Robinson v The London Borough of Hammersmith and Fulham [2006] ADR.L.R. 07/28

CA on appeal from Wandsworth County Court, His Honour Judge Medawar QC before Waller LJ; Jonathan Parker LJ; Jacob LJ. 28th July 2006

Lord Justice Waller :

1. This is an appeal from a decision of HH Judge Medawar dated 13th September 2005. It raises questions relating to the duty of local authorities under the Housing Act 1996 to children under 18 who are made homeless close to their 18th birthdays. Children under 18 who are unintentionally homeless have a priority need, and whereas section 193 of the 1996 Act preserved that accommodation duty for two years, an amendment in 2002 has extended that duty to an indefinite duration subject to circumstances, not including reaching the age of 18, not (at least at present) applying in this case. Are authorities entitled to postpone the making of a decision for some period, calculated by reference to the average period for investigating whether a person is homeless, where the effect will be to postpone the taking of a decision until a child is 18? Are they entitled to postpone the taking of a decision for say 24 hours so that a person becomes 18 before the decision is taken? Are local authorities entitled to postpone the making of a decision as to whether they have a duty to provide accommodation to a 17 year old child while they seek to reconcile the child with the family by mediation, if the effect will be that the child will become 18, and if the mediation fails the child will no longer be in priority need? If a decision is taken when a person is under 18 not to a provide accommodation, and if a review is sought, does the review take place by reference to the facts as at the date of the review i.e. by reference to the fact that the person is now 18 and not in priority need? These are the sort of questions that arise.

The facts

2. On 17th February 2005 the appellant's mother asked her to leave the family home. The appellant was 17 years old and due to be 18 on 11th March 2005. She approached the respondent council and spoke to the housing officer, Catherine Cleary, asserting she was homeless. If she was homeless unintentionally, while she was under 18, she automatically qualified for accommodation as a person in priority need in consequence of the Homeless (Priority need for accommodation) (England) Order 2002. Catherine Cleary, the respondent's Housing Officer, at first stated that because it would take 28 days for the respondents to investigate and because by the end of that period the appellant would be over 18, there was no point in her continuing with her application. The respondents did not at this stage provide even interim accommodation.

3. After advice from a law centre the appellant approached the respondents again on 18th February where she again saw Catherine Cleary. Catherine Cleary phoned the appellant's mother who confirmed that the appellant could not return home, but stated at that stage that she was willing to engage in mediation.

4. A Referral to Mediation Service Form undated stated *"Applicant* will be 18 years of age on 11/3/05. Temporary accommodation booked until then. Applicant has no priority need."

5. On 4th March 2005 (it seems for the first time) the applicant saw a mediation officer and agreed to mediation. The mediation officer said she would be contacting the appellant's mother. On 9th March 2005 the mother refused mediation.

6. On 10th March 2005 the respondents decided that the appellant had no priority need and informed her of that decision by telephone. They also decided not to send the notice required by section 184 of the Housing Act 1996 with the reasons for their decision until the following day. That notice was provided on the following day. Accommodation was provided for a further 14 days.

7. On 1st April 2005 the appellant's solicitor sought a review under section 202 of the 1996 Act. On 10th May 2005 the respondents confirmed that the appellant was not in priority need stating:-

   "I have reviewed the information on file and note that your client's vulnerability was considered on 18 February 2005, when Terry Schiff (Options Advisor) and Paul Clarke (Housing Advice Manager) considered the application. On this occasion it was noted that your client's birthday was three weeks away and Paul Clarke was prepared to place her in accommodation up to and including her birthday, he subsequently agreed a further two-week placement on 10 March and her accommodation was finally cancelled on 24 March 2005. It was at this point that the review of the decision was requested and accommodation pending the outcome of the review was agreed.

   The initial three-week placement was agreed in order to engage the council's in-house mediation service. The service has been charged by the council with trying to effect reconciliation between family members, it is especially aimed at seeking to reconcile young adults with their parents, precisely the situation in this instance.

   The attempt at mediation was unsuccessful and the council was unable to effect a reconciliation between your client and her mother. . . . As in the majority of cases of 16/17 year old homelessness the preferred resolution is reconciliation, it is council policy not to proceed with such cases until mediation has been attempted."

8. The appeal against the review decision was heard by His Honour Judge Medawar on 7th September 2005. He found as follows:-
   (i) That the decision on the appellant's application was, it would seem, made on March 10 2005
   (ii) That the delay in reaching the decision between February 18, 2005, and March 10, 2005, was attributable to the respondents' efforts to resolve the appellant's homelessness by mediation.
   (iii) That the delay in sending the written notification of the decision until March 11, 2005, was *de minimis*.
   (iv) That in any event, the review decision-maker was correct to find that the appellant was not in priority need, because – following ***Mohamed v Hammersmith & Fulham LBC*** [2001] UKHL *57*; [2002] 1SC *547* – the appellant had not been in priority need as at the date of the review.

