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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY FELIX CURLEY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE NORTHERN IRELAND HOUSING EXECUTIVE

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Ronan Lavery KC and Fionnuala Connolly (instructed by the Housing Rights Service) for the Applicant
Aidan Sands (instructed by NIHE Legal Services) for the Respondent

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SCOFFIELD J

Introduction

[1] By this application, the applicant seeks leave to challenge a number of decisions made by the Northern Ireland Housing Executive (NIHE) ("the Executive") by which it declined to award him 'intimidation points' under rule 23 of the Housing Selection Scheme (HSS) ("the Scheme"). The initial decision was made on 7 January 2021. This was then upheld, after the applicant complained about it, on 10 August 2021 (the first stage complaint) and again on 31 May 2022 (the second stage complaint). That last decision was reconsidered by the Chief Executive of the proposed respondent on 2 September 2022.

[2] The applicant challenges each of the above decisions, whilst the proposed respondent submits that all but the final decision have been superseded. In oral argument, Mr Lavery for the applicant accepted that the focus should be on the most recent decision, which was the last in the decision-making chain. Mr Sands explained that, in any event, the decisions made in the course of the complaint process both considered the matter afresh *and* addressed the applicant's eligibility for the claimed points at the time of the initial decision. I accept that the key issue for the court is whether the final decision was lawful but that, in considering that, the applicant is

entitled to ask the court to consider whether, in that decision, the proposed respondent also erred as to whether he was eligible for intimidation points when he first made his application. That is potentially relevant because of the evidence that the risk to him has reduced in the meantime.

[3] I am grateful to all counsel concerned in the case for their helpful written and oral submissions.

Anonymity

[4] The applicant has applied for a grant of anonymity in this case. It is accepted on his behalf that the starting point is that judicial review proceedings should be conducted in public without anonymisation. Nonetheless, the applicant seeks anonymity on the basis that he is a vulnerable person and is under threat from paramilitary organisations. It is therefore said that "the disclosure of his identity in these proceedings could place his personal safety at risk."

[5] In *Re A Police Officer's Application (Leave Stage)* [2012] NIQB 3, McCloskey J rehearsed the relevant principles in considering such an application, which I have considered. I do not accept that the applicant has established a sufficient basis for the derogation from the principle of open justice which he seeks. In reaching this conclusion, I take into account that it is the applicant's case that he is already under threat and that his identity and address is already known to those who (on his case) may wish to do him harm. I do not see how the disclosure of the applicant's name in the course of these proceedings could be said to materially increase that risk, in so far as it exists. I also take into account the substantive evidence provided to the proposed respondent by the police as to the present level of risk, which is set out below. In recognition of the applicant's article 8 rights, however, I have limited reference in this written ruling to matters such as the applicant's health and, in particular, either of the addresses which are at issue in the factual context of the case.

Factual background

[6] The applicant is a vulnerable 40-year-old man. He has resided with his mother at an address in West Belfast since April 2021. Prior to that, however, he lived in his own property (also in West Belfast). On 23 October 2020, the applicant applied for a transfer of housing accommodation to accommodation provided by a housing association. This application was made on the basis that, in June 2020, he had been approached by three masked men at his own property and was told to leave the property and the area. These proceedings essentially concern the Executive's response to that request.

[7] On 3 November 2020, a request was made to the proposed respondent to complete a homelessness assessment. The applicant advised NIHE about the threats to him in June 2020 and the Executive sought information from both the police and an organisation known as 'Base 2.' Base 2 has been described to me as a crisis

intervention project which offers clarification, support and mediation to persons and families at risk of violence or exclusion from their community in Northern Ireland. I was told it is funded by NIHE; but it is also associated with the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO). Put bluntly, it uses a network of contacts to ascertain whether or not there is a paramilitary threat to an individual at a particular time. The NIHE takes this into account in considering whether the threshold for the award of intimidation points under the HSS is met.

[8] On 30 November 2020 the PSNI confirmed that the applicant had reported threats made to him to the police. On 7 December 2020, Base 2 also confirmed to the proposed respondent that the applicant was under threat from Republican paramilitaries. The applicant places great reliance upon this information and, in particular, the following wording:

> "Base 2 can confirm that Felix would be at serious and imminent risk of harm/injury if he continued to live at the above address. Base 2 has information that Felix is at risk in West Belfast."

