Neutral Citation no. [2007] NIQB 55 | *Ref:* **GILC5795**

Judgment: approved by the Court for handing down | *Delivered:* **29/06/07**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MARGARET DELANEY FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE DECISION OF THE BELFAST IMPROVED HOUSING ASSOCIATION

AND IN THE MATTER OF A POLICY OF THE DEPARTMENT OF SOCIAL DEVELOPMENT

GILLEN J

Application

[1] The applicant in this case occupies a dwelling at 12 Beechmount Link, Belfast under the terms of a tenancy agreement with the Belfast Improved Housing Association ("BIH"). She applied to purchase the property, a two bedroom bungalow, from BIH in December 2005 under its house sales policy. The house sales policy ("the policy") is the statutory sales scheme which BIH operates by reason of Article 3A of the Housing (NI) Order 1983 ("the 1983 Order"). Under that policy certain properties and tenants are excluded and provision is made for a purchase price calculated after the application of available discount to market value. It is the case of the respondents that the subject property which she sought to purchase was an excluded property under the statutory scheme and the applicant was not eligible to purchase it on the basis that the BIH will not sell bungalows with two or fewer bedrooms to its tenants.

[2] By letter dated 26 April 2006, the applicant's solicitors wrote to BIH stating that the applicant wished to purchase under the policy. BIH replied that the applicant was not eligible to purchase that property under the current house sales scheme.

[3] It is the case of the first named respondent that BIH operates no other sales policy outside the statutory scheme. If an application were made to

purchase one of its properties outside the statutory scheme, BIH would require approval from the second respondent before doing so in accordance with Article 13 of the Housing (NI) Order 1992 (article 13).

[4] It is the respondents' case that both requests to purchase were specified by the applicant under the BIH's house sales policy. BIH assert that both requests were determined in accordance with its house sales policy as it was statutorily obliged to do (see affidavit of Alan Rea, Director of Housing for the first named respondent dated 16 March 2007. It is also the first named respondent's case that neither the applicant nor her representatives indicated that they wished to purchase the property outside the scheme without the benefit of the package of discount permitted by the scheme itself.

[5] By way of background I add at this point that the first respondent's case is that prior to the implementation of the statutory sales scheme, BIH operated a voluntary sales scheme. The voluntary sales scheme was suspended on 23 May 2004 pending implementation of the statutory scheme. All bungalows were excluded under the voluntary scheme.

[6] It is the case of BIH that at present, and at the time of the applicant's applications, two bedroom bungalows were essential to BIH housing stock. They are allegedly particularly suitable to elderly tenants, the disabled or those with mobility needs and consequently heavily in demand. At Beechmount where the applicant lives there was a new build scheme and the subject property was a mobility bungalow. Mr Rea asserts in his second affidavit that there is a very substantial waiting list for accommodation similar to the subject property. He deposes to the fact that the exclusion in the statutory sales scheme is necessary to protect this type of accommodation within housing stock and to ensure its availability for allocation to vulnerable groups. It is asserted that the applicant herself found her previous accommodation at Albert Street, unsuitable to her physical needs and at the time of her application to re-house, her then landlord, Habinteg Housing Association, asked that she be allocated a mobility bungalow in the Beechmount development. She had not applied under the Habinteg voluntary scheme prior to 19 May 2004. It was that scheme which was suspended on 19 May 2004 pending implementation of the statutory scheme. Her tenancy with Habinteg terminated on 23 May 2004.

[7] The applicant has been granted leave by Deeny J to seek judicial review on the following grounds:

(a) That the BIH has acted unlawfully in adopting an over rigid policy hampering its discretion in that it cannot and will not sell bungalows with two or fewer bedrooms to its tenants irrespective of circumstances.

(b) That the sales policy of BIH and the sales scheme of the Department of Social Development ("DSD") are unreasonable and irrational insofar as they prohibit the sale of bungalows with two or fewer bedrooms.

(c) The decision of the BIH not to sell to the applicant her current residence and those aspects of the house sales policy of the BIH and the house sales scheme of the DSD prohibiting sales of bungalows with two or fewer bedrooms are an unlawful interference with the applicant's rights under Article 1, Protocol 1 of the European Convention of Human Rights and Fundamental Freedoms ("Art 1 Prot 1 of the Convention").

