Neutral Citation Number: [2022] EWCA Civ 442

Case No: CA-2021-000723

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT GUILDFORD
HER HONOUR JUDGE NISA
G00GU400

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 April 2022

Before:

LADY JUSTICE MACUR

LADY JUSTICE ASPLIN
and
LORD JUSTICE COULSON

- -

Between :

MICHELLE BIDEN	**Appellant**
- and -	
WAVERLEY BOROUGH COUNCIL	**Respondent**

- -
- -

Timothy Straker QC and Annabel Heath (instructed by **Wills Chandler Solicitors**) for the **Appellant**
Kelvin Rutledge QC and Adrian Peck (instructed by **Waverley Borough Council**) for the **Respondent**

Hearing date: 9 March 2022

Approved Judgment

This judgment was handed down remotely at 10.30a.m. on 1 April 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Macur LJ:

Introduction

1. The issue in this appeal is the sufficiency of inquiries made to determine the suitability of accommodation offered to a homeless applicant with 'protected characteristics' of disability and gender reassignment.

The statutory framework

2. Part 7 of the Housing Act 1996 ("HA 96") prescribes the statutory duties owed by a local housing authority to the homeless. Relevant to this case are the following provisions.

3. Section 189B of HA 96, requires a local housing authority to take reasonable steps to secure that suitable accommodation becomes available for occupation by an eligible, unintentionally homeless applicant, who is not referred to another housing authority pursuant to section 198(A1), for at least (a) 6 months, or (b) such longer period not exceeding 12 months as may be prescribed.

4. A local housing authority may not approve a final accommodation offer, unless it is satisfied the accommodation is suitable for the applicant and that section 193A (7) of HA 96 does not apply. Subsection (7) does not apply in this case.

5. Section 182 of HA 96 requires a local housing authority to have regard to such guidance as may from time to time be given by the Secretary of State. That guidance is contained within the "Homelessness Code of Guidance for Local Authorities" 2018 ("the Code").

6. Chapter 17 of the Code (in its 2018 edition) provides amongst other things that:

> "17.4 … consideration of whether accommodation is suitable will require an assessment of all aspects of the accommodation in the light of the relevant needs, requirements and circumstances of the homeless person and their household. The location of the accommodation will always be a relevant factor.
>
> 17.6 Account will need to be taken of any social considerations relating to the applicant and their household that might affect the suitability of accommodation, including any risk of violence, racial or other harassment in a particular locality. […]
>
> 17.50 … where possible, housing authorities should try to secure accommodation that is as close as possible to where an applicant was previously living. […]
>
> 17.54 Account should also be taken of medical facilities and other support currently provided for the applicant and their household. Housing authorities should consider the potential impact on the health and wellbeing of an applicant, or any person

> reasonably expected to reside with them, were such support to be removed or medical facilities were no longer accessible. They should also consider whether similar facilities are accessible and available near the accommodation being offered and whether there would be any specific difficulties in the applicant or person residing with them using those essential facilities, compared to the support they are currently receiving.

7. The Code accords with Article 2 of the Homelessness (Suitability of Accommodation) (England) Order 2012/2601 ("the Regulation"), in specifying matters to be considered in determining whether accommodation is suitable for a person are to include:

> "[T]he proximity and accessibility of the accommodation to medical facilities and other support which (i) are currently used by or provided to the person or members of the person's household; and (ii) are essential to the well-being of the person or members of the person's household; and the proximity and accessibility of the accommodation to local services, amenities, and transport."

8. Section 208(1) of HA 96 imposes upon the local housing authority a duty to ensure, so far as reasonably practicable, that the accommodation they secure for the applicant is within their own district.

9. A local housing authority's relief from homelessness duty can be ended under section 193A if the applicant, having been informed of the consequences of refusal and of their right to request a review of the suitability of the accommodation, refuses a final accommodation offer.

10. Under section 202(1) of HA 96 an applicant has the right to request a review of, amongst other things, the decisions as to the suitability of accommodation offered to the applicant by way of a final accommodation offer and the 'discharge' of a local housing authority's homelessness duties. If dissatisfied with the decision on the review, an applicant may appeal to the county court on any point of law arising from the decision pursuant to section 204 of HA 96.

