Neutral Citation Number: [2020] EWCA Civ 489

Case No: B5/2019/0794

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
Recorder Richard Methuen QC
E40CL234

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 2 April 2020

Before :

LORD JUSTICE McCOMBE
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE HADDON-CAVE

- -

Between :

Gerald James	**Appellant**
- and -	
Hertsmere Borough Council	**Respondent**

- -
- -

Timothy Straker QC, Toby Vanhegan and Nick Bano (instructed by **ARKrights Solicitors**) for the **Appellant**
Ranjit Bhose QC and Riccardo Calzavara (instructed by **Hertsmere Borough Council**) for the **Respondent**

Hearing date : 17 March 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Thursday, 2 April 2020

Lord Justice Peter Jackson:

1. This appeal concerns the scope of the jurisdiction of the county court when hearing a statutory appeal from a decision under s. 204 of the Housing Act 1996, and the lawfulness in this case of a contracted-out review decision under s. 202 of that Act.

The background

2. In November 2017, the Appellant, Mr Gerald James, applied to Hertsmere Borough Council for accommodation on the basis that he was homeless. The Council made inquiries under s. 184 Housing Act 1996 and on 29 January 2018, it notified him of its decision that he was not 'vulnerable' and therefore not in priority need within the terms of s. 189 of the Act; also that he was intentionally homeless. Accordingly the Council had no duty under s. 193 to house him, but only a duty to give advice and assistance. On 6 February 2018, the Appellant requested a review under s. 202 of the priority need decision and on the following day the Council agreed to carry out a review. By a letter of 24 August 2018, he was informed pursuant to s. 203 of the outcome of the review, which confirmed the decision that he was not in priority need.

3. Where an authority carries out a statutory review it must be must be carried out within 56 days unless a longer period is agreed between the applicant and the reviewer: regulation 9 of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999, which was applicable in this case, and regulation 9 of its successor, the Homelessness (Review Procedure etc.) Regulations 2018**.**

4. In the present case, the review was not completed for 28 weeks. This was no doubt in part because the reviewer needed to consider further medical evidence from more than one source. As it transpired, the fact that the review was not completed within 56 days (so by 5 April 2018) gave rise to one of the issues on this appeal. The explanation for this lies in events surrounding the contracting out process undertaken by this Council, to which I now turn.

5. The s. 202 homelessness review function is one that may be contracted out under the power contained in s. 70 of the Deregulation and Contracting Out Act 1994. The effect of contracting out is that the person with whom the local authority contracts is authorised to exercise the relevant function of the authority. The legal authority to exercise the public function is therefore conferred by a private law contract, albeit one that is subject to some statutory constraint: for example s. 69(5) and s. 70(4) of the 1994 Act limit the length of a contracted-out authorisation to 10 years and provide that authorisation can be revoked by the authority at any time.

6. In the present case the Council contracted out its homelessness review function to a private sector property management organisation called Residential Management Group Limited ("RMG") by means of a contract signed on 23 August 2017 by the Council's Chief Executive, Donald Graham.

The contract

7. The following elements of the contract are relevant:

(1) The preamble recited that the Council wished to commission RMG to provide a homelessness review service in accordance with the Conditions, the Service Specification, Schedules and any Appendices. The Service Specification included this sentence:

> "RMG will carry out section 202 Housing Act 1996 reviews selected by Hertsmere Quality and Reviews team over a 12 month period. Hertsmere will acknowledge the requests for review and immediately send the referral by email to RMG Ltd."

The syntactical ambiguity in the first sentence will be noted. The Appellant argues that in order to fall within the terms of the contract, and hence be authorised, reviews must be carried out *and completed* within 12 months, while the Council argues that reviews *selected* during the 12 month period must be carried out to completion and will be authorised even if that happens after the 12 months have expired.

(2) The contract contains a number of definitions. These include that the Commencement Date shall be the date on which RMG started to supply services, in fact 18 September 2017. The expression "Term", which appears at a number of points in the contract, was defined as "the period the service shall be provided by the Service Provider from the commencement of the Service to the completion of the work required under the Contract".

(3) Clause 3.1 defines the "Contract Term" as

> "the period from the commencement date to 11 April 2017 unless terminated in accordance with Clause 15 of this agreement. The parties may by agreement extend the Contract Term by periods of up to 12 months at a time, subject to a maximum including the contract term of 3 years."

