

CO/8943/2009

**Neutral Citation Number: [2010] EWHC 951 (Admin)**  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand  
London WC2A 2LL

Wednesday, 14 April 2010

**B e f o r e:**

**MR JUSTICE McCOMBE**

**Between:**

**THE QUEEN ON THE APPLICATION OF ADOW\_**

Claimant

v

**LONDON BOROUGH OF NEWHAM\_**

Defendant

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WordWave International Limited  
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(Official Shorthand Writers to the Court)

**Mr Matthew Hutchings** (instructed by Pierce Glynn) appeared on behalf of the Claimant  
**Mr David Carter** (instructed by Newham Legal Services) appeared on behalf of the  
Defendant

**J U D G M E N T**  
(As Approved by the Court)

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1. MR JUSTICE McCOMBE: I have before me a claim for judicial review brought by Farhiya Adow against the London Borough of Newham. The claim is brought by leave granted by Mr Rabinder Singh QC, sitting as a Deputy Judge of the High Court, on 23 December 2009.
2. The claim that was brought by Mrs Adow in her claim form was for two heads of relief: first, an order quashing the decision of the defendant of 29 April 2009 and/or 15 May 2009 refusing medical priority for the claimant's re-housing application; and, secondly, a declaration that the defendant is not entitled to delegate medical assessments under their allocation policy to Dr Keen or to any other third party.
3. In short, the background to the claim was that Mrs Adow's family circumstances had been over the years subject to some change. She had acquired a partner and children. The one-bedroom accommodation in which she was housed was, I think it is accepted, not adequate for her purposes. It was said on her behalf that the cramped conditions and the damp condition of them was giving rise to health problems to one of her children and to her mother who resided with her. The claimant Mrs Adow asked for priority therefore to be given to her re-housing needs for those reasons and for that purpose to have a medical assessment of her family members' position carried out.
4. The claim for that re-assessment was supported by evidence from a consultant paediatrician in respect of the child and of the general medical practitioner in respect of Mrs Adow's mother and by an environmental health officer, each of whom testified to the unsatisfactory nature of the accommodation on health grounds. On that material the claimant sought re-assessment of her priority. It fell to the authority to secure an appropriate medical assessment of the evidence.
5. The framework in which the matters fall to be decided is under the Housing Act 1996, in particular Section 167 which requires an authority to have a scheme for determining priorities, that is the procedure to be followed in allocating housing accommodation (see Section 167 (1), which section also provides):

"(1) .....

For this purpose 'procedure' includes all aspects of the allocation process, including the persons or descriptions of persons by whom decisions are to be taken."

In sub-section (8) of that section it is provided as follows:

"(8) A local housing authority shall not allocate housing accommodation except in accordance with their allocation scheme."

6. Part of Newham's relevant scheme, set out in the evidence in support of these proceedings, is at paragraph 11 (2) which provides:

"Every medical application is assessed on its merits by the medical assessment officer in the quality and review team."

Accordingly, pursuant to that policy in the Act, it behoved the council to carry out medical assessments through the officer identified, that being the policy. The problem was that Newham "out-sourced" its medical assessments to a Dr Keen who, I am told, is regularly engaged by housing authorities to assist in such matters. It is fair to say that criticisms have in the past been made of his impartiality but that is not a matter which can possibly be decided in any way on this short application.

7. Dr Keen took a different view of the medical priorities and the evidence that had been adduced on the claimant's behalf and advised, or decided on the authority's behalf, that no change in her priority was called for on the evidence that had been presented to him.
8. The claimant's solicitors, dissatisfied with that decision, began to burrow further as to the nature of the decision taken and in the end obtained – I think in April 2009 – disclosure of the documents whereby Dr Keen had made his assessment. From that, of course, it emerged that the relevant decision had been taken by somebody other than a person specified by the allocation policy. Accordingly, correspondence ensued challenging the lawfulness of what had been done and ultimately these proceedings.
9. It seemed at a fairly early stage that the council recognised their difficulties arising out of the factor I have mentioned. In a letter of 23 September 2009 from Head of Legal Services to the claimant's solicitors the following statement is to be found:

"Since no permission has yet been granted" –

[I interpolate, "in these proceedings"] –

"it is averred it is not appropriate for speculation to be made in relation to the way the defendant carries out their medical assessments. It is felt that in the statement to the effect that the assessment must be carried out in accordance with the defendant's allocation policy, it is unnecessary. The council are bound to comply with their policy, .....

and then a reference is made to Section 167 (8) of the Act.

10. Some negotiation ensued for the agreement of a re-assessment of the claimant's medical needs, those of her family and for an appropriate order to be agreed to dispose of the judicial review proceedings. However the inconvenient fact remaining was that there was no one within the council's organisation who could be put forward as a person who could make a lawful decision within the meaning of the policy. The claimant and her solicitors tenaciously stuck to the line that an appropriate order should be made in the proceedings.
11. The substantive part of the proceedings however were resolved by the claimant resorting to a degree of self-help and procuring through her own landlord further and better accommodation for her purposes. Accordingly, her immediate housing needs subsided at or shortly after the time at which permission had been granted for the bringing of these proceedings.

