Priority Need

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LEGAL FRAMEWORK

1. Section 189(1) of the Housing Act 1996 provides:

"(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;
(d) a person who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster."

2. The Secretary of State has power to prescribe other descriptions of persons as having a priority need for accommodation (s.189(2)) and has done so in The Homeless Persons (Priority Need for Accommodation) (England) Order 2002 (SI 2002/2051). The additional categories may be summarised as follows:

- 16- and 17-year-olds;
- 18- to 20-year-old care leavers;
- vulnerable care leavers;
- vulnerable former members of the armed forces;
- vulnerable former prisoners; and,
- vulnerable persons fleeing violence or threats of violence.

3. The Code of Guidance considers priority need in Chapter 8.

VULNERABILITY

4. In practice, the most contentious cases are those involving decisions as to whether the applicant is *vulnerable* because of mental illness or handicap or physical disability: s.189(1)(c).

Old law – Pereira test

5. For some time, the test was that set out in *R. v Camden LBC Ex p. Pereira* (1998) 31 HLR 317, 330, CA: a person is vulnerable if he is less able to fend for himself than an ordinary homeless person so that injury or detriment to him will result when a less vulnerable man would be able to cope without harmful effects: *R. v Camden LBC Ex p. Pereira* (1998) 31 HLR 317, 330, CA.

6. In a number of decisions, the Court of Appeal approved an approach under which the person with whom the applicant being compared was an ordinary homeless person, *i.e.* a person with the characteristics which a homeless person commonly has, often using statistics to demonstrate that homeless persons generally had those characteristics: *Johnson v Solihull MBC* [2013]

EWCA Civ 752; [2013] HLR 39. For an example, see *Ajilore v Hackney LBC* [2014] EWCA Civ 1273; [2014] HLR 46, in which a decision that an applicant who was at risk of self-harming or suicide and lapsing into cocaine use was upheld because homeless persons generally suffered such risks.

Hotak – the comparator

7. This approach was disapproved of by the Supreme Court in the appeals in *Hotak v Southwark LBC; Kanu v Southwark LBC*; *Johnson v Solihull MBC* [2015] UKSC 30; [2016] AC 811; [2015] HLR 23. In *Hotak*, it was held that whether a person is considered to be vulnerable inevitably requires comparison with persons who would not be vulnerable. In carrying out this exercise, the authority should compare the applicant with an ordinary person if made homeless, not an ordinary, actually homeless person. Lord Neuberger said, at [53]:

   "… I consider that 'vulnerable' in s.189(1) connotes 'significantly more vulnerable than ordinarily vulnerable' as a result of being rendered homeless …".

Significantly? - Panayiotou

8. This begged the question as to what was meant by "significantly" more vulnerable: did that impose a high threshold? That issue was addressed by the Court of Appeal in *Panayiotou v Waltham Forest LBC; Smith v Haringey LBC* [2017] EWCA Civ 1624; [2018] QB 1232; [2017] HLR 48.

9. It was held that Lord Neuberger was not seeking to introduce a quantitative threshold. He was using "significantly" in a qualitative sense. The question to be asked is whether, when compared to an ordinary person if made homeless, the applicant, in consequence of a characteristic within s.189(1)(c), would suffer or be at risk of suffering harm or detriment which the ordinary person would not suffer or be at risk of suffering such that the harm or detriment would make a noticeable difference to his ability to deal with the consequences of homelessness.

10. What makes someone vulnerable? Lewison LJ said, at [40]:

    "… the relevant effect of the feature in question is an impairment of a person's ability to find accommodation or, if he cannot find it, to deal with the lack of it. The impairment may be an expectation that a person's physical or mental health would deteriorate; or it may be exposure to some external risk such as the risk of exploitation by others."

11. One issue is what attributes does the "ordinary person" have. An authority are not required to list the attributes of the ordinary person with whom the applicant is being compared: *Rother DC v Freeman-Roach* [2018] EWCA Civ 368; [2019] PTSR 61; [2018] HLR 22.

12. *Hotak* has been understood as meaning that the test for vulnerability is more readily met than it was under *Pereira*: *Hemley v Croydon LBC* [2018] HLR 1.