It is common ground that this should be read as if 11 April 2017 read 11 April 2018. Accordingly the initial contract term was from 18 September 2017 to 11 April 2018. It will be recalled that the 56 day review period in the Appellant's case ended on 5 April 2018 but the review was not completed until August 2018. The review process therefore straddled the period before and after the initial contract term.

(4) Clause 3.3 states that "It is anticipated that the value of work will not exceed £25,000 but that is entirely within the Authorised Officer's discretion".

(5) Clause 4.1 provides that "During the Term" RMG was to devote such time, attention and abilities to the provision of the Services as the contract required.

(6) Clause 4.9 provides that RMG was required to assist the Council in defending any statutory appeal or judicial review proceedings in respect of the review decisions and would receive a fixed fee for doing so.

(7) Clause 6.1 entitles RMG to payment for services rendered in accordance with a schedule of fixed fees that specifies the cost per unit of completed work.

(8) Clause 7.1 concerns the Authorised Officer, who is the person named in the Contract "or such other person nominated in writing by the Council from time to time to act in the name of the Council for the purposes of the Contract". By Clause 7.3 the Authorised Officer was entitled to monitor the performance of the Services. The officer named in the Contract was the Housing Operations Manager, Mr Idris Kargbo. He was in theory answerable to the Housing Services Manager, who was answerable to the Director of Environment, whom was in turn answerable to the Chief Executive. However, by March 2018 neither intermediate post was filled.

(9) Clause 14 provides for the termination of the contract for cause and Clause 15 provides for the consequences of termination. These include the return of work-in-progress and a settling up. Clause 15.3 provides:

> "The termination of the Contract, howsoever arising, shall be without prejudice to any rights or obligations theretofore accrued or to any provisions which are expressed to be performed after or to survive the termination of this Contract."

(10) Clause 20 provides that:

> "A variation to this Contract (including to the scope and nature of the Services) shall only be valid if it has been agreed in writing and signed by both parties. "

The contract contains a requirement for an act to be recorded in writing in nine other miscellaneous contexts, though not, as has been seen, at Clause 3.1 concerning extensions.

The appeal to the county court

8. On 15 September 2018, the Appellant appealed to the county court under s. 204. The Council filed evidence in response from three witnesses: Mr Kargbo, Mr Graham (Chief Executive), and Councillor Morris Bright (Leader of the Council). Their evidence was to this effect:

(1) Mr Kargbo: "As Authorised Officer under that contract, in/around March 2018 I verbally agreed an extension with RMG for a further 12 months commencing 12th April 2018."

(2) Mr Graham: Responsibility for the contract had fallen directly on him in the absence of intermediate officers. "It was always my intention that Idris Kargbo would perform all of my functions in relation to the agreement including, giv[en] his performance monitoring role, taking the decision on behalf of the Council as to whether it should be extended." For the avoidance of doubt, his statement of 22 November 2018 formally confirmed his approval of the agreement he signed and of its extension for a year by Mr Kargbo.

(3) Councillor Bright: Although he considered that the extension of the contract to have been in order, on 22 November 2018 he ratified both the initial contracting out to RMG until 11 April 2018 and the extension until 11 April 2019. This decision was published on 3 December 2018 and became effective and binding so far as the Council was concerned from 11 December 2018.

9. In the county court the Appellant advanced three grounds of appeal. The second and third grounds concerned the public sector equality duty and the adequacy of the consideration of the issue of vulnerability. Those grounds were dismissed by the Recorder and they are not pursued on this appeal, which is concerned only with the first ground of appeal. This alleges that the review decision in August 2018 was of no effect because the Council had not lawfully contracted out its homelessness review function, and that subsequent attempts to ratify were also of no effect.

10. The Council disputed all three grounds of appeal. In a single paragraph of its skeleton argument it also asserted that challenges to the underlying contracting out were not a proper basis for a s. 204 appeal and that that ground of appeal should be summarily dismissed. This isolated assertion did not evoke any response in a supplemental skeleton argument filed by the Appellant or any mention in the court's judgment.

