Chief Adjudication Officer and Another v Quinn and Others; Chief Adjudication Officer and Another v Gibbon

House of Lords
Lord Keith of Kinkel, Lord Mustill, Lord Slynn of Hadley, Lord Nicholls of Birkenhead and Lord Hope of Craighead.
24 July 1996

Arrangements made by a local authority with a voluntary organisation, whereby the voluntary organisation provides residential accommodation, do not fall within National Assistance Act 1948 s26 unless the arrangements provide for the making of payments in respect of the accommodation by the local authority, at rates determined by or under the arrangements. If the arrangements do not comply with s26 then the residents in private sector care homes are entitled to the 'higher rate' of income support.

Facts

The applicants had lived in local authority residential accommodation for some years. The local authorities then leased and transferred the management of the residential accommodation to voluntary organisations. In the first case, the local authority transferred the accommodation under a management agreement whereby it provided financial support in the form of a contribution towards the voluntary organisation's management and expenses. In the second case, the agreement between local authority and voluntary organisation entailed the two bodies co-operating in being responsible for the care and management of residents, who were to be charged weekly sums equal to the residential allowances paid by the Department of Social Security. In both cases, the question arose whether the applicants were entitled to income support at the rate payable to claimants in local authority residential accommodation, or at the 'higher rate' payable to claimants in a private sector residential care home, registered, as these homes had been, under the provisions of the Registered Homes Act 1984.

Held (allowing the applications):

The arrangements did not comply with National Assistance Act 1948 s26 in that no provision was made for the local authorities to make payments to the voluntary organisations at rates determined by or under the arrangements, in accordance with s26(2). It followed that the arrangements did not entail the provision of residential accommodation by the local authority and the applicants fell to be treated like any other persons in private sector residential care homes. Accordingly, they were entitled to be paid the 'higher rate' of income support.

Cases referred to in judgment:

Montreal Street Railway Co v Normandin [1917] AC 170.

Legislation/guidance referred to in judgment:

Health Services and Public Health Act 1968 ss44, 45 and 65 – Housing Associations Act 1985 s58 – Local Government Act 1972 ss123 and 195 and Sch 23 – National Assistance Act 1948 Part III and ss21 to 24 and 26 – Registered Homes Act 1984 Part I – Social Security Act 1986 ss20 and 22 – Income Support (General) Regulations 1987 SI No 1967 regs 19 and 21 and Sch 4 Part I paras 1, 5,

6 and 13 and Sch 7 para 13 – Income Support (General) Amendment Regulations 1988 SI No 663 reg 9 – Income Support (General) Amendment (No 5) Regulations 1991 SI No 1656 reg 2 – LAC(74)13.

This case also reported at:

[1996] 1 WLR 1184; [1996] 4 All ER 72; (1996) 146 NLJ Rep 1150; (1996) 93(37) LSG 27; (1996) 140 SJLB 207; (1996) *Times*, 8 August, HL.

Representation

Duncan Ouseley QC and Richard McManus (instructed by Lawrence Graham, acting as agents for Dorset CC) appeared on behalf of Mr Quinn and Dorset CC.

Genevra Caws QC and James Richardson (instructed by Curwen & Co) appeared on behalf of Mrs Gibbon.

John Howell QC (instructed by the Solicitor to the Department of Health and Social Security) appeared on behalf of the Chief Adjudication Officer and the Secretary of State.

.....

Judgment

LORD KEITH OF KINKEL:

My Lords,

For the reasons given in the speech to be delivered by my noble and learned friend Lord Slynn of Hadley, which I have read in draft and with which I agree, I would dismiss these appeals.

LORD MUSTILL:

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Slynn of Hadley. For the reasons he gives I too would dismiss both appeals.

LORD SLYNN OF HADLEY:

My Lords,

The question which arises on these two appeals is as to how much 'income support' under the Social Security Act 1986 each claimant was entitled. Was it during the relevant periods a weekly sum of £52 or was it £171.40?

