R oao Robin Clarke v Birmingham City Council


No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
4 July 2019

Case No: CO/2600/2018

High Court of Justice Queen's Bench Division Administrative Court

[2019] EWHC 1728 (Admin), 2019 WL 02893992

Before: HHJ David Cooke

Date: 04/07/2019

Hearing date: 27 June 2019

Representation

The Claimant appeared in person.
Gavin McLeod (instructed by Birmingham Legal and Governance Department) for the Defendant.

Approved Judgment

HHJ David Cooke:

1. This is the hearing of Mr Clarke's claim for judicial review of a decision of the Cabinet of the defendant council made on 24 May 2019 to confirm its decision of 27 March 2019 approving an amended capital spending budget that included provision of some £19m (out of an anticipated total of £31m over three years) to fund the retro-fitting of sprinkler systems to all the tower blocks owned by the Council, in the wake of the fire at Grenfell Tower in London.

2. Mr Clarke considers that the decision to fit sprinklers is a waste of public money that could be better spent elsewhere, on the grounds, summarised broadly, that the Council has not investigated in any detail whether the Birmingham blocks are subject to any material risk of a catastrophic fire such as occurred at Grenfell Tower (he contends they are not) or for any other reason, such that any additional contribution to reduction of risk of such a fire that might be achieved by fitting sprinklers, over and above the protection afforded by existing measures already incorporated into their design and construction, would be worth the substantial additional cost involved.

3. He points out that although Birmingham has had a large number of such tower blocks in place for many years, during which time there have been numerous fires in individual flats, the existing fire protection measures have always been sufficient to contain those fires and prevent them spreading to the whole block or any substantial part of it, and contends there is no

reason to think this will not continue to be so in future. In his view, the decision to fit sprinklers was a panic response by politicians keen to be seen to be doing something in response to the Grenfell tragedy, when a more considered evaluation would have shown that it was not necessary or justified.

4. The decision challenged was preceded by a number of other relevant events:

i) On 27 June 2017, 13 days after the Grenfell Tower fire, a report was presented to the Council's Cabinet (bundle p 119) setting out a response to that event. It contained a summary of existing fire protection measures and risk evaluation procedures at Birmingham's tower blocks and, in a section headed "Future Investment", said:

> "In reviewing the safety of our tower blocks, we believe that the addition of water sprinkler systems would assist us in ensuring that residents of the tower blocks have the best protection in the event of fire that is currently available. It is estimated that this will cost in excess of £31 million to retro-fit.
> The leader of the Council has written to the leaders of the core city authorities asking for their support to lobby government to pay for fire suppressant measures. Regardless of the response from government however, it is intended to prioritise the Council's spending on a rolling programme of sprinkler installation and fire prevention measures from capital receipts. A programme of works will be developed once further specifications have been agreed with West Midlands Fire Service…"
> The recommended decision was that "Cabinet… notes and endorses the detailed action referred to in the report [and] supports the approach to Government to help to pay for the sprinkler systems and fire suppressant measures in all of the City Council's tower blocks as appropriate…". The report states that the "Reason for Decision" is "The measures outlined in this report ensure that residents in Birmingham City Council's tower blocks have the best possible protection in the event of a fire."

A separate public document (p 131) records that a decision was made in accordance with the recommendation.
ii) At that time, the Council's capital investment budget for housing stock for the three year period to April 2020 had already been set and of course included no specific provision for expenditure on fire sprinkler systems. On 27 February 2018 the Council adopted a revised overall budget for the next three years, including provision for the spending of £31 million on these fire protection measures. That would require an amendment to the existing capital investment budget, and accordingly on 27 March 2018 the Cabinet considered a document proposing a revised capital investment budget (p 133) to include this additional spending. It was noted (p 136) that this involved an increase in the budgeted expenditure for the 2017-8 financial year of some £7.2 million.
iii) That recommendation was approved. The decision of the Cabinet was subject to a "Call-In" procedure, by which any of a number of potentially interested organs of the Council could request that it be reconsidered by the Cabinet.
iv) One such body was the Housing and Homes Overview and Scrutiny Committee (referred to as the Scrutiny Committee). Two members of that committee, Councillors Henley and Leddy, made a request to it to call in the decision. A note of the Scrutiny Committee's consideration of that request is at p 149. I refer to this in more detail below; for present purposes I note only the resolution recorded as follows:

> "3.1 The Committee resolved to call in the decision for reconsideration by Cabinet, on the grounds that: *5. The Executive appears to have overlooked some relevant consideration in arriving at its decision* .
> 3.2 The Committee therefore formally asks the Cabinet to reconsider its decision; in particular that Cabinet carefully considers all the information and evidence available to assure itself that this large expenditure is wholly justified. An alternative approach might be to consider each case

> individually, and ensure each tower block has its own particular needs met in terms of safety and saving lives. "

The italicised words are evidently a recital of the fifth in a list of predetermined potential grounds for a call-in request.

