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*(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY "JT"
FOR JUDICIAL REVIEW

_____

HORNER J

INTRODUCTION

[1] The Applicant, "JT", brings this claim for judicial review arising out of the failure of St Mathew's Housing Association Limited ("SMHA") and the Northern Ireland Housing Executive ("NIHE") to give him the opportunity to become a tenant of a newly constructed residential two-bedroomed unit on the site of the old Mountpottinger Police Station ("PS") in the Short Strand, Belfast.

BACKGROUND

[2] The Applicant at the relevant time was resident at an address in Pottinger's Quay with a relative. However, he received all communications from SMHA at an address of another family member in Vulcan Street, Belfast. The background circumstances of his claim can be set out briefly. SMHA is a Housing Association. It comprises of a Board of eleven members. One of these members is Mrs Kane ("K"). Another member is Mr Joe O'Donnell ("J O'D"). Its Chief Executive is Mr Jim Black who reports to the Board. It has 187 homes under its management. It provides housing consisting of "general family housing, simple single adult housing and active elderly housing to our residents in Short Strand, Clonard and Poleglass". SMHA is registered with the Department of Social Development ("DSD"). At the end of 2012/early 2013 SMHA was in the process of acquiring a development of residential units comprising 2 and 3 bedrooms, which had been constructed on the PS.

[3] NIHE operates a statutory housing scheme ("the Scheme") pursuant to Article 22 of the Housing (NI) Order 1981. It has done so for more than 30 years. The Scheme was approved by the DSD in June 2000 and came into effect on 1 November 2000. It comprises a number of Rules:

(a) Under Rule 1 participating landlord is defined as the NIHE "or any registered housing association which is participating in the Common Selection Scheme." SMHA was a participating landlord within the terms of the Scheme.

(b) Rule 15 sets out how applicants will be ranked and this is on a points basis in descending order according to housing need. This need for housing is assessed by awarding points under various headings which include intimidation, insecurity of tenure, housing conditions and health/social well-being assessments.

(c) Rule 16 states that where points are equal the date on which the applications are received will decide the order in which the applicants are offered accommodation.

(d) Rule 17 states that individuals with complex needs whose agreed housing option is housing with care schemes form an exception to this selection process. The arrangements for the selection of such applicants which need not concern us are outlined in paragraphs 19-22.

(e) Rule 46 states:

> "All Applicants will be assessed and placed on a Waiting List which is used by all Participating Landlords. As a general rule each dwelling will be offered to the relevant Applicant with the highest points."

(f) Rule 47 provides that:

> "An Applicant is a relevant Applicant if either he/she has applied for, or is deemed to have applied for accommodation with the locational and other characteristics of the dwelling in question, and the landlord is satisfied on reasonable grounds that the non-locational aspects of the dwelling meet the Applicant's needs, and having regard to all the circumstances, do not substantially surpass those needs."

(g) Rule 48 states that the Designated Officer has the authority to depart from the general rule only in the following circumstances and subject to the following conditions which are:

"(1) Exceptionally, such a departure is highly desirable in order to match the special and specific needs of an applicant with the facilities and amenities accessible in a particular dwelling or location.

(2) Any such departure from the general rule must be notified in writing within 3 months to the Board (Director of Housing DOE in the case of housing associations)."

(h) Rule 53 provides:

"An Applicant will be considered for all properties of all Landlords within his/her areas of choice unless he/she indicates otherwise."
(It is important to appreciate that departure from the General Rule can only take place in exceptional circumstances; see 5.1 of the Guidance Manual.)

(i) Rule 58 states:

"The Applicant's preference for a particular type of property will not be regarded as an essential need."

(j) Rule 59 states:

"Three reasonable offers will be made to an Applicant. If all three offers are refused, no further offers will be made for one year after the date of the last refusal."

(k) Rule 69 provides that:

"A Designated Officer has the discretion to make simultaneous offers if difficult to let accommodation to the next 10 highest ranked Applicants on the waiting list which is used by all Participating Landlords until:

(1) the accommodation is let; or

(2) there are no eligible Applicants remaining on the Waiting List."

(l) Rule 71 deals with transfers and states that:

"The Landlord will consider Transfer Applicants for any vacancy in conjunction with those Applicants on the waiting list by all Participating Landlords. A Transfer takes places when a tenant moves from one dwelling to another either within the Landlord's own stock or to a dwelling belonging to another participating landlord."

(m) Rule 72 provides that Landlords have to use the following general principles when making allocations to transfer applicants, namely:

"(1) Allocations must be made as fairly and impartially as allocations to Waiting List Applicants.

(2) A Transfer Applicant should not be re-housed less quickly than if he/she were an Applicant under the Selection Scheme.

(3) Granting of a Transfer should not lead to a reduction in the amount of suitable accommodation available for new Applicants.

(4) The total benefit of any Transfer (or a series of Transfers) should be greater than if a dwelling were to be allocated to a new Applicant.

(5) The ratio of one Transfer allocation for every two waiting list allocations should be employed. However, where this principle is not achievable, Landlords should use an appropriate ratio paying due regard to relevant housing need of Waiting List and Transfer Applicants."

[4] In addition, NIHE publishes a Housing Selection Scheme Guidance Manual ("the Guidance Manual") for housing officials but it is a document to which the general public have access. This attempts to explain in some detail how the Scheme for the allocation of properties should operate.

[5] The Code of Conduct for Board members and which they have to sign up to requires that all Board members "will declare any private interest which may give rise to a conflict in the exercise of their public duties".

[6] It will further be noted that all the employees of housing associations are required to follow the requirements contained in the Government's Governance Guide published by the DSD. The court was not told whether the position of a

Board Member was the same as that of an employee. 6.44 of the Guide provides that all individual Board Members "should act according to high ethical standards and ensure that conflicts of interest are properly dealt with."

[7] 6.46 explains how such conflicts of interest are to be dealt with. It states:

> "The Association is required to have procedures in place for members to declare actual or potential conflicts. These should be recorded in the minutes of Board meetings as well as a separate register.
>
> Members of the Board should identify and promptly declare any actual or potential conflicts of interest affecting them, including conflicting loyalties which may arise when members are appointed as representatives of other organisations.
>
> If an actual or potential conflict arises at a meeting members should refrain from partaking in any discussions or decisions, remove themselves from the meeting and have it so recorded. The Board should take ultimate responsibility for dealing with and managing conflicts that may arise within the Association."

