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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY EM AND CM (A MINOR) BY EM, HER MOTHER AND NEXT FRIEND, EM FOR JUDICIAL REVIEW

-v-

THE NORTHERN IRELAND HOUSING EXECUTIVE

MCCLOSKEY J

Introduction

[1] This is a challenge to certain aspects of the Housing Selection Scheme ("the Scheme") made by the respondent, the Northern Ireland Housing Executive ("NIHE") pursuant to Article 22 of the Housing (NI) Order 1981 ("the 1981 Order") and, as required by statute, approved by the Department of Social Development for Northern Ireland ("DSD"). The applicants are daughter and mother respectively. The daughter is now aged 14 years. The third member of the family unit is her younger brother, aged 12. They complain that the terms of the Scheme have deprived them of the allocation of appropriate housing. Their challenge is based squarely on their rights under the private life dimension of Article 8 ECHR, guaranteed by section 6 of the Human Rights Act 1998 ("HRA 1998"). The remedies pursued are declarations that the Scheme is not in conformity with Article 8 ECHR and an order of mandamus requiring NIHE to reconsider it and, further thereto, to make a fresh decision in the applicants' case.

Statutory Framework

[2] By virtue of Articles 3 and 6 of the 1981 Order NIHE is the public authority with responsibility for specified functions in relation to public housing in Northern Ireland. It operates in tandem with DSD and the Northern Ireland Housing Council. The umbrella statutory provision is Article 6, which provides:

> *"(1) The Executive shall –*
>
> *(a) Regularly examine housing conditions and need;*
>
> *(b) Submit to the Department for approval its programme for such years and in such form as the Department may determine for meeting housing needs; …. "*

DSD has the function of approving any housing programme.

[3] The subject matter of Chapter IV of the 1981 Order is "Housing Management". Article 22 makes provision for the last of the specific "general functions" of NIHE prescribed in Part II of the statutory measure. It provides, in material part:

> *"22. – (1) The Executive shall submit to the Department a scheme for the allocation of housing accommodation held by the Executive to prospective tenants or occupiers.*
>
> *(2) The Department may approve a scheme submitted under paragraph (1) with or without modifications.*
>
> *(3) The Executive shall comply with a scheme approved by the Department under paragraph (2) and with the provisions of Article 22A when allocating housing accommodation held by it.*
>
> *(4) The Executive may submit to the Department proposals for amending a scheme approved under paragraph (2) or a scheme amending a scheme and paragraphs (2) and (3) shall have effect in relation to those proposals or a scheme replacing an existing scheme as they have effect in relation to a scheme.*
>
> *…*
>
> *(7) For the purposes of this Article and Article 22A the Executive allocates housing accommodation when it selects a person to be a secure or introductory tenant of housing accommodation held by it.*
>
> *(8) The reference in paragraph (7) to selecting a person to be a secure tenant includes deciding to exercise any power*

to notify an existing tenant or licensee that his tenancy or licence is to be a secure tenancy."

By Article 22A, NIHE is prohibited from allocating housing accommodation to certain types of persons and is given a discretion to treat as ineligible a person whom it considers to have engaged in serious unacceptable behaviour as defined.

[4] In short, NIHE prepares a draft scheme for the allocation of housing accommodation – namely houses, houses in multiple occupation and hostels, as defined by Article 2 – to prospective tenants or occupiers; DSD approves the draft scheme with or without modifications; NIHE must then allocate housing accommodation in accordance with the approved scheme and Article 22A; and an approved scheme is capable of being amended with DSD approval. The applicant's challenge unfolds against the backdrop of this statutory matrix.

Factual Matrix

[5] Those material facts which are uncontentious may be summarised as follows. The family unit is as set out in [1] above. The applicants assert they have been in "housing need" since 2003 and have been placed in accommodation a two bedroom fourth floor flat, as tenants of a housing association, since June 2008. The impetus for accepting the flat in which they have resided ever since then was the serious domestic violence allegedly perpetrated against the mother by her former partner. The mother's quest to secure more suitable accommodation for the family dates from 2009.

[6] In short, the mother's lengthy struggle to secure better accommodation for the family has been defeated by reason of her failure to qualify for sufficient points under the Scheme. Events during this protracted period have included an initial assessment, in 2012, that the mother was not considered "homeless" within the meaning of the Housing (NI) Order 1988 ("the 1988 Order") as it would be reasonable for her and her children to continue to occupy their flat. This was followed by a later assessment, in November 2014, that she was then considered to be homeless, thereby attracting an award of a further 70 points. By February 2016 the mother's points total stood at 106 and 116 in respect of her two preferred areas for living. Since 2008 the mother has received two "preliminary" offers of housing in her areas of choice. She applied for the first unsuccessfully (in 2012), losing out to other qualifying applicants who had greater points totals. She declined to apply for the second (in 2015) on account of asserted fears of her former partner's family. Since 2008 the mother has periodically altered her two preferred areas of accommodation, without success.

[7] The applicants' quest for better accommodation has consistently had three central pillars: harassment from neighbours, damp in the property and the ill health of the daughter in particular and, to a lesser extent, the mother. The applicant

asserts a nexus between the second and third of these factors. The daughter's ill health consists mainly of asthma and chest and upper respiratory tract problems. Anxiety and sleeplessness have developed more recently. All of this is documented extensively in medical records, which I have perused. The mother also complains of an adverse impact on her own mental health.

