Neutral Citation Number: [2018] EWCA Civ 2876

Case No: B5/2017/1185

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT BIRMINGHAM
Ms Recorder McNeill QC
BM60121A

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2018

Before:

SIR GEOFFREY VOS
Chancellor of the High Court
LORD JUSTICE DAVID RICHARDS
and
LADY JUSTICE ASPLIN

- -

Between:

NASIBAH SAFI	**Appellant**
- and -	
THE BOROUGH COUNCIL OF SANDWELL	**Respondent**

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- -

James Stark (instructed by **Community Law Partnership**) for the **Appellant**
Catherine Rowlands (instructed by **Sandwell Legal Service**) for the **Respondent**

Hearing date: 20 June 2018

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Judgment Approved

Lord Justice David Richards :

1. By a decision taken on 20 June 2016, the Homelessness Review Panel of the respondent, Sandwell Borough Council, upheld a decision that the appellant was not "homeless", as defined, so as to give rise to a duty to provide suitable accommodation for the appellant and her family under Part VII of the Housing Act 1996 (the Act). The appellant exercised her statutory right to appeal to the county court on a point of law. In a judgment given on 7 March 2017, Ms Recorder McNeill QC, sitting in the county court at Birmingham, dismissed the appeal. The appellant appeals to this court with permission granted by Newey LJ.

2. Although the appellant was entitled to and did occupy a one-bedroom flat let to her by the respondent, her case was that it was not reasonable for her to continue to occupy it, and she was therefore "homeless" by virtue of section 175(3) of the Act:

> "A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy."

3. The facts and circumstances of the appellant's case are as follows.

4. A flat in Smethwick (the flat), comprising one bedroom, a living room, kitchen and bathroom, was let to the appellant under a secure tenancy in 2012. She went into immediate single occupation. In 2013 she was married and her husband joined her in the flat. On 15 July 2015, their first child was born.

5. On 2 November 2015, the appellant attended the respondent's housing office in Smethwick and applied for new accommodation on the grounds that it was no longer reasonable for her to occupy the flat, as it was, she said, overcrowded, damp and in disrepair, and difficult to access. The respondent refused to make any enquiries on the grounds that she could not be homeless as she had somewhere to live. Following receipt of a Judicial Review Pre-Action Protocol Letter dated 18 November 2015, the respondent arranged an appointment on 11 December 2015 at which the appellant completed a homelessness application form.

6. The appellant raised two issues in her application form. First, following the birth of her child, the flat was too small. Second, there was damp and mould in the flat, which may have adversely affected the health of her husband and herself. Although not mentioned in her application form, she also relied on the difficulties she was experiencing in access to the flat. The flat is on the first floor of a block of flats with no lift. When coming into the block with her baby in a pram or pushchair, she had to carry the baby up to the flat and leave her unattended there, if her husband was not in the flat, and go back down for the pram or pushchair and any shopping, with the additional risk of theft of those items.

7. By a letter dated 30 December 2015, the respondent informed the appellant that, based on the evidence supplied, she was not found to be homeless or threatened with homelessness within 28 days and that therefore her application had been rejected. The letter stated that issues of disrepair had been dealt with by works undertaken by the respondent and she was able to inform the respondent of any other repair issues that needed attention. In conclusion, the letter stated that "This means your application

does not meet the criteria contained in Section 175 of the Housing Act 1996 Part VII (as amended) and therefore, Sandwell MBC are not required to assist you as a homeless household." It was also stated that her family would be registered on the waiting list for larger accommodation, with the correct banding which would reflect that she was in a flat above ground floor level with a child. The letter informed the appellant of her right to seek a review in the following terms:

> "If you disagree with this decision you can ask for your case to be looked at again. You should ask for a review within 21 days of the date of this letter…Please tell us why you disagree; this will help us with your case.
>
> You will be notified of the review decision within 8 weeks of Sandwell MBC receiving your request."

8. By a letter dated 8 January 2016, solicitors acting for the appellant (CLP) requested a review of the decision and requested her homelessness file as a matter of urgency, adding that they reserved the right to make further submissions in due course. The respondent replied on 12 January 2016, requesting the appellant's signed consent to the release, necessary for data protection purposes, and the statutory fee of £10. CLP did not reply to this letter, and it would appear to have been overlooked. No submissions were made by the appellant or by CLP on her behalf before the review decision was made.

