided in the NIHE's Housing Selection Scheme Guidance Manual ("the HSS Guide") within Chapter 3 dealing with the 'Ranking of Applicants', and particularly at section 3.3.3. There will generally be an interview with the applicant to establish whether the applicant can remain at their property or requires temporary accommodation and in order to gather all relevant details. The PSNI must be contacted in every case, since confirmation from the police is the most likely source of confirmation of the circumstances. There are protocols in place for information-sharing between the police and the NIHE for this purpose. Information can also be obtained from other sources.

[41] Information to assist in the decision-making process *may* be sourced from Base2, which is described as a "crisis intervention, clarification and support service for those who may be at risk of violence of exclusion from the community." The applicant's consent is required before Base2 will provide information, particularly since this will authorise Base2 "to make community enquiries, which may ultimately include paramilitary sources, about his or her personal situation." Where a request is made to Base2 for information, the HSS Guide emphasises that this must be done using the correct templates. The template, set out in Appendix 4 to the HSS Guide, asks for general details about any threat which has been issued in relation to the individual but, if there has been a threat, goes on to ask the following specific question (modelled on the terms of rule 23): "Is the Applicant or a member of their household at serious and imminent risk of being killed or seriously injured if he/she were to live/resume living in his/her home?"

The interpretation of rule 23 provided in the* Thompson *case

[42] As indicated in the leave ruling in the Curley case, the proper interpretation of rule 23 of the Scheme has been addressed in recent times in the High Court in the judgment of Humphreys J in *Re Craig Thompson's Application* [2022] NIKB 17, upon which each applicant relies. I discuss this authority in further detail below. However, for present purposes, the key portions are paras [25], [26] and para [29]. Paras [25]-[26] are in the following terms:

> "[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."

[43] At para [29] of his judgment, Humphreys J continues as follows:

> "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."

The meaning of "serious and imminent" in rule 23

[44] The evidence and submissions on behalf of the respondent are to the effect that the 'threshold of risk' element of the rule 23 test is a high one (and higher than the threshold required for an award of FDA status under the homelessness legislation). In the first case it is clear that the key issue for the decision-maker was that the risk was not, or was no longer, "imminent" for the purpose of the rule 23 at any material time after the housing application was made. All stages of the decision-making in Mr Curley's case occurred before the judgment in the *Thompson* case was handed down and without reference to it. In Mr Wilmont's case, the *Thompson* decision was available before the respondent concluded its consideration of the matter. It was referred to and quoted in Ms Hawthorne's final decision letter; but the view appears to have been taken that the difference in facts between the *Thompson* case and the Wilmont case meant that little assistance could be gleaned from the former. Mr Devine's submissions were to the effect that the interpretation of rule 23 set out in *Thompson* was not, in substance, followed or applied in the Wilmont case.

[45] The respondent invited me not to follow the approach in the *Thompson* case for the reasons set out below. Mr Sands submitted that the rule 23 regime was not an instance of the NIHE giving effect to obligations under article 2 of the European Convention on Human Rights (ECHR). He also submitted that the phrase "serious and imminent" in rule 23 was not a term of art; and that it was unconnected to the "real and immediate" test which is familiar in the context of article 2 jurisprudence. Rather than being the means by which someone at real and immediate risk (for the purposes of article 2 ECHR) was re-housed, rather, in the respondent's submission, the award of intimidation points to an individual was "an act of public solidarity" with those who had been intimidated out of their home. It was not about making provision for them in the short term. Although the respondent accepted that the phrase "serious and imminent" had some parallels with the *Osman* test as it had developed, its submission was that it was not appropriate to import in a wholesale fashion the article 2 test for a "real and immediate" risk (as explained in case-law) into rule 23 of the HSS. In short, the *Osman* "real and immediate" test was not synonymous with, or (in the words of the *Thompson* judgment) "identical to", the meaning of "serious and imminent" in rule 23 of the Scheme.

[46] This argument was supported by a number of ancillary submissions on behalf of the respondent. First, the respondent submitted that, although this may be self-evident, it bore repetition that rule 23 (as the rest of the HSS) is designed merely to provide a weighting for the purpose of ensuring fair and transparent housing allocation. Put simply, where rule 23 is satisfied this results only in an additional allocation of points. It is not concerned with the immediate protection of life and limb. Indeed, the award of points may achieve little or nothing in ensuring the individual's safety by way of offering alternative accommodation as there may be no available accommodation in their areas of choice, or others may have a higher points total. In the respondent's submission, it is not intended that intimidation points should provide a guarantee of safety. Rather, any immediate risk is addressed through Part II of the 1988 Order. Where housing applicants consider that they are at risk or are genuinely fearful of same, they are likely to be both homeless and in priority need as defined by Part II of the 1988 Order. This will entitle them to be housed in interim accommodation pursuant to Article 8 of that Order.

[47] The written submissions on behalf of the respondent indicated that where a person is subject to a serious and imminent threat of death or serious injury related to the occupation of their home *regardless of the motivation* they will therefore be immediately entitled to temporary accommodation while their housing claim is assessed. If they are found to have FDA status they are entitled to remain in temporary accommodation until housed. Again, Mr Sands submitted that this indicated that the 1988 Order rather than rule 23 of the HSS – which was limited in scope to only certain types of attack, namely those of a terrorist, racial or sectarian character or motivated by hostility towards disability or sexual orientation – was the means by which the respondent gave effect to any obligations which fell on it as a result of the operational duty in article 2 ECHR. Were it otherwise, the

respondent's discharge of its article 2 obligations in that regard would be only partial. It would also be ineffective, for the reasons discussed at paras [37]-[38] above. In addition, if the provision of housing allocation points was a significant part of the State's response under article 2 as a means of providing operational measures to mitigate risk, a similar measure likely would exist in the other jurisdictions of the United Kingdom, which it does not.

