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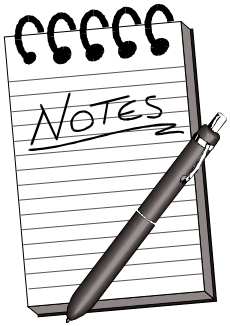
R v London Borough Council, ex parte Connery

QUICK CASE SUMMARY: The authority cannot take into account its own financial situation when deciding whether or not the rent is unreasonably high. However, where this is the case, the authority can then take into account its own financial situation when deciding how far to reduce the eligible rent.



This case has had a significant bearing upon the implementation of 'old' HB Regulation 11 by local authorities, as the issues raised can be considered relevant to authorities generally. Indeed, this is one of the few court cases referred to by the DSS in the HB and CTB Guidance Manual, under the subject of rent restrictions.

With the introduction of the new private sector rents scheme from January 1996, there is less scope for authorities to excercise their own judgment as to what is a reasonable rent. However, for as long as 'old' Regulation 11 is valid for cases which continue to be treated under the rules in force prior to 2 January 1996, then the judgment in this case will remain significant.

THE CASE (taken from Law Report)

QUEEN'S BENCH DIVISION
(CROWN OFFICE LIST)
SCHIEMANN J
24 JULY, 19, 20 OCTOBER 1989

Eldred Tabachnik QC & Kate Markus for the applicant.

David Turner-Samuels QC & Lincoln Crawford for the local authority.

David Pannick for the Secretary of State.

Summary of matters involved as per Law Report

Social security - Housing Benefit - Assessment - Payment in respect of rent - Local authority's financial situation - Whether local authority is entitled to take its own financial situation into account when assessing amount of benefit payable to claimant in respect of rent - Housing Benefit (General) Regulations 1987, regs 10, 11(2)

The judgment in essence

When deciding, for the purpose of determining the amount of housing benefit payable to a claimant in respect of rent under reg 10 of the Housing Benefit (General) Regulations 1987, whether the rent payable for the dwelling occupied by the claimant is unreasonably high by comparison with the rent payable in respect of suitable alternative accommodation elsewhere, a local authority cannot take into account its own financial situation.

However, once it has determined that the claimant's rent is unreasonably high, it may then take into account its own financial situation when deciding how far to reduce the eligible rent, but it may not, having regard to reg 11(2) of the 1987 regulations, reduce the eligible rent below the cost of suitable alternative accommodation elsewhere.

The application for judicial review

Michael Connery applied with the leave of Roch J given On 25 May 1989, for judicial review of the decision of the housing benefit review board of Brent London Borough Council on 11 January 1989 to refuse the applicant's appeal against the decision of the council to restrict his eligible rent for housing benefit purposes to £63 per week, and the decision of the council's housing committee on 12 October 1988 to adopt a scale of reasonable rents and to authorise its director of housing to implement the scale from October 1988.

The relief sought was an order of certiorari to quash the decisions and a declaration that the applicant was entitled to housing benefit of £140 per week. At the request of the parties a preliminary point of law was dealt with by the court, the substantive application being adjourned in the mean time. The Secretary of State for Social Services was joined as a respondent for the purpose of the preliminary point. The facts are set out in the judgment.

JUDGMENT OF SCHIEMANN J. The question raised in the present case by way of preliminary point of law, is one of considerable general importance in the administration of housing benefit paid by local authorities under the Social Security Act 1986. It is concerned with that form of housing benefit known as a rent allowance and the circumstances in which, and the extent to which, a local authority is entitled to take its own financial situation into account in deciding the amount of any housing benefit.

The applicant submits that a local authority's financial situation is a legally irrelevant consideration whenever the authority is exercising any discretion in relation to making rent allowance payments.

The respondents submit that in relation to some but not all discretions vested in an authority making a rent allowance payment, the authority's financial situation is a relevant consideration for the authority to take into account.

