Neutral Citation Number: [2021] EWHC 2739 (Admin)

Case No: CO/1042/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2021

Before :

DAVID PITTAWAY QC
(Sitting as a Deputy High Court Judge)

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Between :

Denis Paling	**Claimants**
- and -	
(1) Ipswich Magistrates Court **(2) Mid-Suffolk District Council**	**Defendants**

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Farhan Asghar (direct access) for the **Claimant**
Christopher Jacobs (instructed by **Mid-Suffolk District Council)** for the Second **Defendant**

Hearing date: 21 July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 18 October 2021.

DAVID PITTAWAY QC :

1. In this application for judicial review, Dr Paling ("the Claimant") challenges the procedural fairness of a hearing on 27 November 2019 at the Ipswich Magistrates Court, where he sought to challenge a liability order made in favour of Mid-Suffolk District Council ("the Second Defendant") in respect of unpaid council tax relating to a leasehold property at 10 Releet Close, Great Bricett, Ipswich.

2. On 8 October 2020 Sir Duncan Ousley refused permission to apply for judicial review on the papers on all grounds except in relation to the fairness of the hearing on 27 November 2019, which he directed be heard at an oral hearing on notice to all parties in order that both Defendants could address the matter properly before permission was granted. He also extended time for lodging the claim to 10 March 2020. On 19 June 202 Mrs Justice Foster ordered inter alia that the Second Defendant file detailed grounds of defence.

3. The grounds identified in the order of Sir Duncan Ouseley dated 7 October 2020, were (1) The ability of the Claimant to hear what was said at the hearing on 27 November 2019, and (2) The refusal to allow the Claimant to make oral submissions in addition to the 10-page synopsis he had handed into the justices.

4. The relevant passages in the Claimant's Statement of Facts to which the judge referred are as follows:

> "6 The solicitor stood with his left hand in his pocket, his back to the Applicant and spoke in a very low voice, which only the bench could hear."
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> "8. The Respondent's solicitor could not be heard from the Applicant's place, and so the Applicant could not answer the Respondent's submission. When the Applicant several times expressed concern that he could not hear the Chairman of the Justices took no measures to enable the Applicant to hear the Respondent's solicitor, as in Franz Kafka's Der Process (The Trial)."
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> "10. The Claimant refused to allow the Applicant to make an oral submission. The Applicant had handed in a 10-page synopsis of his case at the beginning of the hearing, and the Chairman refused to allow the Applicant to make oral submissions. When the Applicant expressed concern, the Chairman threatened to dismiss the Application."

5. Neither party filed any further grounds or submissions addressing the fairness of the hearing. At an oral hearing for permission on 2 February 2021, Richard Clayton QC granted permission to bring the claim for judicial review in relation to the fairness of the hearing on 27 November 2019. On 12 May 2021, he refused the Second Defendant's application on the papers to be removed as a party to these proceedings. As a result of no detailed grounds being filed, the questions posed by Sir Duncan Ouseley, as to the Defendants' position on whether there was any complaint made by

the Claimant, and if so, the magistrates' reaction to such complaint, has not been the subject of any further evidence.

6. At the outset of the hearing before me, Mr Jacobs, on behalf of the Second Defendant, applied to rely on a second witness statement from Mrs Ford, a lawyer employed by the Second Defendant, which detailed the unsuccessful attempts made to obtain a witness statement from the Second Defendant's Revenues officer, Mr Upson, who retired in March 2021, an application which I granted. As a result, the Second Defendant relies solely on the documentary evidence, which is available. Except for an initial response to the claim, the First Defendant has taken no active part in these proceedings.

7. Although the chronology of events leading to the making of the liability order is set out in detail in the Second Defendant's submissions, I do not propose to repeat it in this judgment. Except as I have set out below, I have concluded that I am not concerned with the nature of the dispute but only with the fairness of the hearing which took place on 27 November 2019.

8. Mr Asghar, on behalf of the Claimant, submits that the Claimant, who was acting in person on 27 November 2019, was unable to present his case properly at that hearing. He explained that the Claimant is a 76-year-old man with a number of medical conditions, he has suffered from strokes and has been treated for cancer. His primary criticism is that the Claimant was unable to hear Mr Upson, who spoke in a soft voice, who addressed his remarks solely towards the bench. The Claimant's witness statement produces a plan of the court room, which shows that whereas Mr Upson was situated close to where the magistrates were seated, the Claimant was sat about 20' away. The submission made by Mr Asghar is that the Claimant informed the magistrates that he was unable to hear Mr Upson, and that no reasonable adjustments were made for his age and health. Further when he attempted to make oral submissions to supplement his 10-page synopsis, he was told by the Chairman that his appeal would be dismissed if he continued to speak. If that is correct, Mr Asghar submits it would amount to a breach of the rules of natural justice.

9. There is no dispute that it is a fundamental requirement of fairness that parties to a dispute should have an equal ability to take part in proceedings and a right to be heard. Part of that requirement is that a defendant should have an opportunity of defending himself, and in order that he may do so he is to be made aware of the allegations or suggestions he has to meet, Ridge v Baldwin [1964] AC 40, 113- 114.

