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Neutral Citation Number: [2004] EWCA Civ 134

IN THE SUPREME COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT

ADMINISTRATIVE COURT LIST

(MR JUSTICE STANLEY BURNTON)

Royal Courts of Justice

Strand

London, WC2

Wednesday, 4 February 2004

B E F O R E:

THE PRESIDENT OF THE FAMILY DIVISION

(Dame Elizabeth Butler-Sloss)

LORD JUSTICE CLARKE

LORD JUSTICE SEDLEY

- - - - - - -

"B "

Claimant/Appellant

-v-

CALDERDALE METROPOLITAN COUNCIL

Defendant/Respondent

- - - - - - -

(Computer-Aided Transcript of the Stenograph Notes of

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190 Fleet Street, London EC4A 2AG

Tel No: 020 7404 1400 Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

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MISS CLAIRE MISKIN (instructed by Ridley & Hall of Huddersfield) appeared on behalf of the Appellant

MR GERRY FACENNA (instructed by Corporate Services Directorate, Calderdale Metropolitan Council) appeared on behalf of the Respondent

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J U D G M E N T

(As Approved by the Court)

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LORD JUSTICE SEDLEY:

The issue

1. This appeal concerns the nature and ambit of the statutory requirement for a local authority to give a grant in order to make a dwelling safe for a disabled occupant and others residing with him.

2. The claimant is the father of four children, the eldest of whom, D, is autistic and is thought to suffer from Asperger's syndrome. The family live in a rented three-bedroom house in which D shares a bedroom with the next son, S. He is uncontrollably aggressive towards S, frightening him while he sleeps and attacking him when they are in the bedroom together.

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3. The family therefore want a grant to build an additional bedroom in which D can sleep on his own. It is their case that this is necessary and appropriate to meet D's needs by making the house safe for him and his siblings, and that the respondent council's refusal of a grant is unlawful. This claim was rejected by Stanley Burnton J, who granted permission to appeal on "issues as to the construction of the 1996 Act".

The law

4. The Housing Grants, Construction and Regeneration Act 1996 by s.1(1) and (4) gives the name "disabled facilities grant" to the provision of facilities for a disabled person in a dwelling. By s.100 it defines a disabled person, and there is no dispute that D falls within the definition.

5. S.23(2) empowers the making of discretionary grants for related purposes outside the mandatory ones, but Calderdale MBC has no money for these. The only question is therefore whether it is obliged to make a mandatory grant under s.23(1), subject to s.24(3). The judgment below, [2003] EWHC 1832 (Admin), sets out these provisions in full, but it is sufficient for this appeal to cite the following key elements:

23(1) The purposes for which an application for a disabled facilities grant must be approved, subject to the provisions of this Chapter, are the following:

.....

(b) making the dwelling or building safe for the disabled occupant and other persons residing with him.

24(1) The local housing authority

(a) shall approve an application for a disabled facilities grant for purposes within section 23(1)

.....

subject to the following provisions.

.....

(3) A local housing authority shall not approve an application for a disabled facilities grant unless they are satisfied

(a) that the relevant works are necessary and appropriate to meet the needs of the disabled occupant

.....

6. In spite of the unhappy phrasing of the opening words of s.23(1), the meaning of these provisions is straightforward. If the facts (and it must be for the local authority, at least in the first instance, to establish and evaluate these) come within any of the paragraphs of s.23(1), a grant must be made, so long as the local authority is also satisfied that the works are necessary and appropriate to meet the disabled occupant's needs. The effect is that eligibility for a grant under s.23(1) is a matter of law depending on the ascertained facts, but that whether the works are necessary and appropriate is a matter for the local authority's judgment, subject to the ordinary constraints of public law.

7. In the present case the judge reached the contingent view, with which I respectfully agree and against which there is no cross-appeal, that the council's decision that it was not satisfied in any case that the works were necessary and appropriate within s.24(3) was not one to which it was obliged to come. He left open whether its reasoning in support of its conclusion on the subsection was tenable. I have no doubt that it was not. To say, as the council said in its letter of 6 March 2002, that the works were not appropriate " because there is no clear case for a mandatory grant" is to collapse s.24(3) into s. 23(1) - an error against which Stanley Burnton J gave a necessary warning in paragraph 33 of his judgment. There was a patent failure to give a lawful reason for the adverse conclusion under s.24(3), so that if the appeal succeeds under s.23(1) the council will have to take a proper decision under s.24(3).

