Neutral Citation Number: [2020] EWCA Civ 497

Case No: B5/2019/2078

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT WATFORD
Her Honour Judge Bloom
B02WD117

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8th April 2020

Before :

LORD JUSTICE LEWISON
LORD JUSTICE FLOYD
and
LORD JUSTICE COULSON

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Between :

STEPHEN MCMAHON	**Respondent**
-and-	
WATFORD BOROUGH COUNCIL	**Appellant**

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT WATFORD
His Honour Judge Rochford
F00WD831

Case No: B5/2020/0128

Between:

RALF KIEFER	**Respondent**
-and-	
HERTSMERE BOROUGH COUNCIL	**Appellant**

MR TOBY VANHEGAN & **MR MATTHEW LEE** (instructed by **Arkrights Solicitors**) for the **Respondent**
MR MICHAEL PAGET & MS ZOE WHITTINGTON & (instructed by **Watford Borough Council**) for the **Appellant**

MR TOBY VANHEGAN & MR MATTHEW LEE (instructed by **Arkrights Solicitors**) for the **Respondent**
MS CATHERINE ROWLANDS & MR ROWAN CLAPP (instructed by **Hertsmere Borough Council**) for the **Appellant**

Hearing date : 18th March 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10am on Wednesday 8th April 2020.

Lord Justice Lewison:

Introduction

1. These two appeals raise the question of the interaction between a determination whether an applicant for assistance under the homelessness legislation is "vulnerable" and compliance with the public sector equality duty ("the PSED").

2. There is a further potential issue about the appropriate remedy in the event that a court decides that the reviewing officer has made an error of law.

3. We were informed at the hearing that a different constitution of this court had heard an appeal in *Luton Community Housing Ltd v Durdana* which might have an impact on the issues in this appeal. We therefore said that we would wait until judgment in that appeal has been given, and also allow the parties an opportunity to make written submissions about it. Judgment in *Luton Community Housing Ltd v Durdana* was handed down on 26 March 2020: [2020] EWCA Civ 445. We received written submissions from the parties, the last of which was sent on 2 April 2020.

The basic statutory framework

4. A local housing authority has statutory duties to the homeless. The extent of those duties varies. Where a person is homeless, has not become homeless intentionally and is in priority need, that duty is a duty to ensure that suitable accommodation is available for their occupation (section 193(2). There are some categories of person who automatically qualify as having a priority need: pregnant women, or people made homeless by flood, fire or other disaster, for example. But in other cases a comparative test needs to be applied. The particular category of person with whom we are concerned is described in section 189 (1) (c) of the Housing Act 1996:

> "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."

5. In performing its functions under the homelessness legislation a local authority must also comply with the PSED. The PSED is laid down by section 149 of the Equality Act 2010 and provides, so far as relevant:

> "A public authority must, in the exercise of its functions, have due regard to the need to –
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
>
> (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;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
>
> (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. Relevant protected characteristics include disability. Section 6 of the 2010 Act provides that a person has a disability if he has a physical or mental impairment which has “a substantial and long-term effect” on his ability to carry out normal day-to-day activities. Section 212 of that Act defines “substantial” as “more than minor or trivial”. Schedule 1 paragraph 5 of the 2010 Act provides:

> “(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
>
> (a) measures are being taken to treat or correct it, and
>
> (b) but for that, it would be likely to have that effect.
>
> (2) “Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.
>
> (3) Sub-paragraph (1) does not apply—
>
> (a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable

> by spectacles or contact lenses or in such other ways as may be prescribed;
>
> (b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed."

7. Schedule 1 paragraph 1 enables regulations to be made providing for particular conditions to be, or not to be, an impairment.

McMahon v Watford BC

8. Mr McMahon applied to Watford for assistance on 10 October 2014. On 1 May 2015 Watford decided that he was not in priority need. Mr McMahon asked for a review of that decision. The review was carried out by Mr Minos Perdios who upheld the decision in his letter of 18 November 2015. Mr McMahon appealed against that decision.

9. The extraordinary length of time that this appeal has been outstanding is in part attributable to an agreement to stay the appeal pending the decision of this court in *Haque v Hackney LBC* and *Panayiotou v Waltham Forest LBC*, both of which I will consider in due course. HHJ Bloom allowed Mr McMahon's appeal. She held that although Mr Perdios had not applied the wrong test in his approach to the question whether Mr McMahon was vulnerable, he had not demonstrated that he had properly complied with the PSED.

10. Although this is, in form, an appeal against her decision, it is in substance an appeal against Mr Perdios' decision. We must concentrate on the latter.

Kiefer v Hertsmere BC

11. Mr Kiefer first applied to Hertsmere on 19th December 2016. Hertsmere determined that he was homeless and eligible for assistance but not in priority need. That decision was quashed on 13 September 2018. So Hertsmere undertook another review. The review was carried out by Ms Sally Kaissi, a housing review officer. She decided that Mr Kiefer was homeless and eligible for assistance but not in priority need. The reason for her conclusion was that despite his medical condition, Mr Kiefer was not vulnerable. Mr Kiefer appealed against that decision.

12. HHJ Rochford held that Mr Kaissi had correctly assessed Mr Kiefer's vulnerability. There was no flaw in the decision on that account. There is no cross-appeal against that conclusion. But the judge nevertheless quashed the decision, on the ground that Ms Kaissi had not demonstrated that she had complied with the PSED.