5. When the Cabinet met on 24 May 2018 it considered a document entitled "Executive response to 'Call-In' [of] the decision made by Cabinet on 27th March 2018" (p 153). There was a discussion between the members of the Cabinet, the relevant sections of which are transcribed in the bundle at p 159, at the end of which the Cabinet unanimously resolved to confirm the decision it had taken on 27 March. It is that confirmatory decision that is now challenged.

6. Permission was initially refused on the papers by HHJ McCahill QC on 26 October 2018. However upon renewal at an oral hearing on 11 February 2019 Andrews J granted limited permission to proceed in the following terms:

> "1. Permission is granted, limited to the following grounds:
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> **Ground 1**
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> In reaching its decision of 24 May 2018, the Defendant's Cabinet failed to consider and/or take into account all relevant factors that might weigh against the decision, in particular the matters that were raised in the Scrutiny Report and itemised in paragraph 41 of the Claimant's Statement of Facts and Grounds, and the alternative approach identified in paragraph 3(b) of the Executive response to the 'Call-In' dated 24 May 2018
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> **Ground 2**
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> Alternatively, if and so far [as] the Cabinet did take those matters into account in reaching its decision, it failed to give any or any sufficient reasons for rejecting those points, or for finding that they were outweighed by other relevant factors…
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> 3. Permission is refused **on all other grounds** including, for the avoidance of doubt, irrationality, *Wednesbury* unreasonableness, taking irrelevant matters into account, breach of article 8 ECHR and procedural unfairness (failure to consult). "

7. The Scrutiny Report referred to in this order is the note of the consideration by the Scrutiny Committee mentioned above. That document notes the reasons for the request made by Councillors Henley and Leddy, by reference to the list of permissible reasons to call in a decision, as follows:

> "1. *The decision appears to be contrary to the Budget or one of the 'policy framework' plans or strategies* - the decision to spend the money on sprinklers leads to a £7 million overspend on the budget;

> 5. *The Executive appears to have overlooked some relevant consideration in arriving at its decision* - the scientific evidence supports the case that Birmingham's tower blocks are already safe, in accordance with Building Regulations, so the money could be better spent elsewhere;
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> 7. *The decision appears to be particularly 'novel' and therefore likely to set an important precedent* - the proposal to retrofit sprinklers is novel, particularly as the requirements of the sprinkler system may render other fire protection methods (e.g. compartmentalisation) invalid;
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> 9. *The decision appears to give rise to significant legal, financial or propriety issues* - an additional spend of £31 million is significant;
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> 11. *The decision appears to give rise to significant issues in relation to a particular district* - the issue is one of significance for Brandwood ward, where there are a large number of tower blocks, many over 50 years old that have many issues (relating to size and maintenance)."

8. Paragraph 41 of Mr Clarke's statement of grounds set out these points, and certain others which are noted to have been points made in discussion by members of the Scrutiny Committee as follows:

i) "The evidence presented in the briefing note is not hard evidence, but a series of quotes from bodies with an interest in this area". This refers to a briefing note presented to the Scrutiny Committee but not included in the documents before me. I cannot tell therefore exactly what "evidence" it is referring to but I think a sufficient flavour of Mr Clarke's point can be seen from his argument that a statement from the Commissioner of the London Fire Service to the effect that sprinkler systems should be regarded as essential and not merely desirable should be seen as coming from someone interested in exculpating herself and her officers from blame.
ii) "There are many other fire protection measures in place in Birmingham's tower blocks and these have worked well in the past".
iii) "Scientific evidence from real fires and experiments in full-sized buildings has been included in the Building Regulations, which … do not require any retrofitting to existing buildings".

9. The "alternative approach" referred to in Andrews J's order was that which had been mentioned by the Scrutiny Committee, i.e. the possibility of considering the needs of each tower block individually. In the context of the Scrutiny Committee's request, it seems to me that is to be read as suggesting that there should be consideration in respect of each tower block whether fitting of sprinklers was justified at all in its particular case, not just subsidiary questions such as when and how they might be installed.

