Appeal under section 43 of The Population Management (Guernsey) Law 2016, against a decision of the Administrator to refuse an application for a Discretionary Residence Permit (DRP) by the Appellant.

[2020]GRC070

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between:

MARIO PAULO DELGADO FERREIRA **Appellant**

-and-

THE ADMINISTRATOR OF POPULATION MANAGEMENT **Respondent**

Hearing date: 21 October 2020

Judgment handed down: 8 December 2020

Before: Jessica E Roland, Deputy Bailiff and

Jurats: C H Le Pelley, S J Morris and J M Wyatt

Counsel for the Applicant: Advocate N J Barnes
Counsel for the Respondent: Advocate P M Grainge

Cases, texts & legislation referred to:

Section 43 of The Population Management (Guernsey) Law 2016
The Royal Court (Reform) (Guernsey) Law 2008
Article 8 & 8 (2) of the ECHR
The Housing (Control of Occupation) Guernsey law 1994
R (on the application of Gallaher Group Ltd and Others) (Respondents) v The Competition and Markets Authority [2018] UKSC 25)
North Wiltshire District Council v Secretary of State for the Environment and Clover (1993) 65 P & CR 137
Matheson v States Housing Authority Appeal No. 250 (24th July, 1998)
Walters v States Housing Authority Appeal No. 231 (23rd July 1997)
De Smith's Judicial Review 8th Ed.
Perkins v President of the States Housing Authority Guernsey CA (2nd August 1995)
Thomas v Minister of the Housing Department (Royal Court (Finch, Lieut. Bailiff): February 26th, 2008)

Introduction

1. This is an appeal under section 43 of The Population Management (Guernsey) Law 2016 (the 2016 Law) against a decision of the Administrator to refuse an application for a Discretionary Residence Permit (DRP) by the Appellant.

2. This judgment has been prepared in accordance with the provisions of section 16 (5) of The Royal Court (Reform) (Guernsey) Law 2008 (the "2008 Law"). Where the Jurats have made findings, the findings are unanimous.

3. The Deputy Bailiff did not sum up to the Jurats in open court, but instead retired with them as she 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 on questions of law and procedure and the Jurats are the sole Judges on questions of facts. The Jurats must accept her directions on the law and follow them. She directed the Jurats to have regard to the whole of the evidence presented to the Court and to form their own judgments about the affidavit evidence and the exhibits thereto and which evidence each of them regarded as reliable and accepted and which is not. The Deputy Bailiff directed that the facts of the case are the Jurats' responsibility. If at any time the Deputy Bailiff appeared to express any views concerning the facts, or emphasised any aspect of the evidence, the Jurats were not to adopt those views unless they agreed with them. When it comes to the facts of this case, it is the Jurats' judgment alone that counts.

5. The Deputy Bailiff directed that, save in respect of Article 8 of ECHR, the burden of proof is on the Appellant (section 43 (6) of the 2016 Law) and 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 than not so. In relation to Article 8 of ECHR, the Deputy Bailiff's direction is later in this judgment.

Factual Background

6. The Appellant resides in one room of an Open Market house, sharing the use of a bathroom and kitchen with other residents of the house ("House of Multiple Occupation" or "HMO") inscribed on Part D of the Open Market Housing Register. In accordance with section 65 (1) of the 2016 Law as he was lawfully accommodated in a property in Part D (formerly part A) and had been so for more than 5 years he is entitled to remain in a Part D House of Multiple Occupation indefinitely.

7. The Appellant first came to the Island in 2000. Since that date whilst predominantly resident on the Island, he has had various breaks including a period of 2 years away from Guernsey shortly after the birth of his daughter. Since he returned in 2009 after this break, he has been continuously resident on the Island. His estranged wife and daughter live on the Island also in Part D accommodation. His daughter (if she remains on the Island) will become a qualified resident.

8. He also has a sister who lives here and has made close friends who also live on the Island. He says that he considers Guernsey his home and where he has all his emotional and cultural attachments.