Such a difference at first glance suggests that the claimants' standard of living would have been substantially affected by the answer. In fact it was not; the essential question, as the Social Security Commissioner found, was whether the maintenance of the two claimants was to be provided by central or local funds.

The difficulty of applying the social security legislation, however, is once again borne out by the fact that in Miss Harris's case the Adjudication Officer and the Social Security Appeal Tribunal decided against her; the Social Security Commissioner and the Court of Appeal decided in her favour. In Mrs Gibbon's case the Adjudication Officer decided against her; the Tribunal the Commissioner and the Court of Appeal decided in her favour. The Chief Adjudication Officer and the Secretary of State for Social Security now seek to reverse the decision of the Court of Appeal in each case.

By section 20(1) of the Act of 1986 a person in Great Britain was entitled to income support if, *inter alia*, he was over the age of eighteen and he had no income or his income did not exceed 'the applicable amount'. If he had no income he received the applicable amount; if he had income he got the difference between that income and the applicable amount, the latter to be prescribed by regulations (section 22(1) of the Act of 1986).

By section 22 of the National Assistance Act 1948 persons for whom accommodation was provided under that Part of the Act were required to pay the standard rate fixed by the authority managing the premises in which it was provided. If the person satisfied the local authority that he could not pay the standard rate, a lower rate was to be fixed.

By the Income Support (General) Regulations 1987 (SI 1987 No 1967) made pursuant to the Act of 1986 a distinction was drawn between persons in 'a residential care home' and those in 'residential accommodation'.

By regulation 19(3), as amended by regulation 9(b)(1) of the Income Support (General) Amendment Regulations (SI 1988 No 663) a 'residential care home' includes, *inter alia*, an establishment which is required to be, and is, registered under Part I of the Registered Homes Act 1984. By regulation 19(1), as amended by regulation 9(a) of the Regulations of 1988, subject to reductions as prescribed in sub-regulation (2), for a claimant living in such a residential care home the applicable weekly amount (subject to prescribed exceptions) fell to be calculated in accordance with Part I of Schedule 4 to the regulations. By paragraph 1 of that Part the applicable amount was to be the weekly charge for the accommodation, including all meals and services provided for him, subject to the maximum amount determined in accordance with paragraph 5. That paragraph takes one to paragraph 6(1) in the present case. Subject to special provisions which are not relevant:

> *. . . where the accommodation provided for the claimant is a residential care home for persons in need of personal care by virtue of – (a) old age, the appropriate amount shall be [at the relevant time] £160 per week [as substituted by paragraph 6(1)(a) of Part I of Schedule 5 to the Social Security Benefits Up-rating Order 1991 (SI 1991 No 503)].*

In addition by virtue of paragraph 1(b) of Part I of Schedule 4 there is to be added a weekly amount for personal expenses determined in accordance with paragraph 13 of that Part. At the relevant time paragraph 13 prescribed for the claimant a weekly sum of £11.40.

Regulation 21 deals with special cases where the applicable amount is to be reduced. These included by virtue of paragraph 13(1) of Schedule 7 'persons in residential accommodation' which is defined in regulation 21(3) as meaning:

> *. . . accommodation for a person whose stay in the accommodation has become other than temporary which is accommodation provided – (a) under sections 21 to 24 and 26 of the National Assistance Act 1948 (provision of accommodation); . . .*

For a single claimant in such residential accommodation in addition to amounts which were due under other regulations, the amount of income support was prescribed at the relevant time as being £52 of which £41.60 was in respect of the cost of residential accommodation and £10.40 for personal expenses.

The question is thus whether the two claimants were in accommodation provided under sections 21 to 24 or 26 of the National Assistance Act 1948.

