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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF APONTE,

Respondent,

-against-

No. 5

OLATOYE,

Appellant.

20 Eagle Street
Albany, New York
January 3, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Sara Winkeljohn
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 5, Matter of Aponte
2 v. Olatoye.

3 Counsel.

4 MS. LIPPMAN: Good morning, and may it please the
5 court; Jane Lippman from the New York City Housing
6 Authority Law Department on behalf of appellants Shola
7 Olatoye and NYCHA. And I'd like to reserve two minutes of
8 my time, please, for rebuttal.

9 CHIEF JUDGE DIFIORE: You may.

10 MS. LIPPMAN: There is a disconnect - - -

11 JUDGE RIVERA: Counsel, in order to be in
12 compliance with the state and city and the federal anti-
13 discrimination laws, what is NYCHA's protocol when someone
14 with a disability requests that they have someone stay with
15 them in the apartment?

16 MS. LIPPMAN: NYCHA's obligation under the law is
17 to provide an effective accommodation so one that affords
18 equal opportunity for a disabled tenant to use and enjoy
19 her apartment.

20 JUDGE RIVERA: And how do you make that
21 determination? What - - - again, what's the process - - -

22 MS. LIPPMAN: So - - -

23 JUDGE RIVERA: - - - that you do to respond to
24 these requests?

25 MS. LIPPMAN: Yeah, so it's a multi-prong answer.



1 First of all, NYCHA has in place an exception to its
2 occupancy standards, so as a reasonable accommodation NYCHA
3 provides temporary residency to a caregiver for a disabled
4 tenant who requires twenty-four hour care. So this is an
5 exception to NYCHA's occupancy standards. Ordinarily,
6 ordinarily, temporary residency is limited to one year.
7 However, as - - -

8 JUDGE RIVERA: Well, I'm - - - I think I'm not
9 making myself clear. When - - - when someone presents the
10 request, what is the NYCHA personnel supposed to do?

11 MS. LIPPMAN: Okay.

12 JUDGE RIVERA: Because you're telling me how you
13 get to the eventual conclusion.

14 MS. LIPPMAN: Yes.

15 JUDGE RIVERA: That's not my question.

16 MS. LIPPMAN: So there - - -

17 JUDGE RIVERA: What - - - what are they supposed
18 to do?

19 MS. LIPPMAN: There is a public housing
20 reasonable accommodation coordinator, and this is set forth
21 in NYCHA Standard Procedure for Reasonable Accommodation.
22 So if there's some - - - some reasonable accommodations are
23 evident, very clear. For example, a tenant may require
24 grab bars in a bathroom. Where the nature of the
25 accommodation is not clear then the public housing



1 reasonable accommodation coordinator will get involved.
2 The request for accommodation will be forwarded to the
3 coordinator, and the coordinator will evaluate the request
4 and engage in the interactive process in accordance with
5 the law.

6 JUDGE RIVERA: So when someone says I have a
7 disability and I need someone to live in this apartment
8 with me, does that go automatically to this reasonable
9 accommodation coordinator?

10 MS. LIPPMAN: No, it does not. Because NYCHA
11 already provides a reasonable accommodation in the form of
12 providing temporary residency to a caregiver. So again,
13 this is an exception to NYCHA's occupancy standards. Now -
14 - -

15 JUDGE RIVERA: Okay. So I didn't realize that
16 from your briefs. So NYCHA's position is that it need not
17 ever enter one of these discussions, right, it shouldn't -
18 - - it does not have to do the interactive process because
19 it has as an administrative matter already decided what in
20 every case, regardless of the individual circumstances,
21 would be a reasonable accommodation?

22 MS. LIPPMAN: No, I would disagree with that. I
23 would say that's not correct.

24 JUDGE RIVERA: Okay.

25 MS. LIPPMAN: If the temporary residency of a



1 caregiver is not an effective accommodation and - - - and I
2 can't envision why that would be. But if it were
3 ineffective then NYCHA would engage in the interactive
4 process. The denial of permanent residency permission can
5 be grieved. It - - - it's right on the form.

6 JUDGE RIVERA: But how would you come to the
7 conclusion, that threshold conclusion, that it's not - - -
8 that your regular approach would not satisfy the anti-
9 discrimination law?