On the basis of the evidence I do not see any reason to make a distinction between employees and board members and no reason was suggested during the hearing.

[8] The following facts do not appear to be contentious:

(i) The Applicant was registered as full duty homeless on 13 December 2012 and as such was a full duty applicant. He suffered from a mental illness consequent upon sectarian assaults to which he had been subject.

(ii) The Applicant had 330 points which was the highest points score for a two bedroomed accommodation on the list for the Short Strand on 18 January 2013. This points score was in large part due to the intimidation the Applicant had suffered from criminal elements and meant that he was considered homeless for the purpose of the Scheme.

(iii) On 29 January 2013 the Applicant was offered accommodation in Perry Court. He was unable to decline it immediately for logistical reasons. However, he did reject it by e-mail that night at 19.38 hours as being too close to the house of an individual who had attempted to murder his father.

(iv) An email of 20 January 2013 recorded that Sandra Convery, a housing officer with SMHA, had said that SMHA would be prioritising "transfer applicants" in the allocation of units in the PS.

(v) His brother e-mailed Mr McPeake of NIHE expressing concern about the conduct of the NIHE's East Belfast Office.

(vi) On 29 January 2013 allocations were made in respect of the applicants for the PS. At that time the Applicant was no longer on the filtered waiting list because of the offer made to him of accommodation at Perry Court

(vii) On 30 January Mr McPeake advised that this issue could be dealt with through the complaints procedure.

(viii) On 30 January 2013 Mr Black of SMHA e-mailed the Applicant and his brother informing them that SMHA had pre-allocated all the units at the PS and that the Applicant was not considered because he had an offer of accommodation at Perry Court.

(ix) The Applicant then instructed solicitors and correspondence commenced. This terminated when proceedings were commenced in February 2013.

(x) The three applicants who had been successful in their application for two-bedroomed accommodation at the PS were K, a Board member who had 112 points, Mrs McG who had 90 points and Ms X who was the niece of J O'D, a Board member, who had 34 points. K and Mrs McG were applicants who were management transfers. K was a full duty applicant because her present residence exceeded her needs. In respect of K and Mrs McG it was claimed that there were very difficult mobility/functionality issues that could only be properly resolved through urgent rehousing to suitable lifetime home standard accommodation.

(xi) Ms X had two young daughters who live in an apartment on one level above the ground floor. One of the daughters has severe asthma which causes her to waken and disturb the other daughter. This, it is claimed, makes the older daughter tired and affects her performance at school. The two-bedroomed residence on separate floors at the PS, Ms X claims, would allow her to take the younger daughter downstairs and ensure that her older daughter is not disturbed.

(xii) The points system under the Scheme is intended to measure need. The Applicant, with approximately three times the number of points as K,

four times the number of points as Mrs McG and ten times the number of points as Ms X, could reasonably have anticipated a successful application for a two-bedroomed apartment at the PS.

(xiii) There was a failure by SMHA to adhere to the requirements of the Governance Guide of the DSD. This may be because SMHA did not have in place any procedures for its board members to declare actual or potential conflicts of interest. However, there is no dispute that there is an absence in the minutes or in any separate register of any declaration of any actual or potential conflict of interest involving any Board member. Clearly K was in an obvious conflict of interest. It is contended that given the close ties of consanguinity in an area such as the Short Strand, J O'D was not in a conflict of interest, actual or apparent, because one of the units was allocated to his niece. I do not agree. It must be remembered that "nepotism" is derived from the Latin word for nephew. Its origins can be traced back to the practice in medieval times of popes and bishops assigning cardinal positions to their nephews.

[9] It is important to stress that the court is not in a position to adjudicate on the respective merits of the various applications and will resist any attempt to do so. The court is only concerned with ensuring that the process which has been followed in making the allocations of residential units at the PS has been lawful. As Carswell LCJ said in Re Croft's Application [1997] NI 1 at [19]:

> "The court is entrusted with the task of ensuring in its supervisory jurisdiction that the decision did not contravene any of the requirements of the law in the respects which I have discussed at length in this judgment. When it has done so, it must stand fast. It is not to go into the merits of the case any further than is required to adjudicate upon those issues of law."

ORDER 53

[10] The amended Order 53 Statement is voluminous and the grounds now relied on because of the substantial amendments which have been made to it, are necessarily diffuse and prolix. They can however be grouped together very generally as follows:

(i) Offers should have been made to the applicant simultaneously not consecutively.

(ii) SMHA failed to follow the Rules of Scheme.

(iii) The process for the allocation of the units in the PS was not fair and equitable and therefore unlawful.

(iv) There was an infringement of the Applicant's Article 8 rights under the European Convention on Human Rights.

(v) There is an apparent bias in the allocation process.

(vi) The decision whereby there was a failure to allocate a two-bedroomed residential unit in the PS to the Applicant was a consequence of bad faith on the part of SMHA, its servants and agents.

LOCUS STANDI

[11] There was some query raised as to whether or not any decision of SMHA was amenable to judicial review. I am of the view that this dispute does raise interests of public law. It is clear that the Scheme is a requirement of Article 22 of the Order. I do not accept that SMHA is not required to comply with this Scheme. While there is no statutory obligation on SMHA to follow the Scheme it is important to note that:

(a) SMHA is a participating landlord under the Scheme.

(b) The Scheme applies to participating landlords.

(c) SMHA's own allocation policy states that it carries out its duties "in line with the rules imposed by the Northern Ireland Housing Executive in its administration of the common selection scheme." It goes on to make it clear that it operates its allocations policy in line with the detailed procedures relating to NIHE's Housing Selection Scheme. The Manual provides that SMHA's allocation policy has to be specifically approved by the DSD and all allocations must be made in accordance with it; see 10.37 of the Manual. SMHA's allocation policy was stated to be the Scheme and I assume this was approved by DSD. I am of the opinion that both NIHE and SMHA must comply with the Scheme that has been approved under Article 22 and that it would be unlawful if SMHA did not do so in the allocation of residential units at the PS.

[12] Two aspects of how the Scheme works require detailed consideration in this application. They are:

(i) How does the General Rule, namely that the highest number of points should determine who is offered a vacant property, fit in with the right of the landlord to consider transfers of tenants who are in occupation of other dwellings. I will refer to this as the "transfer applicant issue".