9. At a Homelessness Review Panel meeting on 22 February 2016, the decision taken in December 2015 to reject the appellant's application was upheld. This was notified to the appellant in a letter dated 24 February 2016. Enclosed with the letter was a "Minded to Decision Notice". A "minded to" decision is one which finds that there was an error in the decision under review but nevertheless upholds the decision. Such a decision triggers a right to make further representations. The reasons stated in the Notice were:

> "The decision of the Review Panel was to uphold the decision that found that Miss Safi was not homeless or threatened with homelessness within the next 28 days, on a minded to find basis.
>
> The panel took the view that the Applicant had a secure tenancy with Sandwell Metropolitan Borough Council and that the property was suitable for the household.
>
> The panel also noted that the repairs issue complained of have been dealt with and in fact compensation had been paid as a result of a disrepair counterclaim that been lodged by the Applicant Solicitors. In the event that any further issues of disrepair arose the Applicant could report them to the Neighbourhood Office or the repairs call centre.
>
> The panel also noted that the Applicant had been given a band three rating on the waiting list, which was effective from 15

> July 2015, which meant that she could seek accommodation through the council's allocations process.
>
> The panel also noted that no further submissions have been received in respect of the review from either the Applicant or her solicitors. The panel were therefore not persuaded to change the original decision and upheld the same.
>
> The Applicant was not deemed to be homeless or threatened with homelessness within the next 28 days."

10. Contrary to the relevant regulations applicable to a "minded to" decision, to which I will refer below, the letter did not state any error in the original decision.

11. The covering letter stated:

> "This is a minded to decision letter and notice which means that you have an opportunity to put any further submissions in writing. As an alternative you may request an oral hearing to make any further submissions you wish to. You have a period of 7 days from the date of receipt of this letter to make any further submissions. If no further submissions are received then this minded to decision letter and notice will be confirmed at a further Review Panel Hearing."

12. Following receipt of the respondent's letter, CLP sent on 1 March 2015 the fee for disclosure of the homelessness file, which was made available by the respondent on 15 May 2015 (although it appears to have been reviewed and collated by it on 7 March 2015).

13. There was a significant change of circumstances when in mid-February 2015 the appellant's GP confirmed that she was pregnant, with the birth expected in October 2015.

14. By a letter dated 9 June 2015, CLP made representations on behalf of the appellant. Three grounds were advanced in support of her case that it was not reasonable for her and her family to continue to occupy the flat. First, she was pregnant with her second child, which would exacerbate the accommodation issues, with two adults, a two-year old girl and a baby sleeping in one bedroom. Second, there were the unsuitable access arrangements, which had not been considered by the panel. Again, this would be seriously exacerbated by the birth of her second child. Moreover, the appellant had fallen on the stairs, leading to treatment at the hospital's early pregnancy unit as she suffered bleeding following the fall; this was supported by letters from the unit and her GP. Third, the damp problems in the flat persisted, made worse by the overcrowding. The damp problems had not been resolved by the works undertaken by the respondent.

15. The respondent's Homeless Review Panel met on 20 June 2016 and confirmed the original decision that the appellant was not homeless, because it was reasonable for her and her family to continue to occupy the flat. The decision notice dated 30 June

2016 referred to and summarised the submissions made by CLP and noted that the appellant was pregnant with her second child.

16. As regards the issue of overcrowding, the decision notice stated:

> "The Panel noted that the applicant was registered on the housing register in December 2015 and was awarded band 3 backdated to July 2015 in line with the allocations policy. The Panel noted that the applicant had only bid on four properties in that time all within the Smethwick area. The Panel were of the opinion that if the applicant was flexible with her areas of choice she would be rehoused within a reasonable period of time. The Panel noted that the only information provided for remaining in the Smethwick area was because of the GPs at the Cape Hill Medical Centre. The Panel recommended the applicant's priority within the allocation process be changed to overcrowding priority to assist her with locating appropriate accommodation."

