Kathleen Slattery v Basildon Borough Council

Case No: B2/2013/1160

Court of Appeal (Civil Division)

22 January 2014

[2014] EWCA Civ 30

2014 WL 16501

Before: Lord Justice Sullivan Lord Justice Briggs and Mr. Justice Arnold

Date: Wednesday 22nd January 2014

On Appeal from Southend County Court

His Honour Judge Moloney QC

1BQ00503

Representation

Alex Offer (instructed by Lester Morrill inc Davies Gore Lomax) for the Appellant.

Galina Ward (instructed by Basildon Borough Council) for the Respondent.

Judgment

Lord Justice Briggs:

1 Ms. Kathleen Slattery and her (now) fifteen year-old son Roger are members of an Irish Traveller community which, until a partial eviction in October 2011, lived in caravans and mobile homes at Dale Farm, Oak Lane, Billericay, in Basildon District. They were evicted, together with a number of other members of the Traveller community, because their occupation of the relevant part of Dale Farm was in breach of planning control. Following her eviction, Ms. Slattery and her son have continued to live in a caravan, parked adjacent to another part of Dale Farm fully occupied by Travellers in conformity with planning control, but her occupation therefore continues to be unlawful in that sense.

2 Ms. Slattery's eviction from Dale Farm, after lengthy litigation by members of the Traveller community to resist it, became inevitable following the decision of this court, in December 2008, in *Basildon District Council v McCarthy and others [2009] EWCA Civ 13* . On 25th August 2009 she applied to the Basildon District Council for accommodation on the grounds that she and her son were homeless. On 12th January 2010 the Council offered her accommodation in the form of a three-bedroom house at 71 Norwich Walk, acknowledging that she was eligible for housing assistance, was not intentionally homeless, and was in priority need.

3 In common with a number of other members of the Dale Farm Traveller community facing eviction, she requested a review of the Council's decision that the accommodation offered was suitable for her, under s.202 of the Housing Act 1996 . Common to all those objections was the assertion that any form of ‘bricks and mortar’ accommodation was inherently unsuitable for them as lifelong Travellers. For Ms. Slattery and her son, it was further argued that the consequences of being accommodated in a house rather than a caravan were so serious as to lead to a real risk of significant psychiatric harm to her and her son. For that purpose she relied upon a report of a

Dr. Mark Slater, a consultant psychiatrist with experience of treating Travellers, dated 5th July 2010.

4 The council's review panel (Mrs. Claire Last and Mrs. Kathy Ayres) decided that the Norwich Walk house was suitable as temporary accommodation for her, notwithstanding her objections, by letter dated 15th July 2011 (“the Review Decision”). Ms. Slattery exercised her right to appeal to the county court on a point of law under s.204 of the Act, but it was dismissed by HHJ Moloney QC in the Southend County Court, together with the appeal of another member of the Traveller community, Michael Slattery, in a reserved judgment handed down on 21st December 2012. The conjoined appeal of a further member of the Traveller community, Ms. Joanne Sheridan, was allowed. Ms. Slattery appeals from the decision against her.

5 Ms. Slattery's appeal is not the first to have reached this court, by members of the Dale Farm Traveller community, based upon claims that bricks and mortar accommodation is unsuitable for them as Travellers. Three similar appeals were heard together and *dismissed by this court on 21st March 2012 in Sheridan & Others v Basildon Borough Council [2012] EWCA Civ 335* . All three of those appellants asserted an aversion to bricks and mortar accommodation. Two of them (Mr. and Mrs. Sheridan) asserted, like Ms. Slattery, a risk of psychiatric harm, relying upon their own reports by Dr. Slater.

6 This court, in the Sheridan case, had to decide two main issues. The first was whether a cultural aversion to bricks and mortar accommodation, coupled with evidence of resulting psychiatric harm, caused such accommodation to fall below the *Wednesbury* minimum standard for suitable accommodation. The second was whether it was open to the Council as housing authority to rely upon the absence of any available caravan pitches (as the reason for offering only bricks and mortar accommodation to homeless Travellers) when that state of affairs was arguably the consequence of its own failure to bring such sites forward for use under the powers contained in s.24 of the Caravan Sites and Control of Development Act 1960 .

