IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

[2018] EWHC 2275 (Admin)

CO/2779/2018

Royal Courts of Justice

Tuesday, 24 July 2018

Before:

MS KAREN STEYN QC

(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

THE QUEEN

ON THE APPLICATION OF

SB — Claimant

- and -

LONDON BOROUGH OF CAMDEN — Defendant

ANONYMISATION APPLIES

J U D G M E N T

A P P E A R A N C E S

MR M. SPRACK (instructed by Edwards Duthie Solicitors) appeared on behalf of the Claimant.

MS R. HADDEN (instructed by the London Borough of Camden) appeared on behalf of the Defendant.

THE DEPUTY JUDGE:

1 The claimant seeks permission to challenge the decision of 12 July 2018 made by the defendant, the London Borough of Camden, to refuse to provide services under Part 1 of the Care Act 2014 and/or s.1 of the Localism Act 2012; in particular, the refusal to provide him with accommodation and subsistence. The claim was filed and served on 13 July 2018, together with an application for interim relief and urgent consideration. Ouseley J made an order on the papers on 13 July, refusing interim relief and ordering that the application for interim relief should be considered at an oral hearing on notice on 24 July; that is today. Accordingly, the matter has come before me.

2 The defendant has filed summary grounds, and both parties are represented. In those circumstances, I consider it appropriate to determine the application for permission first before considering interim relief.

3 It is common ground that the claimant comes within the wording of para.7 of Sch.3 to the Nationality, Immigration and Asylum Act 2002 because he is in the UK in breach of immigration laws and he is not an asylum seeker. It is also common ground that as a consequence he is not eligible for support or assistance from the council under Part 1 of the Care Act 2014 or s.1 of the Localism Act 2011 unless the provision of such support or assistance is necessary to avoid a breach of his human rights. Equally, he is not eligible for s.4 support from the Home Office unless the provision of such support or assistance is necessary to avoid a breach of his human rights.

4 The background to the London Borough of Camden's decision of 12 July 2018 is as follows. The claimant is a 58-year-old Pakistani national. He entered the UK on 4 September 2001 using his Pakistani passport and entry clearance visa which was valid until 28 March 2003.

5 A Lahore entry stamp in his Pakistani passport indicates that he returned to Pakistan on 7 January 2002, and then on 27 March 2003 he applied for a further entry clearance visa which was granted. He was granted a multi-visit visa which was valid from 15 April 2003 until 15 April 2008. The date on which the claimant re-entered the UK using this visa is unclear, although he claims to have lived in the UK for more than 16 years.

6 Following the expiry of his visa, the claimant remained in the UK illegally from 16 April 2008 as an overstayer. On 6 October 2010, the claimant was arrested as an immigration offender. The Home Office set up reporting restrictions with which the claimant failed to comply. Then on 15 May 2014, the claimant contacted the Home Office screening unit to make an appointment, and on 27 May 2014, he claimed asylum. On 12 October 2014, the Home Office refused the claimant's asylum and human rights claims, certifying his claims as clearly unfounded. On 27 March 2017, the claimant made further submissions to the Home Office which were rejected by the Home Office on 21 June 2017. The Home Office determined that the claimant had not made a fresh claim because his new submissions taken together with those previously considered did not create a realistic prospect of success.

7 On 15 August 2017, the Home Office discontinued the claimant's support under s.4 of the Immigration and Asylum Act 1999. The claimant's appeal to the First-tier Tribunal against the Secretary of State's discontinuation of s.4 support was rejected on 6 September 2017. The Secretary of State accepted, in the context of that appeal, that the claimant was destitute, but successfully contended that none of the conditions for support applied. In particular, the claimant was not unable to leave the UK by reason of a physical impediment

to travel or for some other medical reason; nor was the provision of accommodation necessary for the purpose of avoiding a breach of the claimant's Convention rights.

8 On 26 March 2018, the claimant made a further attempt to make a fresh claim to the Home Office. This application, too, was rejected by the Secretary of State on 27 April 2018. On 1 May 2018 the claimant made an application to the Home Office for s.4 support, again claiming that he was unable to leave the UK by reason of his medical condition and alleging that the provision of accommodation was necessary for the purpose of avoiding a breach of his human rights under the Human Rights Act 1998 ("the HRA").

9 On 20 June 2018 the Home Office rejected the claimant's application for s.4 support on the basis that he is able to avoid the consequences of being left without accommodation or other support by leaving the UK, and the Home Office medical adviser determined that there is no medical reason precluding the claimant travelling or preventing him leaving the UK on a given day.

10 It is against this background that the claimant, via his solicitors, approached the London Borough of Camden for support in April 2018. The council provided the claimant with temporary accommodation and support whilst investigating his application and undertaking assessments. Initially a needs assessment was undertaken. That was completed in May 2018, and the claimant was found to have eligible needs. But given that the defendant is prohibited from providing the claimant with care and support unless not doing so would breach his rights under the Convention, the council then went on to complete an HRA assessment on 12 June 2018. The defendant concluded that there would not be a breach of his rights under Art.3 or Art.8 of the Convention if accommodation and support was not provided to him. Accordingly, on 13 June 2018, the council decided to cease providing the claimant with temporary accommodation and support save to the extent that the council offered, on a without-prejudice basis, to assist with the claimant's return to Pakistan.