17. As regards damp, the Review Panel noted that there had not been any reports of damp recorded in 2016, but an inspector would visit the flat to arrange any necessary repairs or give advice if the damp was due to lifestyle choices. As regards the access arrangements, the panel noted that these issues were not uncommon with young families in this type of accommodation. The panel considered that "arranging the weekly shop when her husband is available or even consider online shopping which is delivered to the door" would meet the problem. The panel also noted that "there are other methods of holding children such as a baby carrier/sling that allows for the mother to have her arms free".

18. The notice ended by stating that "With the change in the applicant's priority however, the panel considered that the applicant should soon be in a position to source suitable accommodation".

19. The appeal to the county court was made on seven grounds, of which the following five are live on the appeal to this court:

(1) The respondent asked itself the wrong legal questions. The correct legal question was "whether it was reasonable for the appellant to continue to occupy this accommodation indefinitely – i.e. both now and in the future having regard to all the family's circumstances and their pattern of life". The respondent also failed to consider, adequately or at all, the submissions as regards damp, overcrowding and the access arrangements and failed to have regard to its duty under section 11 of the Children Act 2004, to have express regard to safeguard and promote the welfare of the appellant's children, and to its duty under section 149 of the Equality Act 2010, in light of the appellant's protected characteristics of pregnancy and maternity.

(2) The respondent had regard to irrelevant considerations in that, where it is asserted that the appellant cannot remain in her flat, it is irrelevant to the issue of homelessness whether or not the appellant is on the housing register.

(3) There had been material breaches of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 (the Regulations) in the decisions and the decision-making process.

(4) The respondent had acted unfairly and in breach of natural justice by failing to allow the appellant to respond to matters set out for the first time in the decision notice dated 30 June 2016.

(5) The respondent failed to give proper, adequate and intelligible reasons for its decision.

20. The first and second grounds are closely related and I will take them together. The judge correctly identified the relevant legal question: "was it reasonable for the appellant to continue to occupy the property looking not just at the present (for another night) but also looking to the future (the foreseeable future)?" She held that, given that the decision notice referred to the problem of further overcrowding when the second child was born and the likelihood of rehousing within a reasonable time, the respondent had correctly applied the law as stated by the House of Lords in *Birmingham City Council v Ali* [2009] UKHL 36; [2009] 1 WLR 1506. It was reasonable for the appellant to continue to occupy the flat for the foreseeable future pending rehousing and in the light of her priority on the housing register. The judge acknowledged that the appellant's priority on the housing list was not determinative of whether it was reasonable to continue to occupy the flat, but it was a factor that the respondent could reasonably take into account when looking into the future. If it had been the only factor taken into account, "there would have been considerable force" in the second ground of appeal, but it was not the only factor and it was not an irrelevant factor.

21. In *Birmingham City Council v Ali* (*Ali*), the council accepted that the claimants were homeless in that, as a result of the size of their families, it was not reasonable for them to continue to occupy their properties but, at the same time, took the view that it could discharge its statutory duty by leaving them in their homes until suitable permanent accommodation could be found. The House of Lords held that the council's policy was not in accordance with its duty under the Act.

22. The leading judgment was given by Lady Hale, who identified the issue of construction of section 175(3) in these terms at [9]:

> "Does this mean that a person is only homeless if it would not be reasonable for him to stay where he is for another night? Or does it incorporate some element of looking to the future, so that a person may be homeless if it is not reasonable to expect him to stay where he is indefinitely or for the foreseeable future?"

23. At [34], Lady Hale restated the second alternative in these terms: "Or does it mean that she can be homeless if she had accommodation which it is not reasonable for her to continue to occupy for as long as she would occupy it if the local authority did not intervene?" She held that section 175(3) provided a forward-looking test that was not answered by looking only at the immediate situation. Not only did this better fit the

language of the section 175(3) and related provisions, it also better fitted the policy of the Act:

> "38 In the *Birmingham* case, this interpretation has the advantage that the council can accept that a family is homeless even though they can actually get by where they are for a little while longer. The council can begin the hunt for more suitable accommodation for them. Otherwise the council would have to reject the application until the family could not stay there any longer. The likely result would be that the family could not stay there any longer. The likely result would be that the family would have to go into very short-term (even bed and breakfast) accommodation, which is highly unsatisfactory.
>
> 39 It also has the advantage that the family do not have to make repeated applications. If their application, is rejected on the ground that it is reasonable for them to stay one more night, they cannot apply again until there is a different factual basis for the application. How are they to judge whether the council will consider that the tipping point has been reached, when this is such an uncertain event?