10. In his skeleton argument, aiming at the first of the grounds permitted by Andrews J, Mr Clarke set out 12 matters that he identified as material matters that might have weighed against the decision to retrofit sprinklers but which he said had not been addressed at all either in the document before the Cabinet on 24 May or in the discussion at that meeting. I will not set them all out. A number of them were matters that he had raised himself in an email sent on 25 June 2017 after the initial Cabinet decision had been publicised and in a letter before action threatening a judicial review claim sent on 20 April 2018. They included:

i) his contention that the compartmentalised structure of all or most of the Birmingham blocks meant that there was no risk of a widespread fire such as occurred at Grenfell Tower or the previous fire at Lakanal Tower in 2009;
ii) the disruption to tenants that would be caused during the fitting works, and the unsightliness of surface-mounted retrofitted sprinklers and pipes that would require to be installed in their flats;
iii) the greater desirability, as he saw it, of possible alternative uses the money;
iv) the imprudence, as he saw it, of the borrowing that might be required to fund the additional expenditure, and

v) the likelihood that many or all of the tower blocks might be demolished within a few years such that the expenditure on improvements would be wasted.

11. Mr Clarke also makes the point that, as he said Andrews J had observed in granting permission, all of the matters set out in the Executive Response document submitted to the meeting on 24 May were arguments in favour of fitting sprinklers and not points that might have been made against such a decision.

12. The Council's position in response is, in summary:

i) Mr Clarke's objection is in substance to the decision to retrofit sprinklers. That decision was taken by the Cabinet in June 2017 so he is out of time to bring and challenge to it now (his claim having been issued in July 2018).
ii) The decision challenged was only a technical one to adjust the capital investment budget to reflect the expenditure of the £31m approved in the overall budget in February 2018 (Mr Clarke not having challenged the decision to approve that budget and being out of time to do so). Considerations as to the merits of a particular item of expenditure included in that capital budget were irrelevant and not properly part of the process at the stage of approval of the adjusted budget itself, notwithstanding they had been raised by the Scrutiny Committee and to some extent entered into by the Cabinet.
iii) Alternatively, if such matters were properly for discussion at the stage of he budget adjustment decision, the Cabinet had given sufficient consideration to those that were "relevant" for legal purposes and, to the extent it was required to provide reasons at all, those were sufficiently apparent from the Executive Response document and recorded public discussion.
iv) In any event, even if the further matters relied on by Mr Clarke had been addressed directly, it was apparent from the discussion of the members of Cabinet that they would have come to the same conclusion, such that the court must refuse relief pursuant to s31(2A) Senior Courts Act 1981 .

13. I take the first two points together. Mr Clarke submitted that there had been no decision to install sprinklers in 2017 and the document referred to showed at most that the Cabinet had "noted and endorsed" a statement of belief that sprinklers would be desirable and/or action recorded as already taken. This in my view is an unrealistic interpretation of that document; para 5.5 plainly sets out not only a belief that sprinklers offered the best available fire safety but a proposal that they should be fitted, funded if possible by government but in any event by re-prioritising council spending. By "endorsing" that, the Cabinet was in my view clearly deciding to approve that proposal. The approval of an approach to government to pay or contribute to the costs of fitting sprinklers only makes sense if that work is going to be done.

14. That said, I do not accept that all questions of the merits or value of the proposed spending ceased to be proper matters for discussion by councillors or executive officers at that point, or the specific objection that such matters were not ones that could properly be raised and discussed in connection with a later budget decision. Any budget discussion in the real world involves consideration of allocation of limited amounts of money between competing spending priorities, and is not simply a matter as Mr McLeod suggested of funding all the items the Council had previously decided to approve as its objectives. It must therefore be proper for councillors to raise issues as to the value to be achieved by a particular item of proposed expenditure and argue that, for instance, it was less desirable than some other objective such that resources should be switched away from it, or that it was not good value for money and so should not be funded at all in order to keep down total spending. This is as much true of a proposal to "adjust" a budget as of one to set a budget in the first place.

15. If such matters were legitimate for potential discussion on the initial consideration of the revised budget (in this case at the Cabinet meeting in March 2018) it seems to me they must have been legitimate matters to be raised by bodies such as the Scrutiny Committee in a "Call-in" request. Nor would such discussion be academic; if hypothetically the Cabinet decided against funding a particular item, or to reduce the funding for it, council officers would not be able to pursue it except in accordance with the approved budget or to the extent they could properly reallocate expenditure themselves within that budget. In the context of a major item of expenditure such as this, if, as Mr Clarke would have hoped, the Cabinet on

reconsideration had decided not to provide £19m in the capital budget towards sprinklers, it must be doubtful whether the project could have proceeded either at all or until a significant re-appraisal of financial priorities had been carried out.

