Neutral Citation Number: [2024] EWCA Civ 405

Case No: CA-2023-000577

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE MAYOR'S AND CITY OF LONDON COURT
Recorder Deal KC
J40CL226

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 April 2024

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE NEWEY
and
MR JUSTICE COBB

- -

RABAH GHAOUI **Appellant**

- and -

LONDON BOROUGH OF WALTHAM FOREST **Respondent**

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- -

Liz Davies KC and Kevin Gannon (instructed by **Edwards Duthie Shamash Solicitors**) for the **Appellant**
Michael Mullin and Scarlet Taylor-Waller (instructed by **London Borough of Waltham Forest**) for the **Respondent**

Hearing date: 18 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 24 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

1. This appeal concerns the role of the Human Rights Act 1998 in the context of Part VII of the Housing Act 1996 ('the 1996 Act'), which places duties upon local authorities in relation to homeless persons. Specifically, how should human rights considerations be factored into the assessment of suitability of accommodation?

Background

2. The Appellant Mr Rabah Ghaoui is a married man with two young children. The family lived in the area of the Respondent local authority, the London Borough of Waltham Forest, but in April 2019 they were given notice to leave their privately rented accommodation. The following month, the Appellant applied to the Respondent for assistance with accommodation. In September of that year, he placed the older child in the nursery of an Academy, which is in the Respondent's area. It is a private fee-paying school, open only to those of the Islamic faith.

3. In March 2020, the family was evicted and the Respondent provided temporary accommodation in the Harlow area. That was some 20 miles from their previous address, which inevitably made it harder for the parents to attend their workplaces in London and for the child to go to school.

4. In November 2021, the Respondent confirmed that it owed the Appellant a main housing duty under section 193 of the 1996 Act. It offered the family a 12-month fixed term assured shorthold tenancy with a private landlord, again in Harlow. The Appellant instructed solicitors. In December 2021 they requested a review of the suitability of the offered accommodation and in April 2022 made representations. The central point was that the property was unsuitable by reason of its distance from the parents' places of work and the child's school. They explained that it was the Appellant's "preference that [the child] should attend a Muslim school rather than a multi-faith primary school". The submission set out the relevant legal framework, without making any reference to human rights law.

5. In early September 2022, the younger child entered the nursery at the Academy.

6. On 13 September 2022, the reviewing officer spoke to the Appellant. One part of the discussion concerned schools. The officer said that there were local schools in Harlow, to which the Appellant replied that the Respondent was "not considering their rights". The officer said that there was no legal duty to provide accommodation that allowed the children to attend a specific religious school. The next day, she issued a 'minded to' letter in which she said that she was likely to find that the offer was suitable. The lengthy letter included these passages about schooling:

> "The fact that you prefer your children… to attend a Muslim school does not render the property unsuitable in terms of location because there are several primary schools in Harlow, the area of the temporary accommodation offered to you in March 2020 and the area of the property you refused. Neither the homeless legislation nor the Suitability Order 2012 prescribes that housing authorities are

> duty bound to honour the wishes and preferences of applicants regarding schools devoid of a need. Choosing to educate your children in a privately run faith school motivated by dislike of your children mixing with other children from a diversity of faiths is not a need. It follows that when making the offer of the refused property, the council had sufficient regard to the welfare of your children… under s11 Children 2004 because there are state schools in the area where the children can attend…
>
> There is no legal duty for the housing authority to discharge the homeless duty by providing accommodation that meets applicants' wishes or desires. Your preference for the children to attend a Muslim school in a particular location is not essential need for the council to render that its obligations towards the welfare of the children were breached under section 11 Children Act 2004 because of the travelling and waiting involved to get your children to and from school. The resultant inconveniences and stress to you was totally avoidable by relocating the children to a school in the locality of the refused property which is within the same geographical area as the temporary accommodation…
>
> If you had given the children's welfare priority consideration, any reasonable parent would have relocated their children to a school near their residence. It is not an educational requirement that your children attend a Muslim school. The State has a functioning educational system that ensures that all children of school age have access to education until the age of 18 and the education is free. A preference of a particular religious school does not translate into an essential requirement for the purposes of discharging the authority's duty towards you in terms of complying with Suitability Order 2012."

The letter also comprehensively covered other issues raised on the review, including travel arrangements, financial pressures on the family and family ties.