11. The appeal was heard by Recorder Methuen QC on 10 January 2019 and on 20 February 2019 he dismissed it. As to the Appellant's arguments that (a) Mr Kargbo had no authority to agree to extend the contract term, and (b) any such extension had to be in writing, the Recorder stated (a) that it was arguable that Mr Kargbo had authority and that there was nothing in the contract to contradict that, and (b) that the contract itself did not specify that an extension, as opposed to a variation, had to be in writing. However, he ultimately decided the appeal on the basis of the evidence of Mr Gordon and Mr Bright. After quoting it, he stated his conclusion in this way:

> "31. In other words, even if Mr Kargbo should have been further authorised in writing to take the decision to agree an extension, and even if the extension to the contract should have been reduced to writing, it is clear that these were matters of form and not substance.
>
> 32. It is plain that it was the intention of the Respondent Authority to authorise RMG Limited to carry out its functions under section 202 for the initial period of the contract and for the further period of 12 months from 12 April 2018. If there were any irregularities in the process these were cured by the decision of Mr Bright.
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> 33. The first ground of appeal therefore fails."

The appeal to this court

12. The single ground of appeal is that the Recorder was wrong to conclude that the review decision was lawful due to ratification by the Leader.

13. By a Respondent's Notice, the Council invites us to uphold the Recorder's decision on four additional grounds:

    (1) The jurisdiction under s. 204 did not extend to a challenge to the lawfulness of the contracting out. That issue could only be pursued through judicial review in the High Court, and the Recorder should have so held. This is the argument fleetingly advanced below.

    (2) It is sufficient for it to be lawful that the review was begun during the initial period of the contract even though it was not completed until a later date.

    (3) Mr Kargbo had authority to agree to extend the contract, and to do so orally. These are issues (a) and (b) as considered by the Recorder.

    (4) The extension was validly ratified by the Chief Executive (as well as by the Leader) on 22 November 2018.

14. The Appellant appeals with the permission of Patten LJ, who noted that this may be a suitable case in which to consider the scope of the s. 204 appeal jurisdiction.

15. I shall address the issues in this order:

    (1) Did the county court have jurisdiction to consider the contracting-out issue on appeal?

    (2) Was it sufficient for the review process to have started, but not to have been completed, during the initial contract period?

    (3) Was Mr Kargbo authorised to agree an extension?

    (4) Did an agreement to extend the contract have to be recorded in writing?

    (5) Was the review decision validly ratified by the Leader or by the Chief Executive?

Did the county court have jurisdiction to consider the contracting-out issue?

16. The answer to this question depends upon whether, as a matter of statutory construction, the challenge to the validity of the decision arising from the contracting out process is a point of law arising from the decision on the review. Section 204 of the Housing Act 1996 provides:

> "**204 Right of appeal to county court on point of law.**
>
> (1) If an applicant who has requested a review under section 202—
>
> (a) is dissatisfied with the decision on the review, or
>
> (b) is not notified of the decision on the review within the time prescribed under section 203,

> he may appeal to the county court on any point of law arising from the decision or, as the case may be, the original decision."

17. The genesis of this jurisdiction was described by Lord Woolf MR in *R. v. Brighton and Hove Council, ex p. Nacion* (1999) 31 HLR 1095 at 1100:

> "The history of section 204 of the Housing Act 1996 is that, until the Act came into force, applications for judicial review were regularly being made to the High Court where a person who was in need of accommodation sought to obtain the assistance of the courts to prevent local authorities ceasing to accommodate them. The remedy of judicial review in those circumstances was often not appropriate because High Court proceedings are not the right forum in which to resolve the delicate issues which arise out of local authorities' responsibilities for providing accommodation
>
> Judicial review was not appropriate because of the need for relief to be provided at extremely short notice, sometimes from applicants in parts of the country a considerable distance away from the High Court in London. Parliament, therefore, intervened by transferring the general jurisdiction of the High Court to the county court by the provisions of section 204 of the 1996 Act. That gave the county court jurisdiction to deal with appeals on any point of law which means that the county court's powers will be similar to those of the High Court on judicial review."

18. In *Nipa Begum v Tower Hamlets LBC* [2000] 1 WLR 306 the county court judge (Judge Platt) held that an appeal under s. 204 extended to a consideration of any issues that could be raised in judicial review proceedings. The challenge was on the basis of irrationality. Mr Bhose QC, who also appeared for the local authority in that case, argued that the jurisdiction was limited to challenges that the local authority had misunderstood or misapplied the law and did not extend to challenges (for example) of irrationality. This court disagreed. At 313 Auld LJ stated the position in this way at 313E:

> "In my view, the law is … that "a point of law" includes not only matters of legal interpretation but also the full range of issues which would otherwise be the subject of an application to the High Court for judicial review, such as procedural error and questions of vires, to which I add, also of irrationality and (in)adequacy of reasons."

