Case no: B5/2012/2520

Neutral Citation Number: [2013] EWCA Civ 752
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRMINGHAM COUNTY COURT
(HIS HONOUR JUDGE OLIVER JONES QC)

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 6 June 2013

Before:

LADY JUSTICE ARDEN
LORD JUSTICE JACKSON
and
LORD JUSTICE MCCOMBE

Between:

JOHNSON

Appellant

and

SOLIHULL

Respondent

(DAR Transcript of
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Mr Lindsay Johnson (instructed by Evans Derry Solicitors) appeared on behalf of the **Applicant.**
Ms Catherine Rowlands (instructed by Cornerstone Barristers) appeared on behalf of the **Respondent**

J U D G M E N T
(As Approved by the Court)

1. Lady Justice Arden:

1. This is a second appeal from the order of HHJ Oliver Jones QC, sitting in the Birmingham County Court, whereby he dismissed the appeal of the appellant, Mr Craig Johnson, under section 204 of the Housing Act 1996 against the decision of the respondent, which I will call Solihull, following a review of the decision dated 8 May 2012 that Mr Johnson was not in priority need for the purposes of section 189(1)(c) of the 1996 Act. This provides:

> "(1) The following have a priority need for accommodation --
>
> [...]
>
> (c) a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside..."

2. The category of persons who are specifically described as "homeless" for the purposes of priority need has been extended pursuant to powers conferred by section 189(2) of the Homelessness (Priority Need for Accommodation) (England) Order 2002.

3. The meaning of "vulnerability" for the purpose of section 189 was authoritatively considered by this court in R (on the application of Pereira) v Camden LBC [1998] 31 HLR 317. The principal speech is given by Hobhouse LJ, and at the end of his judgment, he summarises the meaning of vulnerability as follows:

> "The Council should consider such application afresh applying the statutory criterion: The *Ortiz* test should not be used; the dictum of Simon Brown LJ in that case should no longer be considered good law. (The same applies to what Mann J said in *Di Domenico*.) The Council must consider whether Mr Pereira is a person who is vulnerable as a result of mental illness or handicap or for other special reason. Thus, the Council must ask itself whether Mr Pereira is, when homeless, less able to fend for himself than an ordinary homeless person so that injury or detriment to him will result when a less vulnerable man would be able to cope without harmful effects. The application of this test must not be confused with the question whether or not the Applicant is at the material time homeless. If he is not homeless, the question whether he is in priority need becomes academic. The question under paragraph (c) can only arise if (or on the assumption that) he is at the material time homeless. A particular inability of a person suffering from some handicap coming within paragraph (c) to obtain housing for himself can be an aspect of his inability as a homeless person to fend for

> himself. Such an individual may suffer from some mental or physical handicap which makes him unable to obtain housing unaided and thus makes him unable to cope with homelessness in a way which does not apply to the ordinary homeless person. But it is still necessary, as is illustrated by the decided cases, to take into account and assess whether in all the circumstances the applicant's inability to cope comes within paragraph (c). It must appear that his inability to fend for himself whilst homeless will result in injury or detriment to him which would not be suffered by an ordinary homeless person who was able to cope. The assessment is a composite one but there must be this risk of injury or detriment. If there is not this risk, the person will not be vulnerable. In so far as the judgments of Hodgson J in *Sangeramano* and Webster J in *Carroll* might be thought to suggest something different, those dicta should not be followed."

4. The question for the housing authority is, therefore, whether the applicant "is, when homeless, less able to fend for himself than an ordinary homeless person so that injury or detriment to him will result when a less vulnerable man would be able to cope without harmful effects." I refer to this below as "the Pereira test." Mr Lindsay Johnson of counsel, who appears for the appellant, emphasises that in Pereira this court considered a number of the earlier authorities such as Ortiz, which had treated vulnerability as composed of two separate elements which had to be considered separately. Mr Johnson submits, and I agree, Pereira established that the test for vulnerability is a single comprehensive test.