The facts

8. It has been uncontested that D's autism takes the form of a behavioural disorder manifested in challenging and aggressive behaviour, especially towards his siblings. He is also dyspraxic. There was evidence that he was not a significant problem at school. But the evidence before the judge was that ever since 1997, when the younger brother S had begun sharing D's bedroom, D had been subjecting him to dangerously inappropriate horseplay and to violent interference

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with his sleep, day after day and night after night. S, unsurprisingly, was now suffering night terrors and eczema.

9. In November 1998 the claimant and his wife applied to the council for a disabled facilities grant to enable them to convert the loft of their house into a bedroom for D. It seems to have been assumed without inquiry that the lessor, Pennine Housing 2000, is willing to let this be done, and we have made the same assumption. Because there was at that time no occupational therapist on the council's staff, it was not until December 1999 that an assessment was made. In her report written the following month, January 2000, Mrs Greenhalgh made no reference to the risk of injury to S and the fact of sleep deprivation. Explaining the basis of the grant application she said only: "Due to DB's behavioural problems, both boys cannot be allowed in their bedroom to play at the same time." She concluded that the real problem was overcrowding, not disability. But since at that stage the application had been made under paragraph (d) of s.23(1), which includes the provision of a bedroom for the disabled person but which is no longer relied on, the initial refusal by letter dated 12 April 2000 is no longer in issue.

10. In January 2001 the claimant and his wife wrote again to the council seeking help. When no reply came they went, in April, to the local ombudsman (the Commissioner for Local Administration). In response to the investigator's inquiries, the council agreed to obtain a report from an independent occupational therapist, Ms Johnson. By the time she reported Ms Johnson had the report of a consultant clinical psychologist, Dr Upadhyaya, diagnosing Asperger's syndrome for the first time. She concluded that D needed "his own space where he could feel safe and be safe"; that "D having a bedroom of his own would achieve this"; and that D "needs to be able to have this space so that the characteristics of Asperger's syndrome can be managed more effectively". All this material was therefore in the council's hands.

11. In March 2002 the council replied to the ombudsman that it would not make a grant, essentially because "the evidence available primarily relates to D's general behaviour and condition rather than the physical layout or the number of bedrooms therein". The ombudsman, regarding this as an issue of law rather than of good administration, decided to take no

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further action; and these proceedings were accordingly brought.

The proceedings

12. Judicial review was sought on traditional *Wednesbury* grounds: that a series of irrelevant considerations was taken into account; that at least one relevant consideration - circular guidance - was overlooked; and that the ultimate decision was simply irrational.

13. Stanley Burnton J concluded that none of these grounds was made out. The indicia that D's behaviours went well beyond the shared bedroom, that the occupational therapist had advised against a grant in 1999, and that by January 2000 D's behaviour outside the home had improved - all of them mentioned in the decision letter - were in his judgment matters capable of having a bearing on the s.23(1)(b) question. As to the first, he said (paragraph 44):

"For example, the fact that DB had attacked SB outside their home indicated that the danger to SB was not confined to their shared bedroom. If so, if an additional bedroom were provided, DB might attack SB in another part of the house. If so, the provision of the bedroom would not make the house safe for SB."

14. As to the other matters, the judge held that they were not irrelevant provided their weight was tailored to their age. He accepted, too, the council's evidence that regard had been had to departmental circular 17/96, which at paragraph 17 said that a s.23(1)(b) grant might be given -

"for adaptations designed to minimise the risk of danger where a disabled person has behavioural problems which cause him to act occasionally or regularly in a boisterous or violent manner, damaging the house, himself and perhaps other people. Where such need has been identified, grant is available to carry out appropriate adaptations to eliminate or minimise that risk."

15. Finally, the judge held that the decision was one which had been rationally open to the council on the material before it.

Grounds of appeal

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16. The principal ground of appeal is that the judge misinterpreted the word " safe" in its context in s.23(1)(b). In addition it is submitted that in the absence of any reference in the decision letter to the departmental guidance it could not be inferred or accepted that proper regard had been had to it; and that the original occupational therapist's report was by 2002 so irrelevant that any reliance on it amounted to an error of law.

