Neutral Citation No. [2011] NIQB 105 | *Ref:* **TRE8366**

Judgment: approved by the Court for handing down | *Delivered:* **8/11/2011**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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JM's Application [2011] NIQB 105

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY JM

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY WM (A MINOR) BY HIS FATHER AND NEXT FRIEND JM

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TREACY J

Introduction

1. By this judicial review, the applicants challenge the manner in which the Northern Ireland Housing Executive ("NIHE") processed and determined a housing application made by JM.

Background facts

2. JM, the first applicant, is sixty-eight years of age; he is registered disabled; and he is the sole carer of WM, his eleven year old son, the second applicant.

3. Until approximately 27 September 2007, both applicants had been living in a NIHE property in an area of Belfast which I shall refer to as X. The second applicant was attending a local primary school. The first applicant alleged that they were regularly and persistently intimidated by neighbours.

4. After an alleged direct threat was made to the first applicant, he attended one of the district offices of the NIHE claiming he had been forced to leave his former address as a result of intimidation. Pending further enquiries, the applicants were placed in temporary accommodation at a hostel.

5. In correspondence dated 23 October 2007, the first applicant was informed that, although he was considered to be homeless and in "priority need", the duty to provide housing under the Housing (Northern Ireland) Order 1988 did not apply because the NIHE was satisfied the first applicant became "homeless intentionally", ie he voluntarily left his former address which was available for him to continue to occupy. The first applicant unsuccessfully appealed this decision. A further appeal (known as a "second stage homeless appeal") was also unsuccessful. It seems that both appeals did not succeed due to a lack of evidence the first applicant would have been at risk if he remained at his former address in X.

6. By correspondence dated 31 January 2008, the first applicant was given 7 days notice to vacate the temporary accommodation. Further, he was advised that, pursuant to the NIHE Housing Selection Scheme, he was awarded 30 points and would be placed on a waiting list for accommodation in his preferred area.

7. In correspondence dated 4 February 2008, the first applicant's solicitors requested information as to how the NIHE reached its decision that the first applicant was "intentionally homeless"; how it decided to allocate 30 points to him under the Housing Selection Scheme; and for an explanation as to the basis of the decision to issue the 7 day notice to the applicant within which he was required to vacate the temporary accommodation.

8. Subsequently, by way of correspondence dated 11 February 2008, the NIHE informed the first applicant that the 7 day notice had been amended to 28 days notice. However, as the NIHE had failed to provide a response to the other issues raised by the first applicant's solicitors, an application for judicial review was lodged. The NIHE permitted the applicants to remain in the temporary accommodation pending the outcome of the judicial review. In addition, the NIHE conducted its own review of its original decision that the first applicant was "intentionally homeless". By this stage, the issue of the regard which the NIHE had given to the second applicant and whether he too could be "intentionally homeless" had been raised.

9. By correspondence dated 8 April 2008, the first applicant was notified of the outcome of the NIHE's further review of its original decision.

The first applicant was informed he was not considered to be "intentionally homeless" as he gave up his home at his former address in X due to being "in fear of violence". Accordingly, the NIHE were under a duty to secure accommodation for the first applicant. The first applicant was then awarded 100 points for the purposes of the Housing Selection Scheme, comprising of:

- 10 points (Rule 44(1) - re-housing would resolve a neighbour dispute);
- 20 points (Rule 43(3) - fear of violence); and
- 70 points (Rule 1(5) and Article 10 of the Housing (Northern Ireland) Order 1988 – "full housing duty").

10. By correspondence dated 17 April 2008, the first applicant was informed he was awarded an additional 20 "interim accommodation points" because of his length of stay in temporary accommodation.

11. The ultimate result of the NIHE's review of its original decision was that, from July 2008, the applicants were living in accommodation in a different area of Belfast and the second applicant was attending a new school.

Grounds of Challenge

12. The relief sought relates to the NIHE's interpretation and implementation of its statutory duties under the Housing (Northern Ireland) Order 1988 and the application of its Housing Selection Scheme.

13. In practical terms, the dispute between the applicants and the NIHE was resolved as a result of the NIHE's review decision that the first applicant was not "intentionally homeless". The grounds of challenge have evolved during the course of the case to reflect the changing circumstances of the applicants.

14. At the leave hearing, Mr Justice Weatherup indicated the application raised important welfare and public interest issues as to how children are treated where a parent is deemed to be "intentionally homeless" and falls within the scope of the Housing Selection Scheme. Leave was granted in order to test these issues. It is important to note, however, that Mr Justice Weatherup emphasised the intention was to proceed by considering points of general principle and it was unnecessary, therefore, to give lengthy consideration to historical facts or to the various stages in the NIHE decision making process.

15. The NIHE asserts that the initial thrust of the applicants' challenge has altered. It is contended that the applicants' submissions concerning the NIHE's performance of its duties under Article 10 of the Housing (Northern Ireland) Order 1988 seem to have assumed prominence over the human rights arguments.