And he continued at 314-315:

> "As to policy, the introduction by section 204 of the Act of 1996 of the new right of appeal to the county court in homelessness cases was intended to transfer from the High Court to the county court the main strain of the High Court's otherwise onerous task of judicial review of those decisions for

> which section 202 provides. I say "transfer ... the main strain" of such jurisdiction to the county court, because the Act does not deprive the High Court of its traditional jurisdiction in such matters. Such jurisdiction simply becomes residual; that is, it has become normally inappropriate to grant judicial review in them because there is now another, and generally more appropriate, avenue of challenge… It cannot have been intended that certain pockets of the High Court's jurisdiction, such as irrationality, should remain its exclusive preserve, thus giving rise to two, often overlapping, modes of challenge to a housing authority's decisions under section 202: cf. *Chief Adjudication Officer* v. *Foster* [1993] A.C. 754, 766-767, *per* Lord Bridge of Harwich. Moreover, a moment's thought indicates that it is in the area of irrationality that the county court is every bit as qualified as, or better than, the High Court to evaluate the strength or weakness of local decisions under challenge. It would be absurd if the new Act were construed so as to give the county court its head on matters of legal interpretation, but not on challenges based on irrationality.
>
> …
>
> There is another reason why the draftsman cannot have contemplated two concurrent, either separate or overlapping, forms of challenge to a local housing authority's decision on homelessness – timing. It is clearly desirable, in the public interest as well as that of applicants, that such challenges are resolved quickly and cheaply… hence the time limit, without power to the county court to extend it, of 21 days for appeal to the county court prescribed by section 204(2). The looser time constraints of R.S. C., Ord. 53, r. 4 and the leave threshold in judicial review would frustrate that clear statutory objective if it could be overridden every time there is a complaint of irrationality in addition to and supposedly distinguishable from, an error of law. For the same reason and save in the most exceptional circumstances, the residual jurisdiction of the High Court should not be regarded as a backstop for the appellate jurisdiction of the county court under section 204 where the applicant for housing assistance has failed to appeal a review decision within the 21 days' time limit. If there is to be any relaxation of that limit it would be better for Parliament to put it under the control of the county court."

19. Concurring, Sedley LJ said this at 327B:

> "On the first main issue on this appeal, the breadth of the county court's jurisdiction under section 204 of the Act, I agree with everything said by Auld L.J. and therefore with the conclusion of the judge. The jurisdiction of the county court is at least as wide as that of a court of judicial review."

20. This approach was noted with approval in *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430, where Lord Bingham stated at [7]:

> "Although the County Court's jurisdiction [under s. 204] is appellate it is in substance the same as that of the High Court in judicial review: *Nipa Begum v Tower Hamlets* LBC [2000] 1 WLR 306. Thus the court may not only quash the authority's decision under s 204(3) if it is held to be vitiated by legal misdirection or procedural impropriety, or unfairness or bias or irrationality or bad faith, but also if there is no evidence to support factual findings made or they are plainly untenable; or … if the decision maker is shown to have misunderstood or been ignorant of an established and relevant fact."

21. *De-Winter Heald v. Brent LBC* [2009] EWCA Civ 930, [2010] HLR 8, established that it was lawful for homelessness reviews to be contracted out to third parties. This court decided this in the context of a s. 204 appeal, and the issue of jurisdiction was not argued.

