SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 30
P287/20

Lord Justice Clerk
Lord Turnbull
Lady Wise

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motion

by

ABDELWAHAB-KABA DAFAALLA

Petitioner

against

CITY OF EDINBURGH COUNCIL

Respondent

Petitioner: M Ross QC, Dewart; Balfour & Manson
Respondent: McNeil QC, D Anderson; City of Edinburgh Council

5 July 2022

Introduction

[1] By interlocutor dated 19 February 2021 the Lord Ordinary held that the local authority council had failed in the duties owed to the petitioner under sections 28 to 31 of the Housing (Scotland) Act 1987. For convenience and clarity the terms petitioner and Council will be maintained throughout.

Background

[2] The petitioner lives with his family, consisting of his wife and six children, four of whom at the time of the petition were under the age of 16 years. He suffers from Type 2 diabetes, functional dyspepsia and osteoarthritis in the left knee. He is said to suffer from depression and anxiety, which is not admitted. In May 2015 the petitioner's application for accommodation and assistance under part II of the 1987 Act was accepted by the Council, who carried out investigations under section 28 of the legislation. In November 2015 the Council provided temporary accommodation under section 29 of the Act. During the course of 2016 the Council made a decision in relation to the petitioner's application that he was homeless and not intentionally so, thus becoming subject to a duty under section 31(2) of the Act to secure permanent accommodation for the petitioner and his family. Two offers of accommodation were refused, and in October 2016 the Council decided that it had performed its duties under the 1987 Act. Following a review of that decision under section 35(A) of the Act the Council confirmed its decision. The petitioner did not challenge that decision by way of judicial review. In March 2019 the Council obtained an order for recovery of possession. Thereafter, following representations on behalf of the petitioner the Council made another offer of permanent accommodation to the petitioner in August 2019. The offer was refused and on 16 January 2020 the petitioner and his family were evicted from the premises provided under section 29.

[3] On 24 March 2020 agents for the petitioner again made an application for assistance under section 28 of the Act of 1987, in which temporary accommodation under section 29 was sought. The basis of the application was stated thus:

> "[The petitioner] suffers from a number of medical conditions including diabetes which puts him at increased risk of severe illness should he contract coronavirus. At present, the family are forced to stay where he can from night to night which makes

> the family particular vulnerable. They are in urgent need of accommodation to keep the family safe and in particular, to protect Mr Dafaalla from contracting the virus. The application was made by email."

[4] Certain medical reports were submitted. On 26 March 2020 the Council refused to accept application, on the basis that

> "We do not consider the contents of your email relevant to Mr Dafaalla's homelessness status and accordingly are not prepared to accept a fresh application on that basis. … Once the Council has formally discharged its duties and met all homelessness obligations the case would normally only be reassessed where there has been a change in the circumstances of the household which would lead to an assessment of a different set of circumstances. So a change of temporary accommodation would not require a new assessment but a change in household or reason for homelessness would."

[5] The petitioner sought judicial review of the Council's decision. The Lord Ordinary concluded that the Council had failed to fulfil its duties set forth in section 28 of the 1987 Act. Although the English cases of *Rikha Begum* v *Tower Hamlets LBC* [2005] 1 WLR 2103 and *R* v *Harrow LBC EX P Fahia* [1998] 1 WLR 1396 were not binding, they were nevertheless of "highly persuasive authority", notwithstanding the differences in the legislation in the two jurisdictions. In stating the circumstances where a council could treat a subsequent application as "no application", the key proposition which emerged was that an authority could only discharge its duties under section 28 without further inquiry if satisfied that the fresh, or repeat, application was on exactly the same terms as the original application. The Council required to conduct inquiries unless the fresh application was exactly the same as the earlier application. That could not be said. The Council had not carried out any inquiries. The refusal to accept the application was based upon a consideration of the contents of the email without any investigation as to any aspect of those contents.

Legislation

[6] **The Housing (Scotland) Act 1987**

"24.— Homeless persons and persons threatened with homelessness.

(1) A person is homeless if he has no accommodation in the United Kingdom or elsewhere.

