Neutral Citation Number: [2021] EWA Civ 1772

Case No:B5/2021/0056

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
His Honour Judge Hellman
G40CL169

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 November 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE MOYLAN
and
LORD JUSTICE NUGEE

- -

Between :

SONGUL CIFTCI	**Claimant/ Appellant**
- and -	
THE MAYOR AND BURGESSES OF LONDON BOROUGH OF HARINGEY	**Defendant Respondent**

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- -

Edward J Fitzpatrick (instructed by **Tyrer Roxburgh Solicitors**) for the **Appellant**
Stephen Evans and David Mold (instructed by **London Borough of Haringey Corporate Legal Services**) for the **Respondent**

Hearing date : 18 November 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10am on Friday 26 November 2021.

Lord Justice Lewison:

The issue

1. The issue on this appeal is whether the London Borough of Haringey were entitled to conclude that Ms Ciftci was intentionally homeless. That, in turn, depends on whether Haringey were entitled to conclude that her deliberate decision to give up secure accommodation was not to be disregarded on the ground that she was unaware of a relevant fact; and had acted in good faith. HHJ Hellman decided that they were.

2. In a nutshell, Mr Fitzpatrick, who argued this appeal on Ms Ciftci's behalf, says that Haringey made insufficient inquiries into the reason why Ms Ciftci was homeless. If they had, they would have discovered at least the possibility that she was homeless because her plans for future employment and accommodation had failed to work out, even though they were based on genuine investigation. If that had been found, then Ms Ciftci's decision to give up settled accommodation would not have amounted to intentional homelessness because she would have been unaware of a relevant fact and had acted in good faith.

3. At the conclusion of the argument we decided to dismiss the appeal, with written reasons to follow. These are my reasons for joining in that decision.

The legislative framework

4. Part VII of the Housing Act 1996 imposes duties on local authorities to assist the homeless. The highest form of duty is owed to a person who is homeless and has a priority need; but who has not become homeless intentionally: section 193. Section 191 defines what is meant by becoming homeless intentionally. It relevantly provides:

> "(1) A person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy.
>
> (2) For the purposes of subsection (1) an act or omission in good faith on the part of a person who was unaware of any relevant fact shall not be treated as deliberate."

5. Before reaching a conclusion about what duty (if any) is owed to an applicant the local authority must make such inquiries as are necessary to satisfy themselves whether any duty, and if so what duty, is owed under Part VII of the Act: section 184 (1). If the local authority is satisfied that an applicant is homeless and eligible for assistance, they must assess the circumstances that caused the applicant to become homeless: section 189A (2) (a).

6. If an applicant for assistance is dissatisfied with the local authority's decision, they may ask for a review of that decision: section 202. When a request for a review is made the housing authority must notify the applicant of the right to make representations: Homelessness (Review Procedure etc) Regulations 2018 reg. 5. If the reviewing officer

considers that there is a deficiency or irregularity in the original decision, but is minded nonetheless to make a finding which is against the applicant's interest on one or more issues, they must notify the applicant (a) that the reviewer is so minded and the reasons why; and (b) that the applicant or someone on their behalf may make oral or written representations: Homelessness (Review Procedure etc) Regulations 2018 reg 7. This is generally known as a "minded to find" letter. The review decision must give reasons if the review confirms the original decision on any issue adverse to the applicant: section 203. The applicant then has the right to appeal to the county court on any point of law arising from the decision: section 204. On an appeal, the court applies the principles of judicial review.

7. An appeal from the county court to this court is, technically, a second appeal; but the focus for this court is whether the review decision was lawful. The facts are for the reviewing officer. The court has no independent fact-finding function (*R v Hillingdon LBC ex p Pulhofer* [1986] AC 484); although a finding of fact may be challenged on public law grounds: *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, [2006] 2 AC 430, 462.