By section 21(1) of the Act of 1948, as amended by section 195(6) of, and paragraph 2(1) of Schedule 23 to, the Local Government Act 1972:

> *. . . 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 eighteen or over who by reason*

A *of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them; . . .*

By the Department of Health and Social Security Circular No LAC 13/74 the Secretary of State empowered local authorities to provide accommodation themselves for persons urgently needing it who by reason of age needed care and attention not otherwise available to them. He also authorised the provision of accommodation by such an authority in premises managed by another local authority or pursuant to arrangements in accordance with section 26 of the Act with a person registered in respect of an old person's home for the provision of accommodation. The Secretary of State also directed local authorities to provide accommodation themselves or in accordance with arrangements for the provision of accommodation in premises managed by another local authority. The local authority empowered to provide residential accommodation is the local authority in whose area the person in question is ordinarily resident and a lower rate may be determined for those unable to pay the standard figure prescribed.

The interpretation of section 26 is the crux of the matter. By that section, as amended by section 44 of the Health Services and Public Health Act 1968 and section 195(6) of, and paragraph 2(3) of Schedule 23 to, the Local Government Act 1972, arrangements under section 21 may include provision by which:

(1) . . . a local authority –

(a) *may make in lieu or in supplementation of the provision, in premises managed by them or another local authority, of accommodation of the kind mentioned in paragraph* (a) *of sub-section (1) of the said section twenty-one, arrangements:*

(i) with a voluntary organisation managing any premises, for the provision in those premises of accommodation of that kind; . . .

By subsection (2):

Any arrangements made by virtue of subsection (1) of this section shall provide for the making by the local authority to the other party thereto of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements.

By subsection (3):

A person for whom accommodation is provided under any such arrangements shall, in lieu of being liable to make payment therefor in accordance with section twenty-two of this Act, refund to the local authority payments made in respect of him under the last foregoing subsection.

In 1986 Miss Harris, who was born in 1909, went to live at Heathlands which was owned by the Dorset County Council since it was clear that she was in need of care and attention not otherwise available to her. This accommodation was provided pursuant to section 21(4) in Part III of the Act of 1948. With effect from 28 March 1991 the Dorset County Council granted leases of Heathlands and seventeen other of their homes providing Part III accommodation to the Dorset Trust, a voluntary organisation, not under the control of the County Council, whose homes are registered under the Registered Homes Act 1984. A management agreement was made between the County Council and the Trust which provided for financial support as a contribution to the management and expenses of the Trust. Miss Harris and other residents of Heathlands were asked whether they would like to stay there under the new arrangement or whether they would like to

transfer to one of the homes being retained by the Dorset County Council. Residents were told that their conditions would not change, that they would not have to pay any more and that they could stay as long as they liked at Heathlands if they chose to stay but that if that they wanted to move to another home so as to remain in the care of the Dorset County Council every effort would be made to find a suitable vacancy. Miss Harris through her niece chose like most other residents to stay in the home to which she had become accustomed. Her claim for income support accepted by the Adjudication Officer on 14 June 1991, was on the basis that under the new arrangements following the transfer of the home she was in 'residential accommodation' and therefore entitled to income support of £32.00 a week. That decision was upheld by the Social Security Appeal Tribunal on 6 November 1991 on the basis that there were arrangements under section 26 of the Act of 1948 which meant that she was in 'residential accommodation'. The Social Security Commissioner held that there were no arrangements under section 26 of the Act of 1948 and that she was not in residential accommodation within the meaning of the Act.

Mrs Gibbon in 1990 went to live in Southlands, a home providing accommodation under section 21(4) of the Act of 1948 which was owned and managed by the Cumbria County Council since she was in need of care and attention which was not otherwise available to her.

On 11 July 1991 the Cumbria County Council granted a lease of Southlands to the Westfield Housing Association ('Westfield') a voluntary organisation which on the same day became registered as a residential care home under the Registered Homes Act 1984. An agreement was made between the Cumbria County Council and Westfield under which it was recited that the two parties would co-operate in providing care and attention for elderly persons. Westfield undertook to be fully responsible for the care and management of the property and to levy a weekly charge to residents of an amount at least equal to the residential care allowances paid by the Department of Social Security. The Council agreed to meet one-quarter of the deficit difference between the amount shown in the budget as collectable for residents and the amount shown in the budget as expendable on the provision of services. The parties are agreed that Westfield also entered into an agreement with the County Council whereby the employees of the authority were to continue to work at Southlands in consideration of a payment by the association to the authority. On 11 July 1991 Mrs Gibbons was told that a transfer would have no direct effect on the services which she would receive, that there would be a weekly charge to residents of £160 and to enable her to pay this she would need to apply for income support. She was told that she could choose between staying at Southlands and moving to another home in the charge of the County Council. Mrs Gibbon indicated in a letter of 10 July 1991 that she wished:

