Neutral Citation Number: [2017] EWHC 24 (Admin)

Case No: CO/2209/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 January 2017

Before :

HER HONOUR JUDGE KAREN WALDEN-SMITH
(Sitting as a Judge of the High Court)

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Between :

THE QUEEN **on the application of** **THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA**	**Claimant**
- and -	
LONDON BOROUGH OF EALING	**Defendant**
- and -	
Ms S. HACENE-BLIDI	**Interested Party**

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- -

Matthew Hutchings (instructed by **Tri Borough Legal Services**) for the **Claimant**
Emma Godfrey (instructed by **Legal and Domestic Services**) for the **Defendant**

Hearing date: 24 November 2016

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Judgment Approved

HHJ Karen Walden-Smith :

Introduction

1. This is a local connection referral case. It raises an important point of principle with respect to determining upon which housing authority the housing duty falls where there has been a cessation of housing duty by one authority and a new application made to another housing authority.

2. The claim to judicially review the decision of the Defendant authority, the London Borough of Ealing ("Ealing"), was filed in the Administrative Court by the Claimant authority, The Royal Borough of Kensington and Chelsea ("Kensington and Chelsea") on 26 April 2016. The acknowledgment of service together with summary grounds of resistance was filed on 25 May 2016 by Ealing, and a Reply was filed on behalf of Kensington and Chelsea on 9 June 2016.

3. Haddon-Cave J. determined the application for permission for judicial review on the papers and granted permission, noting that the law in the area is arguably unclear and requires clarification.

4. The substantive hearing came before me on 24 November 2016. I am extremely grateful to both Mr Matt Hutchings, Counsel for Kensington and Chelsea, and Miss Emma Godfrey, Counsel for Ealing, for their comprehensive and helpful oral and written submissions.

Factual Background

5. Ms Sara Hacene-Blidi is a British citizen. She is disabled and a wheelchair user and has four children who are dependent upon her. She had been living in Ealing since 2008. From 31 August 2012 she lived in private accommodation at 42 Curzon Road, Ealing, W5 1NF ("Curzon Road").

6. In March 2015, Ms Hacene-Blidi applied to Ealing for housing assistance pursuant to the provisions of the Housing Act 1996 ("HA 1996"), Part VII. Ms Hacene-Blidi's landlord at Curzon Road had commenced possession proceedings against her and Ealing accepted a main housing duty towards Ms Hacene-Blidi, pursuant to the provisions of section 193 of the HA 1996.

7. An offer of accommodation at 165 Old Oak Common Road was made by Ealing to Ms Hacene-Blidi on 28 October 2015 in compliance with Ealing's housing duty under Part VII of the Housing Act 1996. Ms Hacene-Blidi refused the offer of accommodation and, by letter dated 24 November 2015, Ealing notified Ms Hacene-Blidi that it regarded its housing duty to have ceased pursuant to the provisions of section 193(7) as she had refused a final offer made under Part VI of the HA 1996. A request for a review of that decision was made by Ms Hacene-Blidi pursuant to the provisions of s.202 of the HA 1996, but that request was withdrawn and the decision of 24 November 2015 stands.

8. Ms Hacene-Blidi was evicted from Curzon Road on 1 December 2015. Ms Hacene-Blidi's landlord was refurbishing the property for the purpose of letting it out at a higher rent.

9. Ms Hacene-Blidi then applied to Kensington and Chelsea for housing assistance pursuant to the provisions of Part VII of the HA 1996.

