Neutral Citation Number: [2017] EWCA Civ 4

Case No: B5/2016/1028

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
His Honour Judge Luba QC
BO2EC899

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2017

Before :

LORD JUSTICE McCOMBE
LORD JUSTICE BEATSON
and
LORD JUSTICE BRIGGS

- -

Between :

LONDON BOROUGH OF HACKNEY	**Appellant**
- and -	
HAQUE	**Respondent**

- -
- -

Mr Kelvin Rutledge QC and Mr Ryan Kohli (instructed by **London Borough of Hackney**) for the **Appellant**
Mr Andrew Arden QC and Ms Stephanie Smith (instructed by **Morgan Hall Solicitors Limited**) for the **Respondent**

Hearing dates : 15 December 2016

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Approved Judgment

Lord Justice Briggs :

Introduction

1. This appeal from the Order made by HH Judge Luba QC in the County Court at Central London on 18 February 2016 raises further issues about the impact of the Public Sector Equality Duty ("PSED") upon the discharge by a local housing authority of its duties under Part VII of the Housing Act 1996 ("HA"), beyond those already addressed by the Supreme Court in *Hotak v Southwark London Borough Council*; *Kanu v Southwark London Borough Council* [2016] AC 811. Both the *Hotak* case and this case concern the relationship between the PSED and what is sometimes called the authority's "full" housing duty, that is the duty under HA s. 193 to "secure that accommodation is available for occupation by the applicant" where the authority are satisfied that an applicant is "homeless, eligible for assistance and has a priority need, and are not satisfied that he became homeless intentionally".

2. In the *Hotak* case, the PSED impacted upon the housing authority's determination of the question whether the applicant had a priority need i.e. whether the authority owed him the full housing duty at all. In the present case the PSED impacts upon the question, raised by an applicant to whom the full duty was owed, whether the accommodation already provided was "suitable" within the meaning of HA ss. 206 and 210.

3. It is common ground, and plainly correct, that the PSED is engaged in the course of any decision-making about the suitability of accommodation made available for occupation under HA s. 193(2), when the applicant is in priority need for accommodation because (as in the present case) he is "vulnerable as a result of… mental illness or handicap or physical disability…" (see HA s. 189(1)(c)). This is because that person has a disability within the meaning of section 6 of the Equality Act 2010 ("EA"), and because disability is a relevant protected characteristic which attracts the PSED, under EA s. 149.

4. In the present case the authority, the London Borough of Hackney ("the Council"), made available for the occupation of the applicant Mr Mohammed Haque a single room on the third floor of a hostel ("Room 315") because it accepted that he was vulnerable by reason of physical disability and mental ill health, and therefore in priority need. Mr Haque complained that Room 315 was unsuitable by reason of particular aspects of his physical and mental condition, and sought a review under HA s.202(1)(f). The Council's reviewing officer, Mr Michael Banjo, decided, for reasons given in his written decision on 29 September 2015 ("the Decision"), that the accommodation was suitable for Mr Haque.

5. The judge quashed that decision because, in his view, Mr Banjo had not demonstrated that he had complied with the PSED when conducting his review. Specifically, the judge held that the Decision showed that Mr Banjo had either:

> "failed to address what is required by the section 149 duty, as explained in *Hotak*, or that if he did so, he has expressed himself in such a way as to be insufficient to discharge his obligation imposed by section 203 (*of the Housing Act*) to give reasons for his decision". (My italics).

6. Both in the County Court, and in this Court, it was common ground that the judge began from the correct starting point. He said, (at paragraph 44):

> "In my judgment, the correct approach is to stand back from the reviewing officer's decision, read as a whole, and to ask whether it is possible to discern from it that the reviewing officer has adopted the approach to section 149 required by the judgment of Lord Neuberger in *Hotak*."

For the Council, Mr Kelvin Rutledge QC and Mr Ryan Kohli submitted that the judge had misinterpreted the *Hotak* decision by assuming that in almost all cases it will be necessary for the reviewing officer expressly to spell out his decision-making by reference to each of the requirements imported into his task by the PSED, which Mr Banjo did not do. Mr Andrew Arden QC and Ms Stephanie Smith for Mr Haque submitted by contrast that the judge had done no more nor less than specify what the underlying principle laid down in *Hotak* required in the different context of a suitability review and that, in any event, Mr Banjo's review was PSED deficient on any sensible analysis.

The Facts

7. Mr Haque is a man in his early forties with serious neck and back pain. In a letter to the Council in January 2015, his GP described him as follows:

> "This 39 year old patient of ours is known to suffer severe chronic cervical and lumbar spine problems affecting his physical as well as his mental health profoundly. He has been receiving ongoing orthopaedic physio, pain management and spinal surgical, for which we are awaiting opinion.
>
> His chronic severe musculoskeletal problems resulted in significant psychological problems, together with his housing situation, making his life unbearable. He is, at the moment, awaiting psychological therapies. However, he is on strong antidepressant medication as well as strong analgesics to control his symptoms."

It appears that Mr Haque's disability had caused him to lose his job as a bus driver in 2011. In January 2013 his mother asked him to leave the house in which he had until then been residing with her.

8. Mr Haque's homelessness application to the Council in February 2013 was refused on the basis that his then disability was insufficient to make him vulnerable within the meaning of HA s. 189(1)(c). Following a successful judicial review challenge, the council provided Mr Haque with temporary accommodation pending a review of its decision that he was not in priority need. He was evicted from that accommodation in August 2014.

