CO/14459/2013

Neutral Citation Number: [2015] EWHC 795 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 6 March 2015

B e f o r e:

HIS HONOUR JUDGE SYCAMORE
(Sitting as a Judge of the High Court)

Between:
THE QUEEN ON THE APPLICATION OF MT (by his litigation friend GT)

-

Claimant

v

OXFORD CITY COUNCIL

Defendant

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WordWave International Limited
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165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

Ms T Jaber (instructed by Campbell Law) appeared on behalf of the **Claimant**
Mr L Johnson (instructed by Oxford City Council) appeared on behalf of the **Defendant**

J U D G M E N T
(Approved)

Hearing date: 10 February 2014

1. JUDGE SYCAMORE:

2. This is a claim for judicial review by MT, who appears by his litigation friend, GT. Permission was initially refused on the papers on 28 February 2014 by His Honour Judge Denyer, sitting as a Judge of the High Court. Subsequently, on 21 August 2014, following an oral renewal hearing, permission was granted by His Honour Judge McKenna, sitting as a Judge of the High Court.

3. The claim is concerned with the housing obligations of the defendant local authority under the National Assistance Act 1948 ("the 1948 Act") and under Part 7 of the Housing Act 1996 ("the 1996 Act").

4. The claimant's judicial review claim form, which was lodged on 2 October 2013, describes the details of the decision to judicially review as a decision:

5. “to refuse the claimant public housing on the basis that he lacks capacity”.

6. The form does not provide any details of the date of decision to be challenged. In the grounds which accompany the judicial review claim form, the issue that arises in the claim is described thus:

> "The claimant has been refused public housing on the basis that he lacks capacity. The issue that arises is whether that approach is inconsistent with article 14 of the European Convention on Human Rights."

7. In summary, the claimant has a mental disability. It was accepted by the parties that as a consequence he is unable to manage his property and financial affairs. On 20 October 2010, his father was appointed as his deputy under the Mental Capacity Act 2005. By a letter of 29 May 2008, Oxfordshire County Council informed the defendant, in the context of an application to go on the General Housing Register in the following terms:

> "[M] has learning disability, this means that he needs daily care to meet his social and personal care needs which is currently provided by his parents his family can no longer continue to care for him at home and for this reason he has been given notice to move out."

8. Oxfordshire County Council is the social services authority for the defendant's area.

5 At the time of the letter of 29 May 2008, the claimant was living with his father. He has continued to live with his father and at the date of this hearing he was still living with his father.

6 On 19 October 2011, the claimant applied to the defendant as homeless. On the same day, the defendant wrote to the claimant explaining that it was satisfied that the council did not have any duty to him under Part 7 of the Housing Act 1996 because he lacked

capacity to make such an application. The letter went on to say that a referral was being made to Adult Social Services, Oxfordshire County Council, who the defendant understood was prepared to offer the claimant accommodation under the 1948 Act.

7 By letter of 28 October 2012, in reply to a letter 15 October 2012 from the claimant's solicitor, the defendant summarised the history subsequent to the letter of 19 October 2011 and indicated:

> "Under Part 7 of the Housing Act 1996 an incapacitated person who lacks capacity cannot make an application as homeless."

The defendant also referred to the case of R v Oldham Metropolitan Borough Council ex parte Garlick [1993] AC 509 in the following terms:

" …. The House of Lords held that a homeless applicant must be capable of accepting or rejecting an offer of accommodation or assistance in order to qualify as an applicant for the purposes of the Act. Where someone does not have the capacity to apply, nor to authorise someone to apply on their behalf, they cannot make an application under Part 7. There must be capacity to respond to the offer and to undertake its responsibilities.

In addition, the case law suggests that there is only a requirement to meet ordinary housing needs under Part 7 and not provision of specialist accommodation (R(Hughes) v Liverpool City Council [2005] LGR 532. Such needs should be addressed under section 21 of the National Assistance Act 1948, as amended".

