

Neutral Citation Number: [2001] EWHC ADMIN 204  
IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
(ADMINISTRATIVE COURT)

CO 1630/99

Royal Courts of Justice  
Strand  
London WC2

Tuesday, 6th March 2001

B e f o r e:

MR JUSTICE RICHARDS

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THE QUEEN ON THE APPLICATION OF TURNER

-v-

LONDON BOROUGH OF BARNET HOUSING BENEFIT REVIEW BOARD

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(Computer-aided Transcript of the Stenograph Notes of  
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MR C RAWLINGS (instructed by Messrs Derrick Bridges & Co, Barnet, Herts EN5 4BQ) appeared  
on behalf of the Claimant.

MR M BRUNNING (instructed by The Legal Department, London Borough of Barnet) appeared on  
behalf of the Defendant.

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

1. MR JUSTICE RICHARDS: The main issue in this case is whether any part of a disability living allowance under s.71 of the Social Security Contributions and Benefits Act 1992 (“the 1992 Act”) can be taken into account when determining whether an exceptional hardship payment should be made under regulation 61 of the Housing Benefit (General) Regulations 1987 (“the 1987 Regulations”).
2. The claimants are a mother and daughter who are both disabled. The mother, Mrs Turner, is physically disabled and has restricted mobility. The daughter, Karen, has disabilities caused by psychiatric illness, including bouts of severe agoraphobia. They both receive disability living allowance. They live together in rented property in the area of the London Borough of Barnet, to which they moved in April 1998 after being evicted from their former accommodation. The property is a semi-detached three-bedroom house, though the claimants say the third bedroom is too small for a bed. They attach importance to the extra space that the property gives them. They also lay stress on the fact that the property is particularly suited to their needs as disabled people. It is an unfurnished, long-term tenancy, the landlord agreed to various disability adaptations, and he gave them permission to have their two dogs on the premises.
3. Soon after moving to the property the claimants applied for housing benefit. They were each granted benefit, but not in a sum sufficient to meet their contractual rent commitment. In essence, the reason was that the claimants were considered to be over-accommodated for housing benefit purposes. The relevant calculations were therefore carried out on the basis of a two-bedroom property, for which a local reference rent was determined. None of those matters, which were determined by a Rent Officer applying statutory criteria, is challenged. The claimants were then granted housing benefit in the amount of the maximum eligible rent so determined, leaving a shortfall in rent of £29.92 per week for each of them. Again, although there has been some dispute over the figures and about backdating them, those matters are not in issue in these proceedings.
4. The claimants applied for discretionary awards to cover the shortfall under the exceptional hardship provisions of the housing benefit regime. Their applications were eventually refused on appeal by the Housing Benefit Review Board on
5. 7 January 1999. The claimants sought permission to apply for judicial review of those decisions, but the proceedings were adjourned pending further consideration of the matter by the Board. The Board then agreed to set aside the January 1999 decisions and to rehear the appeals. Fresh decisions in respect of each claimant were made on 2 June 2000. In the case of Mrs Turner the decision was the same as before, dismissing her appeal. In the case of Karen the appeal was allowed to the extent of granting her a discretionary payment of £10 per month towards the shortfall in rent. The award to Karen related to her need for a mobile telephone. Subject to that, the reasons for the refusal of an award to the two claimants are accepted to have been materially the same, though they were spelled out more fully in the decision relating to Mrs Turner.
6. The decision relating to Mrs Turner included the following “findings of fact” (which in some respects reflect matters of judgment going beyond mere findings of fact):
  - “13. Mrs Turner received Disability Living Allowance of £51.30 per week, which was disregarded income for the purposes of assessing Housing Benefit entitlement. Therefore this was an extra amount available to Mrs Turner that could be used to meet the shortfall in rent.
  14. Mrs Turner was not in rent arrears and had been meeting the shortfall

from her own resources.

15. Whilst some adaptations had been carried out on the property for Mrs Turner's physical needs, these were not major adaptations. Therefore there was nothing to restrict her ability to move to cheaper, suitably sized accommodation.

