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An inquiry into local authority duties to the homeless: *Dafaalla v City of Edinburgh Council*

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On 5 July 2022, the Inner House of the Court of Session refused a reclaiming motion by a local authority, and in so doing approved an earlier Outer House interlocutor which held that that local authority had not fulfilled the statutory duties it owed to a homeless person (and his family). The Housing (Scotland) Act 1987 puts a duty on all local authorities to investigate the circumstances of someone who applies to them for accommodation or assistance to obtain accommodation where they have reason to believe they are homeless or threatened with homelessness. Further, they must offer temporary accommodation and, if eligible, permanent accommodation to applicants.

In *Dafaalla v City of Edinburgh Council*[1] the applicant was seemingly eligible for accommodation, but had refused previous offers of permanent accommodation from the relevant local authority and had in fact been removed from temporary accommodation in January 2020. He then applied again at the start of the pandemic in March 2020, noting his medical conditions put him at increased risk of severe illness should he contract coronavirus and making his current arrangement where he and his family resided where they could from night to night untenable. The local authority did not entertain this fresh application, being of the view that its duties under the homelessness legislation were spent. As shall be discussed below, the Outer House and then the Inner House disagreed, ruling that the local authority remained bound by the statute and as such just because someone had refused accommodation in the past that did not mean they would never be able to get accommodation ever again in the future.

Homelessness court cases are not particularly common in Scotland, which goes some way to making *Dafaalla v City of Edinburgh Council* worthy of comment in itself. The opinion of the Lord Justice Clerk, Lady Dorrian, who heard the case with Lord Turnbull and Lady Wise, provides a useful overview of homelessness law in Scotland as it stands, which (as will be explained below) has evolved in a somewhat piecemeal fashion in the time since the Scottish regime was brought under one statute in the 1980s. It also draws on English case law to make an important – and inaugural – Scots law ruling on the duty incumbent on a local authority through section 28 of the 1987 Act. This piece will offer its own brief overview of homelessness law, before providing some thoughts about the judgment and its possible implications.

Homelessness law in Scotland

Since 1977, there has been British legislation that aims to provide housing solutions for homeless people. The relevant rules for Scotland are now found in Part 2 of the Housing (Scotland) Act 1987. This legislation was amended in 2001 by another Housing (Scotland)

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[1] [2022] CSIH 30.

Act, then further amended by a specifically targeted piece of legislation called the Homelessness etc. (Scotland) Act 2003.

The Housing (Scotland) Act 1987, as amended, sets out the powers and duties of local authorities in dealing with applications from people seeking help on the grounds that they are homeless or threatened with homelessness, as defined in the legislation.[2] It also gives homeless applicants specific rights. As will be discussed in some detail, when an application is made then a local authority must make inquiries around that application. Local authorities must make available interim accommodation pending a final decision,[3] not to mention they should also seek to prevent homelessness and make advice and assistance available. Section 37(1) makes reference to the possibility of guidance, and requires local authorities to have regard to guidance issued by Scottish Ministers in the exercise of their homelessness functions. Such guidance was most recently published in 2019.[4]

The original dedicated homelessness statute was not actually a Government initiative, initially at least, rather it was a private member's bill.[5] The minority administration of the time did support it though and the Housing (Homeless Persons) Act 1977 was passed, but not without its fair share of amendments. These amendments and the final form of the legislation led to applicants facing what has been termed an "obstacle race",[6] with various hurdles to clear before unlocking any resources of a particular local authority. These were whether the person: was homeless or threatened with homelessness; had a priority need; was homeless intentionally; and had a local connection to the area.

Two of these are not the hurdles they once were. In 2012, allocation based on priority need, which previously applied to (for example) a pregnant woman or a person with whom dependent children reside, was removed in Scotland (but not England, as shall be discussed in the context of *Dafaalla*).[7] In the case of intentionality, since 2019 this only needs to be investigated by a local authority when the circumstances suggest this should be done, rather than a blanket obligation for this to be investigated.[8]

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[2] The core test for homelessness, from section 24, is a simple one: does someone have accommodation anywhere? It is further clarified there that you can only be considered to have accommodation if it is accommodation where you would not have to split your household, or if it would be reasonable to continue to occupy. There are also specific situations where someone may have accommodation, but the statute says it can be discounted (e.g. where entry to it cannot be secured, or where there is the prospect of abuse). Per s.24(4), someone is threatened with homelessness if it is likely that they will become homeless within 2 months.

[3] Section 29 of the 1987 Act.

[4] A local authority's failure to have regard to the terms of the guidance when acting may give grounds for judicial review of a local authority's decision: *Kelly v Monklands District Council* 1986 SLT 169, discussed in Peter Robson, *Housing Law in Scotland* (2011, Dundee University Press) 51.