10 MS. LIPPMAN: Well, for - - - for example - - -

11 JUDGE RIVERA: If you haven't done the
12 interactive process?

13 MS. LIPPMAN: For example, in this case, the
14 tenant submitted a permanent permission request. NYCHA
15 also has a reasonable accommodation form. That wasn't used
16 in this case. So the tenant submitted a permanent
17 permission request which was denied. Now on the permission
18 request, it does say that you can grieve the denial. And I
19 would refer the court to Matter of Po So, which is a case
20 in the First Department, where in fact the tenant brought
21 an Article 78 proceeding to challenge the denial of
22 permanent residency permission. So it - - -

23 JUDGE GARCIA: Counsel, on that front I'm having
24 a little trouble understanding how all of that argument
25 fits into this proceeding because it seems to me if you're



1 looking just as succession rights, which is what we're
2 talking about here, you have to almost conclude that the
3 only reasonable - - - either one of two things, I think.
4 The only reasonable accommodation would have been to grant
5 this type of status to this person in the disability
6 proceeding, in the accommodation proceeding, or that to
7 punish the agency for not having some kind of procedure
8 you're going to find that this tenant had succession
9 rights.

10 So I don't - - - I'm having some trouble in
11 understanding how that whole analysis of what would have
12 been a reasonable accommodation fits into this petitioner's
13 - - - this person's request to have these type of
14 succession rights. The - - - the simple answer here is he
15 doesn't have them, right? And if you had a problem with
16 the other proceeding you could have grieved that other
17 proceeding.

18 MS. LIPPMAN: That's right, Your Honor. That - -
19 - that's absolutely right. And the failure to fully engage
20 in the interactive process - - - and we do concede that
21 NYCHA's interactive process was not well implemented in the
22 case. However, the failure to fully engage in the
23 interactive process is not a benefit wholly unrelated to
24 the disability such as succession rights for a caregiver.

25 JUDGE WILSON: Did NYCHA grant temporary status?



1 Let me ask it differently maybe since I see you're
2 hesitating a little bit. NYCHA didn't grant temporary
3 status. Is it common that NYCHA simply does nothing and
4 treats that as it, or is this usual?

5 MS. LIPPMAN: No, this is - - - this is
6 aberrational. Temporary residency permission should have
7 been formalized in this case, and - - - and we concede that
8 this - - - this was not a good example of NYCHA's
9 interactive process. Normally, temporary residency would
10 be formalized. Would be a meeting with management wherein
11 it would be explained that permanent permission could not
12 be granted because the addition of respondent - - -

13 JUDGE WILSON: So where was the - - - where was
14 the breakdown here?

15 MS. LIPPMAN: I think - - - I think the - - -

16 JUDGE WILSON: The building manager gets the
17 request and denies the request for permanent but doesn't -
18 there's no eviction proceeding started or anything like
19 that. What should have happened next?

20 MS. LIPPMAN: That's right. And there were no
21 steps taken at all to evict Ms. Aponte. What should have
22 happened is there was a meeting with the resident services
23 associate, Mr. Berson in January 2011 to explain that
24 respondent could not be added to the household due to
25 overcrowding. What should have happened and what typically



1 would happen is that there'd be a meeting with the manager,
2 the tenant of record, the person who wishes to move in, and
3 it would be explained that the addition of this person
4 could not be permanent due to overcrowding and that
5 temporary permission could be offered and it would be
6 formalized. In this case, as the dissent found in the
7 First Department, there was de facto temporary permission.

8 JUDGE RIVERA: And if the tenant has, as perhaps
9 might have been the case here, obviously, at some point,
10 cognitive limitations, I assume that NYCHA allows for the
11 guardian or someone who is tasked with the responsibility
12 of caring for this individual to engage - - -

13 MS. LIPPMAN: Absolutely.

14 JUDGE RIVERA: - - - in this conversation?

15 MS. LIPPMAN: Absolutely. Absolutely. But
16 respondent could have assisted his mother, another friend
17 or family member can assist. Absolutely.

18 CHIEF JUDGE DIFIORE: Thank you.

19 JUDGE FAHEY: So can I - - - Judge, is it all
20 right?

21 CHIEF JUDGE DIFIORE: Yes.

22 JUDGE FAHEY: How would they have done it right?
23 How would they have followed your rules?

24 MS. LIPPMAN: What should have happened and what
25 typically would happen is that a meeting would be held with



1 the development manager, with the tenant of record, and - -
2 -

3 JUDGE FAHEY: No, assuming all the means, would
4 they have applied for temporary residency first and then
5 could they have applied for permanent residency to
6 establish succession rights? Is that allowable within the
7 rules?