9. Arden LJ initially refused permission to appeal on paper but ultimately granted permission to appeal following an oral hearing.

10. It is not suggested that the appellant ever was intentionally homeless. Mr Andrew Arden QC's submissions in short were (1) the respondents took a decision that the appellant was homeless unintentionally before she was 18 and thus the original decision that she was not in priority need was unlawful; he relies on decisions taken either on 18th February or at latest 10th March 2005 (2) alternatively he submitted that the respondents acted unlawfully by deliberately postponing the taking of a decision until after the appellant's 18th birthday; (3) he submits that the decision on review should have reflected that the respondents

had acted unlawfully and had denied the appellant a right that she should otherwise have had; and (4) he submitted HH Judge Medawar's decision should also have reflected the unlawful conduct of the respondents.

11. Miss Clare Roberts' submission for the respondents was (1) the respondents' decision was made when they sent their 11th March 2002 Section 184 notice by which time the appellant was 18 and not in priority need; (2) in considering whether a person aged 16 or 17 is in priority need, the respondents are entitled and indeed required by the Guidance to seek to reconcile the family (by mediation if necessary); it was mediation not a postponing of the taking of a decision which led to the respondents taking the final decision on 11th March when the appellant was 18 years of age; (3) even if mediation had failed by 10th March it was not unlawful to postpone for a very short time i.e. until 11th March, the taking of a decision by which time the appellant would be 18 and not in priority need; (4) at the date of the review the appellant was not in priority need.

The law

12. A person is homeless if he or she has no accommodation that he or she is entitled to occupy; see section 175. If a person applies to a local authority for housing assistance, and it appears to the authority that he or she may be homeless, the authorities are bound to make enquiries. Section 184 (1) and (3) provide as follows:-

"(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.

(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."

13. If the authority has reason to believe that an applicant may be homeless and in priority need, they must provide temporary accommodation. Section 188(1) provides:-

"If the local housing authority have reason to believe that an applicant may be homeless, eligible for assistance and have a priority need, they shall secure that accommodation is available for his occupation pending a decision as to the duty (if any) owed to him under the following provisions of this Part."

14. If the authority decides that a person is homeless and has a priority need, what is described as the full duty is owed by virtue of Section 193 *". . . . to secure that accommodation is available for occupation by the applicant"*. By section 193(3) as amended in 2002:-

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

15. It is unnecessary to detail the circumstances in which by other subsections of section 193 the duty may cease but they do not include *"no longer being in priority need"*, and the duty may thus continue indefinitely.

16. Section 189 defines those with priority need by subsection (1), and by subsection (2) empowers the Secretary of State *"by order"* to specify *"further descriptions"* of persons. The Secretary of State did so by SI 2002/2051 providing by article 3:-

***"Children aged 16 or 17** (1) A person (other than a person to whom paragraph (2) below applies) aged sixteen or seventeen who is not a relevant child for the purposes of section 23A of the Children Act 1989.*

(2) This paragraph applies to a person to whom a local authority owe a duty to provide accommodation under section 20 of that Act (provision of accommodation for children in need)."

17. Section 182 requires the authority to have regard to such guidance as may from time to time be given by the Secretary of State. Such guidance has been given entitled Homelessness Code of Guidance for Local Authorities (the Code).

18. The right to review is provided for by section 202. The review must be requested within 21 days of the "notification of the decision" (section 202(3)). The decision on the review must be notified within 8 weeks from the day on which the request for review is made (or such longer period as may be agreed in writing between the authority and the person concerned) (see section 203 and the Regulations).

19. Section 204 provides a right to appeal to the county court in the following terms:-

"(1) If an applicant who has requested a review under section 202 –
(a) is dissatisfied with the decision on the review, or
(b) is not notified on the decision on the review within the time prescribed under section 203 he may appeal to the county court on any point of law arising from the decision or, as the case bay be, the original decision.

(2) An appeal must be brought within 21 days of his being notified of the decision or, as the case may be, of the date on which he should have been notified of a decision on review."

20. The appeal to HH Judge Medawar was from the decision on review made within the requisite period. It is thus the decision on that review which is the subject of the appeal, and only indirectly the original decision of the authority.

When was a section 184 decision taken?