…

(2A) A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy.

…

(3) A person is also homeless if he has accommodation but –

…

(b) it is probable that occupation of it will lead to abuse (within the meaning of the Protection from Abuse (Scotland) Act 2001 (asp 14)), or

(bb) it is probable that occupation of it will lead to abuse (within the meaning of that Act) from some other person who previously resided with that person, whether in that accommodation or elsewhere, or

…

(d) it is overcrowded within the meaning of section 135 and may endanger the health of the occupant.

28.— Inquiry into cases of possible homelessness or threatened homelessness.

(1) If a person ('an applicant') applies to a local authority for accommodation, or for assistance in obtaining accommodation, and the authority have reason to believe that he may be homeless or threatened with homelessness, they shall make such inquiries as are necessary to satisfy themselves as to whether he is homeless or threatened with homelessness.

(2) If the authority are so satisfied, they

…

(b) may, if they think fit, make any further inquiries necessary to satisfy themselves as to whether he became homeless or threatened with homelessness intentionally and if the authority think fit, they may also make

inquiries as to whether he has a local connection with the district of another local authority in Scotland, England or Wales.

29.— Interim duty to accommodate

(1) If the local authority have reason to believe that an applicant may be homeless they shall secure that accommodation is made available for his occupation—

(a) pending any decision which they may make as a result of their inquiries under section 28;

(b) where the applicant has, under section 35A, requested a review of a decision of the authority, until they have notified him in accordance with section 35B of the decision reached on review;

(c) where, by virtue of a decision referred to in paragraph (a) or (b), the authority have a duty under section 31 to secure that accommodation of a particular description becomes available for the applicant's occupation, until such accommodation becomes available;

...

31. — Duties to persons found to be homeless.

(1) This section applies where a local authority are satisfied that an applicant is homeless.

(2) Where they are not satisfied that he became homeless intentionally, they shall, unless they notify another local authority in accordance with section 33 (referral of application on ground of local connection) secure that permanent accommodation becomes available for his occupation.

…

35.— Supplementary provisions.

(1) A local authority may perform any duty under section 31 or 34 (duties to persons found to be homeless to secure that accommodation becomes available for the occupation of a person)—

(a) by making available accommodation held by them under Part I (provision of housing) or under any other 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 accommodation from some other person.

> *41. — Meaning of accommodation available for occupation*
>
> For the purposes of this Part accommodation shall be regarded as available for a person's occupation only if it is available for occupation both by him and by any other person who might reasonably be expected to reside with him; and references to securing accommodation for a person's occupation shall be construed accordingly."

[7] The legislation prescribes the circumstances in which a person may be considered to be intentionally homeless in section 26, defines "local connection" in section 27, and provides for review of decisions in section 35A.

[8] Section 28(2) as originally enacted was in these terms:

> "(2) If the authority are so satisfied, they shall make any further inquiries necessary to satisfy themselves as to—
>
> (a) whether he has a priority need, and
>
> (b) whether he became homeless or threatened with homelessness intentionally;
>
> and if the authority think fit, they may also make inquiries as to whether he has a local connection with the district of another local authority in Scotland, England or Wales."

[9] The requirement to inquire into whether there was priority need was deleted in 2012, and the requirement to inquire into whether there was intentional homelessness was deleted in 2019. The intention in each case must have been to widen the category of persons to whom the section 31 duty was owed, and to simplify the process. The category of persons who were considered to have priority need had been defined in section 25, and included, for example, pregnant women, those with dependent children, and others. It follows that at the time of the petitioner's 2016 application the Council must have inquired into whether he had become homeless intentionally.

The Housing Act 1985

[10] The relevant terms of this Act were almost identical with the terms of the 1987 Act as originally enacted. In particular section 62 was in the same terms as section 28. Each of those sections was the gateway to further duties expressed in similar terms, including the duty to provide accommodation in cases of apparent priority need, and to provide accommodation upon making a decision that there was priority need and where the council was not satisfied that homelessness was intentional.