"*Safe* "

17. What the judge said about the word "safe" was this:

"35 Paragraph (b) of section 23 (1) differs from the other paragraphs of that sub section (leaving paragraph (1) aside in two important respects. First, paragraph (b) is the only paragraph that refers to the interests of persons other than the disabled occupant. Secondly, its terms are absolute rather than relative. All the other paragraphs refer to "facilitating" (i.e. making easier) or improving (making better). Paragraph (b), on the other hand, requires the purpose of the relevant works to make the premises not 'safer' but 'safe'. It would seem to follow that works the purpose of which is to remove one source of risk to a disabled occupant of a dwelling will not fall within paragraph (b) if, after execution of the works, it will still be unsafe for him or her. This approach cannot, however, be taken too far, since safety itself is to some extent a relative concept: nothing is entirely free of risk.

36 I turn to the requirement that the purpose of the works must be to make the premises safe for 'the disabled occupant and other person residing with him'. Mr Facenna submitted that it is not sufficient that the purpose of the relevant works is to make the premises safe for both the disabled person and other persons living with him; he submitted that paragraph (b) is restricted to works the primary purpose of which is to make a dwelling safe for the disabled person. According to his skeleton argument:

'Although ..... adaptations may improve the safety of those residing with the disabled person because such people are protected from the possible effects

of the disabled person's aggressive behaviour, it cannot have been Parliament's intention that s.23(1) should oblige a local authority to give a disabled facilitites grant for works aimed

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primarily at protecting someone other than the disabled person.'

37 However, I did not understand Mr Facenna to submit that section 23(1)(b) does not apply where the immediate and direct source of danger is the disabled person (who may injure himself as well as other persons) rather than the condition or lack of facilities of the dwelling. It would perhaps not be easy to draw a line between cases such as the present, if lack of safety and its remedy were established, and the example given in paragraph 17 of Circular 17/96 of adaptations designed for a person with behaviourial problems, which is clearly within paragraph (b).

38 I accept Mr Facenna's submission to some extent. An over-technical interpretation of paragraph (b) leads to absurd conclusions. For example, if a dwelling is safe for those residing with the disabled person, but not for him, it cannot be a sensible interpretation to say that paragraph (b) does not apply because it is not the purpose of the works to make the dwelling safe for both the disabled person and those residing with him. In such a case, it is sufficient that the purpose of the works is to make the dwelling safe for the disabled person; if the works are carried out, the dwelling will be safe for both him and those residing with him.

39 I am also prepared to accept that the relevant works must be intended to make the dwelling safe for the disabled person, and that if it is safe for him, and the purpose of the works is only to make the dwelling safe for those residing with him, paragraph (b) does not apply. That construction of section 23(1) is consistent with the definitions in section 1 of the Act, which as has been seen defines a disabled facilities grant as a grant for the provision of facilities for the disabled person, not for those living with him, and with the requirement

in section 24(3) that the local authority be satisfied that the relevant works are 'necessary and appropriate to meet the needs of the disabled person'. On the basis, for example, where an adequate fire escape is available for the disabled person, a grant to provide an escape for those residing with him would not fall within paragraph (b). The paragraphs of Circular 17/96 set out above are consistent with this approach.

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40 However, I do not discern in the Act a requirement that the principal purpose of the works must be the safety of the disabled person and not that of persons living with him. An enhanced alarm system of the kind referred to in paragraph 18 of Circular 17/96 may minimise the risk of fire resulting from the disabled person's cooking; the installation of the alarm would nonetheless be within paragraph (b) even if several non-disabled persons were at risk from such a fire (so that in a sense the purpose of the works might be said to be the safety of the non-disabled occupants). If a dwelling is unsafe by reason of the absence of a fire escape, and there are five persons living in it, of whom one is disabled, it seems to me that the provision of a fire escape is within paragraph (b), even though in such a case it may be said that the principal purpose of the work is to make the dwelling safe for the non-disabled residents. In both of these cases the relevant works would meet the needs of the disabled person, so potentially satisfying the requirement of section 24(3). The works envisaged in paragraph (i) of section 23(1) are obviously works of a kind that may benefit those residing with the disabled person as well as the disabled person himself."

