Neutral Citation Number: [2021] EWHC 1632 (Admin)

Case No: CO/1829/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LEEDS

Date: 15th June 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

AA	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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- -

Franck Magennis (instructed by Bhatia Best Solicitors) for the Claimant
Benjamin Seifert (instructed by Government Legal Department) for the Defendant

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Hearing date: 15.6.21

Judgment as delivered in open court at the hearing

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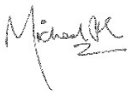
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This is the hearing of a contested application for interim relief in a judicial review case. The hearing has taken place pursuant to directions by HHJ Saffman by an order dated 7 June 2021. The central questions I have to decide are those summarised in the Administrative Court Judicial Review Guide 2020 at paragraph 15.10. They are the familiar principles applicable to the question of interim relief in judicial review.

Anonymity

2. HHJ Saffman provisionally granted anonymity, directing that the continuation of the anonymity order should also be considered at today's hearing. Nobody has appeared to make submissions as to why anonymity should not be continued. The Defendant takes a neutral position. Having regard to CPR 39.2(4) and the relevant commentary I am satisfied that it is necessary in this case to continue the anonymity order that has been made. That is, however, on the basis that it will be open to any person who wishes to do so to make an application to discharge the anonymity order. I am not persuaded that the fact that medical conditions are being described in the present case is a sufficient reason for anonymity. What I do accept is that anonymity is necessary and appropriate in the present case in circumstances where there is the clear potential for ongoing proceedings in the First-Tier Tribunal to determine immigration status. That is a context in which the Claimant's position is that anonymity would appropriately apply to those proceedings, a position which the Defendant has not contested. I am satisfied in the circumstances that there is a necessity for anonymity.

Mode of hearing

3. The mode of hearing was by Microsoft Teams. Both Counsel were satisfied that this mode of hearing involved no prejudice to the interests of their clients. I was equally so satisfied. The open justice principle has been secured. The case and its start time were published in the Court's cause list. Also publish was an email address usable by any member of the press or public who wished to observe this public hearing. The hearing has been recorded. My intention is to release a written approved ruling into the public domain. I am satisfied that a remote hearing was appropriate in the circumstances of the pandemic.

Background

4. The background to the case is this. The Claimant has been in the United Kingdom since 1998 or 1999. He is now aged 43. He lived in Bradford for 7 years from 2000 to 2007. He then lived in Leeds with an aunt and uncle from 2007 through to 2020. He was living in Leeds up to the time when he was placed in a local hotel on 24 March 2021 by the Defendant and through until the 29/30 April 2021 when he was 'dispersed' by the Defendant to Tyne & Wear. That accommodation and dispersal were subsequent to a decision made on 15 March 2021 by which the Defendant was satisfied that the provision of accommodation was appropriate under Schedule 10 paragraph 9 to the Immigration Act 2016. In essence, accommodation for the Claimant – who by then had made an application for leave to remain – was recognised as necessary and appropriate having regard to the destitution and other exceptional

circumstances regarding his precarious position, he no longer being able to be accommodated by his family members, and reliant as he was on help from the Red Cross and friends. Those precarious circumstances, recognised by the Defendant, arose in the context or in parallel with the Covid pandemic and the lockdown in March 2020. Two months after that lockdown the Claimant had suffered a stroke which had led to him being hospitalised until his discharge on 28 May 2020. There was material before the Defendant, and there is material before the Court, as to the Claimant's various medical conditions including diabetes and high blood pressure and low mood and his mobility problems as a consequence of the stroke. As the evidence records the Claimant had been helped by a number of people and agencies in the Leeds area. They included: a GP's practice who have provided physiotherapy on an ongoing basis arising out of the Claimant's needs following the stroke; provision made by a "social prescriber" connected to the GP; provision made by the local Red Cross; provision made by a local charity concerned with helping those with mental health vulnerabilities; and help from friends and family. The Defendant's decision on dispersal was informed by a view expressed by a medical adviser. The Defendant has confirmed in correspondence that the decision-making Team gave consideration to the circumstances including mental health and care being received. The dispersal which took place at the end of April 2021 was to a house in Tyne & Wear.

