

Judgment 6/2009

**Macey v Housing Department – Royal Court (Civil
Action File 1282) – 16 February 2009**

Housing (Control of Occupation) (Guernsey) Law, 1994 – appeal from refusal of application for housing licence – Lieutenant Bailiff retired with the Jurats – reasoned judgment delivered pursuant to s.16 of the Royal Court (Reform) (Guernsey) Law, 2008 – decision of the department held not to have been unreasonable – appeal dismissed

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1282

The 16th day of February, 2009 before John Russell Finch, Esquire, Lieutenant Bailiff

In the action of

MICHAEL WARWICK MACEY (“the Appellant”)

v

THE MINISTER OF THE HOUSING DEPARTMENT (“the Respondent”)

WHEREAS on the 23rd day of January, 2009 the Appeal was dismissed, THE COURT this day handed down Judgment in the terms attached hereto.

**M A TOSTEVIN
Her Majesty’s Deputy Greffier**

**Approved Judgment
16 February 2009**

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

Between

Michael Warwick MACEY

Appellant

-v-

**THE MINISTER OF THE
STATES OF GUERNSEY
HOUSING DEPARTMENT**

Respondent

Date of hearing: 23rd January 2009

Judgment handed down on: 16th February 2009

**Before: John Russell FINCH Esquire, Lieutenant-Bailiff
and
Jurats A C Bisson, S Mowbray and D O Le Conte**

Advocate for the Appellant: St J A Robilliard

Advocate for the Respondent: W P T Nicol-Gent

Case and statute referred to:

- 1) The Housing (Control of Occupation) (Guernsey) Law, 1994, Sections 6(2)(b)(ii) and 10
- 2) *Matheson v States Housing Authority (Guernsey Court of Appeal) 24 July 1998, 26 GLJ 84*

The Appeal

1. Mr Michael Warwick Macey, the Appellant (hereafter “A”), has appealed under Section 56 of The Housing (Control of Occupation) (Guernsey) Law, 1994 (“the Law”) against a decision of the Housing Department (hereafter “R”), contained in its letter of 8th September, 2008 (hereafter “the decision letter”), in relation to an application made by A for a Housing Licence. The Cause, as amended at the hearing, seeks a declaration that the decision was ultra vires and/or unreasonable and to set aside R’s decision, giving such other directions as the Royal Court considers just or expedient. The question that had to be determined at the hearing was unreasonableness.
2. This is the judgment of the Royal Court in accordance with Section 16 of the Royal Court (Reform) (Guernsey) Law, 2008. References to page and folio numbers are as given in the agreed joint bundle before the Court.

Factual Background

3. The facts which follow were relevant for the determination of the Appeal. A is aged 70 and his wife is now 67. Neither is locally-born. They emigrated to Guernsey in 1981 and A entered into a business career, retiring in 2000. Unfortunately, he suffers from Parkinson's Disease (since 2002) and Angina, and is unable to work. His health is alluded to in Dr Turner's letter of 15th June, 2005 (page B: 7). Mrs Macey worked from 2001 - 2005 (page B:5). The couple's assets are set out by Mrs Macey at pages B: 29-30, viz properties in England and France, various pensions for both spouses and around £875,000 in bank deposits. They have always resided on the Open Market.
4. On 7th July 2005, A's Advocate made application for a Local Market Housing Licence (pages B: 1-4). After considerable and unfortunate delay, despite chase-up letters, this was dealt with in R's letter of 16th September 2005 (pages B: 13-15). This was, in the main, a refusal, the grounds of which were summarized as follows:

"The Department does not consider that Mr Macey's familial and like connections are of sufficient strength having regard to his periods and especially his circumstances of residence to justify the grant of a housing licence".

However, the last paragraph of this letter was treated as of considerable importance throughout the hearing of the appeal. It states:

"I can advise you that the Department would be prepared to grant Mr Macey a licence without the need to remove a property from Part A of the Housing Control Register if he wished to occupy accommodation within a Registered Nursing or Residential Home".

5. Mr and Mrs Macey then departed Guernsey. On 25th November 2005, Mr Davey, the Housing Control Inspector, ascertained that they had left, noting:

"Conversation with Mr Macey – he is now resident in UK awaiting suitable house to allow him wheelchair access".