7 As to the first issue, Patten LJ, giving the leading judgment, said this, at paragraph 49:

> “It seems to me that there are no absolute standards to be applied to this issue. There will obviously be exceptional cases where the degree of impairment to the physical or mental wellbeing of the applicant consequent on their being housed in the accommodation will be so serious that nothing can justify it being treated as suitable. *R v Brent London Borough Council, ex p Omar (1991) 23 HLR 446* was just such a case involving, as it did, the accommodation of a Somalian refugee who had been imprisoned and tortured in her own country in a filthy, cockroach infested basement flat with high windows and soaking walls. But at the other end of the scale the risk (e.g.) of depression may be slight and the consequences easily contained. It is clear that in *Lee* Longmore LJ (albeit obiter) did not regard the possibility of psychiatric harm as sufficient to take the accommodation below the *Wednesbury* line. In principle, I agree with this. If the local authority has no available accommodation in the form of a caravan site it is not, in my view, required to acquire land as part of its duty to provide accommodation for the applicants. As Longmore LJ explains in paragraph 16 of his judgment in *Lee* , the provisions of s.193 contemplate the performance of the duty using the housing authority's existing resources within a limited timescale. A cultural aversion to bricks and mortar is not enough to make the offer of such accommodation *Wednesbury* unreasonable even if (as in Mrs Sheridan's case) it may risk bouts of depression. It is reasonable for those to be treated if they occur in just the same way as she has sought and obtained treatment for depression in the past.”

8 On the particular facts about Mr. and Mrs. Sheridan's cases, the court concluded that the risk of psychiatric harm was mainly the consequence of their eviction from Dale Farm, together with their seeking and being offered separate accommodation (since they no longer lived together) rather than a consequence of the offer of bricks and mortar accommodation, rather than caravan pitches. Furthermore, the court found that the review panel had reasonably concluded that ongoing psychiatric disorder could be minimised by reliance upon the services of the NHS.

9 As to the second issue, after a review of the decision of this court in *Codona v Mid-Bedfordshire District Council [2004] EWCA Civ 925* , this court decided that an arguable

failure to exercise its powers under s.24 of the 1960 Act did not disable the Council from relying on the absence of any available caravan pitches. At paragraph 56, Patten LJ said this:

> "Although these are powerful points, I am not persuaded that they can be addressed through the medium of a s.204 appeal. It seems to me to be completely unrealistic to expect a housing officer on a s.202 review to conduct a general inquiry into strategic questions about the preparation of a homelessness strategy and the adequacy of site provision. This would require the officer to review the planning policies of the local authority; the history of site provision; the inadequacy or otherwise of decisions taken about the change of use of land from a planning perspective; and the accuracy of its estimates of gypsy and Traveller numbers over the relevant period. These are matters which fall well outside the expertise of a housing officer and would require detailed and probably extensive evidence. I do not accept that Parliament can have intended the review machinery provided by s.202 to encompass an inquiry of that kind. The review must have been intended to have a much narrower focus of whether the offer of accommodation from within the housing authority's existing resources adequately met the applicant's needs."

10 The Sheridan case was decided after the Review Decision in relation to Ms. Slattery, but before the hearing of her appeal in the Southend County Court by Judge Moloney. He sensibly described the appeals before him as an annex or sequel to the Sheridan case. He concluded that he was bound by the Sheridan case to conclude that the Council were not disabled from relying upon the absence of caravan site accommodation by their alleged failure to exercise their powers under section 24 of the 1960 Act. As to the first of the main issues in the Sheridan case, he asked himself whether the particular facts about each of the three appeals before him brought the appellant's circumstances within the exceptional category where (quoting Patten LJ) the degree of impairment to the physical or mental wellbeing of the applicant consequent upon them being housed in the accommodation will be so serious that nothing can justify it being treated as suitable. On that analysis, he concluded that Ms. Slattery's case fell outside that exceptional category, for reasons which I shall shortly describe.

11 Ms. Slattery sought permission to appeal to this court on the following three grounds:

> 1) That the judge was wrong to find that the Review Decision had reasonably concluded that the proffered accommodation was suitable;
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> 2) That the judge had been wrong to conclude that the Review Decision was a proportionate interference with her Convention rights;
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> 3) That the judge had been wrong to treat himself as bound by the Sheridan case, in relation to the question whether the Council could rely upon the absence of available caravan sites or pitches.