9. Although the claimant described the challenge as being to a decision to refuse him public housing, the reality is that the claimant has not been refused public housing. The decision of the defendant was that as an incapacitated person lacking capacity he cannot make an application as homeless. The claimant in submissions described the claim as reflecting a continuing state of affairs which was thus not out of time. For my part, I have some difficulty with that assertion as the only extant decision of the defendant is that of 19 October 2011. Nevertheless, given that in granting permission the judge appears not to have considered that there had been delay, I will not dismiss the claim on the basis that it is out of time.

10. The two statutory provisions both concern the provision of accommodation. Section 193 of the 1996 Act provides:

> "**193 Duty to persons with priority need who are not homeless intentionally**
>
> (1) This section applies where the local housing authority are satisfied that an applicant is homeless, eligible for assistance and has a priority need, and are not satisfied that he became homeless intentionally."

Section 21 of the 1948 Act provides:

> "**21 Duty of local authorities to provide accommodation**

> (1) Subject to, and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing—
>
> (a)residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them ….".

11. Both parties agree that the lower courts are bound by decisions of the higher courts whether or not those decisions are inconsistent with subsequent decisions of the European Court of Human Rights (Kay v Lambeth London Borough Council [2006] 2 AC 465), unless the case fell into the exceptional category identified by Lord Bingham in Kay.

12. In Garlick, the House of Lords was considering the same question as that posed in this case; that is to say whether a person who lacks capacity to enter into a tenancy agreement could apply under Part 7 of the 1996 Act. The House of Lords, Lord Griffiths, defined the nature of the duty at 516E-G:

> "….It is of the first importance to understand the nature of the duty imposed upon local housing authorities by Parliament. It is not a duty to take the homeless off the streets and place them physically in accommodation. The duty is to give them and their families the first priority in the housing queue ….".

In determining whether a person who lacked capacity to enter into a tenancy agreement could apply under Part 7, at 519E, Lord Griffiths said this:

> "I have already pointed out that the duty under this Act is a duty to make an offer of permanent accommodation. As Purchas LJ pointed out in *Reg v Tower Hamlets, London Borough Council, Ex parte Monaf (1988) 86 LGR 709, 732; 20 HLR 529, 550*, the Act is primarily to do with the provision of bricks and mortar and not with the care and attention for the gravely disabled which is provided for in other legislation."

And at 520A, Lord Griffiths said:

> "But I can see no purpose in making an offer of accommodation to a person so disabled that he is unable to comprehend or evaluate the offer. In my view it is implicit in the provisions of the Act that the duty to make an offer is only owed to those who have the capacity to understand and respond to such an offer and if they accept it to undertake the responsibilities that will be involved. If a person is so disabled that he cannot do this he is not left destitute but is protected by the National Assistance Act 1948 which by section 21(1) provides:
>
> 'It shall be the duty of every local authority, subject to and in accordance with the provisions of this Part of this Act, to provide- (a)residential accommodation for persons who by

> reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them; (b) temporary accommodation for persons who are in urgent need thereof, being need arising in circumstances which could not reasonably have been foreseen or in such other circumstances as the authority may in any particular case determine'."

13. In my judgment, that decision is determinative of the issues in this claim and, applying the principles in Garlick, it follows that the claim must be dismissed.

14. The claimant seeks to argue that notwithstanding Garlick, Article 14 of the ECHR is engaged as is set out in paragraph 4.1 of the claimant's grounds in support of the claim "The claimants submit that the interpretation of the duty of the local authority in Garlick violates Article 14". It is clear from the judgment of Lord Bingham in Kay that a factor which could be considered as relevant for a departure from precedent to be correct was where a binding precedent was arguably inconsistent with a subsequent decision of the European Court. The claimant summarises the submissions in this respect as follow in the skeleton argument:

> "3.41.1 It was decided over twenty years ago and so featured no real consideration of article 14;
>
> 3.41.2 It was also decided before the 2005 Act was enacted. That demonstrated that Parliament intended that those who lack mental capacity should be able to participate fully in society by allowing deputies to be appointed on their behalf. As already indicated, Parliament has made it clear that people should be placed in a position that is equivalent to those who enjoy capacity; and
>
> 3.41.3 The matters above demonstrate how there are good reasons for following the case law regarding article 14 despite the binding nature of ex p Garlick."