(ii) Should the person with the highest points be entitled to be offered one vacant property at a time or should he be offered a selection of vacant properties at the same time to allow him to select one that he considers best suits his needs? I will refer to each of these approaches as the sequential and simultaneous approach respectively.

The Transfer Applicants' Issue

[13] A transfer takes place when a tenant is offered and accepts a move from one dwelling to another dwelling within a landlord's own housing stock, or to a dwelling belonging to another landlord participating in the Scheme. There are two types of transfer tenants. There is the transfer tenant who must satisfy certain access criteria before being considered for a transfer although these can in certain circumstances be waived. For example, these criteria might be waived where the transfer is recommended for good housing management reasons. These must be waived where the tenant is an eligible "full duty applicant", namely someone who has been accepted as being homeless and is owed a duty by the NIHE under Article 10(2) of the Housing (NI) Order 1988. However, these transfer tenants are subject to the same points system as other waiting list applicants according to the Guidance Manual. There also exists a second category of management transfer applicants. These are not managed on the basis of housing need and are not subject to allocation on the basis of the points they have. This category is to give "flexibility to make best use of their housing stock" to NIHE and the participating landlords; see chapter 7.10 of the Guidance Manual.

[14] The arguments presented on the first day about how the Rules of the Scheme should be construed in respect of the allocation of housing units differed markedly from those which were made on the last day of the hearing. I have had particular difficulty with the arguments presented on behalf of SMHA as they were inconsistent. SMHA's position on how the Scheme should operate and the interplay between the General Rule and Rules 71 and 72 differed significantly between the beginning and the end of this application. However the arguments advanced by Mr Sharp undoubtedly reflect the instructions received from SMHA in general and Mr Black in particular.

[15] The General Rule under the Scheme at Rule 46 is that each dwelling will be offered to the relevant applicant with the highest points. This is straightforward. Points measure needs and the relevant applicant is defined by Rule 47. It has never been suggested that the Applicant was not a relevant applicant within the terms of the Scheme although Mr Black in giving his evidence did claim that he had relied on Rule 47 in preferring Ms X to the Applicant. The Designated Officer does have a discretion to depart from the General Rule but this is circumscribed by Rule 48 and is subject to two conditions:

(i) Such a departure is highly desirable in order to match the special specific needs of an applicant with facilities and amenities accessible in a particular dwelling or location.

(ii) Any such departures from the general rule must be notified in writing within three months to the Board (Director of Housing DOE in the case of a housing association).

No such notification was given to the Director of Housing and in any event no case has been made that there were exceptional circumstances justifying a departure from the General Rule. Certainly the Respondent never made an attempt to assess in detail the personal circumstances of the various applicants for accommodation in the two-bedroomed units in the PS. I should also mention that the Guidance Manual at chapter 5 and in particular at chapter 5.2 gives detailed guidance of what should take place if there is to be a departure from the General Rule. I do not consider that the factors listed at 5.2 were taken into account and this should be unsurprising because Mr Black did not make the case that he was acting or purporting to act under the exception to the General Rule.

[16] Instead he relied primarily on Rules 71 and 72 which deal with transfer applicants as giving SMHA permission to depart from the General Rule. Chapter 7.10 of the Guidance Manual states:

> "In addition to the main body of pointed transfer applications, assessed on the basis of housing need, there is a second category within the Transfer Policy designed to allow Designated Officers the flexibility to make best use of their housing stock. This Management Transfer category allows Designated Officers the discretion to transfer tenants, under certain circumstances, without reference to their points level.
>
> The circumstances where Designated Officers can exercise their discretion and create management transfers are where (inter alia):
>
> (i) the tenant is a Full Duty Applicant;
>
> (ii) the transfer relates to the tenant(s) or members of their household requiring specially adapted or specially purpose built housing having regard to their special and specific needs for such accommodation and where an allocation outside the general rule can be justified." (emphasis added)

[17] 7.11 of the Manual states:

> "All allocations to Transfer Applicants will be made with the possible exception of management transfers, in accordance with the rules of the Selection Scheme."

[18] The Manual also says that the allocations to management transfers will be made as and when necessary and that designated officers will take account of "overriding needs of intimidation cases". The principles which the landlords have to follow in making allocations to transfer applicants include:

(a) A requirement to be as fair and impartial as when allocating to waiting list applicants.

(b) Not rehousing transfer applicants less quickly than if they were an applicant under the Selection Scheme.

(c) Making sure that such transfers do not lead to the reduction in the amount of suitable accommodation available for new applicants.

(d) Ensuring that total benefit of any transfer should be greater than if a dwelling were to be allocated to a new applicant.

(e) Achieving a ratio of one transfer allocation for every two Waiting Lists allocations and where this is not achievable, using appropriate ratio paying due regard to relevant housing need of Waiting List and Transfer Applicants.

[19] The Scheme does not say that Rules 71 and 72 are an exception to the General Rule. Rule 71 simply requires the Housing Association to consider transfer applicants in conjunction with those applicants on the common waiting list. The general principles under Rule 72, when making allocations, is that they should be made as fairly and impartially as the allocations under the waiting list. This strongly suggests that a General Rule applies subject to the exception at Rule 48. On the last day of the hearing Mr Dunlop for NIHE (supported by Mr Sharp for SMHA) argued that there was a parallel system for transfer applicants in general which did not depend on the points that they had scored and that to interpret the Scheme otherwise would result in a manifest absurdity. It was stated, inter alia, that otherwise applicants on the common waiting list would, because they had no accommodation, always trump a transfer applicant because of their "housing need". It was asserted that under a system where points dictated who would get a property that it would not be possible for example for a housing officer to make an assessment as to whether the total benefit of any transfer (or a series of transfers) would be greater than if a dwelling were to be allocated to a new applicant. However there was a complete dearth of evidence to support these inferences which

NIHE (and SMHA) wished me to accept although the court had been flexible in allowing parties to file additional evidence or amend as arguments were reshaped.

[20] The matter becomes more complicated when one looks at the Guidance Manual for assistance as to how Rules 71 and 72 should be applied in the Scheme. First of all the commentary at 7.10 refers to a second category of transfer applicants, namely management transfer applicants, as allowing the designated officer flexibility to make the best use of its housing stock.