The Statutory Context

[8] The 1983 Order (introduced by Article 131 of the Housing (Northern Ireland) Order 2003 where relevant states as follows:

Article 3A:

> "(1) The Department shall make a scheme for registered housing associations to offer for sale or lease to their secure tenants, the dwelling houses occupied by those tenants.
>
> (2) A scheme made under (paragraph 1) may contain such provision as the Department considers appropriate and, without prejudice to the generality of the foregoing, shall include provision with respect to the matters mentioned in sub-paragraphs (a)-(f) of Article 3(2).
>
> (3) A scheme under paragraph (1) may include provision for registered housing associations to offer, in such circumstances as the scheme may provide, to grant equity-sharing leases in relation to dwelling houses to which the scheme applies.
>
> (4) Registered housing associations shall comply with the scheme made under paragraph (1).
>
> (5) The Department may at any time amend the scheme made under paragraph (1) or a scheme replacing any such scheme; and paragraph (2) – (4) shall have effect in relation to an amended scheme or a scheme replacing an existing scheme as they have in effect in relation to a scheme.

…

3(2) A scheme submitted under paragraph (1) may contain such provision as the Executive considers appropriate and, without prejudice to the generality of the foregoing, shall include provision with respect to –

(a) the classes of dwelling houses to which the scheme applies;

(b) the manner in which the purchase price of the dwelling is to be determined;

(c) the circumstances in which the purchaser is entitled to a discount of part of the purchase price and the basis upon that discount is to be calculated;

(d) the circumstances in which discount may be repayable;

(e) the condition and covenants to be included in the conveyance or lease of the dwelling house;

(f) the terms on which land used for the purposes of a dwelling house is to be treated as including the dwelling house."

Article 13 of the Housing (Northern Ireland) Order 1992, where relevant, states:

"13.-(1) Subject to paragraph (2), any provision contained in the rules of a registered housing association which prevents it from disposing of any land (where such disposal would otherwise be lawful) shall be of no effect.

(2) Notwithstanding anything contained in Section 30 of the Act of 1969 –

(a) A registered housing association may not dispose of or mortgage any land, and

(b) An unregistered housing association may not dispose of any grant-aided land as defined in Schedule 2, without the consent of the Department.

(3) Any such consent may be given –

(a) Subject to such conditions as the Department sees fit impose; and

(b) Either generally in relation to all housing associations or to a particular housing association or description of association; or

(c) In relation to particular land or in relation to a particular description of land."

The Applicant's Case

[9] In the course of a characteristically eloquent and well marshalled argument Mr Larkin QC, who appeared on behalf of the applicant with Ms White, submitted that BIH had adopted an over rigid policy hampering its discretion to the effect that it would not sell bungalows with two or fewer bedrooms to its tenants irrespective of their particular circumstances.

[10] Counsel relied on In the Matter of an Application by Hugh Herdman for Judicial Review (Herdman's case) neutral citation No. (2003) NIQB 46(Herdman's case), a matter dealing with the refusal of the Chief Constable to grant the applicant a firearms certificate. At paragraphs 19 and 20 Kerr J (as he then was) said:

"[19] A public body endowed with a statutory discretion may legitimately adopt general rules or principles of policy to guide itself as to the manner of exercising its own discretion in individual cases, provided that such rules or principles are legally relevant to the exercise of its powers, consistent with the purpose of the enabling legislation and not arbitrary, capricious or unjust. …. But the decision-maker must be prepared to consider the individual circumstances of each case and be prepared, if the circumstances demand it, to make an exception to the

policy (British Oxygen Co. Ltd. v Minister of Technology (1971) AC 610)."

[11] Counsel also drew my attention to In the Matter of an Application by Caroline Watt for Judicial Review Neutral Citation No. (2005) NIQB 35 (Watts case), a case where the applicant applied to the Northern Ireland Housing Executive to require them to purchase her dwelling under the scheme for the Purchase of Evacuated Dwellings. Under that scheme it was a condition of eligibility for purchase that a certificate signed by the Chief Constable must be submitted to the NIHE stating that it was unsafe for the applicant or a member of her household residing with her to continue to live in the house. In that case at paragraph 25 Morgan J said of circumstances such as that in Herdman's case that where a policy had been devised to guide the exercise of a statutory discretion, "in such circumstances it is important to recognise that the rigid application of the policy may fetter the discretion which Parliament intended should be available to the decision-maker".