[9] The proposed respondent also relies upon this wording for reasons which will become clear shortly. In any event, the Executive accepted that the applicant was a 'full duty applicant' (FDA) on 11 December 2020. This is the highest duty in law owed under the homelessness legislation. Notwithstanding this, on 7 January 2021, the Housing Solutions Team Leader decided that the applicant did not meet the threshold for an award of intimidation points as they were not satisfied that there was a serious and imminent risk that he was likely to be killed or seriously injured ("the initial decision"). The decision is briefly recorded on the Executive's computer system in the following terms:

> "The threat was issued to Felix on 23 June which was five months before he requested a homeless assessment (Nov 2020). He has not terminated his tenancy and still resides there the majority of the week. Although I accept there is a threat against Felix and it would not be reasonable to expect him to continue to live at this address (FDA has been awarded as a result), I am of the opinion that it does not meet the threshold for intimidation points. The threat was issued in June 2020, he presented homeless in November 2020 and still occupies this tenancy as his principal home over six months later. I am therefore not satisfied that there is a serious and imminent risk that he is likely to be killed or seriously injured."

[10] On 29 January 2021 an informal complaint was submitted to the Executive on the applicant's behalf by his mother. In the meantime, on 13 January 2021, a further incident was reported which had occurred back in July 2020. A request was made that

a further report be obtained from the PSNI. A further report was provided by the police on 1 February 2021 which referred to a report of "an incident that two masked males called at the above address on 28 June 2020 shouted something then walked off." The collar could not make out what the men had said; no formal complaint was made and the matter was closed by police with no further police action to be taken.

[11] In a decision of 17 January 2021, the proposed respondent maintained the initial refusal decision ("the informal complaint decision"). Housing Rights Service ("Housing Rights") was then instructed on behalf of the applicant and they lodged a first stage complaint. The essence of this complaint was that the information obtained from both the PSNI and from Base 2 was sufficient to meet the threshold for an award of intimidation points in accordance with rule 23. By a decision of 10 August 2021 issued by the proposed respondent's Belfast Regional Office, the Executive upheld the refusal decision ("the first stage complaint decision"). In the meantime, the applicant had terminated his tenancy (on 25 April 2021) and began to reside at his mother's address.

[12] On 23 August 2021, Housing Rights lodged a second stage complaint on behalf of the applicant. Whilst this was being considered, on 26 October 2021, it is the applicant's case that two police officers came to his mother's home address and advised her of a threat to his life. Housing Rights advised the Executive of this development by email the next day, on 27 October 2021, in the following terms: "Mrs Curley advised me today that the PSNI called to her house last night to advise that Felix has received another death threat." At this stage, the proposed respondent referred this new information back to the Belfast Housing Solutions Team for further investigation.

[13] An email was received from the police on 16 November 2021, in which they advised that the applicant in fact self-reported a threat to them on this date and that they did not provide the information to him as claimed. In due course, a further PSNI report was obtained dated 22 December 2021 which stated that:

> "To date we have had no further reports of a threat, or harm to Mr Curley from any group. We have also not been able to corroborate the threat which we received. We have had no further information to suggest a real or credible threat, and my understanding is that [Community Restorative Justice Ireland (CRJ)] have not been able to confirm one as credible either."

[14] CRJ – another organisation which can assist in verifying threats and which participates in the Tacking Paramilitary Project – provided input on a number of occasions in November and December 2021. They had informed the applicant's mother that they were not aware of any threat against Mr Curley but would look into matters further; then advised the Executive that the groups they had contacted had no interest in Mr Curley (although they were awaiting a response from one further

group); and later said that they had not been able to confirm that Mr Curley was under threat. A further police report was provided on 27 January 2022 after details were sought in respect of the October 2021 incident. It was in the following terms:

> "A Threat Management case was opened on June 2020 in respect of Mr Curley; the Threat Management case was closed on 02 December 2021; there is no current Threat Management opened in respect of Mr Curley."

[15] This was followed up by a telephone call in which, the respondent says, the PSNI reiterated that any threat was self-reported by Mr Curley and that they were either unable to verify the source or legitimacy of any threat; and that it had been assessed as low risk. They further confirmed that the threat management case had been closed since December 2021 and that it was PSNI protocol to close threat management cases after one year, when there had been no corroboration of the threat and the risk was deemed low.