16. Against this background, it will be helpful to consider the precise wording of the two broad grounds on which relief is sought as set out in the amended Order 53 Statement (dated 13 October 2008):

> **"(1) The applicants were treated unreasonably and denied their legitimate expectation that they would be treated fairly as regards the application of *The Housing (Northern Ireland) Order 1988* in relation to their housing needs, specifically in regards to the stipulation by the NIHE of 28 days notice to vacate temporary accommodation and the manner in which advice and assistance are provided pursuant to the NIHE's obligations under [Article] 10(3)(a) and 10(3)(b) of the 1988 Order.**
>
> **(2) The actions of the NIHE are inconsistent with, and in violation of, the rights of the applicants under Articles 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and inconsistent with and in violation of the states human rights obligations to the child and the child's family under the United Nations Convention on the Rights of the Child, in particular Articles 3 (best interests of the child to be the primary consideration), 12 (consideration of the views of the child), 20 (special protection and assistance for children deprived of their family environment) and 27 (the right of every child to a standard of living adequate for the child's physical, etc. and social development) in that the NIHE failed to protect and promote the rights of the applicants in accordance with the ECHR as coloured by their international obligations under the UNCRC".**

The Issues

17. The applicants' skeleton argument has helpfully refined the broad grounds contained in the amended Order 53 Statement into three questions for the Court's consideration:

First Question:

(i) Did the NIHE comply with its statutory duty pursuant to Article 10(3)(a) of the 1988 Order to secure that accommodation was made available for such period as it considered would give the first applicant a reasonable opportunity of securing housing for his occupation?;

Second Question:

(ii) Did the NIHE comply with its statutory duty pursuant to Article 10(3)(b) of the 1988 Order to provide advice and assistance regarding obtaining such accommodation?; and

Third Question:

(iii) Did the operation of the Housing Selection Scheme in the determination of this housing application recognise the rights of each applicant individually and as a family unit, by awarding points for both parent and child?

18. Before considering the parties' submissions it will be of assistance to first consider the legislation including portions of the NIHE Housing Selection Scheme, case law and aspects of a number of affidavits filed on behalf of the parties which are of particular relevance to the arguments made before the Court.

The Housing (Northern Ireland) Order 1981 (the "1981 Order")

19. The 1981 Order provides the statutory basis for allocating housing among those with housing need, including homeless persons. Article 22 imposes a duty on the NIHE to prepare a scheme to determine the order in which prospective tenants or occupiers of its houses are allocated housing accommodation. Under Article 22, the Department of Social Development, the second respondent, has a statutory responsibility to approve the scheme.

The Housing (Northern Ireland) Order 1988 (the "1988 Order")

20. The 1988 Order governs the regulation of homelessness in Northern Ireland. Article 3 of the 1988 Order defines homelessness. For the present purposes, the relevant portion of Article 3 is set out below:

> **"3.—(1) A person is homeless if he has no accommodation in Northern Ireland.**
>
> **(2) A person shall be treated as having no accommodation if there is no accommodation which he, together with any other person who normally resides with him as a member of his family or in circumstances in which it is reasonable for that person to reside with him—**
>
> **(a) is entitled to occupy by virtue of an interest in it or by virtue of an order of a court, or**
>
> **(b) has an express or implied licence to occupy, or**
>
> **(c) occupies as a residence by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of another person to recover possession".**

21. The 1988 Order identifies categories of persons who have "priority need" for accommodation. The categories most relevant to the present application are included in Articles 5(1)(b) and (c):

> **"5.—(1) The following have a priority need for accommodation—**
> **…**
> **(b) a person with whom dependent children reside or might reasonably be expected to reside;**
>
> **(c) a person who is vulnerable as a result of old age, mental illness or handicap or physical disability…".**

22. Article 10 of the 1988 Order sets out the duties owed to persons who are found to be homeless. Three separate duties are imposed on the NIHE where it is satisfied a person is homeless: (i) the "full duty" (Article 10(2)); (ii) the "interim housing duty" (Article 10(3)(a)); and (iii) the "advice and assistance duty" (Article 10(3)(b)):

> **"(2) Where the Executive is satisfied that the applicant has a priority need and is not satisfied that he became homeless intentionally, it shall secure that accommodation becomes available for his occupation.**
>
> **(3) Where the Executive is satisfied that the applicant has a priority need but is also satisfied that he became homeless intentionally, it shall—**
>
> **(a) secure that accommodation is made available for his occupation for such period as it considers will give him a reasonable opportunity of securing accommodation for his occupation, and**
>
> **(b) furnish him with advice and such assistance as it considers appropriate in the circumstances in any attempts he may make to secure that accommodation becomes available for his occupation".**

The NIHE Housing Selection Scheme

23. The NIHE's Housing Selection Scheme (June 2007) is in the form of a series of rules.

24. In respect of accommodation needs, Rule 1(7) provides that, in considering the applicant's needs, due regard should be given to his personal needs and "also to the needs of all other persons who might reasonably be expected to reside with the applicant".