11. A local housing authority must also comply with the public sector equality duty ("PSED") as laid down by section 149 of the Equality Act 2010 ("EA 10") with the aim to: (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; and, (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 (Section 149(3)). Compliance with these duties may involve treating some persons more favourably than others; section 149(6).

12. Section 149(7) identifies the 'protected characteristics' include disability and gender reassignment.

The background

13. Mrs Biden presently occupies a property in Farnham under an assured shorthold tenancy agreement. She has family and a "wider support network" in the Wokingham area where she once lived. She moved to her present address fearing the adverse attentions of her wife's family who lived in and around Wokingham.

14. Mrs Biden was given notice to quit pursuant to s21 of the Housing Act 1988 in 2019. She presented as homeless to Waverley Borough Council ("WBC") on 28 August 2019.

15. On 20 November 2019, WBC concluded Mrs Biden was homeless and eligible for assistance and confirmed that it owed her a duty under s189B of HA 96.

16. Mrs Biden has the protected characteristics of gender reassignment, she is a trans woman, and is disabled, namely she suffers with osteoarthritis to the right knee, depression, and anxiety.

17. On 10 January 2020, the authority made a 'final offer of accommodation' to Mrs Biden of a ground floor self-contained flat in a purpose-built low-rise block let by an independent housing association managing a "range of affordable quality … flats to rent … to general needs applicants…". The flat was situated approximately 0.9 miles away from her present accommodation.

18. Initially, Mrs Biden accepted the offer subject to a review of its suitability. In a letter dated 15 January 2020, Mrs Biden's solicitors referred to her disability and that she was awaiting a knee replacement and was extremely limited in her mobility. She was dependent on public transport which she said was not easily accessible from the proposed address; her support network was in Wokingham, as was her GP's practice. She would be left "isolated and unable to carry out basic daily tasks."

19. On 29 January 2020 Mrs Biden refused the offer of accommodation as unsuitable, nevertheless requesting the review to proceed. Consequently, on 30 January 2020, WBC wrote to her pursuant to section 193A discharging its duty under section 189B of HA 96. Mrs Biden requested a review of that decision also.

20. Mrs Biden's solicitors made further representations in a letter dated 20 May 2020, this time referring specifically to her gender reassignment and the fact that Mrs Biden had "been the victim of many incidents which have left her frightened and concerned to be in remote unfamiliar areas." It was said to be clear that the property offered was not suitable for her physical and mental health needs and "her protected characteristic under the equality act [sic] has clearly not been considered."

The Review Decision

21. The review of both decisions was conducted by Ms Donaldson, a housing options manager for WBC. Ms Donaldson interviewed Mrs Biden on 1 June 2020 and had regard to her solicitor's representations referred to in paragraphs 18 and 20 above. Of relevance to the submissions in this appeal, Ms Donaldson made inquiries of a police support community officer ("PCSO") and a GP's practice local to the designated address, regarding transgender issues raised by Mrs Biden. Ms Donaldson also had access to several medical reports. Her comprehensive review is dated 18 August 2020 and is recapitulated in some detail here considering the nature of the appeal.

22. After detailing physical and mental health issues, Ms Donaldson noted in section A, part 3 of her review that Mrs Biden was "a transwoman and [has] gender dysphoria … a term that describes a sense of unease that a person may have because of a mismatch between their biological sex and their gender identity. The sense of unease … can lead to depression and anxiety and have a harmful impact on daily life… you suffer from depression and anxiety." She noted Mrs Biden's progress on the sex reassignment surgery pathway since 2008 and that "[y]ou say you feel anxious and concerned to be in unfamiliar or remote areas due to incidents you have previously experienced. Trans-people tend to feel anxious when out in the community due to concern about being victimised by wider society because they are a trans-person."

23. In section B, Ms Donaldson noted Mrs Biden's "other circumstances." In summary, Mrs Biden was assessed as articulate, IT competent and sufficiently mobile to travel to Wokingham two to three times per week using public transport and to walk to Farnham town centre and back, carrying shopping on her return.

24. In section C, Ms Donaldson assessed the "accommodation you were offered" in terms of its amenities and in relation to its relative location to the property in which she then resided.

