



Neutral Citation Number: [2024] EWHC 159 (Admin)

Claim No: AC-2023-LON-002460

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 January 2024

Before:

MATTHEW BUTT KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Between:

THE KING

on the application of

MJ

Claimant

-and-

London Borough of Islington

Defendant

Ian Wise KC and Clíodhna Kelleher (instructed by **Miles and Partners**) for the **Claimant**
Kelvin Rutledge KC (instructed by **London Borough of Islington**) for the **Defendant**

Hearing date: 16 January 2024

Approved Judgment

This judgment will be handed down remotely at 10.30am on 31 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Matthew Butt KC:

Introduction

1. This claim concerns the alleged failure by the Defendant to take pro-active steps to secure the rehousing of MJ and her family. Permission was refused by C M G Ockelton, Vice President of the Upper Tribunal sitting as a judge of the High Court on 15th September 2023. The Claimant has renewed her application for permission. This is my ruling in relation to that application.
2. The Claimant, "MJ" is a tenant of the Defendant. She lives in a three bedroom maisonette split over the first and second floors of a housing block with her two adult sons and her 18 year old daughter "A". I make an anonymity order in relation to MJ and A to protect A's Article 8 rights given the intensely private matters covered in this judgment. For some time MJ has pressed the Defendant to find her alternative accommodation as the property is neither safe nor suitable for A to live in with dignity.
3. A local authority must comply with Part VI of the Housing Act 1996. It is common ground between the parties that Part VI does not impose a free-standing duty upon the Defendant to house the applicant. It is also common ground that the accommodation provided by the Claimant is not so inadequate as to render MJ statutorily homeless for the purpose of Part VII of the Housing Act 1996. If the conditions did render MJ homeless then this could create a duty upon the Defendant to provide her with accommodation.
4. A turned 18 in October 2023 and throughout her life has had very challenging needs. She suffers from severe autism and learning difficulties. She is non-verbal and has no sense of danger. She is entirely reliant on others for her care which falls in particular upon her mother who herself suffers from poor health and in particular arthritis. It follows that as A and MJ both get older, the problems are becoming more pronounced. This was a matter which Collins J referenced when the Claimant brought a judicial review against the Defendant on different grounds in 2016, see *R (M) and R (A) v Islington London Borough Council* [2016] EWHC 332 (Admin).

I can well understand and have great sympathy with the plight of the claimants and their families. 2 years have passed since it was accepted that the accommodation they at present occupy means, in the words of the amber risk level, that there are urgent safety needs because of risk of injury to the claimants. As the children get older and stronger, no doubt the risks will become greater. But the view has been maintained that the risk management arrangements with the claimants' mothers mean that the priority need is not such as warrants a direct offer or further points in either case.

5. The principal problems with the home relate to the property being above the ground floor and in particular one floor being on the second floor. In addition to this, the home does not have a walk in shower and suitably sized bathroom in which A can be properly bathed.
6. As A lacks any sense of danger, she is unsafe on the second floor of the property in particular. She will try to open and climb out of windows. She is also at risk when

entering and leaving the property on the first floor as she does not understand the dangers posed by the balcony from which there is a drop down to the ground floor garden below. MJ seeks to keep A safe by locking windows within the house and holding onto A whenever they are on the first floor landing. The former, however, leaves the house susceptible to mould and the latter control measure is an increasing burden upon MJ.

7. Due to A's complicated personal hygiene needs, she has to be taken to the family bathroom within the property to be washed. A then has to be lifted into the bath, at times by her male siblings. This is inappropriate for A and other family members for obvious reasons. A suffers from incontinence at times and is menstruating which adds to the indignity inherent in this situation. Due to the confines of the family bathroom the door has to be left open on occasion when intimate hygiene is attended to. At times MJ has no choice but to wash, clean and change A's clothing in the living room which further compromises A's dignity.
8. Islington has published a Housing Allocation Scheme under which it discharges its functions under Part VI of the Housing Act 1996. Under the scheme, applicants with sufficient points are able to bid for available properties. Points are awarded under categories which include medical and welfare needs. The Claimant has a total of 475 points which gives her a realistic prospect of successfully bidding for an appropriate property. She has been shortlisted for properties in the past. It is agreed that the type of property she requires is one with (i) four bedrooms (but see below) (ii) on the ground floor or first floor with a lift (iii) on one level (iv) with a walk in shower or suitable for adaption for such use and (iv) which has sufficient bathroom space for A. The Claimant does not take issue with the number of points she has been awarded and has not sought to challenge the points allocation by the Defendant.
9. The Defendant has also put in place a "Protocol for Meeting the Housing Needs of Non-Physically Disabled Children whom are at Risk of Serious Injury or Fatality in their own homes" (the Protocol). This is a non-statutory process which enables assessments of environmental risk to be made which are then fed into the housing allocation scheme. Action under the Protocol can include referral to a multi-agency "Team Around the Child" (TAC) meeting which is held to mitigate the risk of harm to children.
10. Islington has recognised the increased risk to A and as of 16 May 2023 the Defendant accepted that the Claimant's family should be regarded as being at "high risk" due to part of the property being on the second floor and the risk this poses to A. The Claimant's case was considered under the Protocol and the Defendant decided that the Claimant is entitled to two "supported choice" housing offers. The effect of this is that MJ will be given a choice of two suitable properties based on her assessed need for accommodation. This will be outside of the standard bidding scheme and as such places the Claimant at a considerable advantage compared to others. This is subject to suitable properties becoming available within Islington's housing stock and no offers have been made to date.
11. The Defendant also convened a TAC meeting on 29 June 2023, which resulted in a risk management action plan in relation to A. The plan details steps to be taken to mitigate the risk of harm to A pending the re-housing of the family.

