Claim Number C40CL187
IN THE CENTRAL LONDON COUNTY COURT
Date:@@@

Before :

Mr. Recorder ALASTAIR WILSON QC

RAZZAQ BARAKATE

v.

LONDON BOROUGH OF BRENT

Hearing date: 10 October 2016

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Judgment Approved by the court for handing down

Representation: Timothy Baldwin, Counsel for the Claimant, Millie Polimac, Counsel for the Defendant.

Mr. Recorder Alastair Wilson QC:

1. This is an appeal to the County Court under section 204 of the Housing Act 1996 ("the Act"). The appeal relates to a decision dated 3 May 2016 by Mrs Jenina Abbeyquaye, which was itself a review of a decision dated 22 August 2014 by the London Borough of Brent ("LBB")[1]. Both decisions held that the Claimant, Razzaq Barakate ("RB") had refused an offer of suitable accommodation made on 13 August 2014, and that LBB's duty to

[1] There have in fact been two review decisions: LBB's original decision that their housing duty had ended was contained in a letter of 22 August 2014. The first review of that decision is dated 12 January 2015. An appeal to the County Court was settled (possibly as a result of the *Nzolameso* case) on the basis that a further review would take place. It is that further review, dated 3 May 2016, which is the subject of the present appeal.

house RB and his family under section 193 of the Act had accordingly come to an end.

2. The offer in question was of out of area accommodation in the Birmingham area. RB considers that accommodation so far from Brent was unsuitable because of its effects on his employment and on his daughter Asal's educational needs. In his Grounds of Appeal he sets out various alleged deficiencies in the Review Decision now under appeal.

3. In *Holmes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7, Lord Neuberger set out as follows the approach to be adopted by the courts in scrutinising the validity of review decisions of this kind:

> *47. ... review decisions are prepared by housing officers, who occupy a post of considerable responsibility and who have substantial experience in the housing field, but they are not lawyers. It is not therefore appropriate to subject their decisions to the same sort of analysis as may be applied to a contract drafted by solicitors, to an Act of Parliament, or to a court's judgment.*
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> ...
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> *49. In my view, it is therefore very important that, while circuit judges should be vigilant in ensuring that no applicant is wrongly deprived of benefits under Part VII of the 1996 Act because of any error on the part of the reviewing officer, it is equally important that an error which does not, on a fair analysis, undermine the basis of the decision, is not accepted as a reason for overturning the decision.*
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> *50. Accordingly, a benevolent approach should be adopted to the interpretation of review decisions. The court should not take too technical a view of the language used, or search for inconsistencies, or adopt a nit-picking approach, when confronted with an appeal against a review decision. That is not to say that the court should approve incomprehensible or misguided reasoning, but it should be realistic and practical in its approach to the interpretation of review decisions.*

4. My attention has also been drawn to *Nzolameso v Westminster* [2015] UKSC 22 (decided after the original decision in the present case, but before the review decision from which this is an appeal) also in the context of a review of an out of area offer, by the Supreme Court in. In that case, the City of Westminster had offered Ms Nzolameso accommodation in Milton Keynes. She contended that the accommodation was unsuitable for various reasons involving the desirability of continuity of education for her children and her own bad health, with the consequent desirability of continuity of medical care.

5. Substituting RB's employment situation for Ms Nzolameso's health situation, the facts of the present case are somewhat similar, but I must resist any temptation on that ground alone to come to the same conclusion as the Supreme Court in the *Nzolameso* case. The *Nzolameso* case did not, and could not, decide whether the accommodation offered to Ms Nzolameso was suitable: that was an issue left by Parliament to Westminster. All the Supreme Court was considering was whether Westminster had adopted a proper process for arriving at, and explaining, its decision. It emphasised at §30 that invidious decisions had to be taken by housing authorities in choosing which family should be offered the limited stock of available property: any offer made to one family inevitably means that another family would miss out. The Supreme Court nevertheless overturned Westminster's original Review decision and decisions of the County Court and the Court of Appeal in Westminster's favour, holding in §§36-37 of the judgment that Westminster's decision did not demonstrate that proper account had been taken of all the relevant circumstances, and that it was accordingly invalid.

