OUTER HOUSE, COURT OF SESSION

[2019] CSOH 54

P1100/18

OPINION OF LORD BANNATYNE

In the petition of

AUGUSTIN-ROGER MAKOMBO-EBOMA

Petitioner

against

GLASGOW CITY COUNCIL

Respondent

Petitioner: Mr Dailly, sol adv; Drummond Miller LLP
Respondent: Mr Byrne; Morton Fraser LLP

19 July 2019

Introduction

[1] This petition for judicial review called before me for a substantive hearing on certain preliminary issues.

Background

[2] The petitioner currently resides in interim accommodation provided by the respondent.

[3] The petitioner is a French national and accordingly may accrue rights within the United Kingdom in circumstances prescribed by the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").

[4] The petitioner sought homelessness assistance in accordance with the Housing (Scotland) Act 1987 ("the 1987 Act") on 11 October 2018. His application was refused in a letter of that date ("the decision letter"). The material part of the decision letter for the purposes of this hearing is as follows:

> "You are a citizen of France. France is a member of the European Union/European Economic Area. In certain circumstances citizens of EU/EEA states are entitled to homelessness assistance. This depends on whether or not they are exercising particular EU treaty rights.
>
> I have looked at the information you have provided to me to determine if you are exercising a treaty right that would entitle you to homelessness assistance. You state that you have been in the UK since 2013 living with your father. You state you are in the UK exercising the treaty right of residency. Exercising that right requires you to be self-sufficient and does not entitle you to homelessness assistance.
>
> Accordingly, you are not now exercising a treaty right entitling you to homelessness assistance. Therefore I cannot grant you homelessness assistance.
>
> You do have the right to request a review of this decision and if you wish to do so, you must submit a review request to the case work office at the above address within 21 days of the date of this letter."

[5] By letter dated 23 October 2018 the petitioner sought to exercise the right of review to which he had been directed in the decision letter.

[6] The right of review is in terms of section 35A of the 1987 Act.

[7] The review process initiated by the petitioner has not been concluded. No written determination containing the reasons therefor has been intimated to the petitioner by the respondent.

[8] The respondent has in the course of the present case offered to carry out the review in terms of section 35A. This offer was repeated at the outset of the hearing before this

court. In short the petitioner's position is that a review in terms of section 35A is not competent and the issue therefore requires to be the subject of a judicial review.

[9] The petitioner has raised a petition seeking in short the following orders:

> "(i) Declarator that the respondent has acted *ultra vires* of section 29(1)(a) of the Housing (Scotland) Act 1987 by failing to provide him with *interim* accommodation and refusing to undertake a homelessness assessment in accordance with section 28 of the 1987 Act *et separatim* by failing to provide the petitioner with a decision and reasons in terms of section 30 of the 1987 Act;
>
> (ii) Declarator that the respondent has erred in law in finding the petitioner was not exercising a European Union Treaty right which entitled him to homelessness assistance in Scotland;
>
> (iii) Reduction of the decision of the respondent dated 11 October 2018;
>
> (iv) an order under the Court of Session Act 1988, section 45(b), for specific performance of the respondent's duty to undertake a homelessness assessment in accordance with section 28 of the Housing (Scotland) 1987 Act and accommodate the petitioner under section 29(1)(a) of the Housing (Scotland) Act 1987; and for such an order *ad interim*."

[10] The respondent in its answers raised certain preliminary matters, namely: in terms of pleas in law one and two the issues of competency and prematurity. In addition they raised a third connected issue in their third plea in law which was in the following terms:

> "The petitioner having a remedy in his own hands the court ought to refuse to provide him with any remedies in the exercise of its discretion."

It was in respect of the above issues that I heard argument.

The respondent's submissions

[11] Mr Byrne began by outlining the core of the petitioner's case in seeking the above orders: given the terms of the decision letter the decision is not reviewable in terms of section 35A of the 1987 Act. He submitted that the foregoing was wholly wrong. It was his position that the decision letter, on a sound reading, is to the effect that as a result of the

petitioner's immigration status no duty arose in terms of section 31 of the 1987 Act. He went on to argue that such a decision was reviewable in terms of section 35A. The material provisions of section 35A for the purposes of this case are:

> "(1) Where an applicant requests a review of a decision to which subsection (2) applies, the local authority concerned shall review the decision.
>
> (2) This subsection applies to the following decisions of a local authority -
>
> (a) any decision as to what duty (if any) is owed to the applicant under section 31 or 32."