Interim relief

5. It is common ground that I need to be satisfied (i) that there is a serious issue to be tried (triable issue) and (ii) that the balance of convenience and justice supports the grant of interim relief. The order sought by way of interim relief is an order requiring the Defendant to provide the Claimant with suitable accommodation in the Leeds area under Schedule 10 to the 2016 Act.

Defendant's position

6. Mr Seifert for the Defendant resists interim relief on a dual basis. First, he submits that there is no serious issue to be tried in this case, still less a strong prima facie case for mandatory interim relief. He submits that it is not arguable that the Defendant has committed any public law error so far as concerns the application of the relevant policy guidance or so far as concerns the reasonableness of the decision reached. He submits that no issue arises under the Equality Act. The second limb of his dual position is this submission: even if there is a prima facie case or a serious issue to be tried, the balance of convenience and justice comes down decisively in favour of refusing interim relief. In that latter respect Mr Seifert emphasises the clear response given by the Defendant, the sufficiency of the disclosure now (belatedly) made to this Court, and the absence – he says – of any compelling evidence of any health deterioration. He submits that 'safeguarding' concerns recognised by relevant appraising officials and individuals are not sufficient to support a grant of interim relief. Mr Seifert rightly reminds the Court of the policy implications, and the knock-on consequences, of the Court too readily giving interim relief, especially in cases which raise issues which may be expected not to be uncommon. He reminds me rightly of the circumstances faced by the Defendant and other agencies in dealing, on the ground, with the sorts of issues that arise in cases of provision of accommodation and the geography of dispersal. His position, pithily put it in the summary grounds of resistance, is: "It is unclear how the fact that the Claimant now resides outside the

Leeds area has caused in any hardship to the point where the balance of convenience would favour the grant of interim relief".

Applicable policy guidance

7. Part of the submissions at this hearing has have involved both Counsel analysing the applicability of relevant policy guidance. The Court has the Home Office Allocation of Accommodation Policy version 5.0 (7 March 2017) and the Healthcare Needs and Pregnancy Dispersal Policy Guidance version 3.0. Those policy documents were considered by HHJ Cotter QC in a judgment on 14 December 2020 in the case of IO v SSHD [2020] EWHC 3420 (Admin), a case on which Mr Magennis for the Claimant strongly relies on Mr Seifert for the Defendant says is clearly distinguishable. Mr Magennis says that both the medical adviser in an email dated 15 March 2021 and the decision-maker in the decision dated that same day have erroneously applied a "not medically essential" test, the very approach found to be legally inappropriate in IO (see paragraphs 27 and 71 in particular). Mr Seifert's main line of defence to that criticism was the submission that such a test ("not medically essential") is consistent with the relevant policy. He says the Allocation Policy, with its reference to an "overriding principle" of a "no-choice" basis and an "exceptional circumstances" test is in substance reflected, at least in the present case, by a test of whether a particular location is "medically essential". He says that the passages in the Healthcare Guidance document – passages which articulate a required approach with (I paraphrase) 'careful consideration on the merits' and 'looking at the matters cumulatively and in the round' and having regard to 'how long the individual has lived in the location' for example – are all legally irrelevant since that Healthcare Guidance document has no application in a Schedule 10 case. I have had considerable difficulty with those submissions. I am not determining any question of law or policy applicability. I am only focusing on whether there is a serious issue to be tried. But I am quite satisfied that it is arguable, indeed strongly arguable, that both the Allocation Policy document and the Healthcare Guidance document – and the substantive content that they set out – are, in principle, relevant to the present decision under Schedule 10. I have been shown no policy guidance document which is tailored to Schedule 10. The Allocation Policy document which Mr Seifert accepts is applicable to Schedule 10 cases does not, on its face, say that it is applicable. What it says is that it applies to section 95 (Immigration and Asylum Act 1999) cases involving asylum seekers. The Allocation Policy document, applicable to section 95 cases, and its contents clearly have to be read alongside the Healthcare Guidance document, a document which itself refers to section 95 cases. I have very great difficulty understanding why two policy guidance documents, designed to be read together in the context of section 95 cases, should be applicable to Schedule 10 cases only in the case of one of them are not the other. The Healthcare Guidance document – disavowed as legally irrelevant for the purposes of today by the Defendant – refers not only to section 95 cases but also cases under section 4. That means it is applicable both to extant asylum claim cases (section 95) and to failed asylum claim cases (section 4). It sets out the position and role of the medical adviser. It sets out a method: an approach for considering medical evidence and addressing the location of accommodation. I find it difficult to see why, bearing in mind that neither of these documents refer to Schedule 10 cases and no other document that I have been shown does so, the Healthcare Guidance document should not in principle equally be applicable to provide further detail. I find it difficult to see on what justifiable basis