[48] As observed in the leave ruling in the Curley case (see para [43]), where the *Osman* test is met – namely where the authorities knew or ought to have known of the existence of a real and immediate risk to the life of an individual from the criminal acts of a third party – this gives rise to an obligation on the part of the State to take reasonable preventative operational measures to mitigate the article 2 risk. A judgment is required as to what those measures might reasonably be in all of the circumstances (see App No 87/1997/871/1083, *Osman v United Kingdom*, at paras 115-116). In contrast, where the rule 23 test is met, the Executive has no discretion: the resulting 'super-priority' must be granted. The additional points must also be awarded in circumstances where the NIHE have no clear indication of what the practical effect of that may or may not be, or indeed whether it will have any operative or preventative effect at all in either the short or medium term.

[49] Finally, the respondent indicated that rule 23 of the current scheme has its roots in the early days of the Executive in the 1970s as an attempt to ensure that those engaged in terrorism and sectarianism did not control the allocation of housing; and that it has since developed as an expression of society's particular revulsion at crimes motivated by hostility on certain grounds. Following the formation of the NIHE in February 1971 the first housing selection scheme was established for the allocation of social housing based on need. Since the first such scheme was established, particular priority has always been given to those who have either lost their homes or been intimidated out of their home because of civil unrest in Northern Ireland.

[50] The respondent has provided some detail of how this issue was dealt with in a number of successive housing selection schemes, namely those introduced in 1972, 1985, 1994 and then the 2000 Scheme which first dealt with this issue in its rule 23. In the 1972 scheme, "absolute priority in allocation" was afforded to those "persons whose homes have been destroyed or seriously damaged during riot or civil commotion or by bomb blast", "persons who have been forced to leave their homes because of actual intimidation or real fear of intimidation", and "persons who are still living in their homes who are considered to be in acute physical danger." The initial focus where the home had not been destroyed or seriously damaged was on those who had actually been forced to leave their homes or those in "acute physical danger." The Scheme for the Special Purchase of Evacuated Dwellings (the SPED Scheme) dates from the same period. The first reference to "serious and imminent risk" of death or serious injury as a result of terrorist or sectarian attack came in the 1994 Scheme.

[51] Thus, the motivation behind, and basic effect of, the current rule 23 was established well before the decision of the European Court of Human Rights in the *Osman v United Kingdom* case in 1998. For this further reason, the respondent submitted that the jurisprudence on the article 2 ECHR positive obligation is not applicable, since it dealt with an entirely separate obligation to protect life in all cases. Rule 23 relates solely to public housing allocation and not to the protection of life.

[52] In his submissions Mr Lavery accepted that the allocation of housing points was not an article 2 ECHR obligation, so that there was not a "direct read-over" between the rule 23 test and the *Osman* test; and that the award of intimidation points was a "stand-alone system." Nonetheless he contended that there was significant assistance to be obtained from the approach which the courts had taken in article 2 cases, where there was a need on the part of the State to take reasonable measures to mitigate the risk to life. Rule 23 of the HSS was to be viewed in this general context. In his submissions, Mr Devine was perhaps more strident in terms of the assistance which was to be provided in the interpretation of the Scheme by reference to article 2 case-law which arose in other contexts. In particular, he relied upon the fact that, in *Re W's Application* [2005] NIJB 253, Weatherup J had held that, "A real risk is one that is objectively verified, and an immediate risk is one that is present and continuing." This formulation had been approved and applied, for instance, in *ZY v Northern Ireland Courts and Tribunals Service* [2013] NIQB 8 and other authorities. Mr Devine submitted that Article 22 of the 1981 Order was an important piece of legislation which gives effect to the State's obligations to protect the lives of individuals. Both applicants relied upon the decision of Humphreys J in *Thompson*.

[53] Turning back to the ordinary and natural meaning of the words used in rule 23, Mr Sands submitted that "imminent" must mean "close at hand" or "about to happen." It could not simply be a continuous state of affairs. He submitted that, given the super-priority which is afforded to those who benefit from rule 23, there was an elevated standard to be applied under both limbs of that rule. Under the first limb, the applicant's home would have been destroyed or *seriously* damaged, which is something which is likely to be objectively verifiable. Under the second limb, he submitted that a serious and imminent threat means that the threat is not merely serious but is "almost upon them." Giving the word 'imminent' its natural and ordinary meaning the respondent submitted that this means "likely to happen soon"; and, further, that it connotes a strong temporality requirement, going beyond a mere synonym for "soon." It was therefore submitted that the second limb was not met by a threat which endured continuously at a low level over a long period; and the article 2 jurisprudence triggering the obligation to take reasonable operational measures merely where a non-fanciful risk was present and continuing was of limited, if any, assistance.

[54] There are different ways of describing the likelihood and immediacy of a threat being realised. In this context, courts are familiar with the model used by the

Security Services which assesses the likelihood of terrorist attack using five different levels from 'low' through 'moderate', 'substantial' and 'severe' up to 'critical'. The natural meaning of the word 'imminent' would be towards the upper end of this scale and congruent with the earlier concept of the applicant being in 'acute physical danger'.

[55] Considering para [26] of the *Thompson* judgment in isolation, I would not have been persuaded that Humphreys J held that the word "imminent" in rule 23 of the Scheme meant simply "present and continuing." On the contrary, in para [26] of his judgment, he specifically explains that "imminent" means "likely to happen soon." I agree with that observation and would not, but for what is contained in para [29] of the judgment, have considered that this simple explanation was to be read subject to the further observations he made in the remainder of para [26]. However, any doubt appears to be dispelled by para [29] of the judgment in *Thompson* (set out at para [43] above). This suggests that Humphreys J did hold that "imminent" simply means "present and continuing."

