

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

**IN THE MATTER OF AN APPLICATION BY SHAY DONNELLY FOR  
JUDICIAL REVIEW**

**Before: Carswell LCJ, McCollum LJ and Campbell LJ**

**CARSWELL LCJ**

[1] This is an appeal from a decision of Weatherup J given on 29 January 2003, whereby he refused the application brought by the appellant for judicial review of a decision of the respondent, the Northern Ireland Housing Executive (the Executive), not to commence proceedings for possession against the tenant of one of its houses whose family had persistently harassed the appellant and his family.

[2] The appellant is and has been since about 1985 the tenant of one of the Executive's houses at 8 Edenmore Park, Limavady, Co Londonderry. The occupants of 4 Edenmore Park are a family named Gamble, Mrs Gamble being the tenant of the house. The appellant claims that Mr Gamble and members of his family have persecuted and intimidated him and his family on countless occasions since they moved into their house in or about 1990. In his grounding affidavit sworn on 19 March 2002, the contents of which have not been disputed or controverted by the Executive, the appellant sets out that there have been over 100 incidents involving the Gambles and his family and that the police had been informed on almost 64 occasions. There have been seven successful prosecutions against members of the Gamble family for offences committed against members of the Donnelly family and, according to the affidavit, three further charges had been laid but the appellant did not know the result. At least 16 separate incidents had been reported to the Executive, together with numerous complaints, but no steps were taken by the Executive to evict the Gambles. It was alleged in the course of argument that threats to kill the Donnellys had been made, but this was not confirmed by placing evidence to that effect before the court. Counsel stated that the appellant and his family have obtained an injunction under the Protection

from Harassment (Northern Ireland) Order 1997, but we did not have details of its terms. We were also furnished with a certificate of conviction which showed that Mr Gamble was on 11 April 2003 sent to prison for three years in respect of unrelated offences, which conviction, we were informed, is subject to appeal.

[3] Under Article 29 of the Housing (Northern Ireland) Order 1983 an order for possession of a house let under a secure tenancy may only be made by the court if one or more of the grounds set out in Schedule to the Order is satisfied and if the court considers it reasonable to do so. Ground 2 specified in Schedule 3, upon which the appellant relies, is:

“The tenant or any person residing in the dwelling house has been guilty of conduct which is a nuisance or annoyance to neighbours ...”

It was not disputed on behalf of the Executive that this condition had been satisfied in the present case.

[4] By letter dated 9 July 2001 the Housing Rights Service took the matter up with the Executive on the appellant’s behalf, complaining of the Executive’s failure to take any action against the Gambles and drawing to its attention the provisions of Articles 3, 6 and 8 of the European Convention on Human Rights and Article 1 of the First Protocol thereto. In its reply of 24 July 2001 the Executive promised a prompt review of the matter, but in its reply eventually sent on 31 October 2001 it simply stated its conclusion:

“In the light of all appropriate considerations, the Executive has decided that, in all the circumstances, it would not be appropriate to commence proceedings against Mrs Gamble.”

[5] By letter dated 26 November 2001 the Housing Rights Service requested the Executive’s reasons in full, which prompted a reply dated 20 December 2001, which we quote in full:

“I refer to your letter of 26<sup>th</sup> November 2001, addressed to Paul Buggy, our Head of Legal Services, and to your subsequent telephone call with Mr Buggy.

As you will be aware, in deciding whether to commence proceedings for possession against any particular tenant, the Executive must not only be satisfied that there are reasonable prospects for success in any such proceedings; the Executive

must also be satisfied that it is appropriate, in all the circumstances, to seek an Order for Possession.

In this case, in considering the question of appropriateness, the Executive had regard to the following:

- Mr and Mrs Donnelly's views in this connection.
- The disadvantages to the Donnelly family if the Executive decided not to commence proceedings.
- The potential for mitigating any disadvantages to the Donnelly family arising from any omission to take proceedings.
- Tenant safety issues, including issues relating to the personal safety of the Donnelly family in the event of proceedings being taken, and in the event of proceedings not being taken.
- Issues relating to the personal safety of Executive Officers.