The applicant is someone in receipt of a rent allowance paid by the authority. The local authority admits that it has made some mistakes in dealing with his applications in the past and has sought to put the matter right for the present and has, in cash terms, done so either entirely or largely so that in cash terms the matters which gave rise to the applicant's complaints have been largely dealt with. As for the future, the authority is changing the guidance which it gives to its officers dealing with housing benefit and any ruling on the legality of the old guidance seems likely to be of no practical import.

The parties asked me to deal with, as a preliminary point, a question of law which was relevant to the framing of the new guidance, and to adjourn the rest of the case until next term; I have agreed to do so.

No point is taken by the authority on the standing of the applicant to pursue this application. I have, pursuant to the ruling of the Court of Appeal in *R v Secretary of State for Social Services, ex p Child Poverty Action Group [1989],* none the less considered whether the applicant has sufficient interest to give me jurisdiction. I think he has.

The Secretary of State has been joined as a respondent at the request of the local authority and at my direction, since not only is he responsible for the drafting of the regulations which I have to construe but also he, to a substantial extent, refunds the local authority by way of subsidy the amounts which they payout by way of rent allowances. Counsel for the Secretary of State supports the contentions in law advanced as to the preliminary point by counsel for the local authority.

With that introduction I turn to consider the statutory and regulatory framework within which the question arises. The 1986 Act provides for the making of a housing benefit scheme by virtue of which housing benefit is provided "in the form of a rent allowance funded and administered by the appropriate local authority" *(see s 28(1)(c)).*

Such a housing benefit scheme has been made and is contained in the Housing Benefit (General) Regulations 1987, SI 1987/1971, as amended. A person is entitled to housing benefit if he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home, if there is an "appropriate maximum housing benefit" in his case and if his income and capital are

sufficiently low to qualify.

The appropriate maximum housing benefit prescribed in the case of rent allowances for any person is 100% of his weekly "eligible rent" less any appropriate deduction in respect of non-dependants. I am not concerned with any such deduction, nor am I concerned with matters relating to the wealth of the recipient. My concern is with what may be taken into account in calculating his eligible rent.

Prima facie, his eligible rent is, so far as presently relevant, the rent which he has to pay to his landlord (see reg 10). The scheme, however, provides for deductions in certain circumstances, essentially where the claimant is living in an unduly large house or paying an undue amount of rent. The purpose behind these restrictions is manifestly to reduce the calls on the public purse. I am not concerned with the unduly large house but am concerned with the unduly high rent.

It is clear that if there were no limit as to the amount of rent allowance, a person who was entitled to rent allowance in respect of 100% of his rent, would he less inclined to bargain with his landlord for a lower rent than would the rest of the population who have to meet their rent bills out of their own pocket.

The regulation which provides for these deductions is reg 11, of which the presently relevant paragraphs are paras (2), (3) and (7). They read as follows:

"(2) Subject to paragraphs (3) and (4), where the appropriate authority considers a) that a claimant occupies a dwelling larger than is reasonably required by him and others who also occupy that dwelling ....having regard in particular to suitable alternative accommodation occupied by a household of the same size; or ...c) that the rent payable for his dwelling is unreasonably high by comparison with the rent payable in respect of suitable alternative accommodation elsewhere, the authority may treat the claimant's ...eligible rent, as reduced by such amount as it considers appropriate having regard in particular to the cost of suitable alternative accommodation elsewhere and the claimant's maximum housing benefit shall he calculated by reference to the ...eligible rent as so reduced.

(3) If any person to whom paragraph (7) applies - (a) is aged 60 or over; or (b) is incapable of work for the purposes of one or more of the provisions of the Social Security Act ... or (c) is a member of the same household as a child or young person for whom he or his partner is responsible, no deduction shall be made under paragraph (2) unless suitable cheaper alternative accommodation is available and the authority considers that,

taking into account the relevant factors, it is reasonable to expect the claimant to move from his present accommodation".

Paragraph (7) deals, inter alia, with the claimant and any of his family. Paragraph (3) deals with circumstances in which the deductions referred to in para (2) may not be made unless various other requirements are met. For present purposes it is convenient to look at para (2) in circumstances where para (3) does not apply. It is, I think, common ground that if the local authority can take its financial situation into account when doing the para (2) exercise then it can do so when para (3) applies and, conversely, that if it cannot do so under para (2) it cannot do so under para (3).

