Neutral Citation Number: [2020] EWCA Civ 379

Case No C1/2019/2541/A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
ANDREW METZER QC SITTING AS A DEPUTY HIGH COURT JUDGE
Claim No CO/3651/2019

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 19/03/2020

Before :

LORD JUSTICE HICKINBOTTOM

- -

Between :

THE QUEEN ON THE APPLICATION OF VINCENT NOLSON

Applicant

- and -

STEVENAGE BOROUGH COUNCIL

Respondent

- -
- -

Hugh Southey QC and **Nick Bano** (instructed by **Duncan Lewis Solicitors**) for the **Applicant**
Matthew Feldman (instructed by **Dispute Resolution Law Group, Legal Services, Hertfordshire County Council**) for the **Respondent**

Hearing date: 12 March 2020

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Approved Judgment

Lord Justice Hickinbottom :

1. This application raises an important issue of practice in relation to applications to the court, notably applications for interim relief.

2. It arises in the context of an application to reopen this appeal, in which Hugh Southey QC leading Nick Bano of Counsel appears for the Applicant and Matthew Feldman of Counsel for the Respondent, all of whom I thank for their helpful submissions. At the hearing of the application on 12 March 2020, I indicated that I would refuse the application, for reasons I would give later. These are those reasons.

3. In this judicial review, the Applicant Vincent Nolson sought to challenge the decision of the Defendant housing authority ("the Council") to continue to provide him with interim accommodation under section 188 of the Housing Act 1996 ("the 1996 Act"). In the claim, he applied for interim relief, which was refused by Butcher J. The Applicant applied, purportedly under CPR rule 54.12(3), to have that order reconsidered at an oral hearing. Anthony Metzer QC sitting as a Deputy Judge of the High Court refused that application on the basis that he had no jurisdiction to consider it, holding that rule 54.12(3) did not apply and the appropriate procedural course to challenge the decision to refuse interim relief was to appeal to the Court of Appeal (Civil Division). On 24 October 2019, I refused permission to appeal. The Applicant applied to re-open the appeal.

4. The factual background is lengthy and complex, but can be shortly stated for the purposes of this application. In November 2016, the Applicant relinquished the tenancy of a property which he rented from the Council to move into his wife's home. On 14 February 2019, he was arrested following an incident at that address, in which he was alleged to have assaulted his wife. The following day, he sought housing assistance from the Council and, following an interview and given his complex support needs, he was accommodated temporarily in a nursing home. However, following the usual procedure, on 8 May 2019, the Council concluded that the Applicant, although eligible for assistance, homeless and in priority need, was intentionally homeless and so not entitled to housing. The Applicant requested a review of that decision under section 202 of the 1996 Act. Prior to the review decision being made, on 7 August 2019 he filed an appeal in the county court under section 204 of the 1996 Act against the intentional homelessness decision.

5. It is the Council's case that the Applicant did not stay at the nursing home for about a month before his holiday at the end of August 2019; and, on 4 September 2019, he informed the deputy manager of the home that he would not be returning there. Accordingly, on 5 September 2019 the Council wrote to him indicating that it considered it no longer had any duty to provide him with any accommodation.

6. On 9 September 2019, the Applicant through solicitors requested that he be provided with suitable interim accommodation under section 188 of the 1996 Act pending the review and/or appeal; and, the following day, they sent the Council a letter before claim. The Council through solicitors responded, negatively, on 16 September 2019.

7. The following day (17 September 2019), the Applicant issued a judicial review of the decision to refuse him further interim accommodation. It was accompanied by an

application for interim relief on an urgent basis ("within 4 hours"), which Butcher J refused that same day, on the papers and without a hearing. In doing so, he said this:

> "1. The application is one for an interim mandatory injunction that accommodation should be provided. This normally requires the showing of a strong prima facie case (R (Lawer) v Restormel Borough Council [2007] EWHC 2299 (Admin).
>
> 2. I do not consider that a strong prima facie case has been show that the [Council] acted unlawfully…".

8. Lawer was a first instance decision of Munby J in an application for a mandatory order for interim relief in a housing case, in which, whilst the judge did express "strong prima facie case" as the correct test, that was not determinative because he concluded that the applicant's entire case had "no reasonable prospect of success", and was indeed "hopeless" and "devoid of any merit" (see [71]). However, although Lawer is frequently cited as authority for the proposition, it was this court which, expressly disapproving the application of the balance of convenience test for negative interim relief as set out in American Cyanamid Company v Ethicon Limited [1975] AC 396, had earlier established that an interim mandatory injunction requiring a local authority to perform its statutory housing duty would not be granted unless the applicant could show at least a strong prima facie case (De Falco v Crawley Borough Council [1980] QB 460 at pages 478 and 481, as confirmed in Francis v Royal London Borough of Kensington and Chelsea [2003] EWCA Civ 443; [2003] 1 WLR 2248 at [16], both homelessness cases).

9. On 24 September 2019, the Applicant applied to the Administrative Court under CPR rule 54.12(3) for an urgent oral hearing to reconsider the decision to refuse interim relief. That application was heard on 3 October 2019 by Anthony Metzer QC sitting as a Deputy High Court Judge who, as I have described, concluded that the court did not have jurisdiction to consider a renewal of the application for interim relief.

10. The Applicant appealed against that refusal. On 24 October 2019, I refused permission to appeal; and, on 30 October 2019, the Applicant applied for a review of that refusal under CPR rule 52.30. That is the application now before me. However, in substance, it is not only an application to reopen; because, Mr Southey submits, having reopened the appeal, I should give permission to appeal.

11. To complete the history, the Applicant's appeal pursuant to section 204 was heard in the County Court at Oxford on 6 November 2019. The appeal was allowed, and the decision based on the Applicant's intentional homelessness was quashed; with the result that he was offered (and he accepted) accommodation pending further enquiries into his homelessness application. Thus, interim relief was effectively obtained. Consequently, it is common ground that this appeal, which only concerns interim relief, would now be academic. However, Mr Southey for the Applicant submits that there are nevertheless good grounds for this court both to reopen the appeal and to grant permission to appeal.

12. There is but one ground of appeal, namely:

> "The [Deputy Judge] was wrong to hold that, where the Administrative Court has refused an application for interim relief on the papers, the correct procedure is to appeal to the Court of Appeal. The correct procedure is to renew the application orally in the Administrative Court (R (MD (Afghanistan)) v Secretary of State for the Home Department [2012] EWCA Civ 194; [2012] 1 WLR 2422 per Stanley Burnton LJ at [19]-[24]."

In other words, the Deputy Judge was wrong to refuse jurisdiction on the oral renewal of the application for interim relief.

13. In relation to that issue, I have been provided with a transcript of the hearing before the Deputy Judge; and, in respect of jurisdiction, the Applicant (then represented by different Counsel) there relied specifically on CPR rule 54.12(3) together with a submission that the CPR do not anywhere prohibit the reconsideration at an oral hearing of a refusal of an application on the papers.

14. Before me, as the ground of appeal indicates, the Applicant relies particularly upon the judgment of this court in (MD (Afghanistan), a case concerning reconsideration of a refusal of both permission to proceed and interim relief on papers. In that case, having confirmed that CPR rule 54.12(2) expressly grants a right to a reconsideration at an oral hearing of a refusal on paper of permission to proceed with a judicial review, Stanley Burnton LJ (giving the judgment of the court), said this (at [21]):

> "It is a general rule of our civil procedure that, in the absence of any order or legislation to the contrary, a party who has applied for an order which has been refused by a judge on the papers, without oral argument, has the right to renew his application orally before a judge of co-ordinate jurisdiction. Thus, where a party applies in the Administrative Court for urgent relief which is refused on the papers, he has the right to renew his application orally to a High Court judge…. It is only if an oral renewal is unsuccessful that the claimant may consider an application to a judge of the Court of Appeal…".

15. The route by which that is achieved in the CPR, not explored in the submissions in this case prior to Mr Southey's helpful skeleton argument, was considered by this court in Collier v Williams [2006] EWCA Civ 20; [2006] 1 WLR 1945. The route is not direct. CPR rule 23.8(c) states that:

> "The court may deal with an application without a hearing if… the court does not consider that a hearing would be appropriate."

However, CPR PD 23A paragraph 11.2 provides that:

> "Where rule 23.8(c) applies the court will treat the application as if it were proposing to make an order on its own initiative";

which must be read with CPR rule 3.3(4)-(6):

> "(4) The court may make an order of its own initiative, without hearing or giving them an opportunity to make representations.
>
> (5) Where the court has made an order under paragraph (4) –
>
> (a) a party affected by the order may apply to have it set aside, varied or stayed ; and
>
> (b) the order must contain a statement of the right to make such an application.
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> (6) An application under paragraph (5)(a) must be made –
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> (a) within such period as may be specified by the court; or
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> (b) if the court does not specify a period, not more than 7 days after the date on which the order was served on the party making the application."

16. In Collier v Williams, it was confirmed that an order made on an application without a hearing falls within CPR rule 23.8(c) unless all parties consent to the matter being determined without an oral hearing (see [32]); and CPR PD 23A paragraph 11.2 applies, with the consequence that, in those circumstances, an application to the court making the first order to set aside, vary or stay that order can be made under CPR rule 3.3(5). As a jurisdictional matter, that further application could itself be dealt with under CPR rule 23.8(c), on the papers and without an oral hearing; but, as the court in Collier v Williams indicated, to avoid a potentially endless loop of applications on the same basis, it is usually good practice to require any application under rule 3.3(5) to be dealt with at an oral hearing because, absent substantially different material, any further application under the same provision can then be struck out as an abuse of process.