As you know, the Executive gave very careful and detailed consideration to this matter. Ultimately, and with considerable regret, the Executive has decided that, having regard to all the circumstances of this case, it is not appropriate to commence proceedings. The Executive's decision is mainly based upon the following considerations. In this case, it has been clear from the outset that there was an issue as to whether there would be a serious risk to the safety of Executive Officers if these proceedings were to be commenced. The Executive carried out a careful assessment of that risk, based on all the information available to it. That information came from both internal and external sources. You will appreciate that, having regard to the confidential nature of that information, the Executive is unwilling to provide details in respect of it. In the light of that information, the Executive was not satisfied that, in this case, proceedings could be taken without serious risk to the personal safety of Housing Executive Officers.

As you will be aware, Paul Buggy, in his 31<sup>st</sup> October letter to Mr and Mrs Donnelly, pointed out the following:

‘The Executive is aware of the fact that you will be disappointed by this outcome. The Executive is keen to arrange a meeting with you, in order to consider what Housing Executive assistance might be appropriate and proportionate in these circumstances.’

I would be grateful if Mr and Mrs Donnelly can contact Mr Frank Mulhern, Principal Officer in our Community Safety Team, with a view to arranging such a meeting. The ‘assistance’ which we have in mind would be directed at the potential for mitigating any disadvantages to the Donnelly family which are the result of the Executive’s decision in this matter.”

[6] The present proceedings were commenced by lodging an Order 53 statement on 19 March 2002, setting out a multiplicity of grounds, not all of which were in issue in the appeal as argued before us. The major contentions were that the risk to the safety of the staff was an irrelevant consideration, together with arguments based on Articles 2, 3, 6 and 8 of the Convention and Article 1 of the First Protocol. The judge gave a written judgment on 29 January 2003, in which he came to the following conclusions:

- (a) The risk to the personal safety of the Executive’s staff was not an irrelevant consideration.
- (b) There was not a breach of Article 8, as the Executive had achieved a fair balance between the appellant’s rights and the public interest in an effective public housing system.
- (c) For the same reason there was not a breach of Article 1 of the First Protocol.
- (d) Articles 2, 3 and 6 of the Convention were not engaged.
- (e) The appellant did not have a legitimate expectation that the Executive would commence proceedings to recover possession of the house occupied by the Gambles.

(f) The Executive's decision was not *Wednesbury* unreasonable.

On appeal counsel for the appellant presented arguments based on all of the above grounds except that of legitimate expectation, and added a contention based on Article 14 of the Convention.

[7] We propose first to consider Article 8 of the Convention, because it seems to us that it is at the heart of the case and received detailed consideration in the judge's judgment. Article 8 provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[8] The learned judge correctly analysed the issue in paragraphs 16 and 17 of his judgment:

"[16] Article 8 obligations are primarily negative but may also involve positive obligations requiring a public authority to take action if it is to comply with Article 8. The positive requirements of Article 8 were described in Botta v Italy [1998] 26 EHRR 241 at para 33 as follows:-

`In the instant case the applicant complained in substance, not of action but of a lack of action by the State. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference; in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family

life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. However, the concept of respect is not precisely defined. In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interest of the individual, while the State has, in any event, a margin of appreciation.'

[17] In the present case the negative obligations arising under Article 8 do not apply as there has been no public authority interference with the applicant's right to respect for privacy and family life and home. The offending conduct is that of private individuals. However the circumstances may give rise to a positive obligation to take action on the part of the public authority if there is to be effective respect for the applicant's private and family life and home. This involves consideration of the fair balance between the private interest of the applicant and the public interest in an effective housing management system."

He expressed his conclusions on this issue in paragraphs 22 to 24:

"[22] In the circumstances of Northern Ireland with its sectarian and paramilitary influences and local territorial clashes particular problems arise in the area of housing allocation. In the present case NIHE consulted with the police, who would be an appropriate authority to determine the nature and extent of a perceived risk to NIHE staff and to advise NIHE accordingly. NIHE is the relevant public authority long standing expertise in the management of public housing. A wide discretionary area of judgment ought to be accorded to the decision-making authority in making a decision of this nature.

[23] There has not been disclosure of the information on which the risk assessment was carried out because NIHE contends that such disclosure would also create a risk to the personal safety of others. The applicant contends that there has not been sufficient transparency in the decision making process. The rights of others affected by disclosure have to be balanced against the desirability of appropriate disclosure of information and as the applicant accepts that there are good grounds for recognising a threat to the personal safety of NIHE staff it is not considered to be necessary that further details should be revealed of the information on which the risk assessment was carried out.