The Housing Act 1996

[11] "*183 Application for assistance*

(1) The following provisions of this Part apply where a person applies to a local housing authority in England for accommodation, or for assistance in obtaining accommodation, and the authority have reason to believe that he is or may be homeless or threatened with homelessness.

(2) In this Part—

'applicant' means a person making such an application,

'assistance under this Part' means the benefit of any function under the following provisions of this Part relating to accommodation or assistance in obtaining accommodation, and

'eligible for assistance' means not excluded from such assistance by section 185 (persons from abroad not eligible for housing assistance) or section 186 (asylum seekers and their dependants).

…

184 Inquiry into cases of homelessness or threatened homelessness.

(1) If the local housing authority have reason to believe that an applicant may be homeless or threatened with homelessness, they shall make such inquiries as are necessary to satisfy themselves—

(a) whether he is eligible for assistance, and

(b) if so, whether any duty, and if so what duty, is owed to him under the following provisions of this Part.

(2) They may also make inquiries whether he has a local connection with the district of another local housing authority in England, Wales or Scotland.

(3) On completing their inquiries the authority shall notify the applicant of their decision and, so far as any issue is decided against his interests, inform him of the reasons for their decision.

193 Duty to persons with priority need who are not homeless intentionally.

(1) This section applies where—

(a) the local housing authority—

(i) are satisfied that an applicant is homeless and eligible for assistance, and

(ii) are not satisfied that the applicant became homeless intentionally,

(b) the authority are also satisfied that the applicant has a priority need, and

(c) the authority's duty to the applicant under section 189B(2) has come to an end.

…

(2) Unless the authority refer the application to another local housing authority (see section 198), they shall secure that accommodation is available for occupation by the applicant.

(3) The authority are subject to the duty under this section until it ceases by virtue of any of the following provisions of this section.

…

(5) The local housing authority shall cease to be subject to the duty under this section if—

(a) the applicant, having been informed by the authority of the possible consequence of refusal or acceptance and of the right to request a review of the suitability of the accommodation, refuses an offer of accommodation which the authority are satisfied is suitable for the applicant,

(b) that offer of accommodation is not an offer of accommodation under Part 6 or a private rented sector offer, and

(c) the authority notify the applicant that they regard themselves as ceasing to be subject to the duty under this section.

…

(9) A person who ceases to be owed the duty under this section may make a fresh application to the authority for accommodation or assistance in obtaining accommodation.

193A Consequences of refusal of final accommodation offer ….

(1) Subsections (2) and (3) apply where—

(a) a local housing authority owe a duty to an applicant under section 189B(2), and

(b) the applicant, having been informed of the consequences of refusal and of the applicant's right to request a review of the suitability of the accommodation, refuses—

(i) a final accommodation offer,

…

(3) Section 193 (the main housing duty) does not apply".

[12] It will be seen that the current provisions in England are in some respects more restrictive than those applicable in Scotland, retaining a focus on priority need and intentionality with the result that differing duties regarding provision of accommodation apply to those in differing categories. They are also somewhat more prescriptive: for example, section 189A sets out detailed provisions as to the nature of the assessment to be made where the council is satisfied that an individual is both homeless, and eligible for assistance. The 1996 also differs from the 1987 Act by providing for circumstances in which the duty may cease, or not apply, whereas the 1987 Act by section 35 provides for circumstances in which the duty may be considered to have been performed; and by making specific provision for subsequent applications.

Fahia* and *Begum

[13] *Fahia* concerned the duty owed under section 62 of the 1985 Act. An application had been refused on the basis that although homeless and in priority need, the applicant was intentionally homeless. A subsequent application, claiming that she was threatened with homelessness by virtue of being required to vacate the guest house accommodation which the council had provided pending determination of the application was rejected. The council's position was that she had not shown any new circumstance which could lead to the conclusion that she was not intentionally homeless and that it could refuse to go through the whole process of making statutory inquiries again. The issue in the case was framed thus by Lord Browne-Wilkinson in the only speech delivered (p 1401 and 1402)