[8] The factual ingredients of the applicants' case are conveniently summarised in the following extract from an affidavit sworn on their behalf by a development worker:

> "*A particular problem has been the recurrent damp.* [The mother] *lives in an overcrowded and damp fourth floor flat where her two opposite sex children, both in secondary school, are forced to share a small bedroom. Her mental health and her daughter's physical and mental health have deteriorated during her long stay …*
>
> *She has told me of many, many occasions when she has been subjected to threats and anti-social behaviour from her neighbours. She has complained to the statutory authorities in the NIHE, PSNI and Housing Associations numerous times, in writing and in person. She has …. provided a large volume of photographic, medical and other evidence to support her need to be rehoused in a suitable home for a family ….*
>
> *However, her circumstances do not attract the necessary points under the respondent's current scheme to make an offer of suitable housing likely in the near future. That remains the case more than eight years after she moved into temporary accommodation to escape domestic violence.*"

The deponent further refers to his experience of many other families in (per his opinion) less compelling circumstances than those of the applicants securing re-accommodation due to the operation of the Scheme.

[9] At this juncture, the main contentious factual aspects of the applicant's challenge should be noted. First, the mother's claim of adverse impact on her mental health caused by the family's unsatisfactory accommodation is bare, unsubstantiated assertion, unsupported by any medical evidence. Second, there is no expert evidence supporting the assertion of damp. Indeed, the evidence includes two letters from the landlord diagnosing condensation (which is generally caused by inadequate ventilation) rather than damp and asserting the execution of appropriate remedial measures. Significantly, the mother has not engaged with this evidence.

[10] Third, while it is clear that the mother made an allegation of anti-social behaviour against her neighbour, a NIHE tenant, there was a counter allegation by the tenant against the mother and, following mediation, resolution of this inter-neighbour conflict was achieved. While there was a subsequent recurrence of the conflict, it is evident that this abated. In summary, the evidence establishes two time limited episodes, occurring in 2014 and 2016, neither involving threats or violence: there is clear documentary evidence, again uncontested by the mother, that the problem was "dog barking", described in a letter to her from her housing association landlord as a "nuisance". The low level nature of the offending behaviour is reflected in the landlord's award to the applicants of 10 points for "*harassment with no violence*".

[11] As regards the daughter, I have adverted in [7] above to what is documented extensively in the medical records contained in the evidence. There is no doubt that the daughter has, from 2014, suffered from the conditions and symptoms noted (I disregard the cryptic and isolated reference to a cough in May 2012). However, there is no expert medical evidence establishing any link with the family's accommodation.

[12] The evidence, therefore, has clear limitations. It falls to be considered by reference to the applicants' burden of proof and the civil standard: se for example R v IRC, ex parte Rossminster [1980] AC 952 at 1026H, R v SSHD, ex parte Khawaja [1984] AC 74 at 112E and R v Board of Governors of Hull Prison [1979] 1 WLR 1401 at 1410, per Geoffrey Labe LJ. The analysis undertaken above gives rise to the conclusion that during the period under scrutiny viz 2009 to 2017, the flat in which the family have been accommodated has become progressively unsatisfactory on account of certain episodes of anti-social behaviour and over-crowding. The clearest feature of the latter factor is that two young teenage children of different gender have been obliged to share a bedroom which, self-evidently, is progressively problematic as the children grow older. Those aspects of the applicants' case which assert damp, adverse impact on the daughter's health caused by damp and more extensive anti-social behaviour are not made out on the evidence.

The Impugned Scheme

[13] The Scheme comprises a total of 84 "Rules" and four Schedules. Its essence is explained in Rule 2:

> "*This is the Scheme within the meaning of Article 22 of the* [1981 Order]*, which makes provision for determining the order in which prospective tenants of the Housing Executive's dwellings are to be granted tenancies of those dwellings.*"

Thus the Scheme operates on a hierarchical, or sliding scale, basis. While the applicants' challenge is to Rules 23 and 31 – 44 of and Schedule 4 to the Scheme, as pleaded, this was substantially refined. At the hearing, Mr Bassett (of counsel) confined the challenge to Rules 23, 23A, 31, 43 and 44A. It would appear that, logically, the challenge must embrace also the corresponding points provisions in Schedule 4 (*infra*).

[14] The subject matter of Part 3 of the Scheme is "*Ranking of applicants*". This is followed by Rules 15 – 45. Rule 15 states:

> "*The housing selection process will rank applicants on a Waiting List used by all Participating landlords on a pointed basis, in descending order according to housing need. There will be four sections whereby applicants may be awarded points, namely:*
>
> *1. Intimidation.*
>
> *2. Insecurity of tenure.*
>
> *3. Housing conditions.*
>
> *4. Health/social wellbeing assessment.*
>
> *Applicants will be considered under each Section of this Part of the Scheme. Points will be awarded on a cumulative basis unless otherwise stated (see Schedule 4).*"

The more detailed outworkings of each of the four qualifying factors listed in Rule 15 are contained in Sections 1 – 4 of Part 3.

[15] The first qualifying factor namely intimidation, is addressed in Rules 23 and 23A. Intimidation, per Schedule 4, qualifies for 200 points. This is the first aspect of the Scheme which the applicants challenge.

[16] The second focus of the applicants' challenge is certain of the provisions enshrined in Section 3 of the Scheme, "Housing Conditions" and consisting of Rules 25 – 32. The applicants' attack is directed to Rule 31 which, under the rubric of "Lack of Amenities and Disrepair", states *inter alia*:

> "*Lack of amenities/disrepair points will be awarded to an applicant if the applicant's current accommodation does not meet each of the criteria set out in subparagraphs (1) – (8) below.*"

The criteria which are then specified range from serious disrepair to the availability of adequate bathing facilities with a satisfactory supply of hot and cold water. The applicants' attack is focused on the second of these eight criteria, which states:

> "*An applicant shall be awarded points if, in the opinion of the Designated Officer, the applicant's current accommodation is not free from dampness which is prejudicial to the health of the occupants (see Schedule 4).*"

Where this criterion is satisfied 10 points are awarded.