[12] Mr Larkin submitted that this woman had exceptional circumstances at hand in that there were particularly pressing personal circumstances in her case militating in favour of purchasing her house which ought to have been taken into account notwithstanding that the home did not qualify under the scheme. The respondents had treated the scheme as the totality of their powers whereas there was nothing in the scheme which constrained the exercise of discretion outwith the scheme. In other words the scheme was not the last word on this matter although it had been treated as such.

[13] In this context Mr Larkin submitted that Article 3A of the 1983 Order (hereinafter referred to as "3A") did not imply a repeal of Section 13 of the 1992 Order. If it had been so intended, the later order could have effected such a repeal in the text of 3A. Hence it was wrong of the respondents to adopt the approach that she could either acquire under the house sales policy scheme (which she could not) or else she had no right at all. The fact that the house sale scheme was co-terminous with a power to sell to a secure tenant under the 1992 legislation was ignored. Mr Larkin submitted that I should make a declaration that the second-named defendant erred in considering that the sale to secure tenants by the first-named respondent was prohibited save under its house sale scheme. In effect the second-named respondent was attempting to repeal the 1992 legislation by virtue of 3A.

[14] It was Mr Larkin's submission that in considering a sale outwith the statutory scheme, the BIH would be exercising a public function as part of a central housing allocation scheme policy. Disposal of land linked with the Department should be considered a matter of public policy (see Aston Cantlow PCC v Wallbank (2003) 3 WLR 284) (the Aston Cantlow case).

[15] Counsel submitted that the statutory house sale scheme in any event did not retrospectively deprive the applicant of any right to purchase. He relied on Article 1 Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention"). It was the submission of the applicant that she enjoyed a right to buy .This was therefore "a possession" or "an asset" which she had enjoyed at least from the end of the voluntary sales scheme in May 2004 until October 2004 when the statutory exclusion was enacted. He relied on Kopecky v Slovakia a judgment of the Strasbourg Court (Application No. 44912/98)(Kopecky's case). That case involved an applicant seeking the right to the peaceful enjoyment of his possessions which he claimed had been violated as a result of the dismissal of his claim for restitution of his late father's property. At paragraph 47, the court approved previous cases where the persons concerned were entitled to rely on the fact that the legal act, on the basis on which they had incurred financial obligations, would not be retrospectively invalidated to their detriment. In that class of case, a legitimate expectation would be based on a reasonably justified reliance on a legal act which had a sound legal basis and which bore on property rights. Counsel argued in the instant case that from May 2004 until October 2004, the applicant had a public law right to have a request to purchase properly considered. Those public rights had been extinguished in October 2004 with the advent of the house sales scheme. No transitional provisions had been made and accordingly Mr Larkin argued that this constituted a breach of Article 1 Protocol 1. Had it been made clear to the applicant that her application would have been treated no less favourably if her application had been made on the basis that no scheme was in place she would have sought to apply outside the statutory scheme.

[16] Mr Larkin further relied for these propositions on Djidrovski v The Former Yugoslav Republic of Macedonia (Application no 46447/99 ECrtHR)(Djidrovski's case). In that suit the applicant, as an army serviceman, had purchased a property with a price adjustment as a member of the Yugoslav army. Following the fall of Yugoslavia the former Yugoslav Republic of Macedonia declared independence under legislation then enacted he would be deprived of the right to purchase the apartment at a reduced price unlike other former and servicemen who had exercised the right. The court said as follows at paragraphs 79 and 80:

> "The court observes that the applicant has in fact become owner of the apartment. It does not appear, from the information made available, that the applicant's continued ownership is under threat. The Government's position …. is that he had no right to buy at a reduced price. In essence the case concerns the price applicable to the purchase and, at most, the applicant runs the risk of being required to pay the difference. ….