10. On 12 January 2016, Kensington and Chelsea notified both Ms Halcene-Blidi and Ealing that the main housing duty was owed and that the conditions for a local connection referral to Ealing were met. By letter dated 20 January 2016, Ealing wrote to Kensington & Chelsea acknowledging that the conditions for a local authority connection referral were met but that it did not owe any duty to Ms Hacene-Blidi in light of her refusal of a suitable offer of accommodation:

> *"…After careful consideration of this case, this authority is satisfied that the conditions of referral are met as the family have a local connection with us on grounds of residence. However, this Council is satisfied that we do not owe Ms Hacene-Blidi any duty under the terms of the above legislation… We discharged our housing duty on 24/11/15 as Ms Hacene-Blidi refused a suitable offer of accommodation… In coming to this decision we have had regards to case law of R v Hammersmith and Fulham LBC ex p O'Brian. In light of*

> *this it is down to your authority to refer the family to social services department for any further assistance they may be entitled to."*

11. Kensington & Chelsea contend that by reason of the acceptance of the conditions of referral being met, Ealing's main housing duty was engaged, and that this was a second duty. Ealing contend that it had already discharged its duty to Ms Hacene-Blidi on 24 November 2015 and that no new housing duty arose. It is this decision which is challenged by way of judicial review. Ealing has not sought to argue that Kensington & Chelsea lack standing to bring this judicial review claim and indeed it is clear that the refusal of Ealing to undertake the main housing duty after accepting the local connection referral has led to Kensington & Chelsea to supporting Ms Hacene-Blidi and her family. Kensington & Chelsea are plainly interested in the issue as to where the housing obligation falls.

12. Ms Hacene-Blidi does not herself challenge the decision of Ealing not to make her a further offer of accommodation. She has, however, issued an appeal under s.204 of the HA 1996 against Kensington & Chelsea's decision to make a local connection referral to Ealing. Ms Hacene-Blidi may consider that she would prefer to be housed by Kensington & Chelsea but that has no bearing upon which authority the obligation to house (if any) will fall. The s.204 appeal was due for hearing in the County Court at Central London very shortly after this matter was heard but I understand that hearing had to be adjourned as it was not ready.

Statutory Framework

13. Section 193 HA 1996 applies where the local housing authority are satisfied that an applicant is homeless, eligible for assistance and has a priority need, and are not satisfied that he became homeless intentionally.

14. It is said in this case that Ms Hacene-Blidi satisfies the conditions of being homeless, being eligible for assistance and that she has a priority need, and that the local authority are not satisfied that she is intentionally homeless. Consequently the duty to secure accommodation is available for occupation for the applicant arises with the local authority to whom she applied (s.193(2)) unless, as in this case, there is a local connection referral to another local housing authority pursuant to the provisions of s.198 HA 1996.

15. An application may be made for housing assistance to any local authority; and in *R v Slough BC, ex p. Ealing LBC* [1981] QB 801, Shaw LJ set out that:

> *"… the merry-go-round can be boarded at different points by application to different local authorities. Each is under a duty to make its own assessment after due inquiry of the factors involved including homelessness. Each is entitled if the circumstances warrant it to form the opinion that a different authority is the one with which the applicant has a local connection; and is empowered on that ground to seek to bring about the lateral shift of responsibility where the duty to provide accommodation appears to the authority to whom*

> *application was made to arise under section 4(5) [of the Housing (Homeless Persons) Act 1977]."*

16. Section 198(5) HA 1996 provides that: *"The question whether the conditions for referral of a case are satisfied shall be decided by agreement between the notifying authority and the notified authority or, in default of agreement, in accordance with such arrangements as the Secretary of State may direct by order".* In this case the conditions for referral were decided by agreement between Kensington & Chelsea as notifying authority and Ealing as the notified authority and communicated in the letter dated 12 January 2016. By virtue of section 200(4) HA 1996, the notified authority is then *"... subject to the duty under section 193 (the main housing duty)"*.

17. Section 193(3) provides that the local authority duty to secure accommodation *"... ceases by virtue of any of the following provisions of this section."* Ealing rely upon the section 193 duty having come to an end by reason of the provisions of section 193(7) namely that Ms Hacene-Blidi *"...having been informed of the possible consequence of refusal and of his right to request a review of the suitability of the accommodation, refuses a final offer of accommodation under Part 6".*

18. Section 193(9) HA 1996 provides that: *"A person who ceases to be owed the duty under this section may make a fresh application to* the authority for accommodation or assistance in obtaining accommodation." Ealing contend that Ms Hacene-Blidi cannot rely upon section 193(9) as her application to Kensington & Chelsea is exactly the same facts as applied at the time when the previous application was dealt with. Kensington & Chelsea contend that exactly the same facts do not apply in the second application and that a new duty arises.