17. It is therefore regrettable that, until after the refusal of permission to appeal, the Applicant relied on CPR rule 54.12(3) to found his contention that the High Court had the jurisdiction to review a refusal of interim relief in a judicial review claim, and that Collier v Williams was not brought to the court's attention. However, under the provisions of the CPR to which I have referred as confirmed in that authority, the Applicant in this case clearly did have a right to make an application to set aside, vary or stay the order made on the papers by Butcher J refusing his application for interim relief. In my view, there is no force in Mr Feldman's (faint) submission that MD (Afghanistan) could be distinguished because the focus of that case was upon the application for permission to proceed: the observations of Stanley Burnton LJ with regard to applications for interim relief, even if technically *obiter*, were clearly right.

18. Whilst none of this jurisprudence is new, as there is evidence before me of other cases in which this issue has caused problems and different results reached, it seems to me that the following may be helpful for future applications, including applications for interim relief.

    i) In any application to the court, even where the relevant court form does not ask the specific question, the applicant should generally indicate whether he wishes

to be heard orally or whether he is content for the application to be dealt with on the papers alone. Whilst in itself that will not prevent a later application under CPR rule 3.3(5) (even by the applicant himself), it will give the other parties an opportunity to consent to the application being dealt with on the papers alone, which would prevent such a further application.

ii) Where the court refuses an application on the papers, unless both parties have consented to it being dealt with on the papers alone, the order should be endorsed with a statement of the right to make (within 7 days or such other time as the court considers appropriate) an application to have the order set aside, varied or stayed under CPR rule 3.3(5). If the parties have consented to a paper determination, then the order will be final and should be endorsed with a statement of the right to appeal to this court within 21 days.

iii) Any application for an adverse decision made on the papers to be "reconsidered" at an oral hearing should clearly state that it is made under CPR rule 3.3(5) (or, if made under another specific provision of the rules, that it is so made).

19. That leaves the question as to what to do with the application before me. As I have indicated, it is clear that the Deputy Judge did have jurisdiction under CPR 3.3(5) to consider an application to set aside or vary the Order of Butcher J, and he was wrong to refuse jurisdiction. Had the appeal been anything more than empty, that may have been a good ground upon which permission to appeal (and, now, the application to reinstate the appeal) might have been granted. However, it is common ground that, for the reasons I have set out, the appeal is now entirely academic.

20. Whilst generally this court is reluctant to hear appeals which are academic as between the parties, relying upon the observations of Lord Slynn of Hadley in R v Secretary of State for the Home Department ex parte Salem [1999] 1 AC 450 at page 457A, Mr Southey submits that this appeal should be allowed to proceed on public interest grounds. Butcher J refused the application on the basis that a strong prima facie case is required if interim relief is to be granted in a housing case. However, that approach has recently been questioned in R (Esposito) v London Borough of Camden [2017] EWHC 3124 (Admin) at [22], where May J doubted the usefulness of the dichotomy between "strong prima facie case" and "arguable case". Mr Southey submits that this court in Francis (see paragraph 8 above) did not have before it, and did not take into account, R v Secretary of State for Transport ex parte Factortame Limited (No 2) [1991] 1 AC 603 which, at pages 682-3, as confirmed in National Commercial Bank Jamaica Limited v Olint Corporation Limited [2009] UKPC 16; [2009] 1 WLR 1405 at [19], eschewed any difference in principle in this context between applications for negative and applications for positive interim relief. Francis is therefore *per incuriam*; and this court should take the opportunity presented by this case to reconsider the test for interim housing relief. Whilst academic as between the parties on the facts of this case, interim relief in housing cases is sought in many cases every day; and, because it concerns interim relief in an emergency context, it is an issue which is unlikely to arise before this court in anything other than a case which has since become academic as between the specific parties on the specific facts.

21. Those submissions were forcefully made; but I am unpersuaded that the issue raised should be considered by this court in this case.

i) Whilst, as I understand it, this issue was raised as a ground of appeal against Butcher J's judgment – an appeal later withdrawn – it was not an issue raised in the High Court, nor in the single ground in this appeal, nor at all in this appeal before Mr Southey's skeleton.

ii) Whilst I accept that interim housing applications are almost always made and determined in the context of great urgency, the difficulties and dangers of considering legal issues absent the facts of a particular case are well-documented and well-known. For the issue to be considered without the context of a live case, would in my view be unsatisfactory and unwise.

iii) As Collier v Williams makes clear, in respect of such an application, there is a right to an oral hearing. If the point now raised by Mr Southey has force (about which I express no view, one way or the other), then it is likely that cases will arise in which it can be made and argued before the High Court prior to any appeal being made to this court. Such proceedings can be expedited, if appropriate.

iv) In my view, there are therefore strong reasons for not granting permission to appeal in this now academic case. That the Applicant faces the even higher hurdle of reopening this appeal does nothing to diminish the argument for not allowing the issue to proceed in this case.

22. Looking at all relevant circumstances in the round, I do not consider it is in the public interest for the issue raised by Mr Southey to be considered by this court in the context of this case. Whilst, had I considered that public interest to have been otherwise, the case for reopening this appeal would have been strong, in the circumstances the appropriate course was to refuse the application to reopen, as I did at the hearing.