

ENGLAND AND WALES / JUDGMENT

Ealing Council v Purewal

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Neutral Citation Number: [2013] EWCA Civ 1579 IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NORTHAMPTON COUNTY COURT (HIS HONOUR JUDGE BRAY) B5/2012/3203
Royal Courts of Justice Strand London WC2A 2LL Tuesday, 5 November 2013 B e f o r e: LADY
JUSTICE ARDEN LORD JUSTICE SULLIVAN LORD JUSTICE DAVIS

- ----- Between: EALING COUNCIL v PUREWAL
- ----- DAR Transcript of WordWave International Limited A Merrill Communications Company 165 Fleet Street London EC4A 2DY Tel No: 020 7404 1400 Fax No: 020 7404 1424 (Official Shorthand Writers to the Court)
- ----- Appellant Respondent Mr M Hutchings (instructed by London Borough of Ealing Legal Services) appeared on behalf of the Appellant Mr T Vanhegan (instructed by Polpitiya) appeared on behalf of the Respondent
- ----- J U D G M E N T LORD JUSTICE SULLIVAN: On 14 November 2012 his Honour Judge Bray, sitting at Northampton County Court, allowed Miss Purewal's appeal under section 204 of the Housing Act 1996 ("the Act") against the London Borough of Ealing's review decision under section 202 of the Act, upholding its earlier decision under section 184 of the Act that she was not homeless because there was accommodation available for her at 22 Friars Court, Northampton. Paragraph 1 of the order made by the judge on 14 November is in these terms: "1. The Appellant's appeal allowed and Respondent's review decision dated 9 May 2012 be varied to find that the appellant is homeless." In its Notice of Appeal the council does not challenge that part of paragraph 1 of the judge's order in which he allowed Miss Purewal's appeal. It challenges only the latter part of paragraph 1 of the order in which the judge varied the review decision to a finding that Miss Purewal was homeless. The council contends that, having allowed the appeal, the judge should simply have quashed the review decision, thus, leaving it to the council to re-determine the matter and to decide whether or not the respondent was homeless. As the judge pointed out, the facts of the present case are most unusual. The respondent had an assured short-hold tenancy on number 22 Friars Court, where she lived with her son, who is now 13 years old. In 2005 she fractured her spine when she jumped from a first floor window trying to escape from her ex-partner. As a consequence, she is disabled and confined to a wheelchair. Number 22 had been adapted and was physically suitable for her and her son. The reason why she said that it was no longer reasonable for her to occupy number 22 was because she claimed to have been sexually assaulted by a near neighbour on 25 February 2010 and to

have been raped by him in the property on 9 July 2010. On 10 September 2010 she made a detailed witness statement to the police under section 9 of the Criminal Justice Act 1967 setting out her account of the events on 25 February and 9 July. For reasons that have not been explained, the CPS decided that there should not be a prosecution. As a result of the respondent's allegations against her near neighbour, her relationship with her neighbours deteriorated and she further alleged that she and her son had been the victims of serious harassment and threats. On 26 October 2011 she applied to the London Borough of Ealing for homelessness assistance under Part 7 of the Act, because she had relatives living in the area. In its decision under section 184 of the Act the council concluded that she was not homeless because there was accommodation available for her at number 22. On behalf of the appellant, Mr Hutchings accepted that in this decision letter, dated 27 October 2010, the council had proceeded on the basis that what the letter described as "the incident" in July 2010 did occur, but went on to conclude that because no further reports of incidents had occurred there were no current threats of violence or the likelihood of violence: "The council is satisfied that on balance of probability that the likelihood of you suffering violence or threats of violence is below one of probability. The council is satisfied that since the incidents in July 2010 that there have been no further incidents reported which suggests no current threats of violence or likelihood of violence." This decision letter was plainly deficient in that it did not engage with the critical issue: if, applying the civil rather than the criminal standard of proof, it was accepted that the respondent had been raped by a near neighbour in her home, was it reasonable for her to continue to live in that home with her rapist living only a few doors away. Although the review decision letter, dated 9 May 2012 is a lengthy document, it is far from easy to interpret. The key paragraph of the letter is in these terms: "I have considered the allegation of serious assault at length. The enquiries made by this council have established that there have been allegations made by you and counter-allegations made by the alleged perpetrator. The police have not proved the allegation of serious assault after investigation. The individuals and organisations that are supporting you have referred to your demeanour as being that of someone who has suffered serious assault. However, when considering whether or not it is reasonable for you to continue reside at 22 Friars Court, all the information that has been made available to this council in relation to this alleged assault has been considered at length. It is reasonable for the council to place some weight on the fact that the police conducted an investigation and that the CPS took no further action, having considered the outcome of the investigation. It is, therefore, within this context that this allegation must be considered, along side the views of those that are supporting you. Having considered all the information available to me, particularly the unproven allegation of a serious assault, I am minded to conclude that your home at 22 Friars Court is reasonable for you to continue to occupy and you are not homeless or threatened with homelessness." Mr Hutchings submitted that the reviewing officer had concluded that the rape did not take place. He particularly referred to the words "the unproven allegation of serious assault." He fairly accepted that the reviewing officer reached this conclusion upon an impermissible basis. He summarised the critical reasoning in the review decision letter in the following manner: "The police have decided not to prosecute.