19. Both authorities rely upon *Rikha Begum v LB of Tower Hamlets* [2005] EWCA Civ 340. Kensington & Chelsea contend that prior to the fresh application for housing assistance to Kensington & Chelsea, Ms Hacene-Blidi had been evicted and was therefore entitled to make a fresh application for housing assistance pursuant to section 193(9). Ealing contend that the initial decision to accept that they owed Ms Hacene-Blidi a main housing duty was on the basis that she was to be evicted, it now being the general policy of housing authorities not to wait until there is an actual eviction before finding that the applicant has not made herself intentionally homeless and all that has happened in this case is that the landlord had followed through with the eviction of Ms Hacene-Blidi. Ealing contend that the housing duty has been satisfied and that no new duty has arisen and that the authority is entitled to rely upon that earlier discharge of duty in circumstances where the authority would have refused the application if it had been made to that authority.

20. In support of its argument, Ealing rely upon the decision of Glidewell J in *R v Hammersmith & Fulham LBC, ex p. O'Brian (1985) 17 HLR 471*. Kensington & Chelsea rely principally upon the determination of Neuberger LJ (as he then was) in *Rikha Begum* and upon the House of Lords decision in *R v LB of Harrow, ex p. Fahia* [1998] 1 WLR 1396. Kensington & Chelsea contend that *R v Hammersmith & Fulham ex p. Chambers*, which *O'Brian* followed, is no longer good law.

Analysis

21. The issue as to the applicability or relevance of *O'Brian* under current housing legislation and whether the notified authority has a new housing duty if it has already satisfied is housing obligation has potentially wide significance to housing authorities.

22. In my judgment, the acceptance by Kensington & Chelsea of the full housing duty and the acceptance by Ealing of the local connection referral made by Kensington & Chelsea means that a new housing duty has been imposed upon Ealing. The decision of Glidewell J. in *O'Brian* does not assist Ealing.

23. *O'Brian* was decided under the Housing (Homeless Persons) Act 1977 ("the 1977 Act") and, as a consequence of there being no express statutory provision as to the cessation of duty contained in the 1977 Act, McCullough J. in *R v City of Westminster ex p. Chambers* (1982) 6 HLR 26 created the concept of discharge of duty. The decision of Glidewell J. in *O'Brian* follows the reasoning of *ex p. Chambers*, namely that the local housing authority had fulfilled its duty by making an offer of appropriate accommodation and the authority could rely upon that fulfilment of the duty *"unless there is a new incidence of homelessness"*. In *ex p. O'Brian,* the London Borough of Hammersmith & Fulham accepted a main housing duty towards the applicant and offered her accommodation in performance of that duty, which she refused. She then applied to the London Borough of Bexley, who made a local connection referral back to Hammersmith & Fulham who declined to make any further offer of accommodation to the applicant on the basis that it had already fulfilled its duty to her. Glidewell J. found against the applicant in her application to judicially review the decision of Hammersmith & Fulham, finding that the authority fulfilled its initial duty by securing that accommodation was available to her and that had the applicant made a second application directly to Hammersmith & Fulham, and not to Bexley, then there would not have been any new duty to provide accommodation for her. Glidewell J. found that the local housing authority was entitled to rely upon a former discharge of duty unless there was a new incidence of homelessness and that there is no logical distinction between the situation of a renewed application to the same authority (as in *Chambers*) and the situation of an application to a new authority (as in *O'Brian*). Both required a new incidence of homelessness.