[16] Just over a week before this Base 2 had also provided another update in response to a Housing Executive request for information (which had been made on 3 November 2021). That request was again in relation to the threat message said to have been received from the police on 26 October 2021. The Base 2 update was in the following terms:

> "Base 2 previously confirmed a threat in December 2020 against Mr Curley however we are unable to obtain confirmation of any current threat against the client. Base 2 are not aware of any current paramilitary threat against the client in the Area."

[17] The second stage complaint decision was issued by the Chief Executive of the proposed respondent on 31 May 2022. The initial decision was again upheld. In the conclusory portion of a long and detailed letter, the Chief Executive's decision was expressed in the following terms:

> "Based on all the available information, I am satisfied that the evidence in relation to this case does not allow us to conclude beyond a reasonable doubt that Mr Curley (or a member of his household) was at 'serious and imminent risk of being killed or seriously injured' by coming to live at [the applicant's previous address] or at his mother's house at [her address] as required by Rule 23(2)."

[18] The applicant's solicitor issued a pre-action letter on 26 July 2022. One of the main grounds of challenge was that the proposed respondent had applied an incorrect legal test in asking whether it could conclude "beyond a reasonable doubt" that the applicant met the criteria for an award of intimidation points under the Scheme. In a

response to this pre-action letter dated 4 August 2022, the Executive's solicitor advised that the proposed respondent accepted that an incorrect standard had been applied and advised that the Chief Executive would therefore consider her decision afresh. The fresh decision came in a letter from the Chief Executive of 31 May 2021 ("the final decision"), which addressed the substance of the decision and also a range of other points which had been made in the applicant's pre-action correspondence. The key conclusion in this final decision is expressed as follows:

> "It is clear that Mr Curley's circumstances do not and have never fallen within the scope of Rule 23. The PSNI and CRJ have not verified a threat within the scope of Rule 23. Base 2 did originally indicate threat albeit one that fell outside the scope of Rule 23 but their position is now that there is no threat against Mr Curley. It is also a matter of fact that when Mr Curley's transfer application of October 2020 was referred to the Housing Executive for a homelessness assessment approximately four months had passed since any alleged incident(s). As far as we are aware Mr Curley has not been attacked in the more than two years since he alleges that he was threatened, despite continuing to reside in West Belfast for this entire period."

Rule 23 of the Scheme

[19] Article 22 of the Housing (Northern Ireland) Order 1981 requires the Executive to submit to the Department a scheme for the allocation of housing accommodation held by the Executive to prospective tenants or occupiers. The scheme is approved by the Department and the Executive is then required to comply with the scheme when allocating housing accommodation held by it.

[20] Rule 23 of the current scheme provides as follows:

> "An applicant will be entitled to Intimidation points (see Schedule 4) if any of the following criteria apply in respect of the application:
>
> 1. The applicant's home has been destroyed or seriously damaged (by explosion, fire or other means) as a result of a terrorist, racial or sectarian attack, or because of an attack motivated by hostility because of an individual's disability or sexual orientation, or as a result of an attack by a person who falls within the scope of the Housing Executive's statutory powers to address neighbourhood nuisance or other similar forms of anti-social behaviour.

2. The applicant cannot reasonably be expected to live, or to resume living in his/her home, because, if he or she were to do so, there would, in the opinion of the Designated Officer, be a serious and imminent risk that the Applicant, or one or more of the applicant's household, would be killed or seriously injured as a result of terrorist, racial or sectarian attack, or an attack which is motivated by hostility because of an individual's disability or sexual orientation, or as a result of an attack by a person who falls within the scope of the Housing Executive's statutory powers to address neighbourhood nuisance or other similar forms of anti-social behaviour."

[21] This provision has recently been considered by the High Court in *Re Thompson's Application* [2022] NIKB 17. That case, as this case does, concerns the second limb of rule 23, namely the award of intimidation points where the applicant cannot reasonably be expected to live in his home because there would be "a serious and imminent risk" that he "would be killed or seriously injured" as a result of terrorist or sectarian attack. I return to Humphreys J's decision below.