24. At [43], Lady Hale said:

> "…accommodation which may be unreasonable for a person to occupy for a long period may be reasonable for him to occupy for a short period. Accordingly, there will be cases where an applicant occupies accommodation which (a) it would not be reasonable for him to continue to occupy on a relatively long-term basis, which he would have to do if the authority did not accept him as homeless, but (b) it would not be unreasonable to expect him to continue to occupy for a short period while the authority investigate his application and rights, and even thereafter while they look for accommodation to satisfy their continuing section 193 duty."

25. While the House of Lords held that it was lawful for the council on the facts of *Ali* to leave homeless families in their present accommodation for the short term, it was unlawful for the council to leave them where they were until suitable accommodation became available under the council's allocation scheme. The present accommodation might become unsuitable long before then: see [64].

26. In the present case, Mr Stark, appearing for the appellant, submitted that the respondent did not approach the question of reasonableness as required by *Ali*. In particular, the respondent did not look forward to October 2016 when the appellant's second child was due and ask itself whether, in the light of this foreseeable event, it was reasonable for the appellant to continue to occupy the flat: and, if it was not, whether the flat remained suitable for occupation for a limited period and, if so, for how long.

27. On behalf of the respondent, Ms Rowlands accepted that, to an extent, section 175(3) looks to the future, but it must be applied in light of an applicant's characteristics at the time of the decision. A local housing authority is not required to speculate as to what the future may hold for an applicant, for example as to how many children she may have. Nor is an authority required to step in because an applicant may at some time in the future require rehousing. The question for the authority is whether at this time it is reasonable for the applicant to continue to occupy the accommodation. While this does require some consideration of how long the applicant is likely to be there, it does not import a duty to accommodate a person who is presently in suitable accommodation.

28. Ms Rowlands submitted that the paragraph in the decision notice of June 2016 quoted in [16] above demonstrates that the respondent applied the right statutory approach and, for good reasons, answered the questions it needed to ask.

29. In my judgment, this ground of appeal is made out. Although the appellant's pregnancy is referred to in the decision notice of 30 June 2015, the question whether the impending birth made it unreasonable for the appellant to continue to occupy the flat was not addressed, even if it was reasonable to expect the appellant and her family to continue living there in the short term. In essence, the respondent, like the council in *Ali*, relied on the appellant being able to find suitable accommodation through the usual operation of the housing list, with the benefit of priority status.

30. The respondent was obliged to ask itself two questions. First, taking account both of the present circumstances of the appellant and her family and of her pregnancy with the birth due in October 2016, was she "homeless", i.e. was it reasonable, looking to the foreseeable future as well as the present, for them to continue to occupy the flat? Second, if the answer was in the negative, how long in the short term was it reasonable for them to continue to occupy the flat and, in the light of that period, would they be able to obtain suitable accommodation in that period through the operation of the housing list. In my view, it is not possible to spell out of the respondent's decision letter, however benevolently read, that it addressed these questions.

31. This point can be made by comparing the original decision in December 2015 and the review decision in June 2016. Although the latter introduces factors not previously mentioned, to which I will refer in more detail below, the approach taken by the respondent in the two decisions was essentially the same, notwithstanding the significant change that would occur when the appellant gave birth to her second child in October 2016.

32. Other issues are raised by the appellant under this ground of appeal.

33. First, the appellant submits that there is no consideration of the impact of the overcrowding with just one child, the disrepair and the access problems. The issue of overcrowding with one child had been addressed in the Notice dated 24 February 2016 on the basis that "the property was suitable for the household". This is a brief statement of a conclusion, but it is not a perverse conclusion on the facts well known to both parties. As regards damp, the proposal for an inspection of the flat was a sensible way forward. If the inspector confirmed the presence of damp and it transpired that it could not be dealt with, the appellant would have been entitled to

make a further application which, assuming a serious problem, would likely be well-grounded. The Decision Notice dated 30 June 2016 addressed the access problem in some detail. While the approach there adopted was not unreasonable for a family with one small child, there is no indication that the problem posed by having a baby as well as a small child was addressed, except on the basis that I have earlier rejected.

