Housing Law Practitioners' Association

Minutes of the Meeting held on 20 May 2015
University of Westminster

Homelessness Update

Speakers: **Matt Hutchings, Cornerstones Barristers**
Jan Luba QC, Garden Court Chambers
Zia Nabi, Doughty Street Chambers

Chair: **Rebecca Chan, Arden Chambers**

Chair: Welcome to this evening's meeting, my name is Rebecca Chan and I am from Arden Chambers. We have an exciting programme for you today. We will be talking about *Hotak Johnson* and *Kanu* and we have three speakers who have all been involved in that case. Can I first ask if there are any corrections to the Minutes of the last meeting? If not, I will introduce the speakers. Firstly, Matt Hutchings from Cornerstones will be introducing the issues and talking generally about the case and the problems that were created by *Pereira*. Jan Luba QC will then be speaking about his view on the case as he was involved in the *Johnson* Appeal and finally we have Zia Nabi from Doughty Street Chambers who was involved in *Kanu* and he will be speaking about his views on the impact of that judgment and how it affects people and applicants with protected characteristics.

Matt Hutchings: Good evening everyone. I would like to thank HLPA for organising this evening and inviting me to speak tonight. My role is merely as a warm up act for other speakers who will follow.

Well, you wait for ages for a Supreme Court decision on homelessness, and then three come along. That actually works in two ways, not only because obviously tonight we are talking about *Hotak, Kanu and Johnson* but we have in recent weeks had judgments in *Nzolameso*, *Hotak et al,* and today in *Hale*, all with significant changes to the law in favour of homeless applicants.

Now it is only possible to achieve that if you actually get the cases up to the Supreme Court in the first place and, certainly in relation to *Hotak, Kanu and Johnson*, that involved a massive collective effort by a number of lawyers so I think we should acknowledge that effort. There were other cases waiting in the wings as well, so I think we should acknowledge that that is what it took to get it up to the Supreme Court and to achieve the progress that has been achieved. Speaking personally, it was a privilege to be involved in a fantastic team effort to put forward the best case that we could to try and change the Priority Needs Vulnerability Test.

I will be speaking under four broad headings. They are: The Problems; The Issues; The Answers; and Future Issues.

The first problem, and a big one, is comparator. So as we all know, the *Pereira* test invited a comparison between the applicant and the ordinary homeless person, perhaps an occupant of the Clapham Omnibus. We know as a matter of fact that actual ordinary homeless people suffer from a range of problems. They generally suffer from poor mental and physical health and, indeed, that is part of the research that is done by various charitable bodies, including Shelter and Crisis, with an aim to try to improve their plight. But it follows that any test that involves a comparison with the ordinary

homeless person produces what we labelled a super vulnerability test. In other words, more vulnerable than the vulnerable; more ill than the seriously ill. So that is the big problem about the comparator.

The second main problem, which is linked, was the lack of any effective review of vulnerability decisions by the courts, and there are two main aspects, to my mind, to that. The first is the illusive nature of the comparator and, if you consider the Court of Appeal decision in ***Tetteh***, by now we're talking about the grandchildren of ***Pereira*** if you like. You had children of ***Pereira*** and grandchildren and by ***Tetteh*** the Court of Appeal was saying that the characteristics of the ordinary homeless person could be based on the local experience of a particular housing officer. If that is right, really it is all that Local Authorities needed, because it is effectively impossible to challenge that evidence base for a decision. The County Court, hearing a s.204 appeal, could have no evidence before it upon which to subject a particular housing officer's experience of homeless people to any form of effective review, so that, in effect, shielded decisions from review.

So my take on it is that really Local Authorities did not even need the later trend of referring to snap stats and all the rest. The urban myth about that is that the ***Pereira*** decisions based on snap stats were invented by Minos Perdios because he had never actually seen an actual homeless person in his life. So he needed some other kind of evidence on which to base the comparator.

As a footnote to the illusive comparator point, of course we have ***Osmani*** which actually suggested that vulnerable meant those people who can afford to help. So that's the illusive comparator.

The second aspect of this problem is ***Puhlhofer***, so if you apply a threshold for the court to intervene of obvious perversity, what does that mean? In practice that means that cursory, superficial, slapdash decisions are upheld and, in combination, these two features really meant that cash strapped Local Authorities could choose any comparator they liked and so the bar for an applicant satisfying the Authority that they were vulnerable could simply be artificially and arbitrarily raised.

The third point was the ***Hotak*** point, which was the relevance of third party support to vulnerability, and from one perspective I would say, and it was discussed, that if an applicant will, in fact, be OK when homeless, then to what extent is this a policy concern of itself. That's not to say that superficial decisions saying, well OK, you've got a brother so you're going to be fine, that's a problem but does that not relate to effective review. But to put the opposite perspective, and the way we submitted it, was that really where this was heading was social care on a park bench when you had legislation saying you should be housing vulnerable people.

So those are what I suggest were the main problems which arose under the ***Pereira*** case law. I may be accused in lingering on the issues of a somewhat archaeological approach, but I do not apologise for it because, in seeing where we are, it is useful to know how got there.

So in relation to the comparator, the first and obvious point is we have come a long way from the ordinary meaning of a person who is vulnerable for one of the following inclusive lists of reasons or any other special reason, and that had been the subject of judicial comment, inter alia, by Mr Justice Sedley, as he then was, in a case called ***Fleck***, when he said that the results were a reproach to a society that considered itself civilised.