the Healthcare Guidance could be put to one side. The point about applicable guidance is strongly arguable and that is sufficient for today. It is also, in my judgment, arguable that even the Allocation Policy document does not support a criterion of "not medically essential". Finally, it is, in my judgment, strongly arguable that – even if it does support such a criterion – it remains the public law duty of the Defendant to consider: all the circumstances of the case; the needs of the individual; the way in which the facets of the individual case interrelate cumulatively and the position in the round.

Triable issue

8. In light of all the facts and circumstances of the present case it is, in my judgment, properly arguable that the Defendant has acted unlawfully, in terms of the application of the relevant policy guidance document and in terms of the reasonableness and justification for the decision, as well as the adequacy of the reasons given for making and maintaining the decision in the present case. I accept Mr Seifert's submission that IO is a section 4 case in a case which raised circumstances particular to that claimant, and that cases will turn on their individual facts and circumstances, but I have found the IO case an illuminating working illustration alongside which to consider the present case. The facts and circumstances of the present case do not require detailed analysis for the purposes of interim relief. They have informed both the conclusion which I have already described as to triable issue, and also the conclusion to which I need to come as to the balance of convenience and justice.

Balance of convenience and justice

9. Mr Magennis has persuaded me, through his written and oral submissions in this case and by reference to the materials put before the Court, that this is a case in which the balance of convenience and justice does clearly come down in favour of the Claimant.

Safeguarding and welfare concerns

10. The concerns which arise on the materials are exemplified by the fact that the Defendant and the Defendant's own decision makers had 'red flagged' the Claimant in a 'safeguarding minute' in January 2021 based on vulnerability having suffered a stroke in mid-2020 and with references being there made to mental health difficulties. The current situation is brought into clear focus by a further 'safeguarding minute' on 21 May 2021 following a referral from Migrant Help. That further 'safeguarding flag' led to a referral to the relevant agency acting for the Defendant in the provision of accommodation. A welfare visit was arranged. The assessment of the named welfare manager had the consequence of the submission of a 'relocation request'. That was on the basis of a consideration of the circumstances and suitability of the accommodation and location currently provided. That material was disclosed only this morning. But the Claimant's solicitor had been made aware, by him, that he had been visited by a welfare manager from the accommodation provider. The solicitor was able to speak to the welfare manager and a witness statement before the Court dated 21 May 2021 – evidence which stands uncontroverted by the Defendant – sets out the four reasons why the welfare manager considered the property to be unsuitable for the Claimant.