9. On 15 August 2014 Mr Haque made a second homelessness application, pending the determination of which he was offered temporary accommodation, this time in Room 315 in the Metropolitan Hostel in Kingsland Road, London E8. There followed a

series of negative determinations and "minded to" letters, together with an unsuccessful review, between August 2014 and February 2015, before the Council finally concluded that he did have a priority need, qualifying for the full housing duty in his favour, on 26 March 2015. He had been accommodated in Room 315 throughout, and the Council concluded that this accommodation was suitable for him, in discharge of its housing duty while he was placed as a priority applicant on its waiting list for the allocation of permanent accommodation.

10. By letter dated 21 April 2015 Mr Haque's solicitors sought a review of the suitability of Room 315 pursuant to HA s. 202. Room 315 was alleged to be unsuitable for Mr Haque because:

    i) Its cramped size restricted his movement and thereby exacerbated his back, shoulder, leg and neck pains;

    ii) Its cramped size, coupled with a "No Visitors" policy applied in the hostel, left him isolated and prevented him from receiving visits from his children, which exacerbated his depression and anxiety;

    iii) The hostel's lack of laundry facilities meant that he was required to wear dirty clothing, since his physical disability prevented him from carrying loads of laundry to a launderette; and

    iv) As a result of all the above, he had been required to increase his dosage of anti-depressant medication.

    Medical evidence supportive of that case was submitted on Mr Haque's behalf.

11. On 29 July Mr Banjo commissioned an enquiry into Mr Haque's situation, summarising the essence of his complaint and asking that an urgent visit to Room 315 be carried out, to view its size and status, to ascertain why its size made it cramped for Mr Haque's use and how that affected his health symptoms, to observe his mobility, to describe the extent to which his room was served by stairs or a lift, and to investigate available laundry facilities.

12. On 4 August Mr Banjo received emailed reports from the hostel's manager, a Mr Asania, and from the Council's temporary accommodation manager Ms Johnson, following Mr Asania's visit to Room 315. In summary, they reported as follows:

    i) That his room was cluttered by a lot of personal belongings, including a big TV.

    ii) Otherwise the room was of a suitable size (rooms in the Metropolitan Hostel being on the generous side of average).

    iii) His third floor room was served by a lift, but he needed to manage fourteen steps on the way.

    iv) The nearest laundry was also in the Kingsland Road, and Mr Haque regularly ate out nearby in Brick Lane.

v) The hostel's No Visitors policy could be relaxed so as to permit a friend or relative to visit him to collect and return his laundry to and from the launderette.

vi) His current medication of 30mg Mirtazapine for depression, and Tramadol for pain, was noted.

Mr Banjo was later informed, upon his further enquiry, that Room 315 measured 16msq (which he converted to 172 sq ft).

13. On 19 September Mr Banjo received a desk-top medical assessment from the Council's medical advisor Dr Keen, based upon information and medical evidence supplied by Mr Haque, which concluded that his current accommodation was suitable for him on medical grounds, since he could navigate some stairs, and it was partially lifted, and that he appeared to be receiving appropriate treatment for his physical and mental conditions.

14. Mr Banjo reviewed all that material, together with the additional material on Mr Haque's file, and concluded that Room 315 was suitable for Mr Haque. His reasons for that conclusion appear in his letter to Mr Haque dated 29 September 2015, which I have called "the Decision". It will be necessary for me to look in more detail at the Decision in due course but, in summary, (and adopting my summary of the complaint in paragraph 10 above):

i) Room 315 was of ample size, were it not excessively cluttered by Mr Haque's possessions, some of which he could put into storage offered by the Council at reasonable cost.

ii) Mr Haque could use local parks, local restaurants and eateries to meet his family and friends, or see them in their own homes, and did not therefore need an exception from the No Visitors policy in order to avoid having his depression exacerbated by loneliness.

iii) The nearest launderette was sufficiently proximate for him to be able to reach it with moderate loads of laundry, and the No Visitors policy was to be mitigated in his case by permitting his family to visit him to collect and return laundry.

iv) The council's independent medical advisor had concluded that his condition was such that a flat served by one flight of stairs and a lift was suitable for him, and that the evidence did not sufficiently demonstrate that his current accommodation was exacerbating his condition, which had been long-standing.

Mr Banjo concluded as follows:

> "In reaching this decision I have had regard to the Equalities Act 2010 and I am sorry for the disappointment that this decision may bring you."

15. Mr Haque's grounds for appealing the Decision ranged far and wide. The first, which succeeded before the judge, was that Mr Banjo failed to apply the PSED in

considering whether Room 315 was suitable having regard to his medical condition. Four supporting grounds were advanced, namely:

i) That Mr Banjo had not considered whether Mr Haque was disabled.

ii) That Mr Banjo had not considered whether Mr Haque could meet his family and friends away from Room 315, given his medical condition.

iii) That no account had been taken of the likely duration of his occupation of Room 315.

iv) That the diminished weight of Dr Keen's analysis, arising from the fact that he had not himself examined Mr Haque, had been left out of account.

16. Other grounds were advanced, of no relevance to this appeal, based upon procedural irregularities, inadequacy of reasoning and perversity.

