Property: R (aoa Fisher) v Durham County Council [2020] EWHC 1277 (Admin), 21 May 2020

Barbara Zeitler

The High Court has considered the interplay between statutory nuisance, caused by noise, and disability discrimination and the Public Sector Equality Duty.

The Facts

Ms Fisher ('the Claimant') is a disabled person within the meaning of the Equality Act 2020 ('EqA'). She has a neurological disorder that causes her to make involuntary vocalisations. She screams and shouts words and sentences, often at night. She is a private tenant in a mid-terraced house in County Durham. The noise made by Ms Fisher has had a serious effect on her neighbours, and has also prevented the re-letting of one of the adjacent properties. Durham County Council ('the Council'), having previously served a Community Protection Notice under the Anti-Social Behaviour Crime and Policing Act 2014, served a Noise Abatement Notice under s. 80 of the Environmental Protection Act 1990 ('EPA') on Ms Fisher.

The Law

Under S. 79(1)(g) EPA, 'noise emitted from premises so as to prejudicial to health or a nuisance' is capable of being a statutory nuisance. If a local authority is satisfied that noise constitutes a statutory nuisance, it is required to serve an Abatement Notice under s. 80(1) EPA or take other steps to persuade the appropriate person to abate the nuisance. Failure to comply with an Abatement Notice without reasonable excuse is a criminal offence: s. 80(4) EPA. If a local authority is of the opinion that criminal proceedings would not afford an inadequate remedy, the local authority may take proceedings before the High Court to secure the abatement of the nuisance, for example by applying for an injunction (S. 81(5) EPA).

By S. 15(1) EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. The Public Sector Equality Duty ('PSED') under S. 149 EqA focuses on advancing equality. S. 149 EqA requires a body carrying out public functions to have due regard to equality of opportunity and elimination of discrimination.

The Proceedings

The Claimant brought judicial review proceedings to quash the abatement notice, arguing that the she had been treated unfavourably by reason of her disability contrary to SS. 15 and 29 EqA and that the Council had breached its PSED under s. 149 EqA. She also raised human rights and irrationality challenges.

The Court accepted that the service of the Abatement Notice served a legitimate aim, there being substantial evidence that Ms Fisher's vocalisations caused harm and distress to her neighbours. The Notice was also proportionate, the Council having given due weight to Ms Fisher's disability. The protection of the health and amenity of the neighbours and the interests of the relevant property owners justified what the court termed the 'modest' limitation on the Claimant's right as to how she lived in her home. The Court noted the steps the Council had taken to engage with Ms Fisher prior to serving the Notice, which included advice about sound-proofing the house, the service of a Community Protection Notice, the consideration of medical evidence, and the offer of various services. The Notice was the last resort, and the Council had shown there had been no less drastic means of solving the problem. A fair balance had been struck between competing interests, in particular as the

Council would not take criminal proceedings, but use the Abatement Notice as a first step of obtaining a civil injunction.

While not explicitly carrying out a PSED assessment, the Court held that in substance the Council had done so. The Court found that at all stages the Claimant's disability had been taken into account. In fact, the Council's actions were taken to reduce or eliminate potential 'discrimination, harassment or victimisation' (s. 149(1)(a) EqA) and to 'foster good relations' (s. 149(1)(c) EqA) between the Claimant and her neighbours. Giving effect to the PSED did not require the Council to give primacy to the Claimant's wishes at the expense of her neighbour's right to live in peace. The Council had explored every viable option and had got the balance of its duties entirely right. The human rights and irrationality challenges were dismissed.

Comments

This is a further case in which a public authority had not explicitly considered the PSED, but was nevertheless found to have complied with the substance of the duty.

Stare decisis: Booth & Anor v R [2020] EWCA Crim 575

Dominic Bright

In these landmark appeals modifying the rules of precedent, the Lord Chief Justice – with Sharp PQBD, Fulford LJ, McGowan VP Criminal Division and Cavanagh J – succinctly summarised the law, issues and ramifications in these terms:

> "For 35 years the approach to dishonesty in the criminal courts was governed by the decision of the Court of Appeal Criminal Division in *R v Ghosh* [1982] QB 1053. In *Ivey v Genting Casinos (UK) (trading as Cockfords Club)* [2017] UKSC 67; [2018] AC 391 the Supreme Court, in a carefully considered lengthy *obiter dictum* delivered by Lord Hughes of Ombersley, explained why the law had taken a wrong turn in *Ghosh* and indicated, for the future, that the approach articulated in *Ivey* should be followed. These appeals provide the opportunity for the uncertainty which has followed the decision in *Ivey* to come to an end. We are satisfied that the decision in *Ivey* is correct, is to be preferred, and that there is no obstacle in the doctrine of *stare decisis* to its being applied as the law of England and Wales."

R v Ghosh

The two-stage test for dishonesty – Was the defendant's conduct dishonest by the ordinary standards of reasonable people; and, if so, did she appreciate that her conduct was dishonest by those standards? – was set out in *Ghosh* at 1064D.

Ivey v Genting Casinos (UK) (trading as Cockfords Club)

In the Supreme Court, Lord Hughes proposed an alternative two-stage test – What was the defendant's actual state of knowledge or belief as to the facts; and was her conduct dishonest by the standards of ordinary decent people? – with which Lords Neuberger, Hale, Kerr and Thomas agreed. The indication was that the directions in *Ghosh* should no longer be given:

> "… the test propounded in *Ghosh* [1982] QB 1053 does not correctly represent the law and … directions based upon it ought no longer to be given. … When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

Stare decisis

The issues involving the rules of precedent were succinctly set out by the Lord Chief Justice:

> "There is no doubt that the discussion on dishonesty in *Ivey* was strictly *obiter* because it was not necessary for the decision of the court. It is for that reason that the appellants submit that it has no legal impact on the decision in *Ghosh*. We note that the possibility was raised in argument that *Ghosh* itself was *obiter* but we approach the question on the basis that, subject to the status of *Ivey*, it is binding not least because it was applied as the law of England and Wales for 35 years, including by this court. The appellants submit that we should apply *Ghosh* and then let the matter return to the Supreme Court. They point out that the Supreme Court did not appear to hear argument on the issue. They recognise that would give rise to the distinct possibility that the wrong test for dishonesty would be applied in the meantime in thousands of cases in the Magistrates' and Crown Courts but that is a consequence of following properly the rules of precedent."

The question was whether the Court of Appeal is obliged to follow *obiter* of the Supreme Court. In answer, the Lord Chief Justice reasoned that the rules of precedent "must, where circumstances arise, be capable of flexibility to ensure that they do not become self-defeating." With this rationale, a "limited modification" of the rules of precedent was made:

> "We conclude that where the Supreme Court itself directs that an otherwise binding decision of the Court of Appeal should no longer be followed and proposes an alternative test that it says must be adopted, the Court of Appeal is bound to follow what amounts to a direction from the Supreme Court even though it is strictly *obiter*. To that limited extent the ordinary rules of precedent (or *stare decisis*) have been modified. We emphasise that this limited modification is confined to cases in which all the judges in the appeal in question in the Supreme Court agree that to be the effect of the decision."

Outcome

Ivey establishes the test for dishonesty in all *criminal* cases. The rules of precedent have been modified to a limited extent. These appeals are therefore important for *civil* (as well as criminal) practitioners following the rules of precedent.