OUTER HOUSE, COURT OF SESSION

[2018] CSOH 100

P309/18

OPINION OF LORD WOOLMAN

In the petition of

TAPIWA ZUNGUNDE

Petitioner

for

JUDICIAL REVIEW

Respondent

Petitioner: Dailly (sol adv); Drummond Miller LLP
Respondent: Campbell; NHS Scotland Central Legal Office

3 October 2018

Introduction

[1] Four years ago the petitioner slept rough on the streets. In October 2014 he obtained a Scottish Secure Tenancy from the Glasgow Housing Association (GHA). At that time he was receiving funding from the Student Awards Agency for Scotland, together with income from low paid employment. From August 2016 onwards his sole income was Job Seeker's Allowance (JSA) of £69 per week. His rent was met in full by housing benefit. The petitioner ran into financial difficulties. He defaulted on his rent. GHA raised an action to recover possession of his flat. He entered into a repayment plan. He agreed to pay £12.75

per week to clear his rent arears. He did so even though he believed that sum to be unaffordable. Unfortunately his belief proved to be correct. He was unable to keep up with his repayments to GHA. A Sheriff granted decree of eviction on 16 October 2017. Since then the petitioner has resided in a homeless hostel in Glasgow.

The decision letter

[2] After eviction the petitioner applied to be rehoused. On 28 December 2017 he received a letter headed "Glasgow City Health and Social Care Partnership". It refused his application. The operative part of the decision letter stated, "Having considered those matters which the Act obliges me to take into account Glasgow City Council considers you to be homeless and that you became homeless intentionally". The letter contains a reference to the right of review. It states that, "you do have the right to request a review of this decision and if you wish to do so you must submit a review request to the case work office within 21 days of the date of this letter". It also suggests that the petitioner seeks independent advice from the local Citizen's Advice Bureau, Shelter Scotland or his local law centre "details of which are provided separately".

Request for review

[3] The petitioner did nothing within the 21 day period. Mr Dailly said that 'he put his head in the sand', which is a common approach for homeless persons to adopt. Eventually, however, the petitioner went to Govanhill Law Centre. On 21 March 2018 a case worker there sent a detailed letter to Angela Harkins, a social worker with GCC. The letter asked for a review of the petitioner's case to be heard out of time. It explained his financial position and enclosed an income and expenditure statement. By return email the same day

Ms Harkins replied "this is way out with the 21 day appeal period therefore accommodation will be ended today, as previously advised".

These proceedings

[4] The petitioner raised these proceedings convening Glasgow City Integration Joint Board ('the Board') as the respondent. He seeks declarator that the decision of 28 December 2017 should be quashed. He no longer seeks a specific order that he be rehoused. The Board queried whether it was the correct respondent. It obtained a letter from Mr Richard Fisher, a senior solicitor who has acted for GCC over many years. He provided his view that GCC and not the Board had legal responsibility for the decision. The petitioner took a different view and continued with the present application. There are three issues for decision. First, who has legal responsibility for the decision? Second, did the petitioner exhaust all his statutory remedies? Third, was the decision unlawful?

Statutory framework

Homelessness

[5] Part II of the Housing (Scotland) Act 1987 provides a lattice of rules about homelessness in Scotland. It imposes certain obligations on local authorities who must, in exercising their functions under the Act, have regard to any guidance given by the Secretary of State: section 37. The minister has issued the Code of Guidance on Homelessness. It states that, in determining whether an individual is intentionally homeless, the local authority should have regard to a number of factors. They include the following:

a. an applicant must have deliberately done or failed to do something which resulted in homelessness or threatened homelessness,

b. Even if the applicant seems to be homeless only because of his or her financial or other imprudence or lack of foresight, it should not be automatically decided that the homelessness was intentional.

c. It should not be assumed automatically that an applicant is intentionally homeless when they have lost their accommodation because of rent arrears. Reasons should be fully explored and decisions made as to whether arrears resulted from deliberate acts or omissions.

Responsibility for homelessness

[6] Section 14 of the Public Bodies (Joint Working) (Scotland) Act 2014 ('the 2014 Act'), introduced integration joint boards, of which the respondent is one. The Scottish Parliament sought to integrate the strategy of health and social care. In particular, it aimed to improve outcomes for patients, service users, carers and their families. It required health boards and local authorities to work together with the aim of agreeing a model of integration between them. The steps that were taken to implement these arrangements are complicated. The integration scheme delegated GCC's functions under part 2 of the 1987 Act to the Board. On 6 February 2016 there was a retransfer of functions. The Board directed GCC to carry out the duties under part II of the 1987 Act.