17. It is to be noted that Mr Haque failed on all his grounds of appeal, save only for the first and item (i) in the supporting particulars. The result was that the Decision was quashed. Nonetheless, and pending this appeal, Mr Haque has remained accommodated in Room 315 and has, in the meantime, progressed almost to the top of the slow-moving queue for the allocation of permanent accommodation.

The Law

The Public Sector Equality Duty

18. The PSED is (now) prescribed by EA s. 149 which, omitting the last two irrelevant sub-sections, provides as follows:

149 Public sector equality duty

(1) 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.

(5) Having due regard to the need to foster good relations 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) tackle prejudice, and

(b) promote understanding.

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

(7) The relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.

19. For present purposes the particular need to which due regard must be had is that set out in section 149(1)(b) (advancing equality of opportunity), as amplified by sub-section (3)(a) and (b), (4) and (6). It is not suggested that the PSED required Mr Banjo to have regard in this context to the need to eliminate discrimination under sub-section (1)(a) or to encourage persons sharing a relevant protected characteristic to

participate in public life (etc.) under sub-section (3)(c). It is common ground that the statutory definition of disability in EA s. 6 is satisfied in relation to Mr Haque. His physical and mental impairments have a substantial and long-term adverse affect on his ability to carry out normal day to day activities. It is common ground that the PSED was therefore engaged upon the Council's review of the suitability of his accommodation.

20. Putting on one side for the moment the relationship between the PSED and housing duties, the general principles affecting the proper exercise of the PSED have emerged from a series of relatively recent cases. Some of them precede the coming into force of the Equality Act 2010, and relate to slightly different forms of equality duty, but the substance of the applicable principles is the same. The cases of particular value are *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; *R (BAPIO) v Secretary of State for the Home Department* [2007] EWCA Civ 1139; *Baker v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin); *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586; *R (Hurley & Moore) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin); and finally *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, in the last of which McCombe LJ provides a useful general summary at paragraph 26.

21. The relevant underlying principles are as follows. First, the aim of the PSED (as of other equality duties) is to bring equality issues into the main-stream, so that they become an essential element in public decision making: see per Elias LJ in *Hurley* at paragraph 70, per Arden LJ in *Elias* at paragraph 274, and per Sedley LJ in *BAPIO* at paragraphs 2-3. In *Bracking*, at paragraph 59, McCombe LJ said:

> "It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude."

That was a case about formulation of policy, but the underlying principle applies equally to public authority decision-making of any kind.

22. Secondly, the duty is a matter of substance rather than of form. It requires that the decision maker be aware of the duty to have due regard to the relevant matters: see per Aikens LJ in *Brown* at paragraph 91:

> "It involves a conscious approach and state of mind."

See also per Pill LJ in *Bailey* at paragraph 74-75. The duty must be exercised in substance, with rigour and with an open mind. It is not a question of ticking boxes: see per Aikens LJ in *Brown* at paragraph 92 and per Dyson LJ in *Baker* at paragraph 37:

> "The question in every case is whether the decision-maker has *in substance* had due regard to the relevant statutory needs. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty as being performed, so too

> a failure to refer expressly to the statute does not of itself show that the duty has *not* been performed."

23. Third, the concept of due regard is to be distinguished from a requirement to give the PSED considerations specific weight. It is not a duty to achieve a particular result: see per Dyson LJ in *Baker* at paragraph 31 and per Aikens LJ in *Brown* at paragraph 81. In *Hurley*, Elias LJ said this at paragraph 78:

> "The concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker."

24. Many of these principles were picked up and applied by Lord Neuberger in *Hotak*. But it is first necessary to look at the nature and incidents of the duties imposed by the Housing Act, before returning to consider how they work in combination, in circumstances different from those under review in *Hotak*.

The Housing Duty

25. HA s. 193 imposes the full housing duty, as follows:

> "(1) This section applies where the local housing authority are satisfied that an applicant is homeless, eligible for assistance and has a priority need, and are not satisfied that he became homeless intentionally.
>
> (2) Unless the authority refer the application to another local housing authority (see section 198), they shall secure that accommodation is available for occupation by the applicant."

26. S. 189 defines priority need for accommodation as follows:

> "(1) The following have a priority need for accommodation –"
>
> a) A pregnant woman or a person with whom she resides or might reasonably be expected to reside;
>
> b) A person with whom dependent children reside or might reasonably be expected to reside;
>
> c) A person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside;
>
> d) A person who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster."

Sub-sections (2) to (4) enable the Secretary of State to adjust that list by addition or deletion. The Homelessness (Priority Need for Accommodation) (England) Order (SI 2002/2051) added a number of additional categories of persons with a priority need for accommodation. They included children aged 16 or 17, young people under 21 (other than relevant students) and various classes of persons over 21 with specific vulnerabilities.

27. It will be immediately apparent that there is a substantial, but not complete, overlap between those with priority need for accommodation under the Housing Act and those with protected characteristics under EA s. 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.

28. HA s.206, headed "Discharge of functions by local housing authorities", provides that:

> "(1) A local housing authority may discharge their housing functions under this Part only in the following ways –
>
> (a) By securing that suitable accommodation provided by them is available
>
> …"

Section 210 makes partial provision by way of determining whether accommodation is suitable, as follows:

> "(1) In determining for the purposes of this Part whether accommodation is suitable for a person, the local authority shall have regard to Parts 9 and 10 of the Housing Act 1985 (slum clearance and overcrowding) and Parts 1 to 4 of the Housing Act 2004."