[17] Section 4 of Part 3 of the Scheme concerns the fourth of the four general ranking factors (in Rule 15) namely: "Health/Social wellbeing assessment". Within this general category there are certain subcategories which include "Primary social needs factors". This is addressed in Rule 43:

> "**Primary Social Needs Points**
>
> *Primary social needs points (see Schedule 4) will be awarded in the following circumstances:*
>
> 1. *Where the applicant or a member of the applicant's household is experiencing or has experienced violence or is at risk of violence including physical, sexual, emotional or domestic violence or child abuse.*
>
> 2. *Where the applicant or a member of the applicant's household is experiencing or has experienced harassment, including racial harassment and there is fear of actual violence (but the criteria for the award of Intimidation points (see paragraph 23) are not met).*
>
> 3. *Where the applicant or a member of the applicant's household, is experiencing or has experienced fear of actual violence for another reason and the applicant is afraid to remain in his / her current accommodation.*
>
> 4. *Where the applicant, or a member of the applicant's household, is experiencing or has experienced distress / anxiety caused by recent trauma which has occurred in the applicant's current accommodation.*"

The awardable points under Section 34 range from 10 to 32. These points can be awarded cumulatively. Pausing, the applicants complain that Rule 43(4) is couched in excessively narrow terms.

[18] Finally, the applicants' challenge is directed to Rule 44(2) which, under the rubric of "Other Social Needs Points", provides:

> "*Where the applicant, or a member of the applicant's household, is experiencing or has experienced harassment but there appears to be no fear of actual violence.*"

Where this factor is established it attracts an award of 10 points. The applicants contrast this with the award of 200 points for demonstrated intimidation.

[19] Summarising, the applicants complain, firstly, about the narrow scope of certain of the points qualifying factors and phenomena in the Scheme; secondly, about the quantity of points awardable for intimidation which, they say, is excessive; and, thirdly, about the sufficiency of the points awardable for the factors of dampness prejudicial to the health of the occupants and harassment involving no fear of actual violence. There is no challenge to the Scheme's treatment of over-crowding, (Rules 28 – 30) for which 10 points will be awarded in respect of each bedroom falling short of the specified criteria.

The NIHE Evidence

[20] The first NIHE housing selection scheme was devised in 1974. It has been revised periodically since then. The statutory requirements to obtain DSD approval dates from 1981. The Scheme has operated a points based mechanism since its inception. Furthermore, the impugned Rule 23, which accords top priority to those who have lost their homes as a result of violence or intimidation, has been a constant feature. The homeless who satisfy the relevant statutory criteria are another priority group for housing allocation in Northern Ireland.

[21] A major review of the Scheme was conducted in 1998/99 and entailed a public consultation exercise. This also involved pilot modelling and assessment exercises. One outcome of the review was the maintenance of victims of intimidation as the top priority group. Subsequently the definition of intimidation was revised from time to time and was the subject of further public consultation in 2007.

[22] A fundamental review of the Scheme, involving independent research from two Universities and public consultation, was carried out in 2013/2014. One of the specific issues being examined is the points allocation to victims of intimidation. This review has not yet produced a definitive outcome and further consultation is envisaged.

[23] The NIHE's affidavit evidence emphasises that the threshold for qualifying for 200 points under the rubric of intimidation is "*extremely high*". In 2015/16, 414 applicants were accorded homelessness status on the ground of intimidation. This is

juxtaposed with 11,202 applicants accorded this status for all reasons, the former group representing 4% of the latter.

[24] The affidavit evidence of NIHE, which emanates from Mr McQuillan, an Assistant Director, includes the following material passages:

> "… *The approach of the Housing Executive has consistently been to allocate housing on the basis of the greatest housing need, while at the same time giving absolute priority to situations which most cry out for such treatment. This is not because one case is necessarily stronger than the other in terms of assessment of individual needs, but because of the perceived need of society to stand up for those who have been the victim of hate attacks and consequently for public authorities such as the Housing Executive to take positive measures in support of such victims. This social policy position has to be secured and nurtured in a context of limited resources and housing stock in which it is simply impossible, given the range and variety of deserving cases, to provide top priority to everyone.*"

The deponent continues:

> "*The Scheme is a tool for the assessment and ranking of individual households who apply for social housing in Northern Ireland. The key concept in the Scheme is the award of points on the basis of housing need and ranking of applicants in accordance with the number of points awarded. As a general rule, housing is then offered to the applicant with the highest points.*"

[25] The deponent further explains that while the highest award of points – 200 – is reserved to those who are assessed to be victims of intimidation, the second highest award of points – 70 – is allocated to the *soi-disant* "Full Duty Applicants" ("*FDAs*") namely those who are either homeless or threatened with homelessness. As noted in [6] above, the mother was awarded 70 points on this basis. This forms the bulk of the total of 110 points awarded to her in respect of her area of first choice, the balance comprising 10 points for harassment, 10 for over-crowding, 10 for a child aged under 10 years living above the ground floor of a building, 8 for "time spent in housing need" and 2 for "functionality" ie negotiating external steps.

[26] Mr McQuillan's affidavit continues:

> "*It has not been possible as yet to allocate the applicants a house due to the very high demand for housing in* [their] *areas of choice.*"

Elaborating, he deposes to certain statistics. First, as of 31 December 2016, there were almost 19,000 FDAs on the waiting list in Northern Ireland. This total has been rising progressively and includes many who have spent several years on the list. On the same date there were almost 2,000 FDAs on the waiting list for one of the first applicant's areas of choice, one third of whom had been on the list for four years or more and 76 for the first applicant's other area of choice. The total numbers on the waiting list for these two areas were 3513 and 144 respectively. Mr McQuillan further deposes that if the mother had accepted the offer of a three bedroomed house located in one of the areas concerned, in September 2015, it would have been allocated to her as she possessed the highest number of points of those to whom the offer was made. The mother avers that she declined this offer as the adjoining house was occupied by her former partner's family whom, she asserts, had threatened her previously.

