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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY LORRAINE McHUGH FOR JUDICIAL REVIEW

KERR LCJ

Introduction

[1] This is an application by Lorraine McHugh, a woman who suffers from multiple sclerosis, for judicial review of a decision of Homefirst Community Health and Social Services Trust not to make arrangements for the provision of assistance to her to carry out works of adaptation at her home. She also seeks a declaration that the Housing Renovation etc Grants (Reduction of Grant) Regulations (Northern Ireland) 1997 are ultra vires the Housing (Northern Ireland) Order 1992 and a declaration that the means test provided for in the regulations is not compatible with articles 3, 6 and 8 of the European Convention on Human Rights and Fundamental Freedoms and article 1 of the first protocol to the Convention.

Factual background

[2] The applicant is a forty four year old woman. She is married to a man who comes from a different religious background. In 1995 she and her husband moved to a chalet bungalow in Ahoghill, County Antrim. At that time Christine McCready, an occupational therapist employed by Homefirst, recommended the installation of certain facilities in the house because of the applicant's medical condition. The trust provides certain equipment to someone such as Mrs McHugh. This is in the nature of wheelchairs, shower seats and ramps up to a total value of £800. It is the trust's position, however, that it is not responsible for major structural alterations. Under current legislation, it contends, this is the responsibility of the Northern Ireland Housing Executive.

[3] After Ms McCready had made her recommendations, Mrs McHugh made inquiries about the availability of grant assistance but she was informed by the Housing Executive that she and her husband would be required to make a substantial contribution based on an evaluation of their resources. Mrs McHugh decided not to proceed with an application for a grant but she claims that she spent a considerable amount (some £33000) on adaptations to her home. Because of their different religious backgrounds and sectarian tensions in the area Mr and Mrs McHugh felt obliged to leave Ahoghill in February 2000.

[4] In the home where the applicant and her husband now live she is unable to use the bathroom. She is obliged to use a commode and finds this distressing and undignified. Her independence has been significantly curtailed and Ms McCready has recommended that certain adaptations be undertaken to accommodate Mrs McHugh's condition. On foot of this report Mrs McHugh applied to the Executive for a disabled facilities grant that would enable her to have the modifications to her home carried out. This was refused on the basis of a means test in which her husband's income was taken into account. In conducting the means test, however, the debt that the couple had incurred in their previous home was disregarded. It is estimated that the adaptations necessary will cost approximately £15000. Mrs McHugh does not have enough income or capital to pay for the works that are necessary.

Statutory framework

[5] By virtue of section 1 (1) of the Chronically Sick and Disabled Persons (Northern Ireland) Act 1978 the Department of Health, Social Services and Public Safety for Northern Ireland is required to inform itself of

> "… the number of and, so far as reasonably practicable, the identity of persons who are … substantially handicapped by illness, injury or congenital deformity and whose handicap is of a permanent or lasting nature … and of the need for the making by that Department of arrangements for promoting the social welfare of such persons under Articles 4(b) and 15 of the Health and Personal Social Services (Northern Ireland) Order 1972."

[6] Section 2 (e) of the 1978 Act provides: -

> "**2.** Where the Department of Health, Social Services and Public Safety for Northern Ireland is satisfied in the case of any person to whom section

> 1 above applies that it is necessary in order to meet the needs of that person for that Department to make arrangements under Article 4 (b) and 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 for all or any of the following matters namely-
>
> (a) … (d)
>
> (e) the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience;
>
> (f) … (h)
>
> then, that Department shall make those arrangements"

[7] Article 4 (b) of the 1972 Order required the Department to provide or secure the provision of personal social services in Northern Ireland designed to promote the social welfare of the people of Northern Ireland. Article 15 of the same Order dealt with general social welfare and provided in paragraph (1): -

> "*General social welfare*
>
> **15. -** (1) In the exercise of its functions under Article 4(b) the Department shall make available advice, guidance and assistance, to such extent as it considers necessary, and for that purpose shall make such arrangements and provide or secure the provision of such facilities (including the provision or arranging for the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate."