22. In *Tachie v. Welwyn Hatfield Borough Council* [2013] EWHC 3972 (QB); [2014] PTSR 662, Jay J considered the question that arises in the present case, namely whether a challenge to contracting out could be made on a s. 204 appeal. The argument was again made by Mr Bhose and resisted by Mr Vanhegan. The judge, having cited *Nipa Begum* and *Runa Begum*, stated his conclusion:

> "16. Notwithstanding the apparent breadth of this appellate jurisdiction, Mr Bhose submits that the Appellants' challenge to the contracting out process cannot raise *"any point of law arising from"* the review or original decision because there is a distinction between errors of law which might lead to such decisions, and errors which flow from them. Put another way, the errors in the instant case, if they exist, are antecedent rather than consequent.
>
> 17. I simply cannot accept the Respondent's submissions on this issue. The point has not previously arisen for judicial determination but in broad terms it is quite clear both on principle and authority that the statutory appeal on a point of law in this class of case is designed to operate in exactly the same way as judicial review, and that any *ultra vires* issue (in the sense explained by the House of Lords in Anisminic) is therefore capable of being taken. I discern no merit in the argument that "arising from" should be read restrictively. Furthermore, had there been any merit in this somewhat arid and technical point I could always have reconstituted myself as an Administrative Court possessing the judicial review jurisdiction which Mr Bhose agrees is ample enough to encompass challenges of this nature. In my judgment, s. 204 is sufficiently broad to permit Mr Vanhegan to raise the various matters which he seeks to under the umbrella of the common

> issues, and I must therefore proceed to address the merits of his case."

23. So *Tachie* does not draw any distinction between antecedent and consequent (or, put another way, intrinsic) errors of law. It should also be noted that in that case there had been a s. 204 appeal which was transferred to the High Court because of the contracting out issue. The possibility of the High Court constituting itself as an Administrative Court was therefore available.

24. In *Nzolameso v Westminster County Council* [2015] UKSC 22; [2015] PTSR 549 the Supreme Court was concerned with a s. 204 appeal against a review decision that 'out of borough' accommodation offered to the applicant had been suitable. Having concluded that the appeal would be allowed, Baroness Hale made these *obiter* observations about the consequences of the publication of housing policies for challenges to their legality:

> "41. Indeed, it would also enable a general challenge to those policies to be brought by way of judicial review. In some ways this might be preferable to a challenge by way of an individual appeal to a county court. But it may not always be practicable to mount a judicial review of an authority's policy, and an individual must be able to rely on any point of law arising from the decision under appeal, including the legality of the policy which has been applied in her case."

25. There is therefore one decision of the High Court directly on the point with which we are concerned, and several statements in this court and above that support the breadth of the s. 204 jurisdiction for which the Appellant contends. However, this approach was questioned in *Panayiotou v Waltham Forest LBC* [2017] EWCA Civ 1624; [2018] QB 1232. That concerned two appeals from statutory review decisions. One (Smith) raised an argument that had been rejected in *Tachie*, namely that the local authority's constitution prevented the contracting out of its Housing Act functions. Having himself rejected the argument, Lewison LJ ended with this postscript:

> "90. I cannot leave this case without expressing my disquiet that such wide ranging challenges to the actions of a local authority as Mr Smith has argued are permitted to arise in appeals under section 204 of the Housing Act 1996. The scope of such an appeal was not argued in *De-Winter Heald* and although in *Tachie* Jay J held that such arguments were available to an appellant under section 204, I would not regard the point as by any means settled. The original right to apply to the Administrative Court for judicial review was transferred to the county court because county courts were thought to have expertise in *housing*, not in administrative law generally. The right of appeal against a decision on review is a right limited to a point of law arising from the review decision, whereas in substance the points raised are challenges to Haringey's antecedent decision to contract out its functions. The right of appeal under section 204 is unfettered, whereas an applicant for judicial review requires the permission of the Administrative

> Court. Time for the making of an appeal under section 204 runs from the date when the appellant is notified of the review decision, whereas the substantive decision to contract out may have been made many years beforehand; and an application for judicial review would therefore be out of time. In addition challenges to public procurement decisions are in general susceptible to challenge under the prescriptive regime laid down by the Public Contracts Regulations 2015. Mr Vanhegan referred us to the decision of this court in *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011, [2010] PTSR 749. In that case it was decided that a person might be able to challenge a public procurement decision by judicial review if he has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way; and that he may have such an interest if he can show that performance of the competitive tendering procedure might have led to a different outcome that would have had a direct impact on him: see [77]. This is certainly not an invitation to pursue technical points that do not affect the individual. Mr Smith was entitled to a decision which was lawful in the sense that the test required by the Housing Act 1996 had to be correctly applied, irrespective of the person who applied it. This question was not, however, formally in issue on this appeal and Mr Vanhegan fairly argued that we ought not to decide it. I reluctantly agree; so what I have said on this topic is entirely *obiter* (a practice which I usually deprecate)."