18. For my part I have no problem with any of this reasoning. It seems to me, if I may say so, perceptive and helpful. It does not deserve the stricture put upon it in the appellant's grounds and skeleton argument that it amounts to a holding that "safe" here means completely safe rather than simply safer. Neither in terms nor by implication does the judge so hold. On the contrary, he points out that all safety is relative because nothing is entirely free of risk.

19. The judge also held, in paragraph 50:

" ..... I should be prepared to include in the needs of the disabled person the need not to cause unintended injury to his siblings."

This holding, which I would endorse, closes the apparent gap between s.23(1)(b), which includes the needs of others in the house, and s.24(3)(a), which in its literal terms does not - a feature it shares with s.23(2).

Discussion

20. The appellant's case has to be that, on the facts which the council knew in early 2002, the application fell as a matter of law within s.23(1)(b) and the council could not lawfully decide otherwise. Mr Gerry Facenna for the respondent submits that even if a loft conversion would make the accommodation safe for D and S within the meaning of s.23(1)(b), there remained an area of judgment for the council under the subsection. Reliance is placed by him on a passage of the judgment of Dyson J in *R v Birmingham City Council, ex parte Mohammed* [1999] 1 WLR 33, 38. Dyson J held that -

"whether [the] purpose comes within s.23(1) falls to be determined objectively, having regard to the nature of the applicant's needs and the proposed works."

He went on:

"The overriding purpose of the DFG is to make the dwelling or building suitable for the accommodation, welfare or employment of the disabled occupant: see s.23(2), and in particular the concluding words 'in any other respect'."

21. The last-cited passage needs to be read in the light of what I have said (paragraph 19 above) about the meaning of 'needs'. It has also to be borne in mind that s.23(2) confers a residual discretionary power distinct from the specific criteria for mandatory grants (subject to the Act's other tests) contained in s.23(1). Dyson J's first-cited comment in *ex parte Mohammed* is plainly right but it cuts, if anything, against the respondent council's case.

22. Moreover, any reliance on the council's exercise of its own judgment founders on what the judge said immediately after the passage quoted in paragraph 17 above:

"41. Nonetheless, in my judgment Mr Thompson considered the correct questions when he assessed the claimant's application, namely whether DB and the other occupants of the house were unsafe and whether the provision of an additional bedroom would make the house safe. It is regrettable that neither his witness statement nor the decision letter gives a simple and straightforward answer to either question. However, I think that the substance of the decision is clear. Mr Thompson accepted that the provision of a separate bedroom would be beneficial, and would alleviate DB's admitted

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behavioural problems, but he did not accept that the lack of a separate bedroom for DB meant that the house was unsafe or that its provision would make the house safe, for the reasons he gave in paragraphs 5 and 6 of his witness statement, which echo the decision letter of 6 March 2002."

Those two paragraphs read:

"5 I considered two issues in relation to Part B above: First, is D or other occupants of the house unsafe due to the lack of an additional bedroom? And secondly, would the provision of an additional bedroom make them safe? I found that framing a definitive conclusion as to these two questions was not a straight forward matter. Clearly the Independent Occupational Therapist who assessed D and his environment believes that an additional bedroom would be helpful. However there are a number of other factors to consider:

(a) The Independent Occupational therapist notes that D disturbs not only his brother S who is in the same bedroom, but indeed the rest of the household who already have other bedrooms.

(b) D is stated by the Independent Occupational Therapist to have symptoms associated with Asperger's Syndrome, a variety of autism. It is proposed that he has little understanding of his actions or their consequences. This would appear to suggest that his problems are much more profound than simply having a causal relationship with his sleeping environment.

(c) The family and Independent Occupational Therapist make reference to difficulties at school, again suggesting wide ranging difficulties in a variety of environments.

(d) D has recently reportedly attacked his brother outside the home causing injuries requiring hospital attention.

All of this suggests to me that there are a complex series of issues connected with D and his behaviour in a variety of environments.

6 I took all of these factors into account, alongside the requirement to consider what is necessary and appropriate. The view of the Authority is that provision of an extra sleeping room to allow D to have his own room might be helpful in

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managing D's condition. However, the Authority is convinced that D's case does not fall into the mandatory category where the Authority is required to undertake grant work. This is because, on the facts, while there may be safety issues connected with D's behaviour, evidence is contradictory and there is no compelling evidence that resolving this issue is fundamentally linked to the provision of an additional bedroom. In fact all the evidence suggests that D has a general behaviour problem which is not particularly related to the physical layout of his accommodation or the number of bedrooms therein."