11 There then followed a period of extensive pre-action correspondence as a result of which the council continued to provide the claimant with temporary accommodation and support until it made the decision (which is challenged by these proceedings) on 12 July 2018 to cease such accommodation and support the following day; that is from 13 July 2018.

12 The claimant seeks to challenge that decision on three grounds. Ground 1 contains a number of elements. First, it is contended that there is a procedural breach in respect of Art.3 of the Convention to the extent that the defendant failed properly to ask itself the correct questions, it is said, when determining whether or not there would be a breach of Art.3.

13 In my judgement, this aspect of ground 1 is unarguable. It is well established by the House of Lords' authority of *R (SB) v Governors of Denbigh High School* [2006[UKHL 15, [2007] 1 AC 100 that the Convention does not give that kind of procedural right. As Lord Bingham explained at para.29 of his judgment:

> "...the unlawfulness proscribed by section 6(1) of the Human Rights Act 1998 is acting in a way which is incompatible with a Convention right, not relying on a defective process of reasoning, and action may be brought under section 7(1) only by a person who is a victim of an unlawful act."

14 *R (SB) v Governors of Denbigh High School* was followed and applied again by the House of Lords in *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420. In my judgment

it is quite clear that the relevant question is not as to the manner in which the council has addressed Art.3; it is whether or not it has determined that question correctly.

15 The second way in which ground 1 is put is as a substantive challenge on the basis that the decision is in breach of Art.3 of the Convention. As to this, I agree with the submission made on behalf of the council that the threshold for a breach of Art.3, although it has been modified by the judgments of the Grand Chamber and the Court of Appeal, respectively, in *Paposhvili v Belgium* and *AM (Zimbabwe) v Secretary of State for the Home Department* [2018] 1 WLR 2933, remains high.

16 As Sales LJ said in *AM (Zimbabwe)* at para.38:

> "So far as the ECtHR and the Convention are concerned, the protection of Article 3 against removal in medical cases is now not confined to deathbed cases where death is already imminent when the applicant is in the removing country. It extends to cases where 'substantial grounds have been shown for believing that [the applicant], although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy' (para.[183])"

17 The council, as I have said, has found that the claimant has clear health needs. He had a stroke in 2008; he subsequently had a heart attack in 2014. He has limited mobility and there is history of depression. Nevertheless, in my judgement, this case does not arguably reach the level of breach of Art.3 as a result of return to Pakistan, and I would reject that ground as unarguable too.

18 It is also suggested that the defendant's decision is irrational. In my judgment, there is nothing in that. The decision represented through the needs assessment and, in particular, the human rights assessment and subsequent decision of 12 July are plainly rational decisions, not least having regard to the needs that have been found and also the degree to which the claimant has been inconsistent in explaining the network of support that he has.

19 The second ground put forward is that the claimant contends that the defendant's decision fails to preserve the claimant's procedural rights to make further Art.8 submissions to the Secretary of State. In this regard, he relies on the decisions in *R (Clue) v Birmingham City Council* [2011] 1 WLR 99 and *R (KA (Nigeria)) v Essex County Council* [2013] 1 WLR 1163.

20 This aspect of the claim is based on the fact that the claimant intends to make further submissions to the Secretary of State and I understand that the JCWI has confirmed the claimant has a personal appointment on 25 September 2018 at the Home Office's Further Submissions Unit. In the case of *Clue*, Dyson LJ explained the position as follows:

> "53. The issues that arise in the present case concern a person who (i) is unlawfully present in the UK within the meaning of para 7 of Schedule 3; (ii) is destitute and would (apart from Schedule 3) be eligible for services of the kind listed in para 1 of Schedule 3; and (iii) has made an application to the Secretary of State for leave to remain which expressly or implicitly raises grounds under the Convention.

54. When a local authority considers whether to provide assistance to a person pursuant to Schedule 3, it must first decide whether para 6 or 7 applies i.e. whether the person was, but no longer is, an asylum-seeker who has failed to co-operate with removal directions issued in respect of him (para 6) or he is in the UK in breach of the immigration laws or is an asylum-seeker (para 7). Secondly, if para 6 or 7 do apply, the local authority must decide whether and, if so, the extent to which it is necessary to exercise a power or perform a duty for the purpose of avoiding a breach of a person's Convention rights. Where there is available to a local authority a range of different types of assistance that would avoid a breach of Convention rights, the local authority should identify what types of assistance it may provide to avoid a breach of Convention rights and then choose between them.

55. If the withholding of assistance would not in any event cause a person to suffer from destitution amounting to a breach of Convention rights (typically article 3), the local authority's investigation ends there. The local authority must, therefore, investigate whether there are available to the claimant other sources of accommodation and support. But if it is satisfied that there are no other sources of assistance which would save the claimant from destitution amounting to a breach of a Convention right, then it must consider the matter further. It must then decide whether there is an impediment to the claimant returning to his country of origin.

...