Themes from the materials

11. As it seems to me, there are, at least, the following themes in the materials before the court. A first theme concerns the medical care which the Claimant had been assessed to need and had been receiving as a consequence of the intervention of his GP's surgery in the Leeds area. The powerful general point made to, and by, the Defendant – namely that NHS provision can be taken to be available nationwide – needs to be put alongside the fact that there is no evidence before the Court to demonstrate how those particular needs and continuity of medical care provision the been secured by the decision made and maintained by the Defendant. One of the points made by the welfare manager as being a reason for unsuitability is that the nearest GP surgery is located a distance away from the accommodation to which the Claimant has been dispersed and that the Claimant has no bus pass and limited mobility and is unable to walk for long distances. That, on the face of it, is a relevant and significant concern

12. The second theme concerns the social support which was provision made, through the GP surgery in Leeds, specifically to address mental health vulnerability and low mood. That provision, rather than medication, was assessed is the appropriate response to mental health concerns. The evidenced position before the Defendant and before this Court was that the "social prescriber" at the GP's surgery had been able to facilitate access by the Claimant to social support and relevant interaction. This second theme illustrates why, on the face of it, it is not sufficient for the Defendant to say – as Mr Seifert submitted – that in the current climate people can access GPs and medical prescriptions without needing to attend any GP surgery or undertake any journey. On the evidence this second theme concerns care for the Claimant's needs has also been lost by the dispersal decision and its maintenance. This is a theme emphasised both by the Red Cross and by the GP's surgery themselves, in materials put before the Defendant and before this Court.

13. The third theme relates to family and friends on which the Claimant relied for help and support. On the evidence that also stood to be lost, and has been lost, by the dispersal decision. There are letters from relevant family and friends which explained to the Defendant the roles being undertaken in providing the Claimant with support. The Claimant's closest friend, a resident of Bradford, has explained what he would do: to check on the Claimant regularly; to make sure the Claimant had enough food to eat; to provide small financial help; and to provide him with travel by taking him shopping and to hospital and to immigration appointments. As at February 2021 that friend had travelled to Pakistan. But, on the evidence, he then returned. The Claimant is now cut off from those individuals. This theme is something with which the Defendant has dealt in a letter maintaining the decision dated 7 May 2021. The points made in that letter, in essence, are these. It is said that accommodation is provided on a "no-choice basis" by reference to what is said in that letter to be the applicable "guidance" (this must be a reference to the Allocation Policy document). Then this: "It should be noted that Newcastle is only one hour 20 minutes away from Leeds by train and 2 hours by car which is not an insurmountable distance". The problem with that answer is graphically illustrated by the evidence. In what is in essence a two-month period, the Claimant has had one visit from his closest friend who was able to go and get him – before Eid – and take him to their house in Bradford and then back after two days. As the evidence records: "That is the only time that someone has visited the Claimant in nearly two months".

14. The fourth theme is that the Claimant has clear mobility issues linked to the stroke which he suffered in May 2020. Central to the concerns identified by the welfare manager were the isolating consequences of that immobility, particularly in circumstances where the Claimant is not able to secure a bus pass and has very limited means – using what I understand to be a cash card – to be able to buy essentials from shops. On the evidence, the nearest halal shop is in Newcastle. It has to be borne in mind that the Claimant has been located in Tyne and Wear: just north of Chester-Le-Street on the way to Gateshead (and closer to Chester-Le-Street than to Gateshead). The supermarket, where he needs to go to buy affordable food, is described in the evidence as "miles" away. The welfare manager assessed as follows: that the Claimant struggles with mobility; and that he struggles to carry shopping bags back from that supermarket. The description in the evidence before the Court is that it is "very difficult" for him to get to that supermarket and: "He is forced to sit down on the road, or [if he] is lucky to find [one on] a bench, three or four times per journey because his stroke makes him struggle to walk. He walks because he can't afford the bus and is not be given any support, or a bus pass, to allow him to travel and overcome the mobility issues that affect him following his stroke. The Claimant instructs that he has struggled to carry one bag of shopping home by himself". This is in a context and alongside evidence that the stroke which he sustained came 'out of the blue' and that he lives currently in 'fear' that he will experience a second stroke .