But how do you actually run the argument that the applicant should not be compared to someone. The basic argument against us was that everyone is susceptible to some harm from homelessness. It will not be pleasant for anyone, and if you look at the Act it is clear that there was a vulnerability test, so not everyone who is homeless is going to satisfy that test, so was there not some kind of comparator? In thinking through the strategy of running this argument I would say that a major concern is that meaning and contest is a slippery slope.

Consider for a moment the phrase: An intelligent Supreme Court Judge, and you'll see where I'm going. In other words, "intelligent" is an adjective that can be applied of people. We generally know what it means, it's rather imprecise but if you select a particular group of people, like Supreme Court Judges, then suddenly it acquires a different meaning, and actually it is a lot harder to satisfy that test. So the trouble with having a comparator is, was not the correct comparator an ordinary homeless person, because after all, that is who you're dealing with. So there was a tactic which was agreed, of holding the line that there is simply no comparator, but also a realistic fallback position that the correct comparator was simply an ordinary person.

The other point that I would like to flag up is that timing is very important in this, because, after all, if you leave aside Lord Justice Underhill's self-selection point, the point he made in *Ajiore*, an ordinary homeless person was, at one stage, just an ordinary person, and then he or she became homeless, and that is probably what did the damage in terms of his or her health.

When a Local Authority is applying a comparative test they are looking at an applicant typically while they are still housed, so there is some kind of trickery that is going on when you compare a person who is still housed with someone who has been street homeless for a long period of time. If you want to compare like with like you need to think about the timing of these comparators and in what situations you are placing them.

Intensity of review - well *Puhlhofer*, I like to call it the sacred cow, is somewhat out of step with general developments in public law. So if we look at the social care case of *KM v Cambridgeshire* about personal budgets we see the Supreme Court saying that those kind of decisions should be subject to close scrutiny, and the analytical framework that case law places on that is that there is only one standard of review, and that's irrationality. However, there is a sliding scale of intensity of review that varies with the particular circumstances. So there is a not particularly creative, but a perfectly sound legal argument based on authority that can be run, that when you're considering whether or not someone is vulnerable in the context of where they are at imminent risk of becoming homeless and suffering from serious harm, that close scrutiny is the appropriate intensity of review. Because of the cases of *Kanu* and *Hotak* we also had the PSED in play and case law in relation to PSED shows that the decision maker must give conscientious attention to the relevant matters, so again we are not talking about in that context the court upholding cursory decisions.

Just one thought which really has not particularly been resolved is: is it right to have a two tier system where you have two different intensities of review, as between those applicants who have a disability and therefore fall within the Equality Act, and those who do not satisfy that somewhat technical definition?

The third main headline, third party support - my starting point is that this particular legislation does not confer a discretion on a local authority as to how to meet an assessed priority need. It says that you have to house ceteris paribus someone who has a priority need, but really I think what won the day on this particular point was two strong arguments against leaving out of account third party and other forms of support available to a homeless person who, considered on his own, would be vulnerable. The first was the magic pill. It is one of those judicial thought experiments but it was certainly put in argument, in particular I think Lord Wilson was particularly persistent in asking about this. If you consider someone who is vulnerable, but then can take a magic pill that renders him not vulnerable to harm when homeless, then are you going to leave that out of account? In general the thought was, well no, you would not ignore the magic pill. So if you do not ignore the magic pill, why do you ignore other forms of help, human help, and where do you draw the line. I think that was one major problem for the *Hotak* point.

The second one, and anyone who was there will probably remember this moment when Lord Wilson had this kind of existential outpouring, which was along the lines of no man is an island, entire of itself, every man is a piece of the continent, a part of the main etcetera, which was: how can you really consider a person entirely extracted from their social context?

So those were the two main arguments against leaving out of account third party support, and compared to those two quite difficult arguments, the bad brother point lost some of its sway. I do not know if you are familiar with this? The bad brother anomaly is the idea: why would you take into account help from the good brother who is willing to help his vulnerable disabled brother when homeless, but then the bad brother who says: no, I will not help him, well he gets housed. But you can read how the Supreme Court grappled with that, and at the end of the day they just thought that was an anomaly and it did not justify rereading the entire vulnerability test.

So on one slide I summarise for you the answers, with which you may be familiar, but in summary:

- The correct comparator is an ordinary person, not an ordinary homeless person;
- The test is significantly more vulnerable than an ordinary person;
- The Supreme Court also said that in all vulnerability decisions the decision maker must pay close attention to the particular circumstances, so I count that as a victory on the intensity of review point. In Equality Act cases, those required a very sharp focus on the effects of disability, so there we see a particular raising of the intensity of review in relation to those cases and Lord Neuberger specifically making an exception to the Holmes-Moorhouse usual approach to review decisions in that context.
- In relation to third party support, it was decided that practical help from any source, including family members, could be taken into account but they did impose some safeguards on that, two caveats: the first was that it has to be consistent and predictable; and the second is merely because such support is available, it does not necessarily follow that the applicant will not remain vulnerable.

No doubt you will hear more from the other speakers about the correct analysis of what the Supreme Court actually decided. I suppose one plea is that we do not fall into the same trap with *Hotak Kanu* and *Johnson* as we did with *Pereira*, in other words my plea is: let's not dive in to a detailed textual analysis of all the judgments. Maybe you will, maybe that will suit your client, but would it not be an irony if, in five years' time, we are complaining that the Court of Appeal has applied the words of a particular judgment within the Supreme Court's decision as opposed to trying to understand what they really meant and it is a back to basics approach which is: we are trying to explain and apply the words of the statute to a person who is vulnerable.

These seem to me to be three of the battle lines where we may well see more litigation in future.

First, what does significantly more mean? Well we submitted that, in effect, it meant more than de minimis, but will we not see or suspect that the test that a Local Authority is really applying is substantially more. So that's one issue I highlight as potentially a focus of future litigation.