13. Once again this is, in form, an appeal against Judge Rochford's decision, it is, in substance, an appeal against Ms Kaissi's decision. We must concentrate on the latter.

The approach to decisions of a reviewer

14. Section 203 (4) of the Housing Act requires reviewing officers to give reasons for their decisions. Section 149 of the Equality Act imposes no separate duty to give reasons: *Haque v Hackney London Borough Council* [2017] EWCA Civ 4, [2017] PTSR 769.

15. Where it is alleged that a review decision should be quashed, it is for the applicant to show that the reviewer has made an error that undermines the decision; it is not for the reviewer to demonstrate that he has not: *Freeman-Roach v Rother District Council* [2018] EWCA Civ 368, [2019] PTSR 61.

16. In examining the reasons for a decision, the court should adopt a benevolent approach. It should not take too technical a view of the language used, or search for inconsistencies, or adopt a nit-picking approach. Its assessment must be realistic and practical: *Holmes-Moorhouse v Richmond upon Thames London Borough Council* [2009] UKHL 7, [2009] 1 WLR 413. The reviewing officer is not writing an examination paper in housing law. Nor are they required to expound on the finer points of a decision of the Supreme Court: *Freeman-RoUKSC ach*.

17. This approach applies both to the question of vulnerability and also to the question whether the PSED has been fulfilled. In *Poshteh v Kensington and Chelsea Royal London Borough Council* [2017] UKSC 36 the question was whether the reviewer had lawfully determined that accommodation was suitable for Mrs Poshteh, having regard to her mental condition. The PSED was relied on. Lord Carnwath said at [39]:

> "In my view, the appeal on this issue well illustrates the relevance of Lord Neuberger's warning in *Holmes-Moorhouse* … against over-zealous linguistic analysis. This is not to diminish the importance of the responsibility given to housing authorities and their officers by the 1996 Act, reinforced in the case of disability by the Equality Act 2010. The length and detail of the decision letter show that the writer was fully aware of this responsibility. Viewed as a whole, it reads as a conscientious attempt by a hard-pressed housing officer to cover every conceivable issue raised in the case. He was doing so, as he said, against the background of serious shortage of housing and overwhelming demand from other applicants, many no doubt equally deserving."

The test of vulnerability

18. The starting point for the test of vulnerability is now *Hotak v Southwark LBC* [2015] UKSC 30, [2016] AC 811. In that context, *Hotak* has been considered in a number of subsequent cases in this court. They include *Panayiotou v Waltham Forest London Borough Council* [2017] EWCA Civ 1624, [2018] QB 1232 and *Guiste v Lambeth LBC* [2019] EWCA Civ 1758.

19. *Hotak* establishes that the assessment of vulnerability is a comparative exercise. The comparison is between the applicant and an ordinary person if made homeless. The assessment is a practical and contextual one taking into account all relevant features. If the applicant can be expected to receive services, support or help from third parties, that forms part of the assessment. The relevant feature which is said to give rise to vulnerability must have a causative link with the effect of homelessness on the applicant; an impairment of a person's ability to find accommodation or, if he cannot find it, to deal with the lack of it. The overall question is whether, taking everything into account, the applicant is "significantly more vulnerable than ordinarily vulnerable" as a result of being rendered homeless.

20. In *Panayiotou* I attempted to explain what *Hotak* meant by "significantly" which was a word that had not featured in previous cases. What I said was that:

> "… the question to be asked is whether, when compared to an ordinary person if made homeless, the applicant, in consequence of a characteristic within section 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. To put it another way, what Lord Neuberger PSC must have meant was that an applicant would be vulnerable if he were at risk of more harm in a significant way. Whether the test is met in relation to any given set of facts is a question of evaluative judgment for the reviewer."

21. If the reviewer concludes that the applicant is "significantly more vulnerable than ordinarily vulnerable" in that sense, the comparative exercise is complete. There is no added requirement of functionality: *Guiste* at [69].

Mr Perdios' decision

22. Mr Perdios began by setting out the material that he considered, which included a wealth of information about Mr McMahon's physical and mental health. The list also contained a reference to section 149 of the Equalities Act 2010. Under the heading "test of vulnerability" he referred to the then recent decision of the Supreme Court in *Hotak*. The test that he adopted was whether Mr McMahon was significantly more vulnerable as a result of being made homeless than an ordinary person would have been if made homeless. He said that the assessment should be a practical and contextual assessment of the applicant's physical and mental ability if rendered homeless; and that account should be taken of services and support available to the applicant.

23. In paragraph 6 of his decision letter Mr Perdios said:

> "I can confirm that I have reached this decision with the equality duty well in mind and carried out this exercise in substance, with rigour and with an open mind. I have focused very sharply on (i) whether you are under a disability (or have another relevant protected characteristic) (ii) the extent of such disability, (iii) the likely effect of the disability, when taken together with any other features on you if and when homeless and (iv) whether you as a result are "vulnerable". This will be evident throughout my letter."

24. That formulation is taken directly from the judgment of Lord Neuberger in *Hotak*. It is also clear from the last quoted sentence that Mr Perdios did not intend to devote a separate section of his decision to the PSED; but that he would have due regard to it when assessing Mr McMahon's vulnerability.

25. Mr Perdios went on to consider a number of different medical problems from which Mr McMahon suffered. He first considered back, neck, shoulder and arm pain. He said that the key thing he needed to consider was not the diagnosis, but:

> "… how this impacts on you and the level of harm or even injury or detriment you will suffer as a result of being homeless and compare this with an ordinary person if made homeless."