Sub-section (2) enables the Secretary of State to specify circumstances in which accommodation is or is not to be regarded as suitable for a person, and matters to be taken into account or disregarded in determining whether accommodation is suitable for a person.

29. The Government's Homelessness Code of Guidance for Local Authorities (July 2006 edition) to which HA s. 182 requires them to have regard, provides further assistance in chapter 17, headed Suitability of Accommodation. Paragraph 17.4 provides:

> "Space and arrangement will be key factors in determining the suitability of accommodation. However, considerations 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 his or her family."

Paragraph 17.5 and 17.6 emphasise the need for housing authorities to consider carefully the suitability of accommodation by reference to the applicant's particular medical and or physical needs and to any social considerations relating to the applicant and his or her household.

30. Reported decisions stretching back well before the introduction of the PSED have emphasised the importance of appraising the suitability of accommodation not merely by reference to its characteristics of space, amenities and location, but also by reference to the particular medical and social needs of the applicant, including particular kinds of disability. Thus in *R v Brent LBC ex parte Omar* (1991) 23 HLR 446, Henry J said of the similar provisions in section 69 of the Housing Act 1985:

> "The question of statutory construction raises the question, suitable to whom or for what? On a reading of the Act, it seems to me that this can only mean suitable as accommodation for the person or persons to whom the duty is owed: here Mr and Mrs Omar and, additionally, their two children.
>
> Therefore, under the statute as presently construed, in determining whether the accommodation is suitable the local housing authority must clearly have regard to the circumstances of the applicant and his or her family, in so far as those circumstances are relevant to the suitability of the accommodation, as well as having regard to the matters to which their attention is specifically directed by the statutes; that is to say, provisions relating to fitness for habitation, over crowding and the like.
>
> It should be noticed that as we are here dealing with people found to have been in priority need under the criteria of section 59, the local housing authority will, in reaching that conclusion, already have investigated all these matters, including under section 59(c), whether a person is vulnerable as a result of old age, mental illness or handicap or physical disability or some other special reason. Therefore, in my judgment, what the local authority must do to discharge their duty under section 69(1)(a) is to make available accommodation that is suitable for the applicant."

He continued:

> "What the local housing authority had to ask itself on that basis was whether this accommodation was suitable for this family in the light of the medical evidence? Clearly, the local housing authority were entitled to have regard to the realities giving the practical constraints imposed, both by the numbers of competing applicants for a housing stock limited in quantity and quality by financial constraints. A high quality of suitability clearly cannot be obtained."

Henry J's approach to suitability was applied by Owen J in *Bibi v Newham LBC* [2003] EWHC 1860 (Admin) at paragraph 35, by Stanley Burnton J in *R (Begum) v Tower Hamlets LBC* [2002] EWHC 633, and by Sir Louis Blom-Cooper QC in *R v Lewisham LBC ex parte: Dolan* (1993) 25 HLR 68. Examples of more recent cases which turned on specific focus upon particular aspects of an applicant's disability include *Boreh v Ealing LBC* [2008] EWCA Civ 1176, which concern the suitability of a house for a wheelchair-bound applicant, and *El-Dinnaoui v Westminster City Council* [2013] EWCA Civ 231, where the relevant disability was that of the applicant's wife, whose fear of heights made accommodation on the sixteenth floor of a tower block unsuitable for her particular needs.

31. I mention these cases about the suitability test not because there were any competing submissions about them during the hearing of this appeal, but because they serve as the non-contentious background to the issue, keenly debated between counsel, as to the extent of the alignment or divergence between, on the one hand, the Housing Act duty to provide a vulnerable person with suitable accommodation, and the PSED, in relation to an applicant for housing with a protected characteristic.

The PSED and the Housing Duty in Combination

32. The first reported case (shown to us) in which the relationship between these two duties was reviewed in this court was *Pieretti v Enfield LBC* [2010] EWCA Civ 1104. At the relevant time the PSED was as laid down (in relation to people with disabilities) in section 49A of the Disability Discrimination Act 1995, although EA s. 149 was shortly to come into force. The applicant for accommodation was found by the council to have made himself intentionally homeless through permitting rent arrears to build up, which led to his eviction and that of his wife. The applicant suffered from depression and his wife from arthritis. Although they did not specifically pray in aid their disabilities as explaining the rent arrears there was sufficient in the documentation about their medical circumstances for further enquiry to have raised a real possibility that their disabilities were indeed relevant. This Court held that the reviewing officer had failed to comply with the PSED and, reversing the County Court judge, quashed the decision. It was, as Mr Rutledge submitted, not a case in which there was any inherently close alignment between the PSED and the particular aspect of the housing duty in issue, namely the assessment whether an applicant had become homeless intentionally.