[5] See Peter Robson, *Housing Law in Scotland* (2011, Dundee University Press) 31 for context

[6] See P W Robson and P Watchman, "The homeless persons' obstacle race", 3 (5-6) (1981) The Journal of Social Welfare Law, 1-15.

[7] By The Homelessness (Abolition of Priority Need Test) (Scotland) Order 2012 (SSI 2012/330), following on from s.2(1) and (3) of the Homelessness etc. (Scotland) Act 2003.

[8] Following the passage of the Homelessness etc. (Scotland) Act 2003 (Commencement No. 4) Order 2019 (SSI 2019/316), implementing s.4 of the Homelessness etc. (Scotland) Act 2003. To explain the reasons for this change, in the policy note accompanying the 2019 Order, it was noted that many of those assessed as intentionally homeless have difficulties in their lives which are out of their control, for example paying their rent or experiencing mental health issues. It was then noted that, "Allowing local authorities greater choice about whether to investigate this will mean that people get the support they need when they need it. It is also acknowledged, however, that it will be necessary to investigate intentionality in some circumstances, to aid housing management and to increase the likelihood of establishing a sustainable solution to homelessness for the

In relation to the factors that remain, s.28(1) says what a local authority must do. This should be a largely factual exercise, linked to s.24 on the state of homelessness. In the first instance, the local authority must make such inquiries as are necessary to satisfy themselves as to whether the applicant is homeless or threatened with homelessness. Assuming this is satisfied, there may be further inquiries in relation to intentionality (as highlighted above) and the local connection of the applicant to another local authority in Great Britain.[9] The English case of *R v Kensington and Chelsea RLBC, ex p. Bayani*[10] suggests inquiries under section 28 need not be onerous, and a court will only intervene if no reasonable local authority could have satisfied itself in the same way. In a discussion of this case, Robson notes "anyone challenging a decision on the ground that the enquiries have not been adequate has a difficult task".[11]

Assuming that a local authority is satisfied that an applicant is homeless (and where intentionality is not in play) statute provides that it shall secure that permanent accommodation becomes available for that applicant's occupation.[12] A similar but adapted duty applies for those threatened with homelessness, per s.32. That is to say, the section 28 assessment will unlock a duty to secure permanent accommodation for someone who is homeless when that person did not become homeless intentionally, but there no is duty to secure permanent accommodate when a local authority is satisfied intentional homelessness is in play.[13] What is meant by available for occupation is explained in s.41, namely that accommodation shall be regarded as available for a person's occupation only where it caters for the applicant and any other person who might reasonably be expected to reside with the applicant.

Where an applicant is not happy with a local authority decision, a review can be sought under ss.35A and 35B. This internal review might lead to the same result, but it does ensure someone fresh to the application, and more senior than the original decision-maker, will have considered the matter. The right to review was introduced by the Housing (Scotland) Act 2001. Someone who is still not happy after exhausting the internal review process has the further option of pursuing a judicial review at the Court of Session.[14] That was the course of action adopted by Mr Dafaalla.

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household involved. By replacing the duty to investigate with a power to do so, if they think fit, local authorities will be given discretion in considering an application and will be better able to focus administrative effort on those, expected to be few, cases where there is a real concern."

[9] Sections 27 and 28(2). There is some discussion of this in Robson, *Housing Law in Scotland* (48-50), and the Code of Guidance can be referred to as well.

[10] (1990) 24 HLR 406

[11] Robson, *Housing Law in Scotland*, 51.

[12] Unless it notifies another local authority in accordance with section 33 (referral of application on ground of local connection).

[13] Although not relevant to this discussion, cases like *McAuley v Highland Council* 2003 SLT 986, *Denton v Southwark LBC* [2008] HLR 11, *Ugiagbe v Southwark LBC* [2009] HLR 35 and *Haile v London Borough of Waltham Forest* [2015] UKSC 34 can be referred to on the question of intentionality (with the final three cases considering the equivalent provision under the Housing Act 1996). It should be noted that when someone is intentionally homeless, it is not the case that there is no duty whatsoever in the 1987 Act, rather temporary accommodation should be provided when a local authority is considering the issue (under s.29), and there should also be advice and assistance provided.

[14] The case of *Makombo-Eboma v Glasgow City Council* [2019] CSOH 54 provides authority for the uncontroversial proposition that this internal review has to be exhausted prior to a judicial review.

The case

The story of Mr Dafaalla and his family is set out briefly above and also at paragraphs [2]-[5] of Lady Dorrian's opinion. Reference can also be made to online analysis for Scottish Legal News by the principal solicitor of the homelessness charity Shelter Scotland,[15] the organisation that was instrumental in framing Mr Dafaalla's most recent (March 2020) homelessness application and supporting him through the process that followed, and Stalker's coverage of the Outer House decision in the SCOLAG Journal.[16] In the opinion, and in the quotes from it that follow, Mr Dafaalla is referred to as "the petitioner" and the local authority is "the Council".

