

R. v. Camden London Borough Council, ex p. Mohammed

Queen's Bench Division

Latham J.

May 23, 1997

Introduction

1. Local authorities' duties to homeless persons are now to be found in Part VII of the Housing Act 1996 (*Encyclopedia*, para. 1-1799/753 *et seq.*). Section 175 of the 1996 Act defines the circumstances in which a person is to be treated as homeless for the purposes of Part VII. By section 175(3), a person "shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy". It is not reasonable for a person to continue to occupy accommodation if it is likely that this will lead to domestic violence against him or her: section 177(1).

2. Once an authority "have reason to believe" that a person may be homeless or threatened with homelessness, they are under a duty to make inquiries to satisfy themselves whether or not the applicant is eligible for assistance and what, if any, duty is owed to him: section 184(1). In conducting their inquiries, the authority must put basic issues to the applicant: *R. v. Tower Hamlets London Borough Council, ex p. Rouf* (1989) 21 H.L.R. 294, QBD; *R. v. Tower Hamlets London Borough Council, ex p. Nadia Saber* (1992) 24 H.L.R. 611, QBD. The authority are not bound to treat the issue as if in a court of law nor are they obliged to put everything to an applicant: *R. v. Southampton City Council, ex p. Ward* (1984) 14 H.L.R. 114, QBD. The applicant must, however, have an opportunity to deal with the generality of material which will adversely affect him: *R. v. Gravesham Borough Council, ex p. Winchester* (1986) 18 H.L.R. 208, QBD.

3. Once they have concluded their inquiries, the authority must inform the applicant of their decision in writing and, if it is adverse to the applicant, give reasons and inform the applicant of his right to request a review of the decision: section 184(3). The purpose of the requirement to give reasons is to enable the recipient to see whether they may be challengeable in law. In *R. v. London Borough of Croydon, ex p. Graham* (1993) 26 H.L.R. 286, CA, Sir Thomas Bingham M.R. said, in relation to Part III of the Housing Act 1985 (the predecessor to Part VII):

"I readily accept that these difficult decisions are decisions for the housing authority and certainly a pedantic exegesis of letters of this kind would be inappropriate. There is, nonetheless, an obligation under the Act to give reasons and that must impose on the council a duty to give reasons which are intelligible and which convey to the applicant the reasons why the application has been rejected in such a way that if they disclose an error of reasoning the applicant may take such steps as may be indicated."

(See also *R. v. London Borough of Islington, ex p. Hinds* (1995) 28 H.L.R. 302, CA)

4. Pending the outcome of the inquiries, the authority are under a duty to ensure that accommodation is available to the applicant: section 188(1). This duty ceases on notification of the decision, even if the applicant requests a review although the authority have a discretion to continue to secure that accommodation remains available pending a decision on the review: section 188(3).

5. The circumstances in which an applicant may request a review are contained in section 202 of the 1996 Act. The request must be made within 21 days of notification of the decision or such longer period as the authority may allow: section 202(3). The review must be conducted by the authority in accordance with any provisions made by the Secretary of State under section 203—see the Allocation of Housing and Homelessness (Review Procedures and Amendment) Regulations 1996 (S.I. 1996, No. 3122, *Encyclopedia*, para. 3-4877), as amended.

6. An applicant who is dissatisfied with the decision on the review may appeal to the county court on any point of law arising from the decision: section 204. The authority may choose to continue to secure that accommodation is available to the applicant pending the outcome of the appeal: section 204(4).

7. Prior to the commencement of Part VII of the Housing Act 1996, authorities' duties to the homeless were contained in Part III of the Housing Act 1985. The 1985 Act did not provide a right to request a review nor a right of appeal to the county court. Hitherto, any challenge to an authority's decision regarding an application for assistance as a homeless person generally had to be by way of judicial review: *Cocks v. Thanet D.C.* [1983] A.C. 286, 6 H.L.R. 15, HL; *O'Rourke v. Camden London Borough Council* [1997] 3 W.L.R. 86, 29 H.L.R. 793, HL. An applicant seeking leave to apply for judicial review could also seek an interlocutory injunction requiring the authority to house him until the matter was determined. In *R. v. Cardiff City Council, ex p. Barry* (1989) 22 H.L.R. 261, CA, it was held that in granting leave the court should usually also enable the applicant to remain in accommodation pending the outcome of the judicial review proceedings.