The case law

8. The apparently simple words of section 191 (2) have become encrusted by case law. In *Najim v Enfield LBC* [2015] EWCA Civ 319, [2015] HLR 19 Longmore LJ said at [32]:

> "… the relevant fact of which a tenant is unaware must, in my view, exist at the time of the deliberate act or omission on his part. The subs.191(2) is intended to deal with genuine mistake or misapprehension of existing fact not with future events which may or may not occur."

9. In *Afonso-da-Trindade v Hackney LBC* [2017] EWCA Civ 942, [2017] HLR 37 this court confirmed that *Najim* was correctly decided. Nevertheless, a simple division between present fact and uncertain future events is not always possible. As Staughton LJ put it *in R v LB Ealing ex p Sukhija* (1994) 26 HLR 726, 731:

> "It is very often possible to dress up some possible or future event as an existing fact, and in some cases it is legitimate to do so."

10. As the case law has developed it has reached the following position, as Sales LJ explained in *Afonso-da-Trindade* at [23]:

> "[The authorities] all indicate that when an expectation regarding what might happen in the future is falsified, what the court has to look for when assessing whether the applicant was "unaware of any relevant fact" is an active and informed understanding of the applicant, at the time she does or omits to do something within the scope of s.191(1), of the *current* prospects in relation to that expectation working out as anticipated, where in fact (as judged objectively at that time) there was no good foundation for the applicant's assessment of those prospects." (Original emphasis)

11. He added at [26]:

> "Accordingly, an applicant who seeks to bring herself within s.191(2) where the future has not worked out as expected by her, has to show that at the time of her action or omission to act referred to in s.191(1), she had an active belief that a specific state of affairs would arise or continue in the future based on a genuine investigation about those prospects, and not on mere aspiration. Her belief about her current prospects regarding the future can then properly be regarded as belief about a current relevant fact (the apparent good prospects that the future will work out as she expects), such that if that belief can be seen to be unjustified by what a fully informed appreciation of her prospects at the time would have revealed, her mistake will qualify as unawareness of a relevant fact for the purposes of s.191(2) ."

12. In *Afonso* the applicant left settled accommodation in Africa. She came to England to live with her sister because medical treatment for her daughter would be better here. After a few months, her sister's landlord terminated her sister's tenancy because he wanted to refurbish the property, with the consequence that the applicant was homeless. The applicant had not agreed with her sister how long she could stay; and had no clear understanding about how long she could remain with her. The reviewing officer decided that she had come to England "on a wing and a prayer"; and further decided that the fact that she did not fully explore with her sister the nature and extent of the accommodation she would be providing did not amount to a genuine investigation. This court held that the reviewing officer was entitled to come to the conclusion that he did.

13. Other decided cases illustrate that statement of principle. I mention one of them because it is the source of a vivid phrase that the reviewing officer used in the course of the review decision. In *Aw-Aden v Birmingham City Council* [2005] EWCA Civ 1834 Mr Aw-Aden left settled accommodation in Belgium to look for work in England. The council found that he was intentionally homeless because he had come to England without having made any prior arrangement to secure settled accommodation. He asserted that he was unaware of a relevant fact, namely the true prospect of being able to find work in the Birmingham area and with it the means to pay for suitable accommodation for himself and his family. This court held that an appreciation of the prospect of future housing or future accommodation could amount to a relevant fact provided it was sufficiently specific; and provided it was based on some genuine investigation and not mere aspiration. In so doing this court approved the decision of Carnwath J in *R v Westminster City Council ex p Obeid* (1996) 269 HLR 389. Maurice Kay LJ said at [11]:

> "What is advanced as "relevant fact" lacks the necessary specificity referred to by Carnwath J. Although the appellant's intentions were formed in good faith, his prospects of obtaining suitable employment here when the Belgian accommodation was given up rested on little more than a wing and a prayer. It cannot be said that the original decision-maker or the Review Panel fell into legal error by failing to invoke section 191(2) in favour of the appellant."