12. However the solicitors maintained, as indeed Mr Hutchings has in his helpful submissions to me today, that it is still appropriate to make a declaration broadly as to the unlawfulness of the council's conduct and pattern of behaviour in relation to these medical assessments. It is right to point out that at no stage did the council acknowledge service as required by the rules of court, nor did it react to the order granting permission to bring the judicial review proceedings. I have been told frankly, and I acknowledge the proffering of the explanation with gratitude, that some of this resulted from the council's system of trying to minimise paper in their office and scanning everything into a computer system and then for the paper or the relevant non-paper to be directed to the proper officer or employee within the council.
13. Unfortunately, that system in this case lamentably failed and it was not until shortly before Easter that the council realised that this hearing was looming ahead. Mr Carter was consulted. He produced (I am not blaming him for it) a skeleton argument only yesterday, received in the Administrative Court Office at 12.43, in which it is acknowledged that what happened in this case and what the practice of the council was would not comply with the provisions of the Act and the policy adopted pursuant to it.
14. However Mr Carter – in his helpful submissions both in writing and orally today – submits that notwithstanding the accepted unlawfulness of what has gone on the court should, in its discretion, refuse any remedy. I have been referred to well-known principles summarised in Mr Fordham's book on judicial review (current edition, pages 246 and 248) pointing out the discretionary nature of the remedy in judicial review but also, properly in accordance with counsel's duty, Mr Carter referred me to the paragraph 24.3.4 indicating that normally a remedy will be granted where unlawfulness on the part of a public authority has been disclosed.
15. In a witness statement adduced at the same time as the skeleton argument, Mr Hugh Corrigan, a legal officer of the council, explained the background to what has happened. It is apparently recognised and understood that this particular deficiency in the council's practice exists and at the same time the desirability, because of some legal problems and some policy ones, of requiring amendment to the allocation scheme in various ways quite separate from the present problem. A number of them are listed in paragraph 7 of Mr Corrigan's witness statement. In that evidence he points out the difficulty of dealing with this one matter in advance of all those other policy changes that are thought to be desirable and the difficulty of carrying out lawful medical assessments under the present policy, absent the engagement of a suitable officer.
16. Mr Carter submits that in those circumstances the court should refuse the declaration sought because the court can be assured that processes are in hand to put the matter right along with a number of other desirable matters that have to be changed in the allocation policy. It is also pointed out that there is a degree of uncertainty from a political point of view in the council's affairs pending local elections, and any decision on a housing policy is something that would be of importance to the new administration in whatever colour it may be after the election on 6 May 2010.
17. Mr Hutchings, on the other hand, submits that I should nonetheless make the declaration for four reasons. First, the council admits that it is in the wrong; secondly,

such a declaration would assist in clarifying the position for all concerned; thirdly, particularly for those who are applicants of this authority; and, fourthly, because it is appropriate that suitable publicity should be made of what has clearly been a breach of the law by the authority.

18. One is always appreciative of the practical difficulties of public authorities, particularly in the area of housing where, with limited resources and high demands, they have to make decisions quickly, humanely and in accordance with law that is not always clear. In this case of course the law was clear, and this authority failed, I fear, to comply with it.
19. I would have been more inclined to Mr Carter's submissions had there been a straightforward admission of the breach from the outset and a frank compliance with the rules of court. I have the distinct impression that this authority was anxious for some considerable time to hide its position as far as possible. It failed to engage in candour with the claimant's solicitors and it failed to afford the court the common courtesy of acknowledging service, as it should have done, even if, following grant of permission, for administrative reasons, it failed to react thereafter. It really was not good enough for this council to postpone until the eleventh hour of the eleventh day – perhaps given the timing of the facts, the twelfth hour of the eleventh day – to make its position clear.
20. Mr Carter has done what he can to dissuade me from making a declaration. However I consider in the circumstances in which this authority has contumeliously failed to comply with the court's procedures, it is only appropriate that it should be given the appropriate indication of the court's displeasure of what has happened and its failure to acknowledge the difficulty frankly. In the circumstances I think that the only correct order to make is an appropriate declaration. I am not going to grant the declaration in the course this short judgment but I will leave – as I am sure it is possible – to Mr Hutchings and Mr Carter the task of drafting a suitable form of words.
21. For those reasons this claim succeeds.
22. MR HUTCHINGS: I seek my costs; I do not know whether that is resisted.
23. MR CARTER: I cannot resist that.
24. MR JUSTICE McCOMBE: On what basis?
25. MR HUTCHINGS: I am sorry?
26. MR JUSTICE McCOMBE: On what basis?
27. MR HUTCHINGS: Do I seek my costs?
28. MR JUSTICE McCOMBE: Yes. Standard or indemnity? You are not pushing very hard, standard basis. I would have been inclined – – – – –

29. MR HUTCHINGS: I have to say that I see your Lordship has made findings about a lack of candour on the part of the defendant. That does make the indemnity basis appropriate.
30. MR JUSTICE McCOMBE: I think it does, but standard basis. You were not pushing very hard. The court sometimes has to be guided by the issue and counsel as well. Standard basis costs, Mr Carter.
31. Thank you both for your very helpful submissions.
32. MR HUTCHINGS: And the public funding assessment?
33. MR JUSTICE McCOMBE: Yes. You will want to be paid, so will your solicitors.
34. MR HUTCHINGS: I suppose they might get paid, but there needs to be a public assessment process. We will draw up an order and then lodge it in the usual way.
35. MR JUSTICE McCOMBE: Yes. If you lodge it and send it for the attention of my clerk.

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