> "The problem is this. When a local authority, having discharged their statutory duties in relation to one application for accommodation, then receive a second application from the same applicant, are they bound in all circumstances to go through the whole statutory inquiry procedure and provide interim accommodation or is there a 'threshold test' which the second application must satisfy if it is to be treated as an application under the Act?
>
> I have sympathy with Harrow's case on this point but I am unable to extract from the statutory language any sufficient justification for the suggested short cut. Under section 62 the statutory duty to make inquiries arises if (a) a person applies for accommodation and (b) 'the authority have reason to believe that he may be homeless or threatened with homelessness.' It is established that requirement (a) is not satisfied if an application purports to be made by someone who lacks the capacity to do so: *Reg* v *Tower Hamlets London Borough Council, Ex parte Ferdous Begum* [1993] AC 509. Moreover when an applicant has been given temporary accommodation under section 63 and is then found to be intentionally homeless, he cannot then make a further application based on exactly the same facts as his earlier application: see *Delahaye* v *Oswestry Borough Council*, The Times, 29 July 1980. But those are very special cases when it is possible to say that there is no application before the local authority and therefore the mandatory duty imposed by section 62 has not arisen. But in the present case there is no doubt that when Mrs Fahia made her further application for accommodation she was threatened with homelessness. Moreover in my judgment her application could not be treated as identical with the earlier 1994 application."

[14] *Begum* concerned the provisions of the 1996 Act. A second application was rejected on the basis that there had been no material change in the applicant's circumstances since the original determination. The issue was framed thus (Neuberger, LJ, para 2):

> "How should a local housing authority respond to an application, under Part VII of the 1996 Act, from a person from whom they had previously received such an application which had given rise to a duty in the council under Part VII, which duty had been discharged as a result of the person having unreasonably refused an offer of accommodation?"

[15] Further reference was made to *Delahaye* in which Woolf, J had determined that it could not have been intended that "someone who is not entitled to permanent accommodation to obtain the continuous use of temporary accommodation by means of successive applications". Reference was also made to *R* v *Southwark London Borough Council, Ex p Campisi* (1998) 31 HLR 560 where Schiemann, LJ had noted that if a repetitious claim was effective, "An applicant could ... by permanently renewing applications, put a local authority under a continuing duty to accommodate her".

[16] In his judgment in *Begum,* Neuberger L J stated:

> 39. The effect of the reasoning of the House of Lords in *Fahia* is that, at least under Part III of the 1985 Act, on receipt of what purports to be an application, an authority are bound to make inquiries, if they have reason to believe that the applicant is or may be homeless, unless the purported application can be shown to be no application. The only relevant basis upon which a purported subsequent application may be treated as no application, according to *Fahia* at p 1402, appears to be where it is based on 'exactly the same facts as [the] earlier application'. That is a rather different formulation from the 'material change of circumstances since the original decision'….
>
> ….
>
> 46. Accordingly, in order to check whether a subsequent purported application is based on 'exactly the same facts' as an earlier application, the authority must compare the circumstances as they were at the time when the earlier application was disposed of (i e when it was decided or when the decision was reviewed) with those revealed in the document by which the subsequent application is made (and any other associated documentation). This should prove less onerous on the authority,

> and should involve less delay and uncertainty for the applicant, than if the comparison was with the circumstances as they are discovered after inquiries by the authority to be after receipt of a subsequent application."

Submissions for the Council

[17] The Council submitted that the Lord Ordinary erred in law in concluding: that it was under a duty to make inquiries under section 28 of the 1987 Act; and that the petitioner's application was not based on exactly the same facts as the previous application. The Council's duty under section 28 was a very narrow one, limited to making such inquiries as were necessary to satisfy itself whether the applicant was homeless. There was no dispute that he was homeless, and there was no inquiry which had to be made by the Council to satisfy itself of that fact. The Council had already performed its duty to the applicant by virtue of the 2016 application and the offers of accommodation which were rejected.