[56] I have been persuaded by Mr Sands' submissions to the degree necessary that I should not follow that approach. That is principally because, for the reasons summarised in paras [45]-[51] above, the State's article 2 ECHR obligation is not upstream of, nor does it underpin, the entitlement to intimidation points in rule 23 of the HSS. There is not, therefore, in my view an obvious read-across between the two regimes. The award of intimidation points is neither necessary nor sufficient to provide an operational housing response to an article 2 risk. There is no reason therefore to import the test for the engagement of article 2 ECHR into the interpretation of rule 23; nor to move away from what would be a more natural reading of the word "imminent" in that rule, particularly when that phrase was introduced into a housing selection scheme in Northern Ireland years before the seminal *Osman* case was decided in Strasbourg. (For the avoidance of doubt, I express no view on an issue which did not arise for argument in this case, namely whether the award of intimidation points falls within the ambit of article 2 for the purposes of article 14 ECHR.)

[57] I do not take the decision to depart from the approach in *Thompson* lightly. In doing so, however, I also take account of a number of additional factors, including that that case was heard as a rolled-up hearing; that it was clearly dealt with on an expedited and urgent basis; and that I am satisfied from the judgment in that case and the submissions made in these proceedings that the full range of arguments advanced on the issue before me were not made before Humphreys J.

[58] This is also not to cast any doubt on the correctness of the outcome in the *Thompson* case. In particular, I note from Humphreys J's summary of the facts that the applicant in that case had a history of paramilitary beatings from the organisation in question (the UDA); that he had previously applied for and been awarded intimidation points by the NIHE; that there had been a variety of recent events, a *short* time before the impugned decision in the case, indicating the

existence and seriousness of the threat to his life; and that the police had warned him on a number of occasions about the threat to his life. The factual context was therefore different from the present cases. A key finding was also that an important piece of evidence had been left out of account (see paras [23]-[24] of the judgment), which was an entirely separate basis for the quashing of the respondent's decision in *Thompson* (see paras [30]-[31]), leaving aside the error of law which the judge also found. On the issue of the imminence of the risk in that case, it also seems to have been a feature of *Thompson* that an application for intimidation points was made promptly after each of the events which were relied upon (see paras [11]-[12]). There was not the time lag which was evident in these cases between the event primarily supporting the existence of the threat and the seeking of intimidation points from the respondent as a result: five months in the Curley case (June 2020 to November 2020) and 12 months in the Wilmont case (February 2021 to February 2022).

[59] For the above reasons, I consider that, in order to establish entitlement to intimidation points under rule 23(2) of the Scheme, a housing applicant must satisfy the designated officer of the NIHE that they cannot reasonably be expected to live in their home because, if they were to do so, there would be a serious and imminent risk that they (or one of their household) would be killed or seriously injured as a result of one of the types of attacks which fall within the purview of rule 23; and that, in assessing this, a serious and imminent risk does not merely mean one which is "not remote or fanciful and which is present and continuing" but, rather, one which is serious and imminent, giving those words their ordinary and natural meaning. In particular, a risk which is imminent is one which appears likely to be realised soon. "Imminent" must add something over and above the risk being "serious". The relevant phrase must also be construed as a whole. The question is whether the applicant cannot reasonably be expected to live (or resume living) in their home because of the serious and imminent risk that arises there. In assessing that, it must be permissible for the designated officer to take into consideration a period of time after the incident or incidents said to demonstrate or give rise to the risk where the applicant has continued to live at the property without the risk having been realised or further attempts at harm having been perpetrated there.

[60] In view of this analysis, I do not consider that either applicant has established that the respondent erred in law in its interpretation or application of the Scheme.

Irrationality

[61] Before turning to the substance of the rationality challenges to the respondent's decisions in each case, it is appropriate to bear in mind the comments of Lord Neuberger in *Holmes-Moorehouse v Richmond-upon-Thames London Borough Council* [2009] UKHL 7 in relation to the proper approach of a court of supervisory jurisdiction to decisions of housing officers. These comments were approved by Lord Carnwath in *Poshteh v Kensington and Chelsea Royal London Borough Council*

[2017] UKSC 36, at para [7]. At para [47] of the *Holmes-Moorehouse* case Lord Neuberger said:

> "… review decisions are prepared by housing officers, who occupy a post of considerable responsibility and who have substantial experience in the housing field, but they are not lawyers. It is not therefore appropriate to subject their decisions to the same sort of analysis as may be applied to a contract drafted by solicitors, to an Act of Parliament, or to a court's judgment."

[62] He continued, at paras [50]-[51] of his opinion, in the following terms:

> "50. Accordingly, a benevolent approach should be adopted to the interpretation of review decisions. The court should not take too technical view of the language used, or search for inconsistencies, or adopt a nit-picking approach, when confronted with an appeal against a review decision. That is not to say that the court should approve incomprehensible or misguided reasoning, but it should be realistic and practical in its approach to the interpretation of review decisions.
>
> 51. Further, as the present case shows, a decision can often survive despite the existence of an error in the reasoning advanced to support it. For example, sometimes the error is irrelevant to the outcome; sometimes it is too trivial (objectively, or in the eyes of the decision-maker) to affect the outcome; sometimes it is obvious from the rest of the reasoning, read as a whole, that the decision would have been the same notwithstanding the error; sometimes, there is more than one reason for the conclusion, and the error only undermines one of the reasons; sometimes, the decision is the only one which could rationally have been reached. In all such cases, the error should not (save, perhaps, in wholly exceptional circumstances) justify the decision being quashed."