[22] The respondent also emphasises the provisions of Part II of the Housing (Northern Ireland) Order 1988, under which it owes certain duties to persons who are homeless. This includes the provision of settled accommodation to those who are unintentionally homeless and in priority need, regardless of the cause. In the Executive's submissions it confirmed that, where a person presents to the Executive as being subject to a serious and imminent risk of harm in their home (regardless of the cause of that risk) it is addressed by the immediate provision of temporary accommodation as part of the Executive's statutory duty under the 1988 Order. A person to whom the Executive owes a duty under Article 10(2) of the 1988 Order "to secure that accommodation becomes available for his accommodation" is known as a Full Duty Applicant, recognising that the obligation to secure accommodation is the highest housing duty that can be owed.

[23] The HSS on the other hand deals with the allocation of points for the purposes of ranking those seeking accommodation in accordance with Article 22 of the 1981 Order for the purposes of allocating available (non-temporary) accommodation. The award of intimidation points by no means guarantees the immediate allocation of a house if, for example, no property is available in the relevant area or areas at that time.

The parties' cases

[24] The applicant contends that the proposed respondent acted in breach of its duty under Article 22 of the 1981 Order to allocate dwellings in accordance with the

approved HSS. He further contends that the proposed respondent left a range of material considerations out of account, including the report from Base 2 from December 2020, the applicant's mother's representation that the PSNI had delivered a further threat against him in October 2021 and the findings of a 2020 report from the Criminal Justice Inspectorate (CJI).

[25] The applicant further has a range of complaints of procedural fairness: first, that, during the second stage complaint process, the original decision-making team was asked to conduct some further investigations without his being aware of this; second, that the final decision was made by the same decision-maker (Ms Long, the Chief Executive) as had made the previous decision on the second stage complaint which had been set aside when judicial review proceedings had been threatened; third, that Ms Long relied on current information about the level of threat against the applicant without disclosing precisely what she was referring to and giving him the opportunity to make representations; and, fourth, that there was manifest delay during the second stage complaint process. As to the first and second of these complaints, the applicant contends that they breach the proposed respondent's guidance on complaints procedures and represent a denial of an independent investigation to which he was entitled.

[26] The applicant further contends that the impugned decision was *Wednesbury* unreasonable; that the proposed respondent erred in fact, particularly by considering the October 2021 threat as having been "self-reported" when it was a threat against the applicant which was conveyed to his mother *by the PSNI*; that the proposed respondent failed to discharge its duty of inquiry in relation to this incident; and that the decisions were in breach of his rights under article 6 and article 8 ECHR.

[27] For the respondent, it is argued that the final decision made by the Chief Executive supersedes all of the previous decisions; that her decision was an entirely rational application of the rule 23 test; that there was no unfairness in the decision-making process; that the evidence relied upon by the applicant as to there being a threat against him is extremely weak; and that the relief now sought in relation of the earlier decisions can bring no practical benefit to the applicant. The proposed respondent also emphasises that the Scheme refers to eligibility for the award of intimidation points being established "in the opinion of the Designated Officer", emphasising that this is a matter of judgment for the Executive.

[28] In terms of the application of the rule 23 test, the proposed respondent emphasises the requirements of both imminence and seriousness of the threatened injury. It submits that this is a high test, particularly when considered in the context of the availability of FDA status for those, like the applicant, who are judged to be homeless because (as a result of a threat) it would be unreasonable for them to continue to occupy their current accommodation. It is the conferral of FDA status, with the consequent immediate duty to provide temporary accommodation, which is the means by which the Housing Executive discharges any obligations it may owe under article 2 ECHR. The award of 200 housing allocation points for intimidation,

the largest single award of points available under the Scheme (which was described in argument as "the bonanza" in terms of moving an applicant up the housing allocation list), should be reserved only for cases of heightened threat. In the respondent's submission, this elevated requirement is reflected in the wording that there must be "a serious and imminent risk that the applicant… would be killed or seriously injured" as a result if one of the specified types of attack.