The second is, we have a new base line for the comparator. So how will a Local Authority judge how vulnerable an ordinary person is? We will be running around for more statistics but from a slightly different source? And is it actually correct to have an empirical comparator, or is it hypothetical? Obviously there are clues, particularly in Baroness Hale's judgment, as to what they really meant by an ordinary person, and I can well see that being litigated.

The third is the concern about where this idea that Local Authorities can take into account charitable and other support actually goes? Where are the logical limits? One point I would make about this is that it would seem to follow from a comparison with an ordinary person that it is really only special

support available to those who are particularly vulnerable when homeless that ought to count against vulnerability. In other words, if you consider an ordinary person and how they will fare on the streets, you have to put charitable support on both sides of the equation. That is not the only point that can be made under this heading, but it is just one I leave you with. So with that short summary, I shall hand over to Jan.

Jan Luba QC: I will follow Matt's introduction to the three cases by making particular reference to the case with which I was involved, the case of *Johnson*. Before I develop my contribution to this evening (which is to ask and answer what I have described as **Ten Key Questions**) I want to make four introductory comments.

First, although our Association has been kind enough to invite three counsel to address you this evening, Mr Johnson's case - and the other recent cases on homelessness - could not have been run without a huge contribution from advice workers, housing advisors and the solicitors who identified and took these cases.

The three cases you are hearing about tonight, *Hotak, Kanu* and *Johnson*, were taken by two not-for profit-agencies, and a legal aid solicitors' firm. I want to pay tribute to those colleagues who found these cases and ran with them. A special mention for my own team, and in particular my solicitor and junior counsel. The solicitor in my case was Sean Gilmore who has been tirelessly working in a legal aid firm in Solihull for a generation - to bring housing advice and help to people who really need it. He is about the only person there doing that work and it is a thankless job (as you all know) when you are doing it on legal aid. Not only did he run this case to the highest court in the land, but he knew from the start that the case was an unattractive one on the facts. His reward for all his incredible effort is a nasty aspect of the legal aid scheme which involves measly payment and is called "the risk rate". I think we ought to say collectively: "Thank you very much Sean". And "thank you" to the other solicitors and advisers who contributed to these recent cases. In relation to my own case, a special mention for Mr Johnson's excellent junior counsel – Mr Lindsay Johnson (no relation!).

It's a pity to be focusing just on these three cases because, as you know, it has been a successful season for homelessness in the Supreme Court. We started with the recent *Nzolameso* case on suitability (and I would also like to pay tribute to the legal team involved in that case) and today we have the *Haile* case on intentional homelessness. We have one more to come, of course, the *Samin v Westminster* case on eligibility. Let us hope that goes the right way too.

The **second** introductory observation is that this evening I am *not*, for once, offering my <u>own</u> opinion on the answers to the questions I am posing. I will stick as closely as I can to the terms of the judgment of the Supreme Court. I know it is 102 paragraphs long, and it is a bit daunting to pick it up and get stuck into it. Let me encourage you, if you do not have much time, to start with Lady Hale whose judgment occupies the last ten or so paragraphs. It is important to remember that although she dissents, she does so on one issue only and it is not the *Johnson* (i.e. *Pereira*) point. So she provides a good, simple, introduction to the subject. Indeed her judgment, if I may say so, is a little easier to read than the judgment of the majority because, obviously, the majority's judgment is written, as it were, by committee, all of whom had to agree on the words. Her words are her own, so you get to the point a little more quickly.

Of course, you do then face a formidable task in picking up today's judgment (in *Haile*), which again is a majority judgment with a dissent. I would suggest that you only do that after you've read the judgment in these three cases. Just when you have been lulled into believing that Supreme Court Justices have committed themselves to direct communication in easy language, you will come to Lord Reed's judgment from today's case. At paragraph [59] he tells us that, in respect of the decision of the House of Lords in *Din,* the judgment as to *tempus inspiciendum* remains good law. How helpful!

My **third** introductory remark is that I want to mention the work I have been doing on your behalf as HLPA's representative on the Supreme Court Users Group. There we pass to the Justices the ideas that come from the front-line about how we could make their work more accessible. What I hear a lot in my daily work is people saying: "Oh, I would have liked to have seen so-and-so argue that point; I wonder how that was put". As you know, all the hearings are broadcast live, which means if you have got four hours in the middle of the working day, and you do not have to put in any billable hours, you can sit there and watch. That is useless. What we really need is the ability to stop/start it, take it away and look at it later. That is something that the Users Group persuaded the Justices to agree to. So in the three cases I am talking about, as well as *Nzolameso*, and today's *Haile* case, you can watch all the argument on catch-up. It sometimes helps, in order to understand the way a judgment is written, to know how the point was argued. Watching the recording of a case can also help when preparing one. Many people in this room will not do more than one or two Supreme Court cases in their career. If you want to see how one is done, have a look at two or three of the recordings. If you are wondering *who* I was going to recommend watching, try Martin Westgate QC in *Nzolameso*. There were some really good points being taken and high quality argument. I know none of that will incentivise you! The real reason you will go home, click on the Supreme Court website and watch the videos, is to see what an "existential outpouring from Lord Wilson" really looks like because, as Matt told you, it was well worth listening to.

My **fourth** and final introductory point is to indicate that I will take up Matt's invitation to go "back to basics." I make no apology for dealing with rather basic propositions on the question of the meaning of "vulnerable", rather than going into, as it were, the academic stratosphere.

I turn to my **Ten Key Questions,** as set out on the slides.

