Neutral Citation Number: [2024] EWCA Civ 1616

Case No: CA-2024-001773

IN THE COURT OF APPEAL (CIVIL DIVISION)
IN THE MATTER OF AN APPLICATION TO APPEAL
FROM THE HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)
MR JUSTICE JAY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/11/2024

Before :

LORD JUSTICE LEWISON

- -

Between :

MS GLADWYS FERTRE	**Appellant**
- and -	
VALE OF WHITE HORSE DISTRICT COUNCIL	**Respondent**

- -
- -

Simon Cox and Hannah Smith (instructed by **Turpin Miller**) for the **Appellant**
Catherine Rowlands (instructed by **Joint Legal Services**) for the **Respondent**

Hearing date: 19/11/2024

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Approved Judgment

This judgment was handed down ex tempore on 19/11/2024
and is released to the National Archives.

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Lord Justice Lewison :

1. Last month I considered an application for Permission to Appeal against a decision of Jay J. The issue before the judge was whether the Appellant was eligible for assistance as a homeless person under part 7 of the Housing Act 1996 which deals with homelessness.

2. The Appellant is a French national who moved from France to the UK on 04 November 2020, before the end of the Brexit transition period. She was granted pre-settled status, or PSS, a few weeks later and was notified that it did not provide a basis for entitlement to benefits and services. In November 2025 she will become eligible for indefinite leave to remain, although there may be some administrative delay before that indefinite leave to remain is actually granted. At that point she will be eligible for assistance under Part 7. Her application in 2021 to the local authority for housing assistance under Part 7 was refused, because, as an economically inactive person, she was not residing in the UK on the basis of the EU-UK Withdrawal Agreement. Her application to be placed on the housing register for allocation of housing under Part 6 of the Act was likewise refused on the ground that she was not habitually resident. The judge considered the relevant law in great detail and concluded that the Appellant was not entitled to assistance under Part 7.

3. In the course of his judgment, he remarked at paragraph 3 that the application was academic because, as he explained at paragraph 15, the Appellant accepted that she was neither homeless nor threatened with homelessness, but having considered the law, he dismissed the application. The Appellant applied for permission to appeal and the Respondent's statement in response to the application, again, objected to the grant of Permission to Appeal on the ground that it was academic.

4. That led me, on consideration of the papers, to adjourn the application to court for further argument, and, as I told the parties this morning, my enquiries with the Court of Appeal listing officer suggest that any appeal would be listed for hearing sometime after March 2025. There are, I understand, applications to intervene made by four interveners, two of whom support the Appellant's appeal, and two of whom, including the Secretary of State, oppose it, but the draft order with which I have been supplied provides that none of the interveners will be liable to pay the costs of the other parties to the appeal.

5. The grant of Permission to Appeal is a discretionary decision. Although the discretion cannot be exercised unless the second appeals test is satisfied under CPR 52.7, the court none the less retains a discretion.

6. Where the issues in an appeal have become academic, the court's general approach to the grant of Permission to Appeal is set out in *Hutcheson v Popdog Ltd* [2012] 1 WLR 782. Lord Neuberger MR gave the leading judgment. At [12] he said:

> "The mere fact that a projected appeal may raise a point, or more than one point, of significance does not mean that it should be allowed to proceed where there are no longer any real issues in the proceedings as between the parties."

7. He went on to say at [15]:

> "Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean "may") be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated."

8. It is not suggested on this application that the Appellant is able to indemnify the Respondent against costs, nor have any of the interveners offered to do so. Indeed, the question was raised with the Secretary of State and an invitation to indemnify the Respondent was refused. None the less, although objecting to the appeal, the Respondent does not intend to participate in the appeal if permission were to be granted.

9. So, the real question, in my view, is whether the appeal is indeed academic. That question was considered by Constable J at an earlier stage in these proceedings in a judgment given on 22 May 2024. The facts at that time were as follows.

