Neutral Citation Number: [2020] EWHC 2117 (Admin)

Case No: CO/1621/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 July 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

R (XN)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Shu Shin Luh (instructed by Deighton Pierce Glynn Solicitors) for the **Claimant**
William Hansen (instructed by Government Legal Department) for the **Defendant**

Hearing date: 30 July 2020

Judgment as delivered at the hearing

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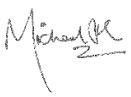
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

Introduction

1. This is a renewed application for permission for judicial review. Permission was refused on the papers on 18 June 2020. I have been greatly assisted by the written submissions on both sides and the oral submissions today by Ms Luh for the claimant and Mr Hansen for the defendant. In my judgment, there are clearly arguable grounds for judicial review in this case. I am also satisfied that it would not be appropriate to transfer the case to the county court. The order I will be making will therefore be that permission for judicial review is granted. I do want to explain why I have arrived at that conclusion, particularly in light of the sustained submissions on arguability made by the defendant, and the careful reasons on the papers of the judge who refused permission.

The policy point

2. The key points in the case, as I see it, really come to this. There is a structural point about whether there needs to be, embodied in applicable policy and other arrangements, a duty to consider relocating a perpetrator of harassment and abuse, in a case in which perpetrator and victim are not part of the same immediate residence, but part of broader communal shared accommodation. The essence of what such a duty would look like can be clearly seen on the face of an existing policy relating to domestic abuse and applicable in asylum support accommodation. That domestic abuse policy sets out a number of key principles to be followed by caseworkers and accommodation providers. Among them it says this:

> "Some victims may wish to remain in their current accommodation, and, in these cases, consideration must be given to relocating the perpetrator".

Built into that principle are two things. The first is an identification of victim and perpetrator, and an eliciting of the victim's wishes so far as concerns whether she or he wishes to remain or be relocated. The second is a duty to consider relocating the perpetrator. On the face of it, at least arguably, the latter duty would carry with it the need to identify a good reason or reasonable basis for a decision not to relocate the perpetrator. That is the first point in this case, and it is a point of principle.

The decision-making point

3. The second key point in the case concerns the decision-making which took place in relation to the claimant and led to her relocation. The essential argument is that the decision-makers did not (a) consider, and did not on reasonable grounds reject, the alternative of relocating the perpetrator (b) having elicited the wishes of the claimant as victim; and that they did not act with urgency in considering, addressing and effecting that solution, or identifying good and reasonable grounds for not doing so. That second point, based on the facts of the case, is linked to the first point. But, as I see it, it is not necessarily parasitic on the first. The claimant submits, in particular by reference to article 8 ECHR and positive obligations, that a duty – at least – to consider relocating the perpetrator arose, and that such consideration needed to be and was not given. The claimant goes further and says that the absence of such a principle, recognised in the relevant policy, itself constitutes a legal deficiency falling within the supervisory jurisdiction of the court.

Arguability

4. In my judgment, both of these points are properly arguable. There is in this case no 'knockout blow' in relation to either of them. Had there been a knockout blow in relation to the second point, then it may very well have followed that permission for judicial review in this case would have been inappropriate in relation to the first point. I would, in those circumstances, have needed to grapple with the question whether the issue about a 'lacuna' in the policy documents was an academic question, if I were satisfied that the decision-maker had in substance addressed the relevant obligation in the present case.

'No policy lacuna'