26. He said that he was not satisfied that Mr McMahon would suffer "significant or even more harm than an ordinary person if made homeless." He went on to explain why. Although Mr McMahon suffered from pain, his GP reported:

> "… that you can walk independently with no reported limits, that you never use a wheelchair, that you do not require any overnight care, that you do not need help with activities of daily living and that you do not require any support to maintain independent living."

27. He considered Mr McMahon's mobility, his participation in a number of different activities (including walking his dog, charity fundraising, planning and cooking his evening meal, accessing food banks and dressing and washing himself and his clothes.) As he put it:

> "You confirmed that when you wake up you take your dog out for a walk and do the same later on in the day. You also plan your own evening meal and are able to use appliances and cook meals at your own pace. You have been able to access food banks. You can dress yourself and use a washing machine."

28. He went on to note that Mr McMahon had no issues with accessing public transport; and that he was able to manage stairs without difficulty. He concluded that Mr McMahon did not have difficulty coping with his current situation. He concluded:

> "It is quite clear that you have sufficient capabilities/resources available to you to ensure that you are not vulnerable."

29. Mr Perdios went on to consider Mr McMahon's asthma which he thought had no significant impact "on your ability to look after yourself or your mobility"; and Mr McMahon's mental health. He noted that Mr McMahon's medical records showed no sign of mental illness during the preceding year, despite his having been homeless during that time. He was still able to keep himself safe and manage his affairs. He added:

> "Furthermore, you do not need any overnight or any support with activities [of] daily living."

30. He then considered Mr McMahon's history of alcohol and behavioural problems; and the medication that Mr McMahon was taking. He was able to access his GP and get medication despite the fact that he was homeless.

31. Having considered these elements sequentially, Mr Perdios then drew them all together. As he put it, he had "looked into all your medical problems and circumstances together as a whole". He concluded:

> "Having done so, I am satisfied that there is nothing that significantly differentiates you from ordinary people who are homeless for the reasons given above. It does appear to me that your capabilities are not significantly compromised and you are quite capable of managing independently."

Ms Kaissi's decision

32. Ms Kaissi described a number of complaints from which Mr Kiefer suffered. They were intermittent claudication, severe wrist pain and type 2 diabetes. He also suffered from depression and low mood. She dealt first with the physical problems.

33. Mr Kiefer's wrist pain was caused by a road traffic accident in March 2015 in which he fractured his wrist. By March 2019 he was still awaiting surgery. In July 2017 his GP wrote to say that Mr Kiefer was unable to work because of pain in his wrists. Ms Kaissi commented:

> "He is currently prescribed with pain-killers and there is no information to suggest that he requires any special wrist bands or that his activities are restricted due to his wrist pains."

34. She turned next to claudication. She explained that this is a pain due to a build-up of fats, that such pains usually last for a few minutes; and they stop once the patient rests their leg. She commented:

> "The condition requires Mr Kiefer to change his lifestyle and to exercise more as no medical intervention is usually required. There is no information to suggest that Mr Kiefer's mobility is currently restricted by his condition and no information to suggest that he is known to any specialist or he requires any ongoing treatments."

35. She noted Mr Kiefer's diabetes and that he was prescribed medication for the management of his health. Although his diabetes was poorly controlled due to his homelessness, there was no information to suggest that his diabetes had deteriorated or that he suffered from complications. He was not insulin dependent requiring special storage (such as a refrigerator). Ms Kaissi concluded:

> "I am of the opinion that Mr Kiefer is still able to take his medication and approach his GP for help whilst homeless."

36. Her overall conclusion was as follows:

> "Based on the above, I am not satisfied that Mr Kiefer is vulnerable due to his physical health problems. It's evident that Mr Kiefer's ability to carry out daily activities has not been restricted by his leg and wrist pains and no information to

> suggest that he will not be able to continue his diabetes medication and approach his GP when required."

37. Ms Kaissi then turned to the mental health problems. She noted Mr Kiefer's low mood and depression. But she said:

> "Although I note that Mr Kiefer suffers from depression and low mood, I am satisfied that his ability to manage daily activities has not been affected by the conditions. Mr Kiefer has been able to approach his GP and also approach various services whilst homeless."

38. She said that she had considered all relevant factors including:

> "(a) The nature and extent of the illness;
>
> (b) The relationship between the illness and the individual's housing difficulties; and
>
> (c) The relationship between the illness and other factors such as drug/alcohol misuse, offending behaviour, challenging behaviour and age."

39. She then considered all the various problems in the round and concluded:

> "I acknowledge that Mr Kiefer suffers from Intermittent Claudication, severe wrist pain and type 2 Diabetes. He also suffers from low mood and depression however he is not linked with any mental health services. I am satisfied that Mr Kiefer demonstrates an ability to manage daily activities with no support required. He has been living independently since his eviction and he was able to approach housing services and also approach you with his housing review.
>
> Therefore, I am not satisfied that he is vulnerable due to his medical health issues."

40. She went on to say in a further part of the review decision that there was nothing in his medical records "suggestive of an inability to carry out daily activities;" and reiterated that there was no indication from the facts that Mr Kiefer was unable to "undertake any task associated with daily living". She reaffirmed her conclusion that he was not vulnerable.

41. Under the heading "The Equality Act" she said:

> "I can confirm that I have also had regard to the Equality Act 2010 (section 149). For the purposes of the Act, disability is defined as "a physical or mental impairment that has a substantial and long-term adverse effect on the ability to carry out normal day-to-day activities".