My **first** question is: *"Why does the term "vulnerable" matter in the homelessness context?"* The answer, as you probably all know, is that it governs nine of the routes to achieving priority need - if you can't get priority need through one of the other three routes (dependent children; emergency; or pregnancy). So you have to get through one of those routes if you want to be found to have a priority need and those nine routes are all governed by the critical words: "*vulnerable as a result of*".

Many of you will be experienced advisers who have been doing this for years who would normally stop reading the list half way through, on the basis you were familiar with it. But the last four or five routes are much too frequently overlooked in practice, perhaps because they are only about thirteen years old! We must remind ourselves that adults who are vulnerable as a result of having been in care or fostered are within these provisions Likewise, people who have become institutionalised by their time in custody or in the armed forces and cannot cope. They have a route to priority need if they are vulnerable. Most importantly of all, perhaps, single people having fled actual or threatened violence. Single battered women classically will be in priority need if they are vulnerable as a result of that experience of having fled actual or threatened violence. It is important that we remember those relatively new categories as much as we remember the old ones.

Just as important is the overall ninth 'sweep-up" category of "other special reason". Perhaps now given added emphasis by Lord Neuberger's description of it in paragraph [51] of the judgment, which I have reproduced on the slide. "Other special reason" is not some tiny category of residual cases. It is, as he has described it, a broad category showing that vulnerability arising from many causes is covered. So we have eight, specific categories and a ninth one which is probably an enormous category, <u>not</u> a small or residual one.

Accordingly, the meaning of "vulnerable" matters, because it governs those nine routes. You have to be vulnerable as a result of one of those nine matters.

My **second** question asks: *"What was the issue in the Johnson case?"* There were three issues in the three cases that were joined together, but the particular issue in Johnson's case was whether the assessment of "vulnerable" involved an exercise in comparison and, if so, who you compared the applicant to. The wording I have given you on the slide is Lord Neuberger's formulation of the first issue in the three cases, and it is the one that Mr Johnson's case raised.

My **third** question asks: *"Is a comparator needed?"* Does the word "vulnerable" involve a comparison between the applicant and others? That is the sort of interesting academic point on which you can now watch the discussion that took place between the members of the court and the representatives of the parties. As Lady Hale points out in her judgment, if you say a person is "tall", is that something that inherently means you are comparing them with others? The statute has never defined "vulnerable". It did not in the old 1985 Housing Act, it did not in the 1977 Homeless Persons Act and it did not in the old National Assistance circulars that preceded them. So we have never known the answer to the question of whether it is a stand-alone term or a term involving a comparator. But we now know the answer to the question, and the answer is "Yes". The word vulnerable does import a comparison. Not expressly, as Lord Wilson pointed out – see paragraph [51] - but (as more succinctly stated by Lady Hale) the term "vulnerable" *implies* a comparison.

As Matt said, that was the first point, and that is a point on which those appearing for the applicants lost. "Vulnerable" is not a stand-alone term. It does involve you looking at the applicant and comparing them with somebody else.

Well, if a comparison is needed, what test do you apply?

Let us start with "*What was the old test?"* That is my **fourth** question. You will be very familiar with the old test. It has been in place for nearly seventeen years and it is the test set out in the judgment of Lord Justice Hobhouse on behalf of the Court of Appeal in the case of *Pereira*. People who were making decisions did not even need to go to the Court of Appeal's judgment for that test because, faithful to his duty to give guidance in accordance with the law, the Secretary of State had changed the Code of Guidance over the years so that the relevant paragraph reflected the test in *Pereira*. That was the position from 1998 until these recent decisions. The *Pereira* test has gone. Of course, the Code of Guidance is temporarily still in place. It may be one of the first acts of the new Secretary of State to introduce a new Homelessness Code of Guidance which corrects paragraph 10.13 to bring it into line with the judgments in these three cases.

My **fifth** question asks: *"What was wrong with that (Pereira) test?"* Well, there were all sorts of things wrong with that test. It was an attempt to insert judicially a definition or a word which Parliament had not provided. It introduced three concepts which were unhelpful. First you asked: *"Is the applicant less able to fend?"* Well, what does that mean? Secondly you asked: *"At what risk are they when you compare them with an ordinary homeless person?"* Well, what is "an ordinary homeless person"? Finally, part of the old test to work out whether a person was vulnerable was to ask whether they were "more vulnerable" than somebody else. That is not very helpful. You were answering the question by asking the question. Even worse was the way the test was being applied in practice. In Lady Hale's judgment, paragraph [91], she demonstrates how the *Pereira* test had been misapplied and misinterpreted to the extent that a statistical comparison was being routinely made with people already long-term street homeless. Things had to change.

So, if we had to have a comparator: *"Who is the new comparator that we get as a result of Mr Johnson's case?"* That is my **sixth** question. Well, for the answer, I suggest you go first to Lady Hale. She puts it most crisply in paragraph [93]. The comparison is with ordinary people. Not ordinary homeless people. Still less ordinary street homeless people. So in going through review decisions, or s.184 decisions, you are looking to see whether they have used terminology like 'ordinary homeless

people' or 'street homeless people' and, if they have, the decision is bad for that misdirection. The test concerns, or the comparison is with, ordinary people.

Lord Neuberger's formulation, perhaps reflecting the committee nature of his judgment, is a little more fluid and therefore, over the three paragraphs [57], [58] and [59], you have it in his words as reproduced in the second bullet point on the slide. It is an ordinary person who has not become homeless, is not threatened with homelessness, but might be. It is better, I think, to use Lady Hale's formulation.