16. Mrs Turner could have rescheduled her finances to ensure that her main priority of housing was secured.

17. Hardship could have been alleviated by moving to cheaper, suitably sized accommodation.”

7. The actual decision and the reasons for it were in these terms:

“The Board unanimously RESOLVED:-

\* That the appeal should not be allowed.

\* Discretionary Awards are only payable when a claimant had demonstrated that they would suffer exceptional hardship if an award was not made.

\* There was no specific requirement for Mrs Turner to remain in accommodation larger than her needs, whilst relying on a Discretionary Award to meet the shortfall in rent. The Board was mindful that account had been taken of Mrs Turner's medical conditions in her weekly expenditure.

\* Mrs Turner had been meeting the shortfall in rent from her own resources.

\* Mrs Turner had not demonstrated that she would suffer exceptional hardship if a Discretionary Award was not paid in accordance with Regulation 61(3) of the Housing Benefit (General) Regulations 1987.”

8. The claimants challenged the new decision by way of amendment to their claim form in the judicial review proceedings previously brought in relation to the January 1999 decision. They did so on two grounds, namely that

(1) the Board erred in failing to “ring-fence” the claimants' disability living allowance and in taking it into account as income that could be used to meet the shortfall in rent, and

(2) the Board failed to put their minds properly or at all to the question of whether it is reasonable to expect the claimants to move. Permission was granted by Burton J in respect of those two grounds, and that is essentially the basis upon which the case has been advanced before me at the substantive hearing.

9. The decisions under challenge relate to the period 1998/1999. In relation to 1999/2000 a differently constituted Board, by a decision dated 11 February 2000, resolved by a 2 to 1 majority that a further £10 per week should be awarded to Karen to enable her to stay in her present accommodation. That decision is not directly in issue, but is relied on by the claimants in support of their contention that the Board were wrong to refuse even that amount of increase in relation to 1998/1999.

Disability living allowance

10. By s.71 of the 1992 Act, disability living allowance consists of a care component and a mobility component.
11. The care component is the subject of detailed provision in s.72. This case does not turn on the construction of the relevant provisions, but I should set out sub-ss.(1) to (4)(a) in order to indicate the kind of disability at which the care component is directed:

“72(1) Subject to the provisions of this Act, a person shall be entitled to the care component of a disability living allowance for a period throughout which-

- (a) he is so severely disabled physically or mentally that-
- (i) he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods); or
  - (ii) he cannot prepare a cooked meal for himself if he has the ingredients; or
- (b) he is so severely disabled physically or mentally that, by day, he requires from another person-
- (i) frequent attention throughout the day in connection with his bodily functions; or
  - (ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or
- (c) he is so severely disabled physically or mentally that, at night, -
- (i) he requires from another person prolonged or repeated attention in connection with his bodily functions; or
  - (ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him.

(2) Subject to the following provisions of this section, a person shall not be entitled to the care component of a disability living allowance unless-

- (a) throughout
- (i) the period of 3 months immediately preceding the date on which the award of that component would begin; or
  - (ii) such other period of three months as may be prescribed, he has satisfied or is likely to satisfy one or other of the conditions mentioned in subsection(1)(a) to (c) above; and
- (b) he is likely to continue to satisfy one or other of those conditions throughout-
- (i) the period of 6 months beginning with that date; or

(ii) (if his death is expected within the period of 6 months beginning with that date) the period so beginning and ending with his death.

(3) Three weekly rates of the care component shall be prescribed.

(4) The weekly rate of the care component payable to a person for each week in the period for which he is awarded that component shall be-

(a) the highest rate, if he falls within subsection (2) above by virtue of having satisfied or being likely to satisfy both the conditions mentioned in subsection (1)(b) and (c) above throughout both the period mentioned in paragraph (a) of subsection (2) above and that mentioned in paragraph (b) of that subsection.”

12. Both claimants qualify for the highest rate of the care component. At the material time it was £51.30 per week, as referred to in the Board's decisions.

13. It is important to note that the care component is not necessarily a payment to meet the costs of a carer. As it is put in Mrs Turner's witness statement, it is a payment towards all the additional costs of disability, which may or may not include care. It helps disabled people to live their lives with dignity. In the case of the claimants it allows them to have an element of independence despite their disabilities and covers the additional costs of caring for themselves by reason of their disabilities, for example the additional costs of travel, food and medical care.

