R v Newham LBC ex p Gorenkin (Mikhail)

Queen's Bench Division
Carnwath J
13 May 1997

A local authority has no power to provide ancillary services under National Assistance Act 1948 s21(5) unless it is providing residential accommodation. However, a person can be in need of 'care and attention' because of a need for such ancillary services, even though s/he has accommodation.

Facts

There were a number of asylum-seekers in the respondent authority's area who occupied private sector accommodation because at one stage they had had an entitlement to state benefits or other means of financial subsistence, but who had become without means, unable to pay their rent or provide food and other basic necessities for themselves. The applicant and others sought assistance from the respondent authority under National Assistance Act 1948 (NAA) s21: see *R v Hammersmith and Fulham LBC ex p M; R v Lambeth LBC ex p P and X; R v Westminster CC ex p A* (1997) 1 CCLR 69, QBD, and *R v Westminster CC and Others ex p M, P, A and X* (1997) 1 CCLR 85, CA. The respondent authority initially provided them simply with food vouchers. It then received legal advice that it was not *intra vires* NAA 1948 s21 to provide food vouchers, absent the provision of residential accommodation. It therefore ceased to provide food vouchers and further resolved not to offer any more assistance under NAA 1948 s21 until the applicant and others had become, or were imminently to be made, homeless by their landlords.

Held:

1 It was not lawful to provide food vouchers without accommodation under NAA 1948 s21.
2 A local authority has no duty to re-assess applicants before withdrawing community care services where it considers that it has provided the relevant services without the legal power to do so.
3 The respondent authority's policy of only offering assistance to persons who were, or who were imminently to become, homeless was unlawful. A person can become in need of care and attention as a result of being starving, even though s/he has accommodation of some sort. The authority has to consider whether, looking at the person's position overall, s/he has arrived at a position where it ought to take responsibility for him/her by securing residential accommodation and the food that goes with it.

Cases referred to in judgment:

R v Gloucestershire CC ex p Royal Association for Disability and Rehabilitation [1996] COD 253, QBD.

R v Hammersmith and Fulham LBC ex p M; R v Lambeth LBC ex p P and X; R v Westminster CC ex p A (1997) 1 CCLR 69; (1996) 93(42) LS Gaz 28; (1996) 140 SJLB 222; (1996) *Times*, 10 October; *Independent*, 16 October, QBD.

R v Westminster CC and Others ex p M, P, A and X (1997) 1 CCLR 85; (1998) 30 HLR 10; (1997) *Times*, 19 February, CA.

Legislation/guidance referred to in judgment:
Asylum and Immigration Act 1996 – National Assistance Act 1948 s21 – Secretary of State's Approvals and Directions under s21(1) of the National Assistance Act 1948 at Appendix 1 to LAC(93)10.

This case also reported at:
(1998) 30 HLR 278; (1997) *Times*, 9 June, QBD.

Representation
S Knafler (instructed by Clore & Co) appeared on behalf of the applicant.
S Rutledge (instructed by the Legal Department of the London Borough of Newham) appeared on behalf of the respondent.

Judgment
JUSTICE CARNWATH: This troubling case arises out of the problems created by the treatment of asylum seekers pending their applications and appeals being dealt with. As is well-known, the former government introduced legislation designed to deprive such persons of various categories of social security assistance and housing assistance if they did not make their applications for asylum at the point of entry. That policy was eventually embodied in primary legislation under the Asylum and Immigration Act 1996.

It was held by Collins J last autumn, and by the Court of Appeal in February of this year [see *R v Hammersmith and Fulham LBC and Others ex p M, P, A and X (1997) 1 CCLR 69, QBD, and R v Westminster CC and Others ex p M, P, A and X (1997) 1 CCLR 85, CA, respectively*], *that such persons could still in principle be subject to duties of authorities to provide assistance under the National Assistance Act 1948 section 21. That section, which has been amended considerably over the years, provides as follows, so far as relevant:*

> *(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing] –*
> *(a) residential accommodation for persons [aged 18 or over] who by reason of age, [illness, disability] or any other circumstances are in need of care and attention which is not otherwise available to them; . . .*

Subsection (2) there says that in making such arrangements a local authority shall have regard to the welfare of the persons concerned. Subsection(4) says that generally accommodation to be provided in the exercise of their functions under this section shall be provided in premises managed by the authority, or by an another authority under agreements between the two.