24. Ealing contend that *O'Brian* is factually "on all fours" with the facts of this case. However, it is in my judgment no longer good law. In the later case of *R v LB of Tower Hamlets ex p. Abbas Ali; R v LB of Tower Hamlets ex p. Aleya Bibi* (1992) 25 HLR 158, Glidewell LJ said that he had been in error in *O'Brian* with respect to his determination that there was one duty created by sections 68(2) and 65(2) of part III of the Housing Act 1985 ("HA 1985"), that duty being imposed upon different authorities although he qualified that by saying that did not *"necessarily follow that my decision in that case was wrong…".* What undermines *Chambers,* and therefore *O'Brian,* is the imposition of a new statutory scheme by virtue of the provisions of the HA 1996 and the determination of the House of Lords in *R v LB of Harrow ex p. Fahia* [1998] 1 WLR 1396.

25. In *Fahia*, Lord Brown-Wilkinson was dealing with the statutory obligation to make inquiries as provided in the HA 1985. He found that when a local authority, having discharged their statutory duties in relation to one application for accommodation, receive a second application from the same applicant, there is an obligation under HA

1985 to make inquires whenever the authority has reason to believe that an applicant for accommodation was homeless or threatened with homelessness unless *"there has been no relevant change in circumstances at all."* That principle, established by the House of Lords in *Fahia*, removes the requirement established by *Chambers* (and followed in *O'Brian*) of the need for a new incidence of homelessness.

26. In *Rikha Begum*, the applicant for housing was found to be involuntarily homeless and in priority need. An offer of a secure tenancy was refused by the applicant but, on review, that was found suitable and the council concluded that their statutory duty (under the HA 1996) had been discharged. The council's decision was upheld on appeal to the County Court. A second application was made a few years later on the basis that it was unreasonable for the applicant and her family to remain in occupation of her parents' flat. Three factors were highlighted as making her situation different: a second child had been born; the flat had been purchased by her father and brother; another brother, a heroin user, had returned from prison to live in the flat as well. The second application was rejected by the council on the basis that it was satisfied there was no material change in the applicant's circumstances. That decision was upheld on review. On appeal to the County Court it was held by the Circuit Judge that the council applied the wrong test by asking whether there had been any material change in the applicant's circumstances; rather the council should have considered the second application in the same way as any application under the HA 1996.

27. On appeal from the County Court, it was held by the Court of Appeal that there was no basis in principle to imply a further requirement, such as the establishment of a material change of circumstances, subsequent to the refusal of an offer of accommodation pursuant to an earlier application. Section 193(9) of the HA 1996 provides an unqualified right for an applicant to make a fresh application which acknowledges that a subsequent application could be made unless it was based on precisely the same facts as an earlier application which had been finally dealt with.

28. Neuberger LJ (as he then was) undertook an analysis of the line of authority, including *Chambers* and Woolf J in *Delahaye v Oswestry BC* The Times, 29 July 1980, which gave strong support *"for the proposition that, once an authority have satisfied their duty in relation to an application by a person who was homeless, they have no duty to that person on a subsequent application unless he can show a material change of circumstances"*. The revival of an authority's duty under the 1977 Act, if there is a material change of circumstances was said by Ackner LJ to be *"properly inferred from the provisions of the Act [of 1977]"*. Neuberger LJ then considered *Fahia* and concluded that the reasoning and the decision of the House of Lords was inconsistent with *Chambers* and other cases and that according to *Fahia* the *"only relevant basis upon which a purported subsequent application may be treated as no application…appears to be where it is based on "exactly the same facts as [the] earlier application." That is a rather different formulation from the "material change of circumstances since the original decision"…"*

29. Neuberger LJ went on to determine that it is clear as a matter of ordinary language that once there is a genuine and effective application, and once the authority are satisfied that the applicant is or may be homeless, or threatened with homelessness, the various obligations, including the final duties set out in sections 190 to 193 of the HA 1996 arise. He found that, in light of the reasoning and decision of the House of Lords in *Fahia:*

> *"…there is no room to imply a further requirement which has to be satisfied, such as establishing a material change of circumstances since the refusal of an offer of accommodation pursuant to an earlier application…A person seeking to imply words into a statute faces a difficult task: it is a course which can only be justified in clear and unusual circumstances. Where the implication involves imposing a further requirement, over and above express requirements imposed by the legislature, the task is, in my view, particularly difficult."*