[24] Having consulted with the police and assessed the risk to NIHE staff and having balanced the other considerations set out in the letter of 20 December 2001 and having consulted with the applicant, I am satisfied that NIHE has achieved a fair balance in the circumstances, regrettable though the outcome may be. NIHE proposed that if the applicant would agree to move to other accommodation NIHE would facilitate such a move by giving priority and financial support. The applicant contends that such a solution penalises the victim and rewards the intimidator. However, such an alternative arises once it has been decided that an order for possession should not be sought for the reason given, and NIHE have then sought to facilitate that option if it was what the applicant wished to do. Accordingly the proposal was a consequence of the decision not to seek possession. In a wider setting there are alternative restraints on future harassment that may arise through the police and the courts. There is the prospect of further criminal proceedings arising out of the events in September 2002. In addition the applicant has now secured an injunction against further harassment and that may lead to action for breach of injunction should further harassment occur.”

[9] The European Court of Human Rights has had occasion in several cases to apply the test of a fair balance of interests. The judge referred to and

quoted from *Botta v Italy* (1998) 26 EHRR 241, and we have set out an extract from the judgment in that case. In *Lopez Ostra v Spain* (1994) 20 EHRR 277 the applicant complained that a waste treatment plant, which had been built close to her home, began to operate without a licence and to emit fumes and smells which caused health problems for local residents. The Court stated in paragraph 51 of its judgment:

“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.”

A similar approach may be found in *Guerra v Italy* (1998) 26 EHRR 357 and in *Hatton v United Kingdom* (2002) 34 EHRR 1, in which the applicant complained that he had been affected by noise from night flights at Heathrow. The Court followed the principles set out in *Lopez Ostra v Spain*, and said:

“ ... States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regard human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project.”

The decision of the Chamber of the Court which heard the application was that the Government had not taken sufficient steps to protect the applicant and had failed to strike a fair balance between the economic well-being of the State and the applicant’s effective right to enjoyment of respect for private and family life and home. That decision was subsequently reversed by the Grand Chamber in a judgment given on 8 July 2003, but we do not



understand the validity of the principles expressed by the Chamber to have been affected by the Grand Chamber's decision.

[10] In the present case the failure of the Executive to exercise its power to seek possession of the Gambles' house has undoubtedly given rise to a substantial detriment to the enjoyment of their private and family life on the part of the appellant and the members of his family. The issue is whether, as the judge held, that failure is to be regarded as necessary under the terms of Article 8(2) or, putting it the other way, the Executive failed to take reasonable and appropriate measures to secure the appellant's rights under Article 8(1).

[11] The Executive stated in its letter of 31 October 2001 that it had consulted with the police, but has not informed the court what advice was given, what police protection would be available if proceedings were taken to obtain possession of the Gambles' house and how effective it would be. Nor has it spelled out the extent of risk which that might involve to its officers. While we can appreciate the desire of the Executive not to reveal details of confidential matters, the course which it has taken has left the appellant and the court altogether bereft of serviceable information from which the validity of the Executive's concerns might be judged. What the Executive has done is to offer the appellant and his family the opportunity to move away from the district, which the appellant understandably regards as an abdication of its responsibility and a retreat in the face of intimidation. In the state of the evidence put before the court we are unable to hold that the Executive has discharged its duty to take reasonable and appropriate measures to secure the appellant's rights. We accordingly hold that there has been a breach of Article 8 of the Convention.

[12] This conclusion makes it unnecessary for us to give an opinion on issues dealt with in the judge's decision apart from that set out in head (b) above. In case it should be material in the future, however, we would express our view in very brief compass on some of those issues.

[13] We agree with the judge that the safety of the Executive's staff was a material and relevant consideration to be taken into account. We also agree with him that there was no material from which a legitimate expectation could arise. For the reasons which he gave in his judgment, we agree that Articles 2, 3 and 6 of the Convention were not engaged. We were not persuaded that there was a breach of Article 14. We do not consider that there was a fair balance of interests under Article 1 of the First Protocol, and we consider that there was a breach of this provision. We do not find it necessary to determine whether the Executive's decision was unreasonable in the *Wednesbury* sense and do not propose to make a finding on this issue.

[14] The appellant is entitled to relief, but we consider that the most appropriate remedy against the Executive as a public authority is a

declaration. We therefore shall allow the appeal and declare that in failing and refusing to commence proceedings for possession of the house occupied by the Gamble family the Executive was in breach of Article 8 of the Convention and Article 1 of the First Protocol. The Executive should accordingly reconsider the matter and reach a decision in accordance with the principles set out in those provisions, the European case-law and the opinions expressed in this judgment.