[21] It is thus clear that in certain defined circumstances a Landlord can, according to the Guidance Manual, prefer management transfer applicants (but not transfer applicants in general) in favour of those on the waiting list with a higher points score. The circumstances in which this can be done are circumscribed by the rules of the Scheme and the Manual which participating landlords, including SMHA, are obliged to follow. In respect of the ratio of one transfer allocation to every two Waiting Lists allocations, I accept that it is important to look at this over a period of time and it cannot be assessed on an individual allocation. I have not been provided with information that would allow me to make an assessment as to whether such a ratio has been observed. I am assured from the Bar that SMHA's returns are checked by the DSD Housing Branch and that if there is a difficulty this will be picked up. I am content to assume that over a period of time SMHA has observed this ratio on a macro basis. However, the Scheme and the Manual specifically make it clear that management transfer applicants cannot be given priority as of right over ordinary applicants who have higher points scores. This can only happen in the limited circumstances set out in the Scheme and explained in the Manual.

[22] Thus according to the Guidance Manual, while K and Mrs G as management transfer applicants can take advantage of the limited exceptions offered under Rules 71 and 72, Ms O'D is only a transfer applicant and is not in a position to rely on this exception to the General Rule. On any reading she must rely on Rule 48 to escape the consequences of the General Rule. This is explained in the Guidance Manual at chapter 5 and I will come back and deal with it later on in this judgment. Mr Black in his evidence did not rely on Rule 48. Instead he relied on Rule 47 but it was never contended by any party in these proceedings that the Applicant was not "a relevant applicant" within the meaning of Rule 47.

Sequential or Simultaneous

[23] Ms Ferran, Assistant Director, in her affidavit explains that the system operated by NIHE (and Participating Landlords) is that of the sequential approach rather than the simultaneous approach when allocating new housing units. In other words an applicant for social housing is "filtered" from the waiting list while that applicant considers the offer of housing that has been made to him. The reasons for this approach are set out in detail in her affidavit. In essence, NIHE has used a sequential approach because it is more practical, less wasteful and fairer. In her

affidavit the evident advantages of the sequential approach are set out in some detail. These are:

(i) It reduces the time that potentially lettable properties are left empty.

(ii) It allows allocations to be dealt with more expeditiously.

(iii) It reduces the risk of squatting.

(iv) It minimises the loss of rental revenue.

[24] Mr Lavery QC for the Applicant, argued that the advantages claimed by Ms Ferran were largely illusory and that SMHA should have adopted a simultaneous approach. On Mr Lavery QC's construction SMHA would have had, at the minimum, to offer the Applicant, if he had been on the waiting list, all the two bedroomed units in the PS. The Applicant would then have had an opportunity to consider them and decide which unit, if any, was to his liking. He was unable to provide the court with any guidance as to:

(a) What restriction, if any, should be placed on the number of units to be offered at any one time?

(b) What period of time the Applicant would have to consider each of the units which had been offered to him?

[25] In respect of whether SMHA should have adopted a sequential or simultaneous approach, it was originally suggested, that support for this was derived from the entitlement of the applicant to have 3 opportunities to refuse offers of accommodation without reason pursuant to Rules 46 and 59. But it is not correct to try reading Rule 59 as giving an applicant a right to be offered three properties at any one time, if there are three or more properties available. This Rule relates to the right of refusal without adequate reason, not the right to select from a group of properties. I do not consider that the author of the Scheme intended Rule 59 to qualify or modify the General Rule expressed at Rule 46. To say, for example, that someone has the right to refuse an offer of employment on three occasions without good reason, is not the same as saying that that person has the right to be offered three different jobs so he can select from those three jobs which is the most desirable.

[26] The other ground relied upon is the NIHE's decisions to amend the Rules subsequent to this challenge to provide expressly that offers had to be made sequentially rather than simultaneously. The fact that NIHE now seek to amend the Rules to make explicit that the sequential approach has to be adopted (and it has been in operation for 30 years I am informed) does not have the effect of requiring a court to construe the Rules of the Scheme as presently drafted as requiring the adoption of a simultaneous approach. It is noteworthy that Rule 69 provides that

with difficult to let properties then the Designated Officer has a discretion to make simultaneous offers. This strongly suggests that in respect of other properties, which are not difficult to let, he does not have such a discretion. Secondly, a fair reading of the Rules, and in particular Rule 58, makes it clear that this Scheme is not one in which the applicant can expect to be offered a selection of properties from which to take his pick. Thirdly, for the reasons offered by Ms Ferran I consider that the construction contended for by the Applicant would produce an absurd result. Namely, in the words of Bennion on Statutory Interpretation (Page 69), a construction that is "unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial or productive of a counter mischief". Here I consider that the result of a simultaneous approach would be to produce an unworkable, impracticable and inconvenient system for dealing with applications on the common waiting list.

[27] Accordingly, I reject any claim that the sequential approach to vacant residential units is unlawful or unfair.

FINDINGS

[28] On the basis of the affidavit evidence, the exhibits thereto and the oral testimony of Mr Black, Chief Executive, I make the following findings:

(i) SMHA as a participating landlord represented unequivocally that it would follow the Scheme. Furthermore as a participating landlord under the Scheme it was bound to follow the Rules of the Scheme.

(ii) The Guidance Manual is published to provide assistance to housing officers. It gives them detailed guidance as to how this Scheme should operate. Necessarily it provides a gloss to the Scheme and where there is a conflict between it and the Scheme or there is an ambiguity, it is the Rules which should prevail.

(iii) K and J O'D failed to follow the guidance given by the DSD. They should have had it recorded in the minutes that they were in an actual or potential conflict of interest. The minutes should have recorded that they had removed themselves from any meeting in which the allocation of units at the PS was discussed.

(iv) Mr Black determined that the policy for allocating units at the PS was to prefer transfer applicants. This is recorded as being said by Mr Black's housing officer in an e-mail of 20 January 2013 from the Applicant's brother and copied to the Applicant. It was not contradicted subsequently by Mr Black. However when Mr Black gave his sworn testimony, he said in answer to questions whether the transfer system can by-pass the points system in the allocation of housing that:

"Yes with management (transfers)."

He further stated:

"Management transfers give discretion to by-pass points transfer."

Mr Black knew that the Guidance Manual permitted him only to consider the limited class of management transfer applicant regardless of their points, not transfer applicants generally. But Ms X's selection can only be justified on the basis of a policy of prioritising transfer applicants.