The Homefirst trust is established under the provisions of the Health and Personal Social Services (Northern Ireland) Order 1991 and part of its responsibilities includes acting as agent on behalf of the Department, within the trust's area, to ensure the performance of the Department's obligations under the 1978 Act.

[8] Grant aid to assist with works necessary to adapt the home of a disabled person in order to allow that person to make proper use of his or her home has been available since 1983 under the Housing (Northern Ireland) Order 1983. This was replaced by the Housing (Northern Ireland) Order 1992. It provides in article 39 (1): -

> "**39.**—(1) In accordance with this Chapter, grants are payable by the Executive towards the cost of works required—
>
> (a) …
>
> (b) …
>
> (c) for the provision of facilities for disabled persons in dwellings and in the common parts of buildings containing one or more flats."

Article 39 (2) (c) provides that a grant for the provision of facilities for a disabled person in a dwelling was to be known as a 'disabled facilities grant'.

[9] Article 47 of the 1992 Order deals with applications for grants by owner occupiers or tenants. It provides: -

> "*Owner-occupiers and tenants*
>
> **47.**—(1) Where an application for a grant is accompanied by an owner-occupier certificate, a tenant's certificate or a special certificate, then, if the financial resources of the applicant exceed the applicable amount, the amount of any grant which may be paid shall be reduced from what it would otherwise have been in accordance with regulations made by the Department with the consent of the Department of Finance and Personnel.
>
> (2) For the purposes of this Chapter, the Department may by regulations made with the consent of the Department of Finance and Personnel—
>
> (a) make provision for the determination of the amount which is to be taken to be the financial resources of an applicant for a grant; and

(b) make provision for the determination of the applicable amount referred to in paragraph (1).

(3) Without prejudice to the generality of paragraph (2), regulations under this Article—

(a) may make provision for account to be taken of the income, assets, needs and outgoings not only of the applicant himself but also of his spouse, any person living with him or intending to live with him and any person on whom he is dependent or who is dependent on him;

(b) may make provision for amounts specified in or determined under the regulations to be taken into account for particular purposes."

[10] Article 52 (1) deals with approval of disabled facilities grant applications. It provides: -

"**52.**—(1) The Executive shall not approve an application for a disabled facilities grant unless it is satisfied—

(a) that the relevant works are necessary and appropriate to meet the needs of the disabled occupant; and
(b) that it is reasonable and practicable to carry out the relevant works, having regard to the age and condition of the dwelling or building;

and, in considering the matter specified in sub-paragraph (a), the Executive shall consult the relevant Health and Social Services Board."

[11] Article 52 (3) deals with the various purposes that a disabled facilities grant may be applied for and the circumstances in which the Executive should grant it. It is in the following terms: -

"(3) Subject to the preceding provisions of this Chapter, the Executive shall approve an

application for a disabled facilities grant if the relevant works are for any one or more of the following purposes—

(a) facilitating access by the disabled occupant to and from the dwelling or the building in which the dwelling or, as the case may be, flat is situated;

(b) facilitating access by the disabled occupant to a room used or usable as the principal family room;

(c) facilitating access by the disabled occupant to, or providing for the disabled occupant, a room used or usable for sleeping;

(d) facilitating access by the disabled occupant to, or providing for the disabled occupant, a room in which there is a lavatory, bath, shower or washhand basin or facilitating the use by the disabled occupant of such a facility;

(e) facilitating the preparation and cooking of food by the disabled occupant;

(f) improving any heating system in the dwelling to meet the needs of the disabled occupant or, if there is no existing heating system in the dwelling or any such system is unsuitable for use by the disabled occupant, providing a heating system suitable to meet his needs;

(g) facilitating the use by the disabled occupant of a source of power, light or heat by altering the position of one or more means of access to or control of that source or by providing additional means of control; and

(h) facilitating access and movement by the disabled occupant around the dwelling in order to enable him to care for a person who is normally resident in the dwelling and is in need of such care.