Therefore, the allegation is 'unproven'. Therefore, I am not satisfied it happened." Mr Vanhegan submitted that in both the section 184 decision letter and in the review decision letter the council had accepted that the rape had occurred. He pointed to the fact that the review decision letter expressly upheld the section 184 decision and that the council did not notify the respondent that it was minded to depart from the section 184 decision in any material respect. For my part, I would acknowledge that the review decision letter is far from clear, but what matters for present purposes is the basis on SMITH BERNAL WORDWAVE which the judge decided that the review decision letter was legally flawed. Reading paragraphs 13 and 14 of the judge's judgment, I am left in no doubt that the judge concluded that in the review decision letter the council was not accepting that the alleged rape had taken place. In paragraph 14 of his judgment the judge said this: "If it (the allegation of rape) is likely to be true, how can it be said that she could continue to live in the place that she is living, only a few doors away from the man who has attacked her and in circumstances where she is continually the subject of either threats or abuse or conduct to which I have already briefly alluded. That, in my judgment, is a vital issue in this case and, effectively, what the reviewing officer has said is, 'I have spoken to the police officer.' There was no prosecution and there has been no rape and, therefore, I can make a judgment that her position is safe." Although the review decision letter considered the allegation of rape at some length, the council, when making its enquiries had not asked the police or the respondent for a copy of any statement that she had made to the police. Her section 9 statement was included by the respondent's solicitors in the bundle of documents that was placed before the judge. In paragraph 15 of his judgment the judge concluded that the council had not carried out a sufficiently thorough investigation. It could and should have obtained the section 9 statement, given the centrality of the rape allegation in the respondent's claim to be homeless. "I have to say that, having looked at all the evidence that I have to find firstly that he [the review decision taker was in fact female] should have called for the section 9 statement to see what the position was with this applicant, because he was forming some judgment, plainly, as I see it, upon the truth or otherwise of her complaint. He should have looked at that section 9 statement. It was easy to get. The police could have provided it if it had been asked for and he should have looked at all the surrounding circumstances, that is to say the cumulative effect of this appellant's position, having regard to her disability, caused by an attack by one man, the sexual attack upon her by another man and all the threats and abuse that were going on." The judge therefore concluded that ground three of the appeal before him, which contended that the council had failed to take account of relevant considerations and did not give proper weight to relevant matters, succeeded. On the judge's findings the review decision letter was an example of a decision that was flawed because it simply did not engage properly with the sexual attack issue. The council accepts that the judge was entitled to allow the section 204 appeal and to quash the review decision letter on that ground. The council appeals because, having reached that permissible conclusion, the judge, in the Council's submission, went an impermissible step further. Having considered the section 9 statement, the judge concluded that there was only one answer to the question: was it reasonable for the SMITH BERNAL WORDWAVE