[18] The key proposition to be taken from *Fahia* and *Begum* was that stated by Neuberger LJ at paragraph 39 of *Begum*:

> "The only relevant basis upon which a purported subsequent application may be treated as no application … appears to be where it is based on 'exactly the same facts as [the] earlier application.'"

Whatever the scope of inquiry under the relevant legislation, an application based on exactly the same facts as a previous application does not give rise to a new duty just because one has applied again.

[19] The new matter asserted, the pandemic and its potential effect on the petitioner, did not affect the petitioner's homelessness status, which had not changed. Changes in an applicant's circumstances which did not go to the basis of the purported application did not give rise to a further duty of inquiry under section 28. That process of inquiry is not an assessment of individual circumstances or level of housing need. Nothing in the purported

application has a bearing on the questions of homelessness, intentionality, or local connection, and accordingly there was nothing into which to inquire under section 28. Information not pertinent to those matters cannot form the basis of an application.

[20] There are important distinctions between the Scottish and English legislation. In England the duty of inquiry extends to a multi factorial question involving the very precise circumstances of each individual applicant and whether they come within one or more of the categories constituting a person being in priority need, and whether they are intentionally homeless. In Scotland the only question arising is whether the person is homeless or not. Unless a subsequent application contained new material relevant to that specific question no new application had been made.

[21] The differences between the English and Scottish statutes meant that while medical issues may be the subject of the inquiry under the 1996 Act, insofar as relevant to priority need, they are of no relevance to any inquiries under section 28. That meant in essence that *Fahia* and *Begum* could be distinguished on their facts, since the material relied on in those cases was relevant to the nature of the gateway inquiries which arose in the English legislation, being broader than those which arose under the 1987 Act.

Submissions for the petitioner

[22] The key submission advanced by the petitioner was that a fresh application triggered the local authority's duties under the legislation, unless it was based on exactly the same facts as the previous application (*Fahia*, at p1402, and *Begum*, at para 39). The application identified new factual material, namely, the onset of the coronavirus pandemic, and the effect of that standing the petitioner's chronic health condition. The comparison to be made was between the facts identified in the newest application and the facts which existed when

the last application was determined (paras 43 and 44 of *Begum)*. As such, the local authority had to make a comparison between the position in March 2020 and the circumstances which existed at the time when the previous application was determined in November 2016. Having carried out that exercise, the authority was bound to consider whether, without further investigation, it could conclude that the facts stated were "not new", or "fanciful" or "trivial". The Council here took no such approach. It merely asserted that the contents of the application were not relevant to the petitioner's homelessness status. The Council failed in its duty to make such inquiries as were necessary to satisfy itself as to whether the petitioner was homeless and had no basis in law to reject the application.

Decision and analysis

[23] At the nub of the Council's argument is the assertion that although the duty to inquire in section 28(1) and that which arises under section 184(1) of the 1996 Act are both gateway duties, the entry to the gateway is different in each case. The core duty only arose under the 1996 Act following these further inquiries, whereas under the 1987 Act it flowed from the fact of homelessness being ascertained. The duty of inquiry under section 184(1) requires inquiry of a wider nature than that under section 28(1) as to eligibility, in respect of which inquiry into priority need and intentionality were central. The mandatory inquiry required under section 28(1) was much narrower, limited to the fact of homelessness. Under the 1996 Act, new material the relevance of which went beyond its bearing on the status of homelessness may form the basis for a new application, whereas only information relevant to that status could do so under the 1987 Act.

[24] These arguments have a deceptive simplicity, but only if section 28(1) were to be considered in total isolation not only from preceding and succeeding sections of the Act, but

from section 28(2). We are satisfied that when section 28(1) is considered in its proper context, the Council's argument is not correct. We do not accept that it is appropriate to interpret the duty under section 28(1) in such a narrow and constrained way.

[25] In the first place, the duty to make such inquiries as are necessary to satisfy itself whether the individual is homeless (or threatened with homelessness) must be interpreted in light of the definition of homelessness contained in section 24. That provides that a person is not to be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy. It also provides that a person is not to be treated as having accommodation if certain other factors exist such as a risk of abuse or overcrowding. These provisions alone suggest that the nature of inquiries to be made under section 28(1) must have a circumstantial element to them.