5. I also accept Mr Johnson's further submission that the application of the Pereira test requires a careful evaluation and weighing up of numerous factors affecting the particular applicant in question. This is made clear by another authority to which Mr Lindsay Johnson referred us, namely the decision of this court in Osmani v Camden LBC [2005] HLR 22. Mr Johnson took us to paragraph 38, which sets out a number of conclusions of Auld LJ, with whom Judge LJ and May LJ both agreed, about the Pereira test. The particular sub-paragraph relied on in this appeal was sub-paragraph (4), which reads as follows:

> "(4) Pereira establishes that a person is vulnerable for the purpose if he has such a lesser ability than that of a hypothetically "ordinary homeless person" to fend for himself that he would suffer greater harm from homelessness than would such a person. One has only to attempt to apply the Pereira test to any particular case by asking the question whether the applicant would, by reason of whatever condition or circumstances assail him, suffer greater harm from homelessness than an "ordinary homeless person", to see what a necessarily imprecise exercise of comparison it imposes on a local housing authority. Given that each authority is charged with local application of a national scheme of priorities put

> against its own burden of homeless persons and finite resources, such decisions are often likely to be highly judgmental. In the context of balancing the priorities of such persons a local housing authority is likely to be better placed in most instances for making such a judgment."

6. That passage makes it clear that, in determining whether a person is vulnerable, the authority must pay close attention to the particular circumstances of the individual. It is also bound to discharge its obligations by taking into account its own burden of homeless persons and finite resources. As Auld LJ says, its decision is likely to be highly judgmental.

7. Going back to the passage I have cited from Pereira, Hobhouse LJ uses the word "unaided" (seventh sentence), but it is now clearly established that the local authority can take into account assistance on which the applicant is able to call. This can be seen, for instance, from paragraph 41 of Osmani on which Mr Johnson also relied. The final sentence of paragraph 41 reads:

> "As to the future, she [the review officer] expressly justified her decision by reference to: 1) that he was undergoing and cooperating with treatment for his depressive condition; 2) that Dr McNicol and Ms Dionisio were carefully monitoring his condition; 3) that he continued to receive support from his wife in all this; and 4) that, thus aided, he was, therefore likely to be able to fend for himself as well as others without such mental conditions."

8. As I read that sentence, the expression "thus aided" in item (4) refers to each of the elements of support being offered to the applicant in that case as described in sub-paragraphs (1), (2) and (3), not simply that in item (4) alone. But nothing turns on that point. I shall have to return to this sentence later in this judgment.

9. That then is the statutory and case law framework against which this appeal is brought. The judge gave a careful and comprehensive judgment. However, it is accepted that on this appeal this court is concerned with whether or not there were any errors of law in the decision of the review officer, and therefore, not intending any disrespect, it is not necessary for me to go into any detail into the reasoning of the judge. He came to the conclusion that the decision of the review officer was not flawed in law.

10. As to the background it is sufficient that I adopt with the judge's summary of the facts, which is contained in paragraph 2 of his judgment:

> "The Appellant is 37 years of age. In his witness statement dated 26th June 2012 which I have read, he describes himself as being 'a persistent criminal offender since I was 13/14 years old'. He has about 50 convictions altogether for what I am told are about 80 separate offences ... He was last released from what had been repeated custodial sentences on 19th April of this

> year having served a three month sentence for theft of a cashbox from a garden centre. He said that he stole this money to give to his brothers and friends who required some form of payment for providing him with temporary accommodation. He last had his own accommodation in 2005. He was evicted whilst he was on remand in custody for some offence. Since then, that is 2005, when not in prison and not able to avail himself of sofas of friends, brothers or his mother, he sleeps rough. So he has been, and is from time to time, street homeless. He describes himself as being 'a recovering heroin addict' and that it is this addiction which has been responsible for his criminal lifestyle. He is prescribed methadone for his drug addiction and his medical records, through which I have been taken very carefully but which I do not propose to recite in this judgment, show also a prescription of diazepam which he says is 'to help me get to sleep at night as I suffer from depression'. There is in fact no evidence that he suffers from depression but there is evidence that he is prescribed diazepam to assist his sleeping. He is semi literate; he has difficulty with reading and writing, although there is no suggestion in this case, nor has there ever been, that he suffers from any particular learning disability which might be classified as a mental disorder. He has two children, both boys, aged 12 and 15, the youngest living with the child's mother and the eldest with the Appellant's parents, the child's grandparents. He has contact with them both but obviously accommodating them overnight is very difficult. That is not a specific ground that he relies upon, even in support of some 'other special reason', nor, in my judgment, could it be."

11. The decision of the review officer, Gemma Thompson of Housing Strategy Policy and Spatial Planning Services of Solihull, started by setting out the evidence which the review officer had taken into account. The decision then sets out the Pereira test and also the conclusion of the writer of the review, namely that the appellant's circumstances were not sufficiently serious for her to conclude that he was vulnerable. She was satisfied that, when street homeless, the appellant would not be less able to fend for himself than an ordinary homeless person so that injury or detriment to him would have resulted when a less vulnerable person would be less able to cope without harmful effect.

