Case No: J40CL138

IN THE COUNTY COURT AT CENTRAL LONDON

Central London County Court
County Court at Central London
Thomas More Building
Royal Courts of Justice
Strand
London
WC2A 2LL

BEFORE:

RECORDER MAGUIRE

BETWEEN:

NAIMA ELBHIRI — **APPELLANT**

- and -

THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA — **RESPONDENT**

Legal Representation
Mr Ian Colville (Counsel) on behalf of the Appellant
Mr Riccardo Calzavara (Counsel) on behalf of the Respondent

Other Parties Present and their status
None known

Judgment

Judgment date: 9 December 2022
(start and end times cannot be noted due to audio format)

Reporting Restrictions Applied: No

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Recorder Maguire:

1. I am going to deliver judgment in the case of Mrs Naima Elbhiri and the Royal Borough of Kensington and Chelsea. This is an appeal under Section 204 of the Housing Act 1996 (as amended) against the Respondent's review decision dated 23 June 2022 by which the Respondent determined that accommodation at Flat 33, Etchingham Court, Etchingham Park Road, London, N3 2EA, hereon referred to as 33 Etchingham Court, was suitable for the Appellant, Mrs Naima Elbhiri and her son, A[redacted] Elbhiri.

2. The specific issue on appeal is whether the Respondent, having accepted a section 202 review request from the Appellant should have followed regulation 7(2) of The Homelessness (Review Procedures etc) Regulations 2018. The Appellant's case is that regulation 7(2) was engaged but not followed.

3. As was summarised by Lewison J in *Abdikadir v London Borough of Ealing* [2022] EWCA Civ 979 at paragraph 8:

> "An applicant who is dissatisfied with the decision on review may appeal to the county court on a point of law arising from the decision: section 204(1). A point of law arises from a decision if it concerns or relates to the lawfulness of the decision: *James v Hertsmere Borough Council* [2020] EWCA Civ 489, [2020] 1 WLR 3606 at [31]. On an appeal to the county court, the court applies the same principles as those applicable to judicial review. Thus grounds of challenge extend to the full range of issues that would otherwise be the subject of an application to the High Court for judicial review. These include challenges on grounds of procedural error, the extent of legal powers(ultra vires), irrationality and inadequacy of reasons: *James v Herstmere* at para 31."

4. At the hearing before me the Appellant was represented by Mr Ian Colville and the Respondent by Mr Riccardo Calzavara. I am grateful to them both for their detailed submissions. I have considered the agreed bundle of documents, the skeleton arguments and agreed authorities so far as they relate to ground six. I remind myself from the outset that it is not my function to supplant my own findings on the decision but decide the matter on a point of law. This is a judicial review exercise, simply a question of whether the decision was made lawfully.

Grounds of appeal

5. The Appellant originally put forward six grounds of appeal. Grounds one to four challenge the decision made as to the suitability of 33 Etchingham Court. Ground 5 challenged the Respondent's Property Procurement Policy and ground six was a procedural challenge in relation to regulation 7(2) of The Homelessness (Review Procedure etc) Regulations 2018, hereon referred to as Regulation 7(2).

6. At the start of the proceedings Mr Colville made the submission that if the Court found in favour of the Appellant as regards ground six, a point which both counsel believed there was no direct legal authority on, the decision of the Appellant would be quashed. In that situation he submitted that there would, therefore, be no need to make submissions to the Court in relation to grounds one to five. Mr Calzavara was in agreement with that submission. On that basis the Court agreed that no submissions in relations to grounds one to five needed to be heard at that stage of proceedings and

using its power under CPR 3.1, the Court's general power of management, the Court stayed the proceedings in relation to grounds one to five pending the outcome of the Court's decision on ground six.

The background leading up to the review

7. I will briefly outline the facts that led up to the review. On or around 1 February 2021 the Appellant applied to the Council seeking assistance for homelessness, the 1 February Application. The 1 February Application identified that the Appellant's son, A[redacted] Elbhiri, date of birth [redacted], as a household member. On 26 February 2021 the Respondent offered the Appellant 33 Etchingham Court as temporary accommodation. On or around 1 March 2021 the Appellant moved in to 33 Etchingham Court along with her son.

8. On 26 August 2021 the Appellant made a new homeless application, the 26 August Application. She remained in 33 Etchingham Court pending determination of that application. The 26 August Application identified that the Appellant's son and adult daughter, Khadija Elbhiri, were both household members. On 28 April 2022 Khadija Elbhiri was, however, removed from the application as she had found alternative accommodation.