[27] Mr McQuillan's affidavit has the following concluding averment:

> "*The applicant's case has been progressed in accordance with the Scheme. It is regrettable that it has not been possible to find suitable social housing as yet for the applicant. The high level of demand and the limited housing stock mean that in certain areas many cases remain on the waiting list for years.*"

Finally, as his affidavit makes clear, the impugned Scheme "… *represents a single gateway into social housing in Northern Ireland let on a permanent basis by the Housing Executive or registered Housing Associations in Northern Ireland.*"

The Competing Cases In Outline

[28] The applicants' case is founded on the private life dimension of Article (2) ECHR in tandem with the respondent's duty under section 6 HRA 1998 to avoid acting incompatibly with the rights which this Convention provision guarantees to them. The applicants contend that the respondent is, and has been, under a positive duty under Article 8 which it has failed to perform. Duly analysed, the positive duty for which they contend is that of moving them to better quality accommodation in one of the mother's two preferred areas, each of which is in Greater Belfast. They complain that the Scheme does not sufficiently protect their rights to respect for private life. The essence of the argument developed by Mr Bassett (of counsel) was that, on the facts asserted by the applicants, the Scheme interferes with the applicants' right to respect for private life which the respondent has failed to justify on the basis of a legitimate aim proportionately pursued.

[29] Mr Sands, (of counsel) countered with a series of inter-related submissions: the applicant's challenge does not engage Article 8 ECHR; alternatively, the requirements of legitimate aim and proportionality are satisfied; and the leading authorities emphasise the limited scope for judicial intervention in a case of this *genre*. Mr Sands also developed certain submissions relating to the factual framework of the applicants' case: these are reflected in the court's analysis and conclusions in [9] – [11] above.

Discussion

[30] It is well established that where an interference with Article 8 rights is demonstrated, the question is whether the impugned act or omission strikes a fair balance between the public interest and the private right invoked. See, for example, Botta v Italy [1998] EHRR 12 at [31]–[34]. This can, in certain circumstances, subject the State to a duty of positive action. The State's margin of appreciation means that its burden must not be impossible or disproportionate and the operational choices based on priorities and resources must be recognised: Stoicesu v Romania [App 9718/03] at [50]. Underpinning all of this is the familiar "balance" principle namely regard must always be had to the fair balance to be struck between the competing interests of the individual and those of the community as a whole.

[31] All of these themes are expressed in Lopez Ostra v Spain [1995] 20 EHRR 277, which involved a complaint of smell, fumes and noise emanating from a waste treatment plant deleteriously affecting a family's enjoyment of their home at [51]:

> *"Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.*
>
> *Whether the question is analysed in terms of a positive duty on the State – to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 –, as the applicant wishes in her case, or in terms of an "interference by a public authority" to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance."*

[32] The balance principle features prominently in this passage, as it does in many comparable passages in the jurisprudence of the ECtHR. It is associated with several inter-related legal doctrines and concepts: qualified rights; the rights and interests of all members of the community; the choices available to the State; and the latitude, or margin of appreciation, enjoyed by the State in certain well recognised contexts. Taking into account that there is no *inter – partes* dispute that the Scheme pursues the legitimate aim of protecting the rights and freedoms of others. I consider that, broadly, this is the legal prism to be applied to the applicants' challenge.

[33] Mr Bassett placed particular emphasis on the decision in Fadeyeva v Russia [2007] 45 EHRR 10 where, in circumstances comparable to those obtaining in Lopez Ostra but having a demonstrated significantly greater impact on human health, involving respiratory and skin diseases coupled with adult cancer deaths occasioned by the operation of a large steel producing plant, the specific question which arose was whether the State had a positive obligation under Article 8 ECHR to rehouse the applicants. The ECtHR resolved this issue in favour of the applicants. At [69] the court formulated the principle that the adverse effects of environmental pollution must attain a certain minimum level in order to fall within the scope of Article 8 ECHR and whether it does so will depend on all the circumstances, such as the intensity and duration of the nuisance, its physical or mental effects and the general environmental context. At [87] the court noted the protracted period of the environmental pollution and, at [88], it highlighted the "*very strong*" evidence of a resulting adverse impact on the applicant's health. Article 8 was, in consequence, engaged. At [89] the court stated:

> "…. *The court's first task is to assess whether the State could reasonably be expected to act so as to prevent or put an end to the alleged infringement of the applicant's rights.*"

The question to be determined was whether the State had failed in its positive duty to take reasonable and appropriate measures to secure the applicant's rights under Article 8(1).

[34] Having diagnosed a clear interference with the private life right guaranteed by Article 8(1), the court turned to examine justification under Article 8(2) through the lens of the balance principle. The court pronounced itself satisfied that the steel plant, though responsible for the emission of gas fumes, odour and contamination generating extensive health problems and nuisance from its inception, contributed to the economic system of the region in question and, therefore, pursued a legitimate aim under Article 8(2). Thus the final question was proportionality. The court determined this issue in the following terms, at [133] and [134]:

> *" It would be going too far to state that the State or the polluting enterprise were under an obligation to provide the*

applicant with free housing, and, in any event, it is not the court's role to dictate precise measures which should be adopted by the States in order to comply with their positive duties under Art.8 of the Convention. In the present case, however, although the situation around the plant called for a special treatment of those living within the zone, the State did not offer the applicant any effective solution to help her move from the dangerous area. Furthermore, although the polluting enterprise at issue operated in breach of domestic environmental standards, there is no information that the State designed or applied effective measures which would take into account the interests of the local population, affected by the pollution, and which would be capable of reducing the industrial pollution to acceptable levels…

The court concludes that, despite the wide margin of appreciation left to the respondent State, it has failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life. There has accordingly been a violation of Art.8."