15. The fifth and final relevant theme which has particularly informed my assessment of the balance of convenience and justice is this. In the papers before the Court in these proceedings the point is squarely made that the Defendant has not identified any particular difficulty in being able to make provision for the Claimant in the Leeds area. There has been ample opportunity to put before the Court any material relating to any such difficulty. The Assessment Policy document, on which the Defendant relies, includes as one of the features within it the question of whether there is affordable accommodation in the relevant area. It refers to the need for the decision-maker to provide reasons, and make best endeavours, as to such alternative accommodation. In the Policy document that question is engaged where there is evidence to support the request for a need for accommodation in a particular area. The circumstances today are different. Today, the Defendant is facing an application for interim relief, adjourned to a hearing, having been given the opportunity – and having taken the opportunity – to provide materials to the Court. What is entirely absent is any material to support any suggestion that there is any particular difficulty with providing the Claimant with accommodation in the Leeds area. That is not a criticism. If the Defendant wished to advance such a position, then material would no doubt have been provided. Mr Seifert has not advanced such a position. The position before the Court is that it is the unchallenged contention of the Claimant that the Defendant would be able to make provision in the Leeds area. That is relevant, in my judgment, to the consideration in all the circumstances of the balance of convenience and the balance of justice.

The primary decision-maker

16. It is important, as Mr Seifert rightly reminds the Court, that judges should not be unduly enthusiastic about jumping into areas concerned with urgent provision of accommodation for individuals with needs. Courts should reflect long and hard before mandating, even on an interim basis, that the Defendant should make provision in a

particular geographical area. The Court starts and ends with a clear recognition that it is the Defendant who is the primary decision-maker, exercising the appropriate judgment and with the appropriate latitude.

Conclusion

17. Having said that, there parameters applicable by the Court to the question of interim relief. I have, with Counsel's assistance, applied them in the present circumstances of this case. Having done so, in my judgment, the relevant considerations point ultimately – and decisively – to the grant of the order that is sought. I shall make the interim relief order for which the Claimant has applied: that the Defendant provide the Claimant with suitable accommodation in the Leeds area under Schedule 10 of the Immigration Act 2016. I shall hear submissions from Counsel on the question of any timeframe that should be included in that order for interim relief and also on the question whether there is any reason why, in circumstances where the Court has an acknowledgement of service and summary grounds and has heard argument on 'triable issue' why this Court should not deal with permission for judicial review and make directions in the judicial review proceedings themselves. I will also of course deal with any consequential application that is made to the court.

Later

18. So far as the interim relief Order is concerned, Mr Seifert accepts that the 14 days foreshadowed in the documents before the Court is an order with which his client will be able to comply. I will order that by 4pm on 29 June 2021 the Defendant shall provide the Claimant with suitable accommodation in the Leeds area under Schedule 10 to the Immigration Act 2016.

Costs

19. Mr Magennis applies for his costs of the application for interim relief on the basis that he has squarely succeeded in an application, which the Defendant resisted and in which the Defendant has squarely failed. Instinctively, I have considerable sympathy for that costs application. However, Mr Seifert has persuaded me that it would be appropriate for me to reserve the costs of the application for interim relief. The reason for doing so is because "costs reserved" is in line with the guidance in the White Book 2021 at page 1460 (paragraph 44.2.15.1) where interim relief is granted "on the balance of convenience" to "hold the ring" (referring in particular to Wingfield Digby v Melford Capital Partners (Holdings) Ltd [2020] EWCA Civ 1647). I am not able to identify any "special factor" which would justify the grant of costs. The justification for costs is squarely this: that an application was made, and resisted, on which the Claimant has succeeded. I would not be prepared for the costs of today to be "costs in the case": that is to say, costs which depend on who wins or loses at the end of the day. But I am satisfied that no harm is done by "reserving" the costs; and that doing so is consistent with the Wingfield Digby guidance in the cases discussed in the White Book. I confess it would have been some comfort to have been provided with authority addressing that principle in the public law arena and explaining why costs should not 'follow the event' where interim relief is contested. I confess also that there could, as it seems to me, be a helpful discipline arising from it being recognised, in a judicial review case, that if interim relief is resisted and costs are incurred a defendant authority can expect to pay the costs if interim relief is granted (and obtain