23. This reasoning, while perfectly understandable, misses what Miss Claire Miskin for the appellant contends is the point of s.23(1)(b): that once the test of safety is met, the fact that there may be other areas of risk which the grant cannot deal with is immaterial. Although Stanley Burnton J did not adopt this approach, it sits logically with his exegesis of the provision. The argument is that he erred in not simply applying the statutory provision to the relevant facts known to the council, and in according the council a margin of judgment about facts which, in law, either did or did not fit the criteria. I think this criticism of the judgment is a tenable one, though it may largely be a result of how the argument was presented.

Conclusions

24. What the issue centrally depends upon is the relative character of safety in paragraph (b) of s.23(1). Given that no works will ever be able to make premises completely safe for the disabled person and those he lives with, do they simply have to be designed to make the premises safer than they are, or is there some threshold of safety that has to be surmounted? In my judgment there is a threshold, but it is plainly not one of complete safety. Adopting the vocabulary of the circular, I would hold that to come within s.23(1)(b) the proposed works must be such as to minimise the material risk, that is to say to reduce it so far as is reasonably practicable, assuming that it cannot be eliminated.

25. Here the relevant evidence was in my view all one way. D was a constant danger to S's wellbeing so long as D was disabled by his autistic condition and the two boys shared a bedroom. A separate bedroom for D would not do anything to reduce the risk of his assaulting or distressing S elsewhere, but

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it would as nearly as possible obviate the risk of his doing harm to S by reason of their sharing a bedroom, and it might well improve his behaviour generally.

26. It follows, in my judgment, that on the facts known to the council the case fell within s.23(1)(b). The purpose of providing a separate bedroom for D was to make the dwelling as safe as was reasonably practicable for D and, more particularly, for S. The fact that there were other - but different - ways and places within the house in which D might harm himself or S or his other siblings did not matter because there were not suggested to be any works that could further reduce the risk in these respects. They simply had to be lived with as before. Adding a bedroom was, on the evidence, the practical way of reducing the risk insofar as it was remediable.

27. This was not a case where, for instance, the same danger was spread throughout the dwelling, so that a separate bedroom would reduce but not minimise it. Such a case would need to be addressed on its own, different, facts. The present case, as it happens, fitted the example which I have cited from the departmental circular, and one would have expected at least some explanation of why the guidance was not to be followed.

28. While in other cases there may be questions of fact and degree which the local authority has to evaluate in order to answer the s.23(1) question posed to it, and while the local authority may often be better equipped than the court to answer them, so that the court will not second-guess them, here there are no such evaluative problems. What remains is to do something the local authority has so far failed to do: to segregate the s.24(3) question from the s.23(1) question, and to answer it in the light of the fact that the claimant has established his grant-eligibility in principle under s.23(1)(b). The council must now decide whether it is satisfied that a loft conversion is necessary and appropriate to meet D's particular needs, which include the need not to harm his brother. This is a matter for the council's considered judgment. Unless it is so satisfied it cannot pay the grant.

29. One has no wish to be critical of non-lawyers who have to apply this difficult and sensitive legislation not in the calm of a courtroom but in the course of a pressured day's work in the office. But one straightforward guideline is that s.23(1) and s.24(3) should be applied sequentially. A lot of the difficulty in

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the present case arose from decision-makers running the two together. S.23(1) is a gateway provision. S.24(3) is a control for those applications which get through the gateway. In a suitable case, no doubt, it may be legitimate to decide that, even assuming that the application passes the s.23(1) threshold, the work cannot be regarded as necessary or as appropriate. But that too is sequential reasoning. What is not permissible is to decide the s.23(1) issue by reference to the s.24(3) criteria.

30. I would accordingly allow this appeal. I would quash the decision to refuse the claimant a disabled facilities grant and direct the respondent council to reconsider his application in the light of the judgments of this court and according to law.

31. LORD JUSTICE CLARKE: I agree.

32. THE PRESIDENT: I also agree. So the appeal is allowed, and we direct the respondent council to reconsider the application of the appellant.

Order: Appeal allowed with the costs of appeal subject to detailed assessment