25. In section D, Ms Donaldson recorded Mrs Biden's reasons why the accommodation identified was unsuitable. First, distance from local amenities and ability to access public transport by reason of her limited mobility which would mean that Mrs Biden would be "isolated and unable to carry out basic daily tasks." Second, distance from her existing GP practice and support network in the Wokingham area which were necessary in light of her mental health issues. Third, Mrs Biden's perception that she was unsafe in a remote and unfamiliar area, bearing in mind her personal details being published on the internet and given mental health considerations and absent a support network. Fourth, lack of consideration of Mrs Biden's protected characteristic of gender reassignment, who as the victim of "many incidents" had left her frightened and concerned to be in remote and unfamiliar areas. Finally, suitability of the accommodation which was in a block of flats normally provided to single mothers and children.

26. In section F, Ms Donaldson gave her assessment of the representations made by and on behalf of Mrs Biden that the property identified was not suitable. Ms Donaldson noted that Mrs Biden had stated that she did not wish to live in the Waverley area and wished to be placed closer to Wokingham. Those wishes had been taken into account by making a final offer of accommodation within WBC's borough, but as close as possible to the Wokingham area and to where Mrs Biden had been living making it possible to retain her links with the Wokingham GP surgery and her support network. There was public transport available, which routes ran close to the designated address and went to the train station which Mrs Biden now used to travel to Wokingham.

27. Mrs Biden told Ms Donaldson in interview on 1 June 2020 that she had been threatened by her partner's family and was at risk from gangs in the Wokingham area for unspecified reasons. Mrs Biden said she had not reported any issues to the police in relation to any threats from her wife's family. Mrs Biden said that she had received a letter opening a bank account in another person's name which she reported to the police, but which they did not take seriously. A previous sexual partner with this person had made a complaint to the police of non-consensual activity.

28. Ms Donaldson recorded that she had asked for crime and incident numbers relating to any incidents of discrimination or hate crime that Mrs Biden had experienced as a trans woman, but none had been forthcoming. Instead, Mrs Biden reported that her name and current address had been published in an online newspaper in relation to two recent convictions for minor offences for which she had been fined and her driving licence endorsed and a community penalty with compensation had been ordered, respectively. Ms Donaldson noted that the online local newspaper was not local to Waverley and the entry appeared in a list of court hearing outcomes relating to different people. Ms Donaldson was not satisfied that the publication made Mrs Biden unsafe in the Farnham area, or specifically the designated address or surrounding area.

29. Ms Donaldson's inquiries of the PCSO revealed that reported crime in the relevant area was low, with violent crime and threats of violence "almost non-existent. There is no evidence of LGBT+ hate crime in the area…he was not aware of any individual harboring [sic] any grudges towards any member of the LGBT + community. He advised that it would be safe for a transwoman to move into [the street] and he would have no concerns for her safety in the surrounding area." The policing issues and crime levels in the area in which Mrs Biden presently resided and that in which the designated property was situated were equivalent as may be expected since they are within 0.9 miles from each other.

30. Ms Donaldson said that she understood that Mrs Biden had been the victim of incidents which left her feeling self-conscious, frightened, and concerned of being in remote and unfamiliar areas. However, the accommodation offered to Mrs Biden is not situated in a remote area but in a well-maintained residential area with which she would readily be able to familiarise herself prior to moving. Therefore, there was no evidence to substantiate any fears of risk in the area. If Mrs Biden felt her mental health to be deteriorating, she was competent to consult with her GP. Ms Donaldson noted that "[a]ny concerns, fears, or worries you had, were not sufficient to deter you from considering a move to Brighton in June 2020" where Mrs Biden's wife and child were planning to move.

31. Mrs Biden had not provided any information about the impact of her protected characteristic in the medical form completed on 7 October 2019 which was available to the original decision maker. It made no reference of Mrs Biden feeling frightened, conscious of, or concerned, when in the Farnham area. Nor had she mentioned this in her medical form dated 18 May 2020, although her solicitor said that these concerns and feelings were made in her universal credit application. Ms Donaldson noted Mrs Biden's 'protected characteristic' as a trans woman and referred to the previous parts of her review, summarised above, in describing its nature and extent and other medical issues.