9. On 1 September 2021 the Respondent completed the Personal Housing Plan, the PHP, for the Appellant. Subsequently the Respondent sent the Appellant a letter stating her application had been dealt with and that as a result of that application the Respondent had a duty under section 193(2) of the Housing Act 1996 to arrange or continue to arrange temporary accommodation for her until she received a suitable offer of housing or its duty to her was otherwise discharged.

10. On 27 April 2022 the Appellant requested a review of 33 Etchingham Court's suitability, the Review Application. Detailed submissions were then made by the Appellant's solicitors including representations about the detrimental impact of the location of 33 Etchingham Court on the Appellant's son and specifically him getting to his school Ark Burlington Danes Academy in Hammersmith. It was claimed that as well as causing him to incur additional costs to get to school it took him approximately two hours to get there on time and this was leaving him exhausted. In an open letter dated 28 April 2022, Mr Ross Scaife, the head of year 12 at the Ark Burlington Danes School, raised concerns and provided details about the detrimental impact of the housing situation on the Appellants son.

11. On 5 May 2022 the Respondent agreed to accept the out of time request for the Review Application. There was then considerable correspondence between the Respondent and the Appellant's solicitors. By letter dated 23 June 2022, the Review Letter, the Appellant was notified that the Respondent's reviewing officer had concluded that 33 Etchingham Court, allocated as temporary accommodation, remained suitable.

The legal framework

12. With the exception of the operation of Regulation 7(2) the parties agreed that the legal framework forming the backdrop to the current appeal was not disputed by the parties. I am grateful to both counsel for their submissions on this area.

13. Homelessness is largely governed by part 7 of the Housing Act 1996 as amended, hereafter referred to as the Act. The Act imposes duties on local authorities to prevent homelessness and to provide assistance to people threatened with homelessness or who are actually homeless.

14. The starting point is section 184 of the Act. Broadly where an authority has reason to believe that a person may be homeless or threatened with homelessness it is under a duty to make inquiries necessary to satisfy itself - (a) whether the applicant is eligible for assistance, and (b) if so, whether any duty, and if so what duty, is owed to him or her, section 184(1).

15. On completing its inquiries the local housing authority must notify the applicant of its decision and, so far as any issue is decided against his or her interests, inform him or her of the reasons for that decision, section 184(3).

16. Under section 193(1) if the authority –

    (a) is satisfied that an applicant is (i) homeless and eligible for assistance, and (ii) has a priority need;

    (b) is not satisfied that he or she has become homeless intentionally, and

    (c) the authority's relief duty has come to an end in relation to that person;

    the authority will have a full housing duty. The full housing duty then continues until it ceases by virtue of the satisfaction of certain prescribed events in section 193 itself.

17. Under section 193(2) that full housing duty requires the authority to secure that accommodation is available for occupation by the applicant.

18. Section 206 then provides that a housing authority may discharge its duties only in the following ways -

    > "a) by securing that suitable accommodation provided by them is available,
    >
    > b) by securing that he obtains suitable accommodation from some other person, or
    >
    > c) by giving him such advice and assistance as will secure that suitable accommodation is available from some other person". Section 206 (1).

19. Section 202 provides applicants with the right to request a review of certain decisions made by housing authorities. These reviewable decisions include under section 202(1)(f):

    > "any decision of a local housing authority as to the suitability of accommodation offered to him in discharge of their duty under any of the provisions mentioned in paragraph (b) or (e) or as to the suitability of accommodation offered to him as mentioned in section 193(7)."

20. Under section 202 (3) such a review request

"must be made before the end of the period of 21 days beginning with the day on which he is notified of the authority's decision or such longer period as the authority may in writing allow.".

21. Section 203 of the Act provides for the procedure that is followed on such a review. Under Regulation 7(2) if the reviewer considers that there is a deficiency or irregularity in the original decision, or in the way in which it was made, but he or she is still minded to make a decision against the interests of the applicant on one or more issues (a) the reviewer must notify the applicant of this and the reasons why, and (b) the applicant, or someone acting on his or her behalf, may make representations to the reviewer. This is conventionally called a "minded to find" letter. Section 203(3) then goes on to provide that the authority shall notify the applicant of the decision on the review.

22. If the decision on review is to confirm the original decision on any issue against the interests of the applicant, section 203(4) requires the authority to notify the applicant of the reasons.

23. By virtue of section 204 of the Act the applicant has a right to appeal to the county court on a point of law if he or she is dissatisfied with a decision of the review. On an appeal to the county court the court applies the same principles as those applicable to judicial review. These include challenges on grounds of procedural error, the extent of legal powers, irrationality and inadequacy. Section 204 (3) then empowers the county court to make such an order confirming, quashing or varying the decision as it thinks fit.