21. Mr Arden suggests that a decision was taken on 18th February 2005 that the appellant was homeless. He submitted that since she was under 18 a decision must also have been taken that she was in priority need. Alternatively he submitted a decision was taken on 10th March, and that since she was under 18 on that day, a decision that she was not in priority need was unlawful.

22. Miss Roberts submitted that no decision was taken on 18th February. The authority were entitled to make enquiries as to whether the appellant was homeless under section 184(1) of the Act, and were required to follow the guidance from the Code which by paragraph 8.38 provides as follows:-

"In all cases involving applicants who are 16 or 17 years of age (except those for whom social services have responsibility), housing authorities will firstly need to establish whether there is genuine homelessness, and if so, should then consider the possibility of family reconciliation. Some 16 and 17 year olds may have left home because of a temporary breakdown in their relationship with their family. In such cases, the housing authority may be able to effect a reconciliation with the family. Wherever appropriate, this should be the housing authority's first response in cases involving this client group. In some cases, however, relationships may

have broken down irretrievably, and in others it may not be safe or desirable for the applicant to return to the family home, for example, in cases involving violence or abuse. Therefore, any mediation or reconciliation will need careful brokering and it is recommended that the assistance of social services is sought in all such cases. The process of reconciliation may take time and housing authorities may need to provide interim accommodation under s.188 in the meantime. If so, the normal 33 working day target for completing inquiries may not be appropriate, and may need to be extended."

23. She further submitted that no decision was taken on 10th March. She cited ***R v Westminster City Council ex parte Ermakov*** [1996] 2 All ER 302 CA and submitted that there should be no distinction between a decision and the providing of the reasons.

24. Mr Arden referred to ***R v Beverley BC ex p McPhee***, The Times 27th October 1978, in response to the above submitting that there were in some circumstances distinctions between decisions and reasons therefor.

25. In my view the authority did not make a section 184 decision on 18th February but did decide on 10th March that the appellant had no priority need. Indeed they communicated the same to the appellant, by telephone. There may often be no reason to distinguish the making of a decision from the notification of it with reasons, but the question seems to me to be essentially one of fact, and on the facts of the appellant's case the authority clearly made a decision on 10th March and it seems to me also that that was the judge's view when he used the words "the reaching of a decision, it would seem, on 10th March 2005" [see paragraph 16 of his judgment].

Was that decision lawful?

26. The judge seems to have thought there was room for the application of the "de minimis" principle. I do not follow that line of reasoning. If the appellant was under 18 at the time the decision was taken, then she was in priority need and that seems to me the end of the matter. There is no entitlement to take a decision on the basis that she was so nearly 18 that the difference between 18 and 17 should be ignored.

The review – should that have been decided on the facts as at the date of review?

27. Mr Arden's first point is that the decision of the reviewer was not made on the basis that the reviewer was now looking at the facts as they were. That seems to be right – the reviewer seems to be upholding the authority on the basis that the decision was on 11th March and the delay due to mediation was justified. But be that as it may, if the reviewer should have been looking at the matter as the date of the review, and if the answer was that by that date the appellant was 18 and thus only one answer was possible, it would not be right to quash the reviewer's decision.

28. Mr Arden's main point was that it simply cannot be right that the reviewer can ignore an unlawful decision which would have given the appellant her right to accommodation. He must hold that the original decision was unlawful, and restore the appellant to the position she should have been in.

29. Miss Roberts relies on the following passages from the opinion of Lord Slynn in ***Mohamed***:-

"23. A second question which has been raised is whether the correct date to decide whether a person has a local connection is the date of the making of his application or the date of the decision or, if there is a review, the date of the review. It seems to me plain that since the question for the local housing authority is whether the applicant "has a local connection" that must mean such a connection at the date of decision or review, whether in the meantime the applicant has acquired or lost (by moving away) his local connection.

24. A linked question which arises is as to the material which may be looked at on the review. The appellant authority contends that the reviewing officer may look at facts known to the original decision maker and those which existed before the time of the original decision but were not known to the original decision maker but he may not look at facts which have come into existence subsequently. The respondent on the other hand says that the reviewing officer can and should look at all the circumstances at the time of the review. In R v Southwark London Borough Council, Ex p Hughes (1998) 30 HLR 1082, 1089, in a case decided under the Housing Act 1985, before a statutory right of review was given, Turner J said:-

"It may be thought therefore that there are compelling reasons why the circumstances of an individual, at the time the inquiry is carried out and the decision is made, must be the circumstances which the housing authority is required to investigate for the purposes of coming to their decision whether or not the applicant is homeless . . . "