Irrationality in the first case

[63] In the Curley case, I do not need to determine the question of whether the respondent's decision-making was irrational since this issue is now academic and, unlike the other two issues which arise in that case, I do not consider that there is any good reason for that issue to be decided in the public interest. Nonetheless, I

would not have been inclined to find for the applicant on this ground for the reasons explained below.

[64] The initial decision in this case was made on 7 January 2021, after the applicant reported the June 2020 incident to the Executive in November 2020. At that time, the PSNI had confirmed that the applicant had reported threats to them; and Base2 had confirmed that Mr Curley was under threat in West Belfast. The initial decision (set out at para [9] of the leave ruling) accepted that the applicant was under threat, such that it was not reasonable for him to live in his property, and he was therefore given FDA status, but did not accept that the risk, at that time, was serious *and imminent.* The initial decision was in the following terms:

> "The threat was issued to Felix on 23 June which was five months before he requested a homeless assessment (Nov 2020). He has not terminated his tenancy and still resides there the majority of the week. Although I accept there is a threat against Felix and it would not be reasonable to expect him to continue to live at this address (FDA has been awarded as a result), I am of the opinion that it does not meet the threshold for intimidation points. The threat was issued in June 2020, he presented homeless in November 2020 and still occupies this tenancy as his principal home over six months later. I am therefore not satisfied that there is a serious and imminent risk that he is likely to be killed or seriously injured."

[65] The first stage complaint decision, made in August 2021, also concluded that the test for the award of intimidation points was not met (either at that point or at the time of the initial decision).

[66] When the initial decision was made, Base2 had confirmed that the threat was current (even though it may later have subsided). Mr Lavery submitted that there was no specific indication that the risk was only low level; and he was critical of the respondent's failure to ask Base2 to clarify matters further.

[67] In the respondent's submission, it asked a very specific question of Base2 which was directly related to threshold set out in rule 23 (see para [41] above) but received a response which did not answer that question directly and which, indeed, suggested something *less than* what was required for the purpose of rule 23. Base2 indicated that Mr Curley "would be at serious and imminent risk of harm/injury if he continued to live at the above address." The respondent points out that this refers merely to a "risk of harm/injury" rather than addressing the test within rule 23, namely whether there was a serious and imminent risk that the applicant "would be killed or seriously injured." A mere risk of harm or injury (at a lower level) is insufficient. There is some forensic force in this point since Base2, which is surely well-versed in these matters, could simply have answered the question

posed in the affirmative or expressed itself in words which more closely matched the test within rule 23. Nonetheless, the court could not escape the impression that there was an element of nit-picking in the respondent's submissions about the Base2 representations. They were clearly designed to be supportive, at least to some degree, of the applicant's request for the award of intimidation points. Further, as noted in the leave ruling (see para [40]) it is in the nature of paramilitary threats that they are frequently threats of serious injury, rather than something lesser.

[68] A more attractive submission on the part of the respondent was that the Base2 organisation is "not an oracle", nor infallible. One must bear in mind that, ultimately, the decision to be made is a housing allocation decision which is for the Executive. In reaching that decision, it is required to take into account a range of relevant information and, provided it does not stray into irrationality, the weight to be attributed to the evidence and the overall assessment of the risk to the applicant is a matter for it. In this case, the decision-makers had a number of sources of information, including the account provided the applicant himself; the written report from the PSNI; and a report from Base2. The PSNI assessment will frequently be given considerable weight given the role and resources of the police.

[69] The respondent relied upon the fact that it had not been told why the applicant stayed in his house in West Belfast, at least for most of the time, despite apparently being at risk there. It further relies upon the fact that it was not clear how or why the threat to him came about. The applicant also did not explain his areas of choice for re-housing, which were areas in West Belfast where he was also thought to be at risk.

[70] The court was troubled by this last issue relating to the applicant's areas of choice (Andersonstown, Twinbrook and Poleglass), in the face of his claim that he was at risk in West Belfast. Selecting these areas for re-housing appears inconsistent with what Base2 said about his being at risk generally in West Belfast. The respondent complained that the applicant's evidence was lacking in candour in a number of important respects, with this being the most obvious example. It also relied upon the fact that there is a significant absence of evidence in this case about the risk upon which the applicant relies and his knowledge in relation to it, with the grounding affidavit of the applicant being extremely sparse and failing to condescend to any detail about a number of the important issues relating to the circumstances giving rise to the threats. There was also no rejoining affidavit, notwithstanding that a number of these matters had been raised in the respondent's evidence. There were a number of concerns about candour in these regards which may have been fatal to the applicant's claim but for his limited capacity.

[71] The Court of Appeal reiterated the importance of the duty of candour in judicial review proceedings, from their inception until conclusion, in *Re Taylor's Application* [2022] NICA 8. This requires, amongst other things, the proactive disclosure in affidavit evidence of all facts bearing on the possible grant of a

discretionary public law remedy on the applicant. I also accept that there was a paucity of evidence about the applicant's mental health issues. However, in light of what I was told about the applicant's capacity, vulnerability and mental health, I was not persuaded that it would be fair or appropriate to dismiss his claim on the freestanding basis of lack of candour. The paucity of information in relation to a number of these matters was, however, another factor which the respondent was entitled to take into account.