14. The mobility component is the subject of detailed provision in s.73. It is unnecessary to examine the qualifying conditions. There are two weekly rates. Mrs Turner receives the higher rate, Karen the lower rate.

15. Specific provision is made for the mobility component of disability living allowance to be disregarded in the calculation of other benefits. Section 73(14) states:

“A payment to or in respect of any person which is attributable to his entitlement to the mobility component, and the right to receive such a payment, shall (except in prescribed circumstances and for prescribed purposes) be disregarded in applying any enactment or instrument under which regard is to be had to a person's means.”

16. There is no equivalent provision in relation to the care component.

#### Housing benefit

17. The main provisions governing housing benefit are contained in the 1987 Regulations. The calculation of the claimants' normal entitlement to benefit is not in issue. I should, however, mention that disability living allowance falls to be disregarded in the calculation of that entitlement. That results from regulation 33 and schedule 4. Regulation 33 provides in material part:

“33(1) For the purposes of regulation 24 (average weekly income other than earnings), the income of a claimant which does not consist of earnings to be taken into account shall, subject to paragraphs(2) to (3A), be his gross income and any capital treated as income under (regulation 34 (capital treated as

income) or 36 (modification in respect of child or young person).

(2) There shall be disregarded from the calculation of a claimant's gross income under paragraph (1), any sum, where applicable, specified in Schedule 4.”

18. Amongst the sums to be disregarded by Schedule 4 is: in paragraph 5:

“Any mobility allowance under section 37A of the Social Security Act or any disability living allowance.”

19. Regulation 61 contains provisions for determining a person's maximum housing benefit. The central provision in this case is paragraph (3), which confers a discretion on the authority to increase the normal maximum by making a payment for exceptional hardship. It reads:

“61(3) where in any case-

(a) regulation 11 applies;

(b) the maximum rent is less than the amount which would be the claimant's eligible rent if regulation 11 did not apply (his reckonable rent); and

(c) the appropriate authority is satisfied that-(i) an amount by way of housing benefit would fall to be payable to the claimant; and(ii) unless that amount is increased, the claimant or a member of his family will suffer exceptional hardship;

the authority may determine that the amount of the person's appropriate maximum housing benefit calculated in accordance with paragraph (1) shall be such increased amount as it considers appropriate in the particular circumstances of the case, but so that the amount of housing benefit payable to that person, including any such increase, shall not exceed his reckonable rent calculated on a weekly basis in accordance with regulations 69 and 70...”

20. It is common ground that (a), (b) and (c)(i) were satisfied. Under (c)(ii), however, the Board was not satisfied that the claimants would suffer exceptional hardship without an increase in the amount of housing benefit payable.

21. Department of Social Security Circular HB/CTB A35/99 gives guidance on the operation of the exceptional hardship scheme (but is plainly not an aid to the interpretation of the legislative provisions). The circular explains that the discretionary provision replaced the previous prescriptive rules under which people could receive further assistance if they were in a “vulnerable group”. The intention was that individual decisions would be made on individual circumstances.

22. Paragraph 12 of the Circular refers to the policy underlying the maximum rent rules: they are intended to give tenants an interest in the level of their rents even when they are receiving housing benefit, and to discourage landlords from charging higher rents to claimants simply because housing benefit will pay. The exceptional hardship scheme should not be used to circumvent these aims.

23. Paragraph 14 lists some of the factors that may be taken into account when considering an individual case. They include:

\* “The extent of the shortfall, including whether the claimant has any capital or disregarded income which he can use to meet it...”

\* “Is cheaper accommodation available locally which the claimant could move to?”

\* “Does the claimant, or anyone in his household, suffer from a health problem, illness or disability, which means that his choice of housing is restricted either temporarily or permanently?”

\* “Does the claimant, or anyone in the household, have any unusual, or unusually large, expenses which make it harder than normal for him to meet the shortfall (e.g. frequent travel to hospital)?”

\* “The hardship should be one that can be alleviated by the payment of more housing benefit so it is reasonable to include financial criteria when considering making a payment.”