34. The appellant's challenge on the basis that the respondent did not comply with its obligations under section 11 of the Children Act 2004 and section 149 of the Equality Act 2010 is, in my judgment, without foundation. It is clear from all the decisions that the respondent had regard to the interests of children and to the appellant's maternity and pregnancy. The respondent was not required to refer expressly to these statutory obligations, which are in any event encompassed within its duties under the 1996 Act.

35. The third and fourth grounds of appeal are that the respondent failed to follow the procedure laid down in the Regulations and acted unfairly in not providing the appellant with an opportunity to respond to the new and more detailed matters on which the respondent relied for its final decision in June 2016.

36. First, it is said that the absence of written representations on behalf of the appellant following the original decision notified on 30 December 2015 resulted from a failure by the respondent to comply with regulation 6. It requires an authority, first, to notify an applicant that they may make written representations and, second, to notify them of "the procedure to be followed in connection with the review". The letter dated 30 December 2015 invited the appellant to "tell us why you disagree". CLP were in no doubt that they were entitled to make representations on behalf of the appellant, as they made clear in their letter dated 8 January 2016.

37. The letter went on to state "You will be notified of the review decision within 8 weeks of Sandwell MBC receiving your request". It gave no notification of the procedure to be followed in connection with the review, and in particular it set no date by which representations were to be made.

38. The request for a review was received by the respondent on 11 January 2016, so the period of eight weeks expired on 8 March 2016. The review decision was taken on 22 February 2016, with no prior notice. While the respondent might have been able to argue, if it had waited the full period to make and notify its decision, that its failure to set a date for the receipt of representations had no adverse impact, it is in my view impossible to conclude that, even if a date had been set, no representations would have been made. This conclusion is not affected by the fact that CLP overlooked the need to pay the fee and lodge the appellant's consent for the release of her homeless file.

39. This failure by the respondent can be seen to have had a knock-on effect on the subsequent decision-making process. Leaving aside the appellant's pregnancy, CLP's representations on her behalf would have likely taken much the form of those made in their letter dated 9 June 2016. The review panel would have responded, as it in fact did in February 2016, with a Minded to Decision Notice, giving the respondent a further opportunity under the Regulations to make representations. It is a fair inference that the respondent would have relied in the Minded to Decision notice on the points made, for the first time, in its final decision in June 2016. The appellant could then have addressed those points.

40. As it was, the respondent relied on the appellant's record of bids for properties to suggest that, if she were more flexible in her choice of areas, she "would be rehoused within a reasonable period of time" and on her enhanced place on the housing list. The appellant had no opportunity to deal with this or with the more detailed consideration of the other issues contained in the Decision Notice dated 30 June 2016. Not only was this the consequence of non-compliance by the respondent with the Regulations, it was also in my view an unfair way of proceeding.

41. For these reasons, I would also allow the appeal on grounds 3 and 4.

42. In breach of regulation 8.2, the letter accompanying the Minded to Decision Notice dated 24 February 2016 notified the appellant that she could make further submissions in writing or, as an alternative, she could request an oral hearing to make further submissions. Regulation 8.2 requires an authority to notify the applicant that representations may be made "orally or in writing or both orally and in writing". However, this breach had no material impact, because CLP submitted written representations and did not, as Mr Stark informed us, in any event intend to add oral representations.

43. The final ground of appeal is a challenge to the reasons given in the final Decision Notice issued in June 2016. In view of the conclusions reached on the grounds, no purpose would be served by a separate consideration of this ground.

44. Since the hearing of this appeal, the court has been informed that a third child has very recently been born to the appellant and her husband, following which CLP on behalf of the appellant made a new homeless application to the respondent. The respondent accepts that the births of the appellant's second and third children amount to a change of circumstances such as to trigger a duty to consider this fresh application. In these circumstances, the respondent submitted that this appeal is now academic and invited the court to refuse relief on that ground. The appellant opposed this course. In my view, the court should rule on the appeal, both because the reasons for the court's decision may have a bearing on consideration of the fresh application and because the question of costs is not academic.

45. For the reasons given in this judgment, I would allow the appeal and quash the review decision taken in June 2016.

Lady Justice Asplin:

46. I agree.

Sir Geoffrey Vos:

47. I also agree.