Judgment 7/2012

J A Carr and The Minister of the Housing Department – Civil Action File No 1678
- The Royal Court
- 21st February 2012

The Housing (Control of Occupation) (Guernsey) Law, 1994 s.56 – appeal against a decision of the Housing Department under s.6A of the Law, not to consider a further application – appeal dismissed.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 21st day of February, 2012 before Richard John Collas, Esquire, Deputy Bailiff

In the matter of JOHN ANDREW CARR ("the Appellant") and THE MINISTER OF THE HOUSING DEPARTMENT ("the Respondent");

WHEREAS on the 7th day of February, 2012 THE COURT, which comprised Richard John Collas, Esquire, Deputy Bailiff, sitting with David Osmond le Conte, David Percy Langley Hodgetts, L.V.O., and Niall David McCathie, Esquires, Jurats, heard Advocate L.C. Hall for the Appellant and Crown Advocate R.T. Sewards for the Respondent and unanimously DISMISSED the Appeal and ADJOURNED the matter for written Judgment to be handed down in due course;

AND WHEREAS on the 7th day of February, 2012 THE COURT awarded costs to the Respondent on the normal recoverable basis;

THE COURT this day handed down a written Judgment for the said decision in the terms attached hereto.

A J NICOLLE
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

Between

JOHN ANDREW CARR

Applicant

and

THE MINISTER OF THE HOUSING DEPARTMENT

Respondent

Decision of Richard John COLLAS Esq., Deputy Bailiff and David Osmond Le Conte, David Percy Langley Hodgetts LVO and Niall David McCathie Esquires, Jurats of the Royal Court

Date of hearing: 7th February 2012

Judgment handed down: 21st February 2012

Advocate for the Appellant: Advocate L C Hall

Advocate for the Respondent: Crown Advocate R T Sewards

Cases, texts, legislation and other material referred to:

Walters v States Housing Authority [1997] GLJ 76

English Statutory Instrument (2010 NO 2214)

Introduction

1. At the conclusion of the hearing of this appeal, the Court announced that the Jurats had decided unanimously to dismiss the appeal for reasons that would be delivered in a written judgment. This is the judgment of the Court.

2. This judgment has been prepared in accordance with the provisions of Section 16(5) of The Royal Court (Reform) (Guernsey) Law, 2008:

> *"(5) A reasoned judgment in civil proceedings in which the Jurats (and not the Bailiff alone) are sitting shall contain –*
>
> *(a) the Jurats' findings and decisions,*
> *(b) any dissenting findings or decisions made by different Jurats,*
> *(c) the identity of the Jurats making dissenting findings or decisions,*
> *(d) the Bailiff's findings, decisions and directions of law and procedure, and*
> *(e) the application of his findings, decisions and directions of law and procedure to the facts."*

3. The Deputy Bailiff did not sum up to the Jurats in open Court, but instead retired with them, as he is permitted to do under Section 14(2) of the 2008 Law.

4. The Deputy Bailiff reminded the Jurats of their respective roles. The Deputy Bailiff is the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats must accept his directions on the Law and follow them. The facts of the case are the Jurats' responsibility. The Deputy Bailiff told the Jurats that if, at any time, he appeared to express any views concerning the facts, or emphasize a particular aspect of the evidence, the Jurats were not to adopt those views unless they agreed with them. When it comes to the facts of the case, it is the Jurats' judgment alone that counts. In this judgment, the findings of fact are the unanimous findings of the Jurats unless the judgment says otherwise.

5. This Appeal is brought pursuant to the provisions of Section 56 of The Housing (Control of Occupation) (Guernsey) Law, 1994, as amended. Section 56(3) provides that "*on an appeal under this section, the Appellant shall have the burden of proof and the final right of reply*".

6. The standard of proof is the civil standard of the balance of probabilities. To establish something on the balance of probabilities means to prove that something is more likely so that not so.