25. Part 3 of the Housing Selection Scheme provides for the ranking of applicants. Rule 15 explains that the housing selection process will rank applicants on a waiting list on a pointed basis in descending order according to housing need. Applicants may be awarded points in accordance with Schedule 4 of the Scheme under four general categories being, (i) Intimidation; (ii) Insecurity of Tenure; (iii) Housing Conditions; and (iv) Health/Social Well Being Assessment.

26. In principle, the scheme allows for points to be awarded not only in respect of an applicant but, also, in respect of a member of the applicant's household. The Department of Social Development's skeleton argument refers, at some length, to each of the Rules within the Scheme which demonstrate how the needs of both the first applicant and those with whom he resides are considered as part of the assessment process. It is not intended to rehearse these in full but the relevant rules identified, including Rules 1(7) and 15 as already

mentioned, are Rules 23, 24(1), 24(3), 26, 28, 43, 44, 55 and 57. The applicants seem to accept that, in principle, the 1988 Order and the Housing Selection Scheme can be applied so as to recognise the rights of the first applicant, the second applicant as a member of the first applicant's household and both applicants' rights as a family unit. However, they challenge whether, in the present case, the Scheme as applied actually recognised and advanced such rights.

27. While initially it was the view of the NIHE that the first applicant was in "priority need" and became "intentionally homeless" it is clear this position changed following a review of the circumstances of the case. The applicants were not required to leave their temporary accommodation after 28 days; the finding of "intentional homelessness" was reversed and permanent suitable accommodation was made available. The alleged breaches of Articles 10(3)(a) and (b) have been rendered largely academic. The first two questions do not raise any point of general principle and relate to the specific facts of the applicants' case. This judgment will therefore focus on the issues raised by para 2 of the Order 53 Statement, these being the points of more general application. Nonetheless, I propose however to set out the NIHE's affidavit evidence in respect of the first two issues which provides clarification as to their approach.

First Question:

The duty to provide temporary housing for a "reasonable period"

28. At para 15 of his affidavit, dated 14 January 2009, Stephen Baird explained the Department's understanding of how the NIHE determined what constituted a reasonable period for the provision of temporary accommodation in an affidavit :

> **"the NIHE *operate a flexible policy* of providing accommodation for approximately 28 days. It is understood that the length of time during which accommodation is provided in any one case will depend upon the circumstances of that case and also upon matters such as the extent of advice and assistance already provided by the NIHE".** [Emphasis added]

29. In an affidavit sworn on 4 December 2008 by Helen Walker, NIHE, paras 12–24 thereof deal with the issue of the temporary housing duty. At para 15, it is averred:

> **"There is *no blanket policy* that the temporary accommodation is provided for 28 days to a person**

> **who is intentionally homeless…".** [Emphasis added]

30. Para 16 explains the policy regarding temporary accommodation as contained in the Housing and Planning Handbook dated April 1989. A relevant excerpt from the Handbook states:

> **"…there is *no standard period* for which it is reasonable for the person to continue to occupy an Executive short stay accommodation and each case must be considered individually. As a general rule you should allow up to 4 weeks. Every effort must be made to avoid the need to evict the applicant. Assistance from Social Services may be sought when parent and children are involved".** [Emphasis added]

31. The 1990 report of the NIHE's Homelessness Working Group concluded that legislation required each intentionally homeless householder to be considered individually in order to decide for how long interim accommodation should be supplied. It continued:

> **"…It will *not* therefore be legal to set a standard time period by which these householders should be asked to leave interim accommodation…" (para 18)** [Emphasis added]

32. In 2002 the NIHE published its Homelessness Strategy which recorded it would seek to ensure temporary accommodation was available:

> **"…taking into account of the employment, educational and health needs of that household". (para 21)**

33. The Homelessness Code of Guidance for Local Authorities dated July 2006 provides that housing authorities must consider each case on its individual merits for the purposes of determining the period for which temporary accommodation will be secured. Para 23 of the affidavit explains that the Code advises, in some cases, a few weeks may be sufficient but, in other cases, a longer period may be required.

34. Para 24 of Ms Walker's affidavit concludes:

> **"The Housing Executive does not operate a strict 28 day period. This is often the timescale granted based on the Executive's experience as the appropriate time required to find alternative**

> **accommodation in the majority of cases.** ***The time limit is not fixed and can be amended depending on the precise circumstances".*** [Emphasis added]

35. Accordingly, it is clear from the respondent's affidavit evidence that the NIHE purports to operate a flexible policy.