It is claimed that the applicant's requirements fall within sub-paragraphs (c), (d), (f) and (g) of this provision.

[12] Regulation 11 of the 1997 Regulations provides that the amount of the grant shall be reduced according to the financial resources of the applicant, as calculated by various formulae therein set out. If the financial resources of the applicant exceed an 'applicable amount', the reduction of the grant payable is determined by a sliding scale that reflects the excess. The 'applicable amount' is defined in regulation 9 as the aggregate of " (a) the total of the weekly applicable amounts of all those persons who are relevant persons in the case of that application, and (b) £40". By regulation 4 the partner of the person with the disability is included in the category of 'relevant persons'. Regulation 10 provides the amount which is to be taken to be the financial resources of the applicant shall be the total of the incomes of all those persons who are relevant persons in the case of that application. Income is determined according to the provisions of regulation 17 and Schedule 1 stipulates how this is to be taken into account in determining the applicable amount. The net effect of all this in the applicant's case is that, when her husband's income is taken into account, the financial resources of the applicant are found to exceed the applicable amount by a sufficiently large figure as to extinguish the grant that would otherwise be payable.

The issues

[13] For the applicant Mr Larkin QC advanced the following arguments: -

1. The duties imposed on the Department (and, by virtue of the 1991 Order, on the trust) under section 2 of the 1978 Act and article 15 of the 1972 Order were mandatory. All of the facilities that were recommended by the occupational therapist were 'necessary to meet the needs' of the applicant. The trust was therefore obliged to ensure that they were provided. It was not sufficient merely to assist with the application for the grant. If the applicant was unable to provide these facilities herself or if the Executive was not prepared to make the grant, the trust had an obligation to provide them.

2. The means test provided for in the 1997 Regulations fails to provide a legal framework for the effective protection of the applicant's rights under ECHR. In particular, the omission of any allowance for the applicant's outgoings prevented a fair and accurate determination of her actual ability to provide the facilities that her condition required.

3. The means test is, in any event, *ultra vires* the 1992 Order. It provides that regulations may be made to provide for the determination of the amount which is to be taken to be the financial resources of an

applicant for a grant. No sensible estimate of financial resources can be made without taking into account the applicant's outgoings. Article 47 (3) (a) contemplates that outgoings would be taken into account in this estimate.

4. No assessment was made by the respondents of the steps necessary to ensure that the applicant's ECHR rights were protected.

The trust's obligations

[14] The nature of the trust's obligations under section 2 of the 1978 Act and article 15 of the 1992 Order must be considered against the background of the breadth of responsibility that the various trusts have for the provision of services over a wide range of health and social welfare fields. To isolate from that vast array of duties a particular area of responsibility and consider its requirements on an individual basis may prompt a misconceived view as to the nature of these particular obligations. I am satisfied that the duty imposed in each item of legislation cannot sensibly be regarded as absolute in its terms. In other words, I do not accept the premise on which Mr Larkin's primary argument is founded, *viz* that, come what may, the trust was ultimately obliged, by reason of these provisions, to carry out the works to the applicant's house if the Executive did not provide her with a grant.

[15] The trust is party to an agreement made between it, the Northern Health and Social Services Board and the Housing Executive which, inter alia, provides that on the Executive receiving an application for a grant, an occupational therapist employed by the trust will make an assessment of the applicant's need and will report on the functional needs of the applicant. This will be provided to the Executive and, where a grant is payable, will form the basis of the estimate of the works that should be the subject of the grant.

[16] In the present case the chief executive of the trust, Christie Colhoun, described the steps that the trust had taken in a letter to the applicant's solicitor dated 6 December 2001. The following are the relevant passages from that letter: -

> "I am satisfied, in meeting our duties and obligations, that the trust has completed a full assessment of Mrs McHugh's needs and has met or assisted her in arranging for those needs to be met.

