10 May 2017

PRESS SUMMARY

Poshteh (Appellant) v Royal Borough of Kensington and Chelsea (Respondent) [2017] UKSC 36
On appeal from [2015] EWCA Civ 711

JUSTICES: Lord Neuberger (President), Lord Clarke, Lord Reed, Lord Carnwath, Lord Hughes

BACKGROUND TO THE APPEAL

The appellant arrived in the UK in 2003 as a refugee from Iran, where she had been subject to imprisonment and torture. She gained indefinite leave to remain in 2009, the year in which she applied to the respondent council for accommodation as a homeless person.

Part VII of the Housing Act 1996 includes the statutory provisions under which local housing authorities are required to secure provision of "suitable" accommodation for a person who is homeless and in priority need, and has not become homeless intentionally. Sub-sections 193(7) and (7F) contain the critical provisions in this case, dealing with the circumstances in which that duty ceases, namely when the applicant refuses a "final offer" of accommodation. However, the housing authority shall not make a "final offer" of accommodation "unless they are satisfied that the accommodation is suitable for the applicant and that it is reasonable for him to accept the offer".

In November 2012 the respondent offered the appellant accommodation in Norland Road, London in a first floor, two-bedroom flat. The appellant's concerns about the physical features of the property (including the small size of the windows) were first raised in correspondence of 29 November 2012, including a letter from the appellant's therapist and her GP, and in a solicitors' letter of 30 August 2013.

The appellant ultimately refused this "final offer" of permanent accommodation at the property on the basis that it had features which reminded her of her prison in Iran and which would exacerbate her post-traumatic stress disorder, anxiety attacks and other conditions. The issue in the case turned not on the "suitability" of the accommodation, but whether it was reasonable for the appellant to accept it. Following a review these grounds were held to be insufficient to justify her refusal. The council's decision was upheld on appeal by the county court and by the Court of Appeal.

JUDGMENT

The Supreme Court unanimously dismisses the appeal and confirms the decision of the review-officer. Lord Carnwath gives the judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

Two issues arise on this appeal: (1) whether the Supreme Court should depart from the its own decision in *Ali v Birmingham City Council* [2010] 2 AC 39 in light of the European Court of Human Rights' (ECtHR) judgment in *Ali v United Kingdom* (2016) 63 EHRR 20, and if so to what extent; and (2) whether the reviewing officer should have asked himself whether there was a real risk that the appellant's mental health would be damaged by moving into the accommodation offered, whether or not her reaction to it was irrational, and if so, whether he did in fact apply the right test **[3]**.

In *Ali v Birmingham City Council* the Supreme Court decided that the duties imposed on housing authorities under Part VII of the Housing Act 1996 did not give rise to "civil" rights or obligations and so Article 6 of the European Convention on Human Rights did not apply to it. In *Ali v United Kingdom* the ECtHR held that Article 6.1 did apply, but accepted that in any event the procedure applied under the Housing Act conformed to its requirements **[18]**.

The review of the domestic authorities shows a continuing debate on this issue, against the backdrop of uncertain Strasbourg jurisprudence. The unanimous judgment of the Supreme Court in *Ali v Birmingham City Council* was intended to settle the issue at domestic level after a full review of the Strasbourg authorities **[32]**. The Chamber in *Ali v United Kingdom* acknowledged the weight to be given to the interpretation of the relevant provisions by the domestic courts and it is thus surprising that it failed to address in any detail either the Supreme Court's reasoning or its concerns over "judicialisation" of the welfare services. The Chamber instead focused on two obiter remarks by Hale LJ (as she then was) and Lord Millett; its treatment of these two statements is open to the criticism that they were taken out of context **[33, 34]**. Further questions can also be raised about the Chamber's reliance on the decision in *Schuler-Zgraggen v Switzerland* as an example of entitlement subject to "discretion": the statute in question gave a right to a full invalidity pension where incapacity of at least 66.66% was established. It is hard to see any fair comparison with the range of factors to which authorities are entitled to have regard in fulfilling their obligations under the housing legislation **[35]**.

The Court's duty under the Human Rights Act 1998 is "to have regard" to the decision of the Strasbourg court Section. There appears to be no relevant Grand Chamber decision on the issue, but the Supreme Court would normally follow a "clear and constant line" of chamber decisions. In *Ali v United Kingdom* it is apparent from the Chamber's reasoning that it was consciously going beyond the scope of previous cases and its answer to Lord Hope's concern that there was "no clearly defined stopping point" to the process of expansion seems to have been that none was needed. That is a possible view, but one which should not readily be adopted without full consideration of its practical implications for the working of the domestic regime **[36]**. This is a case in which the Supreme Court should not regard the Chamber's decision as a sufficient reason to depart from its own fully considered and unanimous conclusion in *Ali v Birmingham City Council*. It is appropriate to await a full consideration by the Grand Chamber before considering whether (and if so how) to modify the domestic position **[37]**.

The reviewing officer's approach

The appeal on this issue well illustrates the relevance of the warning against over-zealous linguistic analysis. This is not to diminish the importance of the responsibility given to housing authorities under the 1996 Act (and reinforced in the case of disability by the Equality Act 2010). The decision-letter viewed as a whole reads as a conscientious attempt by a hard-pressed housing officer to cover every conceivable issue raised in the case: he clearly understood the importance of considering her mental state against the background of her imprisonment in Iran **[39]**.

Although the officer did not in terms address the appellant's claim to have suffered a panic attack, it is hard to criticise him for giving little weight to an incident which she had not mentioned at the time, nor apparently to her medical advisers. The issue for him was not her immediate reaction on one short visit, but show she would reasonably have been expected to cope with living there in the longer term. On that he was entitled to give weight to the medical evidence submitted by her, and consider how far it supported her case **[40]**. It might well have been unreasonable to offer her "accommodation with very small dark rooms without windows at a normal height and looking out onto everyday life", but that was not a reasonable description of this particular property, nor a sufficient ground for her not accepting it. There is no difficulty in understanding the officer's reasoning overall, nor does it disclose any error of law **[41]**.

References in square brackets are to paragraphs in the judgment