10. While the Appellant's case was making its way through the courts, her children were taken into local authority care, and on 01 December 2023 she was compulsorily detained under the Mental Health Act 1983. On 24 January 2024, she was discharged and placed in "step-down" accommodation by Oxford County Council under section 117 of the 1983 Act. The licence for that accommodation of 23 January 2024 stated that it was for a maximum of eight weeks, that is to say to 19 March 2024. That was subsequently extended to 02 April 2024, and then to 22 April 2024. On 6 March 2024, she made a fresh application for housing assistance in the light of the threatened eviction from her step-down accommodation. On 11 March 2024 the Respondent gave a decision under section 184 of the 1996 Act to the same effect as its previous decision, that is that the Appellant was a person from abroad who was not eligible for housing assistance.

11. On 22 April 2024, the Appellant was granted a six-month assured tenancy of supported accommodation for persons with mental health issues. She thereupon withdrew her second application for assistance because she was neither homeless nor threatened with homelessness. Having considered certain authorities Constable J said:

> "This case makes clear that a *risk* of future homelessness can be a sufficient interest such that the matter is not academic. In light of this, Mr Lane's submission that the benefit or interest has, as a matter of principle, to be an actual, present benefit is not correct. There are plainly some matters which are so based upon speculation as to be fanciful, and such matters could not be legitimate interests for the purposes of persuading the court that the matter pursued is not academic."

12. He then set out the factors that led him to conclude that the appeal was not academic. First, if the Respondent had not made an error of law (assuming that it had) the

Appellant would have the enduring benefit of a determination of threshold eligibility for assistance under Part 7 of the 1996 Act.

13. Second, that was a real benefit in circumstances where the risk that the Appellant is made homeless or threatened with homelessness is not fanciful. The Appellant described the risk as a "serious" one, and the judge accepted that characterisation. Her assured shorthold tenancy was for six months only and there was no inevitability about its renewal. Her accommodation was shared with other people with mental health difficulties and its continued appropriateness as accommodation depended upon the happenstance of the needs of a new sharing tenant, over which the Appellant exercised no control. It might also be that should the Appellant's mental condition require hospitalisation she would lose that accommodation.

14. The enduring benefit of the certainty provided by a determination of the Appellant's threshold eligibility in the context of her mental health was also an entirely legitimate one for the court to take into account. Assuming success, the judge accepted that the mental reassurance and confidence that local authorities would have to accept that she passed the eligibility test was a benefit.

15. But he went on to say that even if the appeal was not academic, it was a case in which the court should exercise its discretion to hear it. There were, thus, two grounds for his decision: the appeal was not academic but even if it was, the court should hear it.

16. There have been some developments since then. The accommodation provided as step-down accommodation proved to be unsatisfactory. In September 2024 the Appellant ran away from it and was admitted to hospital in Oxford under the 1983 Act. The charity, MIND, is trying to find her suitable accommodation, although that has not yet transpired. An email exchange between her solicitors and MIND suggested that accommodation should have been available by the end of October 2024. That has not happened, and the Appellant is back in the original flat which proved to be unsatisfactory.

17. The Respondent continues to assert that the appeal is academic. The Appellant is supported by Oxfordshire County Council which has the duty under the Mental Health Act to support and accommodate her. She is not homeless and nor is she threatened with homelessness and has not been during the 6 months that have elapsed since Constable J's judgment. Ms Rowlands thus argues that it is most unlikely that she will be homeless at any time in the foreseeable future.

18. Mr Cox, for the Appellant, first argues that the Respondent should not be permitted to raise the point. It has already been decided by Constable J and to raise it again is an abuse of process. There was no appeal against Constable J's judgment and the Appellant should not be deprived of the benefit of a Respondent's Notice in which the Respondent sets out its case fully, and that it is premature at this stage to assume that any such Respondent's Notice would be served. I disagree. First of all, the question for Constable J was whether to strike out the Appellant's Notice under CPR 52.18 which requires a compelling reason for a strike out. It was not the same as a split trial, which is the analogy that Mr Cox relied on. Secondly, the factual position is not the same as it was before Constable J. Third, at the time he gave his judgment, there had been no judicial determination of the question whether the council had made a legal error but that has now been determined against the Appellant. Fourth, it is one thing to

permit an appeal to go forward for a hearing by a judge at first instance, but another to give permission to appeal to this court. Fifth, Constable J decided that even if the appeal was academic, the court should, nevertheless hear it. It would not have been practical for the Respondent to appeal against that. Lastly, the question for Constable J was whether to strike out an appeal which the Appellant was entitled to bring under the Housing Act 1996 as of right, whereas the question now is whether the court should exercise its discretion to permit a second appeal.