In effect the trust:

- has assessed Mrs McHugh's needs and identified how those needs should be best met;
- facilitated access to NIHE grants department to make a disabled facilities grant application;
- when Mr and Mrs McHugh decided not to proceed following the means test, gave advice on the purchase of an alternative property;
- facilitated access for a further application for a disabled facilities grant following purchase of an unsuitable property;
- provided minor adaptations and equipment to help Mrs McHugh in her previous and present properties;
- carried out a feasibility study for a lift installation which did not offer; and
- has liaised with, and gained agreement from, the NIHE that the McHugh family could be offered an alternative property, in an area of their choice, which could then be adapted.

Having given this matter careful consideration, and taking account of all the circumstances, most particularly that Mrs McHugh knowingly purchased an alternative property that could not meet her assessed need for a downstairs toilet and washing facilities, the trust cannot agree to provide financial assistance to carry out the necessary works."

[17] Section 2 of the 1978 Act and article 15 of the 1992 Order were considered by Coghlin J in *Re Judge's application for judicial review* [2001] NIQB 14. In that case the applicant challenged the alleged failure of the Causeway health and social services trust to discharge its duty under the 1978 Act. It was claimed that the trust was under a duty to install a non-manual system of heating in the applicant's property because she and her husband both suffered significant physical disability and NIHE, the owners of the property, refused to carry out the installation of a central heating system because there was other adults living in the house. On the argument that the trust was under a statutory obligation to provide the heating system, Coghlin J said: -

> "Once the provisions of s 2 of the 1978 Act are read in the context of arts 4(b) and 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 it is clear that the duty of the Department is to make such 'arrangements and provide or secure the provision of such facilities … as it considers suitable and adequate'. … I am satisfied that these provisions afford the Trust a discretion which must be exercised in accordance with the usual *Wednesbury* principles. I reject the suggestion by the applicant that the statutory provisions place the Trust under an obligation to 'guarantee' that a non-manual system will be installed. The Trust have clearly taken reasonable steps to arrange for the installing of such a system taking account of the fact that the applicant's premises remain the property of a third party, namely, the Housing Executive."

[18] I agree with the approach taken by Coghlin J to this issue. The duty imposed on the trust is to evaluate the needs of persons suffering from a disability and to take steps to alleviate them. It does not mean that the trust must in every instance provide from its own resources the facilities required to meet the requirements of the applicant. The present case exemplifies the impossibility of such a notion. According to the trust, the applicant moved into unsuitable premises knowing that they did not have a downstairs lavatory and washing facilities. It is the applicant's case, of course, that she contacted Ms McCready before doing so. But, if the case made on behalf of the applicant on this issue were accepted, she would have been entitled to move to a wholly unsuitable house and demand that the trust carry out the necessary adaptations. Such a situation, I am satisfied, cannot have been intended by the legislature.

[19] In deciding what level of assistance to render to the applicant, the trust was entitled to have regard to the impact that the selection of a particular package of measures would have on its resources. In *R v Gloucestershire County Council and another, ex parte Barry* [1997] 2 All ER 1, the House of Lords was considering the effect of section 2 (1) of the Chronically Sick and Disabled Persons Act 1970 (which is in broadly similar terms to the 1978 Act). It was held that in deciding how much weight was to be attached to the cost of providing facilities to persons with disability, the authority had to make an evaluation about the impact which the cost would have on its resources, which in turn would depend on the authority's financial position. It followed that a chronically sick or disabled person's need for services could not sensibly be assessed without having some regard to the cost of providing

them, since his need for a particular type or level of service could not be decided in a vacuum from which all considerations of cost were expelled.