12. So the conclusion of the decision was clearly put at the outset, and the reasons given for that decision were then set out in the letter. The decision refers to medical problems and to the appellant's learning ability. I do not need to go into these matters, because as a matter of fact, the reviewing officer concluded that they did not result in the appellant being vulnerable. This court is not able to review any finding of fact unless it is a finding or inference of fact which is perverse or irrational or without evidential basis, see generally R (on the application of Begum) v Tower Hamlets LBC [2000] 1 WLR 306. So, for the purposes of this appeal, the important issues dealt with by the review

officer were drug use, prison sentence and other special reason, and the following are the relevant passages in the decision letter:

"Drug use

11. You have a history of illicit drug use namely heroin and cannabis. For this you are being treated under the care of the local substance misuse service and are being prescribed methadone as drug replacement. You are also being prescribed diazepam to help you sleep. There is nothing to suggest from your medical records that your drug use has caused you to suffer from any secondary irreversible medical complications. Furthermore, whilst I appreciate that it may be harder for you to remain off drugs while street homeless, nevertheless, I am satisfied that you can maintain the support that you currently have to do so and would reasonably be able to remain off drugs. Indeed, you confirmed to Mr Perdios from Housing Reviews Limited in your telephone conversation with him on the 16th February 2011 that you were abstinent from drugs.

12. In your solicitor's letter dated 27th April 2012 you implied that you lied to Mr Perdios from Housing Reviews Limited about being abstinent from drugs because you did not know who he was and you thought that he might be the police. I reject this assertion as Mr Perdios made it very clear to you who he was. However, more significantly, you told Roz Daniels at her interview with you on the 25th November 2011 that you were abstinent from heroin between November 2010 and May 2011. This indicates that you have the ability to remain abstinent from drugs. Although you are taking heroin at present you do not appear to have suffered and irreversible secondary medical problems. The above also shows that your statements cannot be relied upon.

13. It is evident from your medical records that you have had several attempts at being treated for your drug addiction and that these have failed. There is, therefore, a chance that if you were street homeless or even accommodated that you would return to using drugs. Even if you do slip back to using drugs this would not necessarily be anything unusual in relation to homeless people. For example, Homeless Link's Survey of Needs and Provision (SNAP) 2010 found that drug issues were among the issues most frequently affecting the users of homelessness services. SNAP 2010 found that 92% of homelessness services are working with people who are experiencing problems with drugs.

14. Given the above I am not satisfied that your drug history makes you vulnerable.

Prison Sentence

15. I do appreciate that you have served many prison sentences. You confirmed that you have been in and out of prison since you were 16. Your last prison sentence was in 2006 for burglary. You were in prison until 2009 when you were released on license. However, you breached the terms of your license and were recalled towards the end of 2009. You completed your sentence in April 2010 and you also recently served another short prison sentence.

16. Jodie Smith, Police Offender manager, stated in her letter that you are doing relatively well within the community and were crime free but I do appreciate that you committed another burglary recently which led to another short prison sentence. It is evident that your history of crime is linked to your drug use as you were burglaring properties in order to fund your habit. It is evident that even in the absence of settled accommodation you have had periods of being crime free. For example, Mrs Smith stated that you were doing relatively well and this could be seen from the fact you are able to manage your own affairs, you were able to sort out your benefits, and engage well with a variety of services. You did let yourself down by committing another crime of burglary but I am not satisfied that this means that you are vulnerable.

17. I acknowledge that you have been in and out of prison since the age of 16 but I am not satisfied that you have necessarily been institutionalised. You remained out of prison for nearly two years and managed your affairs as you are doing at present.

18. I fully acknowledge that it would be beneficial to you and the Offender Management Team if you had settled accommodation. However, I am not satisfied that this means that you will suffer injury or detriment if you were street homeless.

19. Given the above I am not satisfied that you experience of serving prison sentences has made you vulnerable.

[...]

Other Special Reason

[...]

22. Under the category of special reason I must also consider whether your circumstances taken as a whole make you vulnerable. I have looked into all your circumstances and I am satisfied that there is nothing that differentiates you from other homeless people for the reasons given above. It does appear to me that your ability to fend for yourself is not significantly compromised and you are quite capable of managing independently. Whilst I appreciate that it would be stressful being street homeless nevertheless I am satisfied that you have sufficient capabilities to ensure that you would not suffer injury or detriment greater than an ordinary homeless person. Therefore I am not satisfied that you are vulnerable as a result of any special reason. Therefore I must conclude that you are not in priority need under S189 of the Housing Act 1996."