[12] Mr Byrne placed particular emphasis on the words ("if any") in the provision. It was his position that having regard to these words it was clear that the power to review encompassed all decisions where a duty is said not to arise in terms of sections 31 or 32, no matter the reason for that duty not arising. Thus, where in the present case, the respondent determined no duty arose in terms of section 31, that decision was reviewable in terms of section 35A.

[13] Mr Byrne reminded the court that a review in terms of section 35A had been sought by the petitioner. Section 35B of the 1987 Act deals with the issue of procedure on review. Mr Byrne directed the court's attention to section 35B(2) and (5) which provide:

> "(2) The authority… shall notify the applicant of the decision reached on review…
>
> (5) Any notice required to be given to an applicant under this section shall be given in writing and shall, if not received by him, be treated as having been given to him only if it is made available at the authority's office for a reasonable period for collection by him or on his behalf."

[14] Thus he submitted that until the outcome of the review has been communicated in writing to the petitioner the review cannot be completed. There was no dispute between the parties that there had been no such written decision made by the respondent and then intimated to the petitioner. Thus the review was not concluded.

[15] Since the petitioner initiated the review the following had occurred in respect to it:

- On 25 and 26 February 2019 the respondent's solicitor wrote to the petitioner's solicitor and identified the review had not concluded as the respondent was waiting for more material. That correspondence identified that section 35B required a review to be communicated in writing once complete.
- On 22 March 2019, the respondent's agents wrote to the petitioner's agents to advise that the review was outstanding and invite the petitioner to produce the outstanding material to allow the review to conclude. The respondent stated:

  "Can you please indicate whether your client wishes to submit any further material."
- The petitioner has refused to so indicate.

[16] From the above Mr Byrne submitted: (i) there is no need for the present judicial review proceedings; (ii) the petitioner has a statutory form of review open to him, namely: in terms of section 35A; (iii) the petitioner has failed to exhaust his alternative remedies; (iv) the remedies provided by judicial review arise from the supervisory jurisdiction of the court and it is an equitable jurisdiction available where there is no other remedy available; (v) in that the petitioner has failed to exhaust his remedies the petition should be refused on the basis that it was incompetent to proceed by way of judicial review. His final submission was made under reference to *McCue* v *Glasgow City Council* [2014] CSOH 124.

[17] So far as his third plea in law was concerned this was based on the assertion that the petitioner held the remedy he seeks in his own hands. He had timeously sought review of the decision in terms of section 35A. A review in terms of section 35A was a competent form

of review for this decision; and the respondent was willing to review the decision. In these circumstances it was not appropriate for the court to allow the judicial review to proceed (See: *JCM petitioner* 2011 CSOH 174).

The petitioner's reply

[18] Mr Dailly's position in response was a concise one and can be summarised as follows: the petitioner asserts that a statutory review of the respondent's decision is not competent under the 1987 Act. The respondent's decision of 11 October 2018 was not made under the 1987 Act. Rather, it was the respondent's determination of the petitioner's immigration status under EU treaty rights. The respondent's decision made no finding or decision with respect to any of the duties or statutory tests set out in section 31 of the 1987 Act. The availability of statutory review is set out in section 35A of the 1987 Act and given that the respondent's decision fails to make any decision on the duties and statutory tests set out in section 31 it does not provide a review of the decision. Section 35A is of no relevance to the respondent's decision.

[19] In further elaboration of his position Mr Dailly said this: section 35A (1) of the 1987 Act provides that a statutory review is only competent with respect to a decision that section 35A(2) applies to. The decisions referred to in section 35A(2)(b) to (e) are not relevant to the facts of the petition. This was not a matter of contention between the parties. Section 35A(2)(a) pertains to a decision made under sections 31 or 32. Section 32 is not relevant as this duty is in relation to persons threatened with homelessness. He went on to submit that if the court considers the respondent's decision letter it will be noted that it makes no decision as to whether the petitioner is homeless, in terms of section 24 of the 1987 Act, and whether he became homeless intentionally, in terms of section 26 of the

1987 Act. Instead it makes a decision based on the petitioner's immigration law status in terms of the 2016 Regulations. The respondent's decision is accordingly not covered by section 35A of the 1987 Act. It follows that a review in terms of section 35A is not open to the petitioner. Accordingly he requires to seek a judicial review and the present proceedings are competent.

Discussion

[20] So far as the necessity to exhaust alternative statutory remedies before resorting to judicial review it was accepted by both sides that the law was as explained by Lord Jones in *McCue* v *Glasgow City Council*. After a comprehensive review of the authorities Lord Jones observed at paragraph 60:

> "For the reasons which I have given so far, I hold that it is not competent to seek judicial review when an alternative remedy, whether statutory or non-statutory, is available to the applicant and has not been resorted to or exhausted."

