Neutral Citation Number: [2022] EWCA Civ 1059

Case No: CA-2022-000365

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEENS BENCH DIVISION (ADMINISTRATIVE COURT)
Mr Justice Fordham
[2022] EWHC 85 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2022

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
LORD JUSTICE COULSON

- -

Between :

The Queen (On the Application of ZLL)	**Appellant**
- and -	
Secretary of State for Levelling Up, Housing and Communities	**Respondent**
and	**Interested Party**
Shelter	

- -
- -

Jamie Burton QC, Joshua Hitchens & Siân McGibbon (instructed by **Camden Community Law Centre**) for the **Appellant**
Jack Anderson (instructed by **Treasury Solicitors**) for the **Respondent**
The **Interested Party** did not appear and was not represented

Hearing date : 19 July 2022

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Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10.30am on 26 July 2022

LORD JUSTICE COULSON :

Introduction

1. This is a claim for judicial review, in which the appellant seeks to quash "the policy/guidance/funding practices which have ended" the Government's 'Everyone In' policy, which (so it was claimed at paragraph 1(a) of the Statement of Facts and Grounds), contained a "blanket requirement/recommendation to accommodate all rough sleepers and those at risk of rough sleeping". The claim was dismissed by Fordham J ("the judge") at [2022] EWHC 85 (Admin). The judge granted permission to appeal, although – in part because of events that had occurred after the hearing but before hand-down - he recognised that the appeal might be academic.

2. At the appeal hearing on 19 July 2022, the court heard argument on three issues: (i) whether the appeal was indeed academic; (ii) whether the claim identified any decision by the respondent which was or could be a proper target for judicial review; and (iii) what the relief claimed was or could be. Thereafter, the court informed the parties that the appeal was academic and fundamentally flawed in other respects too. The appeal was therefore dismissed. These are the reasons for that decision.

The Factual Background Prior to Judgment

3. The appellant, ZLL, was a rough sleeper. His claim was to the effect that the London Borough of Camden were obliged, pursuant to the 'Everyone In' policy[1], to provide him with accommodation. In April 2021 they refused to do so because (so it was said) the 'Everyone In' policy had been replaced with a subsequent scheme which did not oblige them to offer accommodation to the appellant. The claim for judicial review asserted that 'Everyone In' contained the blanket requirement noted in paragraph 1 above, and claimed that, despite public statements to the contrary by the Government, they had in private brought that policy to an end, and thereby adversely affected the appellant's rights.

4. The claim for judicial review was not based on irrationality, unreasonableness or legitimate expectation. The only basis for the challenge was an alleged breach of the duty of transparency (referred to by the judge as the duty of publication): it was said that, in breach of that duty, the 'Everyone In' policy had been brought to an end without any public statement to that effect. Unusually, the decisions relied on by the appellant as evidence the decision to end the policy – and therefore the target of the judicial review claim - were not decisions by the respondent; instead, the claim relied on the pre-action response to the appellant's original claim letter, and the defence in these proceedings.

5. The judge set out exhaustively at [9] - [37] of his judgment the history of the development of the Government's pandemic policies towards rough sleepers and those at risk of rough sleeping. I do not repeat that detailed material here. In summary, the key events were:

[1] I shall refer to it as a "policy" simply for convenience. It has also been variously described in the documents as an "initiative", a "scheme", a "campaign" and a "programme".

(a) The 'Everyone In' announcement of 26 March 2020, which said that it was "now imperative that rough sleepers and other vulnerable homeless are supported into appropriate accommodation by the end of the week". Funding was announced to "cover all costs incurred in the first phase of the response, but we would keep future funding need under review". The announcement also confirmed that "in the longer term it will of course be necessary to identify step-down arrangements for the future, including the re-opening of shelter-type accommodation".

(b) The 'Next Phase' letter of 28 May 2020, written by the relevant minister to all local authority chief executives in England, which emphasised the need to "continue to focus on ensuring accommodation and support arrangements can be managed safely to protect the most vulnerable…at the same time we need now to start planning the next step for accommodating and supporting people to move from emergency accommodation" following the end of the first lock-down.

(c) The 'Next Steps' launch on 18 July 2020, which was designed to support local authorities and their partners to prevent the nearly 15,000 people accommodated during the pandemic from returning to the streets. The programmes identified a sum of £105m to pay for short-term and immediate accommodation support.

(d) The 'Protect Programme' launch on 5 November 2020, which coincided with the second national lockdown. This asked Councils to make sure that every rough sleeper was offered "somewhere safe to go". It was said that the Protect Programme would "run alongside the ongoing 'Everyone In' campaign".

