Case No: C1/2016/1187

Neutral Citation Number: [2017] EWCA Civ 2693
IN THE COURT OF APPEAL (CIVIL DIVISION)

The Royal Courts of Justice
Strand, London, WC2A 2LL

5 October 2017

Before:

LORD JUSTICE LEWISON
and
LORD JUSTICE KITCHIN

Between:

THE QUEEN ON THE APPLICATION OF CAMPBELL **Applicant**
- and -

LONDON BOROUGH OF CROYDON

Respondent

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Mr Wayne Beglan (instructed by Gowling LLP) appeared on behalf of the **Applicant**

The **Respondent** did not appear and was not represented

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Judgment

(Approved)

LORD JUSTICE LEWISON**:**

1. There may not be much money involved in this appeal but it raises a practical point which is important to local housing authorities fulfilling their duties to the homeless. In a nutshell, Ms Campbell was threatened with homelessness; and she applied to Croydon London Borough Council under the Housing Act 1996 in August and early September 2015. Having been evicted from her flat because of rent arrears, she was staying with friends and family. By 21 September, those arrangements were coming to an end and she was threatened with what is called street homelessness. On that day, Brixton Advice Centre wrote a pre-action protocol letter to Croydon. Having set out some of the history, the letter said:

> "The claimant advised she was seriously injured in 2006 and has had severe back pain and numbness in her arms since then. Her GP is [name and address given]. Details of the action the defendant is expected to take: to treat the claimant has homeless and to provide her with suitable temporary accommodation in accordance with section 184 and 188 of the Housing Act 1996."

Ms Campbell filled in an assessment form on 22 September 2015. In that form she ticked a box to indicate that she had no disabilities, physical or mental, although elsewhere on the form she stated that she had inflammation and torn ligaments. She was interviewed by a housing needs officer on the same day. Under the heading priority need, the note of the interview recorded that based on what Ms Campbell had told the officer, "I told her that the information she supplied will not give her priority." The officer said that she needed to acquire as much information as possible but recorded that the "answers she gave regarding her injury were sparse ... I warned her that she may have no priority based on what she has told me."

2. On 24 September, Croydon replied to the letter from Brixton Advice Centre. A housing needs officer said, "I have asked Ms Campbell to come in today for emergency accommodation pending our enquiries. She states that she is unable to come in today but will come in tomorrow." On the same day, Ms Campbell issued a judicial review claim form. The relief sought was an order requiring Croydon to secure suitable accommodation for Ms Campbell pending their decision as required by section 188(1) of the Housing Act 1996. The statement of grounds in support of the application set out the legal framework, in particular summarising section 188(1) which it is convenient to set out at this point:

> "If the local housing authority have reason to believe that an applicant may be homeless, eligible for assistance and have a priority need, they shall secure that accommodation is available for his occupation pending a decision as to the duty, if any, owed to him under the following provisions of his part."

The statement of facts placed before the court set out some of the history and concluded in paragraph 9:

> "The defendant accepted the homelessness application and interviewed the claimant on 21 September 2015 but failed to provide temporary accommodation pending written notification of its decision under section 184. The defendant made it clear during that meeting that a friend she was staying with at the time was uncomfortable with her remaining and that things were on the edge."

Remarkably, the statement of facts made no mention of Ms Campbell's alleged injury; did not assert that she was in priority need and did not assert that Croydon had reason to believe that she might be in priority need. The mere fact that Croydon had accepted the homelessness application says nothing about priority need. Nor did Ms Campbell reveal, as she should have done on a without notice application, that the

housing needs officer had told her only two days previously that based on the information supplied she did not have a priority need.

3. The claim was considered on the papers, and without any input from Croydon, by Dove J on the same day. He ordered Croydon to provide temporary accommodation and reserved the costs. His reasons were these:

> "I am satisfied that there is sufficient merit in the claimant's case in relation to her entitlement to interim accommodation pending the defendant's decision on her homelessness application, which the statement of fact says was accepted by the defendant to justify the grant of interim relief."

No doubt Croydon complied with that order.

4. The matter came back before the court on 6 November 2015 when HHJ Gore QC refused permission to apply for judicial review on the ground that the claim had become academic. He said in his reasons that since Ms Campbell had secured the relief sought by the application, Croydon would have to show cause why it should not pay her costs. Croydon duly filed submissions about costs which were considered on the papers by Mr Lavender QC. On 23 February 2016 he ordered Croydon to pay Ms Campbell's costs. His reasons were these:

> "Notwithstanding the defendant's submissions, the claim form was adjudged by Dove J to disclose sufficient merit to justify the grant of interim relief, which HHJ Gore QC decided made the claim academic."

It is against that order that Croydon appeals. Ms Campbell, who had been represented by the Brixton Advice Centre, does not appear on this appeal and does not oppose it. That is not really surprising for the reasons that follow. In my judgment Mr Lavender

took too narrow a view. He considered only whether there was sufficient merit in the claim for interim relief to have been granted on a without notice basis. The relief was therefore granted without Croydon having had an opportunity to be heard on the merits. It is a fundamental principle of any civilised legal system that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing at which they or their representatives are heard on the merits. This applies to an order for costs made on an application without notice, see MacKay v Ashwood Enterprises Ltd [2013] EWCA Civ 959, [2013] 5 Costs LR 816. Moreover, the default position is contained in CPR Part 44.10(2), which provides:

> "Where the court makes (a) ... (b) an order granting permission to apply for judicial review or, (c) any other order or direction sought by a party on an application without notice and the order does not mention costs, it will be deemed to include an order for the appellant's costs in the case."

Where an order is made for costs in the case, it means that the ultimately successful party will recover costs from the ultimately unsuccessful party unless the court orders otherwise. Thus the default position is that the ultimate fate of the claim will usually be determined by whom the costs are borne. The fact that Dove J reserved costs does not, in my judgment, operate in Ms Campbell's favour. It follows, in my judgment, that the mere fact that an applicant obtains relief on a without notice application does not tell you much about, let alone determine, the ultimate costs order.

5. Mr Beglan on behalf of Croydon referred us to the decision of this court in R (oao M) v Croydon LBC [2012] EWCA Civ 595, 2012 1WLR 2607. That, however, concerned cases in which a public authority concedes that the applicant is entitled to relief. Croydon made no such concession in this case. Since a court order was made against it

on a without notice application, it had no choice but to comply. Mr Beglan submitted to the administrative court that the pleaded claim would have failed. Section 188(1) entitles an applicant to interim housing only if the local authority has reason to believe that the applicant might have a priority need. As I have said, the statement of facts did not contain any factual assertion which could have led to the conclusion that Ms Campbell might have had a priority need. Mr Beglan thus submitted, rightly in my judgment, that there was a fatal flaw in the pleaded case. This was not therefore a case in which it was difficult to form a view about whether the applicant would have won or lost. She would have lost without a radical amendment of the pleaded case. In addition, in cases of applications for judicial review, especially where an application is made without notice, the applicant has a duty to make full and frank disclosure. Ms Campbell did not disclose the result of her interview with the housing needs officer. That was, in my judgment, a serious omission. Accordingly, in my judgment, the right order to have made would have been an order for Ms Campbell to have paid Croydon's costs. I would therefore allow the appeal.

LORD JUSTICE KITCHIN:

6. I agree.

Order: Application granted.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge