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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2020] EWHC 3646 (Admin)

No. CO/3615/2019

Royal Courts of Justice

Friday, 9 October 2020

Before:

MS MARGARET OBI
(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
NCUBE

Claimant

\- and -

BRIGHTON AND HOVE CITY COUNCIL

Defendant

MR. J. HITCHENS (instructed by Lawstop) appeared on behalf of the Claimant.

MR J. HOLBROOK (instructed by The Legal Services of Brighton and Hove City Council) appeared on behalf of the Defendant.

J U D G M E N T

(Transcribed from poor quality remote hearing recording)

THE DEPUTY JUDGE:

1 This is an application for interim relief in the form of suitable accommodation. An urgent out-of-hours application was made on 6 October 2020. Lavender J. having heard from the claimant, made some case management directions and ordered the defendant to accommodate the claimant in suitable accommodation, forthwith, until 3 p.m. yesterday. It is in light of that order that the case has come before me.

2 I heard oral submissions from the parties yesterday afternoon over the telephone. During the course of the telephone hearing, I was provided with a skeleton argument from Mr Holbrook, on behalf of the defendant, which for some reason had not made its way to me in advance of the hearing. Oral submissions concluded shortly after 4 p.m. and I decided to reflect on my decision before delivering my judgment via telephone this morning. The defendant voluntarily agreed to continue to accommodate the claimant overnight pending my judgment.

3 This morning, I was informed that the claimant's sister has confirmed in a witness statement that she will not be able to provide support to her brother. I have not seen a copy of that witness statement, but I accept, for the purposes of this hearing, that that is what it says. I was also provided with a Home Office press release dated 5 May 2020 and, in addition, Mr Hitchens has attempted to clarify the situation with regard to the s.4 application which I will come to shortly.

4 In terms of the background to these proceedings, from the claimant's perspective, it is as follows. The claimant is a street homeless former asylum seeker. It is said that he arrived in the UK in 2005. He applied for asylum in 2006. Between 2005 and 2020, the claimant stayed with a variety of friends and family members. Most recently, he was living with his sister, but, in mid-September of this year, she asked him to leave. The claimant's sister is no longer willing to provide intermittent support to the claimant, which is something that she had been doing during the previous 15 years.

5 The claimant is ordinarily resident in the defendant's district and currently spends most nights at Brighton and Hove railway station. The claimant suffers from the following medical conditions: (a) diabetes; (b) visual impairment due to his diabetes and (c) symptoms associated with suspected depression and anxiety. His medical conditions are somewhat vague as he does not have an official diagnosis, because of difficulties in accessing appropriate services and a GP. He says that he has not seen a doctor for five years.

6 On 2 September 2020, the claimant approached the defendant seeking accommodation during the COVID-19 pandemic. The defendant carried out a phone interview and wrote to the claimant the same day informing him that he was not eligible for assistance, under the Housing Act 1996. On or before 5 October 2020, the claimant contacted Migrant Help, the advice, support and eligibility provider appointed by the Home Office. He was told that he was not eligible for support under s.4(2) of the Immigration and Asylum Act 1999.

7 Initially, I was informed that a s.4 application had been made, but this morning I have been informed that an application was not made until yesterday.

8 A letter before action was sent to the Secretary of State in relation to the alleged failure to assist; not in relation to the s.4 application presumably because the application was not made until very recently.

9 The application for judicial review relates to the following alleged failures:

> a) to accommodate the claimant in accordance with its COVID-19 accommodation policies;
>
> (b) to provide advice or assistance, contrary to s.179 of the Housing Act 1996;
>
> (c) to provide urgent care and support pursuant to either s.19(3) of the Care Act 2014 or s.1 of the Localism Act 2011.

10 The focus of the application for interim relief, certainly from the claimant's perspective, has been the letter to the local authority, dated 26 March 2020, from the Minister for Rough Sleeping and Housing. The letter sets out the basic principles to be applied by local authorities during the public health crisis. It refers to a need to focus:

> "…on people who are, or are at risk of, sleeping rough, and those who are in accommodation where it is difficult to self-isolate, such as shelters and assessment centres."