(e) The third national lockdown announcement of 8 January 2021, which asked Councils "to redouble their efforts to help accommodate all those currently sleeping rough".

(f) The Rough Sleeping Initiative ("RSI") Toolkit of 28 January 2021, which explained how local authorities might deal with those, like the appellant, who had a 'no recourse to public funds' condition attached to their immigration status. The RSI is a funded Government policy in respect of rough sleepers which pre-dated the pandemic, and continues in operation.

(g) The 'Next Stage' announcement of 15 May 2021, which was part of the roadmap for easing out of the third national lockdown. This identified a further £200m that was being provided by way of a confirmation of RSI allocations, to help more rough sleepers off the streets. It was said to be "running alongside the government's unprecedented Everyone In initiative".

(h) The 'Working Together' letter of 5 July 2021, sent by the relevant minister to all Council leaders and chief executives, which identified the success of the various schemes thus far, and spoke of the need to continue to work together "building on the broad range of partnerships with public health and others that was so critical to the success of 'Everyone In'".

(i) The debate in the House of Commons on 19 July 2021 in which the minister said that:

> "Our ambition to end rough sleeping within this Parliament still stands. We are taking into account the lessons learned from our ongoing pandemic response, including Everyone In and the Protect Programme, to inform our long-term plans."

The minister went on to say that funding, through the RSI, "continues to fund people in emergency accommodation".

The Judgment

6. The judge rejected the appellant's core submission that the 'Everyone In' policy contained an open-ended, all-inclusive requirement that every rough sleeper or those at risk of rough sleeping had, and continued to have, an entitlement to accommodation. His reasons for rejecting that submission are detailed, and can be found at [46], [47], [48], [49] and [51] of his judgment. He concluded that such an interpretation of the policy was at odds with what it itself said, and with the subsequent announcements of other policies running alongside 'Everyone In'. That was sufficient to mean that the judicial review claim failed at the first hurdle: the policy did not confer the right that the appellant complained had been taken from him in an untransparent way.

7. As to the letter of response and the defence - namely the 'decisions' on which the appellant relied to say that 'Everyone In' had been brought to an end - the judge dealt with them at [53]. He indicated that what they said about 'Everyone In' not being a permanent programme was consistent with the announcement of the policy itself, and the subsequent references to 'Everyone In' in the later announcements and letters noted at paragraph 5 above.

8. In those same paragraphs of his judgment, the judge also explained his view that, in all the circumstances, there was no duty of publication. It was only as part of that analysis that the judge separately concluded that, by its nature, the 'Everyone In' policy did not contain prescriptive policy guidance, and did not give rise to a duty of conformity either.

Developments Since The Judgment

9. There have been two significant developments since the judgment. First, the appellant has settled his claim with the London Borough of Camden. The appellant therefore has no outstanding claim in respect of the provision of accommodation.

10. Secondly, there has been the next stage of the Government's evolving policy towards rough sleepers in the light of the pandemic. This was the "Protect and Vaccinate" letter of 20 December 2021. In the witness statement from Penelope Hobman, Director for Homelessness and Rough Sleeping at the Department, sworn on 23 May 2022, she said that Protect and Vaccinate contained two main elements. The first was a request to local authorities to accommodate rough sleepers, supported by £25m in funding, and to do all that they could to ensure that everyone so accommodated was vaccinated. The second element was the provision of £3.2m to help authorities improve the vaccination rates of rough sleepers at a local level. Local authorities were empowered to use that funding in whichever way they thought would best overcome the widespread vaccine hesitancy amongst rough sleepers.

11. The Protect and Vaccinate letter was published on the internet and was accompanied by a Press Release. That referred to the reduction in the numbers of rough sleepers as a result of earlier policies and said that Protect and Vaccinate would "build on the success of the Everyone In initiative". Six weeks later, on 11 February 2022, the Government announced £174m in allocations for the Rough Sleeping Accommodation Programme. This referred to the 37% reduction in the number of rough sleepers "driven by the success of the Everyone In initiative".

12. A further letter was written to all local authority chief executives on 14 February 2022 to confirm that the funding for Protect and Vaccinate would end on 31 March 2022. This stressed that support should be based "on an assessment of an individual's status, circumstance and needs, considering the range of discretionary powers you have available to support and/or accommodate" rough sleepers.

Question 1: Is This Appeal Academic, And If So, Should The Court Exercise Its Discretion To Hear It?

13. In a public law case, the test as to whether a court should exercise its discretion to hear an academic appeal is that set out in *R v SoS for the Home Office ex parte Salem* [1991] 1AC 450 (HL) where, at 456-457, Lord Slynn said:

> "In a cause where there is an issue involving a public authority as to a question of public law, your lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties inter se… The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the future."