14. The ultimate question for the reviewing officer is whether the applicant is intentionally homeless. The asserted fact of which the applicant is said to be unaware must be a "relevant" fact. It must, therefore, be relevant to the question that the reviewing officer is considering. In other words, it must have a bearing on the reason why the applicant is homeless.

15. No doubt that is why, in *O'Connor v Kensington & Chelsea RLBC* [2004] EWCA Civ, 394, [2004] HLR 37 Sedley LJ said at [30]:

> "Without attempting an exhaustive definition, "any relevant fact" must include, if it is not confined to, facts which in the event have brought about the applicant's homelessness."

16. In similar vein, although dealing with "good faith" in section 191 (2), in *Ugiagbe v Southwark LBC* [209] EWCA Civ 31, [2009] PTSR 1465 Lloyd LJ said at [6]:

> "The "good faith" applies to the act or omission, and must be in some way related to the statutory consequence, that is to say whether the person is or is not to be treated as intentionally homeless."

17. Mr Fitzpatrick accepted that the same approach applied to deciding whether something is or is not a relevant fact. The requirement of some form of causative effect is reinforced by section 189A (2) (a) which requires the local authority to assess the circumstances "that caused the applicant to become homeless".

18. It is necessary to say something more about job prospects. The cases in which an appreciation of job prospects have been held to be potentially relevant facts are cases in which the applicant has shown (or at least asserted) a belief that the job in question would permit them (even if in due course) to secure future accommodation for themselves. In *R v London Borough of Hammersmith ex p Lusi* (1991) 23 HLR 260 the applicants moved to Turkey with the intention of finding permanent and suitable accommodation there if and when earnings from a proposed business venture permitted them to do so. The venture failed and they returned to England. It was the failure of the venture (and the consequent lack of earnings) that caused them to be homeless. In *R v Exeter City Council ex p Tranckle* (1993) 26 HLR 244 the applicants had moved to a pub which they intended to run as a business. They were advised that although the pub had been neglected and had lost a lot of trade, it could be turned into a profitable venture. But the business failed, and they were unable to service their debts. This court held that the potential profitability of the business was a relevant fact; and that the applicants had been unaware of the poor prospects for the pub. Their inability to pay their debts was the cause of their homelessness. In *Sukhija* the applicant had come from Bangladesh to England. Her plan was to stay with her parents until such time as she could afford suitable accommodation for her and her children, which she expected to do once she had found a job. Before travelling to the UK her parents had told her that there would be no difficulty in her staying with them until she found her own accommodation, and there was no deadline on the period for which she could stay. Unfortunately, she could not find employment. The reason her appeal failed was that her plan was a question of hope rather than facts. But there was, at least, an articulated connection between the lack of employment and the cause of her homelessness.

19. The duties placed on local authorities under Part VII of the Housing Act 1996 are duties relating to homelessness; not duties relating to unemployment. Accordingly, an appreciation of future job prospects is only relevant in so far as it explains why an applicant is homeless. That is why the reviewing officer in this case was correct to say an applicant's employment situation is "not necessarily" relevant to her housing situation. It may be, if there is sufficient linkage between the two.

The facts found by the reviewing officer

20. Ms Ciftci is a single parent. She is also disabled. She is a double amputee. She has prosthetic legs; and walks with crutches.

21. Between 2007 and the end of January 2019 Ms Ciftci (and latterly her son) had accommodation consisting of a 2-bedroomed self-contained ground floor flat in Switzerland. Her tenure of that flat was equivalent to an assured tenancy. She was not in arrears with the rent; and the flat was affordable. In terms of tenure, affordability, size, location, state of repair and accessibility, it was suitable in every way.

22. At the end of January 2019 Ms Ciftci gave up that flat. She arranged for the tenancy to be taken over by someone else and came, with her son, to the UK. She had no secure accommodation within the UK. Instead she and her son (and their dog) slept on a sofa-bed in the home of a family friend. She was asked to leave in October 2019 and applied to Haringey on the ground that she was homeless.