respondent to continue to occupy number 22, bearing in mind what she had said in her section 9 statement. He then reached his own conclusion that the only reasonable answer to that question was "No". In paragraph 16 of the judgment the judge said this: "Bearing all those matters in mind, in such an exceptional case as this, in my judgment, the review officer came to the wrong conclusion. Applying the Wednesbury principles, namely not just a wrong conclusion but a conclusion which he could not reasonably have reached in all the circumstances, therefore, I decide to vary the decision and find that under the provisions the applicant should properly be described as homeless." For my part, I would accept Mr Hutchings' submission that the section 9 statement could not properly have been the basis for a conclusion that the review decision letter was Wednesbury irrational. An appeal under section 204 is not an appeal on the merits; it is an appeal on a point of law. Whether the review decision letter was unlawful because it was irrational fell to be determined upon the basis of the information that was before the decision taker. If that information was incomplete then there may well have been, as there was here, a failure to take into consideration relevant factors, but that does not mean that the decision letter was irrational. The normal consequence of a decision being flawed because of a failure to take into consideration relevant factors is that the decision is quashed and the matter is remitted to the decision taker to reconsider the matter, taking fully into account the factors which were omitted from the previous, unlawful decision. Mr Hutchings accepts that there may be cases in which the material that the decision taker has not considered is so compelling that it could rationally lead to only one conclusion, and that in such a case the court may vary the decision to give effect to that sole, permissible conclusion. He submits that in the section 204 context, the proper approach is that which is to be found in the case of *Deugi v Tower Hamlets London Borough Council* [2006] EWCA (Civ) 159, [2006] HLR 28 at page 510. In paragraph 36 of his judgment in that case Lord Justice May, with whom the other members of the court agreed, said this: "The question for the judge was whether there was any real prospect that Tower Hamlets, acting rationally and with the benefit of further enquiry, might have been satisfied that Mrs Deugi was intentionally homeless." May LJ concluded that the judge was not entitled to conclude that Tower Hamlets, acting rationally, could not properly have felt obliged to make further enquiries before being satisfied that Mrs Deugi was not intentionally homeless, nor that there was no real prospect of additional enquiries producing a different answer. In formulating the question which he set out in paragraph 36, Lord Justice May had regard to a number of earlier decisions, including one of the decisions relied on by Mr Vanhegan on behalf of the respondent in the present case, *Bond v Leicester City Council* [2002] HLR 6 at page

158. Mr Hutchings submitted that the judge did not apply the Deugi test. He wrongly elided two limbs of Wednesbury: failure to take into consideration relevant factors, and irrationality, and reached his own conclusion on the merits on material that had not SMITH BERNAL WORDWAVE been before the council. This is a case, in Mr Hutchings' submission, where it would be eminently reasonable for the council to wish to make further enquiries. The judge appears to have taken the section 9 statement at face value. There was, of course, no oral

evidence at the hearing before the judge. Moreover, this was a section 9 statement which the council had not had an opportunity to consider. Whether that was due to its own fault in failing to make sufficiently detailed enquiries is not relevant. The fact remains that the council, the decision maker, the fact finder in respect of homelessness decisions, had not considered the section 9 statement. Moreover, this was a section 9 statement the contents of which had not persuaded the CPS to institute criminal proceedings. No reason had been given for that decision. Plainly, there were matters of detail in the section 9 statement which could properly have been the subject of further investigation. Much of Mr Vanhegan's submissions on behalf of the respondent stemmed from two propositions: one, that the council had decided that the rape had occurred and, secondly, that it was unfair to give the council what he called a "second bite at the cherry" by enabling it to carry out further investigations to reconsider that matter. In my judgment, both of those propositions are based upon a false premise. First, the judge did not make his order upon the basis that the council had accepted that the rape had occurred. Rather, he made it upon the basis that the council had decided that there had been no rape because there had been no prosecution and so the respondent was safe, an impermissible basis for reaching a decision that the rape had not occurred, but nonetheless, a decision that there had been no rape. Secondly, if the matter is remitted to the council there is no question of the council being given a "second bite at the cherry." If the review decision letter is quashed on the basis that it was unlawful and the decision taker is required to take a lawful decision that will be the council's first lawful bite at the cherry. Initially, Mr Vanhegan submitted that the judge could properly take into consideration evidence that was before him that had not been before the council for the purpose of deciding whether or not the council's decision was *Wednesbury* perverse. He was not able to provide any authority in support of that proposition in the context of a statutory regime where the right of appeal is not a right of appeal on the merits but a right to appeal on a point of law, in effect, a judicial review jurisdiction. He rightly submitted that the further information that was before the judge was relevant when the judge came to deciding what relief was appropriate, but that brings us back to the critical question: was the judge entitled to conclude that the information contained in the section 9 statement was so compelling that there was no real prospect that the council, acting rationally and with the benefit of further enquiries, might decide that the alleged rape had not taken place, so that, subject to the allegations of harassment, it was reasonable for the respondent to continue to live at number 22. That is a very short point. In my judgment, the answer is that, given this was an untested section 9 statement which the council had not had an opportunity to consider, much less investigate, in a case where there had been no prosecution, it is quite impossible to reach the conclusion that there was no real prospect that the council, acting rationally, might conclude, following further investigation, that the alleged rape had not taken place. For those reasons I would allow this appeal. SMITH BERNAL WORDWAVE LORD JUSTICE DAVIS: I agree that this appeal should be allowed, for the reasons given by Lord Justice Sullivan. LADY JUSTICE ARDEN: I also agree. I add that the allegations which the reviewing officer will have to consider further, as a result of this court's decision, relate to some very serious sexual matters. Needless to say, they will need to be investigated with

great sensitivity and care, given the nature of their subject matter and the vulnerability of the respondent. SMITH BERNAL WORDWAVE

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