> *. . . to claim Income Support from Thursday, 11 July because Southlands Home for the Elderly will be owned and run by Westfield Housing Association from that day. I have chosen to stay here rather than to move to another home run by the County Council. The new weekly charge will be £160 and I do not think I have the means to pay all this myself.*

The Adjudication Officer decided on 31 October 1991 that the applicable amount in her case was £52 a week since she was living in 'residential accommodation' but that given her other resources she was not entitled to income support. The Social Security Appeal Tribunal on 25 March 1992 allowed her appeal on the ground that she was in a residential care home and that decision was upheld by the Social Security Commissioner so that her Income Support fell

to be assessed under regulation 19 of, and Schedule 4 to, the Income Support (General) Regulations of 1987.

The Court of Appeal agreed with the Social Security Commissioner in both cases.

The appellants stress that the object of the regime established by the Act of 1948 is to limit the liability of persons for whom accommodation is provided to an inclusive charge which is itself defined by what they can afford to pay. Thus for those in accommodation provided by the responsible local authority itself the standard payment is due subject to a reduction if the person concerned cannot pay that amount. If accommodation is provided under arrangements made with another local authority, the person concerned pays the authority managing it the appropriate charge based on his ability to pay and the managing authority accounts for the sums received to the authority making the arrangements. So it is said that where accommodation is arranged in premises managed by others the arrangements under section 26 are to:

> *. . . provide for the making by the local authority to the person managing the premises of payments in respect of the accommodation at such rates as may be determined by or under the arrangements and any individual for whom accommodation is provided under such arrangements is liable to refund to the local authority any payments they have agreed to make to the person providing the accommodation or such part as they are able to pay calculated on the basis of the formula provided for in section 22 of the Act: see section 26(2)–(4) of the Act. [Paragraph 6 of the appellants' case.]*

The appellants accept that the relevant question is whether the claimants were in residential accommodation provided pursuant to section 26; the answer to that question, it is said, depends on whether after the transfer of the management of the accommodation the authority had made arrangements for the provision of accommodation of the kind mentioned in section 21(1)(a) of the Act of 1948.

The appellants divide up this question into two parts. First they ask had in fact arrangements been made pursuant to which the two claimants remained in the homes in which they had been living? It is said that in both cases it is plain that they had. Both claimants were given the option of staying where they were or of moving to one of the Council's remaining homes. Such an option could only have been offered if the local authority itself had made the arrangements and thereby given the assurance that the level of care, the security and the charges would continue as they had been previously. There is nothing to suggest that either Miss Harris or Mrs Gibbon made any arrangements individually.

That according to the appellants is enough to establish that section 26 arrangements had been made. It follows that the claimants were entitled only to the lower rate of income support and Mrs Gibbon would receive nothing because of her other income. The fact that there was no provision in such arrangements that the local authority should make to the Housing Associations payments in respect of the accommodation in accordance with subsection (2) was not fatal to the existence of a valid section 26 arrangement. If it were otherwise it is said that local authorities would have 'absolved themselves from their own financial responsibilities to meet that part of the cost of accommodation which an individual is unable to meet and have transferred them to the national taxpayer by virtue of their own unlawful arrangements.' (Paragraph 27(1) of the appellants' case.) Whether or not a failure to comply with statutory requirements means that what has been done is devoid of legal effect depends on the intention of Parliament: *Montreal Street Railway Co v Normandin* [1917] AC 170, 174–175.

