CHRISTOPHER BAKER defends the interpretation and operation of a local authority's housing allocation scheme in the Court of Appeal, in relation to an applicant in statutorily overcrowded accommodation.

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R (Flores) v Southwark LBC [2020] EWCA 1697 (Civ)
Court of Appeal, 15 December 2020, Floyd, Baker and Males LJJ

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Agreeing with the Administrative Court, below, the Court of Appeal held that the words "deliberate act" in Southwark's housing allocation scheme were to be read in an ordinary way and without reference to other provisions in the Scheme which did not apply in this case. The words meant an intentional act, which need not be culpable or planned. Reversing the Judge's dismissal of the claim, however, the Court granted declaratory relief as to the level of priority to be awarded to a family living in accommodation which had become statutorily overcrowded as a result of children growing older.

Background

The applicant, his partner and two children moved into a privately-rented one-bedroom flat in 2014. At that time, the flat was overcrowded by reference to Southwark's room standards, but it was not statutorily overcrowded for the purposes of Housing Act Pt X because both children were then aged under 10 years. In 2016, however, the older child turned 10, with the result that the statutory calculation under s326 of the number of persons sleeping in the flat increased from three to three and a half. This caused the number of rooms in the flat to be insufficient to meet the space standard and the flat accordingly became statutorily overcrowded.

In about 2019, the applicant applied to Southwark for an allocation of social housing under their Scheme, pursuant to Pt 6 Housing Act 1996. The Scheme provided for priority between applicants to be reflected mainly by way of a system of four bands, in descending order of priority, and the applicant was placed in Band 3. The applicant contended that he should have been placed in Band 1, which included the following category:

> "Applicants who are statutorily overcrowded as defined by Part X of the Housing Act 1985 and have not caused this statutory overcrowding by a deliberate act."

Decision

(1) The meaning of a housing allocation scheme, like that of any other comparable policy document, was for the court to determine (cf in a planning context, *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, Lord Reed at [18] and [19]).

(2) The approach to interpretation should, however, be in accordance with the guidance given by the Court of Appeal in *R (Ariemuguvbe) v Islington LBC* [2009] EWCA Civ 1308, [2010] HLR 14, *ie* "a common sense and a practical approach … which allows a sensible degree of flexibility when it comes to dealing with individual cases", Lord Neuberger at [31].

(3) The Court rejected the appellant's contention that the phrase "deliberate act" connoted something culpable, in the sense that it was deliberately intended to promote the interests of the applicant in relation to the scheme. "Deliberate" was an ordinary English word which required no explanation or glossing. An act was deliberate if it was something which the

person who did it intended to do. It need not be culpable or planned. There was no reason to interpret the words as involving concepts of culpability. That was an unnecessary complication, apparently derived from another part of the scheme which did not apply in this case. The applicant for public housing for whom the Scheme was primarily intended should not have to comb through the 60 page document, in the way that a lawyer might, to see whether the clear terms of the relevant words required qualification as a result of other provisions dealing with situations which did not apply to his case.

(4) The Scheme required Southwark to focus on the cause of the statutory overcrowding and, having identified that cause, to ask whether the cause was a deliberate act by the applicant. The cause had necessarily be ascertained from the information which the applicant had provided. Southwark were not required to carry out extensive investigations and it would not be a good use of limited resources to insist that they do so.

(5) It was artificial on the undisputed facts of the present case to regard the cause of the overcrowding as the appellant's decision, some five years before his application to be placed on the housing register, to take a tenancy of his existing accommodation. At that time he obtained for himself and his family the best accommodation which he could afford. He did not take it with any thought of improving his position on the register, a possibility of which at the time he had no knowledge. The accommodation which the appellant reasonably decided to take only became statutorily overcrowded as a result of his children growing, as they inevitably would. That was the cause of the overcrowding in this case. It exceeded the bounds of any flexibility which might be accorded in the implementation of the Scheme to decide otherwise.

Comment

This case is a further example of an increasing trend towards challenging decisions on housing allocation. Such challenges had become relatively rare after the decision of the House of Lords in *R (Ahmad) v Newham LBC* [2009] UKHL 14; [2009] 3 All ER 755, but they have become much more frequent in recent years. Although the legal framework under Pt 6 Housing Act 1996 requires a system of internal reviews of most decisions, there is no system of statutory appeals, unlike homelessness cases under Pt 7 Housing Act 1996. Accordingly, such challenges, whether or not they involve a challenge to the authority's housing allocation scheme, have to be brought by way of judicial review.

One of the likely reasons for the increase in such challenges is the acute shortage of social housing, particularly in London. There is a very real incentive for homeless applicants and others seeking longer-term, stable accommodation in the social rented sector to seek to improve their prospects of securing an allocation ahead of the vast multitude of other applicants. Often this is to avoid being placed in - or continuing to live in - privately-rented accommodation, which is usually seen as being less desirable, less stable and more expensive.

While the Court's approach in this case is an affirmation of the scope for local authorities to exercise discretion in the manner in which they interpret and apply their allocation schemes, the differing outcomes in the Administrative Court and Court of Appeal are a reminder that different judges can draw the limit of that flexibility in different places. See also *R (Woolfe) v Islington LBC* [2016] EWHC 1907 (Admin); [2016] HLR 42, for example, where it was held that the local authority had significantly misinterpreted the wording of part of their own scheme, which had not been sufficiently clear, with the result that the decision was quashed, albeit that the scheme was nonetheless found to be lawful. Decisions based on schemes which are unclear or incomplete can be particularly vulnerable.

The formulation of schemes and the wording of allocation decisions has become detailed, technical and complex, often involving difficult policy decisions to cope with huge and chronic housing demand for very small amounts of available social housing stock. It seems almost inevitable that litigation in this area will increase, requiring even greater care to be taken by local authorities when framing their schemes and taking decisions.