How is this working in practice? Consider *Rother DC v Freeman-Roach*. The applicant suffered from the following:

- anxiety and depression
- speech impediment as a result of strokes in 2006 and 2012
- high blood pressure
- osteoarthritis

13. The Court of Appeal upheld the authority's decision that he was not vulnerable. Note how the decision dealt with each issue.
    - anxiety and depression - treated with moderate doses of anti-depressants. (NB not been referred to a psychiatrist or to the community mental health team).
    - speech impediment as a result of strokes in 2006 and 2012 - not so serious as to prevent him from obtaining support and assistance
    - high blood pressure - controlled by medication
    - osteoarthritis - did not significantly impair his mobility

14. This is consistent with another point considered in *Hotak*. In *Hotak*, the applicant had learning disabilities but received support from his brother who, in essence, acted as his carer. The main issue was whether the authority were entitled to take into account the brother's support in deciding whether he had a priority need. The Supreme Court held (Lady Hale dissenting) that support from family members can be taken into account. More generally, however, support from other third parties is relevant: an applicant who would be vulnerable as a result of a physical or mental condition if it was not treated, but who is perfectly capable of visiting a doctor, collecting his medication from a pharmacist and administering that medication himself, would not be vulnerable when compared to an ordinary person when homeless.

What does homeless mean in the context of priority need decisions?

15. One point that is arising in a number of decisions derives from Lord Neuberger's comment in *Hotak* is that the expression "street homeless" should be avoided. Lord Neuberger said:

> "'Homeless', as defined in the 1996 Act, is an adjective which can cover a number of different situations, and the very fact that the statute does not distinguish between them calls into question the legitimacy of doing so when considering the nature or extent of an authority's duty to an applicant."

16. From this it is then argued that the authority can consider the applicant's position on the basis that he has accommodation but is homeless (*i.e.* "homeless at home" because the accommodation is not accommodation which it is reasonable for him to continue to occupy). I consider this to be misconceived. See Lord Neuberger at [37]: "Thus, the plain inference is that section 189(1)(c) directs an inquiry as to the applicant's vulnerability if he remains or becomes a person *without accommodation*" (emphasis added). Similarly, see Lady Hale at [93]: "The obvious answer is that they must be at

risk of harm from being *without accommodation*: the object of the section is to identify those groups who have a priority need for accommodation" (emphasis added).

PUBLIC SECTOR EQUALITY DUTY

17. Applicants with physical or mental disabilities or illnesses may be disabled persons for the purposes of the Equality Act 2010. This brings the public sector equality duty (PSED) under s.149, 2010 Act, into play.

18. In *Hotak*, the Supreme Court held that the PSED complements an authority's homelessness duties and requires them to focus sharply on:
    (i) whether the applicant is under a disability;
    (ii) the extent of such disability;
    (iii) the likely effect of the disability on the applicant, if and when homeless, when taken together with any other features; and,
    (iv) whether the applicant is vulnerable as a result.

19. In *Holmes-Moorhouse* [2009] UKHL 7; [2009] 1 WLR 413; [2009] HLR 34, it was said that the courts should take a "benevolent" and "not too technical" approach to review decisions and should not be "nit-picking". This now has to be read in light of the four factors set out in the foregoing paragraph.

MEDICAL EVIDENCE

20. Inevitably, much turns on the medical evidence provided to the authority and their own medical advice. The leading case on how to treat the evidence remains *Shala v Birmingham CC* [2007] EWCA Civ 624; [2008] HLR 8. The key points are follows.

- The authority must take into account all the medical evidence provided by the applicant, taking care to recognise differences in subsequent reports which may show that the condition was more severe than initially presented;
- The authority need to take care in how they refer to the applicant's condition. In *Shala*, the decision said that there was nothing particularly severe but the applicant's doctors had said that she was "very depressed", suffering from "severe" post-traumatic stress disorder and was on a "high dose" of anti-depressants.
- Where an authority's medical expert is not a psychiatrist, in weighing his comments against a psychiatrist's report, they must not fall into the trap of thinking that they are comparing like with like.
- Where the authority's expert has not examined the applicant, the authority need to take the lack of examination into account.

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