19. In many of the cases to which I have been referred, the question whether the court should decide academic appeal arose after Permission to Appeal had been granted. That was the position in *R v Secretary of State Ex Parte Salem* [1999] 1 AC 450, it was the case in *Deugi v Tower Hamlets* [2006] HLR 28 (on which Constable J relied), it was also the case in *R (on the application of SB) v Kensington & Chelsea* [2024] 1 WLR 2613 where Permission to Appeal had been granted. It was for that reason that Elisabeth Laing LJ said at paragraph 80 that *Popdog* was only indirectly relevant.

20. *Hamnett v Essex County Council* [2017] 1 WLR 1155 was another case in which Permission to Appeal had already been granted. Although the court determined the substantive point, Gross LJ said at paragraph 38 that the appeal should have been dismissed on the ground that it was academic, even though costs remained a live issue.

21. In its written representations Shelter referred me to the case of *R (on the application of Morris) v Westminster City Council (No 2)* [2004] EWHC 1199 (Admin) where the court considered a case in which the claimant's daughter had been granted British citizenship after the court had quashed a decision, subject to a possible point on compatibility of domestic law with the European Convention on Human Rights. That decision had been taken on 13 October 2003 following a hearing on 16 September. At the resumed hearing Keith J permitted the compatibility point to go forward, but importantly for present purposes he said at paragraph 13:

> "Had it been known prior to the hearing on 16 September 2003 that the claimant's daughter had been registered as a British citizen, and was therefore no longer subject to immigration control, it is inconceivable that the hearing would have gone ahead."

22. I return, then, to what I consider to be the real question: is the appeal academic? Mr Cox relies on the reasons given by Constable J. In my view, the limited practical benefit that the Appellant would achieve if her appeal were to proceed and succeed, is that if she were homeless or threatened with homelessness at some time between March 2025 and the grant of indefinite leave to remain some time after November 2025, she would have a determination that she was eligible for assistance under Part 7 of the 1996 Act. That is, of course, no more than a contingent benefit, but it is, I think, a benefit.

23. Ms Rowlands argues that the question whether the local authority owes a person a housing duty under Part 7 of the Act is a five-part enquiry. The first question is: is the Applicant homeless or threatened with homelessness? If the answer to that is no, then the enquiry stops there. The difficulty with that argument in my view, is that the local authority's actual decision, in this case, turned entirely on the question of eligibility

and that was the sole issue that was raised in the appeal. So, I consider that the first of the *Popdog* criteria is satisfied in this case, as indeed, I suggested in the written order adjourning the application to court.

24. So far as the second and third of the *Popdog* criteria are concerned, it seems to me on the basis of the information that I have, that the two interveners who support the judge's decision will be able to present the arguments opposing the appeal, so the burden will not (or will not necessarily) fall on the Respondent. I am very mindful of the Respondent's concern about spending more public funds on an appeal which has no immediate benefit to the Appellant, but in the circumstances in which the arguments against the appeal will be presented by the interveners, I consider that the Respondent could simply drop out of the picture. If he chooses not to, so be it. Of course, if the appeal succeeds, it will (or may) lead to the quashing of the Respondent's original decision, and in those circumstances the Appellant will, as foreshadowed in the Appellant's Notice, ask for a costs order against the Respondent, but I do not consider that it would be just, in those circumstances, for a costs order to be made against the Respondent where the Respondent would be an unwilling Respondent to the appeal.

25. As Mr Cox accepts, I have power to grant Permission to Appeal subject to conditions. I will exercise that power. I will grant Permission to Appeal but on the terms that the Appellant is not to be entitled to any order that the Respondent should pay the costs of the appeal or of the hearing below. I will also grant permission to the intervenors to intervene on the terms of the draft order with which I have been supplied.