33. *R (McDonald) v Kensington and Chelsea Royal London Borough Council* [2011] UKSC 33 [2011] PTSR 1266 was a decision about the requirements of the statutory needs assessment in connection with the provision of community care services pursuant to section 47 of the National Health Service and Community Care Act 1990, in which the appellant claimed that the assessment of her medical needs had been vitiated (*inter alia*) by a failure to comply with the PSED as imposed by section 49A of the 1995 Act, because no express reference to it was made in the decision-maker's documentation about her case. She said that it was to be inferred that, in determining how to assess her needs, the council had failed in their general duty under that section. Lord Brown giving the leading judgment said, at paragraph 24:

> "This argument too is in my opinion hopeless. Where, as here, the person concerned is ex-hypothosi disabled and the public authority is discharging its functions under statutes which

> expressly direct their attention to the needs of disabled persons, it may be entirely superfluous to make express reference to section 49A and absurd to infer from an omission to do so a failure on the authority's part to have regard to their general duty under the section. That, I am satisfied, is the position here. The question is one of substance, not of form. This case is wholly unlike *Pieretti v Enfield LBC* [2011] PTSR 565 (which held that the section 49A duty complements a housing duty's duties to the homeless under Part 7 of the Housing Act 1996)."

That may be said to have been a case in which the alignment between the PSED and the community care duty was very close indeed.

34. The recent decision of the Supreme Court in the *Hotak* case (handed down in December 2014) is (in relation to the conjoined appeal of Mr Kanu) directly concerned with the relationship between the PSED (in its current form) and the local authority's housing duty. The leading judgment was given by Lord Neuberger, and this relationship is addressed in principle at paragraphs 72-80, and specifically in relation to Mr Kanu's appeal, which was unsuccessful on this point (but succeeded on another), at paragraph 82. His complaint was that, on an assessment whether he was in priority need by reason of his physical and mental disabilities, the reviewing officer had failed to give sufficiently careful or critical scrutiny to his disability.

35. After a review of the cases of *Baker, Bracking, Brown, Hurley* and, in particular, *Pieretti*, Lord Neuberger continued :

> "78. In cases such as the present, where the issue is whether an applicant is or would be vulnerable under section 189(1)(c) if homeless, an authority's equality duty can fairly be described as complementary to its duty under the 1996 Act. More specifically, each stage of the decision-making exercise as to whether an applicant with an actual or possible disability or other "relevant protected characteristic" falls within section 189(1)(c), must be made with the equality duty well in mind, and "must be exercised in substance, with rigour, and with an open mind". There is a risk that such words can lead to no more than formulaic and high-minded mantras in judgments and in other documents such as section 202 reviews. 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".
>
> 79. Mr Underwood QC argued that the equality duty added nothing to the duty of an authority or a reviewing officer when determining whether an applicant is vulnerable. 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. In *Holmes-Moorhouse* [2009] 1 WLR 413, at paras 47-52, I said that a "benevolent" and "not too technical" approach to section 202 review letters was appropriate, that one should not "search for inconsistencies", and that immaterial errors should not have an invalidating effect. I strongly maintain those views, but they now have to be read in the light of the contents of para 78 above in a case where the equality duty is engaged."

36. As to the particular facts about Mr Kanu's case, Lord Neuberger continued:

> "82. I would not, however, have allowed his appeal based on the equality duty. While some might find the outcome of the review surprising, in my view, albeit in a rather prolix and slightly confusing way, Ms Emmanuel did approach the question of Mr Kanu's vulnerability in a sufficiently full and considered way to satisfy the equality duty. 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. In forming this view, I do not place significant weight on the fact that she specifically mentioned the equality duty (although she gave the 2010 Act the wrong name) – see para 31(ix) above. If the earlier part of the letter had not complied with the duty, I doubt very much that the throw-away reference to the equality duty could have saved it."

Analysis

37. I have already set out, at paragraph 6 above, the judge's sensible and uncontentious starting point, to which I would only add that a stand-back approach to the reviewing officer's decision requires also that it be read in its context, which includes the steps already taken to perform the housing duty in relation to the applicant and, in the case of a review, the particular grounds upon which the applicant alleges that those steps have been inadequate.

38. But the judge continued, at paragraphs 48-49 of his ex-tempore judgment, as follows:

> "48. In my judgment, the first ground of appeal succeeds. The terms of the paragraph 78 of the *Hotak* judgment, read together with the duty to give reasons for a reviewing officer's decision, (themselves contained in section 203 of the Housing Act 1996), oblige a reviewing officer to be transparent in his treatment of the issues of whether an applicant does or does not have a

> protected characteristic and as to whether the public sector equality duty is in play and with what effect. In my judgment, that will in almost all circumstances, require a reviewing officer to spell out, at least in summary form, his decisions on those matters. Indeed, he should go further and spell out what follows from an affirmative finding that a protected characteristic is established and that the public sector equality duty is in play.
>
> 49. In this particular reviewing officer's decision there is not, in my judgment, the material to demonstrate those matters. I accept that in some rare cases a reviewing officer's decision might be upheld, even though these matters are not clear on the face of the decision letter, if the pith or gist of what is required can be garnered from the wording used."

Later, at paragraph 51 he said, in relation to Mr Banjo's reasons:

> "There is no suggestion in the reviewing officer's decision that he took up 'different spectacles' or thought he had to modify his normal stance at all in respect of the Code of Guidance nor any indication that he viewed the factual material before him through the prism of the public sector equality duty as it applies to a person who may have a protected characteristic of disability."