[21] The primary issue for the court accordingly is this: Did the petitioner have a statutory remedy which he had not exhausted? In deciding that issue the question for the court becomes this: Was the respondent's decision one which could competently be reviewed in terms of section 35A of the 1987 Act?

[22] The above question turns on the construction of section 35A(2)(a) which sets out one of the types of decision which can be reviewed in terms of section 35A. The terms of this provision are in short compass:

> "any decision as to what duty (if any) is owed to the applicant under section 31 or 32."

[23] Looking to the plain and ordinary meaning of the language in the above provision I am satisfied that the scope of the review provided for therein is sufficiently wide to encompass the challenged decision.

[24] I consider that the critical words in the provision are ("if any"). These words mean that the review provision not only covers a decision as to what duties in terms of section 31 are owed to an applicant, but importantly for the purpose of the argument before this court, on the plain ordinary meaning of these words also covers a decision that no duty is owed to the applicant in terms of section 31. On a fair reading of the decision letter what is decided by the respondent is that no duty was owed to the petitioner in terms of section 31 as he had not established that he was a "qualified person" in terms of Regulation 6 of the 2016 Regulations.

[25] In finding that the petitioner is not a "qualified person" the respondent holds that he is not eligible for permanent accommodation, the duty otherwise placed on the respondent in terms of section 31(2) of the 1987 Act. Accordingly, it seems to me that the respondent has on a proper analysis made a decision in terms of section 31. That decision is to the following effect: the petitioner is not entitled to accommodation in terms of section 31. The argument advanced by the petitioner that there has been no decision in terms of section 31 of the 1987 Act but rather a decision in terms of the 2016 Regulations for these reasons appears to me to be misconceived. The decision was not to hold him entitled to accommodation in terms of section 31 because he was not eligible for such. That is a decision in terms of section 31.

[26] Accordingly, having held that the above was the effect of the decision it appears to me that decision of the respondent falls four square within the scope of section 35A(2)(a). Thus I am persuaded that the petitioner has a right to a statutory review in terms of the said

provision. The petitioner has in fact made a timeous application for such a review and the respondent has made it clear on multiple occasions that it is prepared to consider such a review and to make a determination. It is clear that the review process has not been completed as no written decision thereon has been intimated to the petitioner. Thus the petitioner has not exhausted all of his statutory remedies. The review procedure in terms of section 35A remains open to him. That review procedure is capable of curing the alleged injustice of which he complains. In terms of the review procedure it may be held that he is qualified in terms of the 2016 Regulations and accordingly therefore entitled in terms of section 31 to accommodation.

[27] It is for the petitioner to use the procedure provided by parliament. It is parliament's intention that he should make use of this procedure. Judicial review is a remedy of last resort. Judicial review is an equitable remedy to prevent injustice. Given there is a statutory review procedure open to the petitioner he does not require to resort to judicial review.

[28] For the foregoing reasons I hold that the petition is incompetent and premature.

[29] The above decision is sufficient to decide the matter before the court. However, there was a secondary argument advanced by the respondent in terms of its third plea in law. I am of the view that the secondary argument put forward by the respondent is well founded. Given the view I have arrived at on the construction of the material provisions of the 1987 Act the pursuer has the remedy he is seeking in his own hands, namely: he has a review in terms of section 35A. It would accordingly appear to be appropriate to uphold the respondent's third plea in law as well as the first and second pleas in law.

[30] In the course of oral submissions Mr Dailly put forward a further argument (not foreshadowed in his note of argument) that there were special circumstances in the present

case which caused it to be an exception to the general principle that before resorting to judicial review all statutory remedies should be exhausted (See: *McCue* at paragraph 61).

[31] Mr Dailly advised that he was unable fully to advance this argument which turned on the merits of the application. The interlocutor fixing the hearing before me had excluded from consideration the merits of the action. He therefore submitted that if the court were against him in terms of the arguments advanced by Mr Byrne I should not dismiss this petition but rather put the case out for a further hearing in respect of the issue of special circumstances.

[32] I have considered the foregoing motion and there is nothing I can identify which could bring this case into the area of special circumstances identified by Lord Jones in *McCue* and accordingly I am not prepared to follow the course submitted by Mr Dailly.

Disposal

[33] There was discussion before me as to further procedure: first, Mr Dailly's argument which I have rejected and secondly Mr Byrne wished the matter put out by order if I were finding against the respondent before pronouncing an operative interlocutor. Given the conclusions I have arrived at I believe I can pronounce an operative interlocutor without putting the matter out for any further hearing or procedure. I accordingly dismiss the petition.