

R. v. Westminster City Council, ex p. Tansey

Queen's Bench Division

Simon Brown J.

April 25, 1988

Introduction

Once a local housing authority conclude that a person is homeless, in priority need, not intentionally homeless, and not to be referred elsewhere under the local connection provisions, the authority are under a duty to "secure that accommodation becomes available for his occupation": section 65(2) of the Housing Act 1985 (*Encyclopedia*, para. 1-0157). Section 69 of the Housing Act 1985 sets out how the authority may discharge this duty, by making available the accommodation themselves or by securing it through some other person. In all cases the accommodation secured must be "suitable" and in determining whether the accommodation is suitable the authority shall have regard to "Part IX (slum clearance), X (overcrowding) and XI (houses in multiple occupation) of" the 1985 Act: section 69(1) of the 1985 Act, as amended by the Housing and Planning Act 1986.

In *Cocks v. Thanet District Council* [1983] A.C. 286, 6 H.L.R. 15, Lord Bridge said:

"Once a decision has been reached by the housing authority which gives rise to the temporary, the limited or the full housing duty, rights and obligation are immediately created in the field of private law. Each of the duties referred to, once established, is capable of being enforced by injunction and the breach of it will give rise to a liability in damages. But it is inherent in the scheme of the Act that an appropriate public law decision of the housing authority is a condition precedent to the establishment of the private law duty."

The view that rights in relation to discharge are private law rights was supported in *South Holland District Council v. Keyte* (1985) 19 H.L.R. 97, C.A. If such rights fall within the realm of private law they can be enforced by an action for breach of statutory duty, and if the suitability of a particular discharge is in dispute, challenge is not limited to the narrow, supervisory criteria of judicial review proceedings.

Facts

In June 1986, three houses that had been converted into one block of 59 bedsitting rooms, known as Vancouver Flatlets, was made uninhabitable by fire. The occupants were rendered homeless and 51 applied to the

respondent authority and were placed in interim accommodation. By November 26, 1986, 23 of the residents remained in this interim accommodation. On that date, the respondent authority decided that "the Director of Housing be authorised to offer in cases which he judges to be appropriate accommodation in hostels or hotels." In the report to the committee who took this decision the view was expressed that such accommodation could, depending on the individual facts of a given case, in law amount to "suitable accommodation."

The applicants sought to challenge this decision. Given the disinclination indicated by the court at the hearing of the matter to make any declaratory judgment on individual cases in advance of a decision by the Director of Housing that hotel or hostel accommodation would be suitable for the particular applicants, the only point the court considered was the nature of the court's jurisdiction over the authority's discharge of their duty under section 65 of the Housing Act 1985.

Held (refusing a declaration)

(1) The question of suitability of given future accommodation is pre-eminently a matter of judgment for the housing authority; the question is vested in them not only by the scheme of the legislation as a whole, but in terms by section 69 of the Housing Act 1985, in its present form;

(2) *Cocks v. Thanet District Council* [1983] 2 A.C. 286, H.L., was not concerned with the adequacy of an offer of accommodation in discharge of a housing duty; it is only at the stage of offering accommodation or failing to do so that an authority are to be regarded as exercising a purely executive role; they should be regarded as exercising public law functions up to the point at which they decide that they are required to make available accommodation of a particular kind.

A. Arden and *A. McAllister* for the applicants, instructed by Messrs. Alan Edwards & Co., London, W11.

J. Sullivan, Q.C. and *A. Wilkie* for the respondents, instructed by G. M. Ives Esq., Solicitor to the Westminster City Council.

SIMON BROWN J.: On June 2, 1986, Vancouver Flatlets became uninhabitable through fire. The Flatlets had consisted of 59 bedsitting rooms in three houses converted into a single property. The occupants were homeless. 51 applied to the respondent housing authority and were placed in interim accommodation. That was pursuant to the authority's duty under section 63 of the Housing Act 1985, Part III.

By November 26, 1986, the date of the decision under challenge, 23 of the former residents remained in interim accommodation. The four applicants are amongst them. They bring these proceedings in what purports to be an essentially representative capacity, their circumstances being broadly typical of the larger group. The decision of November 26, 1986 addressed itself to the authority's further duty arising under section 65(2) and section 69 of the Act, there being no question but that the group were homeless,

with a priority need, and not disqualified through becoming intentionally homeless.

