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42 BEDFORD ROW Housing Law BULLETIN

BULLETIN No19

New evidence, settled section 204 appeals and costs

LB Croydon v. Lopes [2017] EWHC 33 (QB)

It is well known that usually when a party obtains the relief then the loser will pay the winner's costs, although that rule can be departed from. The same general principle applies to appeals under section 204 Housing Act 1996 (as amended).

Mathew McDermott

Recently, the High Court in LB Croydon v. Lopes [2017] EWHC 33 (QB) allowed Croydon's appeal against an order that it must pay 85% of the costs of Ms Lopes' withdrawn section 204 appeal, finding that the appeal -- that had settled by consent with an agreement to undertake a further review – would only have succeeded in light of new evidence not available to Croydon prior to the decision being appealed. But for this, Croydon would have succeeded.

What were the facts of the case?

Ms Lopes lived in Portugal with her partner, their two children and her partner's mother. She decided to come to the U.K to look for work, leaving her partner and children behind until she found employment. Ms Lopes said, when interviewed by Croydon when investigating what if any duty it owed her, that she felt employment prospects were better in the U.K.

She said during two separate interviews carried out by Croydon that her partner's mother – with whom they had been staying – had not asked her to leave and that the U.K employment prospects were the driving force. This was said in two separate interviews and Ms Lopes was assisted with interpretation in both.

As a result Croydon found that it owed no duty to Ms Lopes because she had accommodation (in Portugal) that was available and reasonable for her to continue to occupy.

This decision was upheld on a review pursuant to section 202 Housing Act 1996 (as amended), leading to Ms Lopes bringing an appeal pursuant to section 204. An underlying thread in the appeal was that Croydon had failed to make adequate enquiries.

The new evidence and the consent order

Ms Lopes filed a witness statement for use at the appeal hearing, and this included a letter from her partner's mother. The mother was, in this letter, saying that she in fact would not be able to accommodate Ms Lopes.

In light of this, Croydon decided to undertake a fresh review. The parties agreed that the appeal was now unnecessary, but disagreed on which of them should be liable for costs.

Costs were the only matter dealt with by the circuit judge, who ordered Croydon to pay 85% of Ms Lopes' costs because it was 'in reality, a failure to make proper enquiries appeal'. The circuit judge felt that Croydon

should have made further enquiries and so, had the appeal gone ahead, it would have been granted on this basis – although a reduction of 15% was made to reflect the fact that the primary relief sought was to vary the section 202 decision, which the circuit judge found was never realistically going to happen.

The High Court decision

Being an appeal on the question of costs only and absent a determination of the substantive issues, the appeal was dealt with by the High Court.

Lewis, J, reversed the circuit judge's decision and ordered her to pay Croydon's costs (subject to any protection she enjoyed by being in receipt of public funds).

He said that the circuit judge had failed to identify, and then apply, the correct legal test. The scope of the enquiries to be made when seeking to establish what, if any, duty is owed (including whether or not someone is homeless or threatened with being homeless) was a question for Croydon and the decision would only be deemed unlawful if the scope of the investigation could be deemed perverse. The well-known cases of R v. Royal Borough of Kensington and Chelsea ex. p. Bayani (1990) 22 HLR 406 and Cramp v. Hastings [2005] HLR 48 were cited. It is not appropriate to deem enquiries inadequate simply because it would have been helpful to do more.

In reality, the section 204 appeal was compromised because of the new evidence. Had the appeal gone on without the new evidence, the scope of Croydon's investigations - the two interviews, including the interpreters - could not have been deemed perverse and Croydon would have won.

Conclusion

A 'failure to make adequate enquiries' is a very common challenge to section 202 review decisions; it is a rare case where it would not have been at least a little helpful to look in to things a bit more. This case, however, is a helpful reminder that the scope of such enquiries is very much a question for the local authority. Unless the scope of an authority's investigations are perverse, in the sense that evidence leading to an agreement to conduct a further review ought to have been obtained, then this case is a strong indicator that it is not the authority that is responsible for the quashing of the original decision – and so it should not be the authority that bears the burden of costs.

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