> I acknowledge that Mr Kiefer suffers from Intermittent Claudication, severe wrist pain, type 2 Diabetes and depression. I am of the opinion that his depression could be regarded as a disability or relevant characteristic under the Equality Act. However I am not satisfied that Mr Kiefer should be classed as vulnerable based on his depression alone. I am satisfied that his health problems (a) can be ameliorated with treatment (b) that treatment would be able to continue if he is homeless; and (c) as a result, if rendered homeless, Mr Kiefer would not suffer any significant harm or detriment than an ordinary person. For this reason I am not satisfied that he is vulnerable as he is able [to] cope with homelessness."

The interaction between vulnerability and the PSED

42. The starting point, once again, is *Hotak*; or, more accurately, *Kanu v Southwark LBC* (heard together with *Hotak*) which was the only one of the appeals that directly raised the question of the PSED. Lord Neuberger quoted extensively from the 14-page review decision. He noted that the reviewer had said that "the public sector equality duty informs the decision making process; however it does not override it". It is also to be noted that the reviewer did not specifically identify a "disability" as that word is defined by the Equality Act 2010; and, in addition, placed considerable reliance on the assistance that Mr Kanu obtained from his wife and son to perform the tasks of daily living that he could not do for himself.

43. Before he discussed the PSED Lord Neuberger considered the question of "vulnerability". One of the matters under debate in *Hotak* was whether the assessment of vulnerability was a one-stage or a two-stage test. At [46] Lord Neuberger gave that debate short shrift:

> "Eighthly, the cases reveal a disagreement as to whether section 189(1)(c) gives rise to a two-stage test— (i) whether the applicant is "vulnerable", and (ii) whether it is as a result of "old age, mental illness or handicap or physical disability or other special reason"—or whether there is a single, composite test. This is a somewhat arid argument, and I am unconvinced that it is sensible to force housing authorities and reviewing officers into a straitjacket on this sort of issue. In any event, the correct answer may depend on the facts of the particular case. However, given the reference to "other special reason", and given the fact that in many cases there will be a mixture of reasons as to why an applicant is said to be vulnerable, I suspect that the one-stage test will probably be more practical in most cases."

44. The key points here are:

 i) To avoid an arid debate.

 ii) Not to force reviewing officers into a straitjacket; and

iii) To adopt a test that is practical.

45. Although there is a substantial overlap between a vulnerability assessment and the PSED there are also differences. The most important difference, to my mind, is that whether a person has a disability is to be assessed without reference to measures being taken to correct or treat the disability, whereas vulnerability is to be assessed taking into account such measures. As Lord Neuberger put it in *Hotak* at [64]:

> "As Lord Wilson JSC pointed out, this conclusion is supported by considering an applicant with a physical or mental condition which, if not treated, would render him vulnerable, but which can be satisfactorily treated by regular medication. If such an applicant, when homeless, would be perfectly capable of visiting a doctor to obtain a prescription and a pharmacist to collect his medication, and then of administering the medication to himself, it would be unrealistic to describe him as "vulnerable", when compared with an ordinary person when homeless. Mr Paul Brown QC tried valiantly to meet that point, but it does not appear to me that it is answerable."

46. There are other differences too. In *Panayiotou* this court rejected the supposed analogy between disability (as defined for the purposes of the 2010 Act) and vulnerability. I said at [57]:

> "In the first place the defined term is a different word. Second, although it is true that there is a blanket prohibition on discrimination on the ground of disability, there is also a positive duty to treat a disabled person more favourably. That duty is a duty to make "reasonable adjustments". What those adjustments are in any particular case must depend on the extent of the disability in question. By contrast, if a homeless person has a priority need and has not become homeless intentionally the local authority owes the same duty to that person, namely to secure the provision of accommodation, irrespective of whether the test (whatever it is) is only just satisfied or is obviously satisfied by a wide margin. The degree of disability will no doubt go to the fulfilment of that duty by securing the provision of suitable accommodation, but the duty itself will have been triggered. Third, whereas the test of disability in the Equality Act 2010 takes an ability to carry out normal day to day activities as its reference point, Part VII of the Housing Act 1996 is all about finding accommodation. It is also important to emphasise that an assessment of whether someone is vulnerable within the meaning of section 189(1)(c) is a "contextual and practical" assessment: the *Hotak* case, at para 62. In the case of a person who falls within the category of "old age" the focus is not on his or her chronological age but on the effect of old age on his or her ability to deal with being homeless. Likewise in the case of a disabled person the focus is not on the extent of his or her disability, but on the impact of that disability, together with whatever support is available, to

> deal with being homeless. By contrast the definition of "disability" in the Equality Act 2010 is concerned with an individual's unaided capacity to carry out normal day-to-day activities. Fourth, the use of the definition in the Equality Act 2010 focuses on only some of the characteristics in section 189(1)(c) whereas the concept of vulnerability applies to all of them."

47. In *Hotak* at [78] Lord Neuberger said that the PSED was "complementary" to the assessment of vulnerability. As Wilson LJ put it in *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, [2011] PTSR 565 at [26]:

> "The part of [the PSED] with which we are concerned is designed to secure the brighter illumination of a person's disability so that, *to the extent that it bears upon his rights under other laws*, it attracts a full appraisal." (Emphasis added)

48. This is a key point. The PSED is not a free-standing duty. It applies to the way in which a public authority exercises its functions. Those functions derive from other laws. Patten LJ made a similar point in *Durdana* at [17] and [19]. The relevant function in this case was to determine whether the applicant in question was "vulnerable" for the purposes of section 189 (1) (c). In addition, as many cases have emphasised, the PSED is not a duty to achieve a result, but a duty to have due regard to achieve the goals identified in section 149. Lord Neuberger referred to these cases in *Hotak* at [73] and [74].