Background

6. RB has lived in England, in Brent, for about 11 years. He is of Afghan origin. He has a wife and 3 school age daughters. His family is assessed as requiring 3 bedrooms.

7. Unfortunately, in early 2014, RB became unemployed and was unable to afford his then private accommodation. He applied to LBB for rehousing, and on 29 July 2014, after due investigation, they accepted that they owed him and his family the primary housing duty under section 193 of the Housing Act 1996 ("the Act").

8. Council owned housing is not easy to obtain in Brent. There was evidence that in the absence of any priority, a family could expect to wait 13 years before being housed in a 3 bedroom council house in Brent. This case is not, however, about housing the family in council owned accommodation: Under section 193(6)(c) and (7), LBB have the power to meet their housing duty by making an offer of privately owned accommodation (a Private Rented Sector Offer, or "PRSO"). Such accommodation need not be in the area of LBB, though of course LBB must be satisfied that the accommodation is "suitable" for the relevant household. This means that it

has to be suitable for the needs of the particular homeless person and each member of his household; the location of that accommodation can be relevant to its suitability: see *R (Sacupima) v Newham London Borough Council* [2001] 1 WLR 563, CA.

9. On 13 August 2014 LBB offered RB and his family accommodation in Birmingham. There is no criticism of the accommodation as such, but RB considered it to be unsuitable for him and his family on the grounds of its location.

10. Two particular objections to being located in Birmingham are relied on by RB in his appeal to this Court: First, by the time of the offer he had been offered employment within a reasonable distance of the Brent area, and secondly, his daughter Asal's GCSE course would be adversely affected. Looking at these points in more detail:

    i. As to employment, RB's native language is Farsi. (It seems that he also speaks Arabic.) Although on 29 July 2014 he did not have employment, he had told LBB sometime in July that he been interviewed for a job and by 13 August 2014 he had in fact started it. There was at one time some confusion as to the nature of his work. Somehow LBB had concluded that he would be working as an interpreter, but in fact he was working for a company called Arya Metal Works, which supplied equipment to the catering trade. His command of Farsi and Arabic is useful in marketing to that particular company's customers.

    ii. His daughter Asal was in the middle of her GCSE course, and was due to take her final exams in June/July 2015.

The Law

11. The provision of out of area accommodation has long been controversial. Section 208(1) of the 1996 Act provides:

> *So far as reasonably practicable a local housing authority shall in discharging their housing functions under this Part secure that accommodation is available for the occupation of the applicant in their district.*

12. The Secretary of State has the power to specify, by order, circumstances in which accommodation is or is not to be regarded as suitable for a person (section 210(2)(a) of the 1996 Act) and matters to be taken into account in

determining whether accommodation is suitable for a person (section 210(2)(b) of the 1996 Act).

13. This has been done in the Homelessness (Suitability of Accommodation) (England) Order 2012 (the "Suitability Order") in which:

    i. Article 3 sets out circumstances where accommodation is not to be regarded as suitable, such as non-compliant electrical equipment or a landlord convicted of various offences;

    ii. Article 2 makes provision for matters to be taken into account in determining whether accommodation is suitable for a person. Such matters include the following:

        a. where the accommodation is situated outside the district of the local housing authority: the distance of the accommodation from the district of the authority;

        b. the significance of any disruption which would be caused by the location of the accommodation to the employment, caring responsibilities or education of the person or members of the person's household

14. I note that in exercising its housing duty, an authority has no discretion as to the matters set out in Article 3 of the Suitability Order, but has merely to take into account the matters set out in Article 2. Nevertheless, in taking a matter into account, it is not enough for a decision merely to recite that a point exists: there is not merely a duty to note and move on, but a duty to take appropriate account of a factor in the ultimate decision.