7. On 30 September 2022, the Appellant's solicitors responded to the 'minded to' letter, but they made no reference to the above passages. On 17 October 2022, the officer issued her review decision, which included those passages. She found that the offered accommodation was suitable.

The first appeal

8. On 7 November 2022, the Appellant filed an appeal to the County Court under section 204 of the 1996 Act. He argued that the Respondent had failed to take into account the family's rights under Article 9 of the European Convention on Human Rights, and had failed to consider the "human rights implications" of its decision, as required by paragraph 1.28 of the Code of Guidance. It was also said that the Respondent was wrong to class faith education as not being a "need" and in doing so failed to treat it as a relevant circumstance.

9. The appeal hearing took place on 28 February 2023 before Recorder Deal KC, who handed down an admirably concise and considered judgment on 3 March 2023.

10. While summarising the review decision, the recorder remarked that the officer's choice of language in the cited passages could be described as censorious and that she could appreciate why the Appellant might regard it as dismissive of his entitlement to send his children to a private school of his choosing. She made the same observation about the reference to "any reasonable parent". However, the recorder found that the choice of wording was not relevant to the questions of law that arose on the appeal, and it was not submitted otherwise to her or to us.

11. I agree with the recorder's treatment of this unfortunate aspect of the case. There is much to be said for plain speaking in decision-making but there was no need for the officer to speculate about the Appellant's motives for choosing a particular school or to make gratuitous remarks about the reasonableness of his parenting. Comments of that kind may foster appeals, even if they do not actually assist appellants.

12. As to the substance of the appeal, the recorder noted that an appeal under section 204 must be on a point of law. A failure to refer to a Convention right (or indeed another statutory provision) was not an error of law. It would be different if an appellant could show a failure to have regard to a relevant factor, but even then review decisions should not be subjected to the type of analysis that may be applied to a contract, a statute or a judgment: *Holmes-Moorhouse v London Borough of Richmond on Thames* [2009] UKHL 7 at [47-51]. Accordingly, the recorder observed that:

> "In a case where the Appellant's own solicitors made no reference in their many communications to article 9, or to his Convention rights, it is perhaps hardly surprising that a reviewing officer who is not a lawyer followed the same course. What matters, in my judgement, is whether regard was adequately had to the Appellant's article 9 rights, not whether those rights were listed in black and white."

13. Addressing the core of the Appellant's case, the recorder accepted that the Respondent had to take account of any human rights implications in the exercise of its powers. She accepted that a parent electing to send their child to a single-faith school is a manifestation of religious belief. The real question on the appeal was whether the officer's treatment of that issue was an interference with the right protected by Article 9. She could not see a proper basis for concluding that it was. No-one was interfering with the Appellant's preference for a single-faith school and the officer was entitled to place less weight on that preference than the Appellant himself did. Were it otherwise, it would elevate the importance of exercising a public service that respects a believer's freedom to choose a single-faith school into a positive obligation on that authority to make it easier for him to do so. There was no authority in support of that argument. In summary:

> "31. The Appellant could reasonably expect to choose a private school for his child without the Respondent stopping him. He could expect that the choice of school, motivated by religious belief, would be included in the balancing exercise the Respondent had to carry out in matching properties with applicants, as of course it was. But I

> do not think, however, that he could expect the Respondent to place any particular weight on his choice of school (and certainly not such weight as needed to be put on it as to result in a more conveniently located property, whatever that might have been) just because that choice was motivated by faith. Respecting someone's article 9 *freedoms* does not mean elevating a parental choice into a mandate to which everything else must cede."

14. Accordingly, there had been no interference with the Appellant's right to manifest his faith by choosing the Academy for his children. The review decision was not unlawful and did not contravene the requirement in the Code of Guidance that human rights implications needed to be considered. Alternatively, without deciding the point, the recorder stated that even if there were an interference, it might well be justified in the interests of the wider community in the allocation of limited housing.

15. The recorder further found that, in saying that schooling at the Academy was not a 'need', the officer was not marking down the choice of school as a factor but simply concluding that it was not as important to suitability as the Appellant considered it to be.

16. Accordingly the recorder dismissed the appeal and confirmed the review decision.

The second appeal

17. On 12 September 2023, Nugee LJ granted permission to appeal by a narrow margin. He doubted whether there was any flaw in the review decision or the judgment, but observed that the case raised an important point of principle that had not been previously considered.