49. In *Hotak* Lord Neuberger also warned against formulaic and high-minded mantras. He continued in [78]:

> "It is therefore appropriate to emphasise that the equality duty, in the context of an exercise such as a section 202 review, does require the reviewing officer to focus very sharply on (i) whether the applicant is under a disability (or has another relevant protected characteristic), (ii) the extent of such disability, (iii) the likely effect of the disability, when taken together with any other features, on the applicant if and when homeless, and (iv) whether the applicant is as a result "vulnerable"."

50. In the following paragraph he went on to deal with the argument that in the context of an assessment of vulnerability, the PSED added nothing. He said:

> "I quite accept that, *in many cases*, a conscientious reviewing officer who was investigating and reporting on a potentially vulnerable applicant, and who was unaware of the fact that the equality duty was engaged, could, despite his ignorance, *very often* comply with that duty. However, there will undoubtedly be cases where a review, which was otherwise lawful, will be held unlawful because it does not comply with the equality duty." (Emphasis added)

51. He did not give any examples to illustrate that last point, but it is worth noting that he included both the investigation and reporting stages of the review. In *Pieretti*, for example, the housing authority had failed to undertake sufficient inquiries into the applicants' mental problems before coming to a decision that they were intentionally homeless. Another example canvassed in argument was a person suffering from agoraphobia who failed to attend for interview and was rejected on that account. I note that in *Durdana* Patten LJ said at [25] that although it was theoretically possible for the duty to be complied with in ignorance of what it consists of, "such cases are likely to be rare". I do not consider that we need to adjudicate between Lord Neuberger and Patten LJ; not least because in neither of our cases was the reviewing officer unaware of the PSED. The answer may well lie in the focussed nature of a vulnerability assessment of a particular individual (as in *Kanu*) compared with a decision whether or not to take proceedings for possession based on a pre-existing policy (as in *Durdana*). This a point which HHJ Bloom made in the judgment under appeal in *Durdana*. As she put it, in a vulnerability assessment "the whole focus is on the extent of the disability and the consequences of the same."

52. Mr Vanhegan submitted that in paragraph [78] of *Hotak* Lord Neuberger was laying down a sequential test which a reviewing officer must follow. Each of the three questions must be addressed before the reviewing officer is able to answer the fourth and final question. I do not agree.

53. It would be extraordinary if, having dismissed the debate about whether the assessment of vulnerability was a two-stage or a one-stage test as "arid", Lord Neuberger intended to lay down a rigid four stage test which had to be applied in all cases engaging the PSED. That would, indeed, be to force reviewing officers into a straitjacket. In addition, if the application of a four stage sequential test had been essential, the Supreme Court could not have upheld the review decision in Mr Kanu's case. Lord Neuberger said at [82] that there was no breach of the PSED in Mr Kanu's case. He said:

> "The letter appears to identify each aspect of his disability; to address with care the questions of how they would be dealt with if he was homeless; how they would affect him, if he was homeless; whether he would therefore be vulnerable; and why, in Ms Emmanuel's view, he would not."

54. If one examines those parts of the review decision which Lord Neuberger quoted or extracted at [18], it is quite clear that the reviewing officer did not apply the four stage test. Indeed, she made no finding whether or not Mr Kanu suffered from a disability as defined for the purposes of the Equality Act. So the making of such a finding cannot be a fatal flaw in a review decision, contrary to what both judges held in our two cases. Nor did she consider what the effect would be on Mr Kanu if he ceased to receive the support of his wife and son. So she was not even considering "disability" as defined in the Equality Act. Mr Vanhegan suggested that there might be other parts of the review decision which did address those questions. But it is normal judicial practice to quote or summarise those parts of a decision under scrutiny in so far as relevant for the issue under consideration. In my judgment we must assume that all relevant parts of the review decision in *Kanu* are adequately quoted or summarised in Lord Neuberger's judgment.

55. The difference between disability (i.e. impairment of ability to perform day-to-day activities without assistance) and vulnerability (dealing with homelessness with such support as is available) is not a consideration that features in the transition between questions (i) to (iii) in paragraph [78] of Lord Neuberger's judgment, and question (iv); even though Lord Neuberger himself had emphasised the importance of support in the assessment of vulnerability at [64]. I agree with Mr Paget and Ms Rowlands that it would be highly artificial if, in order to answer the first three questions, the reviewing officer had to imagine a world in which the applicant was bereft of any support or medication; but then, in order to answer the fourth question, the reviewing officer had to add back in such support and medication as was available to the applicant. That would not, in my judgment, meet Lord Neuberger's criterion of a practical test.

56. Mr Vanhegan submitted that in considering whether a person suffered from an impairment of their abilities to carry out normal day to day tasks, it was necessary to concentrate on what a person could not do, rather than on what they could do. He also submitted that a disability could also consist of an impairment in carrying out day-to-day tasks at work, as well as in and about the home. As an elucidation of the meaning of disability in the abstract that is no doubt right. But that is not the task that Parliament has set for the reviewing officer. As Lord Neuberger's third question makes clear, what is under consideration is the likely effect of the disability, when taken together with any other features, on the applicant if and when homeless. An inability to work is only relevant if it would have an effect on the applicant if and when homeless. In other words, what needs to be considered in an assessment of vulnerability is that which is relevant to a person's ability to deal with the consequences of being homeless.