As was noted at the outset, litigation about homelessness in Scotland is rare[17] and no Scottish cases on the key point at issue – namely whether the local authority was entitled under section 28 to act as it did by already treating the overall matter as settled – were available. That key point, which contributed to "the nub" of the local authority's argument as set out immediately below the "Decision and analysis" heading of the opinion at paragraph [23], is addressed in terms of the (limited) relevant case authority. The English cases of *Rikha Begum v Tower Hamlets LBC*[18] and *R v Harrow LBC ex p. Fahia*[19] were the primary cases the Inner House referred to,[20] relating to the relevant English law statutory provisions from the Housing Act 1996 that were on essentially similar terms. Those cases developed a principle as to when an apparently new (further) application by someone for accommodation could be treated as "no application". In the circumstances of a local authority receiving such a repeat application, the local authority can only be taken to be complying with its obligations under the homelessness legislation if that further application was in the same terms as the one that preceded it.

The local authority sought to argue for an alternative approach in Scotland, owing to the now different gateway provisions north and south of the border. The English test still involves an assessment of priority need and a mandatory intentionality check. Scotland has moved away from this and the only thing to test for under section 28 was whether the applicant was homeless, or at least that was the argument presented. Given that Mr Dafaalla had been and remained homeless throughout, this would have meant nothing had changed.

Lady Dorian noted this argument had a "deceptive simplicity, but only if section 28(1) were to be considered in total isolation not only from preceding and succeeding sections of the Act,

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[15] "Fiona McPhail: Inner House rules Edinburgh Council erred in refusing homeless application", 7 July 2022 <*https://www.scottishlegal.com/articles/fiona-mcphail-inner-house-rules-edinburgh-council-erred-in-refusing-homeless-application*>.

[16] Adrian Stalker, "Housing Law Update (Part 1)" 516 (2021) SCOLAG 49.

[17] A point noted by McPhail in her *Scottish Legal News* piece, where she observed: "it is rare for a judicial review in a homeless case to reach the Inner House. Not all homeless persons are able to access specialist advice and find lawyers able to take their cases. For those who do, many such cases will settle long before they reach the Inner House. However we see in this case that homelessness law in practice can give rise to complex issues of statutory interpretation. Both parties were represented by senior counsel. The impact of this decision extends beyond Mr Dafaalla and the City of Edinburgh Council."

[18] [2005] 1 WLR 2103.

[19] [1998] 1 WLR 1396.

[20] It can be noted that The Lord Ordinary, Lord Brailsford, referred to those two and also mentioned two further cases "by way of illustration"; *R (May) v Birmingham City Council* [2012] EWC 1399 (admin); *R (Abdul Rahman) v Hillingdon LBC* [2017] HLR 1, noted at paragraph 14 of [2021] CSOH 20. Other cases such as *Delahaye v Oswestry Borough Council*, The Times, 29 July 1980 were fleetingly referred to in the Inner House.

but from section 28(2)" (para [24]). She went on to explain why it was not appropriate to interpret the s.28(1) duty "in such a narrow and constrained way", noting first that inquiries must be somewhat circumstantial owing to their first stage resting on whether someone is in fact homeless and in turn relevant provisions as to when this will be the case that relate to when it is reasonable to occupy accommodation and other factors such as risk of abuse or overcrowding (para [25]).

Next, the fact that intentional homelessness could still be assessed might mean that inquiries "expand beyond the narrow confines contended for on behalf of the Council", such that "[i]t would be highly unsatisfactory that a significant difference between repeat applications under the 1996 Act and the 1987 Act, as contended for by the Council, should arise merely because discretionary inquiries under one regime were mandatory under the other" (para [26]). The fact that English legislation still incorporated a priority need obstacle did not change that (para [27]). Lastly, and convincingly, the "core aim" of the legislation is the provision of accommodation to those who are homeless and the legislation had to be interpreted in that light (para [28]). The notional example of a homeless person who had previously refused accommodation on the fourth floor of a building but then developed a mobility issue was introduced, noting that this person could easily make a fresh application in England but, with the local authority's interpretation, would struggle to do this in Scotland (para [29]). Lady Dorian noted:

> We decline to accept an interpretation of the Act that would have such a consequence. As senior counsel for the petitioner submitted, it would be a bizarre consequence of the removal of a requirement to establish priority need, intended to widen the scope of those to whom assistance would be provided, had in fact the opposite effect. If the duty under section 28(1) were to be interpreted more broadly, in light of section 24, with the consequence that the approach adopted in *Fahia* and *Begum* applied, such a problem would not arise.