30. In my judgment, the HA 1996 creates a statutory scheme in which there is no place for any judicial overlay imposing a further test. When an applicant makes a new application the obligation upon the housing authority is to undertake the statutory enquiries. The applicant does not have to establish a material change in circumstances. The only occasion when the housing authority, whether that is the authority who considered the first application and discharged its duty or another authority, does not undertake the statutory enquiries is if *"there is no relevant change in circumstances at all"*. In such a case, there is no new application to consider.

31. In this matter, the application was made to Kensington & Chelsea and the obligation fell upon that authority to undertake the statutory enquiries. Having accepted the main housing duty towards Ms Hacene-Blidi and referred the main housing duty to Ealing pursuant to the provisions of section 200 of HA 1996, and the conditions of referral being met, Ealing became subject to the duty under section 193 HA 1996. The referral does not allow Ealing to avoid the housing duty as Ealing is placed in no better position by reason of the fact that the second application was made to Kensington & Chelsea and then referred to Ealing.

32. While Ealing had discharged its duty with respect to the first housing duty, that does not entitle Ealing to avoid the duty that arose on the second application. If a housing authority in the position of Kensington & Chelsea, accepting the full housing duty on a second application, has acted perversely in a *Wednesbury* sense or has acted under a mistake of fact, then the authority in the position of Ealing, the notified authority who has already discharged the housing duty on the first application, would be protected. Otherwise it is of no consequence that the second application was made to a different authority to the one who received the first application.

33. Ealing do not seek to argue that Kensington & Chelsea had acted unreasonably or irrationally in accepting the housing duty. What Ealing do argue is that the authority should not have been placed in a worse position than they would have been in had the second application been made directly to Ealing. I do not accept that Ealing have been placed in any worse position by virtue of the application being made to Kensington & Chelsea and the duty being accepted.

34. This is not a case where it can be said that the second application is on exactly the same facts as the first application. In the second application, Ms Hacene-Blidi had been made homeless. In the first application Ealing was acting on the basis that the landlord had taken possession proceedings against Ms Hacene-Blidi. This is not the same as her having been evicted. As Singh J. said in *R (o.a.o. May) v Birmingham City Council* [2012] EWHC 1399 *"there is all the difference in the world … between a person knowing that at some point in the future they may have to leave*

accommodation and a person being told that they will not have somewhere to sleep that night." The scenario of an applicant who is facing the potential of eviction sometime in the future, possession proceedings having been instituted, is not the same scenario as actually having been evicted and being homeless. If the application had been made directly to Ealing then the authority would have been in the same position it is in with the local connection referral having been made by Kensington & Chelsea.

35. Ealing have relied upon the decision of Lewis J. in *R (Brooks) v Islington LBC* [2015] EWHC 2657 (Admin). He refers back to the decision of McCullough J. in *Chambers* as supporting the contention that the HA 1996 does not create a complete statutory code. However, I do not read Lewis J. decision as giving support for that contention. *Brooks* was concerned with how to interpret section 188(1) HA 1996, namely the obligation of the housing association to perform its interim duty to provide accommodation for a homeless applicant in apparent priority need pending the decision as to whether they owe the main housing duty. He construed section 188 HA 1996 as meaning that if *"an authority provide suitable accommodation, or secure an offer of suitable accommodation from another person, the authority have secured that accommodation is available and have performed their duty under section 188 of the Act"*. In doing so he took into account the realities of the situation for which Parliament was legislating. That interpretation of s.188 HA 1996 gives no assistance as to how repeat applications are to be dealt with, particularly where a second application is accepted as giving rise to the main housing duty and where there is a local connection referral. As is set out above, section 193 provides for when the main housing duty ceases and provides for the applicant making repeat applications. Parliament has spelt out what obligations arise in different parts of the Act and, as Moses J set out in *R v Brent LBC ex p. Sadiq* (2001) 33 HLR 525 *"... it may be seen from the scheme of the Act that different duties are imposed according to the category into which the homeless person falls."*