The letter goes on to state that local authorities should:

> "…make sure that these people have access to the facilities that enable them to adhere to public health guidance on hygiene or isolation, ideally single room facilities;
>
> utilise alternative powers and funding to assist those with no recourse to public funds who require shelter and other forms of support due to the COVID-19 pandemic;
>
> mitigate their own risk of infection, and transmission to others, by ensuring that they are able to self-isolate as appropriate in line with public health guidance."

This has been referred to as the "Everybody-In Policy".

11 The Minister set out a programme of actions to be undertaken by local authorities and, over the following month, sent further letters to local authorities announcing additional Central Government funding to assist in managing the cost of accommodating rough sleepers in the pandemic.

12 The defendant's policy response to the Minister's letter and the pandemic is summarised in the report, dated 14 August 2020, and it states as follows:

> "In response to the COVID-19 emergency and in line with Government guidance, we have made an accommodation offer available to all rough sleepers in the City and those at risk of sleeping rough."

The Public Health rationale for this policy is sets out at para.7.16 of the report and it states that:

> "Rough sleepers have been identified as a particularly vulnerable group which we need to provide accommodation for, to protect them, to manage infection control and outbreak prevention and management.

> The Brighton and Hove Local Outbreak Plan identifies that homeless communities and settings are high risk for COVID-19 outbreaks. This includes the provision of a pathway, including integrated input to enable symptomatic people to self-isolate safely, including a care hub. Maintaining the local joined-up multi-agency - including primary, community health, mental health and substance misuse services - is vital for this to be effective."

13 On 14 August 2020, the authority extended the policy to the end of December. In the press release announcing this extension, the authority stated, as follows:

> "A special meeting of the Policy and Resources Committee today agreed to extend the provision of self-contained accommodation to avoid the need for anyone to sleep rough when current arrangements end in September."

14 Mr Hitchens submitted that the claimant was destitute, street homeless, disabled, profoundly vulnerable and has a heightened risk of COVID-19 due to his diabetes. It was submitted that there is a strong arguable case that the "Everybody-In" policy includes the claimant and that he has a legitimate expectation that he will be provided with suitable accommodation until 30 December 2020. My attention was drawn during his submissions to the relevant principles in relation to legitimate expectation.

15 Mr Holbrook submitted, on behalf of the defendant, that the "Everybody-In" policy is irrelevant because Government Ministers have made it clear that the money provided under this initiative is not to be used to circumvent immigration control. He submitted that there is a statutory scheme for failed asylum seekers under s.4 of the Immigration and Asylum Act 1999, and, if the claimant applied under the scheme and was refused, the application for judicial review should be against the Secretary of State. Mr Holbrook was critical of the absence of further information about the s.4 application and invited the court to conclude that the claimant had breached the duty of candour. This submission was based on the position as it was understood to be yesterday. This morning he has gone further. He has inferred that the court had been misled and that it was a fundamental misrepresentation to inform the court that there was an application when, in fact, there was not. Yesterday he submitted that the application for interim relief was weak, or at least not strong, as the claimant is not eligible for local authority support because he is in the UK unlawfully.

16 There is no dispute with regard to the legal principles that I should apply in considering this application. First, the claimant must demonstrate that there is a real issue to be tried, with appropriate modification for the public law context. In this case, the claimant must show a real prospect that, at trial, he will succeed in obtaining a permanent injunction taking account of the fact that any decision to grant any such relief must include consideration of the public interest. Secondly, the court must determine where the balance of convenience lies, once again bearing in mind the public interest considerations.

17 I will start with the "Everybody-In" policy, because that was the main focus of the submissions made on behalf of the claimant. It is clear from the Minister's letter dated 26 March 2020 that the policy included those with No Recourse to Public Funds. The letter makes no reference to any exception. Individuals from a range of circumstances may fall into the No Recourse to Public Funds category, including failed asylum seekers, and it would appear, based on a fair reading of that letter alone, that the claimant and those in his situation were included.