39. There is, as Mr Rutledge pointed out, an immediate tension between this analysis of the judge, requiring "in almost all circumstances" a transparent and express analysis of the application of the relevant aspects of the PSED to the applicant's case, and Lord Neuberger's approach in *Hotak*, at paragraph 79, where he accepted that in many cases a conscientious reviewing officer could comply substantially with the PSED, even if unaware of its existence, or its engagement in a particular case. The tension is slightly, but by no means entirely, dispelled by the judge making it plain, at paragraph 53 of his judgment, that substantive rather than formal compliance with the obligations imposed by the PSED was required, and that a slavish recitation of the relevant parts of section 149 would not, on its own, suffice. The judge may have been aware of this tension because, after reciting in full paragraphs 78 and 79 of *Hotak*, he said, at paragraph 35:

> "However, what does not emerge with precision from these paragraphs, intending no disrespect to their author, is how precisely a reviewing officer's decision will be best framed so as to demonstrate a substantive engagement with the duty and a "very sharp focus". That is the issue that arises from the first ground of appeal in this case."

40. Mr Arden submitted that the relevant principles to be derived from the *Hotak* case, as applicable generally to the discharge by local authorities of their housing duties, were to be found in paragraph 78 of Lord Neuberger's judgment, rather than in paragraph 79 which, he said, was a reflection of the particular fact that in Mr Kanu's case, the duty concerned the assessment of his alleged disability for the purpose of qualifying

for priority need, whereas the present appeal is concerned with the suitability, or otherwise, of the accommodation provided. He submitted that the focus in the *Hotak* case was one in which the PSED and the relevant part of the housing duty ran hand in hand, as in the *McDonald* case whereas, from the housing duty perspective, Mr Haque's disability was no more than an incident in a review focussed mainly upon the relevant characteristics of Room 315. This was, he submitted, therefore more of a *Pieretti* case than a *Hotak* case.

41. In my judgment the starting point is to be appropriately cautious when invited to treat any part of the judgment in a leading case as if it were of statutory force, with a general effect dissociated from the particular facts under review. Parts of both paragraphs 78 and 79 of Lord Neuberger's judgment in *Hotak* are plainly and precisely directed to the conduct of a vulnerability assessment rather than, for example, to a suitability assessment (as here) or to the question whether an applicant has made himself intentionally homeless (as in *Pieretti*). Thus the four-stage approach calling for sharp focus in paragraph 78 is plainly aimed at assisting the reviewing officer in deciding whether the applicant is vulnerable. Equally, Lord Neuberger's acceptance that "in many cases" a reviewing officer might discharge a PSED even if ignorant of it was expressly directed to the conduct of a vulnerability assessment. What emerges as a general principle is the sharp focus required of the decision maker upon the relevant aspects of the PSED where it is engaged by the contextual facts about each particular case.

42. The context of the suitability review in Mr Haque's case may I think be summarised as follows:

    i) He had only been provided with accommodation (otherwise than on a purely provisional basis, pending determination as to his vulnerability) because he had been found to be in priority need by reason of his particular physical and mental disabilities, namely (in summary) serious and chronic neck and back pain, with consequential depression. Those conditions plainly rendered him more vulnerable to homelessness than the generality of the population.

    ii) Mr Haque's specific complaints about the unsuitability of Room 315 were all based upon those specific aspects of his medical condition and their effects, for example upon his mobility and ability to socialise, measured against the perceived shortcomings of Room 315 in meeting those specific needs, rather than the needs of potentially homeless people generally, or even the generality of disabled homeless people.

43. The next question is what, in that context, does the PSED as set out in section 149 of the Equality Act require of the reviewing officer on the particular facts of this case? In my judgment, it required the following:

    i) A recognition that Mr Haque suffered from a physical or mental impairment having a substantial and long term adverse effect on his ability to carry out normal day to day activities; i.e. that he was disabled within the meaning of EA s. 6, and therefore had a protected characteristic.

    ii) A focus upon the specific aspects of his impairments, to the extent relevant to the suitability of Room 315 as accommodation for him.

iii) A focus upon the consequences of his impairments, both in terms of the disadvantages which he might suffer in using Room 315 as his accommodation, by comparison with persons without those impairments (see s. 149(3)(a)).

iv) A focus upon his particular needs in relation to accommodation arising from those impairments, by comparison with the needs of persons without such impairments, and the extent to which Room 315 met those particular needs: see s. 149(3)(b) and (4).

v) A recognition that Mr Haque's particular needs arising from those impairments might require him to be treated more favourably in terms of the provision of accommodation than other persons not suffering from disability or other protected characteristics: see s. 149(6).

vi) A review of the suitability of Room 315 as accommodation for Mr Haque which paid due regard to those matters.

44. Contrary to some of Mr Arden's submissions, The PSED did not in my judgment require Mr Banjo to consider whether Mr Haque needed accommodation which was more than suitable for his particular needs. It required him 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.

45. Nor did the engagement of the PSED in relation to Mr Haque's application for a suitability review in any way absolve Mr Banjo from the requirement to bring his experienced judgment to bear upon those questions. He 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.

46. Nor in my judgment does 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 s. 149, such as those specified in HA s. 210 (and Orders made pursuant thereto) and those set out in the Code of Guidance. As McCombe LJ said in *Bracking* at paragraph 60, considerations required to be taken into account are to be placed side by side with all other pressing circumstances of whatever magnitude.

47. 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's words in paragraph 79 of *Hotak*, a conscientious reviewing officer considering those objections in good faith and in a focussed manner would be likely to comply with the PSED even if unaware of its existence as a separate duty, or of the terms of s. 149.