36. The NIHE asserts that often a time period of 28 days is applied to a person who is intentionally homeless as, in the NIHE's experience, this is viewed as an appropriate time to find alternative accommodation in the majority of cases. However, the NIHE depose this is not operated as a fixed or blanket policy and, instead, the time period can be amended depending on the precise circumstances in an individual case. Ms Andree Devlin decided the notice period of 28 days in the present case was appropriate for the reasons set out in para 5 of her affidavit dated 2 December 2008:

> **"…I considered there was a wide stock of private rented accommodation in the Belfast area and was satisfied that there was no reason why [JM] would not be able to obtain alternative accommodation within a 28 day period. This period was chosen, as it is in accordance with the time limit which would be given to a tenant in a 'Notice seeking Possession'. It was for this reason that a letter was sent to the Applicant advising him that he had 28 days notice to leave the premises…".**

Conclusion on the First Question

37. The respondent's policy on this issue can be summarised as follows:

- It operates a flexible policy of providing accommodation for approximately 28 days [para 28 above];
- There is no blanket policy that the temporary accommodation is provided for 28 days to a person who is intentionally homeless [para 29 above];
- There is no standard period for which it is reasonable for the person to continue to occupy an Executive short stay accommodation and each case must be considered individually [para 30 above];
- The NIHE does not operate a strict 28 day period – the time limit is not fixed and can be amended depending on the precise circumstances [para 34 above].

38. Provided the NIHE adhere to the flexible approach deposed to above and do not have a time limit that is fixed but which can accommodate

individual circumstances, no breach of the statutory duty under Article 10(3)(a) should result.

Second Question:

The duty to provide advice and assistance in securing alternative accommodation

39. Paras 25–30 of Ms Walker's affidavit deal with the NIHE's duty to provide advice and assistance in securing alternative accommodation. Para 25 of her affidavit explains that the general practice is to advise all homeless applicants of alternative housing choices, chiefly, in the private rented sector.

40. Ms Walker avers that a range of written information may be provided to homeless applicants:

> **(i) Pre-tenancy determinations of housing benefit entitlement - these were provided up to April 2008 and thereafter local housing allowance information would have been provided (indicator of the allowance by house type) (paragraphs 26 and 28);**
> **(ii) Standard information leaflet regarding rental in the private sector (provided since September 2008) (paragraph 28);**
> **(iii) Lists of local estate agents (paragraphs 26 and 28);**
> **(iv) Material on the Rent Guarantee Scheme (provided in Belfast)(paragraph 28); and**
> **(v) Written information packs providing information on a range of matters relevant to a person who is homeless (provided by a number of district offices)(para 29).**

41. Ms Walker avers she believes the first applicant was also advised of renting in the private sector at his crisis interview on 26 October 2007.

42. In an affidavit sworn on 2 December 2008 by Andree Devlin, NIHE, paras 6-12 also deal with the NIHE's duty under Article 10(3)(b) of the 1988 Order.

43. As the NIHE Housing Officer who interviewed the first applicant had a limited recollection of the interview, Ms Devlin's affidavit explains the general procedure which is usually applied and which most likely occurred in the case of the first applicant:

> **"…Generally a person presenting as homeless will be advised about the alternative accommodation options. These include friends, family or indeed private rented accommodation". (para 8)**

44. The local Housing Officer in Belfast could not confirm the precise details of advice given to the first applicant but Ms Devlin avers he would certainly have received general advice concerning the need to obtain private rented accommodation. She explains in her affidavit the nature of such advice:

> **"…The advice which is normally given to those served with notice to vacate temporary accommodation are details of places where private rented accommodation can be found including estate agents, newspapers where adverts are published and guidance on housing benefit and the individual's entitlement thereto". (para 10)**

45. It is averred that the NIHE's Hostel Assistant confirmed he regularly spoke to the first applicant prior to April 2008 regarding a range of matters:

> **"…in relation to the progressing of both of his internal appeals and obtaining alternative private rented accommodation providing him with suggested persons or agencies to contact; completing grant form for furniture in anticipation of the Applicant taking up new accommodation. In addition, the telephone in the hostel's general office was made freely available to the Applicant to enable him to make enquiries concerning accommodation..." (para 11)**

46. It is also averred, at para 12 of the affidavit, that in addition to verbal advice concerning the private rental market, customers are given a pack of written information to assist them.

Conclusion on the Second Question

47. The respondent's policy on this issue can be summarised as follows:

- The general practice is to advise all homeless applicants of alternative housing choices chiefly in the private rented sector [para 38 above];
- A range of written information may be provided to homeless applicants [para 39 above];

48. The NIHE acknowledge the absence of detailed information as to the extent of the advice and assistance offered to the first applicant due to the inability of the relevant individuals being able to recollect same. However, provided the general and specific information usually furnished to homeless applicants is in fact furnished regarding alternative housing choices in the private sector (as referred to in Ms Walker's and Ms Devlin's affidavits), no breach of Article 10(3)(b) of the 1988 Order should result.

Third Question:

Did the operation of the Housing Selection Scheme in the determination of this housing application recognise the rights of each applicant individually and as a family unit, by awarding points for both parent and child?