9. In his application (which was completed for him by Advocate Barnes on his behalf) for an out of policy DRP, he stated that he wished to move out of his current accommodation in order to occupy local market accommodation with his daughter who has mental health problems, in order to give her a better and more secure environment. He said he was looking for a 2 bedroomed flat or house in order to accommodate himself and his daughter. The rent was estimated by him at £800–£1,200 per month.

10. Following the application, the Administrator reviewed the document and determined that there was not enough information available for a decision to be made. The Deputy

Administrator of Population Management (the "Deputy Administrator") was allocated the case and as set out in his affidavit of 28 September 2020, he engaged in email correspondence with Advocate Barnes commencing on 25 October 2019 seeking further information predominantly about the Appellant's daughter's mental health. Advocate Barnes responded on behalf of his client on 4 December 2019. He set out some of the real challenges that the accommodation presented for family life exacerbated by the fact that the Appellant's relationship with his wife had broken down (in January 2019) which was causing additional stress and how that was impacting on the Appellant's daughter particularly.

11. Thereafter, the Deputy Administrator invited Advocate Barnes and his client to a meeting which was held on 31 January 2020. The Deputy Administrator also made clear that as things stood it was unlikely that the Appellant would be successful in obtaining his DRP. During the meeting the Appellant was very candid about the impact that the living arrangements were having on him. He also explained that he had moved out of the accommodation with his wife and child and was now living in one bedroom of a HMO. The Appellant thought that obtaining a two bedroomed local market property would mean that his daughter would want to spend more time with him and that the reason why contact with his daughter had stopped was because of his accommodation.

12. He said his daughter's health had improved. During the course of the meeting the Appellant's previous application for a licence under the Housing (Control of Occupation) Guernsey law 1994 was referred to and the Deputy Administrator agreed to review this. He also invited the Appellant to provide any additional information that he wished the Administrator to consider, including evidence from the Appellant's doctor if the impact on the Appellant was an important part of his application; evidence with regard to the living arrangements for his daughter and about his daughter's mental health. No further information was provided.

13. The decision email was issued on the 28th February 2020 refusing the application (the "Decision Email").

14. Advocate Barnes submitted that it was not reasonable to expect the Appellant to live in a House of Multiple Occupation. He argued that the Administrator, in making the decision to reject the application, had focused on the length of time that the Appellant had been resident in the island in Open Market accommodation to the exclusion or insufficient consideration of the other factors that the Administrator should take into account.

15. The Appellant also submitted that the cases where the Administrator had granted a DRP showed a lack of consistency in the Administrator's decision-making and demonstrated that in the Appellant's case, the decision to refuse him a DRP had been made irrationally and/or unreasonably.

16. Advocate Barnes also argued that it was a breach of the Appellant's Article 8 rights to require the Appellant, in all the circumstances of his case, to live in a HMO.

17. The Appellant relies on the ground under section 43 (2)(a) that the decision was ultra vires or there was some other error of law and/ or the ground under section 43 (2)(b) that the decision was unreasonable and should be set aside with directions to grant the permit applied for.

The Law

18. The starting point for the Administrator in exercising her functions under the 2016 Law is section 2 (1). This obliges the Administrator to take into account:

> *(a) strategic objectives of the States that* [she] *considers are relevant to those functions,*

(b) to the extent that they are not inconsistent with (a), approved policies of the States relating to the size and composition of the population, and the availability of housing, and

(c) to the extent that they are not inconsistent with (a) and (b), policies of the Committee relating to the management of the population.

19. These together are the "States population policies" defined under the 2016 Law.

20. The relevant section of the 2016 Law dealing with DRPs is found in Schedule 2 at section 7. Section 7 (1) states that:

> *The purpose of a DRP is to enable a resident to occupy a class or classes of dwelling in circumstances where:*
>
> *(a) it would otherwise be unlawful for him to do so, and*
>
> *(b) it is necessary to ensure compatibility with one or more convention rights or otherwise equitable that he should be so able.*

21. In determining an application for a DRP, section 7 (3) of the 2016 Law requires the Administrator to take account of:

> *(a) any States population policies relating to the circumstances of the applicant and the grant of such Permits (in this paragraph "relevant States population policies"),*
>
> *(b) any criminal conviction disclosed by the applicant that is not spent for the purposes of the (Rehabilitation of Offenders (Bailiwick of Guernsey) Law 2002, and*
>
> *(c) such other factors as* [she] *considers relevant in all the circumstances of the case.*

Section 7 (3)(b) is not relevant to this case.