> 80. The court reiterates that the concept of 'possessions' in Article 1 of Protocol No. 1 has an autonomous meaning and that Article 1 of Protocol 1 in substance guarantees the right of property…. A 'possession' within the meaning of the above provision may be either an 'existing possession' or a claim, in respect of which the applicant can argue that he has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right ….. The 'legitimate expectation' may also encompass the conditions attaching to the acquisition or enjoyment of property rights."

[17] In that case, taking into account the applicant's previous contributions and the agreements in force at the time, the court considered that he could be regarded as having 'a legitimate expectation that the purchase of his apartment would be at a reduced price'.

The first-named respondent's case

[18] Ms Gibson QC, who appeared on behalf of the first respondent with Mr Sherrard, cogently and skilfully argued that the only basis upon which the applicant had sought to request a purchase of the house was under the house sales policy pursuant to 3A. BIH determined both requests in accordance with that policy as it was statutorily obliged to do so.

[19] Leave had been granted by Deeny J on the basis that this was a request under the statutory house sales policy. Accordingly the attempt by Mr Larkin to base his case outside the statutory scheme was being made without the benefit of leave.

[20] In any event, any decision by BIH in relation to the request to purchase outside the statutory sales scheme would not be a public law function and as such would not be amenable to supervision by the court. Hence there would be no issue of "discretion" in the public law sense. Counsel relied on the Aston Cantlow case and also on Poplar Housing and Regeneration Community Association Limited v Donoghue (2002) QB 48 (the Poplar case). At paragraph 66 of the Poplar case Lord Woolf said:

> "66… As is the position on applications for judicial review, there is no clear demarcation line which can be drawn between public and private bodies and functions. In a borderline case, such as this, the decision is very much one of fact and degree. Taking into account all the circumstances, we have come to

> the conclusion that while activities of housing associations need not involve the performance of public functions in this case, in providing accommodation for the defendant and then seeking possession, the role of Poplar is so closely assimilated to that of Tower Hamlets that it was performing public and not private functions. Poplar therefore is a functional public authority to that extent. We emphasise that this does not mean that all Poplar's functions are public. We do not even decide that the position would be the same if the defendant was a secure tenant. The activities of housing associations can be ambiguous. For example their activities in raising private or public finance could be very different from those that are under consideration here."

[21] Ms Gibson submitted therefore that in the instant case any request to purchase a property outside the statutory sales scheme was a private function and therefore BIH could be regarded in no way as a public authority for the purposes of Section 6 of the Human Rights Act.

[22] Counsel submitted that the first named respondent did not have a statutory discretion under Article 3A. It was not involved in the drawing up or formulation of the scheme and any deviation from the scheme would have been a breach of the first respondent's duty under Article 131(4) of the 2003 Order.

[23] Ms Gibson asserted that Herdman's case arose where a statutory discretion was available. The present case gave no discretionary policy to the first named respondent. She adopted what Morgan J had said in Watt's case at paragraph 15:

> "In this case the scheme is made pursuant to the 1988 Order and is a form of subordinate legislation …. Once this scheme is made it is for the decision-makers to follow it. There is no residual discretion to deviate from it without lawful reasons such as conflict with a Convention right."

[24] In this case she argued all the first respondent could do was to follow the legislation concerned.

[25] The only request in this case had been made pursuant to the housing sales policy. Hypothetically, if such a request was made outside the scheme that request would be made outside the context of any power given to the

first named defendant by any statutory provision. The Department's approval would be required. The first-named defendant had been registered as a housing association under the 1992 legislation. Any sale requires approval under the terms of that 1992 legislation by the Department. If the housing association, exercising a private function, decided that it wished to sell property, that would not be the exercise of a statutory power and would require the approval of the Department.

[26] Ms Gibson resisted the suggestion that the applicant enjoyed any legitimate expectation under Article 1 Protocol 1. Relying on Kopecky's case, she drew my attention to paragraph 49 where the court said:

> "There was a difference, so the court held, between a mere hope of restitution, however understandable that hope may be, and a 'legitimate expectation' which must be of a nature more concrete than a mere hope and be based on a legal provision or legal act such as a judicial decision."