[72] A key factor in the respondent's reasoning however was obviously that, after the threat in June 2020, the applicant remained in his house and took no action whatever for some four months. Although he made a report to the police on 23 June 2020 (some three days after the masked men had told him that he had 48 hours to leave the country), he did not leave the country; nor did he leave West Belfast or even his own flat. A further incident is said to have occurred on 28 June but on this occasion (the respondent submits) it is not known what, if anything, was said. There is very little evidence about this. Mr Sands submitted that there was nothing to indicate that this was a 'rule 23-type threat'; and that it could be something which was totally unrelated. In any event, the applicant remained in his dwelling, and it was not until 23 October 2020 that he applied to his social housing landlord for a transfer. The respondent was then made aware of the case and a homelessness assessment was undertaken on 18 November 2020. In advance of this, in July 2020, it appears that the applicant had not wanted to transfer his tenancy with Radius Housing, even after the June incident; and there has been no explanation in relation to why he would not have wished to do so. When he later left his tenancy in April 2021, Radius Housing appear to have been told simply that this was because he did not like the location and no issues were raised with Radius at that time about the threat to him.

[73] In light of the approach I have adopted to the interpretation of the word 'imminent' in rule 23 of the Scheme, I do not consider that it was irrational for the respondent, in January 2021, to conclude that this requirement was not met and had not been met at the relevant time of the application, given that the applicant remained in his own home in the intervening six months with no repetition of the threat. It follows that it was not irrational for Ms Long to conclude that this initial decision should not be overturned.

[74] The further information which came to light thereafter, at the later stages of the decision-making process, did not in my view require a different conclusion to be reached. Indeed, the later material from the police (coupled with additional time passing without the applicant being subject to further threat or adverse incident) served to underscore the diminishing nature of the threat and its lack of imminence.

Irrationality in the second case

[75] There are two aspects to the rationality challenge in the second case, reflecting the NIHE's view that each respective limb of rule 23 was not satisfied. As

to rule 23(1), which the respondent did not appear to consider to be seriously in issue at the final decision-making stage, the applicant asserts that his house *was* seriously damaged in the gun attack in February 2021. He relies on the fact that there was smashed glass and there were bullet holes in the masonry. He further argues that the house was damaged and that this was serious, since there was no doubt that the incident itself would be described as serious. Giving rule 23(1) its ordinary and natural meaning, the home must be "seriously damaged." It is not sufficient simply that some damage be caused by means of an attack which might be described as serious. In this case, therefore, the question is whether the respondent was irrational in determining that the damage to the house was not serious damage. It is clear that such damage may occur otherwise than by explosion or fire (the two cited causes within the rule). However, the meaning of 'seriously damaged' takes its colour from the remainder of that paragraph which refers both to those two means of damage and to the alternative of the house being destroyed completely. In my view it was not irrational for the respondent to conclude that the damage to the property in this case did not amount to serious damage within the terms of the rule. As Mr Sands submitted, there is no evidence that it was uninhabitable or even that substantial repairs were needed.

[76] As to rule 23(2), the applicant makes a range of arguments. He relies upon the fact that the Executive referred in its letter of 24 October to the lack of housing resources, which he submits 'contaminated' the respondent's approach to eligibility. I accept the respondent's submission that this complaint is not one upon which leave was granted by Colton J. In any event, I also do not consider the correspondence to support the suggestion that these issues were taken into account in determining whether or not the applicant should be awarded intimidation points. Read fairly and as a whole, it is clear that the letter rejected the complaint that intimidation points should have been awarded and then went on to discuss the applicant's housing situation in light of that, taking into account his status as a FDA, his selected areas of choice and his current total of 110 housing points.

[77] In terms of the February 2021 incident, the applicant contends that he and a friend were present in the house whenever it was attacked, which he considers as a deliberate attempt at intimidation or possibly even trying to kill him. He has now explained that he has continued to live there because no other appropriate addresses were offered where he would feel safe, so he was "forced therefore to continue to face this threat on terrain that I am familiar with." Elsewhere he says that he felt safest in the environment that he knew. He says that he is aware that paramilitaries have an extensive presence throughout Northern Ireland (the point presumably being that it would be difficult for him to escape the threat wherever he lives within the jurisdiction).

[78] In terms of imminence, the applicant has made the point that there is no indication whatsoever that the paramilitaries' issue with him has gone away. In fact, the input from Base2 suggests that it has not, he submits. Base2's concerns remained serious well into 2022. The applicant also contends that paramilitary

organisations "do not forget"; and there have been no approaches to him from any group, directly or indirectly, to suggest that he is no longer under threat.

[79] In the second case, the applicant has laid very heavy emphasis upon the "unique status" of Base2 and its ability to provide insight into these issues. As in the first case, the respondent relies upon the fact that Base2 did not use the particular wording set out in rule 23 (namely that Mr Wilmont was at serious and imminent risk of being killed or seriously injured if he were to live in the house). The form of wording used in Mr Wilmont's case ("serious concerns") is weaker still than that used in Mr Curley's. In the respondent's submission, the choice of language used is significant. The respondent also takes issue with the applicant's suggestion that the wording used in the Base2 response was "what seems to be [Base2's] usual phraseology." Its position is that the relatively generic language used (see para [14] above) is not a standard response.

[80] More generally in respect of Base2's input, the respondent's final decision letter of 6 February 2023 stated as follows:

> "In summary, Base2 have stated that their enquiries in May/June 2022 were focused on confirming that the incident of February 2021 did take place and was a paramilitary attack and there was no real investigation into any current threat to Mr Wilmont. At the time they made their enquiries they were not aware that Mr Wilmont had remained in the property for over a year following this and had they been aware they would have made more specific enquiries relating to any current/contemporary threat. The language used in their report in stating "there would be" a threat in the area can be interpreted as reflective of their initial understanding that Mr Wilmont was no longer in the property.
>
> In evaluating this information from Base2 I must consider if this is sufficient to conclude that Mr Wilmont is/was at serious and imminent risk of death or serious injury at the relevant time (from February 2022-present). Given the specific and narrow nature of Base2's enquiries, the limited information made available to them from their sources, the apparent misunderstanding that Mr Wilmont had left the dwelling and the inconclusive list of some of the information and reports returned to the Housing Executive, I have decided that it falls short of allowing me to conclude that Mr Wilmont was/is at serious and imminent risk of death or serious injury at the contemporary time (of their report) as required by Rule 23(2)."