(Page B: 16)

6. The next step was nearly 2½ years later. A was interested in taking up sheltered accommodation at Les Blanc Blois and commissioned Mr Matheson to act as his agent for that purpose. Having contacted R with regard to this, they responded by letter of 25th March, 2008, indicating that a housing licence was needed for the occupation of these premises and stating (page B: 17) in relation to the situation in 2005:

"Mr Macey did not take up the offer of a licence at that time and I understand that his circumstances have altered considerably in the meantime in that he and his wife left Guernsey to take up residence in the UK in or about November 2005. Therefore, as Mr Macey is no longer resident in Guernsey, it

is not possible for him to now benefit from the licence offer that was made in 2005”.

7. A’s Advocate responded by letter of 11th April 2008 (pages B: 18-19), indicating, inter alia, that R was willing to issue a licence in 2005 and no time-limit was expressed in that offer. Further unfortunate delays occurred in R’s responding to this letter, despite reminders. By letter of 24th June, 2008 R stated (pages B: 25-27):

“In view of Mr Macey’s health, as outlined in your letter of 7 July 2005, I would suggest that it was not unreasonable for the Department to have concluded that a move away from the Island was highly unlikely and, therefore, not to spell out the consequences of such a move on the licence offer that had been made. Indeed, when conveying any decision, it is not possible for the Department to predict what changes might take place, and, as you know, decisions are always based on the circumstances that prevail at the time a decision is reached. Those ‘in principle’ decisions cannot be seen as binding when significant changes in the circumstances of the applicant take place.

I would suggest that it would have been prudent, prior to the Macey’s relocation from Guernsey, for you or them to have contacted this Department to seek clarification of the impact of such a move on the in principle agreement to grant a licence”.

8. The letter continued by inviting the Macey’s to provide full details of their personal, family and financial circumstances in order for the Department *“to understand what housing/care options might be availableif they wish to pursue an application for a housing licence”*. This was done by Mrs Macey, in an enclosure to the Advocate’s letter of 9th July, 2008 (pages B: 29-31).
9. There followed the decision letter of 8th September 2008, which is the subject of the appeal before this Court (pages B: 32-34). The principal points contained therein were:

- “(i) Mr and Mrs Macey had resided in Guernsey on the Open Market for approximately 24 years, and elsewhere for 46 and 41 years respectively;*
- (ii) they had relocated to England in 2005;*
- (iii) persons on the Open Market know they are not building up any rights of occupation on the Local Market;*
- (iv) reference was made to the letter of 24th June 2008, referred to above, on the question of the impact of the move away from the Island on the ability of the Maceys to benefit from a licence;*
- (v) reference was also made to the States Housing Needs Survey of September 2007. After considering this, the Department “was of the opinion that to allow the Maceys to occupy such a unit would, in all likelihood, prevent a person who was currently resident in the Island, from taking occupation of that unit and, in doing so, vacating a property elsewhere in the Island, which in turn, would help to ease the*

pressure caused by the high demand for Local Market dwellings in the Island.....”;

- (vi) *Mr Macey’s health was also considered;*
- (vii) *after considering all the matters set out, it was concluded that “when Mr and Macey’s familial and like connections were considered, having regard to their periods and circumstances of residence, together with the other factors set out above, the grant of a housing licence to enable your clients to occupy a controlled dwelling in Guernsey was not justified”;*
- (viii) *Article 8 ECHR points (not raised in appeal) were also dealt with.*

Submissions of the Parties

10. A’s skeleton argument is found at D: pages 1-8, and his authorities at folio E. R’s skeleton argument is found at F: pages 1-5, and his authority at folio G. The oral submissions were based on these written arguments and developed them, and the main parts are now summarized.
11. For A, Advocate Robilliard’s principal submissions related to a rigid application of R’s “*policy*” in relation to persons who have lived on the Open Market, thus not properly considering the individual circumstances of the application. There was here a misapplication of Section 10(2) of the Law (who are qualified residents) with regard to Section 6(2)(b)(ii) (considerations in dealing with licence applications include periods resident in Guernsey or elsewhere). A great deal of emphasis was placed on the letter of 16th September, 2005, which was not subject to any express limit of time, and should only have been withdrawn with sufficient notice. Absence from the Island, whilst a circumstance, does not take one outside the boundaries of the 2005 decision; a time-limit should have been given. Advocate Robilliard suggested that the Housing Survey (folio C), did not bear any relevance to the application and R should, in particular, have looked at the actual demand for the type of property sought. There is no evidence here of excessive demand.
12. Advocate Robilliard did not take issue with the policy, but a policy needs to be applied to a particular case. Here we had a set of rare circumstances, not clearly coinciding with the policy. The desire to occupy such highly-specialized premises was exceptional. It was also submitted that persons can get through on the policy (e.g. from Sark, Alderney and Herm) who would not free up Local Market accommodation. Proportionality was now on A’s side. Advocate Robilliard referred to A’s state of health and observed that the decision was unreasonable, especially when taking account of Mr and Mrs Macey’s strong connections with the Island. Reference was made to the Court of Appeal case of MATHESON v STATES HOUSING AUTHORITY (Civil Appeal No. 250) (1998).
13. On behalf of R, Advocate Nicol-Gent quoted pages 4 – 6 of the MATHESON Judgment (Supra):

“It is necessary to bear in mind that public authorities in the exercise of statutory powers enjoy a presumption of regularity, that the burden lies on the citizen aggrieved by any such decision to displace it, and that a decision letter

of this kind is not to be construed as a statute, but, as has been said in bonam partem".