[26] Moreover, the core duty under section 31 only arises where the Council is not satisfied that the individual was intentionally homeless. Although there is not a mandatory duty to inquire into intentionality or local connection, it remains open to a local authority to make such inquiries at its own initiative. Should the Council choose to make such inquiries the scope of relevant issues might expand beyond the narrow confines contended for on behalf of the Council. It would be highly unsatisfactory that a significant difference between repeat applications under the 1996 Act and the 1987 Act, as contended for by the Council, should arise merely because discretionary inquiries under one regime were mandatory under the other.

[27] That is so even allowing for the fact that the English provisions retain a focus on priority need, a factor the significance of which can in any event be overstated. The need to establish a priority need at the gateway stage does not import a full assessment of housing needs at that stage, it involves merely inquiry whether an applicant falls into a certain

category of person, pregnant, with dependent children, or with certain vulnerabilities. In both regimes the actual assessment of housing needs only arises after the initial inquiries have been satisfied and the individual has been determined to be eligible for the requisite assistance.

[28] Finally, it is necessary to construe section 28 in light of the core aim of the legislation, which is the provision of accommodation to those who are homeless. The duty under section 31 will be performed by making available suitable accommodation; and we accept that the full assessment of housing needs requires to be made only after initial eligibility is determined, but that does not mean that, following performance of that duty but rejection of the accommodation offered, an individual's personal circumstances may not have a bearing on whether a subsequent application should be treated as validly made, having regard to the aims of the legislation.

[29] In the course of submissions an example was posited of a case where, following inquiry under section 28(1) only, the Council being satisfied that an individual was homeless, and not satisfied that they were intentionally so, made a suitable and reasonable offer of accommodation which was rejected. Suppose the accommodation offered had been a fourth floor walk-up. Suppose further that the individual, who remained homeless for the reasons advanced in the original application, was later in a serious accident and lost a leg. In England the individual would have no difficulty in having a subsequent application treated as a valid one. However, the submissions for the Council were that the new circumstances had no bearing on the status of homelessness, the nature and causes of which remained unchanged. The only circumstances in which such an individual could make a subsequent application would be where they had accepted the original offer and were now

again threatened with homelessness because the accepted accommodation was no longer suitable.

[30] We decline to accept an interpretation of the Act that would have such a consequence. As senior counsel for the petitioner submitted, it would be a bizarre consequence of the removal of a requirement to establish priority need, intended to widen the scope of those to whom assistance would be provided, had in fact the opposite effect. If the duty under section 28(1) were to be interpreted more broadly, in light of section 24, with the consequence that the approach adopted in *Fahia* and *Begum* applied, such a problem would not arise.

[31] We acknowledge the concerns expressed in *Fahia* and *Begum* as to unmeritorious repeat applications engaging valuable resources:

> "The concern expressed by the courts in the cases before *Fahia* , namely, that a voluntarily homeless person, with apparent priority need, entitled only to temporary accommodation under section 188, can effectively be housed indefinitely through the medium of successive applications, has obvious force. The possibility of an applicant, whose rights have been exhausted (especially in cases where that could be said to arise from his default) being able to resurrect some or all of those rights, simply by making another application, seems surprising. Further, as Mr Luba accepted, the consequences of housing authorities having to accept and investigate any subsequent application will result in their already stretched human and financial resources being subjected to even greater pressure." (Neuberger, LJ, para 56)

[32] However, as was also noted in *Begum* the nature of inquiry will generally not be onerous, and the situation will in most such cases swiftly arise when it may properly be stated that despite attempts to suggest otherwise the subsequent application is in reality made on the same basis as a previous one. The observations of Neuberger, LJ (para 57) that "it should not cause particular surprise if the legislature has adopted a relatively indulgent attitude to people whom … the 1996 Act is designed to protect, namely, the homeless", apply

with equal, if not more force, to the terms of the 1987 Act, having regard to the removal of a requirement of priority need.

[33] The reclaiming motion will be refused.