

Homeless priority need and shared residence orders – *Holmes-*

***Moorhouse -v- LB Richmond* [2009] UKHL 7 (Hoffman, Scott, Walker, Hale & Neuberger)**

Background

Under s.189(1)(b), of the Housing Act 1996 a homeless applicant is in priority need if they are "a person with whom dependent children reside or might reasonably be expected to reside." This is a phrase which also occurs at a number of other points in Part VII – see ss.176(b); 177(1)(b); 189(1)(a) and (c); 198(2), (2A) and (4A)(c); 199(3); 208(3)(b); and 210(1A)(b).

S.8 of the Children Act 1989 provides for contact orders (requiring the person with whom a child lives to allow the child to visit or stay with another person) and residence orders (settling the arrangements to be made as to the person with whom a child is to live). It used to be the case that shared residence orders were regarded as limited to exceptional circumstances but the family courts have changed their attitude to from positive disapproval to acceptance and they are now more common – see *D v D (Shared Residence Order)* [2001] 1 FLR 495.

Facts

HM used to live with his partner and their four children. On 9th August 2005 the county court ordered in family proceedings that he had to leave the matrimonial home but, by consent, that he would have shared residence with three of the children. He then applied to the local housing authority as a homeless person. However, the authority decided that he did not have priority need by reason of the residence of dependent children.

The county court rejected HM's appeal but the Court of Appeal overturned that decision. The authority appealed further to the House of Lords. HM also cross-appealed on some points.

Held

The House of Lords allowed the authority's appeal and dismissed HM's cross-appeal. The leading judgment was given by Hoffman, with further points made by Hale and Neuberger:-

1. In deciding under HA 96 Pt VII whether children can reasonably be expected to reside with a homeless parent, the housing authority is making a different

decision from that of the court under CA 89 and in a different context. If the housing authority had had the benefit of a fully reasoned judgment of a family court, explaining why it was in the interests of these particular children to have two homes rather than one, that would obviously carry more weight than an order made by consent but it could never be determinative. [9], [40]

2. "Might reasonably be expected" refers to an impersonal objective standard. It is unnecessary to ascribe the expectation to anyone in particular. The phrase appeals to an objective social norm. Homelessness law is intended to give effect to the contemporary social norm that a nuclear family should be able to live together. The social norm must be applied in the context of a scheme for allocating scarce resources. [10-12]
3. The question which the housing authority had to ask itself was whether it was reasonable to be expected, in the context of a scheme for housing the homeless, that children who already had a home with their mother should be able also to reside with the father. In answering this question, it would no doubt have to take into account the wishes of both parents and the children themselves. It is certainly desirable that housing authorities should remember that where parents separate, it will usually be in the best interests of the child to maintain a relationship with both parents. It would also have to have regard to the opinion of a court in family proceedings that shared residence would be in the interests of the children. But it would nevertheless be entitled to decide that it was not reasonable to expect children who were not in any sense homeless to be able to live with both mother and father in separate accommodation. [14], [20]
4. It will be only in exceptional circumstances that it would be reasonable to expect a child who has a home with one parent to be provided under Part VII with another so that he can reside with the other parent as well. The needs of the children will have to be exceptional before a housing authority will decide that it is reasonable to expect an applicant to be provided with accommodation for them which will stand empty for at least half of the time, e.g. if there is a child suffering from a disability which makes it imperative for care to be shared between separated parents or where a shared residence order was made some time ago and has been working extremely well, but one of the parents has unexpectedly and unintentionally become homeless (perhaps because of domestic violence from a new partner). [21], [41]

5. Scarcity of housing is expressly relevant as to whether a person is homeless – s.177(2). However, the absence of express provision does not mean it is irrelevant to whether children might reasonably be expected to reside with a parent. It would not be a rational social policy for the authority to ignore the overall purpose of the scheme, namely to determine priority in the allocation of a scarce resource, although that does not mean the authority can say it does not have the resources to comply with its obligations under the Act. The county court judge was correct to say that an authority could take into account that there would be two houses, one to each parent, both of which houses are likely to be under-occupied. [13], [16], [22-23]
6. When an application is made on the basis that someone is threatened with homelessness, the question is whether the children will be residing or might reasonably be expected to reside with him when he becomes homeless. In the absence of accommodation provided by the housing authority, the children would not be residing with him when he became homeless. So the only question is whether they might reasonably be expected to reside with him. [20]
7. The 2002 Code of Guidance para 8.10 (2006 para 10.10) is sound in instinct but muddled in its reasoning. It says little about what “might reasonably be expected” means or the considerations which the authority should take into account. This judgment is meant to fill this “gap”. [19]
8. A county court judge should not adopt an unfair or unrealistic approach when considering or interpreting such review decisions. Review decisions are prepared by housing officers, who occupy a post of considerable responsibility and who have substantial experience in the housing field, but they are not lawyers. It is not therefore appropriate to subject their decisions to the same sort of analysis as may be applied to a contract drafted by solicitors, to an Act of Parliament, or to a court’s judgment. [47-50]
9. A decision can often survive despite the existence of an error in the reasoning advanced to support it. For example, sometimes the error is irrelevant to the outcome; sometimes it is too trivial (objectively, or in the eyes of the decisionmaker) to affect the outcome; sometimes it is obvious from the rest of the reasoning, read as a whole, that the decision would have been the same notwithstanding the error; sometimes, there is more than one reason for the conclusion, and the error only undermines one of the reasons; sometimes, the