10. Mr Asghar relies on two essential characteristics of natural justice, impartiality and fairness, Kanda v. Government of Malaya [1962] A.C. 322, 337 (which was cited in Ridge v Baldwin with approval) where it was held that:

> "In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: Nemo judex in causa sua: and Audi alteram partem. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts and

> are governed by separate considerations. … If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

11. Mr Asghar reminded me that where a breach of natural justice is alleged, this court is not confined to reviewing the decision on Wednesbury principles, it must make its own independent judgement, R (Mahfouz) v General Medical Second Defendant [2004] EWCA Civ 223 per Carnwath at para 19 and R v Panel on Takeovers and Mergers ex p Guinness plc [1991] QB 146 per Lloyd LJ at para 184. Furthermore, the question whether there has been a breach of those principles is one of law, not fact, Rose v Humbles [1972] 1 WLR 33, para 12, where it was held that the assessment of unfairness is one for the reviewing court to make according to its perception as to whether there was a failure on the part of the decision-maker to discharge its judicial function with the result that the hearing was unfair. The issue was also considered by Hildyard J in M&P Enterprises (London) Limited v Norfolk Square (Northern Section) Limited [2018] EWHC 2665 (Ch), at [21], where he held that actual unfairness is the test.

12. The facts relating to the hearing on 27 November 2019 are relatively short. The ambit of the dispute centres around whether the Claimant was unable to hear the case being outlined to the magistrates by Mr Upson, whether he raised this issue with the magistrates, and whether he was not permitted to make oral submissions. There are other subsidiary issues as to whether Mr Upson was given sight of the Claimant's papers before the hearing and did not return them.

13. As the Second Defendant has been unable to obtain a witness statement from Mr Upson, it relies upon his attendance note made the same day as the hearing, which states:

> "Mr Paling's application to have the two Liability Orders set aside was dismissed by the Magistrates today. The hearing lasted about 2 hours 20 minutes. Attached is Mr Paling's legal submission and the Magistrates written decision. Mr Paling was not happy and said he would make application for the Court to state a case and seek a High Court hearing. The Court Clerk (Stephen Reyes) told Mr Paling that it would be better for him to make application to the Administrative Court for a judicial review. He also suggested to Mr Paling that he should apply to the Valuation Tribunal if he felt that he had been billed for an incorrect period or had not been granted the appropriate exemption or discount. Mr Paling told the Court that the address at 42 Summers Road, Farncombe, Surrey, GU7 3BD, was an address that his daughter had held on a shorthold tenancy but she was no longer there. He asked for an adjournment in order to find out from the local council as to the date she left. I opposed the application on the grounds that he had had enough time already and the Magistrates refused his request. Mr Paling stated that he was in occupation of 10 Releet

> Close with Mr Adam Whitehead and Ms Elizabeth Whitehead but did not give any dates. Mr Paling still seems to think that he is being charged an empty home premium although I told him before the Court that was not the case. We are still billing him as a second home and do need to clarify move in dates although whether he will provide the information is doubtful."

14. The Second Defendant also relied upon the First Defendant's initial response to the Claimant's application, prepared by Mr Reyes, the legal adviser, which states:

> " At the hearing on the 27 November 2019, the layout of the courtroom on the day was such that whilst the Local Authority representative was sitting closer to the Legal Adviser than the Claimant, the Claimant was sat so as to afford him a direct eye line to the Justices he was addressing. …… The hearing lasted two hours, during which the Justices heard submissions from the Claimant and the Local Authority. The Claimant submitted that he had been unaware of the original application for the Liability Order, and that accordingly the order made was a result of a substantial procedural error, defect or mishap. The Local Authority submitted that they had sent the Second Defendant Tax bill, statutory reminders and court summons following non-payment of the Second Defendant tax demand, to 42 Summers Road, Farncombe, and they had also written to the Claimant's current IP7 7FA. Further, that emails were also sent to the Claimant's acknowledged email address."

15. Mr Asghar in well-argued submissions relies upon the Claimant's account of what took place to submit that the Claimant did not know the nature of the case against him or the basis on which the liability orders had been made. He submits that Mr Upson's attendance note is short and does not set out what was said in the main part of the hearing. He also relies upon the age and health of the Claimant about which he maintains that the magistrates had been put on notice. He submits that reasonable steps to ensure that the Claimant was able to hear what was being said should have been taken. Essentially, his submissions amount to a catalogue of procedural errors amounting to an absence of fairness in how the hearing was conducted, including not explaining the procedure, as to who should speak first, not making it possible for the Claimant to hear what Mr Upson had to say, not allowing his application to adjourn the hearing for him to obtain further evidence, and finally, not permitting hm to make oral submissions. Finally that whilst the hearing lasted for over two hours, he submits that the Claimant only spoke in total for approximately 5 minutes. The submission made by Mr. Asghar is that in the absence of evidence to the contrary, I should infer that the Claimant's account of what occurred is correct. In addition, he submits that his account is supported by the layout of the courtroom and the undisputed admission that Mr Upson was speaking away from the Claimant.