[20] The decision in *Barry* reinforces the conclusion that the duty imposed on the trust is not absolute. It is a duty to do what it reasonably can to mitigate the effects of the disability on the person concerned, taking into account the finite nature of the resources available to it. In this context, I should refer to an argument advanced by Mr Larkin as to the trust's continuing duty to Mrs McHugh. He suggested that the trust had taken what it regarded as a "once and for all" decision not to provide the adaptations that she required and he relied on averments in the affidavit of Ms McClean to support that contention. At paragraph 2 of her affidavit she said that the trust "had discharged fully all of its statutory and administrative duties" to Mrs McHugh and in paragraph 3 that "major structural adaptations to homes … are entirely a matter for the Executive". These averments, Mr Larkin said, betrayed the trust's attitude that it had no longer any responsibility for Mrs McHugh. These claims were stoutly refuted by Mr Brangam QC for the trust. He asserted that the relationship between the trust and Mrs McHugh was "ongoing and cordial"

[21] I do not consider that the passages from Ms McCready's affidavit should be interpreted as suggested by Mr Larkin. The statements that he has highlighted merely reflect the trust's perception of the allocation of responsibility for Mrs McHugh's needs between the various agencies. Moreover, it seems to me to be clear that the relevant statutory provisions contemplate a continuing role for the trust where required. It is not difficult to envisage that the needs of someone such as Mrs McHugh might change with the deterioration of her condition or the capacity of her family members to support her. The trust, in fulfilment, of its statutory obligations, would have a responsibility to react appropriately to such developments, if they occurred.

[22] I am satisfied that the trust has dealt properly with the applicant's requests for assistance and that the measures that it took as outlined in the letter of 6 December 2001 from the chief executive fulfilled its statutory obligations.

Human rights issues

[23] Mr Larkin submitted that the imposition of a means test for the disabled facilities grant constituted a breach of the applicant's rights under articles 3, 6, and 8 and article 1 of the first protocol to the Convention.

Article 3

[24] Article 3 of the Convention provides: -

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[25] In *Ireland v United Kingdom* [1978] 2 EHRR 25, ECtHR held that proof of a violation of article 3 should be beyond reasonable doubt. In *Pretty v United Kingdom* [2002] 35 EHRR 1 the court dealt with the types of treatment that qualified as inhuman or degrading in the following passage: -

> "52. As regards the types of "treatment" which fall within the scope of Article 3 of the Convention, the Court's case-law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering (see *Ireland v. the United Kingdom*, cited above, p. 66, § 167; *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX). Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 (see amongst recent authorities, *Price v. the United Kingdom*, no. 33394/96, §§ 24-30, ECHR 2001-VII, and *Valašinas v. Lithuania*, no. 44558/98, § 117, ECHR 2001-VIII). The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible (see *D. v. the United Kingdom* and *Keenan*, both cited above, and *Bensaid v. the United Kingdom*, no. 44599/98, ECHR 2000-I)."

[26] Although the applicant suffers from a very serious condition that no doubt bears heavily upon her and is deserving of the greatest sympathy on that account, I do not consider that it has been shown to the necessary level of proof that her having to endure the conditions described in her affidavit amounts to inhuman or degrading treatment. In light of that conclusion it is not necessary for me to consider whether the actions (or inaction) of any of the respondents could be said to be 'treatment' of the applicant for the purposes of the article.

Article 6

[27] So far as is material article 6 of the Convention provides: -

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[28] Mr Larkin argued that the decision whether Mrs McHugh should be awarded a disabled facilities grant involved a determination of her civil rights and that she was therefore entitled to the protection that article 6 provided for that process. The interesting questions that arise on the issue of whether a particular species of administrative decision engages article 6 were discussed in *Re Foster's application for judicial review* [2004] NIQB 1. It is not necessary to repeat what was said there because Mr Larkin accepted that, if article 6 was engaged, the requirements of that article were satisfied by the availability of judicial review to challenge the decision of the various agencies involved in that decision. No breach of article 6 arises, therefore.