23. The reviewing officer considered that the cause of Ms Ciftci's homelessness was that she had given up her flat in Switzerland. That flat was accommodation which it was reasonable for her to have continued to occupy; and if she had not surrendered it would have continued to be available to her. The reviewing officer took the view that, on the face of it, it was reckless for Ms Ciftci to have given up that flat in order to move abroad to sleep on someone's sofa-bed.

24. He therefore proceeded to consider why Ms Ciftci had moved, and whether the reasons for her move justified "such a rash decision".

25. Ms Ciftci's account was that she had lost her job in Switzerland and could not find another one. She was struggling with her disability and felt that her mental health was deteriorating. She had no support in Switzerland and she did not want to approach social services in Switzerland in case they removed her child from her custody. The reviewing officer did not accept this account. He pointed out that Ms Ciftci had no mental health diagnosis; and that she had planned her move well enough to find a new tenant for her Swiss flat. He found that the social welfare system and health care in Switzerland was superior to that in the UK; and that Ms Ciftci's assertion that her child might be taken into care had no basis.

26. He did, however, accept Ms Ciftci's account that she moved to England because she had been told by her sister that she could stay with a family and that there was a job in the UK for her. The job that her sister had found for her was at Rainbow Meats. But it was short-lived and Ms Ciftci was unable to do the work because of her disability. The accommodation was with the Tosun family and amounted to being able to sleep on a sofa-bed with her son and their dog.

27. The reviewing officer stated that "you did not make sufficient enquiries regarding the nature of the work and whether you would be capable of doing it." He went on to say:

> "While this is not necessarily relevant to your housing situation it demonstrates that you did not make sufficient planning in coming to the UK regarding employment or housing. Having been mindful enough to comply with your tenancy agreement and find an alternative tenant to take over the contract for [the Swiss flat] you then came to the UK "on a wing and a prayer," expecting that a sofa bed in someone's living room and a job that you knew little about would be suitable alternative for a settled accommodation that you had resided in since 2012."

28. The reviewing officer then considered section 191 (2) expressly. He found that Ms Ciftci's deliberate act was surrendering her tenancy in Switzerland. Having posed the question whether she was unaware of a relevant fact, he said:

> "I am satisfied that you were fully aware of the need to find settled accommodation before relinquishing your tenancy. You would know that moving into someone's living room with a child and a dog, and making the property overcrowded would be precarious and temporary."

29. He therefore concluded that Ms Ciftci was aware of all relevant facts. Nevertheless, he went on to consider whether Ms Ciftci had acted in good faith. As to that, he said:

> "I am satisfied that you have not acted in good faith. Despite being fully aware of the consequences of acting in surrendering your settled accommodation [in the Swiss flat] you continued to do so. This despite having the capability to act appropriately."

30. So he concluded that Ms Ciftci was intentionally homeless.

The duty to investigate

31. Although Mr Fitzpatrick had criticisms of the way in which the reviewing officer expressed himself, the real thrust of the appeal is that he had failed to make sufficient enquiries; and that if he had, he would (or at least could) have found that Ms Ciftci's plan was that she would stay in the accommodation with her sister's friends for a period of time and then when her finances allowed move to alternative accommodation. Her misappreciation of the nature of the job and her ability to do it was a relevant fact of which she was unaware.

32. As noted, section 184 requires the local authority to make such inquiries as are necessary to satisfy themselves whether any, and if so, what duty is owed to the applicant. That duty will include consideration of the effect of section 192 (2) even if it has not been specifically raised, if it is sensibly capable of arising on the facts: *F v Birmingham CC* [2006] EWCA Civ 1427, [2007] HLR 18 at [17]. But there is no such duty outside the circumstances of obviousness or circumstances in which it is plain that the housing authority has been put on warning as to something that might arise and merit consideration under section 192 (2): *Aw-Aden* at [12](2).