[35] This passage is noteworthy for the court's restraint in its approach to the positive duties which Article 8 required of the Russian State in the context under consideration. It confines itself to the suggestion that these duties may have entailed measures such as assisting the applicant to move to a healthier environment or improving the quality of the environment where she resided by reducing the pollution by, for example, observing the relevant standards imposed by domestic law. Strikingly, the court made clear that the State's duties did not embrace the provision of suitable housing to the applicant. Factually, I consider that Fadeyeva is removed from the matrix of these applicants' case by some distance.

[36] The applicants' challenge acknowledges the obstacle posed by a consistent line of ECtHR decisions that Article 8 ECHR does not guarantee any person a right to be provided with a home: see, for example, Chapman v United Kingdom [2001] 33 EHRR 18 at [99]. It is further accepted that Article 8 is not automatically engaged in every case where a quest to acquire accommodation, or better accommodation, arises. There are certain first instance decisions concerning prospective or current tenants in the context of housing selection schemes which have recognised the engagement of Article 8: Re JM [2011] NIQB 105 at [84] – [94]; Re Turley [2013] NIQB 89 at [37] – [40]; R (HA) v Ealing LBC [2015] EWHC 2375 at [29]; R (C) v Islington LBC [2017] EWHC 1288 at [67]; and R (Osman) v LB Harlow [2017] EWHC 274 (Admin) at [42] and [65]. I shall consider these decisions *infra*.

[37] The most recent detailed consideration of this issue is found in R v Ealing LBC [2017] EWCA Civ 1127. This was, primarily, a discrimination challenge based

on the twin pillars of sections 19 and 29 of the Equality Act 2010 and Articles 8 and 14 ECHR. The contention advanced was that the Council's housing allocation policy was both directly and indirectly discriminatory vis-à-vis four discrete groups: women, the elderly, the disabled and non-Council tenants. At first instance the claimants succeeded on every ground. Following HA, the Judge considered that both aspects of the policy under scrutiny, namely its Working Household Priority Scheme ("*WHPS*") and its Model Tenant Priority Scheme ("*MTPS*") fell within the ambit of Article 8. The Court of Appeal, by a majority, disagreed with the first of these conclusions and, unanimously, with the second. The majority view was expressed most clearly by Underhill LJ at [133]:

> "*In my provisional view, therefore, the provision and allocation of social housing is a social welfare benefit of a kind which does not, without more, fall within the ambit of Article 8.*"

This conclusion recognised, by contrast, the distinctive features of the homelessness context.

[38] This reflection highlights one important feature of human rights law dogma. In so-called "ambit" cases viz those in which a challenge based on a substantive Convention right in tandem with Article 14 ECHR is advanced, the question is not whether the substantive right has been infringed. Rather, the issue to be addressed is whether the somewhat elusive and nebulous "ambit" test is satisfied. This is to be contrasted with cases such as the present which have no Article 14 dimension and, therefore, are unconcerned with the "ambit" test.

[39] Doctrinally, the primary question which arises in cases of the present kind is whether the substantive Convention right invoked – in this case Article 8 – applies. This question is not infrequently formulated in the terms of whether the relevant substantial Convention right is "engaged". In my judgement, this terminology has the potential to confuse and distract given its close association with the "ambit" test. The simpler, and cleaner, question of whether the Convention right invoked applies to the factual context under scrutiny may well be preferable generally. The verb 'to apply' and its derivatives have consistently featured in the vocabulary of the ECtHR. The discursive passage in the opinion of Lord Hope in London Borough of Harrow v Qazi [2003] UKHL 43, at [47] is of note in this context. As was emphasised by the Upper Tribunal in Abbassi v Secretary of State for the Home Department [2015] UKUT 463 (IAC) in deciding whether Article 8 ECHR applies to a given situation the first question, one of law, is whether Article 8 is capable of protecting the facet of family or private life concerned.

[40] Ealing was an "ambit" case and, thus, is somewhat removed from the present case. More to the point is the decision of the House of Lords R (Ahmad) v Newham LBC [2009] UKHL 14. This was a challenge to certain aspects of a Council's policy

for determining priorities in allocating their social housing accommodation, devised pursuant to the statutory duty imposed by section .. of the … Act … which required the Council to secure that "*reasonable preference is given to*" certain groups: the homeless, those occupying insanitary or over-crowded accommodation and others. The Council's appeal succeeded primarily on issues of statutory construction. It was also allowed on policy grounds. The leading judgment of the House, that of Lord Neuberger of Abbotsbury, states at [45] and [46]:

> "*A points-based assessment system is one which ranks each applicant by the number of points he is awarded, the points being attributed to various categories of need on the basis of gravity. Once one departs from a points system, it is difficult to conceive of a scheme which is very subtle in terms of assessing relative need as between applicants who establish urgent need, or as between those who establish a real, albeit not urgent, need. Even more significantly, the specific example of the "simple" banding system in para 9.18 seems very close to that adopted by the Scheme. As I see it, the Scheme has a top band within Direct Offers of Additional Preference and Multiple Need (ie urgent need), a second band within CBL of Priority Homeseeker (ie non-urgent need) and a third band within CBL of Homeseeker (ie no particular need). The use of the word "may" in para 9.23 speaks for itself...*
>
> *Fifthly, as a general proposition, it is undesirable for the courts to get involved in questions of how priorities are accorded in housing allocation policies. Of course, there will be cases where the court has a duty to interfere, for instance if a policy does not comply with statutory requirements, or if it is plainly irrational. However, it seems unlikely that the legislature can have intended that judges should embark on the exercise of telling authorities how to decide on priorities as between applicants in need of rehousing, save in relatively rare and extreme circumstances. Housing allocation policy is a difficult exercise which requires not only social and political sensitivity and judgment, but also local expertise and knowledge.*"