13. The first ground of appeal is that the review officer applied the wrong test in that she used as comparator an ordinary homeless person who had been affected by drug use and other matters, rather than an ordinary homeless person who did not have these issues, that is, an ordinary person who is homeless. This submission is based on paragraph 13 of the decision letter. This particular paragraph has of course to be read in the context in which it appears, namely as having followed paragraphs 11 and 12. In those paragraphs, as Mr Johnson stresses, the review officer accepts that it would be harder for the appellant to remain off drugs whilst street homeless than if

accommodated. Nonetheless, the review officer concluded that she is satisfied that he can maintain the support that he currently has and would reasonably be able to remain off drugs. The appellant has the support of a clinic which is able to advise persons who are in the process of obtaining rehabilitation from drug use.

14. She also notes that he has an ability to remain abstinent from drugs, however she then goes on to deal with an important point, namely that he was taking heroin at the time of the review. I should say that that point is made without any alteration to the previous conclusion that the appellant has the ability to remain abstinent from drugs. However, the review officer accepted in the light of the evidence that if the appellant was street homeless, or even accommodated, that he would return to using drugs. She then goes on to say that even if he did slip back to using drugs, that would not necessarily be anything unusual in relation to homeless people. She refers to the Homeless Link's Survey of Needs and Provision (SNAP) 2010, which found that drug issues were among issues most frequently affecting homeless people, and indeed that the vast majority of homelessness services were directed to dealing with people who had problems with drugs.

15. Mr Johnson accepts, fairly, that he cannot base this appeal on the assessment of a chance that he would return to using drugs if street homeless. That was an assessment which he accepts the authority was entitled to make in the circumstances of the case, and reference was made by the respondent to Griffin v City of Westminster [2004] HLR 32 at paragraph 13. We have not therefore been concerned with the first part of paragraph 13, but rather with the second part of paragraph 13.

16. The thrust of Mr Johnson's submission is that passage in which the review officer referred to the Homelessness Link's Survey of Needs and Provisions (SNAP) 2010 demonstrates that the review officer was not taking the right comparator. He submits she should have taken as the comparator an ordinary person who was homeless. He further submits that the concluding words of paragraph 41 from the judgment of Auld LJ in Osmani (which I have set out in paragraph 6 of this judgment) support his argument. He submits that those words show that the proper comparator is an ordinary person without mental health or (in this case) drug issues.

17. I do not accept that Mr Johnson's interpretation of the concluding words of paragraph 41 of the judgment of Auld LJ is correct. If it were correct, the concluding words would have read "without any", not "such","mental health conditions". In my judgment, Auld LJ did not decide, or proceed on the basis of, the point which Mr Johnson advances.

18. Mr Johnson's interpretation of the concluding words of paragraph 41 is also in my judgment inconsistent with paragraph 38(4) of the judgment of Auld LJ. From that it is clear that the concept of an ordinary homeless person is necessarily an imprecise one. It falls to the Housing Authority to consider what features such a person would have. It is also clear from that paragraph that the question of who is an ordinary homeless person and what characteristics they have is a question to be assessed in the real world. It is sadly not surprising that many homeless persons have drug issues, or that many homelessness services are involved with dealing with those issues. Accordingly, in my

judgment, it was open to the review officer to refer to this report as providing some assistance in determining the characteristics of the ordinary homeless person.

19. I further note that the citation to which the housing officer referred does not state the level of seriousness of drug issues so far as the individuals being surveyed was concerned. There is no suggestion, for instance, that an ordinary homeless person would have severe drug issues as opposed to issues resulting from more occasional drug use. These may have no impact at all upon a person's ability to cope with homelessness, but simply serve to underline that the ordinary homeless person need not be assumed to be a person who has no experience of drug issues.

20. In any event the phrase used in the Pereira test is "ordinary homeless person", not ordinary person who is homeless. This is a deliberate choice of language which firmly indicates that the characteristics of a normal homeless person are those which are relevant for the purposes of the Pereira test

21. Mr Johnson also submits that paragraph 14 of the decision letter was unclear. This largely followed from his submissions on paragraph 13. Paragraph 14 is the conclusion that the Pereira test was not met, which the review officer drew from the assessment in paragraphs 11 to 13. I therefore do not accept the submission that paragraph 14 is unclear.

22. Accordingly, I would reject the first ground of appeal which, as I say, seeks to challenge the assessment of the comparator.