That power is, as has been said, subject to directions of the Secretary of State. The Secretary of State has, directed by the relevant directions [LAC(93)10 Appendix 1], made in 1993, as follows [para 2(1)]:

> *The Secretary of State hereby –*
> *(a) approves the making by local authorities of arrangements under section 21(1)(a) of the Act in relation to persons with no settled residence and, to such extent as the authority may consider desirable, in relation to persons who are ordinarily resident in the area of another local authority, with the consent of that other authority; and*
> *(b) directs local authorities to make arrangements under section 21(1)(a) of the*

Act in relation to persons who are ordinarily resident in their area and other persons who are in urgent need thereof,

to provide residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstance are in need of care and attention not otherwise available to them.

The primary section in the Act is headed 'Duties of local authorities to provide accommodation'. The Secretary of State's direction is headed 'Residential accommodation for persons in need of care and attention' and, as has been seen in paragraph 2(1)(b), imposes a duty where persons are in urgent need 'thereof', which I take to refer to urgent need for residential accommodation under the section.

It is quite clear, therefore, that the whole thrust of the section is dealing with the provision of accommodation, not other forms of assistance which people may need. This gives rise to the problem in this case. The Court of Appeal, in the case to which I have referred, was not specifically concerned with the type of assistance which was to be provided. They accepted the view of the judge that the asylum seekers were not outside the scope of the Act because the need of such asylum seekers for what Collins J referred to as 'shelter, warmth and food' was a need clearly essential to all human beings and one which if not met could result in them being in need of 'care and attention' of the type contemplated by the Act.

Throughout the judgment the Court refers compendiously to the need for food and accommodation without distinguishing between the two. No doubt it was assumed that persons in the unfortunate position of those Applicants, if they became destitute, would be looking for both forms of assistance. Equally clearly there is no difficulty under the statutory provisions, where accommodation is provided, as to the *vires* of the provision of other services. Indeed paragraph 4 of the directions, to which I have referred, specifically directs local authorities to make arrangements in relation to persons provided with accommodation under section 21(1) for other needs including board and services. Therefore the provision of food in connection with the accommodation is clearly anticipated.

The problem in this case is the converse of that. The people with whom I am concerned are people who have some form of accommodation but have no money or other resources with which to buy food or meet their other needs. How are they to be dealt with?

The problem arises specifically in the application of a Mr Gorenkin, but he is simply typical of a number of others and several applications have been made to the Court for leave. I take his example simply as providing the means for the issue of principle to be considered. His position is that he came to the UK from the Ukraine in August 1996. He obtained a room in Forest Gate at rent of £20 per week and was able to get some sort of assistance with the payment of that initially, but he sought assistance from the Newham Council with his food needs and they provided him with food vouchers until 6th May. The reason they stopped that provision was as a result of a legal advice they had taken, and a policy decision made following that advice. This emerges from a report to the Policy Resources Chair Subcommittee dated 16th April 1997. That refers to the advice that has been taken. The advice was as follows:

22.2 The Act specifically provides that 'residential accommodation' should be made available. This therefore means hostel, bed and breakfast (with evening meals) and privately rented properties with meals/toiletries should be provided.

22.3 There is no power to provide food only if no accommodation is required by an asylum seeker.

A The report also refers to the Department of Health circular which deals with their special grant which is provided to meet the consequences of the Court of Appeal's decision. The author of the policy writes:

> *The Department of Health have accepted the need to reimburse local authorities for expenditure incurred in providing accommodation and board, or accommodation with meals or food vouchers for use in nominated supermarkets.*

B

The note on the policy goes on:

> *The Council currently provides food vouchers without accommodation in many cases. In view of the legal position this practice must stop. Where the Council is giving food vouchers without providing accommodation this must stop.*

C

It then goes on to refer to what it calls the 'major operational difficulties' resulting from this and suggests that some notice should be given, in fact one week's notice of the withdrawal of assistance. It then goes on as follows:

D

> *In each case currently being assisted officers have satisfied themselves as part of the original assessment, that there was no need to provide assistance with accommodation and individual asylum seekers have had every opportunity to apprise officers of any change in their circumstances. Officers will arrange to reassess individual asylum seekers who re-present following withdrawal of vouchers in order to establish whether they are entitled to assistance with accommodation. Such assistance will only be offered where officers are satisfied that individuals are either without accommodation or are likely to become so imminently.*

E

F Then it goes on:

> *Officers anticipate the withdrawal of food vouchers is likely to result in a number of individuals losing the support they have been receiving and very quickly re-presenting seeking both accommodation and food.*

G Then it sets out arrangements to respond to that problem.