66. I conclude, therefore, that when applying Schedule 3, a local authority should not consider the merits of an outstanding application for leave to remain. It is required to be satisfied that the application is not 'obviously hopeless or abusive' to use the words of Maurice Kay LJ in *R (M) v Islington London Borough Council* [2004] EWCA Civ 235. Such an application would, for example, be one which is not an application for leave to remain at all, or which is merely a repetition of an application which has already been rejected. But obviously hopeless or abusive cases apart, in my judgment a local authority which is faced with an application for assistance pending the determination of an arguable application for leave to remain on Convention grounds, should not refuse assistance if that would have the effect of requiring the person to leave the UK thereby forfeiting his claim...

...

72. I accept the submission of counsel for the claimant that where the three conditions identified at [53] above are satisfied, the financial situation of the local authority is irrelevant. Were the position to be otherwise, a person's application for leave to remain would, in effect, be rejected on the basis that a local authority applies article 8(2) on one set of criteria (weighing the various calls on its budget), where the same application might be allowed by the Secretary of State (the person whose statutory function it is to determine such applications) on a wholly different set of criteria (weighing the need to maintain a firm and orderly immigration policy). That is obviously incoherent. But it is also unfair

> and arbitrary. It is unfair and arbitrary because it means that the outcome of a person's application for leave to remain depends on the budgetary priorities of the particular local authority to which the claim for assistance is made. The outcome of the application for leave to remain may be different if the claim for assistance is made to a different local authority whose budgetary priorities are different. The disposal of applications for leave to remain should not depend on the vagaries of the budgetary considerations of local authorities.
>
> 73. Different considerations apply where the person who is applying for assistance from the local authority does not have an outstanding application for leave to remain. In that situation, the local authority is entitled to have regard to the calls of others on its budget in deciding whether an interference with a person's article 8 rights would be justified and proportionate within the meaning of article 8(2)."

21 In this case, there is no outstanding application for leave to remain made to the Home Office. There is what Mr Sprack, on behalf of the claimant, has referred to as a nascent claim in the sense that there is an appointment to make further submissions. The basis upon which those further submissions are intended to be made has been described in an email from the claimant's representatives, JCWI. What was said there is that reliance is placed on a change in the claimant's family circumstances as a result of his brother and mother having passed away in Pakistan. It is said these were his only relatives with whom he had social ties. His son and surviving brother, although in Pakistan, are estranged from him. It is also said that reliance is intended to be placed, in the further submissions, on the claimant's health and the medical records, and that the Home Office has not established whether he is fit to fly.

22 In my judgment, this ground is unarguable. Even if one were to treat the further submissions as an existing claim, although they have not yet been made, in my judgement, the test of whether or not they are obviously hopeless or abusive is clearly met. The claimant's brother and mother passed away in Pakistan in 2017 before the third set of submissions were made and rejected by the Home Office. Even if, as he contends, he was not aware they had died at the time, in that third set of submissions the claimant's representations were that he did not have any family in Pakistan who would be able to provide him with any support. So there is no arguable relevant change there. And the medical position is essentially as it was when the claimant made submissions to the Home Office in April. It is clear that the Secretary of State has determined on several occasions, including most recently last month, that the claimant is fit to fly. This is a case, as described by Dyson LJ in *Clue*, where the application, even if it were treated as having already been made when it had not in fact yet been made, is a repeat. In this instance, it is a fourth attempt; three attempts having been rejected already.

23 The third ground relied upon by the claimant is an allegation of breach of the public sector equality duty. The claimant's submission is that the human rights assessment made by the council breached this public sector equality duty. I can deal with this ground shortly. In my judgment, it is misconceived. The requirement as set out in the case of *Hotak* is to focus sharply on whether the person is under a disability, the effect of that disability, and whether it is necessary to provide the individual with support to avoid a breach of human rights.

24 It is clear from the HRA assessment itself. Further, if one considers that assessment in combination with the needs assessment that was completed by the council just one month before – as I consider it appropriate to do in this case - it becomes even more clear that the

council has focused sharply, as required, on the claimant's health issues, and on his disability.

25 In those circumstances, I refuse the claim for permission, and it follows that I also refuse the application for interim relief.

MR HADDEN: My Lady, I am instructed to ask if a transcript can be obtained but I understand that can be done through the normal channels. I don't think you need to give an express permission for that.

THE DEPUTY JUDGE: No; thank you.

MR HADDEN: Although it would need to be anonymised, given the terms of Ousley J's short term anonymisation order, unless this court considers otherwise: that it should no longer be anonymised.

THE DEPUTY JUDGE: Yes. I haven't heard any submissions in respect of anonymisation but, as I understand it, that is effectively based on his mental health needs, including, in particular his psychiatric needs. I wasn't inclined, unless I hear any submissions otherwise, to set aside the anonymisation.

MR HADDEN: No.

MR SPRACK: My Lady, in particular, I would submit there is a difficulty with doing that now given that the proceedings have continued on that basis and there has been a judgment.

THE DEPUTY JUDGE: Yes.

MR SPRACK: I am grateful.

THE DEPUTY JUDGE: Thank you.

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