[27] In Kopecky's case, people were reclaiming property appropriated by virtue of new laws. In that case the applicant's father's coin collection was that which he now sought. This was quite different from the applicant's case where in the first place she had not even applied other than under the housing sales scheme and she had no expectation on the basis of any legal act or provision that she could purchase a property in any event even outside the scheme. Such a request would in the first place have not be referred by the Housing Association to the Department and then it would require the its approval .Such a sequence involved no legitimate expectation based on any legal provision or legal act. The prohibition on the sale of two bedroom bungalows under the current sales policy is a condition precedent to her eligibility under the right to buy scheme where the property in question is a two bedroom or less bungalow. This is a condition which therefore precedes the vesting or accruing of the right to buy.

The second respondent's case

[28] In the course of a well constructed skeleton argument augmented by compelling oral submissions Mr Coll on behalf of the DSD made the following points:

[29] House sale schemes have been in place in respect of the Northern Ireland Housing Executive ("NIHE") tenants and properties for a number of years. Insofar as Article 131 of the 2003 Order put on a statutory footing the sale of dwellings owned by registered housing associations this was a similar development as that to which had applied to the NIHE previously. There is therefore nothing novel or radical about the concept.

[30] Article 3A(1) imposes a statutory obligation on the second respondent to devise a house sales scheme for implementation by registered housing associations (RHAs). Article 3(2)(a) of the 1983 Order places a statutory obligation on the Department to make provision with respect to the classes of dwelling houses to which the scheme will apply. Therefore the Department cannot provide for the sale of excluded dwellings on the basis of ad hoc applications in undefined, or purportedly exceptional circumstances. Mr Coll relied on Watts case to submit that that the instant scheme is a form of subordinate legislation which must be followed by decision-makers with no residual discretion to operate outside its terms in exceptional circumstances. This he submitted distinguishes the instant case from the case of Herdman.

[31] The RHA cannot dispose of property without the consent of the Department under Article 13 of the 1992 Order such consent being upon such conditions as the Department sees fit to impose. This provision must be seen to work in compliance with Article 3A wherein the conditions for sale are set out in the statutory scheme. It was Mr Coll's submission that Article 13 of the 1992 Order cannot be considered outside the context of Article 3A. In particular he submitted that any discretion under Article 13 was supplanted by Article 3A. Mr Coll specifically stated that there might be circumstances still where Article 13 would apply to an unsecured tenant. However when I pressed him on the issue of the attitude of his client to the secured tenant, such as the present applicant, if an application had been made by this secured tenant under Article 13 of the 1992 legislation, I finally understood him to say he could not commit the second named respondent to a response in the absence of a request having been made. Frankly I would have considered any other answer unwarranted in the absence of express instructions.

[32] The current scheme promotes consistency of approach which is particularly important in the context of disposal by sale at discount of publicly funded dwellings in a period of housing market difficulty.

[33] Insofar as the housing sale scheme represents a fixed policy, this can be lawful in the relevant circumstances and counsel relied upon R v Secretary of State for the Home Department ex parte Hepworth [1998] COD 146.

[34] In any event the second respondent denies that there has been any fettering of the discretion. The house sale scheme in place since October 2004 has already been subject to qualifications/amendment eg November 2005 and remains under regular review. He drew attention to the contents of the affidavit of Mr Crothers, Director of Housing in the Department for Social Development in this regard.

[35] The applicant could have applied to have purchased an earlier property or moved to the tenancy of a non restricted property and applied to purchase that.

[36] The refusal was related to the characteristics of the dwelling and not the applicant herself. This is founded on a policy aim and requirement of protecting the publicly available stock of housing particularly suitable for use by the elderly.

[37] Insofar as the amendment of November 2005 afforded relief to tenants where applicants for purchase had been subject to compulsory rehousing and had been provided with an assurance by the NIHE that in such circumstances they would be able to apply for purchase under an older scheme, the second respondent asserted that this was designed to provide equity to tenants in those circumstances who, by virtue of the common waiting list, now find themselves to be RHA tenants rather than NIHE tenants.