8 MS. LIPPMAN: In - - - in this case, permanent
9 permission could not be granted - - -

10 JUDGE FAHEY: Ever?

11 MS. LIPPMAN: - - - ever in this case because of
12 overcrowding under NYCHA's occupancy standards. However,
13 temporary permission should have been formalized.

14 JUDGE FAHEY: So then - - - so that begs the
15 catch-22 question. The succession rights then could never
16 have been established?

17 MS. LIPPMAN: But it - - - it's not a catch-22.

18 JUDGE FAHEY: Okay. Go ahead.

19 MS. LIPPMAN: It's not a catch-22. So whether
20 the - - -

21 JUDGE FAHEY: Why - - - why isn't it? I - - -
22 all right.

23 MS. LIPPMAN: Okay. So whether the addition of a
24 family member will result in overcrowding under NYCHA's
25 occupancy standards depends. NYCHA's tenant selection and



1 assignment plan allows for various combinations of family
2 members in different sized apartments. So - - -

3 JUDGE STEIN: But assuming those weren't the
4 people that - - - that were available as caregivers. I
5 think as a follow-up to Judge Fahey's question, what would
6 the process have been to request permission to move to a
7 larger apartment?

8 MS. LIPPMAN: So - - -

9 JUDGE STEIN: I assume that would - - - that that
10 was a possibility?

11 MS. LIPPMAN: Well, first of all, Ms. Aponte
12 didn't request a transfer to a larger apartment.

13 JUDGE STEIN: I - - - that - - - I know. My
14 question is what would the process have been to make that
15 request? Would it have been to grieve the refusal of
16 permanent residency permission or is there some other
17 mechanism that that would have been done?

18 MS. LIPPMAN: So if the tenant has a medically-
19 documented need for more space, so that transfer would be
20 appropriate - - - which Ms. Aponte did not in this case but
21 hypothetically - - - then during the interactive process
22 with the manager, the issue of a transfer would definitely
23 come up. Say, the tenant needs an oxygen tank or medical
24 equipment, and NYCHA's standard procedure on reasonable
25 accommodations specifically states that a tenant may

1 transfer to a larger apartment as a reasonable
2 accommodation where there is a need for medical equipment.
3 So, yes, this would come up in the normal course of NYCHA's
4 interactive process.

5 JUDGE STEIN: The need to have a permanent
6 caretaker would not be one of those circumstances? Is that
7 what you're saying?

8 MS. LIPPMAN: The need to have a permanent
9 caretaker would - - -

10 JUDGE STEIN: Would not be a circumstance which
11 would permit someone to move to a larger apartment?

12 MS. LIPPMAN: No, because NYCHA doesn't know
13 whether other caretakers may be needed over time. I mean
14 it's not unusual to have different caretakers, a
15 professional caretaker may be needed. So the need for a
16 caretaker in and of itself does not necessitate a transfer.

17 JUDGE RIVERA: Isn't the point the nature of the
18 disability and what the caretaker must do to ensure that
19 the individual who needs the services is indeed provided
20 the services to age out in their home?

21 MS. LIPPMAN: Yes.

22 JUDGE RIVERA: So it doesn't matter really if
23 it's - - - if it's permanent. That's not really the point.
24 The point is what are they doing and can they do that in a
25 one-bedroom apartment?



1 MS. LIPPMAN: Yeah. I think that's right, yes.
2 Yes, we agree with that. I mean the - - - the nature of the
3 accommodation - - - so the accommodation is framed by the
4 disability. And the appropriate accommodation is
5 determined by the medical documentation and the nature of
6 the disability.

7 CHIEF JUDGE DIFIORE: Thank you, Ms. Lippman.

8 MS. LIPPMAN: Thank you.

9 CHIEF JUDGE DIFIORE: Counsel.

10 MS. GOODRIDGE: Good morning. May it please the
11 court, my name is Leah Goodridge from Mobilization for
12 Justice on behalf of Jonas Aponte.

13 JUDGE STEIN: Counsel, I'd like to follow up on
14 what I think Judge Garcia was getting at a little bit which
15 is I'm - - - I - - - I'm having a hard time understanding
16 why we're even talking about the accommodation of - - - of
17 this tenant's disability because it seems to me that - - -
18 that the denial of permanent residency was never grieved.
19 It - - - it was never raised in front of NYCHA or - - - and
20 can't be raised for the first time in an Article 78
21 proceeding. And - - - and why are we even talking about
22 whether there was reasonable accommodation in this position
23 that we're in?