7. In accordance with the judgment of Beloff J.A. in Walters v States Housing Authority [1997] GLJ 76 at page 46F, it is for the Deputy Bailiff to decide whether the Department's decision making power has been exercised ultra vires, in a way other than Wednesbury unreasonably or irrationally, or that the decision was Wednesbury unreasonable or irrational. In either case the Deputy Bailiff must withdraw the matter from the Jurats. If the case is not withdrawn, it is for the Jurats to decide whether the decision was unreasonable. In the present context, the Deputy Bailiff explained that "unreasonable" meant something other than that the Jurats themselves would have come to a different decision had they been the Department. In the case of In re W [1971] A.C. 682, Lord Hailsham of Marylebone, LC, said at p 700 between letters D and E:-

> *"Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable. There is a band of decisions within which no court should seek to replace the individual's judgment with his own….."*

8. As Beloff JA said, at page 47C of Walters:

> "*If the Jurats then consider, having weighed up all the evidence, that the decision reached by [the Department] was unreasonable, they should so say and the Court would in consequence allow the appeal".*

The Facts

9. The background facts of the case are not in dispute. The Appellant was employed as a lecturer for students with learning disabilities/difficulties and learning support by the States of Guernsey Education Department and worked at The College of Further Education. He commenced employment on 1 April 2006 under a fixed term contract expiring on 31 August 2011. The Housing Department issued a five year licence for the post which it extended by five months to expire at the end of the academic year on 31 August 2011, contemporaneously with the fixed term contract. (In this judgment, "the Department" refers to the States of Guernsey Housing Department, the Respondent.)

10. The Appellant lives at a rented property at St Peter Port with his wife and three children aged 13, 10 and 9.

11. On 22 February 2011, the Appellant wrote to the Department to request a non employment related (or "compassionate") Housing Licence, having been told that the Education Department would not apply for an extension to his Essential Workers Licence.

12. By letter dated 25 February 2011, the Department invited the Appellant to elaborate on his personal family circumstances. He did so in a letter to the Department dated 3 March 2011. In this judgment, we refer to the letter of 22 February and 3 March 2011 as the "original application". On 24 March 2011, the Department wrote to the Appellant advising him that the original application for a compassionate licence had been rejected.

13. By letter dated 4 April 2011, the Appellant wrote to the Department requesting reconsideration on the grounds of medical evidence which he had omitted to include with the earlier letters. On 8 April 2011, the Department advised the Appellant that it would not reconsider his request as the further information did not disclose a significant change in any material circumstances relating to him (a reference to Section 6A of the Housing Law to which we refer below).

14. On the date that the fixed term employment contract ended (31 August 2011), the Appellant wrote again to the Department requesting a further reconsideration. By letter dated 7 September 2011, the Department advised the Appellant that it had resolved not to consider his application by reason of Section 6A of the Law.

15. The relevant part of Section 6A of The Housing (Control of Occupation) (Guernsey) Law, 1994, as amended, ("the Housing Law") is as follows:

"*6A. The [Department] shall have no obligation to proceed to consider an application in accordance with section 6, where –*

(a) the application is a further application (that is to say, an application which relates to a person in respect of whom a previous application has been received by the [Department]),
(b) in the opinion of the [Department], that further application discloses no significant change in any material circumstances concerning that person, and
(c) either –
(i) ……or
(ii) within the period of 12 months immediately pending receipt of the further application –

(aa) a previous application has been determined by the [Department], or

(bb) ....."

16. It was accepted and agreed by the parties that the letter of 31 August 2011 was a further application made within 12 months of the determination of a previous application and hence it was agreed that section 6A was engaged.

17. The issues before the Court concern two aspects of Section 6A:

1) The meaning of "*shall have no obligation to proceed to consider an application in accordance with Section 6*"; and

2) Whether on the facts of the case, the decision of the Department that the further application discloses no significant change in any material circumstances concerning the Appellant or any member of his family was reasonable.

18. The Court was informed that the present appeal is the first to come before the Court relating to a decision by the Department under Section 6A. All previous appeals under the Housing Law, and there have been many, have concerned decisions under Section 6 refusing the grant of a housing licence.