[29] The differing ways in which different levels or categories of threat might be addressed as expressed in the final decision letter as follows:

> "Any investigation into alleged threats will therefore not be confined to consideration of Rule 23 alone, but rather entail an assessment of the applicant's housing need in the round. This will include whether they should be owed a duty under the Housing (Northern Ireland) Order 1988, and whether their circumstances warrant other Housing Selection Scheme points in addition to, or instead of, intimidation points. It would be wholly inaccurate to suggest that the only way that the Housing Executive can recognise a threat is through the award of intimidation points, as Rule 23 is concerned with particular categories of attack/threats. A threat which doesn't meet the specific requirements of Rule 23 may still result in a statutory homeless decision. It is important to note that it is this decision, not the award of intimidation points, which confers a statutory right to rehousing as well as the right to avail of temporary accommodation under the phased discharge of the Housing Executive's homeless duty."

Consideration

[30] I can deal briefly with the applicant's complaint that a range of relevant matters were left account. I see no substance in this aspect of the applicant's claim and consider that it fails to surmount the evidential threshold set out in *Re SOS (NI) Ltd's Application* [2003] NIJB 252. Both the Base 2 report on which the applicant relies and the applicant's mother's claim about a further threat being delivered in October 2021 were before the decision-makers and plainly considered by them. The content of the 2020 CJI report which is relied upon is not directly relevant to this case but, instead, contains discussion about the extent to which police are able to directly verify threats. It was not necessary for the NIHE to specifically consider this document. It properly consulted with the PSNI, amongst others, and took into account the information provided by the police which was relevant to the applicant's circumstances. I find those grounds unarguable.

[31] There is similarly no merit in the contention that the proposed respondent failed to discharge its statutory duty under Article 22 of the 1981 Order. The issue in this

case is about the application of rule 23 of the Scheme to the applicant's circumstances, not a wholesale failure to apply the rules of the scheme. Whether the proposed respondent properly understood and applied rule 23 of the HSS is discussed further below.

[32] As to the applicant's complaints about procedural unfairness, it is important not to seek to over-judicialise the process which is at issue in these proceedings. I accept Mr Sands' submission that the decision-making in this case is an administrative one to be carried out by NIHE staff. The NIHE complaints policy has to be read in a common sense way in light of the nature of the decision being made and the practical realities of decision-making in an organisation of that type. I see no unfairness in further enquiries being made by the specific local team responsible for liaising with local police when new issues arose in the course of Ms Long's consideration of the second stage complaint. New information had come to light and she asked the local office to liaise with police about this. The updated police input was duly received and referred back to her for consideration. She remained the decision-maker at this stage; and there was nothing unfair about her asking the relevant staff within her organisation to follow up on certain matters and to provide her with further information before she made a decision. I consider it unarguable that this further involvement of less senior staff resulted in an unfair procedure.

[33] The applicant's complaint that Ms Long was not permitted to reconsider her decision once it was conceded in the course of pre-action correspondence that she had applied the wrong test is also unrealistic. The applicant's pre-action protocol letter of July 2022 sought that a fresh decision be made, as it then was. That correspondence did not contend that the fresh decision was required to be made by someone else but, rather, invited the Executive to confirm "that the decision-maker will reconsider its decisions in accordance with law." The applicant's complaint had already reached the end of the complaints process and, in Mr Sands' vivid phrase, Ms Long was "at the top of the tree." There is nothing inherently unfair in a decision-maker (especially a final decision maker) reviewing their own decision, particularly where they agree to do so having conceded a flaw in their earlier decision-making. A different objection might have been taken were Ms Long to have asked a lower ranking official within NIHE to reconsider her prior decision (although I recognise that that is a mechanism which can be used in certain circumstances). In any event, the concession that an improperly high burden of proof had been applied at the earlier stage left it open to Ms Long to change her decision without any logical inconsistency with her previous determination. Put another way, it would not have been a climb down for her to have changed her decision when addressing it by reference to a lower evidential standard. I consider it clear that no unfairness arose from the way in which the decision was retaken after making a responsible concession on foot of pre-action correspondence.

[34] This leaves the substance of the decision to be examined, both as to whether the proposed respondent correctly understood and applied rule 23 and whether, having done so, it reached a rational conclusion.

[35] As noted above, both the proposed respondent's submissions and the text of the final decision make clear that Ms Long was considering whether the applicant was eligible for the award of intimidation points both contemporaneously (that is, at the time of her decision) and at the earlier decision-making points. I propose to address each of these in turn, in reverse order. In addressing this, I accept the proposed respondent's submission that the standard of review is that of *Wednesbury* rationality. There is no claimed breach of article 2 ECHR in this case, which would involve a different role on the part of the court. Notwithstanding that the yardstick is irrationality, given the context of the case this is an area where the court will exercise anxious scrutiny.