14. There was no suggestion, from the terms of the decision letter, that the Open Market factor trumped the other considerations. A was not simply refused just on the basis he had been an Open Market resident. R did not approach the matter in a pre-conceived way, and had required further information, duly furnished by Mrs Macey. The approach was regular and open and there was nothing in the decision letter to show that the matter had not been approached fairly.
15. Whilst there was no express time-limit in the offer of a licence for sheltered accommodation, this offer was based on the circumstances at the time. Mr and Mrs Macey chose voluntarily to leave Guernsey for a significant period and times change and policies change. This is a significant gap in time. R cannot allow in 2008 an application made in 2005. There was a considerable period of non-residence and Mr and Mrs Macey simply assumed the offer would still be available; there were other options.
16. It was submitted that there was no evidence of discrimination against those on the Open Market and the matter was approached in a regular way. A forensic analysis of the decision letter was to be discouraged. The question is whether it was a reasonable decision. There was nothing to show that A's medical condition had not been considered and, although there is always room for compassion, the court must not be ruled by it.

Directions

17. The Jurats were directed on the law as follows:
 - (i) in this appeal the burden of proof lies on the Appellant and the standard of proof is the balance of probabilities;
 - (ii) the question in this case was whether or not the decision was unreasonable. It was for the Jurats to determine whether this was so. This means something different from the Jurats saying that they themselves would have come to a different decision. There is a band of decisions within which no court should seek to replace the individual's judgment with its own. If the Jurats considered, having weighed up all the evidence, that the decision reached was unreasonable, they should say so and allow the appeal;
 - (iii) if the Jurats considered that they themselves would have come to a different decision but that the decision in question was not unreasonable, the appeal must be dismissed;
 - (iv) if the Jurats considered that the decision was right, equally the appeal must be dismissed.

(These directions are found, e.g. in MATHESON (supra), at pages 6 – 7 of the transcript).

Decision

18. The Jurats considered that there was nothing in the decision letter that indicated a rigid or discriminatory approach. Indeed it set out all the circumstances in very considerable detail, showing that all material factors were afforded due and proper consideration. It was also noted that further information had been sought regarding Mr and Mrs Macey's individual circumstances and considered. This was not the mark of a closed mind and shows that the Housing Department was alive to the onerous requirements it has to observe in cases of this nature. The Jurats did not consider the reference to the 2007 Housing Survey was irrational or dogmatic, R was entitled to rely upon it to the extent it did.
19. The question of the 2005 offer occupied the minds of the Jurats for some time. The question to consider in the light of all the circumstances was, whether R's rejection of A's application in 2008 was unreasonable, and this was not shown. It was noted that Mr and Mrs Macey departed, apparently permanently for England, that it was down to the Housing Control Inspector to find out what had happened, and that there was no attempt to advise R of any intention to return or seek assurances as to future decisions. The Jurats considered that there was a significant period of non-residence and circumstances do change. In the light of the facts in this case, it was not unreasonable on the part of R to assess the application in the light of 2008, not 2005. The Jurats also noted that whilst it might be an exaggeration to say that allowing the appeal on this ground would open the flood gates, it could permit a significant number of other persons to seek licences. In summary, it was considered the application had to be dealt with at the time it fell for decision, not almost three years earlier.
20. The Jurats formed the view that the familial connections in this case, although worthy of note, were not such as to call into question the decision. As with A's health, they were considered, but it was not unreasonable in all the circumstances to conclude that they did not justify the granting of a licence in 2008. The medical evidence dates from 2005 and the Jurats heard nothing to show that residence on the Local Market in Guernsey would have a significantly beneficial effect on A. On the facts these matters were not dealt with unreasonably.
21. In conclusion, it was the view of the Jurats that all material matters were taken into consideration by R, whose decision fell within the band of reasonable responses open to it. The Jurats unanimously dismissed the appeal.

Costs

22. Costs were awarded to R.