12 On Ms. Slattery's paper application for permission to appeal, Lewison LJ refused permission on grounds (1) and (2), on the basis that they raised no important point of principle or practice sufficient to justify a second appeal. But he granted permission on ground (3), on the basis that without an appeal to this court, she would have no opportunity to seek permission to appeal to the Supreme Court on the ground that the Sheridan case had been wrongly decided. He suggested that Ms. Slattery might simply submit to a dismissal by this court of her appeal on ground (3), paving the way for an application for permission to the Supreme Court.

13 The result is that we heard an oral application for permission to appeal on grounds (1) and (2), and an appeal on ground (3). We refused the first application, dismissed the appeal and, after considering written and oral submissions, refused permission to appeal to the Supreme Court.

We stated that we would give reasons for the first and second of those decisions in writing. This judgment sets out my reasons.

Grounds (1) and (2)

14 We placed Mr. Alex Offer, Counsel for Ms. Slattery, under no time or other constraints in developing his submissions on grounds (1) and (2). Notwithstanding his excellent argument, I was not persuaded that it disclosed either a real prospect of success, or a sufficient point of practice or principle to justify a second appeal, even on the more lenient basis which may be appropriate where the first appeal is from a non-judicial decision maker. I shall nonetheless give my reasons in a little more detail than would typically follow the normally abridged oral renewal of an application for permission to appeal. They require an analysis of Dr. Slater's report, the Review Decision, and the relevant part of Judge Moloney's judgment.

Dr. Slater's report

15 Dr. Slater examined Ms. Slattery at a time when she was threatened with eviction, rather than suffering from its consequences. He described her as having a depressive illness of at least moderate severity since 2008, partially treated on current medication. He said that she suffered from two main sources of stress, an incident two years previously which forced her to leave Wolverhampton, and the ongoing threat of eviction, together with what that might entail. He regarded her current depression as unlikely to be resolved for as long as the threat of eviction continued.

16 Under the heading “Likely Impact of Eviction” he advised that eviction would cause her depression and post-traumatic stress disorder to worsen, to the extent that she might become completely unable to cope with day-to-day tasks. He noted her reliance, like most Travellers, upon her strong sense of community and her reliance upon family and other Travellers for emotional and practical support. He continued:

> “If eviction was associated with a removal of Ms. Slattery's support, as would probably be the case, it is highly likely that she would be completely unable to cope, and become very distressed. This may well be so pronounced that she might require admission to a psychiatric hospital which she would find extremely stressful in itself. It is often the case that for Travellers hospital admission can manage immediate risk, but is actually an obstacle to recovery due to the person being removed from their familiar environment and support network, as well as their having an aversion to ‘bricks and mortar’.
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> If Ms. Slattery were forced to accept the accommodation she has been offered by the Council, it is likely that she would become more depressed and anxious, and her post-traumatic stress disorder symptoms would worsen. In fact, as the prospect of moving in became more immediate, her anxiety would reach such a pitch that she would probably be unable to enter the property at all. In the event that she was able to move in, it is highly likely that her distress would steadily increase until it became so intense that she would leave the property and ask to be taken in by another Traveller.
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> In such circumstances, it is unlikely that Ms. Slattery would be able to care adequately for her 12-year old son, and he would have to live elsewhere. Although I have not addressed Ms. Slattery's son, it is likely that he would also be very distressed about having to move away from the familiar environment of Dale Farm and the sense of community that exists there.”

17 Pausing there, it is striking that Dr. Slater's opinion predicted consequences flowing from the eviction, and associated loss of community support, as more serious than those specifically attributable to a move into bricks and mortar accommodation. In his view the former risked the obstacle to recovery caused by hospitalisation, whereas her aversion to bricks and mortars might lead her to be unable to occupy a house, or lead her to return to live with another Traveller. More generally, those passages in Dr. Slater's report, read in the context of the report as a whole, clearly identified her eviction and consequential separation from the support of the Traveller community at Dale Farm as the most serious threats to her psychiatric wellbeing.

