

Judgement 4/2004

**Foley v States Housing Authority, Royal Court
(Civil Action file 820), 13 February 2004**

Housing (Control of Occupation) (Guernsey) Law, 1994 – appeal from decision of the Authority – request by Appellant for statistics to be provided by the Authority – application to the Royal Court for directions – whether information sought was reasonable or relevant – application for that further information refused.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 13th day of February, 2004 before Sir de Vic Carey, Bailiff; sitting alone.

RICHARD J. W. FOLEY

Appellant

V

STATES OF GUERNSEY HOUSING AUTHORITY

Respondent

WHEREAS on 20th November, 2003 the Bailiff considered an application by the Appellant for directions and heard thereon Advocates J. M. Wessels and P. Nicol-Gent Counsel for the Appellant and Respondent respectively.

The Bailiff this day gave Directions in the terms of the judgment hereto and Directed that this matter be progressed to a full hearing.

S.M.D. ROSS
Her Majesty's Deputy Greffier

FINAL DRAFT

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Between:

RICHARD J. W. FOLEY

Appellant

and

STATES OF GUERNSEY HOUSING AUTHORITY

Respondent

Date of Hearing: 20th November, 2003
Date judgment handed down: 13th February, 2004

Advocate for the Appellant: J. M. Wessels

Advocate for the Respondent: P. Nicol-Gent

Judgment of the Bailiff on the Appellant's application for directions dated the 12th September, 2003.

Introduction

1. This is an appeal by a man who was originally given a five-year licence in 1992. The circumstances were that he was born in the Isle of Man and remained there until September 1992 when his then employer of the Royal Bank of Canada decided to move the work that he was involved in from the Isle of Man to Guernsey. The basis for the grant of a licence to Mr. Foley for five years was that he was a key member of the team who would ensure that the portfolio management business of the bank was successfully transferred to Guernsey. His initial licence was given for five years from November 1992. Within twenty-one months of the grant of that licence the Bank wrote to the Housing Authority asking for an extension of that licence until 2002. The Authority decided to extend the licence and it is quite clear from the correspondence that the reason why the extension was sought was so that Mr. Foley knew where he stood and could buy a house in Guernsey. It is worth noting that the Financial Services Commission

supported the bank's application and raised certain issues in favour of Mr. Foley's having his licence extended until 2002 which found favour with the Authority. The Authority wrote that it would be unlikely to agree any further extension from Mr. Foley in this post, but it will be relevant for the jurats when they come to deal with this appeal to note that on the 5th September, 1994, Mr. Foley was being given the right to put his roots down in the island to the extent that he was able to stay here until the 25th November, 2002. That early acknowledgment of the right to stay beyond the initial five years seems contrary to the whole philosophy behind five-year licences.

2. In April 2002 the Royal Bank wrote to the Housing Authority saying that it is important that they have continuity of staff and that it is imperative that they retain Mr. Foley. Before this application was processed the Housing Authority heard from Advocate R. P. Ogier acting for Bank of Butterfield seeking a five-year licence for Mr. Foley who was now apparently going to be made redundant by the Royal Bank of Canada at the end of the year. The summons makes mention of the fact that he could have moved to London with the Royal Bank but not surprisingly he seems to have thought it was more attractive to stay in Guernsey and seek employment with the Bank of Butterfield in a post which the Authority had previously said warranted the employment of a person under a five-year housing licence but not a fifteen-year licence. The Housing Authority refused this application and this is basically what Mr. Foley is now appealing against. The real issue in this appeal centres on the policy of the Housing Authority approved by the States to encourage financial institutions and others to employ persons on five-year contracts to do a particular job on the basis that they will then leave the island either having trained somebody local to do the job in their place or be replaced by another five year appointment. The rationale of this policy is to discourage employees in the finance industry from putting down roots in the island and thus becoming entitled after fifteen years service under an Essential Licence to claim to be qualified residents. Mr. Foley if he has a five-year extension to the two previous licences will do precisely this. There are

certain circumstances surrounding Mr. Foley personally, which are dealt with in the correspondence and in the summons. I do not think I need to go into them for the purpose of this application for directions.

The Appeal

3. Mr. Wessels is appealing on the grounds that this is an unreasonable decision. He also pleads ultra vires, but he has not at this stage divided up his contentions into those which are ultra vires, those that are Wednesbury unreasonable and those which are plain unreasonable requiring the adjudication thereon of the jurats. That will be for another day.

This Application

4. The application is for a direction that the Respondent Authority be ordered to answer the questions raised on behalf of the Appellant by letter dated 3rd March, 2003, in order that any information or material contained in any answer to the said question should be placed before the Court upon the hearing of this appeal. The relevant part of the letter of 3rd March reads as follows:-

“I believe that it would be relevant for the Court to know how many people are in the position of Mr. Foley, that is having originally been granted a short term licence which has been extended. This may be relevant to the Court’s treatment of the argument put forward in paragraph 11(h) of the appeal.