[81] The applicant also submitted that, rather than looking for evidence of continuing threat, the respondent should be seeking evidence which suggests that the established threat has somehow dissipated. He went as far as to submit that once an individual has been identified as a target "there would need to be a positive, verified change in the dynamic before a threat level could be said to be downgraded." I do not consider this to be the appropriate analysis. There are a range of reasons why someone who was initially under threat may no longer be. It is for an applicant for intimidation points to satisfy the respondent that they are entitled to that allocation under rule 23. It cannot be the case that, if a paramilitary threat has been made to an individual (assuming this meets the threshold of risk test in rule 23), they forever remain entitled to intimidation points at any time of asking in the absence of positive evidence that the threat has been lifted. In every case, the decision-maker must consider all of the relevant evidence and information at the material time.

[82] In the respondent's submission, this was a very unusual case because, after the attack on 3 February 2021, the applicant remained living in the house and did not approach it to make a homelessness application until more than 12 months later. There was no evidence that any further incident or threat occurred in the meantime, nor was this suggested by the applicant. Instead, in the respondent's submission, Mr Wilmont continued to live in the house entirely unmolested by anyone up to the date of his application to the Executive. The respondent also draws attention to the fact that the applicant wished to move to two very specific rural areas within only a few miles of the house where he was living. These are within the area in which Base2 indicated there was a risk but also, because of the very narrow focus of his areas of choice, even if the applicant had been awarded intimidation points he would not have been successful in obtaining alternative permanent accommodation there as a result.

[83] The respondent further submitted that the evidence before the court about the threat itself was "threadbare." No words were spoken; and there was no evidence that the applicant was ever told by anyone to leave the house or the area in which he was living. The account given states that the gunshots almost hit the applicant's friend. There was no evidence as to why the applicant believed that the threat was directed at him rather than his friend, or as to whether it was possible that the attackers may have come to the wrong house. His evidence is speculative and/or piecemeal in this respect. The respondent pointed out that, although the criminal damage certificate confirmed that the shots were fired by a proscribed organisation, this did not confirm that the shots were fired as a threat to the applicant to leave his home.

[84] As with the first case, it is right that the details provided by the applicant himself as to what he knew or may have known about the circumstances behind the attack are essentially absent from his evidence or at best extremely limited. However, the evidence relating to the applicant's name being on a list which was

considered to be a 'hit list' and which was later shared with police for that reason does suggest that it is unlikely that the attack at his home was entirely random.

[85] Once again, the key issue is the level and imminence of the risk at the time when the intimidation points were sought. As to that, the respondent also relies upon the fact that there is no averment as to why the applicant did not take up the offer of temporary accommodation if he believed that his life was at risk at that address. Although it was clear from the report from police which was available to the first instance decision-maker that the applicant had reported the incident, that report also suggested that the police's view was that there was no known active threat against the applicant either in relation to the area in which he lived or at all. Importantly, at the time of making the initial decision, the decision-maker also knew that the shooting incident had occurred more than 12 months previously and that the applicant had not considered it necessary to approach the Executive at an earlier stage or to seek temporary accommodation.

[86] Viewing all of the above in the round, again I have not been satisfied that the only rational outcome was for the respondent considering all of the evidence before it to conclude that the rule 23(2) test was met.

The timing issue

[87] Mr Lavery submitted that the delay in the Executive's decision-making in Mr Curley's case was unconscionable. In that case, there was a challenge to the absence of a policy providing for expedited decision-making where an applicant challenged or complained about the non-award of intimidation points. In addition, there was a challenge simply as a result of the amount of time taken to resolve the issue, particularly at the second-stage complaint phase. Leave was not granted on this ground in the Wilmont application but, in his submissions, Mr Devine supported the argument made by Mr Lavery and argued that the time which it takes for these applications to be dealt with is wholly inconsistent with the threat posed and his client's right to life in the second case.

[88] The complaints policy under which Mr Curley's complaint about the initial decision-making was dealt indicates that decisions should be made within 20 working days. (The respondent aims to respond to first-stage complaints within 10 working days but may take longer if they need further information. The policy says that, where there is an exceptional reason, they may take up to an extra 10 working days to respond. In relation to final stage complaints, the policy again says that the respondent aims to respond within 20 working days, although this will be added to if the individual adds to their issues of complaint or is required to provide additional information or evidence while the case is ongoing). In the second case, there is correspondence from the NIHE Central Complaints Team indicating that the investigation team was managing a significant caseload; that they aim to handle cases as fairly as possible (and therefore deal with them in chronological order where appropriate); but concluding that "as such, the target timeframe of 20

working days is currently unachievable." In that case, an assurance was given that the team would, of course, work to respond as swiftly as possible.

[89] The respondent's complaints policy certainly strikes a tone which would lead one to expect expeditious decision-making. It notes that the respondent is committed to providing excellent services for all of its customers and to principles which include that it will "start off right, fix it early, focus on what matters, be fair."

[90] In the first case, the informal complaint was made on 29 January 2021; followed up by a formal complaint on the applicant's behalf from Housing Rights on 21 July 2021. A first-stage complaint decision was made on 10 August 2021, which was almost 7 months after the informal complaint; but within a much shorter period from the official first-stage complaint being made. The second-stage complaint was determined on 31 May 2022, with a further three months after that for the final consideration because of the application of the wrong standard of proof. The respondent's evidence is that, although the letter outlining the second-stage complaint was dated 16 August 2021, it was not in fact emailed to the Executive until 16 September 2021. However, there was a period of some 8½ months between that time and the decision on 31 May 2022.