Conclusion

36. For the reasons set out above, the main housing obligation pursuant to the provisions of the HA 1996 falls upon Ealing. Kensington & Chelsea fulfilled its statutory obligations upon receipt of the application for housing assistance from Ms Hacene-Blidi and found that there was a main housing obligation pursuant to the provisions of section193(1). That main housing obligation fell upon Ealing upon Ealing accepting the local connection referral on 20 January 2016. The cessation of the first duty that occurred when Ms Hacene-Blidi refused the offer of accommodation made by Ealing in response to her first application for housing assistance, pursuant to the provisions of Part VII, does not prevent the second housing duty arising upon her making a fresh application pursuant to the provisions of section 193(9) HA 1996. The fact that application was made to another housing authority does not place Ealing in any better or worse position. In the circumstances, Kensington & Chelsea succeed in this application to judicially review Ealing. I envisage counsel will be able to agree the precise form of order to give effect of the appropriate remedies in this case but I will, of course, accept further submissions on the precise form of order if agreement cannot be reached.

Costs

37. Further to my providing the draft copy of this judgment dated 16 December 2016, Counsel have helpfully agreed the terms of the order save for costs. I have received written submissions from both Counsel setting out their respective positions.

38. Mr Hutchings contends that this is a case in which the Claimant is the successful party and should be entitled to its costs in the ordinary way, pursuant to CPR rule 44.2(2)(a). He sets out that not only has the Claimant won on the substantive point of law that was in dispute, it has obtained practical relief, which the Defendant agrees flows from the judgment, namely a quashing order and a declaration and that, in substance, the Claimant has obtained everything that it sought in the claim. He further relies upon Lord Toulson in *R(Hunt) v North Somerset Council* [2015] UKSC 51; [2015] 1 WLR 3575, where he stated at paragraph 16:

> "If a party who has been given leave to bring a judicial review claim succeeds in establishing after fully contested proceedings that the defendant acted unlawfully, some good reason would have to be shown why he should not recover his reasonable costs."

39. Miss Godfrey, on the part of the Defendant, contends that as the case involved an important point of principle for local authorities, namely whether it was open to a local authority which agreed that the conditions for a local connection referral to it were met to rely on a previous discharge of duty. This involved the court determining whether the decision in *O'Brian* remained good law and Mr. Justice Haddon-Cave, on granting permission, observed that it was arguable that the law was unclear and needed clarifying. She submits that, although the Court has determined that the decision in *O'Brian* is no longer good law, it was appropriate for the Defendant to defend the claim and for the law to be clarified. In the circumstances she submits that it would be appropriate for each local authority to bear its own costs. Alternatively, it is submitted that the Claimant's case was brought on the basis that it had standing to bring a judicial review claim because it was accommodating Ms. Hacene-Blidi, but that In the course of its oral submissions in reply at the hearing on 24th November 2016 the Claimant disclosed for the first time that it had in fact ceased to accommodate Ms. Hacene-Blidi and had the Defendant been aware prior to the hearing that the Claimant was no longer accommodating Ms. Hacene-Blidi, it would have been open to it to invite the court to consider whether the claim had become academic as between the two authorities, and the costs of a full hearing might have been avoided. This second argument does not, in my judgment, have any force. The judgment provides that it is accepted by the Defendant that the Claimant has standing and, even if that were incorrect, this is plainly a matter of such significance that it required a determination.

40. With respect to the argument that there should be no order as to costs, while this was a point of principle that required consideration that is often the case in litigation which cannot be resolved between the parties. There were in this case two legitimate views being taken of the correct interpretation of the legislation and caselaw but I do not consider that precludes the usual order being made that the winning party has its costs paid pursuant to the provisions of CPR rule 44. The order I will make, therefore, is

that the Defendant is to pay the Claimant's costs on the standard basis, subject to a detailed assessment unless agreed.