For my part I do not think that the right approach to section 26 is to ask first whether in fact arrangements have been made for persons in need of care to be looked after by a voluntary organisation and then to ask incidentally whether those arrangements have provided for payments to be made by the local authority to the other party, on the basis that if they have not the Secretary of State has the remedy 'simply to order the authority to make arrangements which comply with the statutory requirements within a reasonable time' (appellants' case paragraph 32(2)). By virtue of section 21(5) of the Act of 1948 accommodation provided under Part III of the Act is to mean 'accommodation provided in accordance with this and the five next following sections'. That includes section 26. By section 26(1) arrangements under section 21 for the provision of accommodation arrangements clearly include arrangements between the local authority and a voluntary organisation managing any premises to provide such accommodation, but section 26(2) provides in unqualified terms that:

> *. . . arrangements made by virtue of subsection (1) of this section shall provide for the making by the local authority to the other party thereto of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements.*

Moreover the person for whom accommodation is provided under any such arrangements must refund to the local authority any payments made in respect of the last foregoing subsection, in lieu of his being liable to make payment for the accommodation in accordance with section 22 of the Act.

This is a separate scheme from that which operates when the local authority itself provides the accommodation. In my opinion arrangements made in order to qualify as the provision of Part III accommodation under section 26 must include a provision for payments to be made by the local authority to the voluntary organisation at the rates determined by or under the arrangements. Subsection (2) makes it plain that this provision is an integral and a necessary part of the arrangements referred to in subsection (1). If the arrangements do not include a provision to satisfy subsection (2) then residential accommodation within the meaning of Part III is not provided and the higher rate of income support is payable.

This seems to me to result not just from the plain meaning of the words of subsection (2) but also from pratical necessity. The voluntary organisation needs to know how much money is to be made available to it pursuant to the arrangements so that it can be sure that the accommodation can be adequately provided. The person for whom the accommodation is provided must know how much he will receive under the arrangements (which is to be refunded to the local authority) and whether or not he needs pursuant to the proviso to subsection (3) of section 26 to ask for the amount to be reduced.

It has been suggested that section 26(2) is really no different from section 26(5) which empowers the local authority to enter and inspect premises where accommodation is being provided under subsection (1) in accordance with arrangements made by a local authority. This cannot be accepted. The arrangements under subsection (1) are intended to be made before the accommociation is provided; subsection (5) gives power to enter and inspect the premises after both subsection (1) arrangements (including the requirements of subsection (2)) have been made and the accommodation has been made available.

The intention of subsection (2) in my view is that rates should be laid down which are enforceable by either party. The rates are to be agreed between the two parties to the arrangement. If such a provision is not included in the arrangements I do not see how it can be imposed either by order of the court or direction

of the minister. The absence otherwise of any power to impose or enforce the rate to be paid indicates that the plain meaning of the words is the right one and that to have valid section 26 arrangements a clause satisfying section 26(2) has to be included. The arrangement or scheme under which persons are to be accommodated by the voluntary organisation is intended to be agreed as a composite whole.

In the case of Miss Harris it is quite impossible to say that there is any evidence of any arrangement which complies with section 26(2). She was clearly accommodated before the transfer of the home to the Dorset Trust in accordance with section 21(4) of the Act of 1948. Dorset Trust took a lease of the house for twenty-five years at a full market rent. It employed its own staff and as a registered home it was independent of the Council. I do not think, as the appellants have contended, that it is an irresistible inference that financial arrangements had already been made; even if some financial arrangements might be inferred they could only be in general terms that there was to be some payment. That is not enough to satisfy section 26(2).

Dorset Trust's contention that there is no section 26 arrangement, that Miss Harris became wholly outside the care of the Dorset County Council and that she fell to be treated like other persons in a residential care home (as it seems are persons admitted subsequently to Southlands after the transfer) is in my view to be accepted.

In Mrs Gibbon's case there was an agreement between the Cumbria County Council dated 11 July 1991 which dealt with the framework of the housing association's future operation and management including some financial and monetary provision.