49. Before going on to consider this question, which is undoubtedly the most important raised by this judicial review, I propose to set out some of the relevant case law.

Relevant Case Law

50. In relation to the duty to offer accommodation, in ***Garlick v Oldham MBC*** **[1993] 2 ALL ER 65** the House of Lords considered corresponding provisions to those in Northern Ireland as included in the English equivalent legislation, the Housing Act 1985. As set out below more fully, Lord Griffiths stated the 1985 Act did not include a duty to offer accommodation to a dependent child. Such a duty was only owed to the parents or those looking after the dependent child. In other words, dependent children are provided for by giving a priority right to accommodation to their parents or those looking after them:

> **"…dependent children are not amongst those classified as in priority need. This is not surprising. Dependent children depend on their parents or those looking after them to decide where they are to live and the offer of accommodation can only sensibly be made to those in charge of them…It cannot possibly be argued that a healthy four year old living with parents is other than a dependent child. Such a child is in my opinion owed no duty under this Act for it is the intention of the Act that the child's accommodation will be provided by the parents or those looking after him and it is to those people that the offer of accommodation must be made, not to the dependent child" (page 69, e – j).**

51. The House of Lords in ***Din v Wandsworth LBC*** **[1983] AC 657** (at 663) considered whether the relevant English legislation intended to promote the retention of family units in respect of the provision of accommodation to homeless persons. The House was required to interpret provisions which were virtually identical to Articles 3 and 5 of the 1988 Order. It was observed that one of the main purposes of the Housing (Homeless Persons) Act 1977 was that accommodation should be made available to all the members of the family together. The particular emphasis on families with children was evident from the provision that a homeless person has a priority need for accommodation when the housing authority is satisfied he is within one of certain categories, one of which was that "he has dependant children who are residing with him or who might reasonably be expected to reside with him". This reasoning was more recently emphasised in ***R (Morris) v Westminster CC*** **[2005] ALL ER (D) 164** (at para 20).

52. In respect of Article 8 ECHR, Strasbourg jurisprudence seems well settled that the rights of an individual under Article 8 do not include the right to a home ***Chapman v UK*** **[2001] 33 EHRR 18**.

53. ***Ekinci v London Borough Council of Hackney*** **[2001] EWCA Civ 776** considered whether the prioritising of homeless persons' applications for housing in accordance with a particular scheme breached Article 8 ECHR. The Court of Appeal rejected the applicant's argument he was in priority need through his 17 year old wife. It found Article 8 ECHR did not require applicants with child spouses to be given priority over applicants with adult spouses or other categories of applicant. The Court of Appeal stated:

> **"[16] There is no breach of Article 8(1) in Parliament enacting a scheme of priorities whereby applications for accommodation by homeless persons are to be determined by local housing authorities whose resources will inevitably be limited".**

54. In ***R (Morris) v Newham London Borough Council*** **[2002] EWHC 1262** it was argued that a failure to comply with the authority's duty to secure accommodation for homeless persons was a breach of Article 8 ECHR. From a review of the authorities placed before the Court, Jackson J derived four propositions of law:

> **"1. Article 8 of the European Convention of Human Rights does not impose on a public authority a duty to provide a home to a homeless person.**

2. The fact of homelessness may be relied upon as one element of a claim that a person's rights under Article 8 to private or family life have been breached. However, homelessness by itself cannot found such a claim.

3. A homeless person has no right in tort to recover damages against a local authority for failure to provide accommodation, in accordance with duties imposed by Part 7 of the Housing Act 1996.

4. Absent special circumstances which interfere with private or family life, a homeless person cannot rely upon Article 8 of the European Convention on Human Rights in conjunction with Part 7 of the Housing Act 1996 in order to found a damages claim for failure to provide accommodation".

55. ***Re TP (a minor)*** **[2005] NIQB 64** considered the relevance of international obligations when interpreting Article 8 ECHR. Article 3 of the UNCRC provides that, in all actions concerning children, the best interests of the child is a primary consideration. In ***TP*** Mr Justice Weatherup stated that the Court should address the applicant's Convention rights in light of international obligations including, in particular, Article 3 of the UNCRC and that such international obligations should "inform the approach to Article 8".

The Parties' Submissions

56. The applicants' arguments centre on whether the housing selection scheme addressed the interests of the second applicant and whether the present scheme addresses the issue of the child in such a way as to be compliant with Article 8 ECHR.

57. The applicants primary submission is that, in awarding points under any proper and legitimate statutory scheme, the NIHE is bound to allow for points to be awarded in respect of a child who is unintentionally homeless and who is at risk of separation from his parent and at risk of being placed in care if accommodation is not provided. They say the NIHE Housing selection Scheme prevents this taking place and is not compliant with Article 8 ECHR.