I should also be grateful if you could let me know if the Authority have statistics for those individuals who have enjoyed 10 years or more residence in the Island who have applied for a licence and whose applications have been granted or refused.”

5. The Advocate then dealing with the matter on behalf of the Respondent replied

"In relation to the statistics relating to extensions of short term licences (and for this purpose I assume you do not mean to confine yourself to the term of art in section 4 of the 1994 Law but include persons on five-year licences), the Authority does keep bare statistics in terms of numbers alone, but does not record the reasons for each extension. Accordingly, the statistics themselves will not assist in determining whether the Authority's response to your client's situation was proportionate or not. Moreover, when the Authority reached its decision it did not have any statistics drawn to its attention, so the members would not have judged the application against that background.

Accordingly, I think that in so far as proportionality is relevant, this is something that will have to be assessed from the other material placed before the Court and any inferences that can properly be drawn from it.

Similarly, the other statistics to which you refer are not available in the format you mention, although I believe that such statistics could be culled from the information held by the Authority. Once again, however, those bare statistics would probably be misleading because they would not reflect the various reasons that form the basis of each individual decision. In other words, the Authority's task in this type of case is not empirical but is to assess whatever reasons are advanced by or on behalf of the applicant to see whether, set against the section 6 factors, a licence extension is justified or not.

The consequence is that I do not propose to produce any of the statistics you have mentioned."

6. Further correspondence was exchanged but this does not materially take the matter any further from the initial response.
7. A procedural issue is raised by the Authority's Advocate namely whether if further statistics and information are extracted from the annals of the Authority the matter should go back for reconsideration by the Authority. Mr. Wessels argues that there is no absolute bar to the material being produced before the Court of Appeal.
8. The Royal Court when considering questions of reasonableness has tasked itself to consider the material that was before the Authority at the time of its decision and has resisted the suggestion that it can take account of material that has arisen since the decision or which clearly was not before the Authority at the time of making the decision. This approach which has gained some support in the Court of Appeal but not conclusive support still appears to be the most practical way of dealing with appeals under the Law of 1994. Mr. Wessels quotes in correspondence from Halsbury Administrative Law, paragraph 17 – (a reference I have been unable to trace).

"Where the challenge is on the basis of a failure to consider a relevant matter, the Court will need to consider all material circumstances in order to assess the significance of the failure alleged."

9. I accept that the position in cases of judicial review is somewhat different. I also accept the comments of Southwell, J.A. in Perkins page 75 at letter C.

"At the start of his address to this Court Mr. Ferbrache asked for leave to put in further evidence consisting of an affidavit of Mr. Perkins and numerous exhibits. We refused leave. By the Court of Appeal (Housing Appeals) Rules, 1987, the power of this Court on appeals generally to receive further evidence is omitted in the case of housing appeals. This is not to say that the Court would have to be blind as to developments which have occurred since the decision of the Royal Court under appeal in circumstances in which those developments were relevant.

Insofar as the evidence sought to be introduced by Mr. Ferbrache, related to matters since 30 March 1994, and particularly since the Royal Court's decision of 29 November 1994, such evidence was not material to the question of whether the Housing Authority's decision of 30 March 1994 could stand. Insofar as the evidence related to other matters, it could have been placed before the Royal Court in November 1994 and anyway it would not be permissible for this Court to admit such evidence under its general rules."

10. However, if the Royal Court is to discharge its duty clearly and with consistency it seems to me that the general rule should be that the Court should try and put itself back into the position of the original decision maker by taking account solely of what was before that body. If in the course of an appeal new issues emerge which were not before the decision maker at the time then the matter should be remitted for reconsideration albeit that that may if the decision is still unfavourable result in a further appeal.

11. Mr. Nicol-Gent for the Authority argues initially that the precise information that Mr. Wessels is asking for is not readily available to the Authority although that it could no doubt by a search of the files be collected. It seems to me as a first point against Mr. Wessels that once this material was collected and analysed it would in effect be new material which the Authority did not have before it at the time of making its decision. A further point to bear in mind is that if such evidence was before the Court the Authority itself might wish to comment on it and then one is running into the difficulties also identified in Perkins on page 74 at letter D.

"Mr. Roberts for the Authority sought to remedy this serious omission by introducing into his case, at paras. 15 and following, evidence as to what the Authority considered and what facts it took into account. Such an attempt to introduce evidence in this way is not permissible. Evidence which is relevant and admissible is placed before the Courts of Guernsey in civil matters (a) by agreement of parties; (b) by written evidence sworn to by affidavit; or (c) by oral evidence if so ordered.

It is not permissible for Counsel to seek to give evidence himself, in his oral address to the Court, or in his written submissions, as distinct from commenting on matters which are already in evidence."