(v) Mr Black in his testimony to the court gave the clear impression that he understood that management transfers could be treated differently to other applicants under Rules 71 and 72 as explained by the Guidance Manual. He did not expect that transfer applicants in general could avoid the points system. However the submissions by Mr Dunlop for the NIHE and supported by Mr Sharp for SMHA was that the parallel system which allowed the points scored to be by-passed applied to all transfer applicants. I do not accept this is correct whether one considers the Rules on their own or together with the advice offered by the Guidance Manual.

(vi) Ms X was not a management transfer applicant. She was not even a full duty applicant. Mr Black when pressed said that he had dealt with the Applicant under Rule 47. He said that he was matching needs to appropriate accommodation. However he could not possibly have made a ruling that the Applicant was not a "relevant applicant", and indeed Mr Sharp did not pursue this point presumably because Mr Black had not made any enquiries sufficient to allow him to reach such a conclusion as to the needs of the Applicant.

(vii) Insofar as Mr Black sought to allocate accommodation to Ms X on the basis that there was a parallel process for the allocation of transfer applicants in general, he failed to take into account 7.10 of the Guidance Manual. This category is a limited one and only applies to management transfer applicants and Ms X was clearly not one of these.

(viii) There was no evidence that Ms X required especially adapted or a specially purpose built house where an allocation outside the General Rule can be justified: see chapter 5.2 on Rule 48 and chapter 7.10 on Rule 71.

(ix) The policy to prioritise transfer applicants was, according to Mr Black, at least, based in part on:

(a) a bedroom tax which had not been implemented; and

(b) the outline of a consultation paper which proposed significant changes to the General Rules and included the relaxation of the transfer quota.

Mr Black should not have made decisions on changes he anticipated would be made. He should have applied the Rules as they stood.

(x) In making the allocation of the units when he did, Mr Black acted opportunistically. He noted the Applicant was not on the filtered list and made the allocation then. There does not appear to be any good reason why he had to make the allocation that day. However, he did not act in bad faith. Mr Black was entirely candid in his oral testimony. He said that regardless of whether or not the Applicant was on the waiting list, he would still not have been given a two-bedroomed unit in the PS because management transfers were being prioritised. I do not consider Mr Black would have been so forthcoming if he had been acting mala fides. Mr Black never had any intention of allocating any of the units in the PS to the Applicant. If the Applicant had not been offered Perry Court, he would still not have been offered a unit in the PS. There were others in addition to the Applicant, such as Ms N, who were affected by this policy of preferring transfer applicants in general and Ms X in particular. (The court was not given any information as to her present housing position.)

(xi) The cool reception and the failure to fully engage with the Applicant and his brother on the part of Mr Black is probably explained by the fact that Mr Black felt uncomfortable because his policy of giving priority to transfer applicants in the allocation of units at the PS was likely to come under careful scrutiny, if the Applicant was not pre-allocated a unit at the PS.

(xii) Mr Black was not accurate when he told the Applicant's brother that SMHA "is not yet in a position to formerly consider allocation to the units you mention as we do not yet own those units". I consider that this inaccuracy (and others) was a consequence of Mr Black's decision to prefer transfer applicants, a matter which he certainly did not make expressly clear to any of the applicants for units in the PS, including the Applicant and his brother.

(xiii) At the meeting of 25 January 2013 between NIHE representatives and Mr Black, NIHE staff made no recommendations or nominations in respect of the allocation of the new build properties. The needs of families with dependent children, the elderly and those with complex needs were discussed. However, Mr Black did not tell the NIHE employees that it was to be SMHA's policy to prioritise transfer applicants at the expense of others on the common waiting list. If he had, I have no doubt the NIHE representatives would have explained that such a blanket policy was in breach of the Scheme (and the Manual).

(xiv) It is significant that where allocations are being made to "management transfers" the allocation has to take into account "the overriding needs of intimidation cases". None of the three management transfers arose as a consequence of intimidation (see 7.11 of the Manual), whereas the Applicant's requirement for housing did. I do not consider that given the enquiries he made and the failure to inform himself of the Applicant's actual position, Mr Black was in a position to determine whether "the total benefit of the transfer was greater than if the dwelling were to be allocated to a new applicant".

(xv) Mr Black's knowledge of the Applicant's personal circumstances was very limited:

(a) He was not clear where he lived – Vulcan Street, Pottingers Quay or Chemical Street. Although he claimed that the Applicant was slightly evasive he never made any independent enquiry to alleviate his concerns.

(b) He misunderstood the nature of the intimidation and why the Applicant was able to live within 200 yards of his current address. He did not fully understand the needs or circumstances of the Applicant.

(c) He had no idea of the mental difficulties experienced by the Applicant consequent upon his intimidation.

Mr Black displayed little interest in the Applicant's personal circumstances. I conclude that this was because of his policy to prefer transfer applicants, of which the Applicant was clearly not one.

(xvi) Mr Black considered "the life time home features" of the units at the PS to "perhaps" surpass the Applicant's needs. It is not surprising that there is a qualification of "perhaps" (at least twice) on his assessment because Mr Black never objectively assessed those needs. The personal circumstances of the Applicant were not something to which Mr Black paid much attention.

(xvii) Mr Black appeared not to consider the family unit of the Applicant to be comparable to the family units of the others who made application for units in the PS. I obtained this impression from his evidence in court and some of his comments in his affidavits about the domestic arrangements of the Applicant and his brother.

(xviii) Instead he proceeded on the basis that priority should be given to transfer applicants. The questioning of Mr Black by Mr Lavery QC revealed a failure on Mr Black's part to make a fair and objective assessment of the needs of each of the respective applicants. Instead, he proceeded on the basis that priority should be given to transfer applicants and he has now sought

subsequently, I conclude, to substantiate the choices that he made. This explains the absence of any contemporaneous documentary evidence seeking to make assessments of each of the applicants for units in the PS.

(xix) There was a complete failure by Mr Black to consider the special and specific needs of the Applicant (or Ms X) "in order to determine whether their particular requirements would merit a departure from the Waiting List in relation to the particular characteristics and amenities of the property to be offered": see paragraph 5.2 of the Guidance Manual. This goes on to state that a deviation under Rule 48 can be justified only if those applicants higher up the Waiting List do not have similar needs for the particular accommodation or location as the Applicant being considered. This exercise was never carried out, or if it was carried out, it has never been drawn to the attention of the court. Furthermore, it does not appear that the factors which SMHA had to take into account when applying Rule 48, for example a profile of the Waiting List or turnover do not appear to have been taken into account. I am also less than satisfied that Mr Black took into account the specific needs of Ms X or the characteristics or location of the property to be allocated. Given Mr Black's failure to pay proper heed to chapter 5 and in particular paragraph 5.2 of the Guidance Manual, it is not surprising that the SMHA originally did not contend that the successful application of Ms X was due to her exceptional circumstances under Rule 48. I note no case has been made that the Applicant was not a relevant Applicant under Rule 47.

