

1. This case determines, definitively, that a thorough vulnerability assessment with an acknowledgement of a consideration of the Public Sector Equality Duty ('PSED') can satisfy the statutory duty pursuant to section 149 of the Equality Act 2010. No further assessment is automatically required.
2. The case concerned two appeals and how a determination of vulnerable for the purpose of assistance under the homelessness legislation interacts with the PSED. Both Mr McMahon and Mr Kiefer had various ailments which they felt amounted to disabilities. They had applied for assistance from their respective housing authorities and were deemed to be homeless but not in priority need. They both asked for a review of their decisions and the reviewing officers upheld the housing authorities' decisions. Circuit Judges quashed the reviewing officers' decisions, the housing authorities appealed.
3. For ease, section 189(1)(c) Housing Act 1996 is as follows:

"189 Priority need for accommodation.

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

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."

4. Lewison LJ gave the only substantive judgment of the court, setting out the law on vulnerability before analysing the reviewing officer's decisions in both cases.
5. The key judgment in this regard is that of Lord Neuberger PSC in [Hotak v Southwark LBC \[2015\] UKSC 30, \[2016\] AC 811](#). At [58], he made clear the question to be

answered: is this applicant significantly more vulnerable than ordinarily vulnerable as a result of being rendered homeless?

6. Lewison LJ then quoted his own explanation in the case of [Panayiotou v Waltham Forest London Borough Council \[2017\] EWCA Civ 1624, \[2018\] QB 1232](#):

"... 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."

7. Lewison LJ found both reviewing officers to have faithfully applied the above test and concluded there had been no error in finding both appellants not vulnerable.
8. The reviewers both stated that they had had regard to the PSED but made no determination either way as to whether Mr McMahon or Mr Kiefer had a disability for the purposes of section 6 Equality Act 2010. It was this omission upon which the appeal was fought.

Why a vulnerability assessment is enough

9. The court re-iterated what we already know about the PSED, but in specific reference to vulnerability assessments and homelessness.

"47. As Wilson LJ put it in [Pieretti v Enfield LBC \[2010\] EWCA Civ 1104, \[2011\] PTSR 565](#) at [26]:

- i. "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]¹. The relevant function in this case was to determine whether the applicant in question was "vulnerable" for the purposes of section 189 (1) (c).

10. The Court of Appeal found that there was a 'substantial' overlap between a vulnerability assessment and the PSED [68]. A good vulnerability assessment will rigorously analyse the specific circumstances of the individual. It is this exact approach which the PSED seeks. A court is not interested in form, but substance. In the same paragraph Lewison LJ emphasised that it works both ways: a 'mere recitation' of the PSED will not save an assessment which has failed to deal with the necessary substance.

11. After this, Lewison LJ concluded:

"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."

Future application

12. The Court of Appeal reiterated that the PSED cannot require a housing authority to provide accommodation for a disabled person if their disability does not render them

¹ [Luton Community Housing Ltd v Durdana \[2020\] EWCA Civ 445](#) Please see the case law update of Alexander Pritchard-Jones for more detail:

https://www.stiveschambers.co.uk/content/uploads/2020/04/APJ-Case-law-update_Luton-v-Durdana-2020-EWCA-Civ-445-.pdf

vulnerable under section 189. Lewison LJ reminded himself that Parliament has chosen specific categories of priority need and that its will must be respected [73]. This is important. Naturally, those who are disabled and homeless are in a dire situation. This is perhaps what motivated the Circuit Judges in both cases to overturn the reviewing officers' decisions. However, the Court of Appeal has indicated it will continue to respect Parliament's decision making in regard to managing the housing shortage.

13. The overarching approach of Lewison LJ should give reviewing officers some latitude. When considering a reviewing officer's decision, the court will look at it in the round [79]. In the second appeal, much was made of the reviewing officer stating that the depression 'could be' a disability. Lewison LJ responded [85]:

"to seize on that tension (as Mr Vanhegan did) is to apply an over-lawyerly approach"

14. Nit-picking of reviewing officers' decisions is clearly to be discouraged. He went on to say:

"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 disciplinary stick with which to beat them"

15. This paragraph is probably what this judgment will be remembered for and needs little amplification. *McMahon* has largely built upon what we already knew. Where it will be important is in offering a worked example as to how courts should strive to not 'straitjacket' reviewing officers.

16. While all of the above is true, this decision does not give housing authorities *carte blanche*. The PSED and vulnerability are not the same thing as Lewison LJ reminds us at [45]. Additionally, Lewison LJ found both vulnerability assessments to have shown their working and meaningfully engaged with the issues. This is crucial. An approach of any less runs the risk of not adequately addressing the PSED. Another point is that a good vulnerability assessment which drops in the PSED frequently must be less likely to attract appeal than one that does not.

Final points of note

17. In *McMahon* both reviewing officers knew that the PSED had been triggered. Lewison LJ at [51] identified the apparent conflict in judicial opinion as to whether, if the reviewing officer was unaware of the PSED being triggered, could the PSED still be satisfied? Lord Neuberger PSC, in *Hotak*, stated that despite an unawareness of the PSED being engaged in *many cases* the investigation and report would be PSED compliant [79]. On the other hand, more recently, Patten LJ in *Durdana* stated that “such cases are likely to be rare” [25]. Lewison LJ at [85] and [89] has expressed a view which is in keeping with the thrust of the authorities in this area. Therefore, it is respectfully contended Lord Neuberger’s assessment is more representative of the practical reality.

18. However, determining whether someone is disabled within the meaning of the Equality Act may be relevant in another regard. Lewison LJ stated a reviewing officer deciding that someone was vulnerable AND disabled could have an effect as to the way the full housing duty is satisfied [74]. The support and accommodation that they receive by virtue of also being disabled may differ to if the individual was simply vulnerable. In practice, it is difficult to see how often this would actually result in a material difference. However, it adds another reminder that the PSED is a continuing duty in all aspects of public administration.

Law is correct as at 27th May 2020

Whilst every effort has been taken to ensure these notes are as correct, they are intended to give a general overview of the law. Delegates are respectfully reminded that they are not intended to be a substitute for specific legal advice. No liability is accepted for an error or omission contained herein.



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