[36] I have no difficulty in concluding that the Chief Executive's decisions about the level of risk at the time of her second stage complaint decision and her final decision were rational. By this time, the police had closed their threat management case; and both Base 2 and CRJ were unaware of any threat against Mr Curley. In light of the applicant's strong reliance on Base 2's knowledge and expertise in this area in terms of the initial decision-making, it is difficult for him to contend that Base 2's more recent input should not carry considerable weight. The clear picture being provided by the combined evidence was that any threat which had existed to the applicant in West Belfast had subsided. That is even before Ms Long took into account the fact that the applicant had not suffered harm some two years or more after he was initially threatened, despite having continued to live in West Belfast for that time. In light of the material before her, it is in my view, unarguable that it was irrational for her to conclude that the rule 23 threshold was not met at that point.

[37] Perhaps the issue which is most difficult in relation to this stage of the decision-making is the treatment of the alleged threat against the applicant which was communicated in October 2021. A legal adviser in the Housing Rights Service had contemporaneously advised the Executive that the applicant's mother had reported that the police had attended with her to warn her of threat to her son. When the Executive asked the PSNI for details of this, they were told by the police that this was "self-reported", ie that it came from the applicant (or his mother) to them, rather than the other way around. The NIHE appear to have accepted the police position that any threat at this time was self-reported. I am not in a position to determine that this represented (even arguably) an error of material fact. The Executive was aware of what the applicant's mother had said about the issue and took that into account; but it is not clear that the threat *was* communicated in precisely the way she has indicated. The police information, provided on two separate occasions, appears to contradict her account; and their closure of the threat management case in December 2021 supports the conclusion that they did not view anything which had happened two months before to represent corroboration of the threat against the applicant. It is not a clearly established fact that the applicant's mother's version of events was the correct one; and nor do I feel that the court could resolve this issue without engaging in the type of fact-finding exercise to which judicial review is classically ill-suited, which would also involve seeking additional evidence from a non-party to the proceedings (the PSNI).

[38] That raises the question of whether it was a breach of the respondent's duty of inquiry to fail to take its own steps to reconcile these accounts or resolve the discrepancy. Mr Sands argued that it was not *Wednesbury* irrational for the Executive to fail to take further investigative steps in this regard. In any event, he argued, by the time of the final decision matters had moved on. Again, the standard of review is one of irrationality in terms of whether it was unlawful for a public authority to fail to take further investigative steps: see *R (Plantagenet Alliance) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), per Hallet LJ, at para [100]. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should only intervene if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. I do not consider that the applicant has a realistic prospect of success on this ground. The Executive had already sought information from the police in relation to this issue and had received a number of confirmations that the October 2021 incident was self-reported. It might well have been desirable for it to have tried to bottom this issue out further – particularly when the applicant's mother had communicated the name of the police constable whom she thought had visited her home to speak to her about the issue. However, it was not irrational to fail to seek this further information when Ms Long had more up-to-date information from the PSNI, Base 2 and CRJ which would inform her decisions at that time; and when the October 2021 issue *post*-dated the earlier decisions she was reviewing (made in January and August 2021 respectively).

[39] Turning to the position as it was when the applicant first sought an award of intimidation points, it is not entirely clear whether the decision-maker at that stage refused the award on the basis that the threat to the applicant was not imminent *or* on the basis that the risk to him was not sufficiently serious (that is to say, it was not a risk of being killed or seriously injured), *or* both. The first stage complaint decision appears to emphasise a lack of imminence in terms of the threat.

[40] I would have grave reservations about a decision in circumstances such as this – where it was accepted that a paramilitary organisation had placed an individual under threat, including by virtue of an ultimatum to leave the area – but this was not considered to be a threat of serious injury. Gruesome experience shows that such organisations, where they choose to enforce such an ultimatum, rarely do so by way of gentle reprimand. Rather, the infliction of serious injury is their frequent recourse.