[29] In summary the process by which units in the PS were allocated was not fair. It was not fair because Mr Black misunderstood or was ignorant of the Applicant's circumstances, a consequence of not making adequate enquiry or giving the Applicant adequate opportunity to highlight those matters to which SMHA should have had regard. Instead allocation was based on a flawed, if well intentioned policy of preferring a certain category of candidates. The preference afforded to transfer applicants was unlawful being contrary to the rules of the Scheme in general and Rule 46 in particular. It was not transparent because nowhere is there any documentary record of how the assessments of each of the candidates were made and how the allocations were subsequently carried out.

DISCUSSION

Unlawful approach

[30] The Applicant was a "relevant applicant" within Rule 47 on the information before the court. He was entitled to expect general Rule 46 to be followed and accommodation awarded to those with the highest points score. SMHA, in pursuing a policy of prioritising transfer applicants whether because of the introduction of a bedroom tax or because of a consultation paper which proposed significant changes to the General Rules or for whatever reason, acted unlawfully. If the Guidance Manual does create a category of applicants which is not dependent on the award of

points for the allocation of accommodation then that category is stated by the Guidance Manual to be "management transfer applicants" and did not include Ms X. The refusal of Mr Black to consider the Applicant for the PS arose because he was not a transfer applicant (even though he was a full duty applicant). It mattered not, Mr Black admitted in evidence, whether the Applicant was on the filtered list on the day of pre-allocation or not. The Applicant was not going to be chosen for one of the two bedroomed apartments. Mr Black, to ease the difficulties he might have with such an approach, opportunistically chose to make the pre-allocation of the housing units immediately he knew the Applicant was not on the filtered list. In those circumstances the Applicant is right to feel that he was not treated fairly and equitably. This court finds that the policy pursued by Mr Black of giving priority to one class of applicants, while it may have been well intentioned, was not lawful under the Scheme.

Fettering the Discretion

[31] It is a basic rule of administrative law that a public authority who has to exercise a discretion must retain for itself the opportunity of exercising this discretion in respect of each case it has to determine. Accordingly, it is not open to a public authority to adopt an approach to the exercise of its duty which effectively transforms a discretion into a rule. As De Smith's Judicial Review (7th Edition) 9.016 states:

> "The courts will therefore scrutinise closely the conduct of the decision-maker in assessing whether or not he has lawfully fettered his discretion."

[32] There is obviously a close connection between the lawful exercise of a discretion and legitimate expectation (see below). As De Smith says at 9.021:

> "When a public authority openly prescribes the criteria upon which it proposes to decide it may thereby create legitimate expectation that unfairness should be given some procedural, or even substantive, protection." (See 9.021)

[33] The decision to prioritise transfer applicants was not in accordance with the Rules of the Scheme. It was also not in accordance with the Guidance Manual. Such a policy unlawfully fettered the discretion of SMHA. Each application should have been considered on the basis of the Rules of the Scheme and not by having a blanket policy of giving preference or priority to one type of candidate. Insofar as the policy was influenced by a proposed bedroom tax or a consultation paper, I do not consider that such considerations were lawful. The Scheme should have been applied to the respective applicants as it stood.

Legitimate Expectation

[34] The doctrine of legitimate expectation according to Gordon Anthony in his book on judicial review at 6.29:

> "Is based on the understanding that there are some instances in which the law should prevent public authorities making discretionary choices that are contrary to an individual's expectation that the decision-maker will act in a particular manner."

The authorities emphasise that such representations have to be "clear and unambiguous". Girvan LJ said in The Matter of Loreto Grammar School, Omagh [2012] (NICA 1 at paragraph 42):

> "[42] Whatever undesirable uncertainties may exist in the law of substantive legitimate expectation, it is clear from the authorities that a legitimate expectation can only arise where there has been, in Bingham LJ's succinct terminology, a **clear and unambiguous representation devoid of relevant qualifications** as to the decision-maker's future conduct (see for example Attorney General for Hong Kong v. Nvunyen Shieu [1983] 2 WLR 735, Bancoult [2009] 1 AC, Coughlan and Association of British Internees v. Secretary of State for Defence [2002] EWHC (Admin) 2119). A legitimate expectation may arise from an express promise given by or on behalf of a public authority or it may arise from the existence of a clear and regular practice which a claimant can reasonably expect to continue (see for example Lord Fraser in Council for Civil Service Unions v. Minister for the Civil Service [1985] AC 374 at 401). It has been stated, for example, in R v. Falmouth and Truro Port Health Authority (ex party South West Water Limited) [2001] QB 445 that **only the clearest of assurances can give rise to a legitimate expectation** (per Simon Brown LJ and Pill LJ). The promise or representation must come close to the character of a contract (see Lord Wolff MR in R v. North and East Devon Health Authority (ex party Coughlan) [2001] QB 21. In R (Niazi) S o S v. The Home Secretary Laws LJ held that the court must be able to find that the public authority has **distinctly promised** before such a legitimate expectation to arise."

[35] I consider that there was a clear representation that SMHA would operate the Scheme as explained in the manual in the same way as the NIHE. The Applicant was entitled to expect that in allocating the new units at the PS SMHA would follow the Rules of the Scheme.

[36] There can be no doubt that SMHA did not follow the Scheme for the following reasons:

(a) A blanket policy of prioritising transfer applicants (or even management transfer applicants) was not in accordance with the Rules. Such a policy was inimical to the Scheme regardless of what taxation changes were proposed or what consultation papers were to be published.

(b) There was a failure to consider whether there were exceptional circumstances justifying a departure from the General Rule 46, especially in the case of Ms X, who was not a management transfer applicant unlike K and Mrs McG. If there was a right for transfer applicants to escape the award of accommodation on the basis of need as assessed by points, as the Guidance Manual but not the Rules suggest, this exception only applied to management transfer applicants and Ms X could not take advantage of it.

(c) There was a failure to adequately take account of the Applicant's personal circumstances and, in particular, the effect intimidation had had on him and his circumstances.