58. The applicants submit that apart from a limited set of exceptions, the housing scheme prevents children being applicants. They say the consequences of this are that, if a parent is intentionally homeless, the child is also treated as intentionally homeless; the child is left

vulnerable to separation from the parent and to becoming a child in need under the Children (NI) Order 1995; and the prospects of the child and parent being re-housed will be affected.

59. The applicants say, despite Article 5 of the 1988 Order recognising that those in priority include adults with dependent children, the housing scheme is not operated or designed to operate in a way to ensure the existence and rights of the child are considered when points are awarded for the purposes of deciding the priority with which accommodation is assigned (i.e. the 70 points awarded to a "full housing duty" applicant are awarded if the parent is not intentionally homeless rather than in connection with "priority need").

60. The applicants rely on ***Re TP (a minor), Re Anne-Marie McCallion*** **[2007] NIQB 76** and ***R v CK (a minor)*** **[2009] NICA 17** to support their contention that the courts have demonstrated a growing regard for the UNCRC. The applicants say these authorities show, in particular, that Article 3 of the UNCRC should inform the approach of the court and that the ECHR should be interpreted in a way which takes Article 3 UNCRC into account. In such a context, the applicants assert, in reliance on ***X and Y v Netherlands*** **Application No. 91, 26 March 1985,** that the NIHE has a positive obligation to consider adoption of measures to secure respect for private and family life for children as individual rights holders.

61. The applicants submit ***Garlick*** (relied on by the respondents) cannot now be regarded as good law as it was decided before the ECHR was incorporated into domestic law by the Human Rights Act 1998.

62. The applicants rely on ***R (Morris) v Newham London Borough Council*** to the extent that it identifies the fact of homelessness is something which may be relied on as an element of a claim a person's rights to private or family life under Article 8 ECHR have been breached.

63. The applicants accept the European Court has not upheld and will not uphold an absolute right to public housing. However, they make the argument that if a state, in the exercise of its discretion, puts in place a statutory scheme which allows points to be awarded on certain grounds, it must then award points by reference to family circumstances in order to be Article 8 ECHR compliant.

64. It is submitted, in the present case, there is no evidence the NIHE took the interests of the second applicant or his family circumstances into account when awarding points to the first applicant under the scheme.

65. The applicants assert Rule 43 of the Scheme may be interpreted in a limited way to permit regard to be given to the second applicant's circumstances. Under Rule 43, points may only be awarded in respect of two factors. As points had already been allocated to the first applicant under Rule 43(3) (fear of violence) this would permit only one further allocation of points in respect of the second applicant. The applicants assert regard could have been given to the second applicant under any of the following factors contained in Rule 43:

> **(i) Rule 43(4) – whether the second applicant as a member of his father's household was experiencing distress or anxiety as a result of recent trauma in their home in X;**
>
> **(ii) Rule 43(5) – whether there was a need to re-house the applicants to prevent the second applicant going into care; and**
>
> **(iii) Rule 43(8) – whether the second applicant's circumstances were analogous to any of those listed in the previous sub-paragraphs. This would have allowed a further 20 points to be awarded under Rule 43(3) if the second applicant was experiencing fear of violence because of the alleged intimidation experienced in X.**

66. Further, the applicants submit there was a possibility additional points could be awarded under Rule 44 which deals with a very wide variety of "other social needs factors". It is asserted that the second applicant's schooling and need to live in a certain area to remain in his current school should have been considered under Rule 44(10)(social isolation) and Rule 44(11) (need to live in a location to take up a new job or a full-time course of study).

67. In summary, the applicants submit there is no evidence that any consideration was given to the second applicant when points were awarded. The applicants have made submissions as to how the scheme was capable of being applied in a manner to recognise the second applicant's existence and rights as well as those of his father and/or the family unit but argue that the NIHE did not apply the scheme in such a manner.

The NIHE's Submissions

Breach of father's/son's Article 8 ECHR rights

68. The NIHE submits that, although a child cannot be an applicant for public housing, where a parent makes an application and there is a dependent child, the interests of the child are considered along with those of the parent. It is asserted that is what happened in the present case.

69. Reliance is placed on ***Garlick*** in which the House of Lords held the duty to make an offer of accommodation was to a dependent child's parents or persons looking after the child. It is submitted this remains good law and the Human Rights Act 1998 has not rendered it unlawful.

70. The NIHE argues that the present scheme does cater for the position of family members including the position of dependent children by specific reference to the Articles in the 1988 Order and the Rules in the scheme which take into account the position of persons who normally reside with a housing applicant (ie Articles 3(2), 4, 5 of the 1988 Order and the definition of "accommodation needs"; and Rules 23, 24, 26, 28, 29, 31, 33, 37, 38, 39, 43, 44 and 45). It is asserted that a homeless applicant can include material relating to a dependant child in an assessment application form for public housing and may raise relevant points regarding the position of a dependent child in subsequent assessment interviews conducted with the applicant.