16. Mr Asghar submits that that was a clear breach of natural justice and relies upon the decision in Kanda v. Government of Malaya (supra) on impartiality and fairness. He submits that there was a breach if the Claimant was unable to hear the case against him and not given an opportunity to contradict or explain the case. He reminded me that the challenge is not confined to Wednesbury principles. He submits that if I am

satisfied the Claimant could not hear then I must make my own independent judgement as to whether the hearing was fair. He also relies upon the appearance of bias, in M&P Enterprises (London) Limited v Norfolk Square (Northern Section) Limited (supra), in circumstances of actual unfairness where the Claimant was told by the Chairman that if the Claimant persisted in seeking to make oral submissions, then the case would be dismissed. He concluded that, from a fair-minded observer's point of view, the evidence available on the issues raised by the Claimant demonstrated that he had taken no part in the proceedings. Finally, he concluded that as to whether or not the result would have been the same had he participated in the hearing, I should be slow to accept that that as an answer where there was an inability to hear or respond to the case. He submitted that it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done. Once a decision is found to be tainted with unfairness or the appearance of bias, the decision cannot stand. It is irrelevant whether the outcome of the hearing below may have been the same nonetheless, In R (Al-Hasan) v SSHD [2005] 1 WLR 688 at [42] -[43].

17. Mr Jacobs, on behalf of the Second Defendant, in equally well-argued submissions submits that in the circumstances it is clear both from the note prepared by Mr Upson and the First Defendant's legal adviser that the matters now raised by the Claimant were not raised at the hearing. First, there is nothing from legal advisor to indicate that the Claimant raised the issue that he was unable to hear Mr Upson or requested reasonable adjustments which, he submits, was raised for the first time in paragraph 11 of his witness statement of 5 April 2021. Second, it is evident that the Claimant did make submissions during the course of a hearing that lasted over two hours. Indeed, the submissions that the Claimant made to the court are summarised in the legal advisor's memorandum. He submits that there is no merit in the Claimant's assertion that he was prevented from addressing the court nor is it credible that the Claimant after a 2-hour contested hearing the Claimant 'did not know fully the case against me and/or the basis on which my application to set aside the Liability Orders was resisted.' He says it is relevant to note that the legal advisor confirmed that at an earlier hearing of the same application (which had been adjourned) 'the Claimant had indicated to the Legal Adviser then present that he understood the grounds available to him'. He submits that the Claimant's participation in the proceedings is also borne out by the attendance note of Mr Upson, which was sent to his managers upon his return to his office after attending the hearing on 27 November 2010.

18. Mr Jacobs submits that the Claimant's application for judicial review should be dismissed on the grounds that the allegations of unfairness, apparent bias and procedural unfairness as alleged are not borne out by the evidence. Neither he submits, would a fair minded and informed observer conclude upon considering the evidence put forward by the First Defendant that there was a real possibility of bias, or actual unfairness in the proceedings on 27 November 2019 as the Claimant alleges. He reminds me of the very different factual matrices in Kanda v Government of Malaya (supra) and the other cases relied upon in support of this claim.

19. Finally, Mr Jacobs refers me to the difficult hurdle that the Claimant had to cross at the hearing to quash the liability orders. In R (Application of Brighton & Hove City Council) v Brighton & Hove Justices [2004] EWHC 1800 Admin where Stanley Burnton J said: "In my judgment, in general the magistrates court should not set aside

a liability order unless it is satisfied, in addition to there being a genuine and arguable dispute as to the defendants liability for the rates in question that (a) the order was made as a result of a substantial procedural error, defect or mishap, and (b) the application to the justices for the order to be set aside is made promptly after the defendant learns it has been made or has notice that any order made may have been made." The magistrates' written decision indicates that they applied the correct test and considered these three matters before dismissing the Claimant's application.

20. In my view, I am able to see from the papers that the Claimant has included in the bundle, the long saga that has existed in relation to the Claimant's inter action with the Second Defendant over the council tax for his property at 10 Releet Close, including decisions of the Upper Tribunal in relation to housing and council tax benefit. I can also see from the 10-page synopsis that the Claimant prepared for the hearing on 27 November 2019 that he had a clear understanding of the principles which the magistrates would have to apply in order to quash the liability order, the three-part approach is expressly set out in his written submissions. To me this demonstrates that the Claimant did understand the case that was being made against him in advance of the hearing.

21. The more difficult question is, however, whether I consider that the hearing itself was unfair. In my view, the two notes from Mr Upson and Mr Reyes do not respond directly to the Claimant's central allegations that he was unable to hear what Mr Upson said, that he informed the magistrates that he was unable to hear, and that he was not given the opportunity of making closing oral submissions. Standing back and reaching an independent view, I have concluded that the claim for judicial review succeeds. In my view, on the basis of the Claimant's evidence, which I accept, a fair minded and informed observer would conclude in this case that justice had not been seen to be done. I do not consider that the merits of whether the Claimant's application would succeed, upon which I do not form a view, should alter my decision. The Claimant's application to quash the liability orders should be remitted to the magistrates to be heard by a differently constituted bench.