30. At first blush the above passages if taken literally seem to support Miss Roberts. Furthermore she pointed out that the passages had been applied in the Court of Appeal in *Sahardid v Camden LB*C [2005] HLR 11

31. I am not persuaded that the above passages have any application to a situation such as the present. It was not in issue in *Mohamed* whether an unlawful decision by the original decision maker had denied rights to the person affected by the decision to which he would otherwise have been entitled. A dictum of Chadwick LJ in *Crawley BC v B* [2006] 32 HLR 636 CA page 651. lends strong support to the argument:-

"The question, therefore, is whether the judge was entitled, or required, on the material before him, to do more than simply quash the decision in the letter of October 8, 1998. I would accept that, if that material had shown that the only decision as to its duty to provide accommodation or assistance that the Council, action rationally, could reach was that the duty was that imposed by section 193(2) of the Act, the judge could properly have pre-empted further consideration by making an order to that effect. But that is not this case. I would accept, also, that there could be circumstances in which a judge might properly take the view that an applicant ought not to be deprived, by events which had occurred between the date of the original decision and the date of the appeal, of some benefit or advantage to which he would have been entitled if the original decision had been taken in accordance with the law. But, again, that is not this case. In my view, there was no proper basis, on April 20, 1999, to impose on the Council a duty under section 193(2) of the Act."

32. In my view accordingly the decision on review would not have been lawful if it had simply stated that the appellant was now 18 and thus not in priority need. If the original decision was unlawful which for the reasons I have already given it was, the review decision maker should have so held and made a decision that would have restored to the appellant the rights she would have had if the decision had been lawful.

33. The views so far expressed would on their own support the allowing of this appeal, but other matters were argued fully and it is right to deal with them. In particular it is right to express a view on whether, if this particular decision had been taken on

11th March, the conduct of the authority would have been lawful. There are three aspects of that question which I will deal with in turn.

Is it legitimate to take the view that enquiries normally last 28 days and thus because a person will be 18 before the end of that period, that person has no priority need?

34. In my view that is an illegitimate stance. If as the appellant did in this case a person says they are under 18 and homeless because they have been told not to come back into what was their home, then the authority has a duty to make inquiries as to whether they are 18 and whether they are in fact homeless i.e. do not have a home to which they are able to go. They are obliged to provide temporary accommodation in the meanwhile (they would also have to inquire whether they were homeless intentionally and possibly whether there was a local connection elsewhere – points which did not arise in this case).

35. I would accept that it may take some period – a reasonable period - to make the necessary inquiries, and that if the age of 18 is reached before the inquiries reasonably made are complete, the authority will be entitled to take the decision the section 184 decision by reference to the facts as they exist at the time of the decision. The authority is not however entitled to take the view that inquiries average a certain period of time or that a target period for inquiries covering the whole spectrum is of a certain period and thus because that period is going to expire after the 18th birthday, no duty of any kind arises. Thus the view expressed by Ms Cleary on 17th February was in my view unlawful, and if the decision to refuse even to provide temporary accommodation on that date is accurately recorded, that decision was in my view also unlawful.

Is it legitimate to postpone a decision to avoid a duty?

36. It also seems to me that it is clear that the authority is not entitled to postpone the taking of a decision simply to avoid a duty. Hodgson J in ***R v Ealing LBC Ex p. Sidhu*** (1982) 2 HLR 45, QBD said this:-

> "They have confused the making of enquiries into the factual situation pertaining at the time, when by statute they are required to make enquiries, with being satisfied that nothing will happen in the future to change the factual situation then pertaining. I can find nothing in the Act, nor have I been referred to anything in the Act, which would justify the delaying of enquiries so that the local authority could be assured that no change would take place in the future."
>
> That it seems to me is a correct statement as to the law.

37. There is a note in the Encyclopaedia of Housing which provides as follows:-

> *"Subs. (3)-(6)*
>
> *Postponement of decisions*
>
> *Although the obligation to reach a decision is not spelled out in the section, it is implicit: [Sidhu]. An authority may not defer the obligation in the hope or expectation of a change in circumstances such as might reduce their duties, for example, by loss of priority need (ibid.), although it may be that – in an appropriate case, a de minimis deferral, perhaps a few days, may be permissible where there is a substantive basis (as distinct from speculation or a remote chance) for the authority to anticipate a material change."*

38. It would not be right to express a view going beyond the circumstances of this case. Suffice it to say that in the case of a 17 year old child, it would not seem to me to be lawful for a local authority to postpone the taking of a decision even for a short period on the basis that by postponing that decision the child will have reached the age of 18 before the decision is taken. Thus if the decision on 10th March had been "if we were to take the decision today, this child would be in priority need, but we will postpone it until tomorrow when she will be 18 and circumstances will have changed", that would in my view have been an unlawful decision.