22. The principles set out in Walters v States Housing Authority Appeal No. 231 (23rd July 1997) remain applicable when considering the Administrator's decision:-

> *"(1) That it is the Bailiff's view that the power was exercised ultra vires, in a way other than Wednesbury unreasonably or irrationally. In such a case the Bailiff would withdraw the matter from the Jurats since, as a matter of vires, that is to say, law, it would fall within his exclusive province. The Court would in consequence allow the appeal.*
>
> *(2) That it is the Bailiff's view that the decision was Wednesbury unreasonable or irrational. The same procedural consequences would ensue as in (1).*
>
> *(3) That it is not in the Bailiff's view an ultra vires (including Wednesbury unreasonable) exercise of power in which case the Bailiff would direct the Jurats that it was for them to determine whether the decision was unreasonable, which, in our view, he should emphasise means something other than that they themselves would have come to a different decision had they been the Authority.*
>
> *In the case of In re W. to which I have referred above, Lord Hailsham, LC, said at page 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 the individual's judgment with his own …"*
>
> *Mutatis mutandis, it seems to us that this is the approach that the Jurats should be directed to adopt towards the decision of the Authority insofar as they are free to*

consider such decision. If the Jurats then consider, having weighed up all the evidence, that the decision reached by the Authority was unreasonable, they should so say and the Court would in consequence allow the appeal.

(4) If, upon such direction by the Bailiff, the Jurats merely consider that they themselves would have come to a different decision but that the Authority's decision under appeal is not unreasonable, the appeal must be dismissed.

(5) If, upon such direction by the Bailiff, the Jurats consider that the Authority's decision was right, equally the appeal must be dismissed."

Discussion

23. Both parties filed skeleton arguments and developed and augmented the arguments in oral submissions. The Decision Email of 28th February 2020 was dissected in detail by both Advocate Barnes and Advocate Grainge.

24. Both parties reminded the Court of the words of Beloff JA in Matheson v States Housing Authority Appeal No. 250 (24th July, 1998):

> *"... a public authority such as the Respondent Housing Authority can have a policy as long as two conditions are satisfied. The first is that the policy conforms with the law; a policy cannot modify, extend still less contradict such law. The second is that those who apply the policy are prepared to listen to reasons why it should not apply in a particular case and in consequence in appropriate circumstances to make exceptions to it."*

25. In accordance with the provisions in the 2016 Law, the Home Committee devised a number of policy presumptions and thereafter policies relevant to the granting of a DRP. The Administrator provided the documentation that showed the genesis of the policies.

26. Prior to agreeing the policy presumptions at a meeting dated 19 September 2016, the Committee for Home Affairs were provided with a briefing paper (the "Briefing Paper") dated 8th September 2016.

27. The Briefing Paper sets out the States' Population objective at the time that the policies were being devised. The document "maintaining Guernsey's working population" contained an objective that was "*that as far as practicable Guernsey's population should in the long term be kept to the lowest level possible to achieve "the Statement of Aims" in [the States Strategic] Plan*." It also sets out the objectives in introducing the Population Management Regime.

28. The policy presumption relevant to the Appellant is Policy Presumption 8:

> *"There is a presumption that Open Market residents who do not stand to become Permanent Residents will not be permitted to move into Local Market accommodation other than residents whose age/health dictates that they need full-time residential/nursing support and who intend to move into a registered care home."*

29. Underpinning this presumption is the following statement "*given that Open Market residents have made a lifestyle choice to move to the Island and into an unregulated housing sector*".

30. However, it is notable that the paper also makes clear that:

> "*Even once a set of policy presumptions have been arrived at it must always be genuinely open to the Administrator to deviate from those policy presumptions in any particular case. This is to ensure that the Administrator's discretion under the law remains unfettered in circumstances where to adhere rigidly to a pre-defined set of policy presumptions would give rise to a decision that would result in an unreasonable*

interference with a person's Article 8 (1) rights and thus result in a situation where adhering to the policy presumption would put the Administrator in breach of the requirement that he/she must act compatibly with Human Right Legislation."