It was acknowledged that there was a concern regarding "unmeritorious repeat applications" (para 31), but this was set against the relatively light nature of the inquiries that were needed. That observation seems to be consistent with the aforementioned *Bayani* case. Finally, Lord Neuberger's comments in *Begum* about the indulgence granted by the legislature to the homeless in England were said to apply "with equal, if not more force, to the terms of the 1987 Act, having regard to the removal of a requirement of priority need" (para 32).

Notably, the Inner House has not given local authorities a direct steer as to what might be relevant in terms of when a subsequent homelessness application can in fact be treated as if it is no application at all and as such not necessitate further inquiries. (From this particular case it can be inferred that the interposal of a pandemic between applications by an applicant with apparent health considerations is not such a situation, but hopefully this is a rare scenario.) Perhaps this lack of guidance was deliberate, as it will invariably drive local authorities towards inquiries and only allow for a subsequent application to not be followed up when it is in exactly the same terms as that which preceded it.[21]

Conclusion

[21] See the discussion of Lord Brailsford in the Outer House at para [32] of the first instance decision, with reference to the aforementioned cases of *Fahia* and *Begum*.

Whilst there are undoubtedly areas of Scots law where English influence should be avoided or resisted, homelessness law is generally not such an area. The application of English cases in what began as a shared statutory regime that has now admittedly diverged into a separate area of Scots statutory regulation has produced an important judgment, which McPhail welcomed "not just for the clarity it provides on the issue of making fresh homeless applications, but it also serves as an important reminder of the purpose of this statutory framework and the need to not lose sight of that purpose."[22] Although not mentioned in the case at hand, that statutory purpose is also set against a backdrop of human rights instruments such as the right to "an adequate standard of living…including housing" (through the International Covenant on Economic, Social and Cultural Rights, Article 11), which may come to be incorporated into domestic Scots law in the near future.[23] An unduly restrictive approach to the inquiries duty in s.28 could have left some vulnerable people in a very tricky situation indeed, so in that regard the decision can be welcomed.

That being said, and without meaning to underplay any of that, there may be homelessness resourcing challenges for some local authorities to contend with. This note has on a number of occasions highlighted the relative rarity of Scots homelessness law litigation – which is another reason to look furth of Scotland for guidance as issues arise in Scotland for the first time – but despite that rarity another recent case of *X v Glasgow City Council*[24] could also have important implications. *X v Glasgow City Council* concerned the nature of a local authority's interim duty to provide accommodation under s.29 of the Housing (Scotland) Act 1987 as buttressed by art.4(b) of the Homeless Persons (Unsuitable Accommodation) (Scotland) Order 2014.[25] In the Outer House, Lord Ericht held that this imposed an absolute duty on a local authority in line with the (amended) wording of the Order, namely to provide accommodation which was suitable for occupation by a homeless household, taking into account the needs of the particular household (in this case a couple with three daughters and a son with autism), and also that the local authority could not escape this duty as a result of resourcing pressures or reliance on third party providers. Stalker has offered important analysis of what that decision might mean for local authorities in practical terms,[26] although a reclaiming motion has been lodged and the result of that will be keenly awaited.

Dafaalla may not have as direct a resourcing implication for local authorities as *X v Glasgow City Council* could, but it is now beyond doubt that they will need to adapt their practice (and their inquiries) when faced with apparently repeat homelessness applications. If this does prove to be a resourcing challenge for local authorities, it is suggested that any further arguments ought not to be played out in court, and in this regard another part of Great Britain can be looked to. The Housing (Wales) Act 2014 makes provision about when a local housing authority there is subject to a comparable duty to assess in relation to a homelessness application. That duty does not apply when an applicant has already applied to that authority and the applicant's circumstances have not changed materially since that earlier assessment

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[22] *Scottish Legal News*, "Fiona McPhail: Inner House rules Edinburgh Council erred in refusing homeless application".
[23] Consider this article on the Scottish Government website: "New Human Rights Bill", 12 March 2021 <*https://www.gov.scot/news/new-human-rights-bill/*>. Further analysis of the likelihood and the implications of this are beyond the scope of this short note.
[24] *X v Glasgow City Council* [2022] CSOH 35, 2022 S.L.T. 554.
[25] SSI 2014/243.
[26] Adrian Stalker, "Housing Law Update" 2022 SCOLAG 519 23 at 23-25.

was carried out, and there is no new information that materially affects that assessment.[27] Whether a scheme such as the Welsh model *should* exist in Scots law could properly be debated as part of a future law reform process.

[27] The Housing (Wales) Act 2014, ss.62(1) and 62(2).