32. The impact of Mrs Biden's protected characteristic was that she took hormone therapy, felt concerned and conscious of being in remote or unfamiliar areas as there had been incidents in the past in which she had felt suicidal and it is common for someone suffering from gender dysphoria to suffer from low self-esteem, be socially withdrawn or isolated or suffer from depression and anxiety. Mrs Biden took a low dose of anti-depressants. Ms Donaldson understood that Mrs Biden may feel frightened, concerned, and conscious of being in remote or unfamiliar areas, as "transgender people tend to have concerns, when in the community, about being

victimized by wider society. Being victimized in the community would be distressing and could cause emotional or psychological harm" as well as worsening symptoms of anxiety and depression. Ms Donaldson recognised that if Mrs Biden was victimized by someone because she is a trans woman, it may take longer to remove herself from that situation because of her limited mobility.

33. Ms Donaldson was satisfied that the original decision maker had given weight to Mrs Biden's concerns and considered the impact of her protected characteristic and other circumstances with an open mind. The original decision maker concluded that private landlords may discriminate against a trans woman making it harder for her to find accommodation than someone without the protected characteristic and therefore felt it appropriate to refer Mrs Biden to accommodation managed by a social landlord which had ethical and social values. This offered a greater degree of protection. Further, the decision maker considered Mrs Biden's safety and security by ensuring the flat offered to her had a door entry system which would have enabled her to manage access to the flat and to provide peace of mind. The accommodation was affordable, in decent condition, of a suitable lay out and: a) as close as possible to Mrs Biden's current home; b) near a bus stop which had a reasonable and regular service and from which she could travel to and from Farnham station, the town and local services and amenities.

34. Ms Donaldson was informed that the designated address was situated within a block containing a mixture of one- and two-bedroom flats. Two-bedroom flats are occupied by families, but one-bedroom flats may be occupied by single people, couples, or young parents with one child. The block of flats is managed by a housing association which grants prospective residents an assured shorthold tenancy, and as a guideline, residents generally live in the flats for about two years before bidding successfully for social housing through WBC's Housing Register. When nominating an applicant for a tenancy of a vacant flat, the Council prioritised those who are homeless or threatened with homelessness and are eligible and are in priority need.

35. Considering all the available information Ms Donaldson was satisfied that the final offer of accommodation was suitable for Mrs Biden on all grounds.

36. Ms Donaldson concluded she was "satisfied that there is no deficiency or irregularity in the original decision or in the manner in which it was made. … that there is no need to serve a "minded to find" notice on [Mrs Biden]" The reasons put forward for refusing the 'final offer' of accommodation were not considered so significant as to render the final offer unsuitable. Ms Donaldson was also satisfied that WBC had notified Mrs Biden of the consequences of refusal and the right to seek review and therefore its duty to relieve Mrs Biden's homelessness had come to an end.

The First Appeal

37. Mrs Biden appealed pursuant to section 204 of HA 96, on several grounds, not all of which are pursued in this Court, but included a public law challenge to the adequacy of the decision-making process by reason, amongst other things, of failure to make adequate inquiries and a failure of the authority to have regard to its PSED.

38. She filed a witness statement dated 27 November 2020 which significantly expanded upon several of the issues that had been canvassed with Ms Donaldson and included specific information of crime and incident numbers, previously requested by Ms

Donaldson; see [28] above. As to this, I assume that permission had been granted for Mrs Biden to submit such evidence in the section 204 appeal for it had not been before Ms Donaldson and the statement is not "limited to that which is necessary to illuminate the points of law" that were to be advanced in the appeal; see *Cramp v Hastings BC*; *Phillips v Camden LBC* [2005] H.L.R. 48 at [71]. As Brooke LJ said at paragraph 14, "the review procedure gives the applicant and/or another person on his behalf the opportunity of making representations about the elements of the original decision that dissatisfy them, and of course they may suggest that further inquiries ought to have been made on particular aspects of the case." However, an appeal is limited to considering points of law. Subject to *Pieretti* considerations (*Pieretti v Enfield LBC* [2010] EWCA Civ 1104) to which I return below, information or representations which were not placed or made before a reviewing officer, although available to the homeless applicant and/or their advisers, should not influence an appeal which challenges the legitimacy of their review on the facts available to them.