Facts

The applicant was a married woman with two children. On January 28, 1997, she applied to the respondent authority as a homeless person under Part VII of the Housing Act 1996. She claimed that she had had to leave her home because of domestic violence. The authority provided her with accommodation pending their inquiries. In interview, the applicant gave inconsistent accounts of her husband's conduct. The authority did not invite the applicant to explain these inconsistencies. On April 1, 1997, the authority wrote to the applicant informing her of their decision that she was not homeless because accommodation with her husband was still available.

The applicant's solicitors wrote to the authority requesting a review of the decision and temporary accommodation pending the review. On April 15, 1997, the solicitors wrote to the authority stating that the applicant had not been afforded the opportunity to address the inconsistencies in her statements. The authority operated a policy under which unsuccessful applicants were only to be provided with

accommodation pending the review of a decision "in exceptional circumstances", although the policy document did not indicate what circumstances might be exceptional.

The applicant sought judicial review of the decision not to provide her with interim accommodation. It was also contended on the applicant's behalf that the authority's policy was unlawful. The authority filed affidavit evidence which showed that of fifty-one reviews conducted by the authority, only four had been successful.

Held (allowing the application):

(1) As an applicant has an unfettered right under Housing Act 1996, section 202, to ask for a review of a decision, it was not intended that the authority's power to continue to secure accommodation for the applicant under section 202(3) would be exercised as a matter of course;

(2) In judging whether the authority's policy was lawful, it was necessary to judge it in its factual context; the statistics showed that very few requests for review were ultimately successful; in those circumstances, the authority's policy of exercising their discretion only in exceptional circumstances reflected the reality of the situation and was lawful;

(3) In exercising their discretion under section 188(3), an authority have to balance the objective of maintaining fairness between homeless persons in circumstances where they have decided that no duty is owed to the applicant, and proper consideration of the possibility that the applicant might be right and that to deprive him of accommodation could result in the denial of an entitlement;

(4) In carrying out this balancing exercise, certain matters will always require consideration, although other matters may also be relevant:

- (a) the merits of the case and the extent to which it can properly be said that the decision was one which was either contrary to the apparent merits or was one which involved a very fine balance of judgment;
- (b) whether consideration is required of new material, information or argument which could have a real effect on the decision under review;
- (c) the personal circumstances of the applicant and the consequences of an adverse decision on the exercise of the discretion;

(5) The authority had failed to give the applicant an opportunity to explain the inconsistencies in her statements and had therefore failed to take in account a relevant and material consideration in exercising their discretion;

(6) The decision letter failed to identify the basis for the authority's conclusion that the applicant was not homeless; the authority's failure to give reasons was a breach of section 184(3); although an applicant may apply to the High Court for judicial review of such a failure, the court would be slow to intervene unless it was clear that the authority's internal review could be perceived to be unfair to the applicant because the authority refused to rectify a deficiency in the decision letter.

Stephen Knafler for the applicant, instructed by Bindman & Partners, London.

Christopher Baker for the respondent, instructed by the legal department of Camden London Borough Council

LATHAM J.: This is an application for judicial review of a decision of the London Borough of Camden of April 15, 1997, not to continue to provide the applicant with interim accommodation pending determination of her review of the refusal of her homelessness application of April 1, 1997.

The applicant is a married lady who had, on December 16, 1996, married a Mr Saggid Sajjad. She was at the time living with her two young daughters, Zara and Zerena in council accommodation which she surrendered when she moved to live with her husband. There is no doubt that problems arose between her husband, herself and her children and, between December 1996 and February 1997, she made allegations of violence by her husband. The result of which was that on January 28, 1997, she applied for housing assistance. On January 30, 1997, interim accommodation was found for her and her children after a particular incident of violence at which the police had attended. The respondent Council thereafter considered her application to be treated as homeless and in priority need.

On April 1, 1997, the respondent Council gave its decision that she was not homeless, as she had accommodation which was available to her at the former matrimonial home. The reason given was:

“there is accommodation available and reasonable for you and your family to return to at the above address. This decision means that the Council has no duty to provide accommodation to you and your family.”

She consulted solicitors who immediately indicated that the applicant wished to have a review of the decision and asked for interim or temporary accommodation pending the review. The respondent Council refused to extend interim accommodation despite a detailed letter setting out the applicant's case on April 15, 1997.