33. In the present case the reviewing officer did explicitly consider (a) whether there was a relevant fact of which Ms Ciftci was unaware and (b) whether she acted in good faith. So there can be no real complaint about a failure to consider the relevant questions. That is why Mr Fitzpatrick's real complaint, as it seems to me, was the investigation was not thorough enough.

34. The duty is not a duty to make all possible inquiries: it is a duty to make necessary inquiries. The general parameters of a public body's duty to inquire was summarised by this court in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647 at [70]. That part of the summary which is relevant for present purposes is as follows:

> "First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge… , it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken…. Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient."

35. The same approach applies to inquiries made under Part VII of the Housing Act: *R v Kensington and Chelsea LBC, Ex p Bayani* (1990) 22 HLR 406; *Cramp v Hastings BC* [2005] EWCA Civ 1005, [2005] HLR 48 at [58]; *Williams v Birmingham City Council* [2007] EWCA Civ 691, [2008] HLR 4. Moreover, since an applicant dissatisfied with an initial decision has the right to a review (which entails at least two opportunities to make representations if the review decision is likely to be adverse to them), the court should be wary of imposing on the reviewing officer a duty to inquire into matters that were not raised: *Cramp* at [14].

36. In the present case, officers made at least 10 phone calls investigating Ms Ciftci's situation; interviewed her, and engaged in correspondence with her. Following the initial decision that she was intentionally homeless, Haringey gave her the opportunity to make further representations about why that was not the case. On 11 March 2020 they then sent her the "minded to find" letter required by the regulations, and again invited yet further representations. The "minded to find" letter said that it was apparent that Ms Ciftci had "made no sufficient plan" to attain settled accommodation; and had acted "on a wing and a prayer" hoping for the best. It further stated that she was unaware of relevant facts due to her "own lack of planning or investigation". Thus the question what investigation or planning Ms Ciftci had made before giving up her Swiss flat was squarely raised. She had the opportunity to refute that assertion, but did not do so. The time for making representations was extended twice. Originally it was set as 1 April 2020 and ultimately extended to 29 May 2020. Even after having received representations on the last day possible, the reviewing officer then sent Ms Ciftci a questionnaire to answer about the circumstances in which she left Switzerland. The

questions were properly focussed and concentrated on the main issues. One of those questions was what plans she had made before coming to the UK for housing and work. It will be recalled that the asserted lack of planning and investigation was one of the points raised in the "minded to find" letter. She answered:

> "I knew I have a family to help me and my sister find me a job before I come to UK, I knew I had a job a friend to stay with and family to help and support me."

37. She was also asked why her plans did not work out. Her answer was that the Tosuns had asked her to leave because when she removed her prosthetic legs and moved about the living room on her knees it was upsetting for their children. She did not mention the loss of her job.

38. As Mr Evans submitted on behalf of Haringey, there was simply no trigger in any of the information supplied by Ms Ciftci to alert Haringey to the real possibility that the reason why she gave up her settled accommodation in Switzerland was that she had an active belief that a specific state of affairs (i.e. her continuation in the job that her sister had found) would arise or continue in the future based on a genuine investigation about those prospects, and not on mere aspiration; let alone that continuation in that job would enable her to find accommodation in due course.

39. Bearing in mind that it is for the applicant to show that she falls within section 191(2) (see *Afonso-da-Trindade* at [26]), I do not think that the reviewing officer can be criticised for not having made further inquiries. This is not, in my judgment, a case in which it could be said that no reasonable reviewing officer possessed of the material that Ms Ciftci provided (after inquiry) could suppose that the inquiries they had made were sufficient. I reject this ground of criticism.

Procedural unfairness?