39. Specifically, as regards her transgender status, Mrs Biden asserted that when she lived in Bracknell, she had sustained multiple assaults against her property and her person between July and November 2018, "primarily motivated by transgender hate". The "main protagonist" was convicted of criminal damage in October 2019. She had applied for protection orders against other unspecified individuals because of the transphobic hate and assaults she was subject to. Since she had first started dressing as a female she would constantly receive "looks" from people and had been subject to verbal abuse. She had been physically assaulted on the train and discriminated against at her current property, although did not always report these incidents. Mrs Biden exhibited extracts from the 2018 Stonewall Trans Report which she said corroborated her own "lived experience" and which justified her dependence upon a support network.

40. Mrs Biden detailed her involvement with "many different agencies and roles which centred on Trans individuals' rights" between 2008 and 2017 which meant that she had "an extensive knowledge on the issues and not because I am Trans myself."

41. The judge, Her Honour Judge Nisa, dismissed the appeal on 3 August 2021, concluding her narrative judgment which addressed each of the grounds of appeal by saying that the authority had "very clearly and correctly made its review decision in line with the guidance taking into account each and every factor that [Mrs Biden] presents, and looking at the impact of each of those factors in respect of the accommodation that is offered with particular reference to the guidance, and also to the Equality Act." She was "satisfied that the review has been conducted correctly … the conclusions reached are fair and safe given the history, concerns, the medical assessment, given the evidence from the appellant herself and the documentation that has been obtained by the respondent in terms of the safety concerns and the suitability in terms of the public transport links."

42. There is no dispute that the relevant issue for this Court is whether "the original decision was right, or at least one the decider was entitled to reach." See *Danesh v RB Kensington & Chelsea* [2007] H.L.R. 17, per Neuberger LJ at [30]. That is, the decision under appeal is that of Ms Donaldson as communicated to Mrs Biden on 18 August 2020 and not that of HHJ Nisa.

The sufficiency of inquiries

43. The issue that we must decide to determine this appeal is a very narrow one, namely: should Ms Donaldson have made the inquiries she deemed necessary on matters relating to the incidence of gender reassignment hate crime in the area of the accommodation offered to Mrs Biden of a Lesbian, Gay, Bisexual, Transgender (LGBT) liaison officer rather than the PCSO? Other matters relating to inquiries made in relation to the availability of a GP practice experienced in dealing with transgender individuals in the vicinity of the accommodation offered to Mrs Biden have, realistically in my view, not been pursued.

44. The College of Policing 2014 Hate Crime Operational Guidance ("operational guidance"), which is appended to Mrs Biden's statement served in the first appeal, recognises that transgender hate crime is vastly under-reported. It was noted that some transgender people may fear ridicule and victimisation from police officers and consequently lacked confidence to report hate crimes or incidents or present themselves as witnesses. The Stonewall 'LGBT in Britain Trans Report', which appears from my research to have been published in 2018 and is also appended to Mrs Biden's statement, confirms the understanding of the operational guidance; two in five trans people surveyed had experienced hate crime or incident because of their gender identity in the last 12 months, but four in five did not report it to the police. Some trans people who had reported a hate crime did not feel supported by the police or experienced even further discrimination.

45. The operational guidance noted that several initiatives had proved effective and "may be appropriate to use in the transgender community". Specifically, many police forces had introduced Lesbian, Gay, Bisexual, Transgender ("LGBT") officers with specific responsibility for building community links and providing support for victims and witnesses of transgender hate crime. The liaison officers provide a "specialist advice point for other officers". However, noting that most interaction between the police and the transgender community is with other police officers and staff, "awareness training on transgender issues, as part of the wider diversity training" was necessary. The correct identification of transgender hate crimes or incidents separately from homophobic crimes or incidents on command-and-control systems would assist to build accurate crime and intelligence reports.

46. The significance of the guidance and information above is readily apparent, and in the instant case, is corroborated by the specific information provided by Mrs Biden of her own victimisation as a trans woman and who claims an expertise beyond that of her own "lived experience" as indicated in [40] above. However, assuming for the sake of argument that the LGBT officer had a better appreciation of the problems facing the transgender community in general, I find it difficult to understand the argument that an unidentified "Surrey Police" LGBT liaison officer would have greater knowledge of the situation on the ground than would the local PCSO.