5. For the defendant Secretary of State, Mr Hansen has taken his stand at this hearing, in essence as I saw it, on the basis of two points. His first point is that there is no arguable gap or lacuna in the applicable policies. He concedes that the principle which I have quoted is not to be found in policies describing situations beyond those immediately cohabiting within accommodation. He submits that there are reasons of principle which distinguish between domestic abuse in this 'immediate household' sense and harassment and abuse which arises in the broader context of shared accommodation, where more than one immediate household are accommodated within a single building. He says that domestic abuse has a well-recognised and principled link to the former. He submits that there are relevant and proper and legally adequate policies relating to the latter. He emphasises that asylum support accommodation is allocated on a 'no choice' basis, and that there are arrangements relating to breach of conditions and eviction of perpetrators, with due process, in the context of harassment. He submits, by reference to authority, that Article 8 positive obligations engage a 'wide margin of appreciation' as he puts it. He submits that there is no arguable positive obligation arising in the present context, but that even if there were, there is no arguable gap in the policy arrangements. I am unable to accept that those submissions constitute a 'clean knockout' blow. In my judgment, the positive article 8 obligation described in Hajduova v Slovakia 2660/03 30 November 2010 at paragraph 46 is, arguably at least, capable of supporting the principled need for the same sort of protective approach as is found in the context of domestic abuse and the same immediate household, within asylum support accommodation. At least arguably, it is very odd if a distinction is drawn which requires the victim's wishes to be elicited and consideration to be given to relocating a perpetrator, but only where they are sharing the same immediate rooms within the accommodation, and not where the abuse emanates, for example, from a next-door neighbour within the shared asylum support accommodation.

'No document addressing relocating the perpetrator'

6. If he is wrong about this first point, Mr Hansen very fairly does not submit that he has a knockout blow rendering the case academic in the following sense. He does not say that he is able to point to a contemporaneous document which demonstrates that a decision-maker, having elicited the wishes of the claimant in this case, did give consideration to relocating the perpetrator and did identify a good reason for not doing so. Very fairly, Mr Hansen says that no such document currently exists within the materials that have been disclosed and put before the court. Mr Hansen is able to point to documents that describe 'all options being looked into'. He submitted that the court

needs to be astute not to ignore the 'practical realities' that arise in such a case: the difficulties that may attach to relocating a perpetrator, and the particular circumstances of the present case. He reminds me that the decision was not taken 'in a vacuum', and that the circumstances in which action to relocate the claimant in this case was taken against the backcloth of two things in particular. First, documents from the middle of April in particular which were urging relocation of the claimant. Second, the Covid-19 pandemic and the implications that had for decision-makers, realities and the availability of alternative accommodation. None of that, in my judgment, at least beyond argument, answers the point as to whether and why no decision-maker having elicited the claimant's wishes in this case addressed their minds to relocating the perpetrator and identified a reasoned basis for not doing so.

'Action was taken'

7. I said Mr Hansen has put forward, as I saw it, two key points in response. One of which – concerning the policy 'lacuna' – I have dealt with already. His second point was to submit that this case is academic and should not be granted permission, in the following sense. He points to the fact that action was taken to relocate the claimant. He submits that there is no remaining argument or remedy which justifies the grant of permission for judicial review, particularly if he is right on his first point of principle that no policy 'lacuna' even arguably arises. I have already found against him in relation to arguability and that point. I do not accept that the relocation of the claimant renders this claim academic. I accept the submissions of Ms Luh on behalf the claimant. She contends that, if the defendant has arguably breached a substantive obligation which arises by reference to an article 8 positive obligation, then the claimant is in principle a victim for the purposes of the Human Rights Act 1998. The court would have the power, and is properly asked to exercise the power, both to grant a declaration of unlawfulness, and to consider the question of just satisfaction (damages) if it finds a breach of article 8. The fact that the relocation was of the claimant is, on her case, the problem, in the sense that it did constitute action, but it did not even involve consideration of the alternative that she says the defendant was duty-bound to address: relocation of the perpetrator. I have this further concern. Were it the position in principle that a claim such as this one became 'academic' and not to be resolved by the court then, as it seems to me, no court would ever be considering the issue of addressing the alternative of relocating a perpetrator. That can be tested by taking an example under the domestic violence policy that the defendant accept does not applies in this ase, and considering a case in which it does apply. Suppose perpetrator and victim were, for example, partners living together in a shared room or flat. The fact that the victim is relocated resolves, in one sense, the protective and safeguarding problem. But it raises the issue as to whether the approach to that resolution was lawful and human rights-compatible, if consideration was not given to relocating the perpetrator, under an applicable principle. In my judgment, the issues in this case are important arguable and not academic.