[41] Continuing, Lord Neuberger cautioned that the relevant statutory provisions were to be construed in a way which would prevent Judges from becoming involved in -

> *"…. considering details of housing allocation schemes in a way which would be both unrealistic and undesirable. Because of the multifarious factors involved, the large number of applicants and the relatively small number of available properties at any one time, any scheme would be open to attack and it would be a difficult and very time consuming exercise for a Judge to decide whether the scheme before him was acceptable. If it was not, then the consequences would also often be unsatisfactory: either the Judge would be in a state of some uncertainty as to how to reformulate the scheme, or the Judge would have to carry out the even more difficult and time consuming (and indeed inappropriate) exercise of deciding how the scheme should be reformulated to render it acceptable."*

See [48].

The challenged based on statutory construction grounds failed.

[42] The irrationality challenge was equally unsuccessful. Lord Neuberger stated at [55]:

> *"…. Once a housing allocation scheme complies with the requirements of section 167 and any other statutory requirements, the courts should be very slow to interfere on the ground of alleged irrationality."*

Lord Neuberger endorsed fully the words of Baroness Hale of Richmond at [12]:

> *"….. No one suggests that Mr Ahmad has a right to a house. At most, he has a right to have his application for a house properly considered in accordance with a lawful allocation policy.* [The legislation] *gives no one a right to a house. This is not surprising as local housing authorities have no general duty to provide housing accommodation. They have a duty periodically to review housing needs in their area."*

Notably, in this passage the rights of the claimant – and, by logical extension, the corresponding duties owed by the housing authority – were couched in orthodox public law terms. One encounters here a clear echo of the oft cited words of Lord Scarman in Re Findlay [1985] AC 318, at 338E, where he referred to a convicted prisoner's right to have his case –

> *"… examined individually in the light of whatever policy the Secretary of State sees fit to adopt provided always that*

> *the adopted policy is a lawful exercise of the discretion conferred upon him by the statute.*"

Lord Scarman's statement of principle has been applied to a broad range of other cases.

[43] It is necessary to consider certain other aspects of the judgment of Baroness Hale. Having identified certain other statutory powers of the authority, Baroness Hale continues:

> "*But this does not mean that they have to have available any particular quantity of housing accommodation, still less that they must have enough of it to meet the demand, even from people in the 'reasonable preference' groups identified in section 167(2). In some areas there may be an over-supply of Council and social housing. In others there may be a severe under-supply.*"

At [13], Baroness Hale also highlighted the –

> "*…. fundamental difference in public law between a duty to provide benefits or services for a particular individual and a general or target duty which is owed to a whole population.*"

In common with Lord Neuberger, Baroness Hale considered that where there is a legal challenge to a policy of this kind, to be contrasted with its operation in a given case, the two central touchstones engaged are compliance with the relevant statutory requirements and irrationality.

[44] The intrinsically limited scope for a successful irrationality challenge shines brightly in the following passage, at [15]:

> "*The trouble is that any judicial decision, based as it is bound to be on the facts of the particular case, that greater weight should be given to one factor, or to a particular accumulation of factors, means that lesser weight will have to be given to other factors. The court is in no position to re-write the whole policy and to weigh the claims of the multitude who are not before the court against the claims of the few who are. Furthermore, relative needs may change over time, so that if the Council were really to be assessing the relative needs of individual households, it would have to hold regular reviews of every household on the waiting list in order to identify those in greatest need as vacancies arose. No-one is suggesting that this sort of refinement is*

> *required. It would be different, of course, if the most deserving households had a right to be housed, but that is not the law.*"

She continued, at [16]:

> "*But it is not irrational to have a policy which gives priority to some tightly defined groups in really urgent need and ranks the rest of the 'reasonable preference' groups by how long they have been waiting. These definitions are of course open to criticism and no doubt when the Council come to rewrite their policy they will give careful thought to the points which have been made in these proceedings, but it is not for the courts to pick detailed holes in the definitions which the Council could have chosen.*"

Baroness Hale's illustrations of housing priority policies which might be open to challenge on irrationality grounds highlight the elevated threshold which a challenge of this *genre* would have to overcome.

[45] Mr Bassett's well researched argument draws attention to certain first instance post - Ahmad decisions in England and one of the English Court of Appeal, R (Jakimaviciute) v Hammersmith and Fulham LBC [2014] EWCA Civ 1438. The latter decision manifestly does not advance the applicant's case. It is a decision by the Court of Appeal, entirely consistent with Ahmad, that in one respect a Council's housing allocation scheme was unlawful as it was non-compliant with the statutory requirement of securing "*reasonable preference*" to the five specified categories of people.

[46] The other reported decisions are either to like effect or concern individual case decisions involving the operation of a Council's scheme, while another involved a discrimination challenge. The cases are R (Alemi) v Westminster City Council [2015] EWHC 1765 (Admin), R (HA) v Ealing LBC [2015] EWHC 2375 (Admin), R (H) v Ealing LBC [2016] EWHC 841 (Admin), R (Wolffe) v Islington LBC [2016] EWHC 1907 (Admin) and R (YA) v Hammersmith and Fulham LBC [2016] EWHC 1850 (Admin). It is to be recalled that the present challenge is based squarely on Article 8 ECHR, specifically its private life dimension. None of these decisions sounds on this discrete species of challenge.