This further duty is to provide what is variously called permanent or indefinite or settled accommodation. The decision was that "the Director of Housing be authorised to offer in cases which he judges to be appropriate accommodation in hostels or hotels." It was arrived at following consideration of a report from council officers who expressed themselves satisfied that such accommodation is in law capable of being "suitable accommodation" depending always, of course, upon the individual facts of a given case.

The essence of the applicants' legal challenge to the disputed 1986 decision is that having regard to the circumstances of this group of ex-Vancouver Flatlets residents, the offer of hostel or hotel accommodation cannot, as a matter of law, satisfy the authority's section 65 duty. That duty I must now set out. I do so by reference to the 1985 Act, as amended by the Housing and Planning Act 1986. Although these amendments took effect only from 1987, the respondent authority and its officers sensibly took them into full account when arriving at their November 1986 decision. So far as relevant the statutory provisions read as follows. Section 65(2): "Where (the local housing authority) are satisfied that he has a priority need and are not satisfied that he became homeless intentionally, they shall . . . secure that accommodation becomes available for his occupation."

Section 69(1):

"A local housing authority may perform any duty under section 65 or 68 (duties to persons found to be homeless) to secure that accommodation becomes available for the occupation of a person

- (a) by making available suitable accommodation held by them under Part II (provision of housing) or under any enactment
- (b) by securing that he obtains accommodation from some other person, or
- (c) by giving him such advice and assistance as will secure that he obtains suitable accommodation from such other person and in determining whether accommodation is suitable, they shall have regard to Part IX slum clearance, Part X overcrowding and Part XI houses in multiple occupation of this Act."

It is the applicants' case not merely that the offer of hostel or hotel accommodation cannot in law satisfy the rights of any of them to suitable accommodation on an indefinite basis, but also that it is open to the court to arrive at its own decision on the facts rather than merely exercise a review jurisdiction to ensure that the housing authority act lawfully in the matter. Except only upon that limited aspect of the challenge, these proceedings, in my judgment, have proved abortive. The reason for that was my own strongly expressed disinclination during the course of Mr. Arden's argument to embark upon what seems to be the unacceptable if not indeed impossible exercise of determining in advance of any actual decision by the Director of Housing upon the individual cases whether, upon the facts of any one or more of them, hostel or hotel accommodation would be suitable. The exercise appeared to me to invite just the sort of declaratory judgment from which the courts have always and with reason shrunk. It would inevitably have involved detailed consideration not only of the characteristics of occupation, both of Vancouver Flatlets on the one hand,

and of such hostels and hotels as might be candidates for an offer of permanent accommodation on the other hand, but also of the individual circumstances of each applicant, even assuming that these four applicants could satisfactorily be regarded as, in all material respects, representative of the larger group. Moreover, the applicants' circumstances would have to be considered on the basis of evidence filed after the decision in question. Thus, the court was being asked to declare unlawful a decision in principle, taken in November 1986, by reference to facts only thereafter available to the respondent authority; facts which, for all the court knows, might cause the respondents themselves to regard the offer of hostel or hotel accommodation as unsuitable in a particular case.

If, as I have concluded, the nature of the court's role is indeed supervisory rather than appellate in character, the application has the effect of inviting the court to specify the factual parameters within which the authority hereafter could lawfully offer the type of accommodation objected to. Least of all was I inclined to undertake such an exercise when it would have involved also a very substantial over-run of the court's available time, made available, I would add, pursuant to counsel's then estimate.

In the result, Mr. Arden sought to discontinue the proceedings. I observe parenthetically that immediately before I began to deliver this prepared judgment this morning, Mr. Arden made reference to a February 1987 attendance note and applied to stand over the central issue to which I have referred for further argument at a later date. In my judgment, however, the objection to the application remains valid, namely, that the challenge would inevitably be not to the November 1986 decision itself (ostensibly the decision under review) but rather to subsequent opinions or perhaps even decisions taken by the authority.