There is no doubt that the policy which Newham adopted was taken in response to legal advice that it did not have power to continue the practice that it was operating at that time. If that were right, then that left them no discretion in the matter because if they were paying for food provision, which they had no H power to provide for, they could be subject to legal sanctions by the district auditor or others. Therefore, no criticism can be made of the Council for acting in the way they did. However, it did produce the surprising result that where someone had no accommodation and no food they could help him by providing accommodation and food, but where someone had some accommodation but I was in severe destitution due to lack of any other means, the only way he could get himself within the authority's powers would be by becoming homeless thus adding to the burden of providing for his needs. If however, that is the effect of the legislation that problem has to be faced.

Mr Knafler, who has argued the matter strenuously on behalf of the Applicants, J says that really the authority have looked at the matter from the wrong end. He says that the question is not whether they need residential accommodation but whether they need care and attention. He points to the way this is dealt with by the Court of Appeal, which makes it clear that they certainly envisaged that someone who was deprived of food over a period would bring himself to a state K inevitably where he needed care and attention of the kind envisaged by the Act. Accordingly he says that the primary question is: does the person need care and

attention? Having done that if the only way the authority can provide for him under their powers is by providing residential accommodation, then that is what they have to do. It is not a possible option to say 'Well, they do not need accommodation, so therefore we will not give them any help at all.'

Against that, Mr Rutledge for the authority says that the reference to care and attention has to be seen in the context of a section which is concerned with the provision of accommodation, so that the care and attention which is needed must be the sort of care and attention which requires residential accommodation. He, I think, accepts that there may be a lacuna in the Act in that there is not a power specifically to provide for those whose needs are extreme but fall short of the need for residential accommodation. He reminds me, of course, that there are other provisions which, for example, will ensure that where children are involved there are adequate powers, but that is not this case.

I have found this a very difficult issue to resolve, because I feel instinctively that the provisions of the 1948 Act were probably not designed to cover the situation which has now arisen. But I am bound by the approach of the Court of Appeal to treat them as applicable. It seems to me that Mr Knafler goes too far if he suggests that one can look at the reference to 'care and attention' quite separately from the context in which it is placed. Where one has a power to provide residential accommodation, then, it seems to me, inevitably implicit that the sort of care and attention one is talking about is the sort of care and attention which can be met by the provision of residential accommodation and that is clear from the whole context of the matter. That also seems to me clear from the direction, to which I have referred, which says that the duty arises when persons are in urgent need thereof, which, as I have said, is urgent need of the accommodation. Therefore until one reaches a stage of someone being in urgent need of accommodation, one does not come within the duty.

Therefore, the authority were right to review their policy and indeed right when they said, on legal advice, that their existing practice of providing food vouchers without accommodation would have to stop. That being the case, it seems to me they were clearly also right to say that they should then review the position in respect of individual asylum seekers to see whether they met the provisions of the section as being in need of care and attention of a kind which could be satisfied by residential accommodation.

On the other hand, I think the policy did go too far in limiting the scope of the reassessment. The sentence I referred to says:

> *Such assistance will only be offered where officers are satisfied that individuals are either without accommodation or are likely to become so imminently.*

It seems to me that where someone has accommodation of some sort, but is otherwise wholly destitute, it is certainly possible that he may reach a stage where he is in need of care and attention as defined in the section. A person who is starving in a garret may certainly need such attention, and it would be very odd if the authority could not review his position while he remains there. What the authority have to consider is whether, looking at the person's position overall, it has arrived at a position where they ought to take responsibility for him by securing residential accommodation and the food that goes with it, and that position may, as I say, be arrived at while he still has a roof over his head. However, it is unfortunate that their powers in that sort of case are limited. It does not appear to be open to them to say: 'Well, we will pay your rent and provide you with food, where you are.' Maybe there should be such a power, but as far as I can see there is not. So in that kind of situation all they can do is use their powers under section

21 to secure residential accommodation, and the welfare and food provision that goes with it.

In conclusion I would uphold the approach of the local authority, subject to that sentence which seems to me to go too far. I will hear submissions as to whether any substantive relief by way of declaration is required; I rather doubt it.

Mr Knafler had a separate point which was that, in any event, the authority had not appreciated their duty to reassess Applicants before withdrawing assistance to them. He relied on a judgment of my own in the case of *R v Gloucestershire County Council. ex parte Royal Association for Disability and Rehabilitation*, 21st December 1995. Certainly, as I said there, where an authority is withdrawing assistance which it has provided properly in accordance with its powers, then it is right that they should reassess before they do so. However, as I understand it here, the reason the authority has refused the provision was because they did not consider they had the power, and if that is right then they were entitled to act as they did. Mr Rutledge has made quite clear that in principle he accepts that, where they have the power, they have an obligation to assess. I have no reason to doubt what he says.