

The Public Sector Equality Duty in homelessness decision-making

UNITY
Street Chambers

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The legal context

- The PSED is “complementary” to the duty of the LHA owed to homeless people under Part 7 of the Housing Act 1996 (“the Act”)
- Before considering PSED in detail it is helpful to consider those pre-existing duties under Part 7, in particular the duty owed under Part 7 towards “vulnerable” persons
- Part 7 of the Act imposes a legal duty upon LHAs to provide (most) homeless people in their district with assistance in obtaining accommodation. The level of assistance depends on the applicant’s personal circumstances
- If a homeless person is deemed “vulnerable” they will be deemed to have a “priority need for accommodation” and will be entitled to what is informally known as the “full housing duty” under section 193 of the Act. This means, essentially, that the LHA will be under a duty to secure that accommodation is available for the homeless person, as opposed to simply providing them advice and assistance

Vulnerability

- **Section 189 of the Act (Priority need for accommodation)**

(1)The following have a priority need for accommodation—

(a)a pregnant woman or a person with whom she resides or might reasonably be expected to reside;

(b)a person with whom dependent children reside or might reasonably be expected to reside;

(c)**a person who is vulnerable as a result of** old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside;

Vulnerability: the old test

- R v. Comden London Borough Council, Ex p Pereira [1998] 31, HLR 317
- Produced what became known as “The Pereira test” for vulnerability
- Held sway for about 16 years, until the decision in Hotak (referred to below)
- A person is vulnerable if they are “less able to fend for themselves” than an “ordinary homeless person” and would suffer an injury or other detriment that the ordinary homeless person would not.
- Thus a comparator is used: the vulnerability of an applicant for housing is assessed with reference to the vulnerability the “ordinary homeless person”

Ambiguity in the Pereira test

- What does the “vulnerability of the ordinary homeless person” mean?
- Does it mean:
 - a) the vulnerability an ordinary person would experience should they lose their accommodation and find themselves homeless, or;
 - b) the vulnerability of a notional homeless person based on the LHA’s experience of homeless persons
- The latter interpretation came to be preferred by the courts, and was applied in Johnson v. Solihull MBC [2013] EWCA Civ 753
- Johnson was appealed to the SC and was heard together in 2015 with two other cases (Kanu and Hotak)
- The SC’s decision on each of the three appeals (Neuberger PSC giving the leading judgment) is reported as Hotak v. Southwark LBC (SC(E)) [2015] UKSC 30; [2016] AC 811

The new test for vulnerability: Hotak

- SC confirmed that it was correct to use a comparator when judging if an applicant is vulnerable for the purposes of section 189(1)(c), and that vulnerable meant “significantly more vulnerable than ordinarily vulnerable” (Q: how much more is *significantly* more?)
- But what of the correct comparator group?
- Correct comparator was the ordinary person if made homeless, not an ordinary actual homeless person
- LHA could take account of third party support which would be available to the applicant if homeless, including (Baroness Hale dissenting) support from family members
- -“Vulnerability...is not so much a clinical assessment of his physical and mental ability (to use a shorthand expression): it is a contextual and practical assessment of his physical and mental ability if he is rendered homeless (which, as just explained, must be compared with the ability of an ordinary person if rendered homeless).” (Neuberger PSC para 62)

Hotak practice and procedure

- Applicants who are dissatisfied with an LHA's decision on vulnerability have the right to request that the LHA reviews its decision (known as a "section 202 review")
- Applicants who are dissatisfied with the outcome of a section 202 review can, pursuant to section 204, appeal to the County Court on a point of law (arising either from the review or the original decision)
- "Benevolent and "not too technical" approach to review letters is appropriate and immaterial errors should not have an invalidating effect, but.....
- When assessing vulnerability under section 189(c) the LHA should have the PSED well in mind, and..
- There will be cases where an otherwise lawful decision on review will be unlawful because of non-compliance with PSED! (Neuberger, PSC, paras 78-79)

The Public Sector Equality Duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.



Duty to make enquiries

Housing Act 1996

184.— Inquiry into cases of homelessness or threatened homelessness.

(1) If the local housing authority have reason to believe that an applicant may be homeless or threatened with homelessness, they shall make such inquiries as are necessary to satisfy themselves—

- (a) whether he is eligible for assistance, and
- (b) if so, whether any duty, and if so what duty, is owed to him under the following provisions of this Part.

Cramp v Hastings [2005]

Equality Act 2010

“to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration”
(R(Brown) v SSWP [2008])

“did she fail to make further inquiry in relation to some such feature of the evidence presented to her as raised a real possibility that the appellant was disabled in a sense relevant to whether he acted ‘deliberately’”

(Pieretti v Enfield [2010])

Vulnerability (1)

Kanu v Southwark [2015]

Court of Appeal: s149 adds nothing to the duty to make necessary inquiries to determine whether a person is vulnerable on account of a disability.

Appeal to Supreme Court: whether reviewing officer failed to comply with PSED in according insufficiently careful or critical scrutiny to K's disability, the consequences to him of an adverse decision on vulnerability.

Vulnerability (2)

Lord Neuberger:

“Not vulnerable” decision overturned on other grounds but court laid down the approach to be adopted:

- Where the PSED is engaged a decision-maker must focus very sharply on:
 - Whether the applicant is under a disability or has another protected characteristic;
 - The extent of such disability;
 - The likely effect of the disability, when taken together with other features, on the applicant if and when homeless; and
 - Whether the applicant is “vulnerable” as a result.
- Will the courts adopt a “benevolent approach”?

Suitability (1)

Hackney LBC v Haque [2017]

- Appellant was vulnerable on account of mental and physical disabilities
- Appeal against suitability of hostel room
- Alleged unsuitability:
 - Size aggravated physical health problems
 - “No visitors” policy left him isolated
 - Lack of laundry facilities
 - Medication increased as a result
- Alleged failure to comply with the PSED as spelled out in *Kanu*

CA: plainly correct that the PSED is engaged in the course of any decision-making about the suitability of accommodation



Suitability (2)

CA: approach in *Kanu* plainly directed at vulnerability assessments rather than suitability or intentional homelessness

What does the PSED require?

Briggs LJ (suitability)	
(i) Recognition of disability	
(ii) Focus upon relevant aspects of disability	
(iii) Focus on consequences of disability	
(iv) Focus on particular needs in relation to accommodation cf. needs of those without disabilities	
(v) Possible need to treat more favourably	
(vi) Review of suitability with regard to those matters	

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What does the PSED require?

Briggs LJ (suitability)	Lord Neuberger (vulnerability)
(i) Recognition of disability	(i) Whether under a disability
(ii) Focus upon relevant aspects of disability	(ii) Extent of disability
(iii) Focus on consequences of disability	(iii) Effect of disability
(iv) Focus on particular needs in relation to accommodation cf. needs of those without disabilities	
(v) Possible need to treat more favourably	(iv) Whether vulnerable as a result
(vi) Review of suitability with regard to those matters	

Conclusion

- Priority need (*Kanu*)
- Intentional homelessness (*Pieretti*)
- Suitability (*Haque*)
- Homelessness (*Chatokai*)

“One approach to rule them all...?”





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Thank you

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