One of the issues in the *Johnson* case was whether you just compare the applicant with the other people in that particular local authority's area. The answer was "No". You get that most crisply from Lady Hale, when again agreeing with the majority. It is ordinary people generally that you compare the applicant with, not ordinary people in a particular locality.

My **seventh** question is: *"What does this new test require?"* We know who the comparator is. We take our person and we compare them with ordinary people. But what are we looking for? We work backwards. If the ordinary person becomes homeless, that's going to be unpleasant and inconvenient for them and potentially will do them some harm. So we must ask the question: Will our person suffer something more than what an ordinary person would suffer if they became homeless?

Lord Neuberger's formulation in paragraphs [52] and [53] for the majority is the one I have given on the slide. He identifies that virtually everyone who becomes homeless suffers some "harm". Therefore "vulnerable" means significantly more harm than would ordinarily be the case. For my part, I think you should go with Lady Hale's formulation (agreeing with the majority, and they agree with her in this respect) - the person involved must, as a result of becoming homeless, be more at risk of harm than any ordinary person would be. Will this applicant be at risk of harm to a greater degree than an ordinary person would be? That is the simple question now to be asked when applying the new "*Johnson* test".

Well that sounds nice and easy. But what you will be asking yourself - and what every homelessness officer in the country is asking themselves - is: *How do you work it out?* That is my **eighth** question and what follows is some help, I hope, towards an answer.

First of all, the question is directing an enquiry as to the applicant's vulnerability *if* he or she becomes or remains a person without accommodation. That is the context in which you approach it. "An ordinary person becomes without accommodation" compared to "the applicant becomes without accommodation". Is the applicant at greater risk of harm? That is the scenario in which you are doing the comparison.

Secondly, you do not use a printout of statistics, data, tables or anything else to make the comparison. You ask the question quite simply. It is not answered by statistics and figures.

Finally, you leave out of account the particular local authority to which the person has applied. You are not interested whether that council have had a million homeless applications or whether their budget has already been spent. It does not matter. The exercise of determining whether a person is vulnerable is not resource sensitive.

But there is more. My own formulation, here departing from a reproduction of the text, is that the new *Johnson* test is probably this:

> *"Will the applicant suffer significantly greater harm, if she or he becomes or remains homeless, than the harm an ordinary person would suffer if they were to become homeless?"*

In that formulation, which I think is the true *Johnson* test, a key question might be: what does "significantly" mean? I do not think that is a difficult question. We all know in the contest of disability discrimination and the Equality Act that the word "substantial" has been interpreted to mean "more than minimal". That's what I think it "significant" means here. Significant simply means something "more than the insignificant". That is all that is required here and I am quite sure that that is what the Supreme Court had in mind.

How can one be sure that that is what the court had in the mind? Well I think one of the best ways of testing it is to look at what Lady Hale said when she posed the question and answered it at paragraph [93].

My **ninth** question is: *"Do you ask apply the test in two stages, or in one?"* Do you ask first, "Is the applicant vulnerable"? And then "Is that as a result of one of the nine factors?" Or do you ask the question as a single composite? The majority eventually decided, see paragraph [46], that it didn't much matter. A reviewing officer, or a homelessness officer, would be OK if they asked it in two stages or asked it in one. But given that Lord Neuberger personally preferred the one stage test, I think we should probably go with that.

So we seem to have the answers to most of our questions. I know that some of you will be thinking: "Well, have we really got that far? What is an ordinary person who might become homeless?" You will suspect that some reviewers are already flicking through the data on the British population … x percent are obese, x percent are alcoholics, and hoping to say: "This applicant is just like X% of the ordinary population". We are not having it. In paragraph [71] of the judgment, Lord Neuberger endorses a statement - by another judge in the Court of Appeal in another case – the 'ordinary person' is the ordinary person who is robust and healthy. That is the terminology we need. It is a robust and healthy ordinary person. Is the applicant at greater risk of harm than <u>that</u> person? If they are, they are in priority need because they are vulnerable.

I said that the *Johnson* case raised one issue - the correctness (or otherwise) of *Pereira*. My **tenth** and final key question is: "*Are there any other questions to be answered?"*

And there are. There are at least two big further questions to be answered. First, what if the person has access to help? They would be at greater risk if they were on their own, but there is help available to them. Do you take into account the help? Second, if they are a disabled person does that cast special responsibilities on the local authority when dealing with the question of vulnerability?

I will not hazard an answer to those, but I know a man who will. That is Zia Nabi who is speaking next.

Zia Nabi: Good evening everybody. I would also like to pay tribute to all the solicitors involved in the case, in particular to Stuart Hearne who, particularly in the case of <u>*Kanu*</u>, was with Mr Kanu from the very beginning until the very end. I would also personally like to pay tribute to Helen Mountfield QC of Matrix Chambers who led me in the Supreme Court and was very helpful and had some really good ideas about how to use the public sector equality duty in homelessness cases, and I would really thank her for that.

You will see I have titled my slide Rebooting the Statutory Test and, certainly no disrespect to anyone, when I say there is a danger of calling this test with reference to a case. The reason for that is it is my view that one of the reasons we got into the mess that we did was because people stopped talking about s.189(1)(c) and started calling it the <u>*Pereira*</u> test, but then we had a number of Court of Appeal judgments saying please do not apply the <u>*Pereira*</u> test as though it were statute, it is not statute. It made not a blind bit of difference to a judge in Central London county court who said: yes Mr Nabi I know the <u>*Pereira*</u> test and I know paragraph 38 of <u>*Osmani*</u>, what more is there to say about priority

need. So just have a think about that, because language is important, and how cases develop comes from the way that we use language. I say that with respect to all other colleagues and people involved.