a costs order if interim relief is refused). In the present case, regarding the position as and when the time comes to address what should happen about the "reserved" costs of today, I at least have the comfort of knowing that I have expressed in this part of this ruling my instinctive reaction. I should have thought it will prove exceedingly difficult for the Defendant to identify any reason subsequently why the costs incurred in conjunction with the application for interim relief should not, when the time comes, be ordered to be paid by the Defendant to the Claimant. Having made those observations, I am not in any way fettering the judgment of the appropriate judicial decision-maker at the appropriate time.

Permission for judicial review

20. That leaves the question of permission for judicial review. I have asked both Counsel whether there is any reason why this Court should not grasp that nettle and deal with permission for judicial review now. Mr Seifert for the Defendant invites me not to do so. In support of his position is the fact that the order made by HHJ Saffman did not, as it could have done, direct that permission be considered by this Court today. I am, however, quite satisfied – having regard to the overriding objective and in all the circumstances – that it is in the interests of justice and the public interest that I should deal with permission for judicial review today, and grant permission for judicial review. HHJ Saffman's order afforded the Defendant an opportunity to "respond to the application for interim relief". What, in the event, happen – very sensibly – was that the Defendant filed an acknowledgement of service with summary grounds of resistance, responding to the application for interim relief but also responding to the application for permission for judicial review. The grounds on which permission was being resisted in the present case overlapped, beautifully, with the grounds on which it was said that there was no serious issue to be tried. Different judges have said different things about whether the threshold of arguability for interim relief in judicial review is the same as the threshold of arguability for permission. It is necessary to proceed with caution. Caution is particularly called for bearing in mind that 'procedural bars' can be raised in relation to permission for judicial review, beyond simply the question of arguability. The present case is one in which no 'procedural bar' is raised in the acknowledgement of service and summary grounds. The basis put forward for refusing permission for judicial review are squarely the Defendant's contentions that the claim is unarguable. That is ground which I have needed to tread (as to triable issue) at this hearing. Moreover, I have reached the conclusion that the claim – by reference to those points – is not only arguable but strongly arguable. I can see absolutely no reason, still less good reason, still less one consistent with the overriding objective, why another judge on the papers should need to revisit the question of arguability and permission in the present case. Nor can I see any basis for saying there is some prejudice in my grasping the nettle and dealing with permission now. It is not as if there is a right at an oral hearing to set aside a grant of permission on the papers. The right arising in relation to an oral hearing applies to a claimant, where permission has been refused on the papers. There would be no reason, in principle, why I could not now be the allocated judge to deal with the papers following this hearing. Indeed there will be every good reason why that course would be appropriate. I repeat: the question of dealing with permission today would be very different if they were not an acknowledgement of service and summary grounds of resistance addressing the question of permission. In the circumstances of the present case, and having raised the matter of my own motion while seized of the judicial

review proceedings, and in light of the procedural flexibility in the public interest that this Court has, I am quite sure that the appropriate course is: to deal with permission for judicial review; and to grant it.

Directions and liberty to apply

21. Having granted permission for judicial review it is not, in my judgment, necessary to consider the question of special directions. The CPR rules and practice directions set out the default position applicable in a judicial review. If either party wished to invite a direction for an expedited substantive hearing in this case I would of course consider it and consider making directions. In particular, if that were something that the Defendant wished to achieve then that could be achieved now by an appropriate order. Having granted permission for judicial review I will order that the costs of the application for permission for judicial review be "costs in the case". In circumstances where the Defendant does not today seek to secure any further directions, for example for expedition, but where it is possible that further directions may be sought, I will give liberty to apply in writing on notice for further directions.

15.6.21