14. That test was recently applied by this court in *Rahoune v London Borough of Islington* [2019] EWCA Civ 2142, where Simler LJ also noted Lord Neuberger MR's strictures to similar effect in *Hutcheson v Popdog Limited (Practice Note)* [2012] 1WLR 782. Although *Hutcheson* was not a public law case, it emphasised that the general discretion to hear academic appeals is a relatively narrow one.

15. There are three reasons why this is now an academic appeal. First, there is now no *lis* between the appellant and the respondent. His claim against Camden, which existed at the time of the original hearing before the judge, has since been compromised. No-one was able to say that there was any residual right or claim available to the appellant which could only be satisfied by the continuation of these proceedings.

16. Secondly, whatever the position in July 2021 (which is what this claim goes to), the policy towards rough sleepers has continued to evolve. The most recent examples are the Protect and Vaccinate policy in December 2021 and the next stage of the RSI programme from April 2022. These proceedings do not, therefore, appear to serve any useful or relevant purpose for either rough sleepers or local authorities now, and Mr Burton did not suggest otherwise.

17. Thirdly, even taking the appellant's claim at its highest, there is now no remaining issue between the parties. The challenge centred on an alleged failure of transparency: the breach of the duty to publish when the 'Everyone In' policy came to an end. But, even assuming in the appellant's favour that there was such a duty, it was in my view met by the press release relating to Protect and Vaccinate, identified in paragraph 11 above. That made plain that, as the Government's response to the pandemic continued to evolve, 'Everyone In' had come to an end, but its success was now being built on by other initiatives. So, to the extent that 'Everyone In' was capable of being treated as a separate and standalone policy (which the judge said was not the case), it was publicly announced on 20 December 2021 that it had come to an end. The alleged duty of transparency/publication had therefore been complied with. Mr Burton properly accepted that, if that was the court's view of the press release, this appeal was indeed academic.

18. Should the court exercise its discretion to hear the appeal anyway? I would say No, because there is no pure point of law here of the kind identified in *Salem*. Any question of law in the present appeal is irredeemably mired in the judge's multi-faceted evaluation. Take the appellant's basic proposition that the 'Everyone In' policy required the accommodation of all rough sleepers or those at risk of sleeping rough. As I have explained, that proposition was a core ingredient of his claim for judicial review. But the judge rejected that case: in the paragraphs of his judgment that I have identified at paragraph 6 above, he explained why 'Everyone In' did not contain such an open-ended, all-inclusive requirement. Unless the appellant can undo that specific conclusion - and I consider that no attempt to do so can be found in the two appeal skeleton arguments produced on his behalf[2] - no separate point of law can be identified for the purposes of any meaningful appeal.

19. That is borne out by a closer consideration of the "pure point of law" which is said to arise here. At paragraphs 38 – 40 of his first appeal skeleton argument, Mr Burton said that the point arose out of the judge's comments concerning the duty of conformity, where he said the judge drew a distinction between guidance which may be a relevant consideration in the context of discretionary decision-making, and a policy which is prescriptive, finding that it was only the latter which gave rise to the duty of conformity. Mr Burton said that this was a novel distinction, and should be considered by this court on appeal.

20. I do not accept that the judge drew any such hard-edged distinction. It is impossible to find it clearly set out in [44] – [53] of the judgment, let alone to conclude that this distinction was an important element of the judge's reasoning. In those paragraphs, the judge was instead evaluating the nature and content of the 'Everyone In' policy in its context, primarily to see if it meant what the appellant said it meant. He concluded that it did not. The judge's critical conclusion was that the 'Everyone In' policy evolved in a fluid way, running alongside other initiatives/campaigns/schemes/programmes as the challenges created by the pandemic themselves evolved. In consequence, he also found (amongst other things) that, on the facts of this particular case, there was no duty of conformity and no duty of publication. There is no point of law that could be separated

[2] On the contrary, Paragraph 18 of the appellant's supplementary skeleton argument appears to be an attempt to disavow that part of the appellant's case altogether. And whilst I acknowledge the arguments in paragraph 41 of the first appeal skeleton argument, they go to whether the policy was "prescriptive" in a legal sense, not whether its contents and context amounted to a blanket requirement to accommodate all rough sleepers.

out or treated independently of all the other matters considered by the judge as part of his evaluation of the nature, scope and effect of the 'Everyone In' policy.