The respondent Council in coming to that decision came to the conclusion that the applicant did not fall within its policy for the provision of interim or temporary accommodation which, insofar as it relates to those such as the applicant, reads as follows:

“No interim or temporary accommodation will be provided whilst the appeal is being considered unless; . . . There are exceptional reasons. The Principal Assessment Officer or other manager will consider these on receipt of the appeal.”

There is no indication in the policy document what will or will not be considered to constitute an exceptional reason.

The application for judicial review is based upon the assertion that that policy is an unlawful policy. There are also other grounds upon which the applicant seeks to challenge the decision, in particular, that the decision followed the failure of the respondent Council to provide any or any adequate reasons for the underlying decision that she was not homeless.

To understand the arguments it is necessary to deal with the statutory structure which, at the relevant time, was to be found in the Housing Act 1996. It is perhaps helpful to say, at this stage, that the procedures set out in the Housing Act 1996 are significantly different from the procedures which were well-known to this Court under the pre-existing housing legislation insofar as it related to those claiming to be homeless.

The 1996 Act unlike its predecessors makes provision for a formal process of review by the housing authority and for an appeal in point of law from such a review to the county court. In some ways, however, the requirement of the procedures remain the same. For example, in the first instance by section 184, the local housing authority is required to carry out the familiar process of inquiry as to whether or not

an applicant may be homeless and/or threatened with homelessness; whether he is eligible for assistance and, if so, whether any duty is owed under the Act.

Subsection (3) reads as follows:

“On completing their inquiries the authority shall notify the applicant of their decision and, so far as any issue is decided against his interests, inform him of the reasons for their decision.”

In the time during which those inquiries are proceeding, the local housing authority is under an interim duty to accommodate any person who it has reason to believe may be homeless, eligible for assistance and have a priority need. It was pursuant to that duty that the applicant here was housed at the end of January 1997.

Section 188(3) reads as follows:

“The duty ceases when the authority’s decision is notified to the applicant, even if the applicant requests a review of the decision (see section 202). The authority may continue to secure that accommodation is available for the applicant’s occupation pending a decision on a review.”

Section 202 provides that an applicant has the right to request a review of various decisions including the decision in question in this case. Once the review has been completed, if it is adverse to the applicant, the applicant has the right under section 204 to appeal to the county court on any point of law, and if there is such an appeal, the local housing authority may continue to secure that accommodation remains available to that person pending determination of the appeal. It follows, that both pending a review and pending an appeal, the local housing authority is given a discretionary power to provide interim housing. The Act itself gives no guidance as to the way in which that discretionary power is to be exercised. It is accepted, however, on behalf of the respondent Council that as in the case of any discretionary power, discretion is not an unlimited discretion, but it must be a discretion which is exercised in accordance with the perceived purposes of the statute.

The context in which the power is given is that the applicant has a right of review and a right of appeal which is unfettered save, of course, in the latter case that it must be on a point of law.

Section 169 of the Act empowers the Secretary of State to give guidance in relation to the exercise by local housing authorities of their functions under the Act. The only reference to the duty to secure interim accommodation is contained in paragraph 20.1 of the Code of Guidance insofar as it relates to the allocation of housing accommodation and homelessness.

The relevant passage in that paragraph reads as follows:

“Should the decision be that no further duty is owed, the authority will wish to give the applicant reasonable notice to quit the accommodation provided under the interim duty. However the local authority can, if they wish, continue to secure that the accommodation is available pending the outcome of a review.”

It was clearly the view of the Secretary of State, for whatever that is worth in this context, that the discretion was a wide discretion.

The applicant argues before me, in these proceedings, that the Act could not have intended that the position of a person seeking relief from a decision taken by a local housing authority, adverse to him or her, should be worse than had been the position prior to the passing of the 1996 Act. It is said that the clear practice that had developed over the years was that if an applicant sought and obtained leave to move for judicial review of an adverse decision by a local housing authority, the courts

would almost inevitably grant interim relief by way of ensuring that the applicant retained accommodation.

A useful statement of that practice is contained in the judgment of Sir John May in *R. v. Cardiff City Council ex p. Barry* (1989) 22 H.L.R. 261 at 263 where he said as follows:

“In my judgment, although it cannot be a general rule in every case, such as in this and in *Hammell's* case, it seems to me that where a court concludes that a local authority's decision under section 62 and 63 of the Housing Act 1985 is or may be susceptible of challenge by way of judicial review, the court as a usual concomitant of granting leave to challenge such a decision should preserve the ‘ring’ as it were, and enable the applicant to stay in any accommodation which he or she may be in pending the ultimate decision on the judicial review proceedings.”