71. Regarding whether there has been a breach of Article 8 ECHR, the NIHE makes three core submissions:

(i) The NIHE's consideration of a housing application does not fall within Article 8 ECHR.

72. In reliance on **X v Federal Republic of Germany [1956] 1 YB 202,** ***Chapman v United Kingdom*** at 99 and ***Kay v Lambeth LBC*** **[2006] 2 WLR 570** at [29]), the NIHE submits that Article 8 ECHR does not contain any right to public housing provided by the State and, therefore, the process by which applications for public housing are processed is outside Article 8.

73. Reference was made to the domestic authorities of ***Ekinci*** and ***R (Morris) v Newham LBC*** as further support for the view that alleged failures to comply with the statutory scheme for housing homeless persons by a housing authority did not give rise to breaches of Article 8 ECHR.

74. In reliance on ***R (Carson) v Secretary of State for Work and Pensions*** **[2003] 3 AER 577** at 28, the NIHE also makes the point that social welfare measures provided by the State do not generally fall within the ambit of Article 8 ECHR as they are not specifically designed to promote or protect family life.

75. On this basis, the NIHE asserts that Article 8 ECHR is not applicable to the circumstance of an application for public housing and, therefore, it is not engaged by the application process.

(ii) Even if Article 8 ECHR applies, there is no material on which the Court could conclude the NIHE has failed to respect the Article 8 rights of father or son.

76. Primarily, it is submitted that the process by which the parent's application subsumes the interests of a dependent child (as envisaged in ***Garlick***) and operated under the 1988 Order and the Housing Selection Scheme, envisages no disrespect on the part of a public authority for the applicant's private or family life. It is argued that, in the present case, the approach to a public housing application is inclusive of the position of a dependent child and, therefore, it is difficult to see how, procedurally or substantively, there could be a breach of Article 8 ECHR.

77. It is contended that, in the present case, the applicants are not able to establish their private or family life has, in fact, been disrespected.

(iii) If the Court holds the submissions in (i) and (ii) are wrong and finds there has been an interference with either the father's or son's Article 8 rights, it is submitted such interference is prescribed by law, pursues a legitimate aim and is proportionate.

78. The arrangements which have a legal basis in the 1988 Order and the Housing Selection Scheme serve legitimate aims including the economic well-being of the country and protection of others. It is argued that the scheme and the 1988 Order are constructed around the need to balance individual interests and those of society in an area where prioritisation will be required and where there are scarce resources available.

79. The NIHE says the administrative authorities and the legislature have made a judgment as to the balance to be found in the present arrangements and such balance is necessary in a democratic society and is proportionate. It is contended the judgment as to the balance to

be found is a discretionary judgment which should not be interfered with by the Court. Further, it is asserted that, as this judgment has been made in an area of social policy, there is well established authority that a wide discretionary area of judgment should be afforded.

Department of Social Development's Submissions

Application of the Housing Scheme

80. As the first applicant was awarded 70 points on the basis that he was identified as being unintentionally homeless and in priority need (i.e. a "full duty applicant"), it is submitted the NIHE did expressly take account of the existence and needs of the second applicant because the categories of "priority need" expressly include those applicants with dependent children. The point is made that, in the absence of a dependent child, it is not clear the first applicant alone would have been able to establish himself as being in "priority need".

81. The Department makes a number of observations in respect of the applicants' argument that it would have been open to the NIHE to award additional points under the Scheme:

> **(i) The assessment of applications and the awarding of points is a matter for the NIHE and it has a discretion to assess whether points should be awarded under any particular heading;**
>
> **(ii) There may be overlap between some of the headings and, if this occurs, it is open to the NIHE to award points on only one or some of those grounds. In the present case, the NIHE chose to award points on the highest point scoring ground (Rule 43(3) - "fear of violence");**
>
> **(iii) Some grounds are drafted in the alternative where the social needs factor in question affects either the applicant "or" a member of his household. If the same factor affects both the applicant and other family members it may not be appropriate to award "double points" under one heading; and**
>
> **(iv) The fact the NIHE chose not to award points under some or more of the possible headings which were open to it does not equate to a finding that the NIHE did not take the needs and interests of the second applicant into account.**

82. The Department asserts that if additional points had been awarded on some or more of the grounds identified by the applicants, the result would have been that the application may have received some slight improved priority (rather than the availability of permanent or better quality housing in a shorter time frame). It is argued that the operation of the system of allocating housing in accordance with priorities does not involve a breach of Article 8 ECHR.

83. The Department also contends that the interim accommodation provided to the applicants did not constitute a breach of Article 8 ECHR since they remained as a family unit throughout this period of time.

Conclusion on the Third Question

Did the operation of the Housing Selection Scheme in the determination of this housing application recognise the rights of each applicant individually and as a family unit, by awarding points for both parent and child?

