

Public

An impartial review?

Jamie Burton outlines the route of appeal for dissatisfied council tenants

IN BRIEF

- An applicant seeking assistance with accommodation was not entitled to a “full merits review” when appealing a decision made by a local authority review officer.

In *Ali v Birmingham City Council*; *Ibrahim v Birmingham City Council*; *Tomlinson v Birmingham City Council* [2008] EWCA Civ 1228 two single mothers had been accepted by the council as being entitled to accommodation pursuant to Pt VII of the Housing Act 1996. However the council was entitled to treat its duty to the claimants as being discharged as they had each refused an offer of accommodation after having been warned in writing of the consequences of refusing a suitable offer of accommodation. Both claimants maintained that they did not receive the letter containing the written warning and that therefore the council remained under a duty to accommodate them.

Applicants under Pt VII are entitled to have decisions reviewed by a more senior officer. Applicants who remain dissatisfied with a decision on review may then appeal to the county court “on a point of law”, in a challenge akin to judicial review. In this case both claimants appealed to the county court against review decisions in which the review officer had found that they had received the warning letters.

In Ms Ali’s case the county court judge was asked to hear oral evidence in relation to whether or not she had in fact received the letter. The argument made was that without doing so the county court judge would not be in a position to determine fairly whether the council still owed her a duty to accommodate her, in breach of Art 6 of the European Convention on Human Rights (the Convention). While she did not seek oral evidence Ms Ibrahim argued similarly that there had not been a determination

of whether or not she had received the letter by an independent and impartial tribunal—the reviewing officer plainly not being independent and the limited scope of her appeal rights being insufficient to “cure” that impartiality.

Both appeals were lost before the circuit judges. In each case it was found that the question of whether or not the respective letters had been received was one solely for the reviewing officer concerned and that, having regard to all the circumstances, their decisions that the claimants had received the letters were fair and in accordance with established principles of judicial review. Both claimants appealed to the Court of Appeal as a second appeal—the case raising an important point of principle.

The legal background

The question whether or not the availability of judicial review of decisions made by ostensibly partial administrators is sufficient to render the decision making process Art 6 compliant had been considered previously by the courts in the particular context of Housing Act 1996, Pt VII. In *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, [2003] All ER (D) 191 (Feb) the House of Lords, departing from an earlier decision of the House, concluded that the review and county court appeal statutory scheme contained in Pt VII was lawful.

However since then the European Court of Human Rights had looked at the issue in a different context in *Tsfayo v the UK* [2006] All ER (D) 177 (Nov). There, an applicant for housing benefit had maintained that she had a “good reason” for not applying for housing benefit on time

and that therefore she ought to be entitled to backdated payments. A tribunal made up of several members of the body set to lose out if the applicant were successful found that she did not have a good reason for the delay in applying.

The European Court found that judicial review did not afford the applicant a sufficient remedy and declared the decision a breach of Art 6. In doing so it distinguished the *Runa Begum* case in the following manner [para 45]:

“In *Bryan, Runa Begum* and the other cases cited..., the issues to be determined required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims. In contrast, in the instant case, the (review board) was deciding a simple question of fact, namely whether there was ‘good cause’ for the applicant’s delay in making the claim.”

The contrast has since been described as between a “classic exercise of administrative discretion” where policy and specialist knowledge are required and “simple determinations of primary fact”.

In the *Runa Begum* case the question was whether offered accommodation was “suitable having regard to the housing circumstances prevailing in the district at that time”, self-evidently a more policy orientated administrative decision than whether or not an individual had received a particular letter. And indeed it was on these lines that the lawyers acting on behalf of Ms Ali and Ms Ibrahim sought to distinguish *Runa Begum* on the facts of their cases.

The decision

Lord Justice Thomas gave the lead judgment. He found that the Court of Appeal remained bound by the decision of the Lords in *Runa Begum*. He gave broadly speaking five reasons:

- (i) the distinction between administrative discretion and fact is not often an easy one to draw;
- (ii) that a scheme in which some decisions were subject to a full merits review and some were not, even though they might

be equally material to the ultimate outcome, would be most unwelcome—the scheme should stand or fall in its entirety;

- (iii) parliament clearly intended the scheme to work in a certain way which included projections and understandings about costs—while this could not be determinative it was a factor which pointed to the scheme being compliant having regard to the state's wide margin of appreciation;
- (iv) if purely factual decisions could result in costly full merits review then decision makers might be tempted not to make them; and
- (v) the gap between a full merits review and modern judicial review was not so wide and the latter in any event, as illustrated by the two cases before him, offers ample protection.

The Court of Appeal also stated that *Tsfayo* did not change anything. Not only did the European Court endorse the decision in *Runa Begum* it was dealing with a different situation where the bias of the principal determiner of fact was clearer and the scheme as a whole was plainly less

favourable to applicants.

The Court of Appeal declined to grant the claimants' permission to appeal to the Lords.

Comment

Plainly a scheme that allowed for a full merits review in some circumstances and not in others would be cumbersome—administrative convenience plainly ought to be a relevant factor. That said, the county courts are well equipped to deal with factual disputes.

The difficulty in making the distinction between fact and discretion is a real one and almost inevitably would lead to increased litigation.

Additionally, the notion that decision makers could be put off making pure determinations of fact where a full merits review was a possibility is highly dubious, not least because the legislation would require them to make them. On the contrary one would hope that the prospect of increased scrutiny of the facts on an appeal would improve the decision making process rather than undermine it.

It is unfortunate when stating that the gap between a full merits review and the exiting protections wasn't particularly

wide Lord Justice Thomas didn't keep in mind the words of Mr Justice Moses in (*R on the application of Bewry*) v *Norwich City Council* [2001] EWHC Admin 657: "The lack of independence may infect the independence of judgment in relation to the finding of primary fact in a manner which cannot be adequately scrutinised or rectified by this court. One of the essential problems which flows from the connection between a tribunal determining facts and a party to the dispute is that the extent to which a judgment of fact may be infected cannot easily be, if at all, discerned. The influence of the connection may not be apparent from the terms of the decision which sets out the primary facts and the inferences drawn from those facts."

The manner in which the *Tsfayo* decision was deemed irrelevant doesn't stand up to scrutiny. In particular it is difficult to see why a council which stands to lose a relatively small amount of cash should be so much more likely to tend to the sort of bias discussed by Moses J above than a local housing authority facing an acute shortage of supply in the face of very high demand. **NLJ**

Jamie Burton, Doughty St Chambers





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