The Review Decision

18 The Review Decision letter contains the following relevant paragraph:

> "It has been submitted that there is a real risk of you suffering significant psychiatric harm if you were to live in conventional housing, and Dr. Slater's evidence is noted and has been fully taken into account. The review panel have considered Dr. Slater's report, and note that he states that after the incident in Wolverhampton you have been depressed and have been suffering moderate depression since 2008. He further states that you are still suffering from mild post traumatic stress disorder. The panel note that none of this is related to the prospect of your having to live in Bricks and Mortar type accommodation. Dr Slatter (*sic*) talks largely of the effects of the eviction from Dale Farm upon you, however it has been agreed in the Courts that the eviction will take place and a move to alternative accommodation is inevitable. Should you feel that your mental state deteriorates at any time in the future you should seek medical input from your G.P, which might include a referral to the mental health services."

19 It is evident that in conducting their review Mrs. Last and Mrs. Ayres assessed Dr. Slater's report in substantially the same way that I have described above. They plainly took it fully into consideration, and their summary of the thrust of it, as lay rather than judicial decision makers, cannot in my view be criticised as unreasonable or deficient, so as to amount to an error of law on their part.

20 Mrs Last gave evidence and was cross-examined in the appeal proceedings. Mr Offer submitted that her answers to cross-examination showed that, contrary to the impression to be gained from the Review Decision, the panel did treat Dr Slater's report as advice, which they accepted, that a move to bricks and mortar accommodation would, of itself, cause Ms Slattery substantial psychiatric harm beyond that occasioned by eviction and separation from her supportive Traveller community. If, as Mr Offer skilfully sought to do in cross-examination, the reader's attention to Dr Slater's report is confined strictly to the single paragraph about a move to bricks and mortar accommodation, that might be a fair observation. But a reading of that paragraph in its context, and of the report as a whole, does no such thing, and Mrs Last did not concede otherwise in her evidence.

21 Furthermore a s. 204 appeal based upon irrationality and infringement of human rights is concerned with the Review Decision itself, and limited to error of law. In that context, divorced from any allegation of bad faith (e.g. that the decision misrepresented the panel's reasons), it will be a rare case indeed in which evidence from and cross-examination of the decision maker will be of any assistance.

The judgment

22 In the separate section of his clear and concise reserved judgment devoted to the facts about Ms. Slattery, the judge cited part of the passage in the Review Decision set out above, and continued:

> "The review panel's main reason for rejecting Dr. Slater's report was that it linked the adverse consequences of the move to the eviction rather than to "bricks and mortar". This was half right; he linked them to the move, not the eviction but more to the effects of separation from friends and family than to "bricks and mortar" itself."

23 I would make two points about that summary. The first is that the judge did not, I think, thereby mean that the review panel had rejected Dr. Slater's opinion. By 'rejecting Dr. Slater's report' I have no doubt that he meant rejecting it as a reason for treating the offered accommodation as unsuitable. He had by then permitted and listened to the cross-examination of Mrs. Last in which she had made it clear that she and her colleague had not rejected the opinion.

24 Secondly, the judge's comment that the review panel's reasoning was "half right" was I think more an observation about the quality of the written expression of their conclusion, rather than

the thought process which led to it. It is I think implicit in the relevant passage in the Review Decision that the panel's reference to “the effects of the eviction from Dale Farm” encompassed not merely the eviction itself, but the consequential loss of community support so clearly emphasised in Dr. Slater's report.

Analysis

25 The question for the county court judge was, as it is for this court, not whether the review panel was right or wrong on the merits as to the suitability of the proffered accommodation for Ms. Slattery but rather whether the Review Decision itself disclosed an error of law. The written decisions of housing officers are not to be subjected to the level of rigorous analysis which might be applied to the reasoning of a judge. Housing officers conducting reviews of this kind are entitled to respect for their experience, and to reasonable latitude in their means of expression.

26 In this case, although Judge Moloney's summary of the thrust of Dr. Slater's report might be said to have been more precise than that of the review panel, I consider that they both reasonably (and indeed correctly) extracted the gist of it, namely that the ongoing threat to Ms. Slattery's mental well-being had more to do with eviction, and the consequential loss of the valuable support of her Traveller community, than to the aversion which would flow from being accommodated in bricks and mortar housing, rather than a mobile home or a caravan.