As I have said, however, when yesterday in the course of argument I indicated my strong disinclination to entertain the application on the basis then sought to be advanced, Mr. Arden sought to discontinue it. Since, however, the challenge raised additionally the issue concerning the nature of this court's jurisdiction over the council's discharge of its section 65 duty, an issue upon which I have already heard some argument, I declined to allow this course. The respondents objected to it and told me that this issue had influenced the Court of Appeal in giving leave to bring these proceedings following invited refusal by the single judge. It involves moreover a point of law which is clearly of wide application and of some importance, quite possibly indeed to these very applicants themselves in the future. Finally, it seemed to me desirable to salvage something from these expensive publicly funded proceedings. I therefore declined to allow total discontinuance. Having heard further argument upon it, I now therefore proceed to determine that point.

It may be put in various ways: whether upon a dispute as to the suitability of accommodation made available by a housing authority pursuant to their duty under sections 65(2) and 69 of the 1985 Act, the court is to exercise merely a supervisory jurisdiction or an essentially appellate one; who, in the last resort decides on the facts whether accommodation is suitable, the housing authority or the courts; is the housing authority, in deciding what to offer by way of suitable accommodation, exercising a public function or merely an executive one?

It is as well, at the outset, to recognise the nature and consequences of the answer to these questions. If Mr. Arden is right in asserting that the

duty is executive in character, then a dispute as to its proper discharge would necessarily be brought before the courts in a private law action, namely, by writ in the High Court or by county court proceedings, these latter being permissible only where there exists in addition to the claim for declaratory relief, a claim also for damages. The court would then have to investigate and decide for itself all the factual matters underlying the dispute, including (at least sometimes) the overall availability of accommodation to the housing authority which Mr. Arden expressly recognises may exceptionally be a lawful consideration to bring into account.

Besides the differences in the mode and forum of proceedings, the crucial distinction would, of course, be this. In those cases where there is room for two views about the suitability of accommodation offered, the court, in its supervisory role, would be unable to substitute its own view for that of the authority whereas in its appellate or fact finding role, it would be bound to do so. From time to time during his argument, Mr. Arden referred to "plainly unreasonable offers of accommodation." These, of course, would be held invalid by the courts even upon judicial review.

I turn to the arguments. Mr. Arden advances two main submissions. First, he relies upon the terms in which Parliament has imposed the duty in question. In dictating how the duty may be performed, section 69, he contends, does not employ clearly subjective language. The phrase "suitable accommodation" is not qualified by an expression such as "in the opinion of the authority." This, moreover, is to be seen in contrast to earlier sections which govern the previous stage of the authority's decision-making function, that at which they are required to reach a conclusion whether or not any duty to house arises, be it on an interim, temporary or permanent basis.

In these earlier sections, points out Mr. Arden, subjective language is frequently found: see, for example, section 63(1) "If the local housing authority have reason to believe" and section 65(2) itself "Where they are satisfied that he has a priority need and are not satisfied that he became homeless intentionally." Furthermore, one finds in section 58(2)(b) and section 60(4), as one does not in section 69, the express provision "Regard may be had, in determining whether it would be reasonable for a person to continue to occupy accommodation, to the general circumstances prevailing in relation to housing in the district of the local housing authority to whom he has applied . . ."

All of this, contends Mr. Arden, besides underlining the contrasting absence of subjective language when it comes to determining what accommodation is suitable for the purposes of discharging the duty to house, explains and justifies what Lord Brightman said in his leading speech in *Puhlhofer v. Hillingdon Borough Council* [1986] 1 A.C. 484 at p. 519: ". . . I am troubled at the prolific use of judicial review for the purpose of challenging the performance by local authorities of their functions under the Act of 1977" (the legislation then in force).

"Parliament intended the local authority to be the judge of fact. *The Act abounds with the formula when, or if, the housing authority are satisfied as to this, or that, or have reason to believe this, or that.* Although the action or inaction of a local authority is clearly susceptible to judicial review when they have misconstrued the Act, or abused their powers or otherwise acted perversely, I think that great restraint should be exercised in giving leave to proceed by judicial

review . . . Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

Mr. Arden lays stress upon the sentence that I have underlined. That decision, the argument runs, was concerned with the authority's duty to determine at the earlier stage whether an applicant was homeless. It says nothing directly about the nature of the authority's duty at the final stage once they are required to provide accommodation.