31. The presumptions were agreed without amendment, as were the policies themselves at a subsequent meeting of the Committee on 28th November 2016.

32. The DRP policies commence with the following statement:

"Generally people who move to Guernsey as adults to live in Open Market housing don't gain the right to live in Local market Housing. The Administrator of Population management has policies about whether or not a person can generally expect to be granted a Permit…"

33. In the Appellant's situation none of the DRP States population policies apply hence the Appellant's application is what is known as an "out of policy" application. There is a standard form for such an application which, as Advocate Barnes describes, demonstrates by the questions it asks, the factors that the Administrator considers relevant.

34. The Appellant submitted that the Administrator had fallen into the same material error that the Housing Authority had in the Matheson case itself; focusing on Open Market residence to the exclusion of other factors which should be weighed in favour of the permit being granted.

35. In relation to the Appellant's specific case, the Decision Email makes clear that the length of time the Appellant has been on Guernsey in Open Market accommodation was not the sole factor which would have led the Appellant to expect to move into Local Market accommodation. Whilst, there is a statement of the general position of Open Market residents not building up rights to occupy a property in the Local Market, the Decision Email then sets out in detail the other factors the Administrator took into account in considering the application. Further, the enquiries and meeting between the Appellant, Advocate Barnes and the Deputy Administrator, all demonstrated that on the Administrator's behalf, genuine and real enquiry into matters that would assist the Appellant were being pursued by the Deputy Administrator.

36. Further the cases where out of policy DRPs have been granted (which the Appellant put forward in relation to his argument on inconsistency of decision-making) demonstrated that the Administrator has not constrained herself into a policy straightjacket when dealing with out of policy DRPs. These were all examples where other factors had tipped the balance into the granting of a DRP even though they were out of policy. In the Court's view this demonstrated that she is fulfilling the obligation identified in Matheson (*ibid*) for the Administrator to "*listen to reasons why it should not apply in a particular case and in consequence in appropriate circumstances to make exceptions to it*". Therefore the Court concluded that the Administrator had not misdirected herself in law in this regard nor failed to consider other factors.

37. If someone is successful at obtaining a DRP, the reasons for that success are not set out in the letter or email granting the permit. However, as set out in the cause and referred to above, the Appellant had the consent of 5 successful applicants to use their application information, which Advocate Barnes argued, showed that when the Administrator made the decision in relation to the Appellant, it was inconsistent with the Administrator's previous decisions. As I found in my previous decision in relation to disclosure on this matter, whilst consistency is generally desirable, equal treatment is not a distinct principle of the domestic law of England and Wales (R (on the application of Gallaher Group Ltd and Others) (Respondents) v The Competition and Markets Authority [2018] UKSC 25) and nor is it in this jurisdiction. However, consistency is a quality of good administrative decision-making. Consistency in this context is linked to notions of rationality and of reasonableness of decision-making.

Consistency promotes trust. As the North Wiltshire District Council v Secretary of State for the Environment and Clover (1993) 65 P & CR 137 sets out, one important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency.

38. Whilst the successful DRP cases relied on by the Appellant were similar in the sense that they involved applications for DRP, an out of policy DRP application can be distinguished from the English cases relied on by the Appellant involving planning applications and sex shops. The relevant DRP decisions are out of policy decisions or the "exceptions" referred to by Beloff J.A. and thus by their very nature each presenting a different factual matrix for the Administrator to consider whether to exercise her discretion. The methodology used for deciding this type of application is set out in the affidavit of the Deputy Administrator. There is no indication that the Administrator acted irrationally in relation to the Appellant's decision.

39. Further, although Advocate Barnes pressed on the Court that the successful DRP decisions were strikingly similar cases, it was the Jurats' conclusion that these were not in fact, on careful examination, so similar that they demonstrated that they were evidence that the decision in relation to the Appellant was an unreasonable one.

40. The Jurats noted that one of the features of the Appellant's application was the lack of evidence supporting the assertions that were being made being on behalf of the Appellant. Although for the reasons set out below it was not necessary for the Jurats to come to a conclusion about whether the decision of the Administrator was an unreasonable one, the lack of substantiation by the Appellant of the reasons behind his application (such as medical evidence) will no doubt have had an impact on the exercise of the discretion by the Administrator.