27 The result is that, in my judgment, ground (1) of Ms. Slattery's appeal has no real prospect of success. Ground (2), based mainly upon Article 8, takes the matter no further since, as Mr. Offer sensibly acknowledged when appearing as counsel for the appellants in the Sheridan case, any consideration of suitability under section 193 of the 1996 Act is bound to involve a proportionate assessment of the effect of the proposed accommodation upon the applicant's family life: see per Patten LJ at paragraph 52.

28 In any event, the question whether the Review Decision was a reasonable appraisal of Dr. Slater's report does not of itself involve deciding any point of practice or principle of general importance. For that reason as well, I would refuse permission to appeal.

Ground 3

29 Having failed to persuade us that Ms. Slattery's case was distinguishable on its facts from the Sheridan case, Mr. Offer advanced two submissions about its effect. The first was that it was not binding upon us, because of inconsistency with an earlier decision of this court. The second was that the Sheridan case was wrongly decided. As to the second point, Mr. Offer sensibly recognised that, if we were bound by the Sheridan case, submissions about why it was wrong would be better reserved for the Supreme Court. Accordingly, he developed it only very briefly in support of his application for permission to appeal, which we rejected.

30 As to his first point, Mr. Offer submitted that the resolution of what I have called the second main issue in the Sheridan case was inconsistent with paragraph 38 of Auld LJ's judgment in the Codona case, with which Thomas LJ and Holman J agreed. Codona was another case about whether anything other than a caravan site or pitch could be suitable accommodation for a homeless Traveller under Part 7 of the 1996 Act. Paragraph 38 of Auld LJ's judgment sets out the fourth of what he described, in paragraph 33, as “a number of basic propositions for the criteria of suitability of accommodation for offer to statutorily homeless persons.” In paragraph 37 he had summarised the concept of a *Wednesbury* minimum for suitable accommodation, below which the absolute duty imposed on the housing authority did not permit it to fall. He then continued, in paragraph 38:

> “And, fourth, where it is shown that a local housing authority has been doing all that it could, the court would not make an order to force it to do the impossible. Its duty was to secure the availability of suitable accommodation within a reasonable period of time, the reasonableness of that period depending on the circumstances of each case and on what accommodation was available. In *ex p Begum,* Collins J said, at 816:
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> > “… Parliament has not qualified the duty in any way: it could have done. However, the

> situation for the council is not quite so desperate as might be thought. While the duty exists, no court will enforce it unreasonably. Mr Luba [counsel for the applicant] accepts that it would be unreasonable for an applicant to seek mandamus within a few days of the duty arising if it were clear that the council was doing all that it could, nor, in its discretion, would a court make such an order. Indeed, permission would probably be refused.""

31 Mr. Offer submitted that it was implicit in that passage that the suitability of accommodation might depend in particular cases upon the question whether the housing authority had been "doing all that it could", so that it was incumbent from time to time upon those conducting a suitability review under s.202 to investigate and decide whether in fact the housing authority had done all it could, for example, to provide caravan sites or pitches for homeless Travellers. This he submitted was inconsistent with the decision in the Sheridan case that an investigation of that kind, necessarily into the conduct of the local authority's planning policy, formed no part of the housing officer's function when conducting a s.202 review.

32 I do not read paragraph 38 of Auld LJ's judgment in the Codona case in that way at all. In my view it is concerned with the predicament of a housing authority which arises where it becomes apparent that it has no accommodation immediately available with which to satisfy even the *Wednesbury* minimum test for suitability. In such circumstances the court will give the housing authority a reasonable period of time in which to find it, by acquisition, conversion, repair or in any other suitable manner. It is not concerned with the prior question whether any available property meets the *Wednesbury* minimum.

33 The result is that there is my view no inconsistency at all between the Codona and Sheridan cases, so that we remain bound to follow the Sheridan case in relation to this issue.

34 I would therefore dismiss Ms. Slattery's appeal under ground 3.

Mr. Justice Arnold:

35 I agree.

Lord Justice Sullivan:

36 I also agree.