57. Wilson LJ made a similar point in *Pieretti*. As I have said, the issue in that case was whether Mr and Mrs Pieretti were "intentionally" homeless. At [33] Wilson LJ said:

> "But the law does not require that in every case decision-makers under section 184 and section 202 must take (active) steps to inquire into whether the person to be subject to the decision is disabled and, if so, is disabled *in a way relevant to the decision*. That would be absurd."

58. At [35] he said:

> "In the context of her duty of review under section 202 of the 1996 Act I would refine the question as follows: 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 applicant was disabled *in a sense relevant to whether he acted "deliberately"* within the meaning of subsection (1) of section 191 of the 1996 Act…"

59. It is clear from these passages that, however extensive the duty is, it is confined to disabilities relevant to the particular decision.

60. The application of the PSED to the homelessness code was next considered by this court in *Haque*. The context was not whether Mr Haque was in priority need on

account of vulnerability: Hackney had decided that he was. The issue was the suitability of the accommodation that he was offered. Briggs LJ pointed out at [27] that:

> "… there is a substantial, but not complete, overlap between those with priority need for accommodation under the HA and those with protected characteristics under the EA section 149(7). Overlapping categories include age, physical or mental disability and pregnancy. More generally, it may be said that all those identified as having priority need for accommodation constitute classes of society who can be said to be exposed to particular vulnerability as the result of homelessness."

61. At [47] he said:

> "I consider that the judge was wrong to base his analysis upon a supposed general principle "in almost all circumstances" requiring the reviewing officer to spell out in express terms reasoning about whether an applicant does or does not have a protected characteristic, whether the PSED duty is in play and if so with what precise effect, even though the adoption of such a disciplined approach may in many cases put the issue of compliance with the PSED beyond reasonable doubt. In a case such as the present, where all the applicant's criticisms of the adequacy of his accommodation derive from precisely identified aspects of his disabilities, and from their alleged consequences, it seems to me that, adapting Lord Neuberger PSC's words in *Hotak's* case …a conscientious reviewing officer considering those objections in good faith and in a focused manner would be likely to comply with the PSED even if unaware of its existence as a separate duty, or of the terms of section 149 ."

62. Once again, it is clear that a reviewing officer need not make findings about whether an applicant does or does not have a disability, or the precise effect of the PSED. This chimes with my interpretation of what Lord Neuberger said in *Hotak*.

63. On the facts of *Haque* it was held that the reviewing officer had properly performed his function; and had had due regard to the PSED, even though he had not said whether Mr Haque had a disability as defined by the Equality Act.

64. *Haque* has been followed and applied in subsequent cases: *Lomax v Gosport BC* [2018] EWCA Civ 1846; [2018] HLR 40 (whether it was reasonable for a disabled person to continue to occupy accommodation); *Kannan v Newham LBC* [2019] EWCA Civ 57, [2019] HLR 22 (whether temporary accommodation had ceased to be suitable). In both those cases this court held that a review decision was vitiated by non-compliance with the PSED because of a failure to take specific features of the case into account. But as McCombe LJ pointed out in *Powell v Dacorum BC* [2019] EWCA Civ 23, [2019] HLR 21 at [44]:

> "The impact of the PSED is universal in application to the functions of public authorities, but its application will differ from case to case, depending upon the function being exercised and the facts of the case."

65. Mr Vanhegan relied on *Durdana* where the landlord was held to have been in breach of the PSED. But that was a very different case. In that case the relevant officer (Ms Wilson) knew that the tenants and their daughter had disabilities; but did not consider how their disabilities might be affected by eviction. As Patten LJ put it at [14]:

> "Ms Wilson accepted in cross-examination that she did not know what the effect of A's disability was on her day-to-day living or what impact their eviction would have on either A or her mother. This is evident from paragraph 2 of the review document. Under the heading "What issues are arising as a consequence of the tenant's disability?" Ms Wilson has summarised the circumstances in which the respondent and her family came to be granted the tenancy but says nothing about the effect of an eviction on their disabilities."

66. That is a far cry from our cases, in which each of the reviewing officers considered the effect of homelessness on the physical and mental problems suffered by Mr McMahon and Mr Keifer respectively.

67. The greater the overlap between the particular statutory duty under consideration and the PSED, the more likely it is that in performing the statutory duty the authority will also have complied with the PSED even if it is not expressly mentioned: *R (McDonald) v Kensington and Chelsea Royal London Borough Council* [2011] UKSC 33, [2011] PTSR 1266. By the same token, the more that a particular decision to which the PSED applies is tailored to the facts of a particular case, rather than being a broad formulation of policy, the closer will be the connection between the PSED and consideration of the facts of a particular case. As the reviewing officer said in *Kanu*, the PSED informs the decision-making process; it does not override it. Or, to use Lord Neuberger's word, the two are "complementary": in other words, they go hand in hand.