19. Section 6, entitled "*Procedure for consideration of applications"*, prescribes the procedure that the Department is required to follow upon receipt of an application for a housing licence. A policy letter from the Department in Billet d'Etat III of 2005 explains, at pages 332 and 334, that the policy behind Section 6A is to prevent multiple successive applications by applicants for a housing licence subsequent to refusals of a licence by the Department where there has been no significant change in any material circumstances since the refusal or the institution or dismissal of appeal proceedings. Such applications prolong the decision making

process and could be used as a means of lengthening the applicants' period of residence and strengthening their connections with the Island prior to the matter being resolved by the Court.

20. The Deputy Bailiff directed the Jurats to consider first whether the further application disclosed "*a significant change in the material circumstances"* of the Appellant or his family.

21. The expressions *"significant change"* and "*material circumstances*" are not defined in the Housing Law. Advocate Hall, on behalf of the Appellant, invited the Court to draw assistance from the definition of "*material change of use"* in the English Statutory Instrument (2010 NO 2214). The Deputy Bailiff directed the Jurats to ignore the Statutory Instrument. He directed the Jurats to give the relevant words and phrases in the Housing Law their normal meaning. If the States had intended otherwise, they would have inserted a definition into the Order in Council. It is not helpful to interpret from another jurisdiction a definition which another legislature has considered appropriate to adopt in a different context.

22. The Deputy Bailiff further directed the Jurats that a "*material circumstance"* means a circumstance which is material, or relevant, to the decision making process. In this case, when deciding what is material he suggested it might be of assistance to look at the Department's letter of 24 March 2011. Any factor which the Department took into consideration in reaching its decision to refuse the Appellant's application is a material circumstance. Some circumstances may be more material than others. The Deputy Bailiff suggested it may be helpful to look at the relative weight attached to different factors when deciding whether any change in that circumstance is "*significant"*.

23. The Court identified the following circumstances:

    1) The Appellant's employment status;
    2) The employment status of the Appellant's wife;
    3) The Appellant's health;
    4) The Appellant's accommodation;
    5) The income of the Appellant and his wife;
    6) The impact of the decision upon the Appellant's children; and
    7) Where the Appellant and his family would reside if they left Guernsey.

24. The Appellant's fixed term employment contract with the States of Guernsey Education Department ended on the 31 August 2011 when his status changed from employed to unemployed. Advocate Hall submitted, on behalf of the Appellant, that such a change in status was significant. On the other hand, Crown Advocate Sewards submitted that by reason of the fact that the contract was for a fixed term, it had always been known that it would end on that date. A change that was anticipated at the time of the original application and has subsequently come about through the passage of time cannot be considered significant. The Jurats agreed and concluded that expiry of the fixed term contract was not a significant change.

25. In the Appellant's original application he anticipated that, if he was granted a compassionate licence, he would continue in the same post after 31 August 2011 either under an extended contract or under a new contract. The grant of such a licence would therefore enable him and his wife to continue their work which, he wrote had a *"significant impact… upon the local Guernsey community and with the children and young adults therein"*.

26. In the Appellant's skeleton argument in support of his Appeal, he claimed that his application was supported by the Principal of The College of Further Education and also by the line manager of the Appellant's wife, who was also employed by the Education Department as a teaching assistant at the Link Centre. A copy of the letter from the Education Department to the Appellant dated 25 January 2011, handed to the Court during the course of the hearing, sought to clarify the extent to which the Principal of The College of Further Education was supporting the Appellant's application. In the penultimate paragraph of the letter, the Head of Staff and Services at the Education Department wrote:

> *"Finally I have spoken to the Principal of the college, Trevor Wakefield, regarding the statement you make in your e-mail that you have his "full support and backing" for an extension to your current licence on compassionate grounds. He has advised me that in his recent conversations with you regarding your role at the college, he has outlined the help that he and his colleagues would be willing to provide to assist you in your course delivery. However, this should not be misinterpreted as being support for a compassionate licence, which must be an entirely personal matter".*

27. An e-mail from the Principal to the Appellant, sent on 16 March 2011 at 10:22 advised him of the following:

> "*I have checked with [the head of staffing services at the Education Department] regarding the situation. As I explained, we had to advertise the post since we do not know the outcome of your Housing application. The recruitment process takes a few weeks and the interviews are scheduled for 6 April. This should give time for Housing to make their decision and should you be successful in gaining a licence, then [the head of staffing services] has explained that we will withdraw the vacancy"*.