48. EA s. 149 does not require the decision maker to give any reasons for a decision to which the PSED applies. HA s. 203(4)(a) does require the housing authority to give reasons for a decision on review which confirms an original decision on any issue against the interests of the applicant. Generally speaking, this requires the reviewing officer to enable the applicant to understand why he has lost, and to enable him to judge whether the authority have properly fulfilled their statutory obligations including, where it is engaged, the PSED: see *Nzolamseo v Westminster City Council* [2015] UKSC 22 per Baroness Hale at paragraph 32. But this imposes no single or uniform standard as to how compliance with a statutory duty may be demonstrated. As Lord Woolf said in *Crown R (Asha Foundation) v The Millennium Commission* [2003] EWCA Civ 88 at paragraph 27:

> "Where the obligation to give reasons exists, this does not require a single standard of reasons to be given. The standard of reasons required depends upon the circumstances of the particular case. Where reasons are required to be given, the obligation is to give appropriate reasons having regard to the circumstances of the case…"

49. In my view the judge's no doubt well-meaning attempt to erect such a standard, as applicable to almost all suitability reviews where the PSED is engaged, led him into an erroneous conclusion that, merely because this standard was not complied with by Mr Banjo, he had failed to demonstrate compliance with the PSED. It is noteworthy that the only particular respect in which he found that Mr Banjo failed to comply in substance (rather than in form) was a supposed failure to consider whether Mr Haque was disabled within the meaning of the Equality Act so as to constitute a protected characteristic bringing the PSED into play: see paragraphs 48 and 54 of the judgment. In each of the other respects identified in Mr Haque's grounds of appeal to the County Court, the judge found that Mr Banjo had given requisite consideration to the matters complained of.

50. But a fair "stand-back" reading of the Decision as a whole, in its context, makes it plain in my view that Mr Banjo appreciated that Mr Haque both alleged, and indeed suffered from, a relevant disability. The documents in the file included his GP's original description of those disabilities in January 2015, on the basis of which Mr Haque had in due course been found to be in priority need due to physical and mental disability. Mr Banjo referred to that letter in terms as part of the evidence which he had considered, and proceeded to describe in detail the physical and mental disabilities relied upon by Mr Haque for his allegation that Room 315 was unsuitable for his needs, together with their particular alleged effects, in paragraphs 1 to 6 of the Decision. Mr Banjo therefore demonstrated a sufficient recognition that Mr Haque was disabled, being the first stage of the required analysis which I have endeavoured to set out sequentially at paragraph 43 above. For this purpose the requirement is not an appreciation that, as a matter of law, the PSED duty was therefore engaged, but a sufficient recognition that Mr Haque was in fact disabled.

51. A conclusion that the judge's erection of an inappropriately rigid standard for the purpose of giving reasons sufficient to demonstrate compliance with the PSED led him into error does not absolve this court from carrying out its own stand-back appraisal of the Decision, read in its context, to ascertain whether sufficient compliance with the substance of that duty is thereby demonstrated. For that purpose I have read and re-read the Decision letter with a view to ascertaining whether Mr Banjo adequately undertook all six stages of the analysis set out in paragraph 43 above which I consider that the PSED required of him in the particular circumstances of Mr Haque's case. As I have said, I consider that he plainly undertook the first stage.

52. The specific aspects of Mr Haque's impairments relevant to the suitability of Room 315 as accommodation for him were set out with admirable clarity in his solicitor's letter seeking the review and summarised, albeit more briefly, in paragraphs 2 to 5 of the Decision. They were that his chronic back, neck, shoulder and leg pains were exacerbated by the allegedly cramped nature of the accommodation, that his severe depression and anxiety had been worsened due to the combination of cramped accommodation and the strict No Visitors policy applied at the hostel, that the position of Room 315 on an upper floor coupled with the absence of a laundry facility on the premises made it difficult for him, with his physical disabilities, to take laundry to a service provider, and that the combined effects of these shortcomings in the accommodation provided had caused him to have to increase his dose of anti-depressant medication.

53. The same summary sufficiently demonstrates a focus by Mr Banjo upon the consequences of those impairments, in terms of the disadvantages which he might suffer in using Room 315 as his accommodation, by comparison with persons without those impairments. Plainly, Mr Haque was not complaining of some inherent or general unsuitability in the accommodation such as was likely to affect all inhabitants of Room 315. His complaint was, as Mr Banjo demonstrated that he understood, specifically based upon his particular ailments and their effect upon him as a user of Room 315. Furthermore, Mr Banjo's analysis of whether those disadvantages were made good clearly demonstrated a rigorous focus upon Mr Haque's particular needs, and whether they called for accommodation different in its size, situation or accessibility to visitors than that provided by Room 315, for the purposes of stage (iv) of the required analysis. Thus for example he asked himself, at paragraphs 7, 8 and 11 of the Decision whether his particular need to relieve his chronic pain called for larger accommodation, or for him to de-clutter Room 315 to make more space for himself, and the means whereby the Council might assist him in de-cluttering, by offering storage space at reasonable cost for as long as Mr Haque continued to live there.