23. The second ground of appeal concerns the composite assessment made in paragraph 22 of the decision letter. Mr Johnson submits that the review officer had to consider all the various circumstances concerning the appellant and in particular how they interacted with one another, and that it was not sufficient for the review officer merely to say that she was satisfied that there was nothing that differentiated him from ordinary homeless people "for the reasons given above" (see the second sentence of paragraph 22 of the decision letter).

24. In my judgment, it is correct that the review officer had to consider all the factors together and to see whether they produced a different result by their combination. But, in my judgment, that is in fact what the decision-maker has done. The first sentence of paragraph 22 accepts that there is an obligation to take the circumstances as a whole.

25. Paragraph 22 then goes on to say that the review officer has looked at all the appellant's circumstances. It seems to me that it would be taking far too technical an approach to say that the review officer had left out of consideration and had excluded from her consideration the effect of the combination of these various factors. It has to be accepted that there will be cases where a composite assessment does not make any difference to the assessment of the individual aspects of a person's vulnerability, but on the other hand there are certainly cases where the composite assessment will make a material difference and that is why the exercise is one that must be gone through. In my judgment, it was gone through, and the essential point in answer to the second ground of appeal is that there was no misdirection by the review officer.

26. Accordingly, I also dismiss the second ground of appeal.

27. The third and final ground of appeal concerns the prison sentence. The fact that the person has been released from custody is expressly made a further ground on which he or she can be found to be vulnerable by paragraph 5(3) of Homelessness (Priority Need for Accommodation) (England) Order 2002. The relevant provision is paragraph 5(3)(a) and that reads:

> "A person who is vulnerable as a result of—
>
> (a) having served a custodial sentence (within the meaning of section 76 of the Powers of Criminal Courts (Sentencing) Act 2000)..."

28. There was a suggestion in the judge's judgment that this provision would only apply to long-term prisoners, but it is not so restricted by the Order, and we did not ask Mr Johnson to address this point. As it was not a point made by the review officer, it was not one which formed part of the decision which we have to consider. The real basis of the review officer's rejection of the prison sentence and release from custody as a special reason was she concluded that the appellant had not become institutionalised and was therefore, put shortly, not less able to cope than an ordinary homeless person (see paragraph 17 of the decision letter).

29. The review officer goes on to say: "You remained out of prison for nearly two years and managed your affairs as you are doing at present". She had taken into account in the preceding paragraph advice from the offender manager and others that the appellant had been doing relatively well in managing his own affairs, although he had committed an offence in the meantime. The review officer's conclusion about that was that that alone did not mean that he was vulnerable.

30. This ground of appeal is contained in paragraph 23 of the grounds of appeal which I will read:

2. “Nor can the conclusions be supported on the facts. The appellant committed a further offence while housed; in the light of the other findings, it is perverse to suggest that he would not be at risk of doing so when homeless. That is especially so when the letter is read as a whole: the reviewer finds that the appellant’s offending relates to his addiction and that his addiction would continue if he were to be made homeless. It follows that offending (or detriment) would be an inevitable result of homelessness.”

31. It is well-known that the ground of perversity raises a high hurdle for any appellant to reach because it is necessary to show that the decision-maker was irrational. I can well understand that, when a person comes out of prison and thus leaves a situation in which he has been accommodated and fed perhaps but not necessarily for some time, and finds that he has no accommodation in the community, that person may feel isolated and may be unable to cope without being given some temporary accommodation by the local authority. But that will not be always the case. In the present case it is clear from the papers that from time to time the appellant has lived with friends and so on. But

more importantly than that, as I have demonstrated, the review officer refers to other evidence, which the review officer has taken into account and which substantiate her conclusion that the release from custody did not lead to vulnerability, and that the appellant could be described as not institutionalised.

32. In my judgment, that conclusion was a holistic assessment of all the evidence before the review officer. Moreover, in my judgment it is not open to the appellant to take one strand of evidence and to seek to challenge the assessment on that ground. The assessment was based on a full assessment of all the relevant evidence, or the evidence which the decision-maker considered to be relevant, and in my judgment the conclusion to which the review officer came cannot be described as irrational.

33. For those reasons, I would dismiss this appeal. I would add that we did not call upon the respondent, but we had the benefit of a skeleton argument which had been carefully prepared by counsel, Ms Rowlands. I would therefore dismiss the appeal.

3. Lord Justice Jackson:

34. I agree.

4. Lord Justice McCombe:

35. I also agree.

Order: Appeal dismissed