28. The Jurats concluded from the above that if the Appellant had been successful in obtaining a compassionate licence at an early enough date, his employment contract would have been extended to enable him to continue in the same post.

29. However, the Jurats took into account that the application for a "*compassionate"* licence was not employment related. If such a licence had been granted, the Appellant would not have been required to remain in the same employment or indeed in any employment. For that reason, the Jurats considered that it was debatable whether the employment prospects in Guernsey of either the Appellant or his wife were "*a material circumstance"*.

30. Hence, the Jurats agreed with the Department that the termination of the Appellant's employment contract through the passage of time was not a "material change in a significant circumstance".

31. His employment prospects in the UK, were described in several passages in the correspondence between the Appellant and the Department.

32. In the Appellant's letter of 3 March 2011, he wrote "*furthermore, an additional concern should, I be unsuccessful in this application, is my ability to secure subsequent employment on my return to the UK mainland. The current economic downturn and government policies, leading to significant cuts in public spending, have decimated the job market and subsequently there are no opportunities currently available to me within the further education sector. This major issue is further compounded by my age, as I approach fifty, the potential for comparable employment is greatly and further reduced. Also, despite my utmost efforts to maintain my professional development (CPD) during my employment in Guernsey over the past five years, I have become removed from educational developments etc in the UK and consequently remain de-skilled on attempting to re-enter the challenging employment market in the further education sector. I am consequently faced with the realistic possibility of having to return to the UK with no employment or other significant source of income with my wife and three children to consider"*.

33. In its decision letter of 24 March 2011, the Department wrote:

> "*Your application also refers to the job market in the UK and whilst the Department does not dispute the fact that the current economic climate might have reduced job opportunities, it notes that you state that you have a wealth of experience, and a proven record of delivering quality teaching along with evidence of this and of your achievements at the College of Further Education. In addition, whilst the Department does not have details of your employment prior to your coming to Guernsey, it notes that you have spent by far the majority of your working life outside of the Island and worked in the UK as recently as 5 years ago. These are all factors which suggest you have the potential to find work elsewhere and the Department considers that this is not an insurmountable issue, and is certainly less relevant in your case than it might be for people whose skills were much more specialised or tailored to the needs of the Island and, therefore, less widely transferable"*.

34. In the Appellant's letter of application of 31 August 2011, he wrote "*despite our strenuous and continuing efforts during the past few months neither myself or my wife Helen Carr have been able to obtain suitable employment in the UK in our vocational areas of expertise as a consequence of the economic downturn and cuts in public spending"*.

35. The Department replied, in its letter of 7 September 2011:

> *"The Department notes that your most recent request refers to the fact that, despite you and your wife having sought employment in the UK in your areas of expertise, neither of you have been able "to obtain suitable employment". The Department notes that at the time of your original application, you referred to the fact that you had not secured employment off Island, albeit you referred to your wealth of experience in the teaching profession and to the fact that you might have to return to the UK with no employment. As your situation in this regard remains the same, the Department does not consider there to have been any significant material change in the circumstances"*.

36. The Jurats decided that the Department's conclusion that there was no significant material change in the Appellant's employment prospects in the UK was within the range of reasonable decisions the Department was entitled to reach. In March 2011 he had warned that there were no opportunities currently available to him within the further education sector. The situation had not changed significantly when, in August, he confirmed that he had not been able to find a post.

37. The Appellant might consider it unfair that in its letter of 24 March 2011, the Department expressed the view that his employment prospects in the UK was not an insurmountable issue. If the Appellant considered that opinion to be unreasonable, his remedy was to appeal the original decision, but he is now out of time for doing so. He has not sought leave to appeal out of time and the Court is not in a position to consider how it would have decided such an appeal had one been instituted.