24. Paragraph 15 states that it is reasonable to look into a claimant's spending pattern in order to ascertain whether he can avoid hardship. He should not be expected to reduce expenditure on essentials (e.g. food and fuel) unless it is unreasonably high. It may be reasonable to expect him to reduce expenditure on non-essential items. However, the personal circumstances of the claimant should be considered when determining whether expenditure is really non-essential.
25. Paragraph 16 states specifically that the mobility component of disability living allowance should be disregarded in accordance with s.73(14) of the 1992 Act, since the application of regulation 61(3) does depend on having regard to the claimant's means.

#### Ring fencing of disability living allowance

26. It is common ground that, in reaching the decisions under challenge, the Board duly disregarded the mobility component of the disability living allowance. The Board took into account only the care component of £51.30 per week. It took the view that that money was available to the claimants to meet the shortfall in rent.
27. For the claimants, Mr Rawlings submits that the Board thereby fell into error. The point is put in two broad ways: first, that it was not open to the Board as a matter of law to take the care component into account (i.e. ring-fencing applies to the care component as well as to the mobility component); alternatively, the Board failed to give proper consideration to whether the care component should be taken into account.
28. As to ring-fencing, Mr Rawlings accepts that this is not required directly by any statutory provision. Section 73(14) applies only to the mobility component, and paragraph 5 of Schedule 4 does not apply in terms to the consideration of a discretionary award under regulation 61(3). Nonetheless, he submits, those provisions are consistent with a wider statutory purpose that disability living allowance should be excluded from consideration when determining housing benefit. Such a purpose is, moreover, to be derived from the very nature of the disability living allowance. The purpose of the allowance is to bring disabled persons into line with able-bodied persons as regards facility of living. In terms of paragraph 15 of the DSS circular, the care component must be viewed as having been given by the State for expenditure on essentials. It is not intended for payment of rent. To attempt to redirect it towards payment of rent by relying on its availability to meet the shortfall in rent is to undermine its purpose, to strike at the substance of the benefits system and to

discriminate against the disabled.

29. The alternative argument is that it was at least open to the Board to exclude the care component from consideration in the exercise of their discretion. Given the claimants' case that it ought to be left out of account because it was intended to bring them into line with able-bodied persons, the Board ought to have considered whether to leave it out of account. Had the Board done so, and had they considered in that context the statutory provisions relating to the ring-fencing of disability living allowance, they might have decided to leave the care component out of account. As it was, however, they seem to have taken it into account without considering the appropriateness of doing so or considering why the claimants' case should be rejected. Thus paragraph 13 of the findings of fact in the decision letter in respect of Mrs Turner recites the receipt of disability living allowance (the care component) and simply says, "Therefore this was an extra amount available...", without considering whether it was right to take into account in that connection: it was simply expressed as if it were an inevitable conclusion.
30. I am not persuaded by either limb of Mr Rawlings' submissions. As to ring-fencing, it is striking that the legislation makes specific provision for ring-fencing of the mobility component in s.73(14) but that no corresponding provision is made for ring-fencing of the care component in s.72. Had ring-fencing of the care component been intended, a specific provision in s.72 would have been the obvious way to deal with it. So too it is striking that, although regulation 33 and paragraph 5 of Schedule 4 require the disability living allowance to be disregarded for the purposes of the income calculation under regulation 24, there is no provision requiring it to be disregarded when considering a discretionary award under regulation 61(3). In circumstances where the draftsman has been so specific about what is to be disregarded and in what context, I do not think that one can extract any wider statutory purpose to the effect that disability living allowance is to be disregarded altogether when determining housing benefit. The very fact that the statutory ring-fencing does not apply to the care component in the context of regulation 61(3) is in my view a strong indicator that ring-fencing is not required.
31. Nor do I consider that to take the care component into account in the context of regulation 61(3) necessarily frustrates the purpose for which that component is granted. Although the claimants say that the care component is intended to meet the additional costs of disability and to bring them into line with able-bodied persons, it is a fixed sum at the relevant rate (in this case the higher rate) and does not depend upon incurring specific additional costs. In effect, it recognises that a disabled person will have additional requirements and costs, but also recognises that those requirements and costs will vary and that different people will have different priorities and different ways of addressing their problems. Thus the recipient is left with freedom of choice as to the use of the payment.
32. In this case, as it seems to me, the claimants have chosen to live in their present accommodation because it gives them extra space and meets their requirements in other respects (as regards adaptations, dogs, etc.). All that is entirely understandable. If one leaves aside any question of housing benefit, I see nothing wrong with a recipient of the care component using part of it by way of payment of rent for larger and more suitable accommodation than he would otherwise be able to afford. But equally, if the resulting rent is higher than will be met by a normal payment of housing benefit, I see nothing wrong in principle with taking the care component into account when determining whether the person concerned can afford to live in the chosen property or will suffer exceptional hardship. That is not to say that the care component can always be said to be available for that purpose. Everything depends on individual circumstances. What it does mean, however, is that an