21. Furthermore, on the appellant's case, it was the absence of a duty of publication which mattered for the purposes of his claim (a point emphasised by Mr Burton at paragraphs 5-8 of his first appeal skeleton argument). To that extent, therefore, whatever the judge said about the duty of conformity (and the alleged distinction he is said to have drawn between different types of guidance), was irrelevant to his ultimate decision: as Mr Burton himself submitted in his first appeal skeleton argument at paragraphs 19 - 25, a duty to publish may arise regardless of whether or not there was a duty of conformity.

22. So for these reasons, applying the test in *Salem*, this is not an appeal which gives rise to a simple or clear-cut issue of law, like the construction of a statute. Neither is this an appeal where scores of other cases are waiting for the outcome of the abstract issue identified by Mr Burton. On the contrary, we were referred to just one case in this connection, the decision of HHJ Graham Wood QC in *R (oao Cort) v London Borough of Lambeth* [2022] EWHC 1085 (Admin). That was a case that was decided on its own facts, and Judge Wood was clear at [81] that the judge's decision in the present case - and therefore this appeal - had no bearing on its outcome.

23. Accordingly, for all those reasons, I consider that this appeal is academic and that the court should exercise its discretion against considering it further.

Question 2: Is There A Decision To Be Impugned?

24. Mr Burton accepted that neither the response to the pre-action protocol letter, nor the defence to the claim itself, could constitute decisions at which a public law challenge could properly be targeted. He explained that those were all the appellant had at the time that the proceedings were commenced. That may be so. But matters have obviously moved on since then. No one suggests that the appellant does not have all the relevant material on which he could identify the decision – if there was one – which he sought to challenge. But there has been no amendment of the claim form, and no attempt to identify any decision made by or on behalf of the respondent which would be capable of attracting a proper public law challenge.

25. This matters because, as the judge emphasised, 'Everyone In' was part of an evolving policy, with the Government responding to the various stages of the pandemic as the situation changed. So if the appellant cannot say what - if any - particular decision in that process he seeks to challenge by way of judicial review, then the Government cannot know what is at stake and what, if anything, it needs to address for the future. I give one example of this difficulty to demonstrate the point. As noted above, the claim form suggests that 'Everyone In' contained a blanket requirement to accommodate all rough sleepers. Assuming (contrary to the judge's conclusion) that that assertion is right, the 'Next Phase' announcement of May 2020 (paragraph 5(b) above) arguably made it clear that that was no longer the case: it addressed various elements of the next phase on the assumption that not all rough sleepers had been or could be accommodated. So if that was the first modification of the 'Everyone In' policy, which saw it go (on the appellant's case) from applying to all rough sleepers to applying only to some, then there is a strong ground for saying that the challenge should have been made to the decision to change the policy in May 2020. There was no such challenge,

and this claim cannot be a vehicle for such a challenge because it was made so long after the May 2020 announcement.

26. In my view, the absence of a proper target for this claim bears out the judge's analysis that the 'Everyone In' policy was an evolving thing, and too elusive to be identified as a separate, standalone policy to which the duty of publication could attach. The failure to identify an impugnable decision is also fatal to the judicial review claim.

Question 3: What Is The Relief Claimed?

27. The relief claimed in the claim form was an order quashing the decision to end the 'Everyone In' policy. Since no such decision has been identified, that relief cannot be granted. The claim form has never been amended to identify any other relief that would be appropriate in the present case.

28. Mr Burton accepted in his oral submissions that he was not entitled to a quashing order. However, he sought to suggest that the appellant might have a claim for a declaration. No such claim was made in the claim form and Mr Burton was unable to point to the proposed wording of any such declaration sought by the appellant in this case which could be considered as part of an application to amend. A declaration of the kind indicated in paragraph 19 of Mr Burton's supplementary skeleton was inappropriate, because that too relied on an alleged failure to publish the cessation of the 'Everyone In' policy, which had simply not been established. In any event, it would not be appropriate for this court to consider, for the first time on appeal, the appellant's entitlement to a declaration that has not yet even been formulated.

29. During argument, it became apparent that Mr Burton was seeking a different type of declaration, but only at a high level of generality. The declaration he indicated would be something like: "if there were public statements which suggested that 'Everyone In' was continuing, but if a decision had already been taken privately to end the policy, the respondent would be in breach of the duty of publication". But such a declaration would beg all the questions that I have previously identified. It would be of no utility, either to the appellant or anyone else, because it would be entirely conditional. And it would be unrelated to Mr Burton's "pure point of law" in any event.

Summary

30. For these reasons, I conclude that this appeal is now academic and there is no basis on which the court should exercise its discretion to hear it. The absence of an impugnable decision and any sustainable claim for relief support the conclusion that the appeal should be dismissed.

LADY JUSTICE ASPLIN:

31. I agree.

LORD JUSTICE LEWISON:

32. I also agree.