38. The Appellant's wife's employment prospects were not an issue by the Appellant in his original application. Prior to 31 August, her ability to obtain employment in Guernsey arose by virtue of being a member of the Appellant's household. In the decision of the Jurats, it was reasonable for the Department to conclude that her employment status was not a material circumstance.

39. In summary, the Appellant failed to satisfy the Jurats that the Department had unreasonably concluded there was no significant change in material circumstances in relation to their employment status.

40. The Appellant's health concerns were not mentioned in his original application, but were raised for the first time in his letter to the Department dated 4 April 2011. Any health concerns had not recently arisen, they were matters of long standing. In the view of the Jurats, the Department's decision that they represented no significant change in the material circumstance as at 7 September 2011 is a decision the Department was entitled to reach.

41. It was a natural consequence of the termination of the Appellant's employment contract and the expiry of his housing licence that he would cease to be eligible to occupy his rented accommodation in Guernsey. Such change had been foreseeable and was not "*a significant change in their material circumstances"*.

42. Similarly, the loss of income to the Appellant was a natural consequence of the termination of his fixed term employment contract and was not "*a significant change in the material circumstances"*.

43. Also, the impact of the decision on the Appellant's children was a natural consequence of the termination of the fixed term employment contract and the expiry of the housing licence. It was not unreasonable for the Department to reach the view that it was not "*a significant change in the material circumstances"*.

44. In his letter dated 31 August 2011, the Appellant explained that "*it is impractical to return to live in the UK with relatives with three young children. The children's maternal grandmother does not live in an appropriately sized dwelling that could accommodate a family of five"*. He went on to explain why it would not be acceptable for his children to live in that accommodation.

45. In the view of the Jurats, the option of living with the children's maternal grandmother was not the only option that would be available to the Appellant. They were not persuaded that this amounted to a material circumstance and nor did it amount to a significant change.

46. In conclusion, the Appellant has failed to discharge the burden of proof of showing that the Department had unreasonably decided that the Appellant's application of 31 August 2011 did not disclose significant changes in material circumstances.

47. Consequently, by virtue of Section 6A of the Housing Law, the Department had "*no obligation to proceed to consider an application in accordance with section 6"*.

48. The next issue for the Court was a matter of law for the Deputy Bailiff. Did the Department have to consider, in its discretion, whether to consider the application in accordance with Section 6.

49. In the view of the Deputy Bailiff, the language of Section 6A is significant. The phrase "shall have no obligation" does not mean "shall not". It does not prohibit the Department from proceeding to consider the application. The Department could have proceeded if it so wished. The Department has a discretion which it must exercise.

50. Section 6A gives no guidance to the Department as to the circumstances in which it might proceed to consider an application for reconsideration. Both counsel encouraged the Court to look at the policy report that led to the introduction of Section 6A. Billet d'Etat III of 2005 indicates, as we have said, that the purpose of the amendment was to prevent the Department having to consider successive applications similar to original, rejected applications in circumstances where the applications and any appeal procedures inevitably take time and result in the applicants lengthening their period of residence and strengthening their connections with the Island.

51. Crown Advocate Sewards, on behalf of the Department, postulated circumstances where there might be a reconsideration without such consequences. For example, he suggested that three years into a five year employment related licence, application might be made to extend the licence from five years to fifteen years. The application might be rejected and the applicant might seek reconsideration on the grounds that material information was omitted from the original application. The Department could decide to reconsider the application without requiring the applicant to wait a further twelve months. The Deputy Bailiff does not wish to comment as to whether that would be the only circumstance in which the Department might exercise its discretion under Section 6A. However, he recognises that such a hypothetical example might be permissible.

52. Returning to the present case, the Department had a discretion. The Court had to look at two further issues. The first was whether the Department's letter of 7 September 2011 disclosed that the Department exercised such a discretion. The second issue was if the Department did so, was its exercise of the discretion unreasonable? Counsel agreed the first issue was one of *vires* and hence for decision by the Deputy Bailiff; the second issue was for decision by the Jurats.