That agreement recites certain powers which the council had to provide or to assist in the provision of accommodation under a number of statutes including the Act of 1948 although section 26 of the Act of 1948 is not mentioned. The agreement itself is recited to be one of co-operating and providing care and attention. The management of the home was, however, to be the full responsibility of the association. Like clause 5 the association was to levy a charge to residents of an amount at least equal to the residential care allowance paid from time to time by the Department of Social Security. The council agreed to pay one-quarter of the deficit shown in the budget as collectable from residents and the amount shown in the budget as expendable on the provision of services but subject to an annual limit. The accommodation provided was to be 'available for letting to frailer aged persons of limited means'.

These arrangements seem to me to be inconsistent with the scheme for payment and refund set out in section 26(2) and (3) of the Act of 1948 and to lay down provisions which are more akin to an arrangement between a client and a home in the private sector even though in other ways rights and obligations between the parties to the agreement were included in the framework agreement.

The claimants have referred to a number of other statutory provisions under which it is said that the local authority could have made the arrangements which it did. Thus by section 45 of the Health Services and Public Health Act 1968 a local authority may, or if directed must, make arrangements for promoting the welfare of old people. By section 65 of the same Act authorities are empowered to give assistance by way of grants or loans for the provision of accommodation similar to that provided by the local authority under Part III of the Act of 1948. By section 58 of the Housing Associations Act 1985 a local authority may assist a housing association by way of grants or loans. Section 123 of the Local Government Act 1972 permits the disposal of surplus land.

Since I for my part am quite satisfied that the arrangements made in these two cases did not constitute the provision of residential accommodation within the meaning of Part III of the Act of 1948 it does not seem to me to be necessary to consider whether any of these other statutory provisions gave the two local authorities power to do what they did. On the basis that these were not section 26 arrangements the *vires* of what was done has not been put in issue.

On the basis that this was clearly not a section 26 arrangement it is not strictly necessary to decide the question raised by the Commissioner and adverted to by Hirst LJ in the Court of Appeal as to whether once the claimants passed into the care of the housing associations they were no longer in need of the local authority's protection since care and attention acquired by them were 'otherwise available'. However since the matter has been discussed, I indicate briefly my view on this issue as it arises in the present context. If there had been a section 26 arrangement then by virtue of section 21(5) residential accommodation would have been provided under statutory arrangements made by the local authority; as there was no such statutory arrangement but Miss Harris and Mrs Gibbon were cared for by the two housing associations care and attention were otherwise available. If that accommodation no longer became available or if they became unsuitable for it, or it for them, then it might be that they once again were in need of care and attention which was not otherwise available.

There has been some discussion also as to the effect of the Income Support (General) Amendment (No 5) Regulations 1991 (SI 1991 No 1656). This amended paragraph 21 of the General Regulations of 1987 by providing in regulation 2(2) a new paragraph:

> *(3A) Where on or after 12th August 1991 a person is in, or only temporarily absent from, residential accommodation within the meaning of paragraph (3) and that accommodation subsequently becomes a residential care home within the meaning of regulation 19 (applicable amounts for persons in residential care and nursing homes) that person shall continue to be treated as being in residential accommodation within the meaning of paragraph (3) if, and for so long as, he remains in the same accommodation and the local authority is under a duty to provide or make arrangements for providing accommodation for that person.*

It is argued on the one hand that this is merely declaratory of the law and on the other hand that it changes the law. In any event it does not seem to me that the wording of the amendment is of any assistance in deciding the issue in the present case. On the view to which I have come it did make a change in the law.

It follows that in my opinion the Social Security Commissioner and the Court of Appeal were right to hold that there was no section 26 arrangement in either case and that the higher level of income support fell to be paid. I would dismiss both appeals.

LORD NICHOLLS OF BIRKENHEAD:

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Slynn of Hadley and for the reasons he gives I too would dismiss both appeals.

LORD HOPE OF CRAIGHEAD:

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Slynn of Hadley. I also would dismiss these appeals for the reasons which he has given.