(d) The structure of the family unit of Ms X appears to have been preferred to the structure of the Applicant's family unit.

Article 8

[37] There was some dispute as to whether rights which the Applicant enjoys under Article 8 of the European Convention on Human Rights ("ECHR") were engaged. In Chapman v United Kingdom [18 January 2001: Application No 27238/95] the European Court of Human Rights stated at paragraph 99:

> "It is important to recall that Article 8 does not in terms give a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. While the State provides funds to enable everyone to have a home is a matter for political not judicial decision."

[38] In Ekinci v London Borough of Hackney [2001] EWCA Civ 776 Pill J at paragraph 16 said:

> "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. In assessing priorities, Parliament is entitled to take into account considerations, such as vulnerability which may or may not have an impact on family life, as well as those which inevitably do. … Article 8(1) does not require applicants with child spouses to be given priority over applicants with adult spouses or over other categories of applicant."

The Applicant had been offered a property suitable for his needs, Perry Court, but he complained that his rights were engaged because another property became available later which he considered preferable and for which he was not considered. In Kay and Others v Lambeth London Borough Council [2006] 2 AC 465 Lord Nicholls said in respect of a possession case that:

> "Interference will be justified as **necessary in a democratic society** on one or more of the grounds set out in Article 8(2). The interference will be justified because in one case the defendant has never had any right to be on the property at all. In the other case the defendants had only limited rights afforded by the housing legislation."

[39] I also note that in In the Matter of an Application by Josephine Clarke for Judicial Review Kerr J, without commenting on whether the applicant's Article 8 rights were engaged, said:

> "The applicant's claim that the decision of the Executive breached her Article 8 rights must be considered in the light of willingness of NIHE to rehouse her and her family as soon as the dwelling in the area(s) chosen by her becomes available. In essence the applicant's complaint against NIHE is that it has failed to accord sufficient priority to her claim. It is clear that the Executive must devise a system of allocation of houses which caters for all the demands on its housing stock. Provided the policy which it has devised is fair and is operated equitably, NIHE

> cannot be faulted if in an individual case, a tenant's aspirations cannot be satisfied immediately."

[40] I have concluded that the policy adopted by SMHA for the allocation of the two-bedroom units in the PS was not fair and did not operate equitably. Furthermore, as I have said, there appears to have been a preference given to the family unit of Ms X over that of the Applicant. 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.

Unfairness

[41] Clayton and Tomlinson in the Law of Human Rights at 11.155 state:

> "Two general points should be noted about the **duty to act fairly** in English public law. First, although the question of whether fairness is required and what is involved in order to active fairness is a decision for the court, the standard to be applied is a flexible one. As the House of Lords made clear in R v Secretary of State for the Home Dept ex p Doody [1994] 1 AC 531 standards of fairness are not immutable and change over time, both in general and in an application in particular of cases. Furthermore, principles of fairness cannot be applied by rote but depend on the context of the decision in question. Secondly, the duty goes beyond the areas normally covered by constitutional **due process rights:** the duty does not just lie on those charged with the **determination of civil rights and obligations or of any criminal charges** but extends to all decisions made by public bodies. In the present context the aim is to examine the common law **fair hearing rights** which apply to what English public law regards as **judicial or quasi-judicial** decisions."

[42] In this case I would have expected that Mr Black, if he was considering by-passing the points system in order to give priority to transfer applicants, would have ensured that he was fully conversant with the personal circumstances of all those who were affected. I would also expect him to have adequately documented such enquiries and to be able to justify his selections objectively.

Bad Faith

[43] On the day of the allocations, 29 January 2013, it is true that the Applicant was not on the filtered list as he had not yet been able to reject the offer of accommodation at Perry Court. Mr Black was in no doubt that the Applicant's preferred choice was a two bedroom residential unit at the PS. As I have said he

noted the Applicant was not on the filtered list and made his allocation then. There does not appear to be any good reason why the allocation had to be made at that particular time. Mr Black probably hoped that by making an allocation at this time his policy of preferring transfer applicants would not the subject of a detailed examination by any disappointed applicant. This did not make the approach of SMHA lawful, as clearly there were other applicants with higher points who were adversely affected by the approach of SMHA such as Ms N. Furthermore, I have no doubt that the selection was opportunistic. There are ambiguous and contradictory comments from Mr Black about his knowledge of the Applicant's search for accommodation. I conclude from reading the affidavits and hearing his evidence that he checked and knew the Applicant was off the list because he was considering Perry Court. He decided to make the allocation at the PS on 29 January for that very reason. At that time Mr Black would have had no doubt that the Applicant wanted a unit at the PS in preference to Perry Court. So he therefore made the allocation of the units when he did because he thought that this would make it easier to defend his decision. However, it is quite clear from his oral testimony that if the applicant had been on the filtered list, Mr Black would still have preferred the other transfer applicants over him. In other words, a decision not to give the Applicant a unit at the PS was made earlier, when Mr Black decided to prioritise transfer applicants over ordinary applicants.

[44] I do not consider that in so acting Mr Black was guilty of bad faith or malice or improper motive. As he frankly stated under oath, an admission, I conclude, he would not have made if he had been guilty of bad faith, he had already decided to prioritise transfer applicants and whether the Applicant was on the list was not something that would have had a decisive influence on his actions. Mr Black did not act dishonestly or take a course of action which he knew to be improper. I have no doubt that he was acting from the best of motives. For the record, it is important to note that I do not consider that he has fulfilled the necessary criteria for bad faith or improper purpose set out at 5.47 of Anthony on Judicial Review in Northern Ireland or paragraphs 30-33 of Gillen J's decision in the Matter of Sheridan Millennium [2008] NIQB 8. However, in failing to follow the Scheme, and in particular the General Rule and by not considering the relevant factors on whether or not this was an exceptional case, SMHA clearly acted unlawfully.

Apparent Bias

[45] In Porter v Magill [2002] 2AC 357 Lord Hope at paragraph 103 said that the test of whether there was apparent bias should be as follows:

> "The question is whether the fair minded and informed observer, having considered the facts, would conclude that it was a real possibility that the Tribunal was biased.

[46] In Helow v Secretary of State for the Home Department [2008] 1 WLR 2416 Lord Hope at paragraph 2 said:

> "That the fair minded and informed "observer" is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious … but she is not complacent either. She knows that fairness requires that the judge must be, and must be seen to be, unbiased."