53. The Court's attention was drawn to the decision letter of 7th September 2011 at page 32 of the Court bundle and in particular, the fourth and fifth paragraphs on that page. The relevant passages of the fourth paragraph read as follows:

> "*In view of the above, the Department has concluded that, in accordance with the provisions of section 6A of the Law, the Department has no obligation to consider your case further as, for the reasons set out in detail above, the Department has concluded that your request for a non employment-related housing licence, received by way of a letter dated 31 August 2011, discloses no significant change in any material circumstance relating to you and/or any other member of your immediate family since your earlier application, the decision on which was communicated to you by way of the Department's letter dated 24 March 2011."*

The following paragraph reads:

> *"In light of all of the above, the Department has resolved that in accordance with the provisions of Section 6A of The Housing (Control of Occupation) (Guernsey) Law, 1994, it will not proceed to consider your application".*

54. Crown Advocate Sewards' submission was that the two paragraphs clearly indicate two separate decisions being taken by the Department. The first decision was whether the Appellant had disclosed significant changes in material circumstances in respect of which the Department concluded that he had not. In the second of those paragraphs, the Department communicated to the Appellant that it had considered the exercise of its discretion and resolved not to proceed to consider the application.

55. After careful consideration of the language, the Deputy Bailiff agreed with the Crown Advocate. In the first paragraph, the wording "*in view of the above, the Department has concluded that ……"* suggests one decision. The second paragraph, "*in light of all of the above, the department has resolved that ……"* suggests that the Department had taken a second decision that it had considered whether to exercise its discretion and had decided not to do so. The Deputy Bailiff respectfully suggests that the letter could have been more clearly expressed. He acknowledges that this is the first occasion on which a Section 6A decision has been reviewed by the Court. The quality of the explanation of the Department's reasons in its letters for rejecting housing licence applications has improved almost beyond recognition and the officers that draft such letters are to be commended for the quality that is generally shown in the explanations that are now given to applicants. Such improvements have no doubt been necessitated by criticisms laid by the Royal Court and the Court of Appeal by previous decisions. The Department is to be commended for the way it has responded to such criticism. The Deputy Bailiff hopes that in future the Department may explain explicitly both that it has a discretion under Section 6A and also how it has exercised such discretion.

56. The Jurats were directed to consider whether the Department's decision not to exercise its discretion in the present case was unreasonable. The Jurats' conclusion was that, having regard to the purpose of Section 6A, the Appellant had not persuaded them that the Department's decision was unreasonable.

57. The Appellant raised a number of human rights arguments, based on the Appellant's rights to respect for private and family life under Article 8 of the European Convention of Human Rights.

58. It is well established that such rights are engaged when the Department considers an application under Section 6 of the Housing Law. However, the decision subject to the present appeal is under Section 6A not Section 6. The Deputy Bailiff respectfully agreed with Crown Advocate Sewards and directed the Jurats that the very purpose of Section 6A of the Law was to exclude the need to determine the substantive application in specific circumstances.

59. When taking its decision of 24 March 2011 on the Appellant's original application, the Department had the obligation and duty to consider all the human rights implications. If it had failed to do so or had done so unreasonably, the Appellant had the right to appeal within two months. He failed to do so and cannot attempt to pursue such an appeal on the present application. The Deputy Bailiff accepted Crown Advocate Sewards' submission that the Section 6A decision amounts to determination of a "qualitative change" in the circumstances of the Appellant and his family. Such a decision does not engage Article 8 rights in the way submitted by the Appellant.

60. Consequently, the Court rejects the Appellant's human rights submissions.

61. For the reasons given in this judgment, the Appellant's appeal is dismissed.

62. By way of postscript, the Court wishes to mention again the fact that this is the first occasion on which the Court has been asked to review a Section 6A decision. It is fundamentally important that applicants for a housing licence appreciate the importance of ensuring that every application contains all the information available to the applicant relevant to the decision making process. In the present case, that was encouraged by the Department in its letter to the Appellant of 25 February 2011 which particularised the details it required. Every such application must be complete in every respect because the legislation will normally permit only 'one bite of the cherry'.