15. Significantly, it is not the case that there has been any determination of issues such as these by the European Court. Indeed, as is pointed out on behalf of the defendant, Garlick has been cited in subsequent cases without disapproval or judicial criticism; for example, R(A) v Croydon London Borough Council [2008] EWCA Civ 1445 on the issue of mental capacity; and in R(G) v Barnet London Borough Council [2003] UKHL 57. In Croydon, Ward LJ, at page 1029B-C, said this:

> "Thus Mr Bear and Mr McGuire submit that Parliament must have intended that all necessary decisions were to be made quickly and with a minimum of formality by those operating the service on the ground and they draw support from Lord Griffiths' speech in *R v Oldham Metropolitan Borough Council ex parte Garlick [1993] A.C. 509*."

And in Barnet, Lord Nicholls, at page 227G-H:

> …. The statutory housing provisions cannot be circumvented by making an application in the name of a dependent child: *R v Oldham Metropolitan Borough Council, Ex p Garlick [1993] AC 509*. Nor should families be permitted to circumvent these provisions by relying on the duties of local social services authorities to meet the accommodation needs of children."

16. As I have already observed, the claim form is incorrect when it suggests on the claimants' behalf that he was being refused public housing. The decision made by the defendant was that he could not make an application as homeless as he is an incapacitated person who lacks capacity. In terms of the obligation under the 1948 Act, Oxfordshire County Council has made it clear that they would assess, if requested to do so, and provide the necessary assistance, thus providing public housing under the provisions of the 1948 Act. For example, in their letter of 31 March 2009, the defendants, Oxfordshire County Council, said:

> "Please find attached a letter from [MT]'s father, [GT], with regards to the level of support that he currently provides to his son and the level of support that he has continued to provide should [MT] be housed within council or housing association accommodation.
>
> We can confirm that currently the local authority does not provide care and support directly to [MT] within the family home and that [GT] and his family support [MT] at key times when at home. [GT] has stated that should [MT] move into his own home, then the family have agreed to continue with the same level of care and support.
>
> Should this support cease, then we would have a duty to reassess [MT's] needs and the situation regarding the best environment to which we would provide support for any eligible needs.
>
> [MT] is currently on an Occupation Therapy waiting list in order to have a daily skills assessment.
>
> Please do not hesitate to contact me should you wish to discuss further."

17. As I have indicated, the current claim arises from the defendant's decision not to accept an obligation to process a homelessness application from the claimant. There is difference in terms of the obligations under the two statutory provisions. Under the 1986 Act, the duty is to provide assistance and priority for those who are eligible, not homeless intentionally and in priority need of accommodation. Under the 1948 Act, local authorities are obliged to assist those who are in need of care and attention which is not otherwise available to them. For the sake of clarity, I should point out that the latter provision is the province of the social services authority. In this case, the defendant is not a unitary authority and thus Oxfordshire County Council have that responsibility.

18. Finally, the claimant asserts that he falls between the provisions of the 1948 Act and the 1996 Act because it is suggested that he does not require “care and attention”. It is submitted on his behalf in terms that so far as the 1948 Act is concerned his need for care and attention is, and will always continue to be, met by his father and that as such he arguably does not qualify under section 21 because the care and attention is otherwise available.

19. This was considered by Baroness Hale in R(M) v Slough Borough Council [2008] UKHL 52, a case concerned with the 1948 Act, in the following terms at paragraph 33:

> " ... the natural and ordinary meaning of the words 'care and attention' in this context is 'looking after'. Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list."