54. Again, Mr Banjo considered whether the constraints on Mr Haque's mobility required ground floor accommodation, both generally, and for the purposes of reasonable access to laundry facilities. He concluded on largely uncontentious medical evidence that Mr Haque was able to negotiate the fourteen steps giving access to the lift to the third floor, that he would be able to visit local restaurants and eateries, and therefore socialise with family and friends there and in other public places, notwithstanding the No Visitors policy. He also ascertained that the policy could be relaxed to enable Mr Haque's family to assist him in the delivery and collection of laundry, and concluded

that Mr Haque could, to an extent, help himself by taking smaller loads and using a wheeled bag.

55. While instinctive sympathy for Mr Haque's rather miserable predicament may make these conclusions look rather tough and perhaps unsympathetic, they nonetheless show an appropriate focus on Mr Haque's alleged and real needs, and upon the extent to which accommodation at Room 315 reasonably met them, bearing in mind that the PSED attributes no specific weight to the considerations to which there must be due regard, and determines no particular outcome. As to stage (v) (namely the requirement to consider whether Mr Haque deserved more favourable treatment than other persons not suffering from his disability) it seems to me that the whole of the review was directed to that issue. The complaint was not that Room 315 was inherently unsuitable, but rather that Mr Haque with his particular disabilities deserved special treatment by being accommodated on the ground floor, in a larger room unaffected by visitor restrictions than the generality of homeless persons in priority need. It by no means follows from Mr Banjo's overall conclusion that Room 315 was suitable that his focus was not, from start to finish, on the question whether Mr Haque's disabilities called for some form of preferential treatment.

56. As for the final stage (vi) (namely a review of the suitability of Room 315 as accommodation for Mr Haque which paid due regard to all those matters), I can only say that, in my judgment, it did, read as a whole and in context. Using the judge's vivid language, the pith or gist was there. Mr Arden pressed upon the Court in attractive submissions the proposition that Mr Banjo was, in an unfeeling and hard-hearted manner, merely seeking to justify an *a priori* decision that Mr Haque need not be moved into better accommodation, rather than conscientiously discharging the PSED by a recognition that he deserved something more than barely suitable accommodation. Perhaps his most moving point (in terms of the generation of instinctive sympathy for Mr Haque) was his demonstration that Mr Banjo went as far as suggesting that his de-cluttering of Room 315 could usefully include removal into storage of his large screen television, from a room in which he was barred from receiving visitors. But in my judgment, tough and perhaps even insensitive decision-making, which is not relied upon in support of an allegation of lack of good faith, does not of itself point to a lack of rigorous, open-minded focus upon, or having due regard for, Mr Haque's real needs as a person suffering from disability.

57. Judicial notice can be taken of the fact that housing authorities experience grave constraints in finding appropriately located suitable accommodation for those applicants demonstrating priority need, and that many of them deserve more favourable than purely average treatment by reason of vulnerabilities, including protected characteristics of a type which engage the PSED. The allocation of scarce resources among those in need of it calls for tough and, on occasion, heartbreaking decision-making, but having to say no to those deserving of sympathy by no means betokens a failure to comply with the PSED.

58. For those reasons I would allow this appeal, and re-instate the decision, on review, that Room 315 was suitable for Mr Haque's needs.

Lord Justice Beatson:

59. I agree with both judgments.

Lord Justice McCombe:

60. I agree that this appeal should be allowed for the reasons given by Briggs LJ. However, I do not wish to leave this case without making one or two additional remarks of my own, which I hope may afford some further practical guidance to decision-makers in this type of case, in addition to that provided by the comprehensive analysis in my Lord's judgment.

61. I confess to having had hesitation as to whether Mr. Banjo's decision sufficiently *demonstrated* adequate regard for the requirements of the PSED. I was concerned in particular about Mr Haque's position in the light of the "No Visitors" policy and the comments made about the cluttering of the room with Mr Haque's personal possessions, especially his television set. It seemed to me that in Mr Haque's case, where his symptoms of disability were not only physical, but included depression, the importance of access to friends and relatives and (if he felt the need) to a really good TV set might need specific attention in discharge of the PSED. I considered Mr Arden's submissions on this point to be particularly persuasive.

62. In the end, however, I am satisfied that the decision taken was focussed upon the needs of Mr Haque, with the disabilities which he suffers, compared with those without such disabilities. I am also conscious of the requirement not to be over-exacting in assessing these decisions, as pointed out in the *Holmes-Moorhouse* case. One must also keep in mind the deep experience of the reviewing officers who make these decisions. I agree entirely with what is said in paragraph 57 as to the realities that lead to tough decisions having to be made, notwithstanding full regard to the PSED. In my judgment, in this case, the learned and very experienced judge below was too exacting in what was to be expected of decision-makers. I was satisfied that my own concerns outlined above, if taken too far on this appeal, would amount to micro-managing the decision-making process.

63. As Briggs LJ says in paragraph 41 of his judgment, one is to be cautious in treating any part of a judgment in a leading case as if it were of statutory force, including our judgments in this case. However, I think the six points raised in paragraph 43 above may well be of help in cases of this type in enabling a decision-maker to demonstrate transparently what consideration that he/she has given to the particular features of the PSED arising in any individual case. It is reassuring to a court to see that a decision-maker has looked at specific aspects of the duty and can say what his/her response to it is. I am far from suggesting a "tick box" approach to these matters, but some particularity in the written decision, demonstrating due regard to the relevant aspects of the duty, can avoid litigation of the present character.

64. As indicated, I too would allow the appeal.