[91] Mr Lavery submitted that, because of the delay in the case, the applicant 'lost the benefit' of the Base2 assessment. (However, that ignores the delay on the applicant's part in raising the issue with the Executive in the first place; and the fact that the later decision-making processes also reassessed the correctness of the initial decision on the evidence available at that time.) In addition to that, there is a disadvantage in the delay itself, with the applicant waiting and being subject to uncertainty and worry. The applicant submitted that delay of this nature was in breach of his procedural legitimate expectations and/or was irrational or procedurally unfair. However, he accepted that litigation on this issue would have been unnecessary if the 20 working day target for all decisions in the complaints policy had been met.

[92] The respondent resists the challenge on the timing ground on two bases. First, it argues that the policy is sufficiently flexible to allow for urgent consideration where the situation demands it. Secondly, although the respondent accepts that it is important and desirable that decisions as to the award of rule 23 points should be made promptly and without delay, it submits that it is not generally necessary to do so as part of any article 2 ECHR response. As to the second ground of objection, the respondent argues that both applicants' cases provide useful examples. Mr Curley waited four months before making an application to transfer from his home and refused all offers of temporary accommodation in the meantime, remaining in the home in which he contended he was at risk. The respondent also argues that at no stage did the applicant or his representatives ever claim it was necessary for the Executive to make an immediate decision. In Mr Wilmont's case, he waited for over a year before he made an application and, even if he had been successful in being awarded intimidation

points, he would still not have been moved out some two years later as the availability of housing in his areas of choice was so limited.

[93] Returning to the circumstances of the first case, as noted above the respondent relied upon the fact that there was never a request for urgency. Mr Curley approached his landlord some four months after the June incidents and the Executive only in November. A decision within eight weeks in January 2021 was reasonable, in the respondent's submission, given the enquiries which had to be made. The applicant's mother made an informal complaint on 29 January but there was a reply to this on 17 February. After that, the applicant did nothing for five months until Housing Rights made the formal complaint on his behalf on 21 July. By the time of the formal first-stage complaint, the applicant had terminated his tenancy, having moved from the property in April 2021 to live with his mother (at an address at which he has never suggested he felt under any threat, although this is also in West Belfast). The formal first-stage complaint was determined within three weeks after it was submitted.

[94] The second-stage complaint took over eight months to determine. The respondent relied upon the fact that the final stage complaint under the policy entails a full, independent investigation. In this case, evidence of a potential new threat incident emerged which required investigation and multiple enquiries were made with the PSNI, Base2 and CRJ. Whilst the time taken in these circumstances may have been undesirable, Mr Sands submitted that it was not unlawful, particularly given the nature of this non-statutory process.

[95] Having considered the arguments in relation to this issue, I do not find that the respondent's complaints policy is unlawful in failing to provide for an expedited complaints process in this area. That is primarily for three reasons. First, the policy *does* contain indicative timeframes which, if complied with, would represent a reasonable time within which to deal with a complaint about non-award of intimidation points. In reaching this view, I take into account the fact that such cases are often not straightforward and that investigations and enquiries with third-party organisations (principally the PSNI but sometimes others, such as Base2, other community organisations, medical practitioners, etc.) will be required or appropriate. Second, I accept the respondent's submission that the policy is sufficiently flexible to cater for urgent cases where a request for urgent determination is clearly made and this is achievable. Third, the challenge to the policy was advanced on the basis that decisions in relation to intimidation points by their very nature should be adjudicated upon as a matter of utmost urgency. However, this is in turn on the basis that the award of such points is the means by which an applicant in fear of violence will be urgently re-housed. For the reasons discussed above, this is the wrong starting point. The degree of priority which is secured where intimidation points are awarded is very significant. If they are wrongly awarded, this potentially disadvantages other housing applicants unfairly. The assessment of risk in this area is complicated. There is also scope for manipulation of the system in order for housing applicants to secure an unfair advantage (which, I emphasise, was not

suggested to be an issue in either of the cases before the court). Immediate decisions are often not possible. This is one reason, however, why Article 8 of the 1988 Order provides for an interim duty to accommodate those in an *apparent* case of priority need whilst enquiries are undertaken.

[96] I also take into account that the respondent must be alive to the fact that its complaints procedure may well not be considered to be an effective alternative remedy precluding an application for judicial review, especially where the complaints process cannot be completed expeditiously. In the *Thompson* case, Humphreys J took the view that the availability of the complaints process was not sufficient to warrant the refusal of leave or relief, taking into account (amongst other things) the relative speed with which the judicial review process could deal with the issue (see para [38] of the judgment).

[97] It is regrettable that, in the Curley case, the indicative timeframes set out within the complaints policy were not met. On balance, I would not hold that the delay in making the first-instance decision was so unreasonable as to be unlawful or procedurally unfair; nor the delay from the making of the formal first-stage complaint to its determination.

[98] It does seem to me that there is some scope for confusion and unnecessary delay because of the distinction between an informal complaint and a formal complaint – or, perhaps more accurately, between informal and formal resolution of a complaint – after a decision has been made with which an individual disagrees. In this case the applicant's mother submitted a complaint on 29 January 2021, which was dealt with informally and which the Executive responded to on 17 February 2021. However, it was only in July 2021, after Housing Rights was instructed, that the first-stage complaint was formally lodged. In a case of this type, it may be appropriate simply to disregard the informal stage of the process. At the very least, dissatisfied housing applicants should be given clear advice and guidance about the distinctions between informal resolution and the making of a formal first-stage complaint in order that they know what stage of the process they are at and precisely how their complaint is being treated.

