Neutral Citation Number: [2019] EWCA Civ 2142

Case No: C1/2019/0488

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Mr Justice Nicklin
[2019] EWHC 371 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 December 2019

Before :

LORD JUSTICE MOYLAN
LADY JUSTICE SIMLER
and
SIR PATRICK ELIAS

- -

Between :

ZAHIA REHOUNE	**Appellant**
- and -	
LONDON BOROUGH OF ISLINGTON	**Respondent**

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- -

Mr Lindsay Johnson (instructed by **Hopkin Murray Beskine**) for the **Appellant**
Mr Christopher Baker (instructed by **Islington Legal Services**) for the **Respondent**

Hearing dates: 26 November 2019

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Approved Judgment

Lady Justice Simler:

Introduction

1. As a consequence of regulations known as the Discretionary Financial Assistance Regulations 2001 made under s.69 of the Child Support, Pensions and Social Security Act 2000, local authorities have power to make discretionary housing payments (referred to as "DHP") to those in receipt of housing benefit who "appear to such an authority to require some further financial assistance (in addition to the benefit or benefits to which they are entitled) in order to meet housing costs" (Regulation 2(1)(b) of the 2001 Regulations). Regulation 3 sets out prescribed circumstances in which DHP can be made, and Regulation 4 sets out the limit on the amount of DHP that may be made.

2. The appellant in this case, is a lone parent of three young children, and has been affected by a number of relatively recent welfare reforms. First, s.96 Welfare Reform Act 2012 introduced a maximum benefit entitlement of £26,000 per annum, subsequently reduced to £23,000 per annum for non-working families living in London; and secondly, by s.13 Welfare Reform and Work Act 2016 a limit was introduced on the number of children in respect of whom a person could claim child tax credit: a benefit claimant cannot claim child tax credit in respect of a third or subsequent child if that child was born after 6 April 2017 (the "two child rule").

3. The appellant was provided with accommodation by the London Borough of Islington (the respondent) under the homelessness legislation on 23 January 2018. The effect of the changes just referred to capped her total benefit entitlement, including housing benefit, at £442.31 per week, making the rent of £405 a week for the accommodation provided unaffordable.

4. By letter dated 31 January 2018 the respondent notified the appellant that she would receive DHP to cover the weekly shortfall in respect of rent; but she was told that she would be required to pay £15 per week towards that shortfall out of her benefit income. Solicitors acting on the appellant's behalf challenged this decision and sought a review.

5. Before any review was in fact conducted (and during a period when further information was being sought by the respondent for the purpose of conducting a review), the appellant commenced proceedings for judicial review, challenging as unlawful what she described as the blanket policy of the respondent, and its application in her case, requiring her and other 'family' recipients of DHP to fund the first £15 per week of any shortfall between housing benefit and contractual rent.

6. The challenge was resisted. The respondent accepted that it operates a general practice that an applicant awarded DHP should bear some personal responsibility to contribute towards his or her own rent, but denied the blanket policy alleged. Further, it contended that the amount of DHP and/or any amount of rent which an applicant is required to bear, is always considered on an individual basis and where circumstances genuinely indicate that an applicant cannot afford or be expected to pay the general amount, it is reduced and in appropriate cases reduced to nil.

7. By a judgment dated 12 February 2019 Nicklin J dismissed the appellant's claim for judicial review, holding:

   i) Contrary to the respondent's case, there is a policy of seeking as a starting point a contribution of either £15 (for families) or £5 (for single people) from recipients of DHP towards the shortfall between housing benefit and contractual rent.

   ii) However, the policy is not unlawful because it is not a blanket or inflexible policy admitting of no real exceptions. The policy expressly recognises that DHP recipients might be assessed as requiring a nil contribution and as a matter of practice, the evidence shows that the respondent did not impose a contribution of £15 as a blanket policy. The figures in fact showed that a third of applicants are assessed at a nil contribution, a third are required to make the £15 payment per week, and a third have their contribution assessed somewhere in between nil and £15 per week.