24 MS. GOODRIDGE: We're discussing that because the
25 legal standard here is whether Mr. Aponte was denied



1 succession rights on the basis that NYCHA failed to provide
2 reasonable accommodation. Here, the only reason that Mr.
3 Aponte was denied succession rights is because NYCHA did
4 not provide written, permanent permission for Mr. Aponte to
5 join his mother's household when she originally applied for
6 that. So - - -

7 JUDGE WILSON: Well, suppose - - - suppose NYCHA
8 had provided a two-bedroom apartment but on a temporary
9 basis to - - - for Mr. Aponte as a resident. Would that
10 have been a reasonable accommodation?

11 MS. GOODRIDGE: Well, I - - - I think here
12 succession rights is permitted. So for example, if Ms.
13 Aponte had a two-bedroom apartment and she had a son who
14 just wanted to move in to have a place to stay, not
15 necessarily to be a caregiver, then she would have been
16 granted permanent permission so the overcrowding wouldn't
17 have been an issue. But here we have a case where Mr.
18 Aponte moved in to care for his disabled mother who's - - -

19 JUDGE WILSON: I'm asking something a little
20 different I think which is she has a one-bedroom apartment.
21 She has a medical need because she has dementia. And what
22 NYCHA - - - NYCHA didn't do this but suppose what NYCHA had
23 done is said, look, we - - - we will offer to move you in
24 the same building to a two-bedroom apartment that you can
25 have but on the condition - - - and your son can live there



1 but only as a temporary resident, not a permanent resident.
2 Would that have satisfied any discrimination law?

3 MS. GOODRIDGE: In this particular case, that may
4 have satisfied anti-discrimination law but what the
5 Appellate Division found is that we don't know what NYCHA
6 would have done. NYCHA's main argument relies on the
7 premise of what it would have done or what it could have
8 done, but we know what NYCHA actually did. And the
9 Appellate Division looked at that. There were several
10 opportunities for NYCHA to come to the right conclusion.
11 There was - - -

12 JUDGE FAHEY: But as a - - - as a policy matter
13 just to follow up on - - - on Judge Wilson's question, it's
14 a distinction between the right to accommodation and the
15 right to succession I - - - I think that we have to look
16 at. And - - - and I have a difficult time drawing that
17 distinction because if you say they have accommodated them,
18 if it was done correctly he could have been accommodated
19 theoretically, then succession just isn't a possibility at
20 all. And the right to accommodation doesn't automatically
21 lead to a right to succession. And wouldn't your argument
22 lead us to that? Wouldn't your argument - - - the end
23 result be we - - - whenever we accommodate someone in a - -
24 - in a particular setting that they automatically gain
25 succession rights?

1 MS. GOODRIDGE: So there's several different ways
2 that NYCHA could have accommodated Ms. Aponte. Here, they
3 could have granted her permanent permission status, and I
4 want to just make a quick point that reasonable
5 accommodation is an exception to a rule. You cannot simply
6 reiterate a rule and claim that that is reasonable
7 accommodation. So that would have been allowing Mr. Aponte
8 to move in and have permanent status. That would have been
9 one accommodation.

10 JUDGE WILSON: But why would that - - - why would
11 that be a greater accommodation than what they, in fact,
12 did as regards Ms. Aponte's disability?

13 MS. GOODRIDGE: I'm sorry. I didn't hear the
14 question.

15 JUDGE WILSON: Why would - - - why would giving
16 Mr. Aponte succession rights permitting him to move in as a
17 permanent resident have given Ms. - - - Ms. Aponte, his
18 mother, a greater accommodation to her disability?

19 MS. GOODRIDGE: Well, I think NYCHA makes the - -
20 - that argument in its brief and it - - - it
21 mischaracterizes the legal standard. The legal standard
22 here is that there - - - it's a two question - - - did
23 NYCHA violate the laws by failing to provide a reasonable
24 accommodation, and as a result of that, was Mr. Aponte
25 harmed. So here - - -



1 JUDGE STEIN: But back to my point, how - - - how
2 - - - there's no record here to determine whether a
3 reasonable accommodation was made because nothing was ever
4 raised in that regard. The only thing - - - nothing was
5 done. Nothing was done at all.

6 MS. GOODRIDGE: And that - - - and that was
7 NYCHA's burden to bear. So for example, there's several
8 ways where Ms. Aponte requested accommodation. She
9 submitted NYCHA received not one but two requests. On one
10 form it said I am sick, dementia, need help. There are no
11 magic words that a tenant needs to use to - - - to say that
12 I need a reasonable accommodation.

13 JUDGE STEIN: And once they - - - once they
14 didn't get what they wanted, don't they have to let them
15 know that this isn't good enough or we want a bigger
16 apartment or we want - - - I mean they asked for permanent
17 permission, but then when it was not granted they didn't do
18 anything. So - - -

19 MS. GOODRIDGE: The legal standard here is not on
20 the tenant. The legal standard is after the tenant
21 requests a reasonable accommodation and the landlord
22 refuses it, it is on the landlord's duty, the landlord's
23 burden - - -

24 JUDGE GARCIA: I think Judge Stein's point on
25 that is that standard is applied in the accommodation



1 proceeding, not in a subsequent collateral proceeding on
2 whether or not this person has succession rights. All
3 those standards and a review of what was and wasn't done
4 should have been done in a - - - in an objection, a
5 grievance of that proceeding itself where there's a full
6 record.

7 And it seems like now your argument again has to
8 be one of two things, that the only reasonable
9 accommodation we would have to conclude would have been - -
10 - and this goes to Judge Wilson's point - - - that
11 permanent succession rights, permanent residency should
12 have been granted when she actually got the accommodation
13 in fact that she was looking for - - - this person stayed,
14 the son stayed, or because of some failure in the process
15 we're going to send some type of deterrent message to the
16 agency that you have to do this the right way. And that
17 seems - - - both of those things seem difficult to me to
18 accomplish in this proceeding.

19 MS. GOODRIDGE: There are two points to answer
20 that question. The first is that there's no - - - the
21 point that there is no record really is based on NYCHA's
22 failure to engage in their interactive process. Ms.
23 Aponte, there is - - - it's undisputed that they received
24 information that they had a ninety-year-old woman with a
25 mental disability who reached out for help. That's the



1 first point.

2 JUDGE GARCIA: Wouldn't that - - - all that
3 record have been then developed in a direct grievance of
4 that proceeding which we - - - cannot be done here?

5 MS. GOODRIDGE: It can be done because Mr. Aponte
6 brought this proceeding under the premise of associational
7 discrimination. What that means in - - - in sum is that a
8 tenant may be able to bring a proceeding - - - any person
9 under the Fair Housing Act and under a reasonable
10 accommodation may be aggrieved. The person does not have
11 to be a person with a disability. So the legal standard
12 that the Appellate Division looked at is whether a person
13 was harmed because a landlord failed to provide reasonable
14 accommodation or discriminated in another facet. So, for
15 example, there's case law where a - - - children in a
16 hospital provided sign language to their parents. The
17 hospital - - - that case is Loeffler v. Staten Island. The
18 hospital did not provide the reasonable accommodation. The
19 parents received it anyway. But the children were able to
20 bring that case under associational discrimination. So the
21 legal standard is whether Mr. Aponte was harmed or not, and
22 clearly, we're here today because Mr. Aponte is facing
23 eviction. That is a harm.

24 JUDGE RIVERA: But I think that the - - - the
25 problem that I see with your argument is the harm is not



1 the one you're pointing to, the succession rights. The
2 harm would have been if they tried to evict him. That's
3 the harm because she needs - - - she needs the assistance.
4 He's willing and wants to provide it. And NYCHA's standing
5 between her request for assistance, his willingness to do
6 so.

7 And then you can have sort of that - - - that
8 process of figuring out how to respond to her needs. But
9 that strikes me as where he might have a claim to the harm
10 but not that, oh, I should have been put with my mother in
11 the position to eventually have succeeded to this - - - to
12 a lease to that apartment, or as Judge Wilson suggested
13 before, if - - - if they had been moved to a larger
14 apartment to that other apartment. And I think that's - -
15 - that's where I'm having difficulty under the - - - under
16 the framework of the anti-discrimination law to follow your
17 analysis.