[99] I consider that the time taken to determine the final-stage complaint was unreasonable, even with the complications involved in the case and the need for further investigation. However, I do not consider any relief ought to follow as a result of this finding, which speaks for itself. For the reasons discussed at paras [45]-[51] and [56] above, I do not consider that the delay represents any breach of article 2 ECHR.

Concluding observations

[100] Subject to any appeal of this judgment, I would make the following observations about the operation of rule 23 of the HSS in light of the findings and conclusions above.

[101] I have found that the requirement under rule 23(2) that there be a "serious and imminent" risk of death or serious injury for one of the identified reasons should be given its natural meaning, rather than the specific meaning set out in case-law as the test for engagement of the article 2 *Osman* duty. Whether the relevant risk is serious and imminent is a matter of judgment for the NIHE, subject to rationality challenge. A result of this is that a housing applicant who considers that there is a serious and imminent risk to them which may entitle them to intimidation points would be well advised to bring this to the attention of the Executive as soon as possible. Such applicants should be aware that failure to do so, particularly for a lengthy period, may affect the prospect of their establishing that the relevant threshold is met, particularly if they remain in occupation of their property without any further difficulty for a prolonged period of time.

[102] It is, of course, not the case that such an applicant will only succeed in securing intimidation points where they have vacated their property or taken advantage of an offer of temporary accommodation. However, those who find themselves in this unfortunate position should be aware that the Executive's powers and obligations to take immediate operational steps to secure their safety, where they cannot reasonably be expected to live in their home because of the threat of violence, arise through the homelessness provisions in the 1988 Order. Where there is or has been a risk meeting the rule 23(2) threshold at a relevant time (*viz* at or during the time when the Executive has been asked to award intimidation points or is considering this) this will provide an applicant with significant additional priority in terms of the allocation of further permanent housing. Intimidation points are not, however, the only means, and not even the primary means, by which an imminent risk are addressed. They provide a longer-term benefit in recognition of society's abhorrence of individuals having been intimidated out of their homes and desire that such persons should not be disadvantaged in terms of their permanent housing.

[103] Given the requirement that there be (or have been at a material time) a serious and "imminent" risk, there is an obligation upon the Executive to deal with requests for intimidation points, and reviews of decisions not to award such points, expeditiously. An applicant should not be disadvantaged by having to wait an unduly long period of time for a decision. Even if they have the opportunity to avail of temporary accommodation, or actually do avail of this, they are still entitled to know and to seek to progress their permanent housing prospects within a reasonable period of time.

[104] There may be thought to be some curious features about the intimidation points regime as it currently operates. First, there is some dissonance between a system which, on the one hand, requires a threat to be imminent before points are awarded but which, on the other hand, is not the means by which such imminent risks are to be immediately addressed. Second, intimidation points awarded under rule 23 remain in place even where the risk which justified their award has subsided or entirely dissipated (see para [44] of the leave ruling in the first case,

further confirmed in the respondent's evidence in each case) unless and until certain circumstances come about. This includes the applicant being re-housed on a permanent basis satisfactorily under the Scheme or unreasonably refusing a number of offers of new accommodation in which case the intimidation points will be lost. However, this means that a housing applicant can enjoy considerable priority over others even where this is, in fact, no longer justified by an existing, imminent risk. Each of these features may be thought to support the respondent's submission that the purpose of rule 23 is about showing solidarity with the victims of certain types of threat who have been intimidated out of their homes or have coped with serious and imminent risks designed to intimidate them out of their homes. At the same time, they give rise to questions about whether the Scheme could be designed in a more effective fashion or in a manner which takes fuller account of, and is more joined-up with, the provisions in the 1988 Order. Additionally, if the purpose of the award of such points is to show solidarity with someone who has been the victim of a serious and imminent risk, the policy question arises as to why an applicant should not be given the benefit of the points where the relevant risk pre-dated their housing application, provided it can be shown that such a risk arose at their property in the past and they have not been re-housed in the meantime.

[105] The respondent also submitted that one of the purposes of the intimidation points regime was to ensure that paramilitary organisations were not in a position to dictate how public housing was allocated or where an applicant for public housing was to live. On one view, that makes sense; since a beneficiary of intimidation points will be much better placed to choose and secure housing within their areas of choice (subject to the availability of housing stock). On another view, however, the intimidation points regime, particularly when viewed alongside the practice of community enquiries (sometimes involving paramilitaries themselves) as to the nature and extent of the risk posed, could be suggested to formalise and facilitate paramilitary influence over housing decisions. This is particularly so where, as the Scheme provides, an offer of an available dwelling may be refused to an applicant with intimidation points where they seek re-housing in an area of choice where the Executive deems the same risk to arise. In a democratic society the ultimately correct response is for all such influence to be removed.

[106] It is perhaps unsurprising, therefore, that the respondent's evidence is that the inclusion of intimidation points, and the super-prioritisation of intimidation cases which does not exist in other housing selection schemes in the United Kingdom, remain matters of debate. As part of the fundamental review of housing allocations initiated by the then Department for Social Development, a 2017 public consultation included a proposal to remove intimidation points entirely from the HSS. The Minister for Communities subsequently made a statement to the Northern Ireland Assembly in December 2020 that that proposal would not go forward and, instead, the Housing Executive was asked to consider alternative approaches. Ms Long's affidavit confirmed that that work is ongoing. The court does not underestimate the challenges of dealing with this difficult issue,

particularly in light of the current chronic shortage of public housing. It is nonetheless hoped that the issues which have arisen in this litigation, and which are dealt with in this judgment, may assist in any ongoing consideration of the matter.

Disposal

[107] For the reasons given above, I dismiss the first application for judicial review, save to the extent that the applicant succeeds on his challenge to the length of time taken to determine the second-stage complaint. I dismiss the second application for judicial review.

[108] I will hear the parties on the issue of costs.