8. The judge observed that the respondent might *potentially* be vulnerable to challenge on the ground that it does not make clear the exercise of this "unpublished policy, and therefore the ability of someone affected by the decision to challenge that policy is arguably impaired", however he concluded that the point did not assist the appellant on the facts of this case because she was able to and did challenge the contribution of £15 a week initially required of her.

9. Furthermore, in light of his conclusion that there was no blanket or inflexible policy requiring a contribution of £15 per week, the judge decided that it was unnecessary to consider the appellant's further arguments that the policy was unlawful because it failed to have regard to material considerations, including welfare reform and local authority obligations under the Children Act 2004; and unlawfully discriminates against women on grounds of their sex. These arguments were, he concluded,

> "premised on an assumption that the defendant has adopted an inflexible policy to the disadvantage of the claimant. In my judgment, it has not. The fact that the defendant has not reassessed the £15 contribution is not as a result of the application of an unlawful policy, but because the claimant has not taken advantage of the opportunity to persuade the defendant that it should not require any contribution from her to the shortfall in her rent. As matters stand, therefore, the claimant cannot point towards a final adverse decision made in relation to her claim for DHP that is susceptible to challenge by judicial review on the alternative grounds advanced in this claim. If, for example, having considered further information and evidence by the claimant, the defendant decided to reassess her for a nil contribution, there would be no decision capable of supporting [such] a challenge...".

10. This appeal sought to challenge Nicklin J's judgment as wrong on the following three grounds:

i) The judge failed and refused to determine the alternative bases on which the policy was challenged as unlawful;

ii) The judge was wrong to conclude that the un-published policy was not unlawful;

iii) The failure by the respondent to have regard to material considerations (the impact of welfare reform and its own obligations under the Children Act 2004); and the policy's unlawful discrimination against women on grounds of their sex, both render the policy unlawful as the judge should have found.

11. The respondent has throughout resisted the appeal, contesting all three grounds. In short, its case on the substantive issues is that the judge was entitled in the circumstances not to address the arguments about material considerations and unlawful discrimination given his conclusion that there was no blanket or inflexible policy requiring a set weekly contribution to the shortfall. The argument about transparency was not pleaded or properly investigated, and in any event there was sufficient transparency in context and on the particular facts.

Developments post-dating the judgment

12. Following the judgment below, and the provision of additional information on the appellant's behalf about her income and expenditure, the respondent reviewed the decision requiring a weekly contribution of £15 by her, and by letter dated 1 April 2019 the amount of DHP payable to her was increased by £15 per week and backdated.

13. The respondent also instigated, arranged and supported a benefit application and appeal leading to an award on 15 May 2019 of disability living allowance ("DLA") for the appellant's son, from 11 July 2018 to 10 July 2022. This award of DLA means that the benefit cap previously applicable to her, does not apply and consequently her entitlement to housing benefit is to the full amount to cover her contractual rental payments. The result is that she no longer has any rent shortfall to meet and that in turn has obviated her need for payment of DHP.

14. A further more recent development in October 2019 is that she is now in permanent local authority accommodation where the rent is controlled.

15. These developments, and in particular the award of DLA in May 2019, make this appeal entirely academic in the appellant's particular case. So much is conceded by Mr Lindsay Johnson, who appears on her behalf. He drew the court's attention to correspondence from both sides, sent to the court before the grant of permission to appeal, identifying the first two developments, and accepting that the appeal was academic. However, the correspondence from the appellant maintained that the appeal should proceed on all three grounds, notwithstanding its academic nature, because it was said to raise important points of wider significance. For the respondent, the correspondence invited withdrawal of the appeal, and emphasised that the arguments advanced on appeal were misplaced and/or raised no issue that required resolution in this case in light of the appeal being academic.

The resolution of this academic appeal

16. The grant of permission to appeal did not address expressly the fact that the appeal had become academic. This court notified the parties shortly before the substantive hearing that it expected to be addressed on this question. We were provided by Mr Johnson with a helpful Supplementary Skeleton Argument dealing with the question of academic appeals; and with a small bundle of correspondence prepared by the respondent relevant to this issue.