[47] The fair minded and informed observer would have considered there was a real possibility of bias. Both K and J O'D should have declared that they were in an actual or potential conflict of interest; they should have played no part in development of the PS and in particular in the allocation of its units; and this should have been recorded. Indeed, there is much to be said, given Mr Black's invidious position as chief executive answerable to the board, for this exercise to be carried out by an outside body independent of SMHA. I was told that where such circumstances had arisen in the past an employee of the NIHE of suitable experience would carry out the allocation exercise on behalf of the Housing Association. This seems to be a solution tailored to the needs of this particular allocation of housing units. It is important to record that this is a conclusion of apparent bias and I do not find that there was any actual bias on the part of Mr Black or SMHA.

CONCLUSION

[48] For the reasons which I have given I conclude that the allocation of the two bedroomed units in the PS was unlawful. It was not fair and equitable. The decision to prioritise transfer applicants was not in accordance with the Rules of the Scheme (or of the Guidance Manual). In my opinion such a policy was unlawful. It fettered the discretion of SMHA. Each application should have been approached on the basis of the Rules of the Scheme. In the circumstances of this allocation a fair-minded and informed observer would have concluded there was a real possibility that the allocation process was infected with bias.

RELIEF

[49] In determining what relief I should grant, I gave each of the parties an opportunity to make oral and written submissions. They have done so most comprehensively and I am extremely grateful to them.

[50] I conclude that in this application the proper principles for the court to follow are as follows:

(i) Judicial review remedies are discretionary. The exercise of this discretion is fact sensitive.

(ii) The court has a narrow discretion to refuse to grant relief where the judicial review has been successful.

(iii) The margin of discretion is even narrower where there has been a breach of the Applicant's Convention rights: see De Smith's Judicial Review 7th Edition at 18.048. I accept Lord Bingham's statement of the law in Berkeley v Secretary of State for the Environment and Another [2000] 3 WLR 420 where he said:

> "In the Community context, unless a violation is so negligible as to be truly de minimis and the prescribed procedure has in all essentials been followed, the discretion (if any exists) is narrower still."

(iv) The grounds on which relief can be refused include delay by the Applicant, other reprehensible conduct of the Applicant, the existence of an alternative remedy, the absence of any practical purpose in granting a remedy;

(v) The effect of a remedy on the respondent or other third parties.

(See Supperstone, Goudie and Walker on Judicial Review (4th Edition) at 18.12.1).

[51] As Mr Justice Gillen memorably said in Re Zhanje's Application for Judicial Review [2007] NIJB 14 at paragraph [2](b) of the section entitled "Conclusions on the Removal Issue":

> "Once the fabric of justice is torn, steps must be taken to repair it. Good administration cannot be invoked to bury manifest injustice."

There is no suggestion the Applicant did not move promptly or that his conduct or that of his solicitors is open to any criticism. There is no alternative remedy open to him nor is it impossible to give him practical relief. Therefore the decision whether to grant relief depends on its effect on third parties. I agree that when a number of people may be adversely affected should substantial relief be granted, then good administration may be undermined and this is a reason for not giving relief. In this case I am told that K and Mrs McG, management transfer applicants unlike Ms X, have given up their previous tenancies, they have taken up tenancies in the PS and are presently in occupation. I have been made aware of the disability problems that affect these two families. I therefore decline at this stage to make any order that will affect them, their families or their private law rights.

[52] The Notice Party, Ms X, has not taken up residence in the PS nor has she entered into a tenancy agreement for the PS. I note that she has lived in her present accommodation for eight years. While I am sure that a two storey accommodation might be of some assistance in preventing one of her two children from disturbing the other child's sleep because of her asthma, I am far from convinced on the facts as I understand them, that such a move is absolutely necessary. It is obvious that if one of the children wakes because of her asthma, then Ms X would be required to accompany that child downstairs, if such downstairs accommodation was available. I do not understand why Ms X cannot achieve the same end by taking a child into her bedroom. Mr Sayers, on her behalf, was unable to offer any explanation. However even if there is a good reason why she cannot do this, I still do not see it as a reason why I should not grant relief given the period of time they have occupied their present residence. There is also the purchase of furniture by Ms X for her new residence. The new sofa may be too big for her present accommodation as she claims but it is clearly in use. This was purchased, according to the documents I was sent, before she was allocated the new property. No satisfactory explanation has been provided for this inconsistency. The table and chairs remain unpacked. I was not told whether or not she would be entitled to a refund if they were returned to the retailer. I also note that the documents record the bed and mattress were purchased by another person. Again no satisfactory explanation has been offered for this anomaly. In any event Ms X appears, prima facie, to have a claim against SMHA for any loss she may have suffered. I also take account that the need for accommodation is measured by the points system and that her points amount to a fraction of that of the applicant. Mr Sayers, on behalf of the Notice Party, asserted that as the Applicant had brought this judicial review he was leaving himself open to be intimidated at his new address. The Applicant and his family are best able to judge whether this is correct given the nature of the intimidation. I am certainly not in a position to make a ruling on the basis of the facts before me. It would be most unwise for me to fall into error by speculating when I do not know the applicant's circumstances. In doing so, I would be making a mistake similar to that of Mr Black. I do not consider that giving a declaration provides sufficient relief to the Applicant and he is entitled to substantial relief so that the injustice visited upon him can be mended. I propose to adopt the approach of Weatherup J in Re Hove and Another which was followed by Gillen J in Re Zhanje's Application. Weatherup J invoked Section 21 of the Judicature Act (NI) 1978 this section provided that:

> "… Where an application for judicial review –
>
> The relief sought is an order certiorari; and
>
> The High Court is satisfied that there are grounds for quashing the decision in issue, the court may, instead of quashing the decision, remit the matter to the lower deciding authority concerned, with the direction of reconsidering it and reach a decision in accordance with the ruling of the court or may

> reverse or vary the decision of the lower deciding authority."

[53] I remit the matter back for consideration to SMHA. I consider it preferable for the reasons set out that the decision is taken by someone outside SMHA. I do not see any reason why this cannot be done by an official of NIHE who has not been involved in the pre-allocation of housing in the PS. This would obviously exclude Ms Ferran, Mr Graham and Mr McPeake. I direct that the Applicant be included for consideration together with Ms X and all those others presently eligible under the waiting list.

[54] I will hear the parties on the question of costs.