Two features of the case

8. I am not reaching any other findings or conclusions for the purposes of this permission stage. I simply record the following two features of the case, in the light of the matters that have been ventilated before me. The first is that the claimant's case is that there was, in this case, a three-month period of harassment and abuse from another resident within the asylum support accommodation. The second is that there was a specific

incident on 16 February 2020 which led to safeguarding referrals the next day and on 5 March 2020. In my judgment those materials, on the face of it, have some significance in relation to the issues that have been raised before this court. In those safeguarding referral documents what is recorded in the defendant's decision-making record sheets is a referral from Migrant Help which describes what it calls a case of "domestic violence". It describes an attack by a housemate on the claimant, with punches, scratches, the pulling of hair and physical injuries. It describes how the claimant was told that this was a safeguarding issue would be looked at within 24 hours. The document goes on to record two points of particular significance, on the face of them. The first point is it is recorded that this is not a new problem but a recurring problem, with complaints and aggressive behaviour ongoing from the perpetrator. It goes on to say the perpetrator has been aggressive to children outside the property and that the perpetrator and her daughter been asserting dominance and causing disruption for other residents. The use of the word "perpetrator" it is noteworthy. The second point is that the document records a conversation between the claimant and the person who was dealing with the safeguarding issue and then escalating it. It says this:

> "When requesting crime reference [the claimant] stated the police had not given her one. Advised [the claimant] she would need to get us this in order to formally process her complaint and provide her with full assistance necessary such as moving the perpetrator. This distressed [the claimant] as she thought she would not receive assistance or may have to move again. Informed her this was not the case and she needed the crime reference number in order for us to be able to possibly move the perpetrator as there [were] no reports of previous history or incidence. We would do our best to accommodate keeping her in the property with the friend she has made in room two. The claimant will phone today to get crime reference number."

That passage, in my judgment on the face of it, has real practical resonance for the central issues in this case. It links to a submission made by Ms Luh, in relation to the importance of considering relocating a perpetrator, about the invidiousness of placing a victim in the position of wondering whether to draw attention to a situation of harassment or abuse, if its implications are that the victim will then themselves be moved on away from the household, without consideration being given to relocating the perpetrator. There are many other points and documents in the case, but in the circumstances, it is neither necessary nor appropriate for me to go into them any further. The case is arguable both on its broader first point and its case-specific second point, with the link between the two of them.

Transfer to the county court

9. Ms Luh's skeleton argument fairly raised with the court that the court may wish, of its own motion, to consider a transfer to the county court. The position, as at 17 July 2020, was that the defendant did not support such a transfer. The claimant does not invite one. I do not consider it appropriate to transfer this case to the county court. This is not a case where there are well-established applicable principles and what is left is to consider the facts as to whether those principles have been adhered to, for the purposes solely of deciding whether damages are appropriate, and if so with what quantum. I am not saying that it is only those cases that will be transferred to the county court. This is a case in which there are important issues of principle which would underpin the remedy

of declaratory relief, if they are well-founded, as well as any question of damages. In my judgment, the nature of the issues in this case make the case appropriate for retention within the Administrative Court.

Permission for judicial review

10. The fact that judicial review was pursued in this Court, and started at a time prior to any action as to relocation of anyone, has had the consequence that the case has been addressed through this sifting stage of permission. With the advantage of the submissions on both sides, and taking a different view from the one taken by the judge on the papers who considered that no duty had arguably been breached in this case, I have concluded that the permission threshold is satisfied. I grant permission.

Mode of hearing

11. I add an end-note on mode of hearing. The hearing was BT conference call. The parties were satisfied that this mode involved no prejudice to their interests, as was I. The open justice principle was secured. The case and its start time were published in the cause list with an email address for anyone wishing to observe to be able to do so. The conference call was recorded. I am promulgating this approved written version of the ex tempore judgment, into the public domain. I directed the mode of hearing, to eliminate the need for anyone to travel to or be physically in a court room, being satisfied that it was necessary and appropriate.

30 July 2020