[41] However, it seems to me that the key issue is that of imminence. In January 2020, the threat had been extant for some six months and no harm had befallen the applicant, even though he had chosen to remain at his own address, at which he had been threatened. The decision-makers also placed reliance on the fact that the applicant had not mentioned or relied upon the threat until some four months after it had been made. The inference clearly drawn from this is that the applicant himself was not as concerned about the threat as he later presented himself to be. He had not left the property, notwithstanding his FDA status and therefore the availability to him of temporary accommodation. Moreover, the absence of any action against the

applicant was taken into account as either showing that the risk was never serious and imminent or, at least, was not so at the time of the Executive's decisions.

[42] An issue arises as to how "imminent" is to be understood in this context. The first stage complaint decision quoted a dictionary definition: "impending, at hand, close, ready to take place." In the *Thompson* case, which was decided *after* the decisions in issue in these proceedings, Humphreys J said that "'imminent' simply means 'likely to happen soon.'" However, he went on to draw an analogy with the meaning of 'real and immediate risk' in article 2 ECHR and said (at para [29]):

> "In my judgment, the proper test to be applied by a Designated Officer operating this scheme is identical to the test for the engagement of an article 2 right, namely that there is a risk of death or serious injury which is not remote or fanciful and which is present and continuing."

[43] This approach emphasises the continuing existence of the threat rather than how close it looms. For my part, I have some doubt about whether the rule 23 wording should be construed in this way, in light of the NIHE's submissions summarised at para [28] above. The article 2 test, as developed in the authorities, governs when the article 2 operational duty to protect life is *engaged*; but there is then a further step which consists of determining what can reasonably be expected of the authorities in terms of measures within their powers to avoid that risk. If the rule 23 test is to be construed in the same way as the article 2 test, when article 2 is engaged by a paramilitary threat the award of intimidation points is mandatory, notwithstanding that that is neither necessary nor sufficient to ensure immediate re-housing. In light of the judgment in *Thompson*, however, I cannot conclude otherwise than that there is an arguable case in the applicant's favour as to whether Ms Long misdirected herself as to the proper meaning of the rule 23 test when she upheld the first instance decision in particular. That decision was taken at a time when it was confirmed by Base 2 that a threat was in existence. I should only depart from the ruling in *Thompson* if persuaded that it is clearly wrong; and I certainly could not so conclude at this point in the proceedings.

[44] I cannot accept the proposed respondent's submission that, even if there was a potential legal flaw with the early decision-making in this case (or Ms Long's upholding of that early decision-making) that is now academic because the threat to the applicant has now dissipated. Although there is a logical attraction to that argument, it is undermined by the information provided to the court to the effect that the Executive does not (at least generally) remove intimidation points which have been awarded at a particular point in time if there is then a material change in circumstance. The practice of the Executive is that rule 23 points, once awarded, remain part of an applicant's total points allocation until such times as that person is allocated a dwelling under the Scheme, refuses two reasonable offers of accommodation or withdraws their housing application. Put simply, if Mr Curley was awarded intimidation points in January 2020, these would not be removed from him even if all relevant agencies later advised the Executive that the threat against him had evaporated.

[45] The other area where I consider that the applicant has a legitimate complaint of illegality is in respect of that aspect of his case relating to the delay in the NIHE's decision-making. In particular, he complains that there was manifest delay in the second stage determination of his complaint between 16 August 2021 and 31 May 2022. More generally, he complains that it is procedurally unfair that there is no expedited route for resolution of the complaint where the subject matter is the non-award of intimidation points under rule 23. There is a great deal of common sense in this last point: if a housing applicant has been wrongly denied intimidation points (and is therefore at serious and imminent risk of death or serious injured from a relevant type of attack) it is important that this is identified and corrected as swiftly as possible.

Conclusion

[46] In light of the foregoing analysis, I propose to grant the applicant limited leave to apply for judicial review on the following grounds in his amended Order 53 statement of February 2023, namely:

(a) Ground (a)(i) which, pursuant to the court's power under RCJ Order 53, rule 3(4), I direct to be reformulated as follows:

> "… the decision-maker erred in law as to the meaning of rule 23 of the Housing Selection Scheme and, in particular, the meaning of the phrase 'serious and imminent risk.'"

(b) Ground (e), arguing irrationality; and

(c) Grounds (a)(ii) and (c)(iv) to reflect the 'timing' issue.

[47] I also make clear that the grant of leave relates only to Ms Long's consideration of the correctness of the decision-making at the initial and first stage complaint phases.