Now I want to start just with the facts of Mr Kanu as I think they are relevant. Mr Kanu tried to apply as homeless in July of 2011. Southwark refused the application. He went back once he was evicted to apply as homeless in November of 2011 and by April of 2012 we had a review decision that he was not in priority need. The County Court Judge at Lambeth quashed that decision in August of 2012. Hurrah we thought. Surely no one can think Mr Kanu is not a vulnerable person. Southwark reached a second review decision again finding him not to be in priority need in March of 2013. That was quashed in a second County Court appeal. Hurrah we thought. Now that is an end of it. He will be entitled to some accommodation. The Local Authority appealed. The Court of Appeal allowed Southwark's appeal. Mr Kanu appealed the Court of Appeal. The Supreme Court, a week ago, allowed Mr Kanu's appeal.

Mr Kanu died two days ago, and he died because he was not a well person. I think in all the midst of feeling really pleased about a very helpful back to basics we should remember that there have been a lot of people who have suffered because of the irrational way in which this test has been applied, and how Local Authorities kept moving the goal posts. If there is one issue I thought about, it is: was I taken backwards in arguing irrationality? Lately I have started to try to run irrationality in appeals. I have tried to say to the Judge: do not be afraid of irrationality. It is not a magic word. And I know that I am not alone. Lord Justice Carnwath, in a speech he gave to the Hong Kong bar, I think last year, said he had always thought the *Wednesbury* test was bonkers. He said what does that mean? More and reasonable than any reasonable person. He thought irrationality - as in the GCHQ test - was a poor test. I think there has been a recent speech by Lord Sumption in which again he has made similar points, and there have been a number of Supreme Court judgments, *Kennedy v Information Commissioner*; *Pham*, in which the Supreme Court is saying we really need to look again at irrationality and decisions actually becoming untouchable. It has gone too far one way so one thing I would ask colleagues to do is to be brave, put in the point that the decision is irrational. If enough people say it, at some point it will be listened to, and that is what happened with these cases. I personally think the fact there were three cases there all helped each other, and it was a volume, it was a weight of opinion that finally could not be withstood.

Disability is defined in the Equality Act 2010. What is it? Well, summarising, it is a physical or mental impairment which has a substantial and long term effect on a person's ability to carry out normal day to day activities. It is a benevolent act, the Equality Act. I am absolutely thrilled that the Supreme Court have said that in vulnerability cases involving disabled people it is complementary to the Housing Act so if we are reading the Equality Act benevolently, so we must read the Housing Act benevolently. We know it is benevolent, but look how substantial is defined. Substantial is simply more than minor or trivial. Long term is something that has either lasted twelve months or is likely to last for twelve months, and in working out whether something is substantial or not you ignore the effect of medical treatment, so it is a very deliberately benevolent piece of legislation which we should be using.

Then we have the first public sector equality duty. Now when this first came up I read s.149 so many times and each time I read it I scratched my head because it is long and it does not necessarily mean that you are entitled to something at the end of it. It is just a duty to have due regard, well, what does that mean? So in our case of *Kanu* we tried to see how we could practically use the public sector equality duty in vulnerability cases. The Court of Appeal said it adds nothing in vulnerability cases, the public sector equality duty. The Supreme Court rejected that and overturned them. It does add something, the question is what does it add? So there is a duty there. You have to have due regard to the need to advance equality of opportunity, well, what does that mean? And, another one, foster good relations between persons who share a relevant protected characteristic and persons who do not share it. What does that mean? What if you have a family with a disabled member, and the non-

disabled members are having to look after the disabled member when they are homeless, what might that do to their relations? Could that be something we could say?

So it goes on to say: What does having due regard to the need to advance equality of opportunity mean? It expands equality of opportunity, first to remove or minimise disadvantages suffered by persons, so when you are advancing the equality of opportunity, the way you are doing it is by removing or minimising disadvantages suffered by people, and we will see how, again, that might work out practically.

What do *Hotak*, *Kanu* and *Johnson* tell us about the public sector equality duty? They say it must be exercised in substance with rigour and an open mind. So it may extend the scope of enquiry into an application, there might perhaps be some academic, some might say arid, debate about whether it extends the scope of enquiry or whether it heightens the duty of enquiry. I will not answer that tonight, but it does do something to the duty of enquiry. It is complementary to the duty under Part 7, as I have said, and you cannot say any more that it adds nothing in vulnerability cases, and I quoted the paragraphs where I get those propositions from.

What else do *Hotak*, *Kanu* and *Johnson* tell us? That a real officer must focus very sharply on: is the applicant disabled? What is the extent of disability? What is the likely effect of disability on the applicant if and when homeless? As the person on the Waterloo Bridge says, selling the Big Issue, homeless is not hopeless.

If we stand back to this, what does "very sharply" mean? Well, what "very sharply" means is it gives you a tool to attack the decision, because one of the grounds of appeal can be there was a lack of sharpness in the focus. That is why you increase the intensity of review. Also, by setting out these questions at paragraph 78, I think what the Supreme Court is doing is similar to what Lord Justice Sedley tried to do in the case of *Lambeth v Harwood*, in proportionality cases in possession claims is that what proportionality does in possession claims, even when you have a secure tenancy, it gives you a structured approach to decision making. What the Supreme Court have done here, I would suggest, is they have given us a structure that we should be looking at in decision matters as to how disability is being dealt with, and has this been carried out with sufficient focus of a sufficient sharpness.

