

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **22/04/2005**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**IN THE MATTER OF AN APPLICATION BY CAROLINE WATT FOR
JUDICIAL REVIEW**

MORGAN J

[1] The applicant is the owner and former occupier of a dwelling house situated in a housing estate in Armagh. She is a Protestant and her partner is a Roman Catholic. Shortly after midnight on 17 June 2003 her car was maliciously set on fire outside her house. The housing estate is one which is recognised as being predominately loyalist. The applicant considered that the attack was sectarian and that those involved were members of or affiliated to a loyalist paramilitary organisation. On the same day she left her home with her partner and two young children and has not resided on the property since that date because of her fear of further sectarian attack.

[2] Police were called to the scene of the incident. They assisted the applicant to gather her belongings and move from the area. It is common case that the applicant asserted at the scene her belief that the attack was sectarian. The applicant asserts that police at the scene advised the applicant not to go back to her home. The police officer dealing with the incident has made an affidavit in which he denies that any such advice was given. He states that police gave assistance to the applicant to move her belongings as it was clear that she wished to move immediately. No application was made to cross examine the police officer and I proceed on the basis that the evidence does not establish that the applicant was advised at the scene that she should not go back to her home.

[3] On 22 July 2003 the applicant applied to the Northern Ireland Housing Executive (NIHE) to require them to purchase her dwelling house under the Scheme for the Purchase of Evacuated Dwellings (SPED). Under that scheme it is a condition of eligibility for purchase that a certificate signed by the Chief Constable or authorised signatory must be submitted to NIHE stating clearly that it is unsafe for the applicant or a member of her household residing with her to continue to live in the house because that person has been directly or

specifically threatened or intimidated and as a result is at serious risk of serious injury or death.

[4] Within the PSNI it is the Senior Director of Human Resources who has been given responsibility for the determination as to whether to issue the relevant certificate. The position was held at the time by Joseph Stewart. On 10 September 2003 he decided to refuse to issue a certificate. In doing so he relied upon a report from Constable Ferguson, the investigating officer, which established the arson attack, a report from Special Branch indicating that there was no intelligence to link the attack to any paramilitary group and a recommendation for refusal by Chief Inspector MacLean. In his recommendation Chief Inspector MacLean pointed out that there had been evidence of some Roman Catholics being targeted by loyalists in this estate but there was no corroborative evidence in this case and no previous incidents concerning the applicant. On 19 September 2003 the NIHE wrote to her to advise her that the Chief Constable had refused to issue the relevant certificate and accordingly her application could not be accepted under SPED.

[5] Shortly after receipt of this determination the applicant contacted CID in Armagh. She spoke to Detective Constable Gowing. She says that he advised her that it would not be safe for her to return to her house. She then instructed her solicitors to write to the NIHE on 1 October 2003 seeking a review of their decision in the light of this information. The following day NIHE asked PSNI to re-investigate the matter.

[6] Chief Inspector MacLean prepared a report dated 18 November 2003 to which he attached the report of the investigating officer, Constable Ferguson, setting out the background to the incident, the fears of the applicant, the detail of an incident of harassment which occurred before the applicant met her partner, the report of an eye witness who saw two people leaving the scene and recording the occurrence of sectarian incidents on the estate primarily involving another family. The report also stated that Detective Constable Gowing had not advised the applicant that it would not be safe for her to return to the property and he has subsequently confirmed that on affidavit. A further report from local police dated 24 November 2003 stated that special branch were not in possession of any current intelligence to indicate the existence of a specific threat against the applicant and confirmed that there had been no further incidents in relation to the property or the applicant.

[7] On the basis of these materials Mr Stewart concluded that the attack on the applicant's vehicle did not arise because she or a member of her household had been specifically or directly threatened or intimidated or that the applicant or her family were at risk of serious injury or death as a result of such threat or intimidation. On 3 December 2003 he wrote to NIHE refusing

the application for a certificate under the scheme. On 9 December 2003 NIHE wrote to the applicant refusing her application under the scheme.