41. It is clear from wording of section 2 of the 2016 Law that exercising of the Administrator's functions in accordance with her duties is a three stage process. The first obligation is for the Administrator to take into account the strategic objectives of the States relevant to her functions. Thereafter she must consider policies in relation to the size and composition of the population and the availability of housing and only then (and to the extent they are not inconsistent with the first two requirements) the policies of the committee relating to the management of the population.

42. The Decision Email acknowledges that the Administrator has a duty under section 2 (1)(b) of the 2016 Law to consider policies in relation to the availability of Housing. However as Advocate Barnes submitted, the reference in the Decision Email to a "*recognition that there is a shortage of housing*", is not supported by a policy reference. Counsel for the Administrator confirmed that there was not one.

43. In the Briefing Document for the 19th September meeting, whilst there is reference to population, however there is no reference to a housing policy or to the obligation found under section 2 (1)(b). Therefore it appears that the duty on the Administrator to take into account policies on the availability of Housing has not been incorporated within the policies themselves.

44. The 2016 Law requires the Administrator to take into account housing policies unless inconsistent with "the strategic objectives of the States". If there is a relevant housing policy then this must be properly taken into account in relation to the Appellant's circumstances and identified need. If there is not then the Administrator was wrong to make reference to the duty under section 2 of the 2016 Law and then to make an unsupported general statement about "*the shortage of affordable housing*" to balance this against her view that the Appellant can sustain himself in a HMO in Open Market accommodation. In failing to properly take

into account the obligations under the 2016 Law the Administrator has fallen into material error.

45. In the absence of a policy, this does not mean that the Administrator must ignore housing. Whilst it is a matter for the Administrator, under section 7 (3)(c) the Administrator must take into account "*such other factors* [s*he*] *considers relevant in all the circumstances of the case".* If availability of housing on the local market and an applicant's other housing options are a matter which the Administrator considers relevant then she must consider it here. However there must be relevant evidence to support her considerations.

46. The Appellant's refusal letter of 20th October 2015 from his application to the Housing Authority for a compassionate licence was 18 pages long. A considerable number of paragraphs of that letter were taken up setting out in detail the Appellant's housing needs, those in a similar housing situation to the Appellant and the relevant housing stock. The Appellant cannot have been left in any doubt in 2015 about the reasons why the Housing Authority considered that he should not be granted a licence then, including in relation to availability of housing.

47. In the Briefing Paper, reference is made to the previous housing refusal letters being between 15-25 pages and that "*it is hoped that publishing policies and guidance in respect of Discretionary Resident Permits will reduce some of the administrative overhead experienced*". Whilst reduction of cost is an important consideration for any States of Guernsey department, nevertheless in the exercise of the "*draconian powers*" with "*care and sensitivity*" (see Perkins v President of the States Housing Authority Guernsey CA 2nd August 1995), this should not lead to short-cutting in decision-making nor is it any less imperative that an applicant for a permit knows exactly why his or her application has been refused.

48. Advocate Barnes argued that the refusal of the DRP was a breach of the Appellant's Article 8 rights. The Appellant should not be expected to continue to live in a HMO effectively confined to one bedroom with shared facilities. He relied on the particular impact this had on his ability to have contact with his daughter but also that he was in his 40s, who having spent such a long time on this island should not be compelled to live in these conditions. The Respondent argues that the decision is not a breach of Article 8 or to the extent that it is, it is proportionate.