15. The Home Office has published supplementary guidance on the homelessness changes in the Localism Act 2011 and Suitability Order 2012, which includes the following:

> *48. Where it is not possible to secure accommodation within district and an authority has secured accommodation outside their district, the authority is required to take into account the distance of that accommodation from the district of the authority. Where accommodation which is otherwise suitable and affordable is available nearer to the authority's district than the accommodation which it has secured, the accommodation which it has secured is not likely to be suitable unless the authority has a justifiable reason or the applicant has specified a preference.*
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> *49. Generally, where possible, authorities should try to secure accommodation that is as close as possible to where an applicant was*

previously living. Securing accommodation for an applicant in a different location can cause difficulties for some applicants. Local authorities are required to take into account the significance of any disruption with specific regard to employment, caring responsibilities or education of the applicant or members of their household. Where possible the authority should seek to retain established links with schools, doctors, social workers and other key services and support.

50. In assessing the significance of disruption to employment, account will need to be taken of their need to reach their normal workplace from the accommodation secured.

16. LBB submit that the present case differs from the *Nzolameso* case: LBB has stated its housing policies in detail, and has explained how in the present case those policies led to the particular decision in the present case. Accordingly, they submit, neither their decision making process nor the finding of suitability in this particular case can be challenged, despite RB's reliance on the *Nzolameso* case.

17. At the hearing of this Appeal, I allowed LBB to adduce further evidence from the second reviewing officer, Jenina Abbeyquaye as to the manner in which she had conducted the review, which exhibited certain information she had relied on which is not mentioned in the review.

18. Mrs Abbeyquaye's decision (as supplemented by the additional evidence) did not specifically refer to the paragraphs from the Home Office's Supplemental Guidance quoted above in paragraph 15 of this judgment, though she did say in her introductory paragraph 5 that she had considered the Guidance[2].

19. She dealt individually with RB's employment and education points as follows:

The Employment Point

20. In relation to the employment point she accepted that RB had found a job starting on 11 August 2014, but observed that it did not get the benefit of Accommodation Placement Policy. This does provide that "*wherever reasonable practicable*" an employee would not be placed more than 90

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[2] The original decision of 22 August 2014 stated that in reaching its decision "*the Council fully considered .... 5) All existing legislation, statutory guidance and caselaw relating to making suitable offers of accommodation*".

minutes (by public transport) from his place of work, but only in the case of employees who had held the job for more than 6 months and where the job involved more than 24 hours work per week. (RB's employment was for 24 hours per week, but in any event he had not held it for more than 6 months.)

21. Furthermore she said that she was "*satisfied that you can find alternative employment near the area where we offered the accommodation.*" His employment at Arya Metal was "*not specialist in nature*" and "*it will be relatively easy to find alternative employment though [an] employment agency such as www.indeed.co.uk*". In saying this, she had nevertheless also observed that Arya Metal Works supplied mainly companies who speak RB's native languages, with whom RB could converse without the need for an interpreter.

22. As to the language point, she said that since RB had been in England, in employment, for about 16 years "*it is reasonably expected that you have improved your communication skills in English. Indeed the longer any one remains in this country, the more proficient they should become in communicating in English and thereby increase their potential for employment.*"

The point about Asal's Education

23. As to Asals' education, Mrs Abbeyquaye noted that her exams were due to be taken in June 2015, whereas Brent's Accommodation Placement Policy only gives priority to families in cases where a child is due to take public examinations within the next six months.

24. Although she did recognise that moving to Birmingham would cause some problems though she said in her paragraph 55 that "*having secure affordable accommodation is important to the wellbeing of children and must precede most other considerations*", a proposition which could effectively discount the educational needs of a child in any situation where an out of area placement is offered.

The Grounds of Appeal

Grounds 1 and 2

25. RB contends that LBB failed to pay adequate regard to §48 of the Supplemental Guidance quoted in paragraph 15 above (Ground 1) and that

there is no evidence that they investigated the availability of affordable accommodation in their area (Ground 2). It is convenient to consider these two points together.