[8] On the same date the applicant's solicitors wrote to D/C Gowing to enlist his support. He then prepared a report dated 12 December 2003 in which he recorded the incident of 17 June 2003, a further incident at the end of November 2003 when a window was broken by a ball bearing type projectile and a further incident on 8 December 2003 when the rear kitchen window was broken. He noted that three other persons had been intimidated out of the area in recent times. It was apparent to him that the applicant's home had been targeted because of her relationship with a Roman Catholic and he felt that it would be unsafe for her to return to the property.

[9] On 2 February 2004 the applicant sought judicial review of the decisions made by PSNI and NIHE in December 2003 in respect of her application. Leave was granted on 18 February 2004. In a replying affidavit sworn on 19 March 2004 D/C Gowing exhibited his report of 12 December 2003. In light of that report the applicant made a further application under SPED on 5 April 2004.

[10] That application was considered by Mr Stewart in May 2004. Notwithstanding D/C Gowing's report he remained of the view that the attack on the car did not indicate a specific or direct threat or intimidation. The two subsequent attacks on the vacant property were comparatively minor incidents. There was no graffiti to suggest sectarian involvement and no intelligence to suggest paramilitary involvement. The Area Commander who was full aware of the eligibility conditions concluded that there was no tangible evidence or intelligence that she was being targeted for sectarian reasons. Finally Mr Stewart noted that there had been no further attacks on the property after December 2003. He concluded that there was no evidence of a specific threat or act of intimidation against the applicant or that the applicant or any member of her household was at risk of serious injury or death because of such threat or intimidation. On 7 June 2004 he wrote to NIHE refusing the application for a certificate and on 9 June 2004 NIHE refused the application. The applicant thereafter amended the judicial review application with the leave of the court to include the decisions communicated in June 2004 and to include a further claim in respect of the approval of the SPED scheme by the relevant government department.

The Statutory Scheme

[11] The statutory basis for the operation of SPED by the NIHE is found in Article 29 of the Housing (Northern Ireland) Order 1988 which provides:

“Scheme for purchase of evacuated dwellings

29. –

(1) The Executive shall submit to the Department a scheme making provision for the Executive to acquire by agreement houses owned by persons who, in consequence of acts of violence, threats to commit such acts or other intimidation, are unable or unwilling to occupy those houses.

(2) A scheme submitted under paragraph (1) may include provision as to –

(a) the circumstances in which the Executive may acquire a house under the scheme;

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

(c) the fittings which the Executive may purchase when acquiring a house under the scheme;

(d) the disposal of such houses; and

(e) such other matters as the Executive considers appropriate.”

NIHE duly submitted a scheme which was approved by the Department in accordance with Article 29(6) of the 1988 Order on 11 May 1989 and subsequently amended with Departmental approval on 10 January 1977. The amended scheme sets out the eligibility conditions in paragraph 2.1 as follows:

“2.1 All of the following conditions must be satisfied before an application will qualify for acceptance within SPED.

(i) The house must be owner-occupied and must be the applicant’s only or principal home.

(ii) A certificate signed by the RUC Chief Constable, or authorised signatory, must be submitted to the Executive, stating clearly that it is unsafe for the applicant or a member of

his/her household residing with him/her to continue to live in the house, because that person has been directly or specifically threatened or intimidated and as a result is at risk of serious injury or death.

- (iii) The applicant must qualify for A1 (Emergency) status under the Executive's Housing Selection Scheme."

The Issues

[12] The applicant's first contention is that Article 29 of the 1988 Order imposes a statutory duty on NIHE to acquire the houses of those who are unable or unwilling to occupy their homes because of threats, violence or intimidation. I cannot accept that proposition as correct. As submitted by Mr Hanna QC for NIHE and the Department Article 29(1) certainly imposes a duty upon NIHE to submit a scheme which must accord with the statutory purpose in the sense of addressing the problem facing those who because of violence are unwilling to continue living in their homes. Article 29(2)(a) establishes, however, that it is for the scheme to define the circumstances in which NIHE may acquire a house.