Mr. Arden's second argument is that his submission is clearly supported by the highest authority. Above all, he relies upon the following passage in Lord Bridge's speech in *Cocks v. Thanet District Council* [1983] 2 A.C. 286 at p. 292:

" . . . it is necessary to analyse the functions of housing authorities under the Housing (Homeless Persons) Act 1977. These functions fall into two wholly distinct categories. On the one hand, the housing authority are charged with decision-making functions. It is for the housing authority to decide whether they have reason to believe the matters which will give rise to the duty to inquire or to the temporary housing duty. It is for the housing authority, once the duty to inquire has arisen, to make the appropriate inquiries and to decide whether they are satisfied, or not satisfied as the case may be, of the matters which will give rise to the limited housing duty or the full housing duty. These are essentially public law functions. The power of decision being committed by the statute exclusively to the housing authority, their exercise of the power can only be challenged before the courts on (certain) strictly limited grounds . . .

On the other hand, the housing authority are charged with executive functions. Once a decision has been reached by the housing authority which gives rise to the temporary, the limited or the full housing duty, rights and obligations are immediately created in the field of private law. Each of the duties referred to, once established, is capable of being enforced by injunction and the breach of it will give rise to a liability in damages. But it is inherent in the scheme of the Act that an appropriate public law decision of the housing authority is a condition precedent to the establishment of the private law duty."

Mr. Arden understandably emphasises the use of the word "immediately" in the sentence "Once a decision has been reached by the housing authority which gives rise to the . . . duty, rights and obligations are immediately created in the field of private law." True, as Mr. Arden recognises, the factual background against which the House of Lords were concerned to resolve the essentially procedural questions there arising was one involving a dispute as to whether or not any housing duty arose rather than as to how any such duty could properly be discharged. Nevertheless, he submits, the House of Lords cannot be supposed to have expressed themselves merely carelessly in their stated conclusion that once the duty arose, private law rights were immediately created.

Mr. Arden relies further on the decision of the Court of Appeal in *South Holland District Council v. Keyte* 19 H.L.R. 97. The homeless defendant in that case was housed by the authority in temporary accommodation. When

offered alternative accommodation elsewhere, she refused it. The authority sued for possession. At the trial, the defendant sought leave to counterclaim for a declaration that the alternative accommodation offered by the authority was unsuitable. Leave was refused at the trial on the ground that such a contention had to be made by way of judicial review. Her appeal failed on the ground that her counterclaim was advanced too late. In dismissing it, however, two of the judgments touched upon the point now at issue. The Master of the Rolls' judgment contained this brief parenthetical reference to the point:

"Bearing in mind that the essence of the proceedings is whether or not this lady had to give up these premises, it seems to me that, *although she may not have been correct in thinking that the relief sought in the counterclaim was a matter for judicial review*, the issue could without doubt be better dealt with by separate proceedings" (my emphasis).

Parker L.J. went rather further:

"But it must be realised that once the local authority have made their decision, then one moves into the realms of private right, and there is no decision of the local authority upon which anything else is dependent; it is simply a matter for the court to determine whether or not the duty has been fulfilled."

Linking his two main arguments together, Mr. Arden submits that the recognition in those decisions of the purely executive nature of the discharge of the council's duty, once following the public law stage it is found to exist, is no mere change or mishap. Rather it is the result of the different legislative language used at the different stages: that at the final stage lacks, he submits, the subjective element necessary to oust the court's fact finding role.

Able and forcefully though these arguments were advanced, I cannot accept them. In the first place, they appear to me to run clearly contrary to the overall scheme of the legislation. I cannot understand why Parliament, given as is common ground that the housing authority were to enjoy exclusive decision-making powers in determining when the duty to house arises, should then have chosen to entrust to the courts a fact finding rather than review role as to the suitability of the accommodation made available in discharge of that duty. Secondly, as Mr. Sullivan urges, the applicants' argument appears to overlook the effect of the final clause in the amended version of section 69 "and in determining whether accommodation is suitable they (the housing authority) shall have regard to . . .," a clause which expressly envisages the decision resting with the authority.

True, as Mr. Arden submits, Parliament is not to be thought, by inserting such an amendment, to have intended to change the essential nature of the duty from what it was before. But that, Mr. Sullivan argues, and I accept, suggests rather that Parliament should all along be recognised to have intended the authority rather than the courts to be the sole arbiters of suitability, subject only and always to the courts' review powers.