26. It is apparent from §48 of the Supplemental Guidance (and it has been held in the case law shown to me) that the question of suitability is not an absolute one to be determined simply by comparing the qualities of a particular proposed home with the needs of a particular family. If that were so, it would be easy to conclude that a Birmingham placement was wholly unsuitable for RB because for practical purposes a move to that location would disrupt his recently acquired employment, his daughter's education, and break most of his social connection with an area he had lived in for 12 years. The Supplemental Guidance, however, makes it clear that where suitable accommodation is unavailable in a housing authority's area, then out of area accommodation which would otherwise have been unsuitable may become suitable.

27. Thus in the context of location, the concept of suitability can be seen to be not an absolute one, but a relative one, depending on the availability or non-availability of something closer. This relative suitability must, as I see it have, a further important consequence: As soon as one allows the test of suitability to include this relative element, it seems to me inescapable that in cases of far away placements, the test should also include some consideration of the timescale within which more suitable accommodation might be found.

28. Suppose, for example, that a London authority has accepted a section 193 duty to house a large family which requires 6 bedrooms, but, on a particular day, it can only find affordable accommodation of that size in Carlisle. Without having some perspective of how long it would take to find somewhere closer than this, it is impossible to judge whether, on the relevant day, the Carlisle accommodation is suitable or not. If it would probably take years to find anything closer, then the Carlisle may indeed be "suitable" on that day, despite the disruption such a move would cause to the family's medical, educational, employment and social connections. If, on the other hand, there is a very reasonable chance that something more suitable would turn up in a month or so, then it seems to me that accommodation in Carlisle would usually <u>not</u> be suitable, even if, on the day of the offer being made, it happens to be the only available and

affordable accommodation with 6 bedrooms which the housing authority is aware of.

29. To take another example, if, in a particular week, a housing authority has been able to place several families in close-by suitable accommodation, it is likely that for a while at least it will be short of any further such family accommodation. This would particularly be so during a holiday period when some or all of the housing authority's scouts were not actively seeking properties to let. Great injustice would be caused to the other homeless families on its list if, at the end of that week, a local authority were able to insist that far away accommodation was suitable for them all, on the grounds that at that moment nothing closer was available.

30. In the case of placements within a reasonable distance, the timescale ingredient may make no difference to the issue of suitability, but where the proposed accommodation is so far away that it will force the rupture of a family's medical, educational, employment and social connections, it seems to me that it is only possible to assess its suitability with the benefit of some indication of how long it would be for something better to turn up. In my view, therefore, in considering the suitability of far-away accommodation in the light of the Supplementary Guidance, it is incumbent on a local authority not merely to investigate the particular needs of a family but, where far distant locality would have a considerable impact on the family's medical, educational, employment or social connections, to investigate the likelihood of more suitable accommodation coming available within a reasonable time.

31. No such investigation appears to have been made in the present case, though there is material in the case which suggests that if LBB had hung on for a while, something better might indeed have turned up in a reasonable time. Mrs Abbeyquaye exhibited to her review decision a market rent analysis[3] prepared by or for LBB which discusses rents and availability in other parts of Greater London beyond Brent (including for 3 bedroom accommodation). It contains comments such as: "*Good potential for procurement in RM10*", "*There were large numbers of rental properties*

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[3] This was dated April 2015, but Mrs Abbeyquaye says in §17 of her Witness Statement that it was not out of date.

available in postcodes N3, NW2 and NW11 which would increase the chances of procurement at or around the LHA rate", "*Good potential for procurement in postcodes: EN1, EN2, EN3 and N9*", "*Good potential for procurement in postcode area HA2*", "*Good potential for procurement in postcodes: UB3, UB4, UB9 and UB10*".