12. The nub of the Claimant's argument is that MJ has for over ten years been raising concerns about her home not being adequate for A. It is submitted that these problems are becoming more pronounced as A becomes older and are now at a level that renders Islington's conduct unlawful. The failure to offer MJ appropriate accommodation is said to amount to a breach of (i) Section 11 (2) of the Children Act 1989 (ii) the Scheme and/or Protocol (at least since 16 May 2023) and (iii) Article 8 of the Convention. The Claimant seeks a declaration as to these three breaches, damages for the breach of Article 8 by way of just satisfaction and a mandatory order that a suitable property be provided to the Claimant within such timetable as the court considers to be appropriate. The Claimant relies upon *R (Bernard) v Enfield LBC* [2003] H.L.R. 4 in which this court held that housing conditions amounted to a breach of Article 8 and submits that it is strikingly similar to this claim.
13. The Defendant responds that as of 09 October 2023 the claim has become academic insofar as the Children Act 1989 and the Protocol are concerned as neither apply to A once she is 18. More generally, it is submitted that Part VI of the Housing Act does not impose a duty to provide housing of a certain type but sets out the manner in which such housing should be allocated. It is submitted that the Claimant seeks therefore to enforce a duty which does not exist under the law. The Defendant submits that the Section 11 (2) duty has been discharged by its housing scheme, the Protocol and other actions taken such as the TAC Management Plan. It is submitted that there is no timeframe for supported choice offers to be made as this is subject to properties being available and the Protocol has not therefore been breached by no offers having been made to date. As to Article 8, the Defendant submits that *Bernard* is a case concerning a duty to accommodate under Section 21 of the National Assistance Act 1948 and not allocation under Part VI of the Housing Act. Article 8 does not itself create a right to housing and it is submitted that the efforts taken by the Defendant to date demonstrate sufficient respect for A's Article 8 rights. The needs of other higher priority applicants must also be considered under Article 8 (2).
14. The starting point is that it is not for a court to assume that a local authority has carried out its functions in a conscientious manner, see *R(E) v London Borough of Islington* [2017] EWHC 1440. The court must scrutinise with care what the local authority has done based upon objective evidence.
15. It is well known that local authorities in London face great difficulties in providing housing including to those who are in priority need. Per Briggs LJ in *Hackney London Borough Council v Haque* [2017] PTSR 769: "[t]he allocation of scarce resources among those in need of it calls for tough and, on occasion, heartbreaking decision-making, but having to say no to those deserving of sympathy by no means betokens a failure to comply". The unsurprising evidence is that four bedroom properties in the Defendant's borough are in very short supply and in particular when arranged over one floor as such properties are normally split level.
16. The Claimant accepts that her family is not statutorily homeless and that there is no freestanding duty to provide housing under Part VI of the Housing Act. She argues that the delay in providing her with adequate housing renders the operation of Islington's allocation scheme and the Protocol unlawful. I agree with the Defendant that the

approach of this court must be to analyse with care the legal basis for each of the challenges advanced by the Claimant in order to see if any give rise to an arguable ground of challenge.