49. The significance of an individual's human rights has been acknowledged throughout the 2016 Law. Section 1 (6) states that "*the Administrator shall act compatibly with Convention Rights and with fairness and impartiality when exercising [her] functions".* Section 7 of Schedule 2 makes it clear that the very purpose of a DRP is to provide a solution where it would be unlawful for someone to occupy a particular class of dwelling and yet his Human Rights require the Administrator to grant a DRP to allow him to occupy a dwelling (or that is it is otherwise equitable to do so). The case of Thomas v Minister of the Housing Department (Royal Court (Finch, Lieut. Bailiff): February 26th, 2008) sets out the considerations of the Human Rights in the housing context by reference to Gillow and English cases which consider Article 8 and Article 8 (2) at paragraph 43:

> *"The key phrase for consideration in the present case is to be found in Article 8(2). The interference must be "necessary in a democratic society". It will be recalled that there is no quarrel with the Housing Law or the legitimate aim it pursues, following the Gillow decision (supra). The most important consideration is whether or not the interference is proportionate to the legitimate aim pursued. Various formulations have been made by the House of Lords, a helpful one coming from Lord Bingham in R v Shayler [2003] 1 AC 247 – the acid test was whether, in all the circumstances, the interference with the individual's Convention Right prescribed by national law was greater than was required to meet the legitimate object which the State sought to achieve. (Lords Hobhouse and Scott agreed)."*

50. The concept of private life under Article 8 is a broad one. Again from Thomas *(ibid)*:

> *"30. "Private life" is a rather broad term, which is difficult to pin down and define. One helpful attempt can be found in R v Broadcasting Standards Commission ex.p. BBC [2001] QB 885 at 900, per Lord Mustill:*
>
> > *"To my mind the privacy of a human being denotes at the same time the personal 'space' in which the individual is free to be itself, and also the carapace, or shell, or umbrella, or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate".*
>
> *31. More concisely, "private life" can be said to cover all aspects of a person's physical identity and thus freedom to live as they choose. Whilst some matters are not within the sphere of "private life", the concept under the jurisprudence of the Strasbourg Court is a wide one. In Pretty v United Kingdom (2002) 35 EHRR 1, at para 61, it was said (quoted in Lester and Pannick, para 4.8.18, enclosure (E) of "A's" Bundle):*
>
> > *"The concept of "private life" is a broad term, not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person Article 8 also protects a right to personal development and the right to establish and develop relationships with other human beings and the outside worlds ……. the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees".*
>
> *32. "Home" has an autonomous meaning. The concept was examined by the House of Lords in Harrow London Borough Council v Qazi [2004] 1 AC 983, Lord Millett observed at 1016, para 89:*
>
> > *"A person's home is ….. the place where he and his family are entitled to be left in peace free from interference by the State or agents of the State. It is an important aspect of his dignity as a human being and it is protected as such and not as an item of property"."*

51. It has been acknowledged in a number of cases under the previous regime that once Article 8 is engaged the burden of proof moves to the now Administrator to demonstrate her decision is justified under Article 8 (2).

52. There has been an acknowledgment in the 2016 Law that lodgers formerly living in Part A of the Open Market and who have been ordinarily resident in Guernsey for at least 5 years should be treated differently from those who, when the law came into force, had been an ordinarily resident for less than 5 years. This means that the Appellant can remain indefinitely in a HMO, however, in the absence of funds to move to Part A of the Open Market register or a DRP, the Appellant is restricted to this sort of accommodation.

53. In the absence of policies on housing availability or of a proper consideration of relevant housing stock, the Administrator cannot properly consider whether the restriction of the Appellant to living in one form of housing is a legitimate aim or proportionate interference in the Appellant's private life. This may not have interfered with the Appellant's private life or may be a necessary and proportionate interference and outweigh the impact the Appellant says his living accommodation has on his life with his daughter and the impact continuing to live in a HMO has upon him, but if this is the case then the Administrator should state this.

54. Further when considering the Appellant's Article 8 rights, the considerations which the Administrator must take into account are wider than the ability of the Applicant to stay in his

current accommodation and whether or not the Appellant fits with the DRP policies. As can be seen from the definition of private life from Thomas above, Article 8 encompasses a number of dimensions of the Appellant's life and it is necessary for the Administrator to look at all the Appellant's circumstances as at the date of the decision to decide whether the decision was compatible with the Human Rights Law.

Conclusion

55. I have therefore concluded that the Administrator erred in failing to properly take into account the obligations under the 2016 Law. The Administrator also failed to properly take into account the Appellant's convention rights. It was not necessary having come to these conclusions for the Jurats to consider whether the decision was an unreasonable one, the Appeal must be allowed and the matter remitted back to the Administrator for fresh consideration.