32. It is true that Mrs Abbeyquaye comments in §72 of her review decision that "*not all landlords are willing to let their properties to tenants who are reliant on housing benefit to pay for their rent. In addition, some private landlords perceive, not entirely without justification, that some local authority clients have vulnerabilities which can make it harder for them to sustain tenancies. The availability of affordable accommodation is limited by this*". While these factors may reduce the flow of property available to families in RB's position, they do not answer the question which in my view should have been asked before deciding that accommodation in Birmingham was suitable for RB's family, namely: "*How long is it likely to take for something more suitable for RB's family to turn up?*"

33. As I see it, Mrs Abbeyquaye's decision is based squarely on the proposition that "at the point of offer" (as she puts it in §48 of her decision)[4], no accommodation closer than Birmingham was available. It is fair to say that her focus on one particular day is slightly softened or qualified in her Witness Statement, where she explains how in the period 4 August to 19 August 2014 a total of only 11 Private Rented Sector Offers ("PRSOs") were made. (They are listed on a schedule at her exhibit JA2.) She also explains how LBB has a team of 5 procurement officers looking for property in Brent and elsewhere. 2 are looking in Brent and London Boroughs, 2 in the Home Counties and 1 in the Midlands. What she did not enquire into, however, was the chance of something much more suitable than accommodation in Birmingham turning up within a reasonable time.

34. It follows that in my judgment the first two of RB's Grounds of Appeal succeed.

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[4] Or "*on the date in question*" (to use a phrase appearing twice in LBB's skeleton argument).

Ground 3

35. RB's third Ground of Appeal is based on the point about Asal's educational needs. It is alleged that LBB took account of an irrelevant consideration (namely the unavailability of affordable accommodation in or near Brent) and failed to make adequate enquiries about the extent of the disruption likely to be caused by a move to Birmingham.

36. If this ground stood alone it would not in my judgment succeed. The unavailability of suitable accommodation in or near Brent – if established – is not an irrelevant consideration when looking at Asal's educational needs. On the contrary, in deciding the issue of suitability a housing authority must to balance up the extent of likely disruption against all other factors, including the desirability of a child being housed in affordable, and therefore stable, accommodation.

37. This Mrs Abbeyquaye sought to do. The exercise she performed was one which the Court could only interfere with if satisfied that there was an error of law in her approach. Given the relatively long period before Asal was due to take her GCSEs it does not seem to me that in this jurisdiction I could possibly invalidate her decision in the absence of some identifiable error of law.

38. The only error of law in her approach which I consider to be established is essentially the same point as arises on Grounds 1 and 2: in exercising her power of review, Mrs Abbeyquaye failed to take into account the possibility of more suitable accommodation coming available within a reasonable time which would have avoided the disruption to Asal's education. To that extent alone Ground 3 succeeds.

Grounds 4 and 5

39. In her Review Decision, Mrs Abbeyquaye accepts (in §32) that on 13 August, at the time the Birmingham offer was made to him, RB mentioned his new job at Arya Metal Works. Later (in §59) she considers only his benefits income, for the purpose of assessing his ability to afford the Birmingham property (as to which there is no contest). She did not, however, consider whether, with the benefit of the income from his job, he would have been able to afford something in or closer to Brent.

40. The fact that RB had found a job by the time of the offer of 13 August 2013 had at least the potential to make a material change in the affordability of accommodation to him. It is true that it was not a very well paid job, but no investigation seems to have been made as to how much extra income it would have generated or whether it would have affected the affordability to him of property in or closer to Brent.

41. Ground 4 of the Notice of Appeal contends that there was an error of law in the Review Decision's treatment of his employment, in that it considered only the facts on its own file on 13 August 2014 (i.e. his benefits income alone), and ignored his employment income which was not known to LBB at that time. In this connection it is argued on the authority of *Osseily v Westminster* [2007] EWCA Civ 1108 and *Omar v Westminster* [2008] EWCA Civ 421 that what matters is the objective state of facts at the time of an applicants' refusal of an offer, even if those facts only came to light in the course of a review of the decision. In the *Osseily* case, which was a case about a refusal of an offer, followed by a review of the issue of suitability, Laws LJ said at §13 of his judgment (which was referred to and relied on in the *Omar* case):