The appeal

24. Pending the outcome of this hearing the Appellant appealed on one ground, namely that when reaching its decision the Respondent had breached Regulation 7(2).

25. Turning then to Regulation 7(2). Regulation 7(2) provides as follows:

> "If the reviewer considers that there is a deficiency or irregularity in the original decision, or in the manner in which it was made, but is minded nonetheless to make a decision which is against the interests of A on one or more issues, the reviewer must notify A -
>
> (a) that the reviewer is so minded and the reasons why, and
>
> b) that A, or someone acting on A's behalf, may make representations to the reviewer orally or in writing, or both orally and in writing."

26. In the case of *Hall v London Borough of Wandsworth* [2004] EWCA Civ 1740 the Court of Appeal had to consider whether a reviewing officer should have found a deficiency or irregularity in the earlier decision triggering the obligation to give advance notice of his intended decision under what was then regulation 8(2) of the Allocation of Housing and Homelessness Review Procedure Regulations 1999 and which is now Regulation 7(2). When delivering the leading judgment in that case Carnwath LJ provided what I consider to be a relevant insight into the purpose of

Regulation 7(2) when he described the thinking behind what is now Regulation 7(2) but, as mentioned, at that time was regulation 8(2).

27. In paragraph 26 he says:

> "The thinking behind such a requirement seems to be that a bare right to make representations on the first decision will not be sufficient, if that decision was itself flawed in some respect, so that it does not represent a full and reliable consideration of the material issues. In that event the applicant's rights are reinforced in two ways: first, by requiring the reviewing officer to give advance notice of a proposed adverse decision and the reasons for it; and, secondly, by allowing the applicant to make both written and oral representations on it."

28. Carnwath LJ helpfully considered what was meant by a deficiency. At paragraph 29 he said:

> "The word 'deficiency' does not have any particular legal connotation. It simply means 'something lacking'. There is nothing in the words of the rule to limit it to failings which would give grounds for legal challenge. If that were the intention, one would have expected it to be stated expressly. Furthermore, since the judgment is that of the reviewing officer, who is unlikely to be a lawyer, it would be surprising if the criterion were one depending solely on legal judgment. On the other hand, the 'something lacking' must be of sufficient importance to the fairness of the procedure to justify an extra procedural safeguard. Whether that is so involves an exercise of 'evaluative judgment' ... on which the officer's conclusion will only be challengeable on *Wednesbury* grounds."

29. Mr Colville submitted that in his case no reasonable housing authority would not have served a Regulation 7(2) notice on the Appellant given the new facts that had emerged since the Appellant had been allocated 33 Etchingham Court. One of those pieces of evidence was an open letter dated 28 April 2022 from Mr Ross Scaife, the head of year 12 at the Applicant's son's school. In that letter Mr Scaife outlines a number of issues which the housing situation had created for her son. I quote from that letter:

> "At the start of this year A[redacted]'s mum informed me of their current living arrangements. Living in Finchley means that Abdulrahim needs to travel for roughly two hours taking three buses to get to school. This makes it very difficult for him to manage his time as travelling to and from school takes up so much of his time. As a result of this he does not have time to get ready at home and we've had to facilitate for him to get changed and ready at school. It has also meant that he does not part in after school extra-curricular activities due to the concern of the time he will get at home. This is not ideal as having extra-curricular experience is essential for students when applying to universities and degree apprenticeships especially in such a competitive market place. Due to the time pressures and difficulties of getting to school A[redacted] is often late to school despite leaving home very early. This is taking time away from the classroom and means he has to work harder to catch up.

> Further, aside from the academic impact of Abdulrahim's housing situation I am very concerned on how this will affect his mental health. Living in these conditions is not healthy for anyone especially someone going through adolescence. With such considerable travel time from school he is spending very little time at home with his friends. I am worried how this will impact on his emotional development and levels of support from family and friends. At school he is constantly tired and fatigued meaning he is not performing at his best. It is inevitable that this will be long lasting damage on his mental health if this situation is not rectified soon."

30. Mr Colville also sought to demonstrate that these new pieces of information and these areas had not been previously included or considered in the assessments made by the Respondent. He pointed to a number of different pieces of evidence. Firstly, he looked at the 1 February Application which, in his view, did not address the effects of A[redacted] travelling to and from school from 33 Etchingham Court, in fact that did not even seem to show any reference being made to it. Even if the 1 February Application was to be considered completely irrelevant in this decision he also looked at the 26 August Application and at the PHP, neither of which in his view properly addressed this situation.