40. Mr Fitzpatrick also argued that what was said about Ms Ciftci's job in the review decision was procedurally unfair because it had not been articulated in the "minded to find" letter. The reason for the difference between the two was that the questionnaire sent to Ms Ciftci between the "minded to find" letter and the review decision had asked her about the reasons why she left Switzerland; to which she replied that she had a job. The procedure applicable to a review decision is that the applicant is given one chance to make further representations after the "minded to find" letter; which will itself have been preceded by the initial decision which is the subject of review. Mr Fitzpatrick's submission in effect would require the reviewing officer to send a "minded to find" letter and then, having received representations in response to that letter, send another "minded to find" letter before coming to a decision.

41. I do not consider that it was procedurally unfair for the reviewing officer to make a decision based on the material that had been supplied.

Application to the facts found

42. The first relevant test to apply is, in my judgment, that stated by Sales LJ in *Afonso-da-Trindade*. In other words the question is: was Ms Ciftci's expectation about the future an "active and informed understanding" at the time when she gave up her Swiss flat?

More particularly, did she have an active and informed understanding of her future housing prospects? If not, then her expectations do not amount to a fact at all.

43. The second is whether Ms Ciftci's loss of her job was relevant to her homelessness. If, not, then even if there is a fact, it is not a relevant one.

44. In the present case, Ms Ciftci never made a link between the job for which she came to England and the prospect of future accommodation. All that she said was that her sister had found her a job and a family that she could stay with. There was no evidence that she had made any inquiry into the nature of the job, as opposed to simply relying on her sister. She never said that her expectation was that the income from that job would enable her to find other accommodation. In answer to the question why her plans failed, Ms Ciftci's reply did not mention her job at all. In his skeleton argument Mr Fitzpatrick submitted that:

> "It appears that the plan was that she would stay in the accommodation with her sister's friends for a period of time and then when her finances allowed move to alternative accommodation."

45. If Ms Ciftci *had* said that, then the loss of her job (or more accurately her alleged mistake about the sustainability of the job) might have been a potentially relevant fact. But that is not what she told Haringey. She never suggested that the plan was what Mr Fitzpatrick said that it appeared to be. There was no articulated plan at all. All that she had done was to look at the short term.

46. Nor did the reason she was asked to leave the Tosuns have anything to do with the loss of her job. It is not, for example, suggested that she was required to pay anything to the Tosuns, still less that the loss of her job made the accommodation with them unaffordable. As HHJ Hellman said, the alleged link between the job and her accommodation plans was first raised in the course of the appeal to the county court. The essence of the grounds of appeal advanced in this court majored on the alleged link between the job and Ms Ciftci's prospects of accommodation. But that is not the way that she presented to the Council; and it is not borne out by the facts. In those circumstances, it is not possible to see what *relevant* fact relating to her job (i.e. relevant to her homelessness) Ms Ciftci was unaware of.

47. All that is left, then, is that Ms Ciftci gave up her flat in Switzerland and came to England because her sister told her that she could stay with a family. The reviewing officer found that she made no further inquiries about the nature or potential duration of that arrangement. Nor (in so far as it is relevant) did Ms Ciftci make enquiries about the nature of the job that her sister had found for her. The reviewing officer was entitled to find that the arrangement with the Tosuns was inevitably a temporary arrangement only. It is impossible to see any significant difference between Ms Ciftci's situation as regards housing and those of the unsuccessful applicants in *Sukhija* or *Afonso*.

48. In my judgment, the reviewing officer was fully entitled to conclude, on the information that he had, that Ms Ciftci gave up her settled accommodation in Switzerland and came to England "on a wing and a prayer".

49. In those circumstances, the reviewing officer was also entitled to find that Ms Ciftci was not unaware of any relevant fact; and that the cause of her homelessness was her decision to give up her settled accommodation in Switzerland. The consequence of those findings was that the reviewing officer was entitled to find that Ms Ciftci was intentionally homeless.

Result

50. It was for these reasons that I joined in the decision to dismiss the appeal.

Lord Justice Moylan:

51. I agree.

Lord Justice Nugee:

52. I also agree.