68. In the case of a vulnerability assessment, there is substantial overlap between the requirements of the homelessness code and the PSED. In addition, any vulnerability assessment will be concentrated on the particular facts of the case in question. What the reviewing officer must consider is whether a person is vulnerable as a result of "mental illness or handicap or physical disability". It is difficult to see how that task can be performed without a sharp focus on the extent of the illness, handicap or physical disability; and its effect on the person's ability to deal with the consequences of homelessness. What matters is the substance of the assessment not its form. Provided that a reviewing officer appreciates the actual mental or physical problems from which the applicant suffers, the task will have been properly performed. As Ms Rowlands put it, the task of the reviewing officer is not to label; it is to understand. Just as a failure to mention the PSED or a failure to tabulate each feature of it will not necessarily vitiate a vulnerability assessment, so a mere recitation of the PSED will not save such an assessment if it has failed in substance to address the relevant questions: *Kannan* at [24].

69. In *Hotak* Lord Neuberger went on to say at [80]:

> "Section 189(1)(c) is part of a scheme whose aim is to assist homeless people generally, and in particular to allocate the scarce resource of accommodation available to an authority to particular classes of homeless people. In section 189(1), Parliament has decided the principles by reference to which that allocation is to be effected, and those principles cannot possibly be described as unreasonable. When an authority assesses what support and care would be available to an applicant with a relevant protected characteristic, and whether that would, as it were, take him out of section 189(1)(c), it is simply putting Parliament's decision into effect."

70. Accordingly, if a reviewer finds that a person is vulnerable (whether by reason of a protected characteristic or not) the duty to find that person suitable accommodation is triggered. If a person is determined to be vulnerable, the same duty to find accommodation applies whether the extent of his vulnerability is great or small; and whether caused by a disability as defined by the Equality Act or by some other mental illness, handicap or physical disability as described in section 189 (1) (c) of the Housing Act. The duty is the same in both cases. That was the conclusion that this court reached in *Kanu* ([2014] EWCA Civ 1085, [2014] PTSR 1197). At [52] Underhill LJ recorded the submission for the council:

> "Thus the council is required under the 1996 Act to treat any person who is disabled within the meaning of the 2010 Act as in priority need—and thus (subject to the questions of intentional homelessness and eligibility for assistance) to secure them accommodation—*if their disability renders them vulnerable*. That fully satisfies the duty to take due steps to take account of their disability." (Emphasis added)

71. He commented at [53]:

> "In my view that submission is well founded. I cannot see how the public sector equality duty can extend to requiring a housing authority to secure accommodation for a disabled person in circumstances where their disability did not render them vulnerable. It is true that the definition of "vulnerable" adopted in the case law means that it is not enough to say "I am disabled and homelessness will have an adverse impact on me": he must be able to say "by reason of my disability I will be less able to cope with homelessness than a non-disabled person". But applying that test—which is the test prescribed by Parliament—does not mean that the authority is not taking due steps to take account of the disability: rather, it puts the focus where it should be, on the disadvantage which he suffers as a result of his disability."

72. I do not consider that anything that Lord Neuberger said when the case reached the Supreme Court casts any doubt upon that proposition. Indeed, the fourth and final

question he formulated in paragraph [78] of his judgment reinforces the proposition that the key question is whether a person is vulnerable for the purposes of section 189 (1) (c). So too does the fact that Mr Kanu's appeal to the Supreme Court was dismissed, despite the reviewing officer not having followed the four stage sequential test or, indeed, anything like it.

73. Suppose that, having considered all the facts, a reviewing officer decides that a homeless person is not vulnerable for the purposes of section 189 (1) (c). He goes on to consider whether that person is disabled for the purposes of the 2010 Act and decides that he is. I cannot see how it can realistically be suggested that, having decided that a person is not vulnerable, the fact that he is disabled gives him automatic priority. Some categories of person are entitled to automatic priority: pregnant women among them. But the disabled are not. They are only entitled to priority if the disability causes them to be vulnerable. If they are not vulnerable, despite having a disability, then a decision that they do not have a priority need is, to use Lord Neuberger's phrase, "simply putting Parliament's decision into effect". Now suppose that a reviewing officer decides that a homeless person is vulnerable as a result of physical disability. The full housing duty is therefore triggered. What difference can it make to the triggering of that duty, if, in addition, the reviewing officer decides that that person is also disabled? The same duty will have been triggered.

74. What differs is the way in which that duty, once triggered, is satisfied. It may bear on the question whose case, among all those in priority need, should be dealt with first. It may bear on the nature of the accommodation to be offered. The accommodation must be suitable, having regard to any disability. So a person who is both vulnerable and disabled will have to be provided with accommodation more tailored to their particular needs. That was the situation in both *Haque* and *Kannan*. In the first of these cases the housing authority had complied with the PSED. In the second it had not.

75. In addition, the question of disability may bear on the question whether a person is homeless in the first place. That was the situation in *Lomax*, where the housing authority had also failed to comply with the PSED.

Did Mr Perdios comply with the PSED?

76. HHJ Bloom was troubled by the fact that Mr Perdios did not say in terms whether he considered whether Mr McMahon was or was not disabled within the meaning of the Equality Act 2010.

77. In my judgment the judge took far too narrow a view. As *Haque* shows, it is not necessary for a reviewing officer to make an express finding whether a person's conditions do or do not amount to a disability for the purposes of the Equality Act. So far as I can tell, the same is true of *Kanu*.

78. Mr Perdios said in terms that he had had regard to the PSED (and indeed to the way in which Lord Neuberger said that it should be applied) and that his consideration of it would be an integral part of his assessment.