Is it legitimate to persuade the parties to take up mediation before reaching a decision as to what duty is owed under s184?

39. What then about mediation and reconciliation? Reconciliation and mediation are obviously to be encouraged, indeed more than to be encouraged. A 16 or 17 year old child thrown out of what has up until then been their home ought, if conceivably possible, to be reconciled with the parent or whoever has been responsible for the decision to exclude (provided of course that there is no danger to the child or others). Furthermore equally obviously an authority is entitled to have time to check the genuineness of the decision to exclude the child, and indeed the reasons given by the child for being excluded, for example where there may have been collusion. The question to which I have not found it easy to provide a clearly defined answer, is whether the authority in making its inquiries under section 184(1) as to what duty is owed to a 17 year old is entitled to persuade the parties to take up some form of mediation procedure before reaching its final decision, (providing temporary accommodation meanwhile); or whether it has to reach a decision without the aid of mediation , and then use mediation as a means of fulfilling its full duty to provide accommodation under section 206 , on the basis that if mediation works, the authority would be *"securing . . . suitable accommodation from some other person"* or possibly *"giving . . . assistance as will secure that suitable accommodation is available from some other person";* see section 206(1) (b) and (c).

40. Paragraph 8.38 in the Code of Guidance quoted in paragraph 22 above, would indicate that the authors of the Code take the view that mediation might prolong the period of inquiry. But the unsatisfactory feature of that view is that if mediation works – all well and good, but if it does not, taken literally, the process of mediation may take the child beyond his or her 18th birthday, and the final decision would then be "*no priority need*". This indeed was the respondents' position in argument before the review decision maker and before HH Judge Medawar. Their argument was that mediation having taken the time it did, and the 18th birthday having been reached in the meanwhile, at the time of the decision there was no longer priority need.

41. In my view it cannot be right that an authority can persuade a family into mediation while a child is 17 and then use the time that the mediation would take to deprive the child of a right that it would have had without mediation. I accept, I should stress, that there may be circumstances where the authority is entitled to take the view that the homelessness is not genuine because the family have simply not tried to patch up any differences founded on rather insignificant arguments about trivial things. There may also be circumstances where a mediation will not deprive a child of a right that he would otherwise have had because the 18th birthday is many months away. Even in the instant case if the authority had used mediation with speed as at 17th February to get reconciliation if it could be achieved within a matter of a few days, there could be no complaint. But if an authority are of the view that a child genuinely has no place to go unless a mediation can sort matters out, and a mediation cannot take place without depriving the child of a right it would otherwise have had, then in my view the authority has to take the view that its full duty must be performed, and use mediation in order to fulfil that duty.

Jonathan Parker LJ:

42. I agree. I would only wish to add a few words about mediation. It goes without saying that mediation is an enormously valuable tool in the resolution of problems of homelessness. However, the process of mediation is not to be confused with the duty of a local housing authority under section 184 of the Act to make inquiries as to what (if any) duty it owes to an applicant under Part 7 of the Act. In my judgment, the process of mediation is wholly independent of the section 184 inquiry process. The two processes may of course proceed in parallel; and if mediation is successful while the section 184 inquiry process is still on foot, then of course there will be no need for the latter process to continue any further. On the other hand, a local housing authority has, in my judgment, no power to defer making inquiries pursuant to section 184 on the ground that there is a pending mediation.

Lord Justice Jacob:

43. I agree with both judgments and so add only a little. A local authority under s.184 has a duty to investigate and decide. It may not postpone or delay either the investigation or the decision.

44. Thus it may not wait so that the decision is given in an average time – on the contrary the average is or should be the result of the varying times different cases take to investigate and decide. If the authority could, in simple cases, wait for the average time, that average would necessarily go up.

45. It also follows that the authority cannot wait for a mediation to take place. In addition to the reasons given by my Lords there is another reason why this is so. Section 179 provides that *"every local housing authority shall secure that advice and information about homelessness, and the prevention of homelessness, is available free of charge."* A near 18 old who came to the authority could obviously not be properly advised to mediate if the effect of mediation would be to delay the actual s.184 decision past the 18th birthday. Yet mediation from the outset is obviously highly desirable. The only way one can reconcile the mediation process with performance of the s.184 duty to make inquires and come to a decision is to hold that they are processes wholly independent of one another.

46. So, if a successful mediation beats the decision making process well and good. But that prospect does not merit any delay to that process.

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Clare Roberts (instructed by Legal Services Division, LB Hammersmith) for the Respondent