17. I do not accept that there is an arguable breach of the Scheme or the Protocol. I pressed the Claimant to identify which particular provision had been breached by the Defendant as the Housing Scheme does not on its face impose a time limit for two suitable properties to be offered. Mr Wise KC identified the provision which he said had been breached as the “Example Risk Matrix” at page 18 of the Protocol which states that for high risk cases *Actions need to be implemented as soon as possible and not later than 6 months*. Mr Wise argues that this must be interpreted as the Protocol requiring that two suitable properties must be offered within six months. The Defendant says that the Protocol requires not that offers are made within six months but that the “action which needs to be implemented” in six months is giving the Claimant priority by affording her enough points that she can bid for relevant properties and putting her in the “elite” supported choice category; this has been done. I agree with the Defendant in this regard. The Claimant’s contended for interpretation cannot be correct as the allocation scheme is dependent upon the stock of housing available to Islington which will always be finite and in great demand. There is no time limit stated within the definition of “supported choice” in the allocation scheme.
18. In any event as the Defendant is now over the age of 18 the Protocol does not apply to her. I do not consider that there is any purpose in a declaration that a protocol which no longer applies was breached between May and October 2023 (which I do not consider to be arguably the case in any event).
19. I also accept the Defendant’s submission that Section 11 of the Children Act 1989 has not arguably been breached by the absence of suitable property offers to date. Section 11 (2) does not change the scope of the functions to which it relates and cannot as a result create a duty to offer housing within a specified timetable under Part VI of the Housing Act where one did not exist before. The obligation upon Islington is to make arrangements for ensuring that its function is discharged having regard to the need to safeguard and promote the welfare of children. Islington has done this *inter alia* by its allocation scheme, the Protocol and the TAC Housing Risk Management Plan. It is important to remember that the obligation is to safeguard and promote the interests of all children in the Borough, not just A. To grant the mandatory order the Claimant seeks would be to the detriment of other families who are higher on the priority list than the Claimant.
20. In any event as the Defendant is now over the age of 18, I do not consider that there is any purpose in a declaration that a provision which no longer applies was breached between May and October 2023 or any longer period (which I do not consider to be arguably the case in any event).
21. This leaves the Claimant with Article 8. I would not have refused permission on the basis that A is not a party to the claim even though I agree with the Defendant that this would be required for the purposes of a claim under the Human Rights Act 1998. Were this the only obstacle then I would have granted permission to amend the claim form to add A as a second Claimant. I do not, however consider Article 8 to have been arguably breached in the Claimant’s case because steps have been taken by the Defendant to

protect A's Article 8 rights. These include awarding MJ sufficient points to be able to bid on suitable properties and placing her in the advantageous supported choice category. Additionally a risk management plan has been put in place in accordance with the TAC Housing Risk Management Plan.

22. The Claimant's core complaint is that she has not been rehoused by Islington to date. It remains the case, however, that everything that Islington can lawfully do to expedite the Claimant's request and mitigate the risk in the interim is being done. The Claimant is in the most advantageous position she can be under Islington's statutory allocation scheme. Realistically the Claimant's true complaint is that Islington has not sourced, obtained and earmarked for her a suitable property from the private sector. The court is asked to make a mandatory order forcing the Defendant to do so within a specific time period. The problems with such a remedy are readily apparent. As a general rule local authorities cannot earmark properties which they acquire for a particular resident due to the unfairness this would cause others see *R. (Begum) v Tower Hamlets* [2003] HLR 8 and *R. (Bell) v Lambeth* [2022] HLR 45. Islington can only allocate properties in accordance with Part VI of the Housing Act 1996. In order to give an effective remedy, sufficient properties would need to be purchased from the private sector to make two offers to the Claimant and anyone else of equal or greater need within Islington. This would involve significant expenditure by the Defendant and the kind of political decision making about allocation of resources which this court does not become involved in.
23. I also note that after the claim was served there has been a material change in circumstance. The Claimant had for some time required a four bedroom property as she did not want her two adult sons to live elsewhere (this was certainly the position during the TAC meeting on 29 June 2023). At some point around the time the claim was served, the Claimant began to bid on three bedroom properties as one of her sons is now prepared to move out of the family home and be housed elsewhere under Islington's "New Generation" scheme. The stock of three bedroom properties is generally greater than four bedroom properties. The Claimant counters that a three bedroom solution is speculative (as her son might not be offered a property), however, the fact is that MJ is currently bidding on three bedroom properties which are in generally greater supply. I consider this to be a material change of circumstance and I would additionally be minded to refuse permission on this basis.
24. Nothing in this judgment should minimise the serious problems MJ and her family are enduring. Islington must continue to strive to protect this family and to find a long-term solution which will require the family being re-housed. I was assured by Mr Rutledge KC at the hearing that even though A is now over 18, MJ will continue to benefit from the supported choice scheme. I consider this essential if the matter is to be swiftly and lawfully resolved.
25. For these reasons, I refuse permission to apply for judicial review.