31. Having made his submissions to demonstrate that the new information was relevant and had not been previously considered by the Respondent, Mr Colville then referred to the text of the review letter to demonstrate that the reviewing officer had considered this information as part of his review, i.e. that he was aware of it. In the review letter the reviewing officer noted the history of the application and at paragraph 8 he summarised the new submissions that the Appellant had made with regard to why 33 Etchingham Court was unsuitable for her. He then described the relevant statutory provisions. He considered the Appellant's son's educational needs in paragraphs 37 to 53 of the review letter and included much of the text of the open letter that had been sent from the Appellant's son's head of year. It is clear that he was aware of the new information. Mr Calzavara did not dispute that additional information nor dispute Mr Colville's submission that it would have shown an irregularity or deficiency.

32. Mr Colville then went on to consider whether Regulation 7(2) applied in this situation. He submitted that it did and in support of that submission he directed the Court to the Court of Appeal decision in *London Borough of Wandsworth v NJ* [2013] EWCA Civ 1373. In that case the Court of Appeal also had to consider whether when reaching a review decision a reviewing offer had complied with what was then regulation 8(2) of the regulations of the Allocation of Housing and Homelessness Review Procedures 1999 but which is now Regulation 7(2).

33. In *NJ* Lewison J reviewed the authorities on the current regulation. I refer in particular to the passage in his judgment in paragraph 70 and 71 onwards where he sets out his views. Para 70:

> "In my judgment the following propositions are established by authority:
>
> i) Regulation 8(2) imposes two mandatory duties on a reviewing officer: ... a duty to consider whether there is a deficiency in the original decision and (b) if the reviewing officer considers ... there is a deficiency a duty to

serve a 'minded to find' notice. *Lambeth London Borough Council v Johnson* [2008] EWCA Civ 690.

ii) Whether a reviewing officer has complied with these duties is capable of challenge on public law grounds: *Hall v Wandsworth London Borough Council* [2004] EWCA Civ 1740.

iii) The reviewing officer should treat regulation 8(2) as engaged whenever he or she considers that an important aspect of the case was either not addressed, or not addressed adequately, by the original decision-maker. *Hall v Wandsworth Borough Council* at para 30.

iv) That inadequacy may arise because of a subsequent [challenge] in the facts which was unknown to the original decision-maker in which event the original decision may have become deficient. *Banks v Kingston Upon Thames Royal London Borough Council* [2008] EWCA Civ 1443.

v) The deficiency must be one that is of sufficient importance to the fairness of the procedure as to justify an extra procedural safeguard. *Hall & Wandsworth London Borough Council* at [29]. Whether a deficiency has this character is to be tested by asking whether further representations could have made a difference to the decision that the reviewing officer had to make. *Banks v Kingston Upon Thames Royal London Borough Council* at [72]. If further representations could have made no difference to the decision then it is not a relevant deficiency. *Ibrahim v Wandsworth London Borough Council* [2013] EWCA Civ 20 .... But the reviewing officer must be careful not to prejudice that issue. *Mitu v Camden London Borough Council* [2011] EWCA Civ 1249.

71. In light of those principles I would hold as follows:

i) Where new facts emerge that relate to an important issue in the case the reviewing officer must consider whether those new facts expose the deficiency in the original decision.

ii) They will expose a deficiency in the original decision if in ... light of those new facts that issue was either not addressed [nor] adequately addressed.

iii) Although it will usually be the case that there was a deficiency in the original decision if the reviewing officer decides to uphold it on different grounds, there may yet be a deficiency is the reviewing officer decides to uphold the decision on the same grounds.

iv) If the reviewing officer comes to the conclusion that there was a deficiency (in the extended *Banks* sense) in the original decision but nevertheless is minded to uphold it (whether on the same or ... different grounds) he or she must serve a 'minded to find' notice.

v) If the reviewing officer concludes that there is no deficiency, that conclusion is susceptible to judicial review on the usual public ... grounds."

34. Mr Colville submitted to the Court that given the facts if the Respondent's reviewing officer had applied the principles described by Lewison J when he was making his review decision he would have seen that there was a deficiency or irregularity in the original decision or in the manner in which it is made. In his view this is because where new information has emerged, here for example the information contained in the open letter from Abdulrahim's head of year, which is clearly important to the suitability review he was bound to consider it. It would have been clear to the reviewing officer that the more recent additional information had not been considered previously and was relevant.

35. In his view given that the reviewing officer was minded nonetheless to make a decision that was against the interests of the Appellant on one or more of the issues the reviewing officer was therefore obliged under Regulation 7(2) to notify the Appellant that he was so minded and the reasons why and that the Appellant, or someone acting on the Appellant's behalf, may make representations to the reviewer orally or in writing or both orally and in writing. In this case the Appellant claims that the reviewing officer failed to do that.