12. It clearly would not be open to Mr. Nicol-Gent to give evidence of any further thoughts of the Authority.
13. Even if I am being too restrictive on the interpretation that I place on the admissibility of the new material that the Authority might or might not be able to produce and its in effect being new material not before the Authority there are other reasons why in this particular case it is not appropriate that the Court should require this additional material.
14. Here one needs to break the application down into its two halves. The first request for information is as to how many people having originally been granted a short-term licence have had it extended. By short-term licence here I assume that Mr. Wessels is restricting the inquiry to five-year licences. Even if this information was available I cannot see how that could be relevant for the jurats' deliberations. The first point to note is that the scheme of things is that persons who are granted short-term licences in the main have to accept that theirs is a short-term licence and go away at the end of its term, despite the fact that they may have formed an attachment for Guernsey and its employment opportunities. Not everybody appeals. The reasons for the Authority to extend such licences are bound to be very varied and once one is moving beyond five years one is moving into the area of an unusual or exceptional applications. I say this notwithstanding the point that I have noted concerning the circumstances of this licence being extended after two years of the initial five-year term. The real issue in this appeal is whether the ten-year term should be converted into a fifteen-year term or less. If the statistics were restricted to those who have sought to have a ten-year term extended and have or have not been granted such extension it does not seem to me that those figures in themselves can be relevant to proportionality. I cannot see how it matters whether three people have had such an extension or thirty when addressing issues of proportionality. One obvious issue, which can only be one of speculation, is that there will be cases where people come here

under successive short-term licences that their services converted into a level of essentiality to the community that would justify a fifteen-year licence. There will also be persons with familial and other connections with Guernsey which have built up and lead to their staying here either under essential licence or otherwise.

15. It seems to me that Mr. Wessels is misdirecting his thinking when he suggests that it is going to be relevant for the jurats to know the number of people who have had their licence extended in circumstances similar to those of Mr. Foley. Proportionality is a relevant issue in housing appeals where one is dealing with an identifiable fixed set of circumstances. The classic kind of case where proportionality would be in issue would be where a person comes to the island under a fifteen-year essentiality licence, brings his family over, buys a house and unexpectedly dies after six months service. On the usual criteria the widow of such a person would not be able to justify the grant to her of a licence on the grounds of local connection, but when one asks how many essential licence holders suffer this involuntary and unpredictable fate the decision of the Authority to refuse a licence to the widow which would result in her having to uproot herself from her new home might well, in those particular circumstances, be regarded as disproportionate to the aims of the law. Such cases can be contrasted with the scenario, which sadly all too frequently happens of an essential licence holder coming to the island and then the marriage breaking up after six months or a year. The spouse then asks for compassionate treatment. The numbers of cases where such a situation arises would probably be preclude any argument that it was disproportionate not to be licensing such persons without further enquiry. The situation we have here is such that if there are have three people who meet Mr. Wessels' criteria he can argue that it will be disproportionate not to allow one more person to be licensed in similar circumstances, as to do so, will not have a great effect on housing statistics. If there are thirty he can then argue that with such a large number of people finding themselves in a similar circumstance to Mr. Foley it is disproportionate to say no in Mr. Foley's case. I further note the point that the jurats

cannot possibly know the individual circumstances behind each statistic whereas of course it would be clearly possible to identify those persons who have been granted licences because their spouse has expired very early on in the course of his service under an essential licence.

16. I now turn to the second request which is for statistics "for those individuals who have enjoyed ten years or more residence in the island who have applied for a licence and whose applications have been granted or refused". It is common knowledge that the Housing Authority have evolved a system whereby persons who are not qualified residents but have clocked up a number of years living in Guernsey in certain circumstances whereas their occupation has not been unlawful are "licensed in" to complete the period which they require to live in Guernsey in order to become qualified residents. Even if the information of this relating to this broad category of persons could be collated by the Authority I cannot see how without categorisation of the circumstances of each extension the statistics could have any meaning for the jurats and even then how on earth could they be used for making any test of the proportionality of the decision in Mr. Foley's case.

17. This appeal should in my view be progressed to hearing and I reject Mr. Wessels' claim to be entitled to further information before the jurats consider it.

18. That said I have referred back to my judgment in 'X' v. the States Housing Authority and the issues that I raised towards the end of that judgment concerning the amplification of reasons for rejection and the lack of any clear statement as to why the current housing situation still requires a strict housing control regime. The Authority has not addressed any of these issues since my decision in 'X' or indeed since the decision of the Court of Appeal in Ward, which I was essentially echoing in the latter part of my judgment in 'X'. These may be matters which will be relevant to the jurats deliberations as to the reasonableness of the Authority's decision in Mr. Foley's case. In saying this I am not

overlooking the statement of the States population objective referred to in the Housing Authority's letter to Mr. Wessels dated the 20th December, 2002, and neither do I ignore the statement of the Authority concerning its policy over extending five-year licences the reasonableness of which will have to be considered by the jurats.

19. Unfortunately there is a further problem before this appeal can be listed for hearing before the jurats in that the Court of Appeal in Lainé v. the I.D.C. has recently expressed certain views as to the procedure to be adopted on Island Development Appeals and the giving of reasons. This is as far as I am aware the only outstanding case concerning the Housing Authority and we need to consider what changes to the current procedure are appropriate in this case and indeed in all cases involving administrative appeals under the Island Development, Housing Control and other legislation which troubles this Court on appeal.