[38] The second respondent submitted that the provisions of the Convention were not engaged or indeed breached in this instance. The "right to buy" could only be attained by the applicant upon compliance with various eligibility criteria within the scheme relating to, not only the tenant, but also the relevant dwelling itself. The applicant did not in domestic law have a right to buy the dwelling .In Mr Coll's submissions she does not possess the right to buy. Counsel went on to submit that the provisions of the scheme governing a tenant's eligibility to purchase the occupied dwelling is not a possession even in the context of the wide interpretation given to same in Convention jurisprudence. He called in aid Kopecky's case in which the ECtHR held that a conditional claim which lapsed as a result of the non fulfilment of a condition cannot amount to a possession in the form of an asset. Insofar as the court contemplated the notion of a legitimate expectation giving rise to a possession, counsel distinguished that case from the present insofar as this tenant did not and could not have based any legitimate expectation on a legal act which had a sound legal basis and which bore on property rights. Counsel further relied upon in McDonnell, Re An Application for Judicial Review (2004) NICA 7 (20 February 2004), to underline the same points.

[39] Alternatively Mr Coll submitted that if the provisions of the house sales scheme do interfere with the applicant's rights under Art 1 Prot 1 the same can be justified as being provided for by law under and as being in the public and/or general interest namely the maintenance of housing stock suitable for and attractive to the elderly for future public use.

Conclusions

[40] I determined that this case must be dealt with on the basis of the leave granted by Deeny J. In so far therefore as Mr Larkin sought to widen this case to embrace a consideration of Article 13 of the 1992 Order, and to seek a declaration that the second-named respondent erred in considering that sale to secure tenants by the first defendant was prohibited save under the housing sales scheme I refused leave for that approach or an amendment to that effect to be made at this late stage. Both the respondents opposed any such amendment. I came to this conclusion for the following reasons:

[41] I recognise that it is not uncommon for arguments to be refined at the actual hearing and for the court to adopt a liberal attitude to developing arguments in the course of the case. Where no injustice arises from allowing the amendment to take place, and where it is not likely to cause prejudice or lengthen the proceedings, then such amendments will often be allowed. It is highly desirable that the courts should determine the real question wherever possible (see R (Middlebrook Mushrooms Limited) v Agricultural Wages Board of England and Wales (2004) EWHC 1447).

[42] However in this case, it was clear to me that the applicant had never sought to purchase the property in question other than under the house sale scheme with all the attendant discounts. The correspondence from the applicant on 23 August 2005 and, significantly, the application made on her behalf by her solicitor on 26 April 2006 to the first named respondent was clearly within the confines of the house sale scheme. Accordingly neither of the respondents had ever considered - or been asked to consider - the situation under Article 13 of the 1992 Order.

[43] Mr Larkin argued that it was quite clear from the submissions of Mr Coll, on behalf of the second-named respondent, that it would not permit any further exercise of the discretion even if an application had been made under Article 13. Mr Coll had argued, counsel submitted, that essentially the discretion would only be exercised under Article 13 nowadays in the event of an application by an unsecured tenant.

[44] I am not satisfied that Mr Coll went that far in the final analysis and I was satisfied that he had not committed the second-named respondent to a refusal to reappraise the situation if an application were to be made pursuant to Article 13 of the 1992 legislation.

[45] I have concluded that it would be contrary to the fundamental principles of fairness if I was to permit the applicant to pursue this ground and to make a declaration as urged on me by Mr Larkin in circumstances where the second-named respondent had not been afforded the opportunity to make a considered response and where no request had ever been made to it

to do so. Fairness requires that the second defendant be afforded a right to be told of the request and an opportunity to give a timely and measured response. One of the principles of natural justice is that a person or body is entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against it. I do not consider that permitting what amounts to a fundamental change in the approach of the applicant at this stage to deal with a request under wholly different legislation from that which had been the subject of the grant of leave and which had never been made by the applicant prior to this hearing would be fair or reasonable in the circumstances.