36. Mr Colville noted the absence of any language in the review letter stating that the reviewing officer had in any case considered Regulation 7(2) but had concluded no irregularity or deficiency existed such that Regulation 7(2) was not engaged. That wording was not there.

37. Mr Calzavara did not dispute the existence of the new information or the point around deficiencies and irregularities, his submission was a very different one. He submitted that Regulation 7(2) did not apply at all so even if there was this deficiency, which he did not dispute, it was a none point because simply put Regulation 7(2) was not engaged. He submitted that this was because whilst in the ordinary course of events an authority will on review have an original written decision which it is considering and in respect of which the additional safeguard provided by Regulation 7(2) might arise that was not the position in this case.

38. Mr Calzavara submitted that as this was a suitability related decision there was no need for the Respondent to provide an underlying written decision. In making that submission, with which Mr Colville agreed, he relied on the decision of the Court of Appeal in *Akhtar v Birmingham Council* [2011] EWCA Civ 383 and specifically paragraph 46 in which Etherton J held:

> "So far as concerns the letter of 12 August 2009, I reject Mr Nicol's submission that, as a matter of principle, every offer letter should give reasons explaining why the offer property is considered to be suitable and reasonable for the applicant to accept. It is obviously implicit in every such offer that the housing authority considers the property to be suitable in all material respects, including location, size and configuration. I cannot see that any purpose would be served by a bald statement to that effect."

39. Developing his submission Mr Calzavara explained that there were therefore no reasons that the Respondent's reviewing officer might consider and in respect of which the said additional procedural safeguard might be afforded or, put in other words, that the additional procedural safeguard provided in the form of Regulation 7(2) only engages where there is a written reasoned adverse decision.

40. Taking Mr Calzavara's submission through to its logical conclusion this would mean that the review officer would be approaching his review decision in a vacuum. It would therefore effectively deny an applicant that has made a review request under section 202(1)(f) for example of the benefit of the right to make submissions to the reviewing officer under Regulation 7(2).

Findings

41. I accept Mr Calzavara's submission that as this was a suitability related decision there was no need for the Respondent to provide a reasoned decision as to why it considered 33 Etchingham Court to be suitable. I do not, however, accept Mr Calzavara's submission that because the Respondent was not required to do so means, by definition, that there was no basis for that decision which the reviewing officer could refer back to when carrying out his review. I am, on that count, more persuaded by Mr Colville's submission that decisions like this are not made in a vacuum and that instead they are based on reasons which local housing authorities carefully put together. The existence of reasons for a decision does not, in my view, depend on whether or not they are included in any written notification to an applicant.

42. I am further troubled by Mr Calzavara's submission because Regulation 7(2) is drafted, in my view, clearly and without ambiguity. It does not state that the requirement only applies when the decision being reviewed is one which required written reasons to be given to the applicant. Nor does it contain an express exception to the effect that a Regulation 7(2) notice is not required when the decision is not one which required a written reasoned decision to be given to the applicant.

43. The only restriction which Parliament did include on the engagement of Regulation 7(2) was to limit it to situations where there is a decision that is adverse to the applicant. To imply an additional limitation into the drafting of Regulation 7(2) whereby it could only apply where a reasoned decision was given would, in my view, be to seek to avoid the procedural fairness that parliament intended to be provided by this regulation. The text of Regulation 7(2) suggests that exactly as Carnwath LJ stated in *Hall v London Borough of Wandsworth* that it was intended to provide a safety net to applicants who wanted reviews of any of the decisions specified in section 202(1).

44. Given that I turn to consider whether Regulation 7(2) was breached, namely whether there was a procedural impropriety. I am bound to follow the guidance given by the Court of Appeal by Lewison LJ in the *NJ* case and based on that guidance and the submissions of counsel I believe that it was. Here it was made clear by Mr Colville with whom I agree that the new facts emerged that related to an important issue in particular the impact of the location of 33 Etchingham Court on A[redacted], the text of the letter left me in no doubt that this was known by the reviewing officer. Following the guidance given by Lewison LJ in *NJ* this required the reviewing officer to consider whether those new facts exposed a deficiency in the original decision. In my view if he had done that it would have been clear to him that there was a deficiency and he would have provided a Regulation 7(2) notification.

45. For these reasons the appeal succeeds. In my view this is a case that should be remitted back to the Respondent to conduct a further review with due consideration being given to the engagement of regulation 7(2).

46. I invite the parties to draw up an appropriate order.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

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