There is, of course, nothing impossible in the notion of the court deciding for itself the issue of suitability. Under Part IV of the Act, the part governing secure tenancies, that very function plainly is conferred upon the courts. Sections 84(2)(b) and (c), for instance, expressly prohibit the court from making possession orders in such cases "unless it is satisfied that suitable accommodation will be available for the tenant when the order takes

effect." But this is a function which Parliament has explicitly placed with the court and significantly Parliament has then been at pains in Part IV of Schedule 2 to the Act to define, with great particularity, the matters for the court to take into account. In short, it seems to me that the contrast in these regards between Parts III and IV of the Act is altogether more striking than any contrast between the subject language of section 65(2) and the relative lack of it in section 69. Whilst I recognise that *Puhlhofer* cannot, for the reasons urged by Mr. Arden, be regarded as conclusive of the point, I accept Mr. Sullivan's submission that it nevertheless constitutes powerful persuasive authority in support of the respondents' argument. It cannot readily be supposed that Lord Brightman would have regarded the action of the local authority at the final stage (that of determining the suitability or otherwise of particular accommodation) to be subject to what would amount to an appeal to the courts on the facts when plainly comparable decisions concerning whether or not it was reasonable for an applicant to continue occupying his former accommodation lie exclusively with the local authority. It may after all be noted that Lord Brightman, with whose speed the other members of the House agreed, regarded even judicial review proceedings to be only exceptionally appropriate.

In a word, *Puhlhofer*, to my mind, strongly supports the argument that the suitability of given future accommodation—as well as the comparable earlier question of the sufficiency of previous accommodation—is pre-eminently a matter of judgment for the housing authority. The question appears to be to be vested in it not only by the scheme of the legislation as a whole, but in terms by section 69 itself, in any event in its present form.

I further reject Mr. Arden's submission that I am bound to accede to his argument on the authority of *Cocks v. Thanet District Council*. It is plain to me that Lord Bridge was not there envisaging any dispute about the adequacy of an offer of accommodation in discharge of a housing duty. I doubt indeed whether anyone even recognised the scope for such a dispute given the reference in the section, as it then stood, to accommodation *simpliciter* rather than "suitable accommodation." Certainly, I cannot suppose that Lord Bridge would regard the decision-making process as to what accommodation was suitable to be a purely executive function, to be indeed in any way different in kind to the earlier, clearly public law, function of deciding whether the duty to house arose in the first place. If necessary, which I do not accept that it is, I would accede to Mr. Sullivan's alternative submission that the sentence so heavily relied upon by Mr. Arden must be regarded as *obiter* and cannot prevail over what appears to me to be the plain meaning of the statute itself. As to the Court of Appeal judgments in the *South Holland District Council* case, I cannot but note the doubt implicit in the Master of the Rolls' aside and, further, that Parker L.J.'s comment on the point was, if not strictly *obiter*, at least in the nature of an optional extra. That decision must inevitably have been the same whatever view was taken on the point now at issue.

I find it wholly unsurprising that in the result the council should be regarded as exercising public law functions up to the point at which they decide that they are required to make available accommodation of a particular kind. It is only at that stage, namely, offering such accommodation or failing to do so, that they are to be regarded as exercising a purely executive role. I regard the position as strictly akin to that of a local education authority in the discharge of its duty to make available grants to students

under the Education Act 1962. Section 1(1) of that Act was similarly couched in non-subjective language: "It shall be the duty of every local education authority . . . to bestow awards on persons who (a) are ordinarily resident in the area of the authority . . ." Yet with the case of *Shah* [1983] 2 A.C. 309 the House of Lords held that even when it was plain that authorities up and down the country had been misapplying the legislation by wrongly construing the concept of ordinary residence, the appropriate course for the court to take was not to grant declaratory relief, but rather to remit the cases for consideration by the local authorities for, as Lord Scarman put it, such a course avoids any semblance of the courts assuming the function assigned by Parliament to the local education authority, namely, the power to decide whether to make or to refuse an award."

I have no doubt that once the local authority, upon reconsideration, determine their liability to pay a grant, their consequent duty to make that payment would be regarded as an executive function to be enforced, if necessary, by private law proceedings. In my judgment, this position is strictly analogous to that arising under the Housing Act.

For all these reasons I reject the applicants' argument. Unless either party contends that I should make some particular form of declaration accordingly, I would think it appropriate merely to leave this judgment to speak for itself.