decision is the only one which could rationally have been reached. In all such cases, the error should not (save, perhaps, in wholly exceptional circumstances) justify the decision being quashed. [51-52]

10. The court's decisions under the CA 89 as to what would be in the interests of the welfare of the children must be taken in the light of circumstances as they are or may reasonably be expected to be. The court must choose *from the available options* the future which will be best for the children, not the future which will be best for the adults. It also means that the court may be creative in devising options which the parents have not put forward. It does not mean that the court can create options where none exist. Family court orders are meant to provide practical solutions to the practical problems faced by separating families. They are not meant to be aspirational statements of what would be for the best in some ideal world which has little prospect of realisation. The county court judge in the family proceedings should not have made a shared residence order in this case because one parent had no accommodation to offer the children and no money with which to feed and clothe them. Unless the father is able to find accommodation and means to support his children, the shared residence order should be discharged. [8], [30], [37], [38], [42]
11. The Court of Appeal was wrong to suggest that a housing authority should intervene in family proceedings to argue against the court making a shared residence order. [17]
12. The reviewing officer wrongly construed the effect of the shared residence order but that was irrelevant to the outcome. He had ample grounds on which to reach his conclusion. [26]
13. Lord Hoffman also directed that the judgments of Hale (see paragraph 10 above) & Neuberger (see paragraphs 8 & 9 above) should be required reading by family court judges dealing with residence orders and county court judges hearing homelessness appeals respectively. [26]

Analysis

This is a wide-ranging and important judgment, albeit very disappointing in many respects. Given what Lord Hoffman said about it being required reading (see paragraph 13 above), it may also become well-known, even in the unlikely event that counsel do not quote extensively from it.

For separated parents, a shared residence order is now not achievable unless the departing parent has other accommodation already lined up. The potential of a homelessness application is now clearly not good enough, in particular because it will only be in exceptional circumstances that such an application can result in each parent having a home suitable for all their children.

Advisers will have to explore the possibilities of what is exceptional (paragraph 4 above). Hoffman gave one example, drawn from the facts of *Holmes-Moorhouse* itself (Mr Holmes-Moorhouse has a disabled son who is getting too big for his ex-partner to deal with by herself). Hale gave one other example. This is certainly not an exhaustive list and there is potential for many others.

What Hoffman said about the relevance of resources is open to abuse (paragraph 5 above). It was not advanced on behalf of the authority, nor did the judgment suggest, that an authority may take their own scarce resources into account. Hoffman was concerned that "might reasonably be expected" is an appeal to a generalised social norm and that social norm would take into account the general scarcity of housing. It is the same kind of test as is already contained for other purposes in s.177(2).

It had been argued on behalf of Mr Holmes-Moorhouse that his children did actually reside with him before he left the matrimonial home and, if his homelessness application had been determined at that time, he would have been in priority need. Hoffman squashed that idea (see paragraph 6 above). He said you must look at the situation as it will be when the applicant is actually homeless, by which time the question will be whether the children might reasonably be expected to reside with him.

Lord Neuberger gave some depressing comments about the interpretation of review decisions and the effect of errors within them (see paragraphs 8 and 9 above). The former comments merely gives House of Lords approval to the same comments already made in *R -v- Croydon LBC ex p Graham* (1993) 26 HLR 286. The latter comments arguably go further than any previous authority and will predictably be relied on by counsel for local authorities as a matter of course. However, it is also arguably consistent with previous authority which said that procedural errors should result in a quashing of a decision unless the outcome would "inevitably" be the same – *Ali v Newham LBC* [2002] HLR 20.

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