26. *Adesotu v Lewisham LBC* [2019] EWCA Civ 1405; [2019] 1 WLR 5637 concerned the question of whether a discrimination claim under the Equality Act 2010 could be brought by way of a s. 204 appeal. This court held that it could not. Section 114 of the Equality Act gave the county court a distinct jurisdiction, and that should be used. Further, a discrimination claim, unlike a s. 204 appeal, involves fact finding. As to the "antecedent policy point", Bean LJ noted the view of the trial judge (Judge Luba QC) that the doubts expressed in *Panayiotou* were "not easy to reconcile" with dicta in *Nzolameso* and concluded at [37]:

> "I would not embark on resolving this controversy in the present case… it is not necessary for the disposal of the appeal. Resolving it should wait for a case where it is or may be determinative."

27. Those being the authorities, I turn to the submissions on this appeal, which lost nothing from their previous outings but can as a result be compressed.

28. Mr Bhose QC, leading Mr Calzavara, once more contends that:

(1) The plain meaning of the words of the section makes clear that jurisdiction is confined to a point of law *arising from* the review decision. The section focuses on the period of time between receipt of the statutory review request, when the authority's obligation to review its original decision is triggered (s. 202(4)), and

the notification of the statutory review decision, when its obligation is discharged (s. 203(3)).

(2) The reasoning in *Panayiotou* is to be preferred to the decision in *Tachie* for the reasons given in the later case.

(3) If the county court's jurisdiction extends to enabling applicants to challenge the exercise by authorities of Housing Act functions, it would potentially extend to other legislation. In this case, that includes local authority constitutions, delegation, and the lawfulness of decisions on ratification, which may be divorced in time or in substance from the decision under appeal. This militates against the presumption of regularity and affords insufficient protection of the public interest. It is unlikely to have been Parliament's intention when conferring this new jurisdiction upon the county court.

(4) This conclusion does not give rise to any tension with the guidance in *Nzolameso*. The Council accepts that in so far as the reviewing officer applies a policy the s. 204 jurisdiction extends to a challenge to that policy because it forms part of the reasoning. But that is not this case.

29. In response, Mr Straker QC, leading Mr Vanhegan and Mr Bano, argues that there are sound legal and practical reasons for reading s. 204 widely enough to permit a challenge of the present kind:

(1) Under section 204(1), the county court has jurisdiction in relation to *any* point of law. This wording is wide enough to cover a challenge by a homeless applicant that the person who took the relevant decision had no power to do so. That approach is supported by *Nipa Begum, Runa Begum, Tachie* and *Nzolameso.*

(2) There are practical reasons why this interpretation is to be preferred:

(a) The purpose of s. 204 was to transfer these cases from the High Court to the county court. This would be undermined by the return of homelessness appeals to the Administrative Court. As was intended, the county court now has pre-eminent experience in dealing with these applications.

(b) The permission stage in judicial review would frustrate the clear statutory objective of an unconditional right of appeal in respect of homelessness decisions.

(c) One purpose of s. 204 was for challenges to review decisions to be brought quickly, more cheaply and more locally. This would be undermined if a contracting out challenge carried the judicial review time limit (3 months for judicial review rather than 21 days under s. 204). Also, proceedings in the High Court take longer because there are a smaller number of hearing centres and judges than the county court. They are also likely to require applicants to travel further.

(d) Splitting jurisdictions duplicates court costs and time.

30. Before stating my conclusion on this issue, I record that we have considered whether this is indeed an appropriate case in which to rule on the scope of s. 204. On one

hand, it is usually possible to dispose of an appeal on case-specific grounds and the issue would only become unavoidable if the appeal were to have succeeded in all other respects. On the other hand, the issue is very much a live one on this appeal, it has been fully prepared and argued by specialist counsel, and both parties ask us to address it. The question has cropped up periodically ever since the legislation was enacted and the current state of the law (with the one direct authority at High Court level having been questioned in this court) is unsatisfactory. Every time the issue resurfaces it causes expense and takes up time, and it cannot be foreseen when this court will next have the opportunity to address it. It is our role to provide clarity on issues of this kind and I believe the time has come when it would be remiss of us to refrain.

