Homelessness and the Equality Act 2010 Post – Wilson and Haque

The Equality Act 2010 adds something to the task that local authorities have to carry out when considering whether someone is homeless…. But what? In *Hotak v Southwark LBC, Kanu v Southwark LBC and Johnson v Solihull Metropolitan Borough Council* [2015] UKSC 30 we got a partial response. The public sector equality duty ("PSED") means that the decision maker should focus sharply on whether the Applicant is disabled and how that affects them. Different decision makers have taken this in different ways. Two recent cases illustrate the point.

Birmingham City Council v Wilson [2016] EWCA Civ 1137 was an appeal against a decision of the now-retired HHJ Oliver-Jones QC. The Appellant was offered accommodation in a tower block along with her two sons. One of her sons – as it turned out – had a fear of heights so acute as to amount to a disability. At the time she applied, however, she did not appreciate this and ticked the box saying that no-one in her family was disabled. She sought a review of the suitability of the accommodation offered on the basis that her sons were scared of heights, but it was not couched in terms of a disability or supported by any medical evidence. She was sent a "minded to" letter which she did not respond to. After the decision that the accommodation was suitable was upheld, the Appellant appealed and obtained medical evidence. The Judge upheld the appeal on the basis that the submissions made by Mrs Wilson raised "a real, as opposed to a fanciful, possibility of there being mental disability" and Birmingham should therefore have investigated further.

The Court of Appeal reminded itself that there is a duty on the local authority to make such inquiries as are necessary to satisfy itself as to the duty it owes to an Applicant. This is enhanced by the Equality Act.

> "*the relevant question has now become:*
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> > *"did [the reviewer] fail to make further inquiry in relation to some such feature of the evidence presented to her as raised a real possibility that the appellant was disabled in a sense relevant [to the assessment to be made on the review]?"*
> >
> > *…*
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> *It is agreed that the question whether the evidence presented raises a "real possibility" that any applicant for housing assistance is disabled is to be assessed by looking to see whether the review officer subjectively considers that such a "real possibility" arises or acts in a Wednesbury irrational way in concluding that it does not. In my view this is the correct approach."*

In this case, however, the reviewing officer had not failed to make those inquiries. Although the Applicant had raised the issue of a fear of heights, there was no duty to think of that fear in terms of a disability. There was an onus on the Applicant to bring forward all relevant material. This was particularly so given that she had had a minded to letter.

> *"In the absence of any indication that Ms Wilson thought that any issue of such gravity had arisen as to need her to address it by seeking any professional advice or diagnosis, [the reviewing officer] could rationally assess the position to be one where the children's fear of heights was within the normal spectrum and not indicative of any possibility that they had a disability within the meaning set out in the 2010 Act.*

In *Haque v Hackney LBC* [2017] EWCA Civ 4 the Court of Appeal took the opportunity to clarify to some extent how the PSED applies in relation to suitability decisions. There was no question but that the PSED fell to be considered in relation to suitability as much as to issues of vulnerability.

In a decision that will be welcomed by local authority decision makers (and the advocates who defend their decisions) the Court of Appeal emphasised that what matters is the substance not the form. It is a question of "stand[ing] 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*." The Judge below, the highly respected housing specialist HHJ Luba QC, had stated that principle, but, ruled the Court of Appeal, had not applied it in this case.

Mr Haque had been placed in hostel accommodation and argued that it was not suitable for him given his disabilities, which included mental health problems. He complained, amongst other things, that the hostel's "No visitors" policy made him feel isolated and therefore exacerbated his mental problems.

The Judge held that the decision maker had failed to look at each aspect of the PSED in relation to the case. However, the Court of Appeal emphasised what Lord Neuberger had said in *Hotak* at 79:

> *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.*

The Court cautioned against applying *Hotak* as if it were a statute. *Hotak* was about vulnerability not suitability. Thus the 4 stage test adumbrated by Lord Neuberger for deciding that issue would not necessarily be appropriate in suitability cases. Briggs LJ emphasised

> *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.*

So what did the PSED require in this case? The Court identified what needed to be in the decision:

> i) A recognition that the Applicant suffered from a physical and/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 the accommodation as accommodation for him.
> iii) A focus upon the consequences of his impairments, ie the disadvantages which he might suffer in using that accommodation, by comparison with persons without those impairments *and*
> 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 the accommodation in question met those particular needs: see s. 149(3)(b) and (4).
> v) A recognition that the Applicant'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).

What did *not* need to be in the decision letter, on the other hand, was a bland acceptance of the Applicant's case. The reviewing officer was entitled to bring his own judgment to bear on the accommodation and its suitability for the Applicant. And there was no need for a decision to spell out whether the Applicant was, or was not, disabled, or had any other protected characteristic. If the decision maker adopted a disciplined approach, it would no doubt put the issue beyond reasonable doubt. But where a reviewing officer considers each aspect of the Applicant's conditions and how it affects them, the PSED will normally be satisfied.

The EA s. 149 does not require the decision maker to give any reasons for a decision to which the PSED applies. It therefore adds nothing to the existing duty on local housing authorities to inform the Applicant 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. There is no single standard for reasons.

Even though the decision maker had not decided whether or not Mr Haque was disabled, he had made it clear that he appreciated that the Applicant claimed to – and did – suffer from a disability. He had considered the impact of the disability and the reasons given for saying that the accommodation was unsuitable.

The Court recognised that those who are disabled and homeless are often in accommodation which is no more than barely suitable. Yet this is not to say that they must be moved.

> *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.*

The PSED does not alter the statutory duties owed to the homeless even when the Applicant or their family has a disability. What the PSED does do is require the local authority to make proper inquiries, being alert to the possibility that there may be a disability that the Applicant does not declare, but to the extent of making the case on their behalf, or accepting at face value what they say. These cases underline the benefits of the Regulation 8 procedure of sending out a "minded to letter" giving Applicants the chance to mention disabilities and explain their impact, and of the benefits of a structured approach to the PSED. If there is a medical condition, it is not necessary to think of it in terms of a disability. Think of it in terms of something the Applicant has to live with. How does it affect them, in a way that it does not affect other people? Does that affect the decision the local housing authority has to take? If not, why not? That's all there is to it.

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