The applicant, therefore, asserts that the policy expressed by this council must be an unlawful policy insofar as it purports to restrict the exercise of the policy to those cases where exceptional reasons can be shown. Her counsel makes the point that, in any event, the phrase “exceptional reasons” does not adequately describe a policy but merely a restrictive approach, and there is nothing in the Act which indicates that there is or should be a restrictive approach to the exercise of this discretionary power.

The problem of course in this particular case, as in all cases that will arise under the new Act, is that the person who is seeking review is not seeking judicial review as a result of having been given leave; the person seeking review is exercising a right which can be exercised by every person in respect of whom an adverse decision has been made.

The decision itself, as to whether or not to exercise the discretionary power in favour of the applicant, is being exercised by the local housing authority whose function is to hold the balance between the homeless as described in the speech of Lord Lowry in the case *Din v. Wandsworth London Borough Council* [1983] 1 A.C. 657 at 674. Where he said:

“ . . . the real contest here is not between the homeless citizen and the state: the duty of the housing authority is to hold the balance fairly among all the homeless persons and to exercise a fair discretion according to law, while your Lordships' task is to declare the law relevant to this case”.

Clearly, that statement was in the context of a decision on an application by a person who was asserting that they were homeless, but it does point out the particular status which the local housing authority, the respondent Council in this case, holds and, in particular, the problems which it faces.

As I have indicated, and I accept the applicant's argument in this respect, the Act does not suggest prejudice against granting interim relief, nor does it express prejudice in favour of granting interim relief. Looking at the structure of the Act, it seems to me to follow, from the unfettered right of an applicant to ask for a review, that the Act clearly did not envisage that the discretionary power would be exercised as a matter of course in favour of such a person. Indeed, one would be surprised if anyone suggested that that was an appropriate argument. It seems to me, that the proper approach to this particular problem is to look at the situation as it actually exists on the ground in order to put the policy in its proper context of fact as well as law to determine its validity.

The evidence that is before this Court from Christine Winter is that between January 1, 1997 and March 31, 1997, there were 51 reviews dealt with of which only

four were successful. It seems to me, in deciding how to approach the policy, that is the most useful piece of background information which one can have, for this reason: it immediately indicates, as it seems to me, the true nature of the problem, namely that there are very many requests for review of which only very few are found at the end of the day to have been meritorious. In those circumstances, it seems to me, that the use of the phrase "exceptional reasons" can properly be understood to reflect that reality.

The important question is whether, in applying that phrase, it is apparent that the officers of the respondent Council have either failed to take into account material considerations, have taken into account immaterial considerations or have otherwise displayed irrationality. The need that I identify as the underlying requirement of the exercise of this discretion is to keep, on the one hand, well in mind the objective of fairness between those who are homeless in circumstances where the local housing authority has in its first decision decided that there is no duty to the particular applicant and, on the other hand, to give proper consideration to the possibility that the applicant may be right, and that to deprive him or her of accommodation could result in a denial of an entitlement.

In carrying out that balancing exercise, it is clear that there are certain matters which will always require consideration. First, the merits of the case itself and the extent to which it can properly be said that the decision was one which was either apparently contrary to the merits of the case or was one which required a very fine balance of judgment which might go either way.

Secondly, it requires consideration of whether there is any new material, information or argument put before the local housing authority which could have a real effect upon the decision under review.

Finally, it requires consideration of the personal circumstances of the applicant and the consequences to him or her of an adverse decision on the exercise of discretion. It may well be that in some cases other considerations may prove to be relevant.

The question, in this case is whether those considerations where, in fact, borne in mind and properly given effect to by the respondent Council. I say that because the statement of policy which uses the phrase "exceptional reasons" seems to me, on the material that I have indicated, to be of itself a perfectly rational way of describing the approach. The particular matters which were taken into consideration in the present case were, on the affidavit evidence of Lesley Anne Leggett, the merits of the case and the personal circumstances of this applicant. I can see no basis upon which it could be argued, that Miss Leggett misdirected herself in her approach to either of those considerations. From the evidence that she had, it was apparent that the applicant had put forward inconsistent accounts as to the behaviour of her husband such as to throw real doubt upon her account.

The problem, it seems to me, is that in the letter of April 15, 1997 from the applicant's solicitors, the solicitors had written as follows:

"In the light of our client's instructions we do not believe that the authority has carried out its proper duty to investigate the case and obtain proper evidence from the police. In the event that they have obtained evidence which they feel is adverse to Mrs Mohammed's case they have not put this to our client and given her an opportunity to comment on it."