31. In my view, the correct interpretation of s. 204 Housing Act 1996 is that a point of law arises from a decision if it concerns or relates to the lawfulness of the decision. Both normal statutory construction and the preponderance of authority point to the county court having jurisdiction to hear appeals from s. 202 review decisions that is not limited to points of law that might broadly but imprecisely be described as "points of housing law" but extends to the full range of issues that would otherwise be the subject of an application to the High Court for judicial review. These include challenges on grounds of procedural error, the extent of legal powers (*vires*), irrationality, and inadequacy of reasons. That much was stated by this court in *Nipa Begum* in the context of an irrationality challenge and if that decision does not indeed amount to binding authority extending to the circumstances found in this case, the matter can now be put beyond doubt. I do not accept that an error of law arising from a decision can only relate to errors that are intrinsic to the making of the decision or to events during the period between the request for a review and the making of the review decision. That narrow reading conflicts with the intention of the legislation that this statutory appeal jurisdiction should be removed from the Administrative Court and entrusted to the county court. I also consider the submissions on the practical advantages of this interpretation, set out at paragraph 29(2) above, to be well founded and supportive of this conclusion.

32. I do not believe that this outcome is likely to cause any difficulty in relation to s. 204 appeals. In most cases, any point of law will be specific to the individual decision. Cases where the challenge has a wider focus will be infrequent, and will usually be readily susceptible to resolution as part of the s. 204 appeal, particularly where the challenge is formal and without resonance for the real legal issues and the merits. But if, in a small minority of cases, the county court considers that the issue raised is one of general public importance, it is open to it to transfer it to the High Court under s. 42 of the County Courts Act 1984 in accordance with the criterion at CPR 30.3(2)(e). The issue could then be determined at High Court level, and that court could constitute itself as an Administrative Court if that was felt for some reason a more appropriate vehicle, as happened in *Tachie*. I nonetheless consider that the county court should be slow to identify an issue as one that it cannot determine for itself. By way of example, had the contracting out issue in the present case been pressed in the court below I would have expected the court to have determined it, and not to have transferred it to the High Court. But, as I say, there may be cases where the general importance of the challenge is such that transfer will be appropriate. By these means, the concerns expressed in *Panayiotou* are acknowledged, the proper scope of s. 204

upheld, and the residual supervisory jurisdiction of the High Court in the field preserved.

33. The first limb of the Respondent's Notice having failed, I turn now to the other issues, which turn on the terms of the contract and the question of ratification. Questions of contractual interpretation are to be approached in accordance with the statement of Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] AC 1173:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

Was it sufficient for the review process to have started, but not to have been completed, during the initial contract period?

34. The Council argues that because RMG had been instructed to undertake a statutory review on 22 February 2018 – before the expiry of the contract – it was required and authorised to complete it even though completion was after the contract term. The contract was entered into lawfully and in knowledge of the 56-day extendable limit. It points to the clauses cited at sub-paragraphs 7(1), (2), (5), (6) and (7) above as showing that the concept of the "Term" is distinct from the chronological contract term. The contract provides for RMG to provide services to achieve the outcome of a statutory review decision and "the lights do not go out" on the contract at the end of the contract term. Any other interpretation would make no sense, either as between the contracting parties, with work in progress and the right to payment being lost, or from the point of view of those seeking review decisions.

35. The Appellant argues that for good order and predictability of consequences it is essential that those exercising public functions are duly authorised. Mr Straker contends that the work under the contract must be completed within the contract term and that even if RMG was "asked" to continue after that date it was not "authorised" to do so. He sought to make good this argument by referring to the 10-year contracting out limit which, he suggested, had the effect that no work completed after required 10 years could ever be legally authorised. That analogy seemed to me to beg the question we have to decide.

36. I find the submission of the Council as to the meaning of this contract correct in this respect for the reasons it gives. The effect of the Appellant's submission is that unless the contract happened to be extended no review could be selected by the Council for sending to RMG within 56 days of the end of the contract term. This indeed makes no sense in the context of a contract designed to ensure the uninterrupted performance of a continuing public function. In the end, the Appellant had no answer to this. I would therefore uphold the Recorder's decision on the further ground that the commissioning of the review within the contract period, without the contract having been subsequently terminated, provided RMG with authorisation to continue and

complete the review regardless of whether completion took place after the expiry of the contract term.

37. This conclusion is on its own sufficient to lead to the dismissal of this appeal, but lest it is wrong I address the remaining issues.