> *In my judgment ... where the authority has already decided that the accommodation offered was suitable, and that the duty owed under s 193 has therefore already been discharged, the question the reviewer must address is whether, on the facts as they are known to be at the date of the review, the accommodation previously offered would now be considered suitable. If it would, the decision to discharge the duty would be upheld. If it would not, the decision to discharge cannot stand, and the authority will remain under a continuing obligation to provide the Applicant with suitable accommodation.*

42. In the present case I have not been provided with any evidence that at the time of the Review Mrs Abbeyquaye had been provided with information as to RB's income from his new job, which would have enabled her to re-assess the issue of affordability as at the time of the refusal on 14 August 2014 and to consider whether the new income would have made any difference. In the absence of such evidence, it does not seem to me that what Laws LJ said in *Osseily* has any application to the present case. Ground 4 accordingly fails.

43. Ground 5, on the other hand, contends that there was a failure "at the relevant time" to make adequate investigations as to RB's new income and its effect on the affordability of accommodation. (The "relevant time" could

be either on 13 August 2014 when RB told LBB about his new job or in the course of the Review by Mrs Abbeyquaye. In neither case, however, does it appear that such enquiries were made.)

44. Given the possibility that the additional income might have made a difference to the affordability of accommodation in or closer to Brent, and taking this point with my conclusion that LBB should also have considered the possibility of something better than Birmingham coming available within a reasonable time, in my judgment the failure to investigate the issue constitutes a further significant defect in LBB's procedures in this case. It is impossible on the material before me to exclude the possibility that if this aspect of the case had been investigated it would within a reasonable time have been possible to identify accommodation much better suited to the needs of the RB family.

45. Ground 5 accordingly succeeds.

What order should be made as a result of this judgment?

46. Section 204(3) provides:

> *On appeal the Court may make such order confirming, quashing or varying the decision as it thinks fit.*

47. Clearly the Court in a case such as the present has a choice between sending a case back for a further review, or deciding that enough is enough, so that the housing authority must start again with a new offer of accommodation judged to be suitable for a family's current needs. In response to a request from me, both sides have filed further submissions on the nature of the relief to be granted.

48. Although it was not altogether clear from the Claimant's Grounds of Appeal what relief he was seeking, Mr Baldwin has provided a skeleton argument favouring the quashing of the original decision. Miss Polimac's skeleton argument asks that the review decision alone should be quashed, and the matter sent back for a third review.

49. This Appeal came on for hearing more than 2 years after the original decision by LBB that the offered accommodation in Birmingham was suitable. During those 2 years many things may have changed so far as the needs of this family are concerned. I know nothing of RB's current employment situation or the current educational needs of his younger

daughters, though I have been told that he is at the moment in accommodation not provided by LBB. Other factors may also have changed.

50. On the face of it, therefore, it might be thought that it would make more sense for the process to start again with a new offer of accommodation. Merely setting aside the review decision would not achieve this, and the grounds set out in this judgment for setting aside the review decision apply equally to LBB's original cessation of duty decision.

51. Although I was strongly tempted to order that the second review decision be amended so as to quash LBB's original decision, I have been persuaded by Miss Polimac that this would not be the appropriate course in the present case.

52. I have to start from the position that where an original decision is flawed, the primary means provided by the Housing Act for putting it right is by means of the housing authority's own review procedure. Where, as here, there has been a failure by the reviewing authority to consider all relevant matters, the normal order must be for the reviewing authority to conduct the exercise again, this time taking into account the matters in question.

53. In some cases, the passage of time may have made it impossible to do so, but in this case LBB asserts that all the necessary material exists to enable the necessary review to be conducted: LBB has its own records of what was available and likely to come available at the relevant time, and the Claimant must be in a position to supply information about additional income which would have enhanced his ability to afford such property.

54. It seems to me, therefore, that there is insufficient basis in the present case to do more than send this case back for a further review, and, not without considerable regret, I shall so order.

Alastair Wilson QC, Recorder.