79. And so it was. Again and again he described Mr McMahon's complaints, and said that they did not impact on "activities of daily living;" that he had no mobility problems; that he could dress and wash himself and plan and cook his meals. He did not need "any support with activities of daily living". Given that the test of disability under the Equality Act is whether a person has an impairment that has a substantial and long-term effect on his ability to carry out normal day-to-day activities, it seems to me to be clear that, reading the decision as a whole, Mr Perdios decided that Mr McMahon was not relevantly disabled. To quash the decision because Mr Perdios did not adopt a particular formula to express his clear conclusion is, in my judgment, to ask far too much of a reviewing officer.

80. Be that as it may, what Mr Perdios did was to consider carefully whether Mr McMahon's problems (both individually and cumulatively) impacted on his ability to carry out normal day-to-day activities and, more particularly, (whether or not they were disabilities as defined by the Equality Act) whether they made him "vulnerable" for the purposes of section 189 (1) (c). That was the bottom line and, as I have said, the only statutory question that Mr Perdios was required to answer.

81. There is no evidence (or at least none that we were shown) of any normal day-to-day activity which Mr McMahon either cannot perform or can only perform with difficulty. Mr Vanhegan pointed to the fact that Mr McMahon had been medically retired from his job; but the question for Mr Perdios was the effect of any disability on Mr McMahon, if homeless.

82. In my judgment Mr Perdios did everything that, in this context, the PSED required him to do.

Did Ms Kaissi comply with the PSED?

83. HHJ Rochford was troubled for the same reason as HHJ Bloom. He focussed particularly on Ms Kaissi's statement that Mr Kiefer's depression "could be" regarded as a disability for the purposes of the Equality Act. He was also troubled by the fact that Ms Kaissi said that Mr Kiefer's health problems could be "ameliorated by treatment". That, he said, was irrelevant to the question whether Mr Kiefer had a disability for the purposes of the PSED.

84. Once again, I consider that the judge took too strict a view of the review decision. It is clear that Ms Kaissi said that Mr Kiefer's ability "to carry out daily activities has not been restricted by his leg and wrist pains." That is a reference both to the wrist pains and to the claudication. So far as his depression and low mood were concerned, she said that she was satisfied that Mr Kiefer's "ability to manage daily activities has not been affected by the conditions." Her overall conclusion was that "Mr Kiefer demonstrates an ability to manage daily activities with no support required".

85. In my judgment that is a clear finding that Mr Kiefer was not relevantly disabled. There was no impairment that had a substantial and long-term effect on his ability to carry out normal day-to-day activities. It is true that there is a tension between that conclusion and her statement that the depression "could be" a disability. But to seize on that tension (as Mr Vanhegan did) is to apply an over-lawyerly approach (or as Lord Carnwath put it "an over-zealous linguistic analysis") to a review decision. On a fair reading of the decision as a whole, the statement that depression "could be" a

disability is a theoretical possibility. In Mr Kiefer's particular case Ms Kaissi considered that the depression had no effect on his ability to manage daily activities. The only condition not specifically mentioned is Mr Kiefer's diabetes. That is one of the conditions that is managed by medication. But whether or not Ms Kaissi ought to have regarded that as a disability for the purposes of the Equality Act, what she concentrated on (and in my judgment rightly concentrated on) was the effect of that condition on Mr Kiefer's vulnerability. Ms Kaissi approached that question in the same way that Lord Neuberger commended in *Hotak* at [64] (quoted above). As in Mr McMahon's case, there was no evidence that any of Mr Kiefer's conditions in fact impaired his ability to carry out normal day-to day-activities.

86. As in Mr McMahon's case, Mr Vanhegan pointed to the fact that Mr Kiefer was medically unable to continue his work as a carpenter. But what he was unable to do was to link that disability with Mr Kiefer's ability to deal with the consequences of homelessness. Ms Kaissi said that there was nothing that was even *suggestive* of an inability to carry out daily activities. That was a finding of fact which was not challenged. If there was nothing that was even suggestive of such an inability, I cannot see that Ms Kaissi was under any further duty to make inquiries. But in fact, Ms Kaissi drew attention to that in her letter to his solicitors of 2 August 2019. She invited further representations by 9 August. None were made. The silence is eloquent.

87. As in the case of Mr Perdios, in my judgment Ms Kaissi did everything that, in this context, the PSED required her to do.

Result

88. One of the striking features of both appeals is that there is no evidence that any of the various medical conditions (whether physical or mental) has any real effect on the ability of either Mr McMahon or Mr Kiefer to carry out normal day-to-day activities.

89. All this goes to show that there is a real danger of the PSED being used as a peg on which to hang a highly technical argument that an otherwise unimpeachable vulnerability assessment should be quashed. I do not consider that that is why the PSED exists. It is not there to set technical traps for conscientious attempts by hard-pressed reviewing officers to cover every conceivable issue. Nor is it a disciplinary stick with which to beat them.

90. One must, of course, sympathise with anyone who is made homeless, especially if they are disabled. But the pressure on local authorities to house the homeless is such that with limited stock available, only those who are genuinely vulnerable can be given priority.

91. I would allow both appeals. *Luton Community Housing Ltd v Durdana* also dealt with the consequences of a breach of the PSED. I have concluded that there was no breach of the PSED in either of our cases. In these appeals, therefore, the question of remedy (on the assumption that there was a breach of the PSED) does not arise; and I express no opinion about it. It must wait for a case in which it matters.

Lord Justice Floyd:

92. I agree.

Lord Justice Coulson:

93. I also agree.