84. Having considered the parties' arguments I reject the NIHE's argument that its consideration of a housing application does not fall within Article 8 ECHR. Whilst ***Chapman v UK*** establishes that rights under Article 8 do not include the right to a home *per se* it is also clear that the fact of homelessness may be relied upon as one element of a claim that a person's Article 8 rights have been breached (see ***R (Morris) v Newham London Borough Council***).

85. Section 6 of the Human Rights Act makes it unlawful for a public authority, such as the NIHE, to act in a way which is incompatible with a Convention right. Under section 6(6) "an act" includes a failure to act. Decisions concerning the housing provision that will be offered to individual members of one family can engage Art 8 not because they have a right to a home *per se* but as one element of a claim that such rights have been breached.

86. The applicant's submission is that the NIHE's Housing Selection Scheme failed to recognise the rights of each applicant individually and failed to recognise their rights as a family unit because it does not award points for the parent and for the child individually. They contend that to be Article 8 compliant the Housing Selection Scheme must allow points to be awarded in respect of the child individually. They contend that the case of ***Garlick*** should no longer be regarded as authoritative because it was decided before the ECHR was incorporated into domestic law. They assert that more recent case law supports the emergence of a positive obligation on public authorities to deal with children as individual rights holders and that this should be

recognised in NIHE's Housing Selection Scheme and that the current scheme fails to recognise these emerging rights.

87. I consider that there is nothing objectionable in a child's Article 8 rights being recognised in a manner that also recognises his dependant status and the natural limitations on his legal and practical capacities. Part of the importance of Article 8 is that it recognises the rights of children to be able to be dependent on their parents. Article 8 is intended in part to facilitate the natural differentials in legal and personal capacity which exist within family units. There is therefore nothing inherently objectionable in a housing selection scheme which allocates points to a family viewed as one collective unit.

Did the present Housing Selection Scheme in the determination of this housing application recognise the rights of each applicant individually and the collective rights of the family unit by awarding points for both the parent and the child?

88. Article 5 of the 1988 Order identifies categories of persons who have priority need for accommodation. Article 5(1)(b) accords priority need to "a person with whom dependent children reside or might reasonably be expected to reside". In their revised decision making process the respondents acknowledged that this applicant did have priority need.

89. As the DSD's submissions note, it is not clear that the applicant alone would have been able to establish that he had a priority need, but when viewed as part of a family unit the applicant was accorded this status. In my view this establishes that the existence, needs and rights of the dependent child were taken into account appropriately and correctly to establish a priority need for accommodation that would meet the individual and collective needs and rights of the parties including their Article 8 rights to respect for family life.

90. The applicant contends that the 70 points awarded to him which recognised his priority status and triggered a "full housing duty" towards him, was not awarded because he, as the parent of a dependent child, had a priority need, but was awarded when it was decided he was not intentionally homeless. He says that this application of the scheme was inappropriate because it made the level of housing duty owed to him depend upon an assessment of an individual decision by him "the decision whether or not to leave his further home" rather than making it dependent upon his *status* as a member of a collective family unit.

91. This raises an interesting point as to *how* collective family rights should be recognised in a housing selection scheme. As noted above it is acceptable for dependent children's housing needs to be met via provision made to the responsible adult. This form of provision recognises the family relationship and the dependency of the child. It is also important that where a responsible family member takes a decision in the interests of another family member that decision should not be inappropriately individualised in a way that could operate against the collective interest of the family unit. So, for example, if one of four children in a family was being bullied or intimidated in an area and his parent took a decision to move out of the family home and out of the area for the purposes of protecting that child then it would be quite wrong to apply the intentionally homeless test to the parent's action without taking account of the affected child's situation and of the parent's legitimate concerns and legal responsibilities towards that child. It would usually be wrong, for instance, to decide that such a parent, who was not personally subjected to intimidation or bullying, was therefore intentionally homeless. Such a decision could operate to reduce the level of housing duty owed to the family as a collective unit.

92. In many cases, inappropriate individualisation such as that cited in the above example would be unfair and unreasonable because it would not give sufficient weight to the connections between parent and child and to the dependence of one on the other. Just as it is right to take account of these factors by making housing provision for dependent children via their parents, so it is right to recognise and give weight to parental decisions made for the benefit of a dependent child which might attract penalties had they been made for any other reason. Any lawful housing scheme will recognise the responsibilities parents owe to their children in all stages of the application of the scheme.

93. In the present case the adult applicant decided to leave the home in order to avoid intimidation. He and his son were housed in emergency accommodation and eventually they were rehoused in appropriate accommodation in a different area. The housing duty owed to them was originally considered not to amount to a full housing duty but this was later changed as a result of an internal review of the case. A full housing duty was then recognised to exist and the applicants were eventually rehoused in appropriate accommodation. Throughout the application process father and son were in fact accommodated together.

94. For these reasons the Court holds:

    (i) that Article 8 ECHR does apply in the administration of housing selection schemes; and

(ii) that the applicants have not established that their Article 8 rights were violated on the facts of the present case.