So, how does it work? Firstly, as Jan said, the comparator is a non-disabled, robust and healthy homeless person who has a need for accommodation. Baroness Hale was quite keen to say that the comparator should not be described as someone who is homeless, as homeless can mean all sorts of things under s.175 but just someone who has a need for accommodation, and so they expressly approved paragraph 42 of *Hotak* in the Court of Appeal. When talking about support they compared the person who might need support, saying that no amount of support would enable the applicant to cope with homelessness as would a robust and healthy homeless person, and can I support Jan in saying that we should not allow, in the comparator, anyone to step back from that. There is no need for statistics. I do not think, in answer to Matt's question, it is an empirical comparator. I think we know what it means. It is a robust and healthy homeless person, and going beyond that, trying to add more detail to that, is moving away from the statutory test and is not going to be of assistance.

Secondly, you can take support into account, but, and this is a very big but I would suggest to you, there has to be a careful and contextual practical assessment of physical and mental ability. But there is that word again: careful. What is coming out from this statute is the degree of care that should be exercised and we go to back to intensity of review.

Will the person be more likely to suffer illness or require attention of other social services? Paragraph 63. If the person is more likely to suffer illness, or require the attention of other social services because of being in need of accommodation, they are vulnerable. And also, I would suggest, a non-vulnerable

and non-disabled household member cannot be forced to support the disabled person. The bad brother. Now I think you can decide not to support your fellow homeless member without being a bad brother. Again, and I say this with respect to Matt, language is powerful - saying a bad brother will not support and a good brother will. If I and my brother were homeless, I might not support him. I might be too busy looking after myself.

So the Authority, when it's making its decision, has to be thinking: We have got to advance equality of opportunity for a disabled person to enjoy good health when gauged against a non-disabled person; we have to foster good relations between persons who share a relevant protective characteristic, and persons who do not; and we have to remove or minimise disadvantages suffered by persons who share a relevant protective characteristic. Those are issues we have to have due regard to in reaching our decision.

So, how does that work in practice? The Authority, I would suggest, has to consider whether any medical treatment or support from fellow non-disabled members of the household may have its own negative consequences. So ask yourself the following questions:

- Does the increased medication, the magic pill argument, have increased side effects and risks? Because if the medication itself will have increased side effects and risks then it is not enough. You are vulnerable in my view.
- Will the medication be preventative or will it be addressing the consequent deterioration? If the magic pill prevents anything going wrong that falls on the right side. But if the medication is there to treat you once you have got worse, then I would suggest that person, taking the public sector equalities duty into account, is vulnerable.
- Is there a risk of hospitalisation? Because if there is, then how does that square with the Local Authority's duty to have due regard to the need to remove or minimise disadvantages suffered by a disabled person?
- Will family relations be negatively affected? If they will how does that play into the Local Authority's duty to have due regard to ensure good relations between disabled and non-disabled people?

What does it mean in practice too? So the decision will need to be structured to take account of the public sector equality duty, but there is no magic formula. The Local Authority need not know about the public sector equality duty, and need not refer to it, but if it has done what is required that will be sufficient. But the court will subject the reasoning at least in public sector equality duty cases to a greater level of scrutiny and *Holmes-Moorhouse* has to be read accordingly.

So arguably, I would say, we are moving to a stage, certainly with disabled people, where you can argue for a lower threshold than irrationality in saying a decision is unlawful, which I think, perversely, is just unreachable. I have had a judge tell me: listen, surely irrationality is something that would be on another planet, that is what you have to get to get irrationality. Well, I am not interested in that. I am not interested in another planet. I want to be on this planet and I want to say a Local Authority decision is actually wrong, and that is where I think we will hopefully see development in the law.

So, concluding thoughts:

"Vulnerable" means significantly more vulnerable than an ordinary vulnerable person. So if we just use the definition in the Equality Act, significant simply means more than minor or trivial. I think there are all sorts of statues in which significant is said to mean just more than minor or trivial.

I would suggest that there must be a presumption that persons in receipt of Disability Living Allowance or Personal Independence Payments are, prima facie, vulnerable. We know how Local Authorities deal with this in their decision letters, different tests, and the way that they do this is they just park the

Disability Living Allowance as if it is not relevant. Well I would suggest that it is relevant, because there you have factual findings about what a disabled person can or cannot do. Often the decision letters make it clear, and I would suggest that if Local Authorities want to reject those findings they have to have an evidential basis for doing so, or they have to explain how, despite those evidential basis, your client is not vulnerable. So that is something that is ripe for attack.

Finally, we do not really use evidence in statutory appeals because the courts keep telling us that you cannot, and certainly there is a case which I and some colleagues submitted to Strasbourg in 2010 where we were trying to argue that perhaps you could occasionally bring some evidence, and Strasbourg have expressed an interest and are playing, but will not let us know when any decision is likely to be forthcoming. That is nearly five years now we have been waiting, and the wait goes on, and all I can hope is that it is not the case that there is a good outcome and the Human Rights Act is abolished.

I think there are very valid arguments, when you are challenging the intensity of review, when you are saying: look, this review decision is incorrect, and the court can subject it to a much greater level of scrutiny than it thinks it might be able to, why should we not be able to try to adduce expert evidence to make that point?

Finally, something that was discussed in the Supreme Court but is not mentioned in their judgment, which relates to public sector equality and the exercise of discretion in cases of a person disabled but not vulnerable. As colleagues will know, if you are not in priority need the Local Authority still has a discretion to accommodate you under s.192. It is theoretically possible, I suppose, to be disabled and not to be vulnerable. In those cases you should be looking at s.192 and asking the Local Authority to take that into account when it exercises its discretion.

Chair: Thank you to our speakers for some insightful talks. I would now like to invite questions from the floor.