[47] Finally, in support of his submission that Article 8 ECHR applies to the factual matrix of the applicants' case, Mr Bassett relied on certain first instance Northern Ireland decisions, namely Re JM's Application [2011] NIQB 105 at [84] – [94] especially and Re Turley's Application [2013] NIQB 89. As regards JM, I note the absence of any reference to Article 8 ECHR in the court's formulation of the three fundamental questions to be addressed and determined, in [17]. Furthermore, the

conclusion expressed in [84] does not engage with the full scope of the decision upon which it is purportedly founded viz R (Morris) v Newham LBC [2002] EWHC 1262. On this issue the decision is unreasoned and conclusionary in nature. In addition, it does not specify whether the family life or private life dimension of Article 8 was considered to be applicable. Finally JM, unlike the present case, was concerned with the operation of a housing selection scheme. For this combination of reasons, I consider that it offers no support to the applicant's case. It is, in any event, a first instance decision not binding on this court.

[48] While the applicants also rely on Turley at [37] – [40], I discern nothing in these passages laying a clear and coherent foundation for their Article 8 private life challenge. As [28] – [36] and [41] – [48] of the judgment of Horner J make clear, this was primarily a case concerned with the application and operation of the scheme in question. While Horner J stated at [41] that there had been an infringement of Article 8 because the housing association concerned failed to properly apply the NIHE Scheme and, in doing so, operated a policy for the allocation of two bedroomed units which was not fair or equitable, two observations are apposite. First, there was no considered examination of the question of whether Article 8 ECHR, in either of its dimensions, applied and no conclusion on this issue. Second, the terms in which the learned judge expressed himself are significant:

> "*As such there was an infringement of Article 8 but I do not consider that it adds anything to the common law rights of the applicant.*"

The common law rights engaged related to the unlawful fetter of the housing association's discretion and the substantive legitimate expectation of the applicant.

Conclusions

[49] My conclusions on the law are based on the factual matrix outlined in [11] above. As I shall make clear, these conclusions would be unaffected by the adoption of a view of the evidence most favourable to the applicants.

[50] Article 8 ECHR proportionality cases are frequently concerned with issues related to the allocation of limited public resources. In passing, the recently promulgated decision of the Court of Appeal in Department of Justice v Bell (unreported, 07/11/17) is to be acknowledged in this context. While this issue is an undeniably important aspect of the matrix of the present challenge, it is not to the forefront, as the submissions of counsel confirmed. I consider that lying at the heart of the applicants' challenge is the question of how the public authority concerned, NIHE, has chosen to identify a priority ranking order for the allocation of a limited stock of public housing in a context shaped by limited financial resources. This is the territory to which the key considerations of margin of appreciation (or discretionary area of judgment) and restrained judicial function belong. In short, NIHE, with the

necessary statutory approval of DSD, has determined that those eligible housing applicants to whom certain factors or phenomena apply have a more compelling need for the allocation of public housing than others. The priorities thus assessed are reflected in the Scheme under challenge.

[51] Next, it is appropriate to observe that the applicants do not challenge the operation of the impugned Scheme. Rather, they mount a direct challenge to certain aspects of the Scheme itself. Thus there is no challenge to the several assessments of NIHE that the mother qualifies for the allocation of specified points under certain rubrics – which, in passing, appear unimpeachable in any event. Furthermore, I consider that in its periodic allocation of specified points to the applicants, NIHE was not exercising any discretion. The correct analysis, rather, is that it was discharging its statutory duty, imposed by Article 22(3) of the 1981 Order, to give effect to the Scheme. There is no suggestion in the applicant's' challenge that this duty involves any incompatibility with Article 8 ECHR.

[52] The applicants' case acknowledges that the family life dimension of Article 8 ECHR does not apply to their situation and circumstances. On the current state of the law, this concession is unavoidable. Indeed the present case is a paradigm illustration of why this is so. The family life of the three persons concerned has at all times continued, unabated and unobstructed. There is no semblance of any lack of respect by NIHE to their enjoyment of family life. The applicant's case is confined to the private life limb of Article 8.

[53] If the private life dimension of Article 8 ECHR has no application to the matrix of the applicant's challenge (or, in the formulation which I do not favour, is not "engaged"), their case fails at first base. Without any disrespect to the arguments formulated by the parties' respective counsel, I consider that this issue will require substantially more detailed examination in a suitable future case. While recognising the somewhat elusive and amorphous nature of the concept of private life, I have profound reservations as to whether it embraces a situation such as that of the applicants. However, in the present case I shall assume, without deciding, that this essential first stepping stone in the applicants' challenge is established. I shall also assume, contrary to [11] above, that all of the essential ingredients of the applicants' case are established.

[54] Based on the assumption that the private life dimension of Article 8 ECHR applies to the applicants' situation and circumstances, logically the next question is whether an interference with their right to respect for private life is demonstrated. I have equally profound reservations about this. It is extremely difficult to see how the non-fulfilment of the applicants' understandable wish for better quality publicly financed housing accommodation interferes with the right to respect for private life enjoyed by them, individually or collectively. As Lord Hope stressed in Qazi *(supra)* at [50], Article 8, at heart, protects arbitrary interference by the State with the two rights protected. However, once again, I shall assume this in their favour.

[55] Developing the two assumptions in [52] and [53] above, the next question in the Article 8 analysis is whether the Scheme impugned by the applicants has a legitimate aim within the compass of Article 8(2). As the evidence noted in [23] above establishes, the overarching aim of the Scheme is the allocation of limited public housing based on assessed need. I am satisfied that this is embraced by the broad phraseology of "*the protection of the rights and freedoms of others*". The contrary was not argued. While it could also be linked to the economic well-being of the country, this is another day's work for a future court.