20. It is clear that this claimant needs looking after in the context described by Baroness Hale. As was observed on behalf of the defendant, the outcome in both statutory schemes is identical; that is to say that accommodation is provided. A need for accommodation is a prerequisite in both schemes. In the context of the 1948 Act, the question of care and attention was considered by the Supreme Court in R(SL) v Westminster City Council [2013] UKSC 27; see, for example, Lord Carnwath JSC at paragraph 48:

> "The need has to be for care and attention which is not available otherwise than through the provision of such accommodation. As any guidance given on this point in this judgment is strictly *obiter*, it would be unwise to elaborate, but the care and attention obviously has to be accommodation-related. This means that it has been care and attention of a sort which is normally provided in the home (whether ordinary or specialised) or will be effectively useless if the claimant has no home. So the actual result in the *Mani* case may well have been correct. The analysis may not be straightforward in every case. The matter is best left to the good judgement and common sense of the local authority and will not normally involve any issue of law requiring the intervention of the court."

So there must be a need for accommodation before the question of care and attention arises.

21. In the claimant's case, although the father indicated in 2008 that the claimant must leave the family home, the reality is that the claimant continues to reside there and his needs are currently met by the family. For as long the claimant's father continues that arrangement, the claimant has no entitlement to assistance under the 1948 Act or the

1986 Act as he has no need for accommodation. As I have already observed, the need for accommodation is a prerequisite in both legislative schemes.

22. It is only in circumstances in which the claimant were to be evicted by the father that the need for accommodation would arise. The difference between the two schemes is that under the 1986 Act there is a requirement for priority need and under the 1948 scheme, having established the need for accommodation, a need for care and attention must be demonstrated. In my judgment, Parliament's decision to determine that two different systems are appropriate for the provision of accommodation is a rational decision which is not amenable to challenge by way of judicial review.

20 The common factor in the two schemes is the need for accommodation but in the case of the 1948 Act, some form of care is also required.

21 The ration in Garlick (Lord Griffiths at 520) is (1) there is no purpose in making an offer of accommodation to a person who does not have the ability to understand the offer; (2) similarly, there is no purpose in such an offer to a person who cannot understand the responsibilities that would be involved; (3) in any event, Parliament has provided alternative provision under the 1948 Act.

23. That is a logical distinction and in my judgment, it cannot be said to be discriminatory to provide two different systems for provision of accommodation.

24. In the circumstances, I dismiss this claim for judicial review. Garlick remains binding and, in any event, for the reasons I have set out, I am not satisfied that incompatibility has been demonstrated.

25. MR JOHNSON: My Lord, I am grateful for that. We would ask for our costs. You will recall there was an issue raised at the beginning of the hearing in relation to the late filing of the skeleton argument on behalf of Oxford. In our submission, that takes matters no further forward in the light of your judgment. The judgment is on exactly the same terms as the summary grounds were set out, including your comments in relation to delay. So we would ask for the usual order for costs. There will need to be public funding protection on behalf of the claimant.

26. JUDGE SYCAMORE: This is a matter for detailed assessment, is it not?

27. MR JOHNSON: I think it is, my Lord.

28. Yes, Ms Jaber?

29. MS JABER: My Lord, I commence by asking for permission to appeal in relation to this decision on the basis that the creation of two Acts is an issue of high public importance which should be heard at the Court of Appeal. I would ask whether you are minded to grant permission to appeal in this case. In relation to costs, I do not see a basis on which we can resist a normal costs order being made subject to public protection and detailed assessment.

30. JUDGE SYCAMORE: Thank you.

31. Do you have anything to say on the permission to appeal matter, Mr Johnson?

32. MR JOHNSON: My Lord, your concluding remarks make the point that it is not just the case that Garlick remains good law, you dismissed the claim in any event. In our submission, there is no general point of public importance that arises from these facts. The tension between the two Acts might be one of some relevance but on the facts of this case, they are not.

33. JUDGE SYCAMORE: Thank you very much.

34. The claimant applies for permission to appeal. I refuse that application. I am not satisfied that the appeal would have a real prospect of success, nor is there any other compelling reason why the appeal should be heard. As I indicated, the decision of the House of Lords in Garlick remains binding on this court. There is no decision of the European Court to the contrary. In other respects, I refer to the terms of my judgment.

35. The application for costs is not resisted. I order that the claimant pays the defendant's costs to be the subject of a detailed assessment. I understand the claimant has the benefit of public funding and the usual protection order in that respect will be made.