18. In December 2023, the Appellant and his family obtained a private sector tenancy closer to the Academy and were thereafter not homeless or in need of assistance from the Respondent. As a consequence, the outcome of the appeal has become academic for him. However, after an exchange of written submissions and consideration of the relevant authorities, Andrews LJ directed that the appeal should proceed to a hearing. She considered that it raised an issue of general public importance affecting local authorities generally when discharging their homelessness duties, namely what is the correct approach to determining the suitability of accommodation when the applicant's circumstances engage rights under the ECHR, in particular Article 9 and Article 2 of the First Protocol ('A2P1')?

Legal framework

19. Before considering the submissions of the parties, it is convenient to refer to the principal provisions in the fields of housing and human rights law.

20. The provisions of Part VII of the 1996 Act were summarised in the recent judgment of Lewis LJ in *Webb-Harnden v Waltham Forest LBC* [2023] EWCA Civ 992; [2023] HLR 45 at [4-10]. Reference need only be made to the following provisions. Section 206 requires that the accommodation offered in discharge of housing functions under Part VII is suitable. Section 208 provides that authorities should secure that accommodation is available in their district so far as is reasonably

practicable. Section 210 empowers the Secretary of State to specify by order matters to be taken into account or disregarded in determining whether accommodation is suitable for a person. That was done in the Homelessness (Suitability of Accommodation) (England) Order 2012, SI 2012/2601, which sets out at Article 2 a range of matters to be considered. There is also statutory guidance, the Homelessness Code of Guidance for Local Authorities ('the Homelessness Code'), issued under section 182, on the suitability of offers in the private rented sector (paragraphs 17.12-17.30) and the location of accommodation (paragraphs 17.48-17.61).

21. Section 11 of the Children Act 2004 provides that when making decisions about the suitability of accommodation, local housing authorities must consider the duty to safeguard and promote the welfare of any children. That does not make the children's welfare paramount or even a primary consideration, but it requires the decision-maker to identify their principal needs and to have regard to the need to safeguard and promote them when making the decision, and it must be clear from the decision that proper consideration has been given to the relevant matters required by the 1996 Act and the Homelessness Code: *Nzolameso v City of Westminster Council* [2015] UKSC 22, [2015] 2 All ER 952 at [27-28 and 32].

22. Turning to human rights considerations, section 6 of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. The Articles relied on in this case are Article 9 and A2P1.

Article 9:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 2, First Protocol:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The second sentence of A2P1 is subject to the derogation at Schedule 3, Part 2 of the Human Rights Act so that it applies "only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure".

23. Paragraph 1.20 of the Homelessness Code provides that housing authorities and other agencies that carry out public functions on behalf of housing authorities must do so in a way that is compatible with Convention rights. Paragraph 1.28 requires housing authorities to consider the human rights implications of their actions in the exercise of their powers, or risk having their decisions overturned as a result and the planning and delivery of their services being affected.

24. There is very little direct authority on the substantive application of human rights considerations to housing decisions. In *R (E) v Islington LBC* [2017] EWHC 1440 (Admin), [2018] PTSR 349, damages were awarded for a violation of A2P1, where the local housing authority had failed to ensure that a child placed outside its district had a school place available.

25. The most relevant authority for our purposes is the decision of this court in *Codona v Mid-Bedfordshire District Council* [2004] EWCA Civ 925, [2005] HLR 1 ('*Codona*'). That concerned the question of whether an offer to a gypsy family of short-term bricks-and-mortar accommodation was suitable when they wished for cultural reasons to live in caravan accommodation. The appellant argued that the failure to secure her accommodation on a caravan site, even on a temporary basis, violated her rights under Articles 8 and 14. The court held that the local authority must give special consideration to securing accommodation that would facilitate the family's traditional way of life and that, when considering whether accommodation was suitable they must carefully examine the claim for special consideration of their housing needs. It went on to find that, as it could be assumed that the family would only be in bricks-and-mortar accommodation for a short time, there was no violation. The court, through Auld LJ, made some reference to the significance of human rights considerations. At [42] he observed that suitability of offered accommodation in a homeless case has the gloss of Article 8, which requires a balancing of countervailing factors where they exist. At [55-56] he addressed the submissions made to the judge in this way:

> "However, the Judge went on to deal with the Art.8 point, put to him as a separate or supplemental ground of complaint fortifying Mrs Codona's claim, in much the same way as Mr Watkinson seeks to argue it here as a proposed fourth ground of appeal. It is, of course, all part of the same question, lawful application of a proper definition of suitability to the circumstances of the case, including Mrs Codona's aversion to conventional housing and the fact the offer was for short-stay bed and breakfast accommodation.
>
> The Judge was clearly alive to the combined effect of the absolute nature of the Council's duty, fortified by the Art.8 effect, when put against the Council's argument that it could not as a matter of practical possibility meet the wishes of Mrs Codona and her family for a pitch to house their six or seven caravans at relatively short notice."

26. In relation to the process undertaken by decision-makers we were referred to *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100 ('*Denbigh*'). That was a challenge to a school uniform policy that did not permit a pupil to attend school wearing the jilbab. She claimed violations of Article 9 and

A2P1. The Court of Appeal overturned the judge's dismissal of the claim, but the House of Lords restored the judge's order. Its observations about process are relevant. At [29] Lord Bingham remarked that the focus of the Convention is not on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights had been violated. At [31] he said this, in agreement with an article criticising the Court of Appeal's approach:

> "… I consider that the Court of Appeal's approach would introduce "a new formalism" and be "a recipe for judicialisation on an unprecedented scale". The Court of Appeal's decision-making prescription would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governors, even with a solicitor to help them. If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it."

27. At [66] Lord Hoffman described the Court of Appeal as having required the school to set itself an examination paper of human rights questions. At [68] he continued:

> "But article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9(2)? The fact that the decision-maker is allowed an area of judgment in imposing requirements which may have the effect of restricting the right does not entitle a court to say that a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done. Head teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows. The most that can be said is that the way in which the school approached the problem may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law."

28. Against this background, I turn to the appeal in the present case. We are called upon to determine whether the review decision was lawful, rather than assessing the decision of the recorder: *Danesh v Kensington & Chelsea RLBC* [2006] EWCA Civ 1404; [2007] 1 WLR 69 at [30].

The parties' arguments

29. We received helpful written and oral submissions from Ms Davies KC and Mr Gannon for the Appellant and from Mr Mullin and Ms Taylor-Waller for the Respondent.

30. The main element of the Appellant's case falls under Ground 1, which contends that the review decision was unlawful because it did not recognise that his preference for single-faith education was a freedom protected under Article 9 and did not then go

on to assess suitability on that footing. Ground 2 frames the argument with reference to the obligation in the Homelessness Code to consider the human rights implications of decisions. Ground 3 asserts that a dismissive characterisation of the preference as not being a 'need' failed to give proper recognition to the freedom protected by Article 9.

31. In the course of her submissions, Ms Davies did not seek to argue that Article 9 or A2P1 mean that accommodation could only be suitable if it was near a single-faith school. Nor did she make a conventional public law rationality argument to the effect that the decision was one no reasonable decision-maker could have reached. Instead she submitted that there was a third category, a human right that should have been recognised. The reviewing officer should have realised that the offer of accommodation in Harlow was an interference with the Article 9 freedom and then have looked for justification. The officer had to recognise that the right was engaged and to give it appropriate respect. The lack of awareness of this state of affairs and the failure to engage in a structured decision-making process rendered the decision unlawful. Ms Davies acknowledged that, had the officer taken a more subtle approach, her submission would be a difficult one, but here the outcome was a clear breach. As to A2P1, this was not the Appellant's primary case, but whilst the housing authority was not an education authority, the same local authority performed both functions; more to the point, schooling was a relevant factor for the housing authority to consider. Overall, the Respondent was required to do more to accommodate the Appellant's rights, including by considering deferring the decision in case more suitable accommodation became available.