1. Who is legally responsible for the decision?

[7] I am satisfied that GCC was the decision maker, accordingly it should have been convened as the respondent. Only the actual decision maker can be made subject to review: *West* v *The Secretary of State for Scotland* [1992] SC 385 412 – 413 per Lord President Hope. I do not accept Mr Dailly's carefully presented argument under sections 25 and 26 of the

2014 Act that GCC acted as the Board's agent in making the decision. The Board is involved in overall strategy, not in individual decisions. It has no employees and it would have far reaching ramifications if it were it to be held liable for all decisions made under its procedures. In arriving at this conclusion that there was no relationship of principal and agent, I feel a great deal of sympathy for Mr Dailly. It is far from clear who should have been convened as the respondent. Matters were further complicated by the decision letter purporting to come from another entity altogether, Glasgow City Health and Social Care Partnership.

2. Has the petitioner failed to exhaust all other remedies?

[8] Mr Campbell argues that the petition is incompetent for a second reason. He contends that the petitioner should have made his application for review within the 21 day period, "or such long a period as the authority may allow" as set down by section 35(a) of the 1987 Act. Mr Campbell adds that the petitioner ought properly to have sought review of the decision of 21 March.

[9] The jurisprudence on this point is conveniently summarised as follows: "As a general proposition it may be said that judicial review is not available if there is an alternative means of relief open to the applicant" Clyde and Edwards *Judicial Review*, paragraph 12.01. That statement is supported by a long line of authorities stretching from *Dante* v *The Assessor for Ayr* [1922] SC 109 to RCS 58.31. It is also clear, however, that exceptional circumstances may justify a departure from the general rule: *BRB* v *The Corporation of the City of Glasgow* [1976] SC 224, *Tarmac Econowaste Limited* v *The Assessor for Lothian Region* [1991] SLT 77, *MDMH* [2014] CSOH 143. That reflects the wider contours of

judicial review. In *Ingle* v *Ingle's Trustee* [1999] SLT 650 at 654D-F, the Second Division stated:

> "Judicial review remains an equitable remedy and the court will only exercise its power when it is fair and reasonable to do so. Just to take one example to illustrate this, justice involves fairness to all parties to the litigation so that the court may well not regard a substantial injustice as occurring if the party complaining had brought it on himself by his own conduct and the result of remedying it would be unfair to the other party in the litigation."

Before arriving at a decision on this second issue it is therefore important to consider whether there is a flaw in the original decision. That may have an impact on this second question.

3. Was the original decision flawed?

[10] By way of background the petitioner did not have the benefit of independent advice until he went to Govanhill Law Centre which is a trading name of Govan Law Centre. In particular, he did not have representation before the sheriff in the eviction proceedings. The petitioner contends that a person in receipt of JSA of £69 per week could not afford to pay rent arears at the rate of £12.75 per week. As a comparison, the Department of Works and Pensions operates a third party deduction scheme for social and private landlords. It permits a maximum deduction at source of 5% of benefit entitlement to be paid directly to such a landlord from social security benefits. In the petitioner's case that would have been £3.45 per week.

[11] Turning to the decision letter itself, it is not apparent that GCC fulfilled any of the steps mentioned in the Code to investigate the cause of the petitioner's homelessness. No reasonable reader could draw that inference. Instead he or she would deduce that GCC had made an automatic assumption without inquiry, contrary to the guidance. The

Supreme Court has recently reaffirmed that adequate reasons must be provided in homelessness cases. *Nzolameso* v *Westminster City Council* [2015] UKSC 22 at paragraph 32, GCC does not satisfy that test. Its reasons were inadequate.

Conclusion

[12] I hold that not only was the original decision invalid, but that the circumstances are exceptional. That allows a departure from the normal rule that all other remedies must be exhausted. I note that the petitioner sought a review as soon as he received independent advice and that no other route is now open to him. So on the merits I find in his favour. Of course given my ruling that the respondent should have been GCC this does not avail him. I refuse the petition on that narrow point. I hope, however, that GCC reads this decision with care. It would be unfortunate if another petition had to be raised and argued on the same grounds.