[46] My conclusion not to permit this issue to be further determined in the absence of such a request by the applicant to the first and second-named respondent, essentially ends the need for any further consideration of that issue. I pause to observe however, that whilst I retain an open mind on any arguments that might arise before a future court hearing in the event of such a request being made, I am currently singularly unconvinced by the argument of Mr Coll that Article 3A effects in any way an implied repeal of Section 13 of the 1992 legislation with reference to secured tenants. Whilst the later legislation and current circumstances of the housing stock might well be factors that could be taken into account in exercising any discretion under Section 13 of the 1992 legislation, I find nothing in Article 3A which expressly or by implication dictates such an exclusionary policy with reference to secured tenants. Had it been intended to repeal Section 13 of the 1992 legislation in relation to secured tenants, it would have been a simple matter for the legislature to have done this expressly and in simple language. In the absence of detailed analysis of this matter, this court would be difficult to convince that a discretion does not remain in the hands of the decision-maker under Article 13 of the 1992 legislation even in respect of secured tenants once the first named respondent had made a reference.

[47] Insofar as the application is confined to Article 3A of the 1983 Order, I am satisfied that this legislation operates as a fixed policy wherein the first-named defendant had no discretion and properly refused the applicant's request in the context of the statutory obligations. I am satisfied that this is a case where, policy having been settled, there is neither scope nor need for the exercise of any residual discretion. In Hepworth's case, Laws J said:

> "As regards the question whether there is an unlawful fetter of discretion, I cannot think that a clear system for incentives within the prison can sensibly be expected to operate if its administrators have to consider whether in any individual case the scheme's established criteria ought to be disapplied, or if this court were to hold that such criteria are legally bad in the first place on the ground that there

> should be room for discretion in individual cases. There is no principle of administrative law which says, in a milieu such as this, that there cannot be black and white rules."

[48] The legislation under discussion is set in the context of housing needs. Mr Rea, the Director of Housing on behalf of the first defendant, has properly adverted to the need to protect this type of accommodation within the housing stock and to ensure its availability for allocation to vulnerable groups. In those circumstances I am satisfied that it is lawful to have a policy without exception. I do not consider that this is a case where it is justifiable to argue that there is an overrigid policy or that the discretion has been unreasonably fettered. This case is wholly distinguishable from the instances set out in Herdman's case where Parliament had intended that a discretion be vested in the decision-maker. On the contrary this case is similar to the example of Watt's case where in the context of house purchase schemes for evacuated dwellings, a scheme had been made for the decision-makers to follow without residual discretion to deviate from it without lawful reason such as conflict with a Convention right.

[49] I consider therefore that the first-named respondent has properly adopted the policy of the second-named respondent namely the house sales scheme of the Department of Social Development. That obligation to adopt and comply arises pursuant to Article 131(4) of the Housing (Northern Ireland) Order 2003. Insofar as the first respondent applied that scheme without exercising any discretion, I consider that to have been lawful. The terms of the legislation did not afford the first named defendant an opportunity to exercise any statutory discretion under Article 3A .

[50] The second-named defendant similarly acted lawfully in refusing to contemplate any flexibility in the application of the scheme and I do not consider that such a policy is overrigid given the need to protect the housing stock. Mr Coll rightly draws attention to the fact that Article 3A(1) places on the second defendant a statutory obligation to devise a house sales scheme for implementation by registered housing associations. There is a need for certainty for those implementing such a scheme and for those tenants making application under it as to the exact circumstances in which publicly funded assets may be disposed of. Such a scheme promotes consistency of approach. That is particularly so where the policy is based on the characteristics of the dwelling itself rather than to the personal characteristics of any particular applicant.

[51] I find no basis for acceding to the second ground set out by the applicant namely that the house sales policy of the first respondent and the house sales scheme of the second respondent are unreasonable and irrational insofar as they prohibit the sale of bungalows with two or fewer bedrooms.

Mr Rea, at paragraphs 8 of his second affidavit, has clearly set out the housing need that requires to be protected (see paragraph 6 of this judgment).