authority is not precluded as a matter of law from taking the care component into account. To take it into account cannot be said to frustrate the purposes for which disability living allowance is paid or otherwise to run counter to the statutory regime.

33. As to the alternative argument, I cannot accept that the Board failed to consider whether the care component should be left out of account as a matter of discretion. The decision letter does not have to spell out the Board's reasoning process as fully as if it were the judgment of a court. It also has to be read against the background of the submissions before the Board (submissions that had been summarised in the January 1999 decisions but were not summarised again in the June 2000 decisions). Bearing those considerations in mind, I think it tolerably clear that the Board's view as to the availability of the care component to meet the shortfall in rent was based on a consideration of, and rejection of, the claimants' case that it should not be taken into account in that connection.
34. Accordingly, I take the view that the Board were entitled to take into account the care component in considering whether the claimants would suffer exceptional hardship if an award were not made. For that purpose they looked both at the claimants' expenses (including those relating to Mrs Turner's medical condition) and the claimants' resources (including the care component) and asked themselves whether the shortfall in rent could be met from available resources. The conclusion they reached was reasonably open to them.
35. That view is unaffected by the fact that a differently constituted Board decided by a majority, in relation to 1999/2000, that a discretionary award should be made to Karen to enable her to stay in her present accommodation. Different decision-makers can reach different judgments even on identical facts without transgressing the bounds of reasonableness. The decision in relation to 1999/2000 serves as a reminder that the case advanced by the claimants to the Board was not without merit. But the function of this court is to decide the lawfulness of the Board's decisions, not to reach its own decision on the merits.

#### Reasonableness with regard to moving house

36. The second ground advanced by Mr Rawlings is that, in holding that the claimants could move to alternative accommodation, the Board failed to take into account relevant considerations and reached an irrational conclusion. The main focus of the submission is the finding (paragraph 17 of the findings of fact in respect of
37. Mrs Turner) that "hardship could have been alleviated by moving to cheaper, suitably sized accommodation". The only matter considered in reaching that finding was that the adaptations to the existing property were not major (paragraph 15 of the findings of fact). No consideration was given to any of the other matters put forward by the claimants as showing why their existing accommodation was suitable and they should not be required to move - such as that they had only just moved to the existing property, that a further move would be too stressful, would disrupt Karen's therapies and would have an adverse effect on their health, and that it would be difficult to find accommodation meeting their requirements.
38. In R.v. Sefton MBC ex p. Cunningham (1991) 23 HLR 534 a decision was quashed for, inter alia, failure to address the question of whether it would have been reasonable to move. That decision related to the predecessor legislation, where the availability of suitable alternative accommodation and the reasonableness of moving to it fell to be considered as part of the statutory criteria for the calculation of benefit. But it is submitted that even under the current rules the possibility of moving to alternative accommodation has to be given proper consideration if the Board are to rely on it as a reason for withholding a discretionary award.