16. There is no doubt that the Cabinet's discussion on 24 May did not include specific consideration of the 12 matters that Mr Clarke puts forward as potential arguments against sprinklers, or even those of them that had by that date been identified by him as things he considered ought to be taken into account. Nor did it decide to commission an evaluation of these items, or of the more general consideration whether in the actual circumstances of the Birmingham blocks fitting sprinklers would lead to any appreciable increase in safety or, if it did, whether the extent of that increase would be worth the cost involved - the "value for money" issue.

17. Mr Clarke's argument under Ground 1 as permitted by Andrews J is that these matters were all "relevant" in law such that an error of law is committed if they are not addressed. He referred me to the decision of Carnwath LJ, sitting as a judge of the Administrative Court, in *Derbyshire Dales DC v Secretary of State for Housing, Communities and Local Government [2009] EWHC 1729 (Admin)* and to a passage quoted at para 27 from a New Zealand case in which Cook J of the New Zealand Court of Appeal said:

> "… in certain circumstances there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers … would not be in accordance with the intention of the Act".

Mr Clarke's contention is that the specific points he raises, and/or the general question of whether the proposal to fit sprinklers represents value for money, are "obviously material" in this sense.

18. In fact I think the judgment in that case is against the proposition that Mr Clarke seeks to put forward. It must be borne in mind that it was a planning case, and therefore the discussion of whether particular matters were so important that any failure to consider them vitiated the decision took place against the background of the statutory nature of the planning process. The issue in that case was whether the authority was required to have regard to the potential that a particular development (wind turbines) could be sited at an alternative location. But the general principles can in my view be read across to a situation such as the one before me.

19. At paragraph 17, Carnwath LJ said this, following a citation from authority which I need not set out:

> "… the words 'relevant or at least permissible' and 'relevant and indeed necessary' … signal an important distinction, insufficiently recognised in some of the submissions before me. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is *necessarily* relevant, so that he errs in law if he fails to have regard to it.
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> 18. For the former category, the underlying principles are obvious. It is trite and long established that the range of potentially relevant planning issues is very wide… and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker… On the other hand, to hold that a decision-maker has erred in law by failing to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered him) to do so…

> 23. The principles by which a matter is to be deemed 'material' or 'relevant' have not been consistently stated in the cases or the textbooks. The passages from the Bolton MBC judgment … might suggest a relatively low threshold. It would be enough for the court to decide for itself that consideration of some factor … 'might realistically' have led to a different result. However that approach is not supported by the textbooks, nor, in my respectful view, by other authorities…
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> 26 … Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 2 All ER 680* [said]:
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> "If in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. … What has to be emphasised is that it is only when the statute *expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation* that the court holds a decision invalid on the ground now invoked. It is not enough that it is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision… (emphasis added)"…
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> 28. It seems, therefore, that it is not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because 'obviously material') requires to be taken into account 'as a matter of legal obligation'. "

20. It is not enough, therefore, that it would have been permissible for the Cabinet to consider the "value for money" issues Mr Clarke raises, and would not be enough even if I were to conclude that if it had done so it might realistically have agreed with Mr Clarke's points to the extent that it would have arrived at a different decision and excluded or materially reduced the proposed budgeted expenditure. It would not be enough if I were to conclude that some, or even many, people might have taken the view that Mr Clarke does, apparently shared by at least Councillors Henley and Leddy, that sums of the order envisaged should not be committed without a detailed analysis of the costs and benefits realistically conferred. It must be shown that there was some express or implied legal obligation on the Council not to proceed unless this was done.

21. Mr Clarke does not point to any express legal obligation, however arising, on the Cabinet to take these matters into account or commission a report. He has not, for instance, referred to anything comparable to the Public Sector Equality Duty or obligations to obtain environmental assessments that would require councils in all circumstances to investigate matters relating to the value for money of proposals they are considering, or to commission any internal or external report dealing with such matters before committing themselves to expenditure.

22. Short of such an obligation, it is in my judgment generally for a decision taker to determine what matters are potentially relevant to be considered, and what weight is to be given to each of them. Any challenge to its decision would as Carnwath LJ noted at para 28 cited above, have to be on grounds of irrationality.

23. Against that background, if one considers what was before the Cabinet on 24 May, it was that the Scrutiny Committee's request that the Council should "carefully [consider] all the information and evidence available to assure itself that this large expenditure is wholly justified". The Scrutiny Committee did not put forward either one or a number of specific points that

should be considered, but made a general request that the Council should investigate in more detail the evidential support for the potential benefits of sprinklers and any arguments that might go towards justifying or not justifying the expenditure.