[52] In McDonnell's case the Court of Appeal dealt with a similar policy of the NIHE which concerned a not dissimilar "right to buy" policy under Article 3(1) of the Housing (Northern Ireland) Order 1983. A request to purchase the dwellings concerned was refused by the Northern Ireland Housing Executive under the terms of the scheme. At paragraph 43 Coghlin J, giving the decision of the court, stated:

> "The respondent Housing Executive in conjunction with the Department is the body charged with the primary responsibility for the development and administration of public housing policy in this jurisdiction and, in the course of doing so, the respondent is required to take into account the varying interests of the different categories of those who are dependent upon public housing. The particular element of the 'right to buy' policy to which these appeals relate was the need to preserve an appropriate stock of accommodation for those who were over 60 which the respondent sought to achieve by striking a balance between the exclusion of persons from the policy and the priority which they were afforded at the letting stage. The affidavits and exhibits filed on behalf of the respondent confirm that, since its conception, the respondent has remained sensitive to the potential adverse impact of the policy upon those over 60 and has developed and adapted the policy to respond to a changing situation. After carefully reviewing all the circumstances …. we have reached the conclusion that the respondent has discharged the burden of establishing reasonable, objective and proportionate justification for the policy that it has adopted."

[53] I have reached a similar conclusion in this case. The purpose of restriction on the sale of these dwellings is with the aim of protecting the housing stock in the public sector with particular attention to those houses which are likely to be required for the elderly in the context of an aging population. I therefore do not consider that the house sales scheme is unreasonable or irrational.

[54] For the purposes of the third and final ground, I now set out the provisions of Protocol 1 Article 1 of the Convention:

> "Protection of Property
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
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> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[55] It is the applicant's contention that the provisions of the house sales scheme prohibiting the sale of bungalows with two or fewer bedrooms amounts to unlawful interference with the applicant's rights pursuant to Article 1 Protocol 1. It is argued that she has a right to buy and this constitutes a possession or an asset to which she is entitled. Mr Larkin argued that this right existed at least between May 2004, when the voluntary scheme was suspended, and the introduction of the housing sales scheme in October 2004 when she became ineligible because of the prohibition on bungalows. When the voluntary sales scheme was no longer in force and she was a tenant, there was no presumptive policy at public law excluding a policy of selling a house to her. Consequently he submitted that the retrospective implementation of the policy and the policy itself represented an unlawful interference with her peaceful enjoyment of her possessions and that the prohibition was disproportionate to the legitimate aim being pursued.

[56] Counsel relied on the cases of Kopecky and Djidrovske.

[57] I am satisfied that both the Kopecky case and the Djidrovski case are factually quite different from the present case. There is no basis upon which the applicant could claim that her legitimate expectation was based on a reasonably justified reliance on a legal act or for example as in the Kopecky case that she had incurred financial obligations which were now being retrospectively invalided to her detriment.

[58] This applicant could not in my view lay claim to any asset or possession in the absence of demonstrating compliance with the house sales scheme's criteria. She never had a right to buy. Moreover she never applied even to exercise such purported right until the present scheme was in force. I find a parallel here to the McDonnell case where the court held that a not dissimilar provision could not constitute a breach of Article 1 Protocol 1 and the provision did not apply to the question of the right to buy under the

relevant house sales scheme. At most she had a mere hope which was not based on any legal act or legal provision and she had not fulfilled any of the conditions which required to be fulfilled before the right to buy could arise. In my view therefore the house sale scheme did not retrospectively deprive the applicant of any right to purchase, no such right having existed. The terms of any such purchase were always speculative and subject to both the approval of the first and second named respondents' approval. I accept the argument of Ms Gibson that no representations were ever made by BIH that any such sales would be acceded to nor were any representations made as to the terms of such sales. At no stage did this applicant ever entertain more than a hope of any right to buy.

[59] If I am wrong in my conclusion that there was no breach of Article 1 Protocol 1, I am satisfied that the State's margin of appreciation when dealing with housing policies is a wide one (see Mallacher v Austria (1989) 12 EHRR 391). I consider that the protection of the housing stock particularly for the benefit of elderly people in the context of an aging population and in a market of rising property prices is a lawful and legitimate aim. The steps taken constitute a proportionate response to that aim.

[60] In all the circumstances therefore I have come to the conclusion that this application must be dismissed.

[61] I pause finally to observe that in light of the findings I have made it is unnecessary for me to determine whether any decision made by BIH in relation to the request to purchase outside the statutory sales scheme would be a private law function or a public law function. (See the Aston Cantlow case).