[13] Next it is contended that the scheme places an illegitimate fetter on the discretion which the applicant contends NIHE has as a result of Article 29. In particular it is argued that NIHE has devolved its discretion to the Chief Constable by virtue of the requirement for a certificate under paragraph 2.1(ii) of the scheme. Once, however, one accepts that it is for the scheme to set out the circumstances in which the obligation to purchase arises the question is whether the terms of the scheme fall within the object and purpose of the Order. In his oral submissions Mr McGleenan BL refined his written submissions to contend that the scheme as drafted was ultra vires the 1988 Order because the scheme gave the Chief Constable the critical power of certification.

[14] The requirement for certification in paragraph 2.1(ii) is designed to establish firm criteria for the engagement of the obligation involving the public agency which is likely to be best placed to make judgments on the risk of violence, threats or intimidation. Article 29 does not impose any free standing obligation on NIHE to make these determinations and in my view the scheme clearly falls within the object and purpose of the relevant Article.

[15] The applicant submits that the scheme creates an unacceptably high hurdle for her to cross. Relying on *Re Hugh Herdman's Application* [2003] NIQB 46 she further contends that the Chief Constable applied the criteria too rigorously and without consideration of her exceptional circumstances. In my view there is a critical difference between this case and Herdman's case. That

application concerned the application of a policy which 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. In this case the scheme is made pursuant to the 1988 Order and is a form of subordinate legislation (see Halsbury's Laws of England Volume 44(1) at paragraphs 1499 and 1500). Once the scheme is made it is for the decision makers to follow it. There is no residual discretion to deviate from it without lawful reason such as conflict with a convention right.

[16] In the course of oral argument Mr McGleenan BL submitted that the Chief Constable had unlawfully delegated his decision making responsibilities to Mr Stewart who was Senior Director of Human Resources in PSNI but not a police officer. I received helpful written submissions after the hearing from the applicant and Mr Montague BL on behalf of PSNI. In my view the point does not assist the applicant. The scheme requires that a certificate signed by the Chief Constable or authorised signatory must be submitted. It is for the Chief Constable to identify the person who should provide the certificate. He has identified Mr Stewart. Although he is not a police officer Mr Stewart has the assistance of numerous officers and the experience of carrying out the evaluations of the material provided. There is nothing to suggest that he is not capable of making those decisions on those materials and accordingly I do not consider that any question of delegation arises or that there is any case made that Mr Stewart is an inappropriate person to carry out this task.

[17] The applicant criticised the reliance placed by Mr Stewart on the absence of special branch information, the absence of tangible evidence or intelligence that she was being targeted and the decision not to accept the view of D/C Gowing. In my view there was nothing to suggest that Mr Stewart was doing anything other than informing himself on the basis of all the available material as to how he should approach his task under the scheme. He has provided full reasons for his decision and nothing now turns on that point.

[18] Finally it was asserted that NIHE and the Chief Constable had a positive obligation to purchase the dwelling by virtue of Article 2 of the convention. Mr McGleenan relied on *Osman v UK* 29 EHRR 245 in support of that proposition. I entirely accept that a positive obligation can be imposed on the state to protect human life but this was not such a case. If the applicant had remained at her home it would have been for the authorities to consider the appropriate measures for her protection. There is no suggestion in this case that the police had declined to consider any request for protection either at the premises or elsewhere. The applicant left her home shortly after the incident and did not return. She was never thereafter in danger. Her decision to leave was not caused or contributed to by any act or omission of the state.

Once that decision was made there was nothing to sustain the view that article 2 of the convention was engaged in respect of her.

[19] Although article 8 and article 1 of protocol 1 of the convention were pleaded in the Order 53 statement no submissions were advanced in respect of them. The fact that the applicant retained ownership of the properties, that there was no evidence of diminution of value, that there was no evidence of any disruption of family life after the move and no complaint in respect of the operational protection provided by PSNI to the applicant and her family means that any such claim would have faced considerable difficulties

[20] Accordingly I dismiss the application.