Was Mr Kargbo authorised to agree an extension?

38. There are two aspects to this question. Did the role of Authorised Officer in itself carry with it the authority to extend the contract? Was Mr Kargbo authorised to do so by the Chief Executive?

39. I am, to say the least, doubtful that the contract contemplated that the Authorised Officer had authority to bind the Council to an extension of the contract. The contact was signed by the Chief Executive. The Authorised Officer's role was "to act in the name of the Council for the purposes of the contract" and specifically to monitor the performance of services. It is one thing to say, as is no doubt the case, that no extension would have taken place without consultation with Mr Kargbo but another to conclude that he had authority to extend it off his own bat. There is a distinction to be drawn between the running of the contract and its existence. I am not persuaded that the Council has made out this ground.

40. I take a similar view of the argument that Mr Kargbo had authority derived from the Chief Executive. The evidence of Mr Graham, given 8 months later, was that it was always his intention that Mr Kargbo could extend the contract. However, there is no record of any act of delegation regarding this contract. As to the command structure, it is not clear whether the Housing Service Officer (who was made redundant on 9 March 2018) was in post when Mr Kargbo agreed an extension of the contract "in/around March 2018". At all events, I would need more persuasion to accept that valid delegation had taken place when the alternative is that the Chief Executive understandably gave no thought to the matter until long after the event.

Did an agreement to extend the contract have to be recorded in writing?

41. The Council accepts that it would have been better had the extension been recorded in writing, but it contends that the contract did not require this. Clause 3, which concerns extensions, does not require writing. In contrast, Clause 20, which concerns variations, does, as do a number of other clauses. On a true construction of this contract, I consider it moot whether an extension to it is a variation of it for which writing is required, and the matter would also need to be considered in the context of the public law duties that exist in this case. In the end, it is not necessary for us to resolve whether the later completion of reviews commissioned during the initial term engages the exception to the usual rule on clauses precluding oral modification, as explained by Lord Sumption in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24 at [16].

Was the review decision validly ratified by the Leader or by the Chief Executive?

42. It will be recalled that the Recorder based his decision on ratification by the Leader of the Council.

43. In the light of detailed submissions made by Mr Bhose about the Local Government Act 2000 and the constitutional arrangements of the Council, the Appellant now accepts that the Leader and the Chief Executive each had the power to agree to extend the contract. However, Mr Straker submits that they did not do so at the time and that as the review decision was (on this hypothesis) made without authority their purported ratifications on 22 November 2018 were of no effect as *ultra vires* acts cannot be ratified: *Ashbury Railway Company v Riche* (1875) LR 7 HL 653 and *R v Rochester City Council ex p. Hobday* 58 P & C R 424. He also made, but wisely did not press, a submission that it was too late to ratify and that it would be unfairly prejudicial to allow ratification.

44. Mr Bhose responds, relying upon *Firth v. Staines* [1897] QB 70 and *Webb v Ipswich Borough Council* (1989) 21 HLR that the preconditions for ratification are satisfied in this case and that as the challenge is one of form and not substance, ratification is unexceptionable.

45. In my view, the Recorder was right to find that, if ratification of the extension to the contract was required, the Leader of the Council validly performed it. The same conclusion applies in respect of the Chief Executive. There is nothing in the argument that they were ratifying an *ultra vires* act as the delivery of contracted out review decisions was squarely within the powers of the Council, while the actions in *Ashbury* and *Hobday* were outwith the powers of the company and the local authority respectively. Nor, if there was anything to ratify, do the Appellant's arguments show that the interests of justice would be served by preventing the remedying of a defect that had nothing to do with the merits of the matter and deprived the Appellant of no genuine legal right, but rather of an adventitious advantage.

46. I therefore conclude that (1) the county court had jurisdiction to determine all the challenges made by the Appellant to the lawfulness of the review decision, (2) the review decision was lawfully made because it was commissioned during the review period, (3) if that be wrong, it was validly ratified by the Leader of the Council and by the Chief Executive, and it is accordingly unnecessary to reach a concluded view on (4) whether the contract was validly extended by Mr Kargbo, or (5) whether any extension of the contract could only be effective if made in writing.

47. For these reasons, I would dismiss the appeal.

Lord Justice Haddon-Cave

48. I agree.

Lord Justice McCombe

49. I also agree.