47. Mr Straker QC argues that the LGBT officer's "immersion" into the transgender community would give him/her inside knowledge of the incidence of unreported hate crimes throughout the force region wherever he/she was based. I do not accept that argument. I agree with Mr Rutledge QC, that it is entirely speculative to assume that the PCSO had not received awareness training on transgender issues and/or did not liaise with the LGBT liaison officer, or that the LGBT liaison officer, if approached

directly by Ms Donaldson, would not have liaised with the PCSO. Notably, the statement that was produced by Mrs Biden as described in [39] and [40] above, contains no additional evidence from the Surrey LGBT officer that contradicts the information provided by the PCSO, and nor is it claimed that the information provided by the LGBT liaison officer would have been different. The highest that Mr Straker puts it is that the making of such inquiries would engender confidence in the process. That hopefully is a by-product but is not the purpose of the review procedure.

48. The inquiries that were required to be made are those necessary fairly to make a decision regarding the suitability of accommodation for Mrs Biden; see *Codona v Mid-Bedfordshire District Council* [2005] EWCA Civ 925, at [33]. Subject to this, the "scope and scale" of the necessary inquiries to be made by a local housing authority is a matter for them and this court should not intervene unless satisfied that no reasonable housing authority could have been satisfied on the basis of the inquiries made; *R v Royal Borough of Kensington and Chelsea, ex p Bayani* (1990) 22 H.L.R. 406; *R(on the application of Khatun) v Newham London BC (Office of Fair Trading, interested party)* [2004] EWCA Civ 55. See also *Hotak v Southwark London Borough Council (Equality and Human Rights Commission and others intervening)* [2016] A.C. 811 below.

49. The attempt to compare the circumstances in Mrs Biden's case with the situation in *Pieretti*, is entirely misguided and contrived. In *Pieretti* the reviewing officer was held to be at fault for failing 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" (at [35]) and lacking in awareness "that a disabled person may not be adept at proclaiming his disability" (at [28]) whereas the duty created by the Disability Discrimination Act 1995, a predecessor of the EA 2010, was " 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."

50. However, at paragraph 33 in *Piereti*, Wilson LJ (as he then was) made clear that "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."

51. I regard it as absurd to suggest that Ms Donaldson's failure to expand the scope of her inquiries to involve the LGBT liaison officer reflects her failure to have due regard to the protected characteristic of gender reassignment, whether stand alone or in conjunction with Mrs Biden's disability. As it was, she proceeded in her review on the basis that Mrs Biden might be physically confronted by transphobic individuals and would be at a disadvantage in removing herself. I do not see how this can be categorised as lack of awareness or diligence in making her inquiries.

52. Neither do I see that there is a valid comparison to be drawn with the fact specific situation which occurred in *Shala v Birmingham City Council* (2007) EWCA Civ 624 in which it was made clear that housing officers do not have the relevant expertise upon which to make a critical evaluation of the evidence and must seek relevant expertise. The position of a LGBT liaison officer and PCSO is not remotely akin to the respective position of a patient's treating psychiatrist as against a medical adviser without full recourse to the relevant medical reports.

53. I reject the implicit submission that no reasonable reviewing officer could have determined the inquiries to be sufficient, nor would I categorise them as in any sense inadequate upon which to make a fair and composite assessment of the suitability of the accommodation offered.

54. There is no disagreement that the PSED applies to a local housing authority's discharge of homelessness functions nor that the principles to be drawn from the several authorities, to which I refer below, do not accommodate the consideration of multiple protected characteristics. However, there is floated, albeit I detect with some diffidence, the submission that gender reassignment as a protected characteristic creates a heightened duty on the part of the housing authority, quite apart from the consideration of whether it is necessary to offer more favourable treatment to applicants with any other protected characteristics such as race, disability, age etc.

55. There is, as Mr Rutledge makes clear, no statutory basis for such a contention. Any enhanced or modified statutory protections which do exist are expressly stated in EA 2010 and are limited to specific circumstances, for example, the discrimination provisions unique to pregnancy and maternity. There is no corresponding provision which relates to the protected characteristic of gender reassignment.