That was a very fair point. The position was that the respondent Council had come to adverse conclusion as to the applicant's account, based upon what was said to be discrepancies, but nowhere in the papers can I find any attempt by the respondent

Council to put those discrepancies to the applicant to see whether or not she could answer them, or to see whether or not they were based upon a misunderstanding or misapprehension.

It is trite law, that in the context of the inquiries that the local housing authority has to make under the relevant statutory provision, in this case section 184, it should give the applicant a proper opportunity to answer criticisms that may be made about his or her account.

A good example of the Court's approach is in the judgment of Simon Brown J., as he was, in *R. v. Gravesham Borough Council ex p. Winchester* (1986) 18 H.L.R. 207 at 215 where he said:

"The applicant must be given an opportunity to explain matter which the local authority is minded to regard as weighing substantially against him."

It follows that the fact that the applicant had not been given an opportunity to answer the concerns required consideration by the respondent Council and a reasoned response.

It is true that in the affidavit of Lesley Anne Leggett she says, at paragraph 14:

"I took full account of the letter from Bindmans dated April 15, 1997 and all of the matters set out therein before reaching my decision based upon the entire circumstances of the applicant's case."

In my judgment, that is an inadequate response to the point that was being made on behalf of this applicant which was, a point of some substance. It follows, that in relation to this particular decision, the respondent Council did fall into error in failing to take into account a relevant and material consideration. Further, the original decision was tainted by unfairness; and the refusal to reconsider by bearing the applicant's explanation when the unfairness was identified compounded that unfairness. The consequence is that the decision under challenge must be quashed.

I wish to deal, however, before concluding this judgment with two further matters. First, in the affidavit of Christine Winter, she explains the respondent Council's approach to the determination of whether or not there are exceptional reasons in any given case. She says as follows:

"Exceptional reason cannot be defined, and I would not seek to define them. Examples might include borderline cases or where there would be particular prejudice to the applicant. As a matter of practice exceptional circumstances have, in relatively short time since the policy came into being, been found in a number of situations."

It will be seen from my views as to the relevant considerations to be taken into account by the local housing authority, that this is an unexceptionable but incomplete account of the way in which the matter should be approached. It is necessarily incomplete as Christine Winter herself accepts. As I have said earlier, in this judgment, the considerations that I have set out are not intended to be, in any sense, exhaustive.

It does, however, seem to me, that to restrict consideration of the merits of the application for review to borderline cases is, for the reasons that I have already given, too narrow an approach—borderline cases will undoubtedly fall within one of the categories the category I have identified, but there will be others, the general nature of which I have sought to explain.

The second point that I wish to deal with arises out of the argument on behalf of the applicant, that the letter setting out the decision of the respondent Council of April 1, 1997, was deficient. There is no doubt that it was. It did not, as it should have done, identify the basis upon which the respondent Council had come to the conclusion that the applicant was not homeless except in terms which in no way shed light on the reasoning.

The question arises as to the Court's approach to such defective reasoning in the context of the new procedures under the 1996 Act. In the context of a review, it seems to me that the failure of a respondent Council to give reasons to which the applicant is entitled is clearly a breach of the obligation under section 184(3) of the Act which could justify an application to this Court for relief. However, it seems to me, that this Court should be slow to intervene, unless it is clear that the process of review was being rendered capable of being described as "unfair" as a result of a refusal by the local housing authority to put right a deficiency in such a letter. Generally speaking, the Court would wish to ensure that if the matter was capable of being put right to enable a fair hearing of the review it should allow the process to be completed rather than interfere officiously merely in order to assert a deficiency which was capable of being remedied. I say that simply in order to indicate, that whilst I do not wish in any way to detract from the importance of a local housing authority giving full and proper reasons under section 184(3), the purpose to be served by the giving of such reasons must be kept well in mind, which is to enable the applicant to put before the local housing authority a proper case based upon a full understanding of the council's previous decision to refuse accommodation.

I would hope, therefore, that if there are cases in the future where defective reasons are given in circumstances such as this, a prompt request for details will be made by the applicant or those acting on the applicant's behalf in order to enable the matter to be rectified if the respondent Council is minded to or capable of rectifying it.

For the reasons I have given, I have concluded that the decision challenged is, in fact, unlawful and should be quashed.