17. Having heard argument on the consequence of the appeal being academic, the court indicated to the parties the conclusion reached that there is no good reason in the public interest to hear this appeal, and the appeal would therefore be dismissed with reasons to follow. These are my reasons for that conclusion.

The discretion to hear academic appeals

18. There is no dispute that the court has discretion to determine an appeal that has become academic. The leading authority on the exercise of that discretion remains the decision in R v Secretary of State for the Home Department ex parte Salem [1991] 1 AC 450 (HL) where at 456- 457 Lord Slynn held:

> "In a cause where there is an issue involving a public authority as to a question of public law, your lordships have a discretion to hear the appeal, even if by the time the appeal reaches the house there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties inter se… The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the future."

19. Subsequent cases have emphasised how narrow the discretion is. In Hutcheson v Popdog Ltd (News Group Newspapers Ltd, third party) (Practice Note) [2012] 1 WLR 782 (which was not a public law case and did not involve a public authority) Lord Neuberger of Abbotsbury MR held that the "mere fact" that an appeal might raise a point of significance did not mean that it should be allowed to proceed where it is academic as between the parties (paragraph 12). He identified the following propositions (at paragraph 15):

> "Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean 'may') be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is

> not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated."

The submissions

20. Although the appellant accepts that this appeal is academic, Mr Johnson submits that there is good reason for hearing the appeal and it is in the public interest to do so. That public interest derives, he submits, from the challenge to the judgment below on the basis that the policy is unpublished (ground two). That it is unpublished makes it unlawful and the judge's conclusion to the contrary is plainly wrong in law and as a matter of principle. This is a live issue. The policy is being applied to significant numbers of vulnerable people, and a point of some general importance is therefore raised. Further the respondent has indicated that it has no present intention of committing the policy to writing. This justifies the appeal being heard on this ground. It can be fully ventilated in argument. Moreover, the respondent will not be inappropriately prejudiced by continuing with the appeal, it having reached such an advanced stage.

21. So far as the additional grounds of appeal are concerned, Mr Johnson realistically accepted when pressed that it is impossible to justify keeping those arguments alive. In my judgment he was right to do so. Having failed to establish that there is an inflexible policy requiring payment of £15 each week by way of contribution, his arguments on material considerations and unlawful indirect discrimination must inevitably shift to take account of the true nature of the policy actually found. The arguments directed at the so-called blanket policy are entirely hypothetical, and it seems to me that there is no public utility in considering arguments on the alternative grounds without a clear understanding of the factual basis underpinning that consideration. That factual underpinning has not been investigated or determined.

22. Mr Christopher Baker, who appears for the respondent, resists the submission that there is good reason for the appeal to be heard even on ground two. He emphasises that there are in fact no other affected cases waiting to be heard, so that the appeal would be hypothetical. Furthermore, he contends that the question of the transparency of the policy was not pleaded in the claim form or statement of facts and grounds, the evidence was not specifically directed at this issue and the point was never fully addressed before the hearing. In any event, the extent to which a policy must be published is fact specific. Here there is a published policy, albeit he accepts it makes no mention of the £15 starting point for weekly contributions by family recipients of DHP or of the possibility of review. Nevertheless, the witness statement of Ms Eileen Broderick, a manager in the 'Income Maximisation' team of the respondent, states at paragraph 12:

> "Every DHP decision letter provides the following information regarding review following the National guidance: You have a right to ask that this decision to be looked at again or ask how the decision was made. This is called a Level One Review. Please write to me at the above address within one month of the date at the top of the letter. State why you think the decision is wrong and sign the letter yourself. We aim to respond to this request within 10 working days of receipt of your letter."

Her statement also refers to a Level Two Review which can be requested if the applicant is not satisfied with the Level One outcome.

23. For all these reasons, he submits that there is no sufficient interest to be served by continuing with this appeal and the mere fact that costs have been incurred does not alter that.