18 However, the subsequent letters from the Minister, dated 28 May 2020 and 22 September 2020, provide clarification and indicate that failed asylum seekers are excluded. The 28 May 2020 letter states:

> "I do recognise that there are challenging times and that you may have accommodated people who would normally and otherwise be ineligible for support, making judgments based on risk to life. I wanted to take this opportunity to restate the government's position on eligibility relating to immigration status, including for those with No Recourse to Public Funds. The law regarding that status remains in place. Local authorities must use their judgment in assessing what support they may lawfully give to each person on an individual basis, considering that person's specific circumstances and support needs. You will already be making such judgments on accommodating individuals who might otherwise be ineligible, during extreme weather, for example, where there is a risk to life."

The 22 September letter states as follows:

> "Local authorities must ensure that any support offered to non-UK nationals who are not eligible for homelessness assistance complies with legal restrictions (for example, the restrictions contained in Schedule 3 to the Nationality, Immigration and Asylum Act 2002)."

19 It seems to me that, by 22 May 2020, the published policy could not be described as unqualified and certainly not to the extent that it, in effect, amounted to a promise. The claimant did not seek accommodation from the defendant until 2 September 2020. For this reason, the Home Office guidance on 5 May 2020 does not assist. It is superseded by the letter of 22 May 2020 and that was then followed by the letter dated 28 May 2020. In my judgment, this is significant and undermines the legitimate expectation argument.

20 I will briefly turn to the statutory provisions under the Housing Act 1996, the Care Act 2014 and the general ineligibility under Schedule 3 of the Nationality, Immigration and Asylum Act 2002. I accept the submission made by Mr Holbrook that s.179 only obliges the defendant to provide advice and information. Under the Care Act, a local authority is not required to meet the care and support needs of an adult who is subject to immigration control purely because the adult is destitute or because of the physical effect or anticipated physical effect of being destitute. The claimant would need to establish that his needs to be looked after are beyond merely the provision of a home.

21 The claimant makes no mention of diabetes in his witness statement. As I mentioned previously, he has not seen a doctor for five years and he states that his mental health has deteriorated in the last month.

22 As the claimant is unlawfully in the UK, his circumstances are caught by the general prohibition of support under Schedule 3. This general exclusion is additional to the specific exclusions, including s.1 of the Localism Act of 2011 which governs the local authority's general power of competence.

23 I am mindful that this is an application for interim relief and, accordingly, nothing in this judgment should be taken as a concluded view on the general arguability of the claim. However, I am satisfied, based on the information before me - and the information that was

not before Lavender J, which includes the May 2020 and September 2020 letters - that the claim does not pass the threshold for the grant of interim relief on the basis of legitimate expectation. It also does not pass the threshold on the basis of a statutory provision. But let me assume that I am wrong about the merits of the case. The next issues are the availability of an alternative remedy and the duty of candour, which I will take together, because, in my view, they are interrelated.

24 I accept the submission made by Mr Holbrook that, as a failed asylum seeker, the claimant should have made an application under s.4, which requires submission of a very long application form; in fact, it is 32 pages long. It is stated in the statement of facts and grounds that the claimant made an application but it was refused. This is the document that was before Lavender J on 6 October 2020. However, Mr Hitchens has confirmed this morning that that is not what happened. The application for accommodation under s.4 was made yesterday, which may explain why there is no mention of the application in the claimant's witness statement and no mention of it in the witness statement provided by the adviser from Voices in Exile, who provide advice to refugees, asylum seekers and those with No Recourse to Public Funds. Both witness statements are dated 7 October 2020.

25 Before I turn to the consequences of this, I will say that I do not accept that the s.4 application is a red herring, as suggested by Mr Hitchens. The judicial review claim is for suitable accommodation. As there is a statutory scheme, which offers the opportunity for accommodation to be provided, in certain circumstances and subject to certain conditions, the steps that have been taken to further that application are highly relevant.

26 The claimant was subject to the duty of candour, which requires the parties to ensure that all relevant information and facts are put before the court. The duty extends to making proper enquiries before making an application. It is a heavy burden and I have reached the conclusion that it has not been discharged in this case. There is no good reason, as far as I can see, why the status of the s.4 application (i.e. the fact that there has, in fact, been no application until yesterday) had not been communicated to the court previously. An application has either been made or it has not. The duty of candour required that to be made clear and it was not made clear. For that reason, alone, I would refuse the application for interim relief.

27 In conclusion, the application for interim relief is refused on the merits, but, in any event, I refuse it for breach of the duty of candour.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.