Article 8

[29] Article 8 provides: -

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[30] In order to establish a breach of this provision it would be necessary for the applicant to show that, in the context of disabled facilities grants, the effect of article 8 was to impose a positive obligation on the authorities to ensure that she was provided with the adaptations that were deemed necessary to cater for her condition. As Simor and Emmerson point out in paragraph 8.040 of their work, *Human Rights Practice*, the essential object of article 8 is the protection of the individual against arbitrary interference by public authorities. In certain circumstances it may give rise to positive obligations on the part of the state, however. The state enjoys a wide margin

of appreciation as to the need for and the content of any measures taken to ensure respect for family and private life – see, for instance *Abdulaziz, Cabales & Balkandali v United Kingdom* [1985] 7 EHRR 471.

[31] I am satisfied that, if article 8 is engaged in the present case, the decision taken by the state to restrict the availability of the grant on the basis of a means test is both justified and proportionate. This conclusion makes it unnecessary for me to reach a firm conclusion as to whether article 8 is in fact engaged and I refrain from reaching a final view on that question which may require to be considered in future litigation.

Article 1 of the First Protocol

[32] Article 1 of the First Protocol provides: -

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[33] Mr Larkin argued that the applicant's entitlement to a disabled facilities grant was a property right and thus article 1 of the first protocol was engaged. He suggested that any denial of the applicant's entitlement to the grant, such as by a means test, interfered with her article 1 protocol 1 rights and could not be justified under the second paragraph of the provision.

[34] This argument is predicated on the applicant's entitlement to the grant. The simple riposte to it, therefore, is that such entitlement has not been established. By instituting a system of disabled facilities grants the state does not invest in all who might be eligible for such grants a property right in them. Such a right, if it can be said to exist, does not crystallise until entitlement is established. I am satisfied therefore that no breach of article 1 of the first protocol arises.

Ultra vires

[35] Article 47 of the 1992 Order is an empowering provision allowing the Department to make regulations as to the circumstances in which an applicant will be eligible for a disabled facilities grant. In providing (as it does in paragraph (3)) that in the regulations the Department may make provision for account to be taken of the income, assets, needs and outgoings of the applicant's spouse, the article is unexceptional. The applicant's case exemplifies the unremarkable nature of this provision. She and her husband and family live together in the house which is for the use of the family generally.

[36] Mr Larkin argued that article 47 (3) in effect required the Department to include in the regulations provision for the outgoings of applicants for grants to be taken into account. Although the language of the article was permissive, to disregard these rendered the means test meaningless, he claimed. For the Department, Mr Maguire submitted that there was no mandatory requirement that the Department include outgoings in the application of the means test. He pointed out that the regulations duplicate those in force in Great Britain and suggested that there were strong policy arguments for not including outgoings in the means test.

[37] While recognising the moral force of the argument that a means test should normally include an estimate of an individual's outgoings, I cannot accept the proposition that the Department was required by the language of the statute to make this an element of the estimate of the applicable amount. Article 47 (3) is expressed to be without prejudice to the general power contained in article 47 (2) and the language used in both provisions is plainly permissive. If it had been the intention of the legislature that the regulations made by the Department must contain any or all of the elements referred to in article 47 (3) this could have easily been achieved. The substitution of the word 'shall' for the word 'may' in the paragraph would have had that effect. A provision imposing a duty, as opposed to conveying a power, is regularly encountered in this type of rule making stipulation. But the legislature has chosen not to employ the entirely conventional means of achieving that objective. The selection of the word 'may' must in this context be considered to have been deliberate. It follows that the Department was not obliged to include outgoings as an element of the means test and that the regulations are not ultra vires.

Consideration of the applicant's Convention rights

[38] Since I have concluded that none of the applicant's convention rights has been infringed, her claim based on the avowed failure of the respondents to take them into account is non-viable. In any event the onus of showing that there has been a failure of the respondents to take those into account rests

firmly with her – *Re SOS Ltd* [2003] NICA 15 and I am not persuaded on the available evidence that the possible impact of the decisions under challenge on the applicant's convention rights was ignored by the respondents.

Conclusions

[39] None of the grounds advanced on the applicant's behalf has been made out and the application must therefore be dismissed.