56. Neither do I see that the principles to be extracted from any of the authorities supports the same. Referring to the number of "valuable judgments in the Court of Appeal", Lord Neuberger in *Hotak*, stated that the adverb "due" in section 149(1) of EA 2010, could not be precisely defined or prescribed, since the "weight and extent of the duty are highly fact sensitive and dependent on individual judgment". The duty must be exercised in substance with rigour and with an open mind. Provided that there had been a proper and conscientious focus on the statutory criteria "the court cannot interfere . . . simply because it would have given greater weight to the equality implications of the decision"; see [74] and [75]. The PSED can fairly be described as complementary to a local housing authority's homelessness duty. It "must be exercised in substance, with rigour, and with an open mind" and with sharp focus on the relevant protected characteristics; see [78].

57. In *Haque v Hackney London Borough Council* [2017] P.T.S.R. 769, Briggs LJ, as he then was, considered "the PSED and housing duty in combination". At paragraph 32, he did not consider that *Pieretti* was a case in which there was any "inherently close alignment between the PSED and the particular aspect of the housing duty in issue". The PSED required the housing officer in Mr Haque's case "to apply sharp focus upon the particular aspects of Mr Haque's disabilities and to ask himself with rigour, and with an open mind, whether the particular disadvantages and needs arising from them were such that room 315 was suitable as his accommodation." The housing officer "was not obliged to accept Mr Haque's assertions of impairments at face value, still less their alleged effect upon his use of room 315 as accommodation. To the extent that the alleged impairments and their consequences were matters for medical expertise, he was entitled if not obliged to take expert advice (as he did). He was no less obliged to apply rigour to the question whether Mr Haque's challenges to the suitability of room 315 as his accommodation were made out in fact, than in any other suitability review, whether or not initiated by a person with protected characteristics." Nor did "the engagement of the PSED in a particular case absolve the reviewing officer from taking into account factors relevant to suitability other than those thrown

into focus by the terms of section 149, such as those specified in … the code of guidance."; see [44] – [46].

58. In *McMahon v Watford BC, Kiefer v Hertsmere BC* [2020] EWCA Civ 497, Lewison LJ drawing together the strands of precedential authorities said that PSED is not a free-standing duty, or a duty to achieve a result, but to have due regard to achieve the goals identified by EA 2010. The question when assessing suitability of accommodation was not whether a person has a disability or protected characteristic, but how any disability or protected characteristic or other circumstances impacts on that person as compared to those without such issues or characteristic.

59. I agree with Mr Rutledge's analysis when he aligns the details of Ms Donaldson's review decision against the suggested requirements of the discharge of PSED in the *Haque* case at paragraph 43. Ms Donaldson recognised the nature of Mrs Biden's protected characteristics; see [22] above. She focused upon the consequences of Mrs Biden's disability in so far as it was relevant to her occupation of the accommodation offered to her in terms of lay out and access to current GP practice and support networks. She had regard to the disadvantages created by the 0.9-mile difference in location between the accommodation offered and that presently occupied by Mrs Biden; see [24] to [26] and [30] above. She identified the difference between Mrs Biden and a transgender individual without disability, or a disabled individual who was not transgender; see [32]. She had due regard to the possibility of victimisation; see [28] to [30]. The selection of accommodation had borne in mind that private landlords may positively discriminate against transgender individuals; see [30]. This is capable of being regarded as more favourable treatment of Mrs Biden's application.

60. I regard any attempt to categorise the inquiries made by Ms Donaldson as displaying a disregard for the PSED as hopeless. Ms Donaldson gave 'very sharp focus' to Mrs Biden's circumstances. She made a composite assessment, alive to Mrs Biden's protected characteristics, individually and in combination, and placed in the context of all other statutory guidance. Ms Donaldson made relevant and reasonable inquiries of appropriate agencies, having regard to the concerns raised by Mrs Biden. Despite that advice, she nevertheless contemplated the possibility of the existence of transphobic abuse. The requirement to consider whether it was necessary to treat Mrs Biden "more favourably" did not require Ms Donaldson to achieve a perfect match, nor did it require her to further Mrs Biden's express wish to relocate to Brighton.

61. Mr Straker freely concedes on Mrs Biden's behalf, that Ms Donaldson's review is "highly competent" and "alive" to critical factors of proximity to Mrs Biden's present address, restricted mobility, access to medical care, and general and specific safety concerns arising from her protected characteristics. It seems to me, therefore that he is left with very little room for manoeuvre.

62. For these reasons, and subject to my Lord and my Lady, I would dismiss this appeal.

Asplin LJ:

63. I agree.

Coulson LJ:

64. I also agree.