32. For the Respondent, Mr Mullin observed that Article 9 had not featured in the Appellant's representations until the first appeal. His fundamental submission was that Ground 1 is fatally misconceived because the reviewing officer's task was not an academic one, concerning the ambit of the Appellant's Convention rights. She was not required to theorise about the nature and extent of rights under Article 9 and A2P1 and reach a conclusion about them, but to assess the suitability of the accommodation offered, in light of the representations made by the Appellant, and to reach a decision. As stated in the *Denbigh* case, Article 9 does not entitle a person to have a decision taken in a particular way. Here, the Appellant is not saying that the decision is unlawful because there has been a breach of Article 9. Rather, he says that the decision is unlawful because the decision maker has not considered and recognised the significance of the right. That is the formalising fallacy that was deprecated in *Denbigh* and confuses the approach to human rights with the public sector equality duty.

33. If, contrary to this main submission, it is necessary to move to the substance of the decision, Mr Mullin argued that there had been no interference with the Appellant's rights, indeed it would be difficult to see an authority that was trying to relieve a situation of homelessness as bringing about a violation. The reviewing officer clearly appreciated the strength of the appellant's preference in regard to schooling and she repeatedly referred to the issue in the review decision. It cannot be argued that she left it out of consideration, and she was not obliged to prioritise it. She referred to the statutory guidance in general terms. She was not carrying out a function "in relation to education and teaching", so A2P1 did not apply. This court has repeatedly held that housing authorities do not have to postpone decisions in the

'micawberish hope' that something better will turn up: *Alibkhiet v Brent LBC* [2018] EWCA Civ 2742.

Conclusion

34. I have no difficulty in concluding that there was no error of law in the review decision, and that the recorder was right to say so.

35. An assessment of suitability calls for a decision-maker, whether a housing officer or a reviewing officer, to identify all the relevant factors and to give them the weight that seems appropriate in their professional judgement. In doing so, they are guided by the terms of the primary and secondary legislation and the code of guidance, but the decision is a practical one, rooted in the circumstances of the individual case. It is made within a legal framework and has legal consequences, but the obligation is to reach a sound decision, not to carry out a legal analysis.

36. Homelessness decisions may raise issues that engage a Convention right, but instances where a decision designed to relieve homelessness will amount to a violation will surely be very rare. That is reflected in the virtual absence of decided cases involving human rights arguments about suitability, even under Article 8, and the present case is apparently the first in which Article 9 has been relied upon. What this shows is that in the quarter of a century since the Human Rights Act, lawyers and judges have recognised that decisions of this kind are fact-based evaluations and not legal constructs. The provision in Paragraph 1.20 of the Homelessness Code that housing authorities should consider the human rights implications of their actions does not compel decision-makers to identify rights and potential violations, nor does it disturb the message in *Denbigh* that human rights are respected through outcomes not processes. The references in *Codona* to the obligation on the authority to give "special consideration" to meeting Mrs Codona's housing needs and to her claim being "fortified by the Art. 8 effect" indicate that factors engaging a Convention right are to be given full and proper consideration, not that they must attract undue, still less predominant, weight by virtue of their Convention label. As Auld LJ said, it is all part of the same question, lawful application of a proper definition of suitability to the circumstances of the case.

37. Applying these principles to the present case, I agree with Mr Mullin's response to the main ground of appeal. The claim that the decision-maker was bound to recognise that she was dealing with a human right as such – Ms Davies' third category – sits in a no man's land between a claim of violation and a claim of irrationality. It is contrary to *Denbigh*, by focusing on process and not outcome, and by insisting that the decision-maker has to engage in a structured human rights analysis rather than an ordinary exercise of identifying and weighing up relevant factors.

38. Once the matter became the subject of an appeal, the recorder held that there had in fact been no interference with Article 9. She was entitled, indeed right, to reach that conclusion on the facts of this case for the reasons she gave: the Appellant had no right to expect the Respondent to place any particular weight on his religiously-motivated choice of school, and certainly not such weight as would be necessary to result in a more convenient property. The question of justification therefore did not arise. Had it done so, the Appellant would likely have faced an insuperable task in

showing that his faith-based preference should give him priority over other homeless persons.

39. Ground 2 fails for the reasons I have given above. Paragraph 1.20 of the Homelessness Code requires officers to address the substance of the issue giving rise to a human right; it does not require the officer to follow a particular process.

40. As to Ground 3, I again agree with Mr Mullin. Although the officer did not accept that single-faith education was a need, she paid considerable attention to the schooling issue and reached a decision about suitability that was plainly open to her.

41. For these reasons I would dismiss the appeal.

Lord Justice Newey:

42. I agree.

Mr Justice Cobb:

43. I also agree.