Conclusions

24. I do not consider this to be a case where the discretion to continue to hear this appeal, even on the limited basis now proposed by the appellant, should be exercised notwithstanding that the appeal is academic. This is not a case where any discrete question of statutory construction or point of law arises for decision. Rather, the issue that arises in relation to the lawfulness of the transparency of the policy is fact and context specific. The steps actually taken by the respondent to alert applicants to the right of review and challenge are likely to be highly relevant.

25. I would readily have accepted that this issue is of wider importance than simply the appellant's case since there is no doubt that many people are affected by the DHP policy. Although there are no other cases currently being litigated, others can be anticipated, particularly in light of the apparent lack of transparency of the contribution policy. I refer in particular to the letter dated 31 January 2018 notifying the appellant that she would be paid DHP but would have to contribute £15 per week to the shortfall. Nothing whatever is said in this letter to alert her to the fact that this weekly sum is a starting point only, dependant on her individual circumstances, or that she could challenge the contribution rate by seeking a review of this decision. I do not know if hers was a standard letter; and if not why not. It appears to differ from the standard DHP decision letter described by Ms Broderick.

26. However, the difficulty is that the transparency issue was never pleaded, as Mr Johnson accepts, and was raised for the first time during argument in the hearing below. The consequence is that the respondent has never had the opportunity fully to investigate and consider this point, leaving Mr Baker in the position that he is unable to say what might have emerged by way of further evidence. Any difference between the letter of 31 January 2018 and the letters referred to by Ms Broderick has not been investigated or explored. This raises a question of fairness. It is also the case that the judge made no findings of fact about the steps, if any, taken by the respondent to make its policy transparent, and the extent to which these were or were not sufficient. These factual questions have simply not been properly explored and addressed because of the way in which they arose; and I consider that it is too late for the appellant to raise them, especially in the context of an academic appeal. If lack of publication does continue to raise an issue of wide and general application, it seems to me to be likely that there will be other cases that raise it, where the facts can be properly investigated to determine rights and obligations that are actually at stake. That is the appropriate way for this issue to be resolved.

27. These considerations point clearly to the conclusion that the court should not exercise the discretion to hear this appeal. This is not one of those exceptional cases where there is any real benefit to be achieved or public interest that justifies doing so. In my judgment the appeal should be dismissed accordingly.

28. Mr Baker submits that costs should follow the event in the usual way and the respondent, as the successful party, should be awarded the costs of the appeal. Mr Johnson resists that and submits that no order for costs should be made in the particular and unusual circumstances here. He submits that the appeal has not been dismissed on its merits and that it would be wrong to penalise the appellant in costs. It was not open to the appellant to withdraw the appeal and while she could have discontinued, that would have put her at risk of costs. By contrast, he is critical of the respondent and suggests that the respondent could have applied to strike out the appeal but failed to do so, and latterly has leapt on this court's bandwagon in adopting the approach it has to the question of continuing with this academic appeal. Moreover, a compromise was always possible and the appellant offered to compromise the appeal with no order as to costs if the respondent agreed to publish its policy within a period of (say) six weeks. That offer was refused and this conduct also justifies there being no order for costs in this case.

29. I do not accept Mr Johnson's submissions and have concluded that the normal rule that costs follow the event should apply. The respondent is the successful party, the appeal having been dismissed. The respondent objected to the appeal on the grounds that it was academic before the grant of permission, highlighting the change of circumstances that had occurred. It is difficult in those circumstances to see any justifiable basis for criticising the respondent's approach. Furthermore, the appeal was persisted in on all three grounds right up to the hearing, notwithstanding that it had become academic, and it was not until the hearing that Mr Johnson limited his position by focusing only on ground two. The respondent was forced to defend its case on all three grounds and the only compromise offered by the appellant was one that was based on the respondent effectively conceding ground two.

30. For all these reasons, in my judgment the appeal must be dismissed as academic and the appellant must pay the respondent's costs of the appeal on the standard basis, to be assessed if not agreed.

Sir Patrick Elias

I agree

Lord Justice Moylan

I also agree