18 MS. GOODRIDGE: Okay. The anti-discrimination
19 laws here have been - - - it - - - have been over four
20 decades. And what's clear here and the standard that NYCHA
21 had to meet was whether Mr. Aponte was harmed here. The
22 only reason - - - the only reason that Mr. Aponte is being
23 evicted is because he did not receive succession rights.
24 He didn't receive succession rights because NYCHA did not
25 grant Ms. Aponte's requested reasonable accommodation for



1 written permanent authorization. What NYCHA argued today -
2 - -

3 JUDGE STEIN: That's where I think the argument
4 sort of falls there because that again presumes that the
5 only reasonable accommodation rights would have been - - -
6 would have resulted in permanent residency for - - - for
7 Mr. Aponte.

8 MS. GOODRIDGE: Well, here in this particular
9 case the main distinction between temporary and permanent
10 permission, as NYCHA states, is that a tenant would have to
11 renew the temporary permission every year, so permanent
12 permission was suitable. And in this case, Ms. Aponte
13 clearly showed that she had a mental disability. She could
14 not remember the year, the season, and for her to renew
15 every year it would have been more suitable for her to have
16 permanent permission. So that argument - - -

17 JUDGE STEIN: Is the standard more suitable? Is
18 that the standard?

19 MS. GOODRIDGE: Here in this particular case,
20 NYCHA had to show why it was an undue burden to grant
21 permanent permission. It hasn't shown that, and in this
22 case, the record is clear that Ms. Aponte suffered from a
23 mental discovery and she needed some - - - and she was also
24 elderly and had a physical disability.

25 JUDGE WILSON: The NYCHA - - -



1 MS. GOODRIDGE: She needed someone to move in.

2 JUDGE WILSON: The NYCHA rules as I've read them,
3 at least in the case of a caretaker allow for the automatic
4 renewal by the building manager every year and don't
5 require reapplication. Is that right?

6 MS. GOODRIDGE: I'm sorry. What's - - - I'm - -
7 -

8 JUDGE WILSON: The NYCHA rules or the handbook
9 that I saw in the case of somebody who is allowed temporary
10 residence as a caretaker do not require reapplication every
11 year. The building manager can simply grant that.

12 MS. GOODRIDGE: NYCHA cites to a rule about
13 caregivers, about home health attendants, but those are for
14 paid home health - - -

15 JUDGE WILSON: Where does it say paid in that?

16 MS. GOODRIDGE: Those are for homecare - - - the
17 - - - the specific title I believe says homecare
18 attendants. This is - - -

19 JUDGE WILSON: And is there any - - - is there
20 any NYCHA precedent that - - - that would - - - or anything
21 you know of that would indicate that that person cannot be
22 an unpaid family member?

23 MS. GOODRIDGE: Well, in this particular case,
24 Mr. Aponte - - - I'm sorry, Ms. Aponte applied for
25 permanent permission, and the legal standard here is why



1 the permanent permission should not have been granted on
2 the basis of undue burden. And NYCHA continually has
3 reiterated that it has a policy, but the legal standard to
4 bear is why it should not have made an exception to that
5 policy.

6 The Appellate Division held this - - - this
7 decision right, and in addition, NYCHA's policy here
8 discourages aging in place. For example, a person who
9 wants to move in like Mr. Aponte and care for his mother
10 who raised him, who could not at the end of her life
11 remember even who he was, no one is going to move in and do
12 that if they know that they are going to face eviction. So
13 it discourages aging in place and it's arbitrary and
14 capricious for that reason as cited in our amicus brief by
15 the AARP.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MS. GOODRIDGE: Thank you.

18 CHIEF JUDGE DIFIORE: Ms. Lippman.

19 MS. LIPPMAN: Thank you. I would just like to
20 make a few points. First of all, there's been no argument
21 here that respondent's temporary residence in Ms. Aponte's
22 apartment was ineffective. Also, like to add that
23 temporary residents such as respondent never pay rent.
24 Okay. Their income is not included. That is part of the
25 reasonable accommodation. Also, as Judge Wilson pointed



1 out, renewal of temporary residency permission for a
2 caregiver, whoever the caregiver may be, a professional, a
3 family member, friend, can be automatic. Management may
4 automatically renew it. NYCHA does not need to assert the
5 undue burden defense here. Ms. Aponte was reasonably
6 accommodated. Also, I just - - -

7 JUDGE RIVERA: Can I ask you the - - -

8 MS. LIPPMAN: Yes.

9 JUDGE RIVERA: - - - hypothetical that Judge
10 Wilson posed to your adversary, would that violate the
11 federal HUD regulations?

12 MS. LIPPMAN: The - - - the hypothetical - - -

13 JUDGE RIVERA: Moving them to a larger apartment
14 but only giving the son temporary - - -

15 MS. LIPPMAN: No, it - - - it wouldn't. It
16 wouldn't violate it.

17 JUDGE RIVERA: You - - - you could have moved
18 them - - -

19 MS. LIPPMAN: Well - - -

20 JUDGE RIVERA: - - - instead of leaving them in
21 the one-bedroom in an overcrowded situation with the same
22 outcome that he doesn't have succession rights. Is that
23 true?

24 MS. LIPPMAN: Well, in this case, the medical
25 documentation did not indicate they needed more space.



1 JUDGE RIVERA: No, no, no.

2 MS. LIPPMAN: Oh, hypothetically.

3 JUDGE RIVERA: Let's assume that - - -

4 MS. LIPPMAN: Oh, okay.

5 JUDGE RIVERA: Let's assume that it would.

6 MS. LIPPMAN: Yes.

7 JUDGE RIVERA: My question was could - - - could
8 you do that?

9 MS. LIPPMAN: Yes.

10 JUDGE RIVERA: And grant temporary?

11 MS. LIPPMAN: Yes.

12 JUDGE RIVERA: I - - - I thought your - - - again
13 I am misreading your briefs - - -

14 MS. LIPPMAN: They could ask for permanent.

15 JUDGE RIVERA: - - - because I thought the - - -
16 your argument was that if - - - if he was in a non-
17 overcrowded situation that he would have had rights. He
18 could have made the argument for succession?

19 MS. LIPPMAN: He could - - - he could request it,
20 yes. If - - - if one wishes - - - if a family member - - -
21 one of the delineated categories of family members wishes
22 to move into the apartment, the addition to the household
23 will not result in overcrowding.

24 JUDGE RIVERA: But - - - but can you grant the
25 move to a larger apartment if he is willing to waive his



1 rights to that request?

2 MS. LIPPMAN: Sure. And - - -

3 JUDGE RIVERA: That's allowed by the federal
4 regs?

5 MS. LIPPMAN: Yes, and I would add that
6 professional caregivers are never entitled to permanent
7 permission. That is undisputed in this case. If Your - -
8 - Your Honor is referring to a family member, a family
9 member may request permanent permission. They don't have
10 to request permanent permission. But they may, yes.

11 JUDGE RIVERA: What - - - what does NYCHA do to
12 address this last concern that your adversary raised which
13 was raised by - - - by the briefing, the amici?

14 MS. LIPPMAN: The last concern - - -

15 JUDGE RIVERA: About - - - about discouraging
16 aging in your home and discouraging or undermining the
17 opportunity for a family member to stay. Because unless -
18 - - certainly, in New York City to request the family
19 member - - - I mean it's a sacrifice anyway, to give up
20 perhaps their permanent home to come to NYCHA to take care
21 of their aging, dying relative and then not have a
22 permanent home is quite - - - quite the burden.

23 MS. LIPPMAN: Yes, Your Honor. And NYCHA fully
24 supports and promotes aging in place by allowing caregivers
25 to live with the disabled tenant with automatic renewal of



1 the residency and exclusion of the caregiver's income from
2 calculation of the rent. So the caregiver may live there
3 for whatever period of time his or her services are needed
4 rent-free. There is no need to give up another residence.

5 JUDGE RIVERA: No, no. I get that. Let me ask
6 the last question because you - - - you have the red light,
7 I know we've gone over. If - - - if Ms. Aponte had medical
8 documentation that established that what she needed was not
9 someone who was not known to her, even though she has
10 dementia, I get that, but that she needed this relative to
11 actually provide the care and the relative establishes
12 through evidence that unless they're given a permanent - -
13 - unless they're given a lease they cannot leave their
14 home. They can't afford it. They can't risk it. Would
15 that be a - - - would those be factors you would take into
16 consideration or they're irrelevant to this because you've
17 already made a decision that you can never overcrowd?

18 MS. LIPPMAN: Reasonable accommodations by
19 definition are decided on a case-by-case basis. I cannot
20 envision a circumstance where NYCHA would need to grant
21 permanent permission to a caregiver. NYCHA does not need
22 to accommodate the comfort of a caregiver. However, should
23 such a situation arise, the option is not foreclosed.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 MS. LIPPMAN: Thank you.



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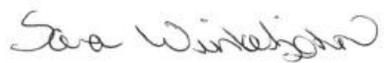
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Aponte v. Olatoye, No. 5 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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