It is important when looking at para (2) to appreciate that there are two separate discretions involved, that under sub-para (c) and that enshrined in the concluding words of the paragraph. The first discretion is concerned with deciding whether the rent payable for the applicant's dwelling is unreasonably high by comparison with the rent payable in respect of suitable alternative accommodation elsewhere.

It is common ground that in making this decision the authority cannot take its own financial situation into account. The second discretion only arises if the authority considers that the claimant's rent is unreasonably high. In those circumstances the authority *may* treat the eligible rent as "reduced by such amount as it considers appropriate having regard in particular to the cost of suitable alternative accommodation elsewhere".

The issue which I have to resolve is whether in the exercise of this second discretion the authority can take its own financial situation into account. It has done heretofore and intends to continue so to do unless the court declares that this is illegal.

In opening the case, counsel for the applicant laid stress on the fact that the authority appeared to have taken into account the amount of subsidy which it was likely to receive from central government under the Housing Benefit (Implementation Subsidy) Order 1987, SI 1987/1910, and made the point that the order was a separate statutory instrument from the Housing Benefit (General) Regulations 1987. But as the argument proceeded I think he accepted, rightly in my view, that the crucial question was whether the authority could take its own financial situation into account. If it can take projected rate income into account it can take projected subsidy income into account.

He submitted (and this is common ground) that, in the words of Lord Bridge in *R v Tower Hamlets London*

BC, ex p Chetnik Developments Ltd [1988] "....before deciding whether a discretion has been exercised for good or had reasons, the court must first construe the enactment by which the discretion is conferred. Some statutory discretions may be so wide that they can, for practical purposes, only be challenged if shown to have been exercised irrationally or in bad faith. But if the purpose for which the discretion is intended to serve is clear, the discretion can only be validly exercised for reasons relevant to the achievement of that purpose".

He submitted that it was inherent in the respondents' argument that once they considered that the rent paid by the applicant was unreasonably high by comparison with rent payable in respect of suitable alternative accommodation elsewhere, they were free to treat the claimant's eligible rent as reduced by an amount which brought it below the cost of suitable accommodation elsewhere.

I agree that if this were inherent in the respondents' argument it would point towards the argument being wrong. The respondents, however, after some initial havering by counsel for the local authority, both accepted that in the light of the wording of reg 11(2), with its specific requirement that regard most be had in particular to the cost of suitable accommodation elsewhere and the general scheme of the 1986 Act, it would be illegal to reduce the eligible rent to a sum below the cost of suitable accommodation elsewhere.

The respondents thus submitted that while they could not reduce the eligible rent to below the rent of suitable alternative accommodation, they could reduce it thus far, and in deciding whether or not to reduce it thus far a relevant consideration was the state of the authority's own finances.

In my judgment this submission is correct. Authorities, generally, in the carrying out of their functions are bound to have regard to the financial implications of any action or inaction on their part, save in those cases, of which the *Chetnik Developments Ltd* case is one but by no means the only example, where there is an absolute duty to do something and to raise the appropriate funds to enable that duty to be fulfilled. In those cases the financial situation of the authority will not be relevant. But the present case is not, in my judgment, such a case.

In the present case, faced with an applicant whose rent is unreasonably high by comparison with the rent payable in respect of suitable alternative accommodation elsewhere, the local authority has a discretion which can for present purposes be formulated as being concerned with the question whether to pay benefit equivalent to

the full amount of the rent or whether to reduce it. Since the whole purpose of the legislation is to enable the indigent to live in suitable accommodation and meet an appropriate rent, it is difficult to see how a local authority could refuse to pay benefit equal to the cost of suitable alternative accommodation.

But there is no express or self-evident reason why when considering whether or not to reduce the eligible rent to such cost, the local authority should not take into account its own financial situation, so I rule that it is entitled so to do.

Declaration accordingly.

Solicitors: James Ritchie (for the applicant); Stephen K Forster, Wembley (for the local authority); Treasury Solicitor.

SOURCE: All England Law Reports (1990)
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