24. What the Cabinet had to decide, therefore, was the question whether it should or should not enter into this more detailed analysis before proceeding to approve the budgeted expenditure. Mr Clarke's objection is in substance that the Council did not decide to conduct such an analysis, which implies that, as a matter of law, there could only ever be one proper answer to the question asked.

25. But that in my judgment is unsustainable. If it is assumed for present purposes that the Cabinet was obliged by its own procedural rules to address the question that had been put to it by the Scrutiny Committee in its "call-in" request, that cannot impose an obligation to answer the question in one particular way and actually conduct the analysis that the Scrutiny Committee had requested it to consider. In the absence of any express statutory obligation to consider such matters of detail, it is only if its decision not to do so could be considered to be *Wednesbury* unreasonable that it could be challenged. Mr Clarke however has been refused permission to bring a challenge on *Wednesbury* grounds.

26. Reading the transcript of the Cabinet discussion, it is in my view apparent that it does address the question asked. It could no doubt be said that much of the discussion is not particularly well structured, and some of the points made are not particularly coherent. But points were made about the statements made by Chief Fire Officers in London and the West Midlands that sprinklers ought to be fitted (such statements being sometimes described as "scientific evidence" and at other points as "expert advice"), about the possible lack of justification for a distinction between any new blocks in which sprinklers would be required by revised Buildings Regulations and older blocks in which they would not be required by law to be retrofitted, and about the Scrutiny Committee's concern that there had not been "a due process following scientific research to have got to [the decision to fit sprinklers]". The chair of the meeting put the matter to a vote with the concluding remarks "I would just reiterate that the advice from both the Fire Officer here in the West Midlands and indeed the Fire Commissioner in London is crystal clear, we cannot delay on this matter any further. So can I put the recommendation to Cabinet please, is that agreed?". There was then a unanimous approval.

27. The Cabinet therefore decided against instituting the detailed investigation that the Scrutiny Committee had requested it should consider, and which Mr Clarke would prefer it to have undertaken. It was in my judgment entitled to do so. It was a matter for its discretion whether the policy imperatives that it identified were outweighed by the advantages of longer or more detailed scrutiny of the balance between the safety benefits and the costs, and it plainly decided that they were not.

28. It follows that ground 1 as permitted by Andrews J fails. As to the alleged insufficiency of reasons, Mr McLeod submits that what the Cabinet was considering was a matter of the internal administration of the Council and not a determination of the rights of a citizen in which there might be a legitimate expectation that reasons would be given sufficient for the citizen to identify why a determination had been made against him. It was doubtful, he submitted, whether there could be any obligation on the Council at all to provide reasons in such a case. There is in my view force in such an argument. Many decisions in matters great or small must be made by councils and other bodies daily in the course of administering their affairs. It would be impractical for all of them to be subject to a requirement that reasons be identified or stated, whether or not the decision-making process takes place in a meeting to which the public has access (such as this decision) or is one that might be reached in the course of day-to-day operations by one or more individuals exercising their functions.

29. But even if it is assumed in favour of Mr Clarke that there was an obligation in the present case to identify reasons sufficient for a citizen potentially interested in challenging a decision to be able to determine what had been decided and why, it is in my view clear that such a standard was met. The Cabinet decided not to embark on the more detailed analysis that

had been suggested, because it considered that the reasons for proceeding without further delay identified in the "executive response" and referred to in the course of discussion outweighed the potential advantages of further investigation.

30. Mr Clarke does not agree with that decision. No doubt there might be others who would take the same view. But it was in my judgment a decision properly taken by the Cabinet in respect of which no legal error has been identified and the challenge to it must be dismissed.

31. In the circumstances the question whether there might realistically have been any different outcome does not arise. But in case the matter goes further I should say that if I had concluded that the Cabinet erred in declining to consider the "value for money" issue I would not have also concluded that doing so would not have made a difference. It may be, as Mr McLeod argued, that the Cabinet members at the meeting were minded to proceed regardless of what consideration might have led to. But it cannot be said, in my view, that if hypothetically they had decided to embark on a more detailed investigation, for instance by commissioning an expert report, that this could not have led to matters emerging that might have made a difference to their eventual decision.

32. I invite the parties to agree the order resulting. I will list a hearing at which this judgment will be formally handed down. If there are matters arising that can be dealt with on that occasion in 30 minutes or less I will take them; in any other case there need be no attendance and any matters arising will be dealt with at a later hearing, for which the parties should submit an agreed time estimate and dates of availability.