[56] Stripping away the layers, the core of the applicants' case is that NIHE (and, I add, by logical extension DSD) has been too generous in its allocation of points to those housing applicants who are assessed to be victims of intimidation, has been excessively miserly in its points allocation to those who complain of harassment and damp living conditions and has chosen to define these phenomena in unjustifiably narrow terms.

[57] Exposed in this way, I consider that the applicants' challenge cannot withstand the application of the governing principles emerging from the jurisprudence rehearsed above. I acknowledge unreservedly the judicial role in a challenge of this species. I am quite prepared to accept that Ahmad, while purporting to confine the grounds of challenge in this kind of case to compliance with statutory requirements and irrationality, does not necessarily exclude other grounds of challenge. A challenge based on Article 8 ECHR is a paradigm example. Ahmad was not concerned with a challenge of this *genre*. Nor does its *ratio decidendi* exclude – again for example – decisions adopting housing allocation schemes or applying such schemes based on other public law misdemeanours such as improper motive, bias or bad faith. While it seems to me highly unlikely that a judicial review challenge based on any of these grounds is not available, this question does not fall to be decided in the present case. The proposition that much of the reasoning in Ahmad is readily exportable to the Article 8(2) ECHR framework seems to me unassailable.

[58] Giving effect to the principles formulated above, I consider that a reasonable margin of appreciation is to be accorded to the public authority concerned in the formulation of a housing selection scheme of the kind under challenge in these proceedings. The applicants' challenge is focused on those aspects of the impugned Scheme highlighted above. Disproportionality is the legal touchstone to be applied. This is to be evaluated by reference to the doctrinal framework constituted by the balance principle and its outworkings. A profound distinction is to be made between the role of the court and the choices made by two public authorities endowed with the presumptive experience, insight and expertise concerned. Both factually and juridically, and taking the applicants' case at its absolute zenith, all of the indicators point towards a reasonably wide margin of appreciation out of NIHE (and DSD) and a correspondingly limited judicial function.

[59] Thus this challenge will be determined (a) assuming the facts in their most favourable light for the applicants, (b) assuming that, as a matter of law, the private life dimension of Article 8(1) ECHR applies, (c) assuming further that the most favourable view of the facts establishes an interference and (d) acknowledging that the allocation of public housing to those assessed as being in greatest need is a legitimate aim under Article 8(2). Doctrinally, the critical question therefore becomes: is the Scheme a proportionate means of achieving the legitimate aim in play?

[60] As the resume of the decided cases in [29]–[45] makes clear, the jurisprudential tide is empathically against the applicants' case. I consider that where the State devises a system of priorities for the allocation of publicly financed housing to qualifying applicants, it enjoys a margin of appreciation belonging to the outer limits of what may properly be reviewed by the court in a challenge based on Article 8 ECHR. I do not rule out the theoretical possibility of a court intervening in a challenge of the present *genre*. But it is not easy to conceive of the circumstances in which this would be appropriate to the judicial role. One such case might be that of demonstrated bad faith infecting a discrete provision of the Scheme. Another might be a demonstrated breach of the equality duty imposed by the Northern Ireland Act 1998. Beyond these whimsical illustrations I decline to venture. The juridical reality is that Article 8 ECHR (assuming that it applies) provides a highly unpromising legal basis for a successful challenge of the present species.

[61] It seems to me that the applicants cannot shrink from the contention that their challenge to isolated aspects of the impugned Scheme obliges the court to review the measure as a whole and in substance to at least begin the re-writing exercise. If the court were minded to grant any of the forms of relief sought, they could not conceivably be in the vague terms of the pleading formulated by the applicants. Remedies couched in such terms would, in contemporary public law, be vacuous. They would lack the precision and particularity necessary to give effect to the well-established principle that public law remedies should normally be practical and effective in all contexts other than that in which a pure declaratory order is sought.

[62] This court is enjoined by the decision of the Supreme Court in Ahmad to adopt a position of reluctance and restraint in a case where a single member of a very large cohort mounts an isolated legal challenge of the present kind. Baroness Hale highlighted the claim of the individual litigant versus the claims of "*the multitude who are not before the court*" and the impropriety of the court "*picking detailed holes*" in the minutiae of a social housing accommodation scheme such as that under challenge in the present case. These observations are in my view readily applicable to the Article 8 ECHR framework and the governing principles identified in this judgment. While the undesirability of judicial intervention in a challenge of the present species could be reinforced by reference to still further authority, I gladly leave that task to the academic commentators whose writings have contributed so

much to one's understanding of Article 8 ECHR. The judgment of every court must be nothing if not pragmatic and no more elaborate or analytical consideration of the jurisprudential landscape is in my estimation required in deciding the present case.

[63] Finally I add one further assumption. I have assumed, without deciding, that the self-evidently elevated threshold of "manifestly without reasonable foundation" adopted by the ECtHR in Bah [2012] 54 EHRR 773 does not apply to the applicants' challenge. The interesting question of whether this threshold is confined to Article 14 ECHR cases will fall to be decided in a suitable future case. I have decided the applicants' case on the basis of less demanding threshold principles.

[64] The questions of whether NIHE, rather than DSD, is the appropriate respondent or whether both should be respondents in a challenge of this kind was not ventilated. I consider this to be a live issue for determination in some appropriate future case.

Order

[65] The application for judicial review is dismissed. The respondent is entitled to recover its costs from the applicant, to be taxed in default of agreement. The costs of the applicant, as an assisted person, will be assessed accordingly.