39. Those submissions would have some force to them if the Board had relied on the possibility of the claimants moving to alternative accommodation as an essential reason for withholding an award under regulation 61(3). There does not seem to have been any inquiry about the availability of suitable alternative accommodation or any consideration of how reasonable it would be to require the claimants to move to such accommodation.
40. In my judgment, however, the decision does not depend on the possibility of such a move. It is true that reference is made to that possibility in the findings of fact, namely in paragraphs 15 and 17 of the decision in respect of Mrs Turner and the corresponding paras of the decision in respect of Karen. But in the reasons for their decision, in the passage already quoted, what the Board say is this:
- “There was no specific requirement for Mrs Turner to remain in accommodation larger than her needs, whilst relying on a Discretionary Award to meet the shortfall in rent... Mrs Turner had been meeting the shortfall in rent from her own resources. Mrs Turner had not demonstrated that she would suffer exceptional hardship if a Discretionary Award was not paid...”
41. There may be an implication that Mrs Turner could move to smaller and cheaper accommodation. But the key point being made, as it seems to me, is that if Mrs Turner chooses to remain in her existing accommodation (which is larger than her needs as determined for housing benefit purposes), she can afford to do so out of her own resources and exceptional hardship has therefore not been demonstrated. Thus, even if one excludes the possibility of her moving, the key point remains as a separate and valid reason for the decision. Again I take the view that the conclusion reached in accordance with such reasoning was a conclusion reasonably open to the Board.
42. An alternative way of expressing what is essentially the same point would be that, even if there were an error in the Board's decision (in holding that the claimants could move without having properly investigated that possibility), the decision would plainly have been the same in the absence of that error. In those circumstances, in the exercise of my discretion, I would decline to quash the decision on this ground. I stress, however, that that is not the primary basis for my rejecting the second ground.

### Conclusion

43. For the reasons given in this judgment, the conclusion I have reached is that the decisions of 2 June 2000 were both lawful. Neither ground of challenge succeeds and the application for judicial review must be dismissed.

MR BRUNNING: My Lord, I would seek an order for costs. The Claimant is legally aid, so I would seek the usual legal aid order which is that the costs not be enforced without leave.

MR JUSTICE RICHARDS: The usual order in a legal aid case is that the claimant must pay the defendant's costs, but the determination of the claimant's liability for payment of such costs is postponed pending further application. That is the expression.

The old wording, “not be enforced without leave of the court” has been replaced by that wording, the precise rationale of which constantly escapes me, but which is better tailored to the legislative regime. I think it is that the determination of the liability of the payment, that is to say whether the claimants personally are to pay, is postponed pending further application, so it is postponed indefinitely. You cannot resist that?

MR RAWLINGS: My Lord, no. That is my understanding of the common order that is made today.

MR JUSTICE RICHARDS: Thank you very much.

MR RAWLINGS: My Lord, I have one application regarding permission to appeal and also a request for a detailed assessment of both the claimants' costs. They are both bringing this case by way of public funding.

MR JUSTICE RICHARDS: You can certainly have detailed assessment of the claimants' costs for legal aid purposes.

MR RAWLINGS: My Lord, I make a formal application under CPR 52 for permission to appeal on the basis that there are real prospects of success and there are compelling reasons why the Court of Appeal should be charged with considering this matter.

My Lord, under the real prospects test, CPR 52 refers to CPR 24.2. The test is that there should be some chance of success. It is the same test as considered under summary judgment application. My Lord, what I say is, notwithstanding your judgment, there is some chance - and I would say obviously more than some chance - of success in the Court of Appeal for both claimants on both limbs, but primarily the limb regarding the ring-fencing along DLA.

My Lord, it is, as I said in submission in the substantive hearing, an issue that concerns disabled persons, not just these particular claimants. In my submission, there is some chance of succeeding in front of the Court of Appeal but, at least, a discretionary consideration of ring-fencing the DLA care component ought to be taken into account by the review board when faced with a disabled person.

My Lord, I say, in the context of the present move in society for the protection of disabled persons, that it is something that the Court of Appeal may be particularly keen to give guidance on. That leads me to the "compelling reason" point, my Lord. Because of the situation of disabled persons, there are compelling reasons that this matter should be dealt with in the public interest and in the interests of those who are disabled, so everyone including local authorities and housing review boards know exactly where they stand.

My Lord, of course I do not, in any sense, undermine your judgment, it is just that I think I may have a better chance in the Court of Appeal.

MR JUSTICE RICHARDS: I always recognise the difficulties of seeking permission to appeal in the face of a judgment that firmly dismisses the application. I am not going to give permission to appeal. I do not consider there to be a real prospect of success and I do not regard the matter as being of sufficient general importance to justify the grant of permission in the absence of such a prospect. You will have to go to the Court of Appeal to seek permission.