Nik Nicol, 1 Pump Court Chambers: Thanks very much for the three speakers for that excellent presentation. One thought that occurs to me on Matt Hutchings' question of what "significantly" means, is that there has already been judicial discussion of what "substantial" means in the case of *Queen v Lambeth ex parte Carroll* back in 1987 when Webster said that "substantial" must be disregarded unless it means anything more than de minimis, which would seem to support your argument. Something which I wanted to report though is that I am probably going to be involved in the first Court of Appeal follow up to this case. We have an oral permission hearing in a couple of weeks in the case of Awanah v London Borough of Waltham Forest but there are issues in the case which go beyond this. The particular one that I have been chasing, for which there are useful remarks in the judgment, is the line between the Housing Act and community care legislation. In *Garlick* back in the 80s it was said that the Housing Act and community care legislation do not overlap. That is repeated in this judgment. In s.23 of the Care Act it specifically says that these cannot be met by using duties under the Housing Act. It is arguable that a vulnerable person means someone who does not require care under the Care Act. In *Garlick* their Lordships said that a person is in priority need, vulnerable because they are in priority need under the Housing Act, if they can live independently. That is directly contrary to what the likes of the people you have been talking about have been saying in their decisions for years. Therefore I am seeing this point in the case of Awanah as to whether this lack of overlap means that a vulnerable person is someone who does not require care. Any thoughts on that would be useful.

Matt Hutchings: Care and support under the Care Act does not necessarily mean accommodation, does it? So it could be care and support at home in order to enable someone to live independently.

Nik Nicol, 1 Pump Court Chambers: But they will not have a home if that happens.

Matt Hutchings: Correct. Are you also running a point under the Care Act?

Nik Nicol, 1 Pump Court Chambers: The test applied by the officer was you do not have all of these problems. If that person had any of those problems that would mean they qualified for care under the Care Act.

Matt Hutchings: In the eligibility order there's actually a threshold, a basic threshold test that now applies and I think it is something like significant. The basic answer must be these are two different pieces of legislation. They do not cross refer save insofar as the Care Act says if your needs can be met by housing then that is not within the Care Act. So there is nothing in Part 7 that says if you could apply under the Care Act then you cannot get help under this act.

Zia Nabi: In a case called *Wahid v Tower Hamlets* a long time ago, I tried to argue that Mr Wahid, who was not being helped on the allocation scheme, should get accommodation using s.21 of the National Assistance Act. I think in that case, which dealt with s.21(8) National Assistance Act, Lady Justice Hale, as she was, said: That only applies if it is not otherwise available. If the Care Act follows a similar route I think the primary statute to get accommodation is the Housing Act 1996, part 7 and part 6. It is when you do not fit into any of those categories but you still have a need for care and attention that is not otherwise available to you that you fall back on the Care Act.

Jan Luba QC: I just want to add to that by thanking Nik for reminding us of what was said in the *Crown v Lambeth ex parte Carroll*. The Code of Guidance at the time said that the person had to be substantially disabled, and the High Court in *Lambeth and Carroll* said that that was wrong if it meant substantial in the sense of very significant and I think that will be very helpful guidance if you are faced with the argument: this is not significant in the sense of "very serious". For those of you who have still got your pens out *ex parte Carroll* is a 1987 20 HLR 142, and is probably worth going back to for that reason. You can refer back to the slide from my Question 7. I think it is significant that Lady Hale does not use the word "significant" or "significantly" at all. In the second bullet point on my slide for Question 7 I have reproduced what she says at paragraph 93 indicating that she believes that the majority have agreed that the test is simply whether the person is more at risk and that must, I think, indicate that the whole court, if it meant anything by "significantly" simply meant more than "insignificantly".

Matt Hutchings: Is your case basically one of the old style *Pereira* cases where they just raised the bar too far? Is that what it comes to?

Nik Nicol, 1 Pump Court Chambers: No, there is more to it than that. There are a number of issues in it, but I think the points you make are valid ones and I can see a judge making them to me, but I still think there cannot be an overlap between requiring care and being vulnerable. Their Lordships in *Garlick* specifically said a person in priority need is someone who can live independently.

Simon Mullins, Edwards Duthie Solicitors: I have a friend who looks at paragraph 46 of the judgment and notes that a single stage test is to be preferred but my friend does not then quite understand why nine categories of priority need are required. Can you help me as to how to advise my friend in this matter?

Contributor: We probably all agree about this, that the list of eight priorities are indicative of what might be a special reason that would make someone vulnerable. They are a reasonably heavy legislative steer as to what a vulnerable person might look like.

Contributor: They are there to help the authority focus its decision making mind but they are not exclusive.

Jan Luba QC: They are really there because the Bill that became the Housing Homeless Persons Act 1977 was a Private Members Bill and it was introduced in a hurry in the dog days of the outgoing government and it was necessary to get something in force quickly around which there was political consensus. The list: old age, mental illness etc. appeared in the Circular under the National Assistance Act which had been introduced in 1974 and what happened was that parliamentary counsel, with the assistance of Stephen Ross and Shelter and others who were working on the Bill at the time, simply imported the language from the Circular as matters indicated simply because it was an easy way of seeking to identify the people that might be considered to be vulnerable. It is historic accident more than anything else.

Michael Paget, Cornerstone Barristers: Can I ask Zia a question about how the policy duty works in practice? If the reviewing officer considers matters carefully, and then says: but I do not think when you are homeless I can remove this disadvantage, is that enough to satisfy the due regard test.

Zia Nabi: Technically I can see how that might satisfy the duty to have due regard, and that is where you would then have to subject that decision to very close scrutiny to see whether that is actually correct or not, but I agree, use of the public sector equality duty is something that is a whole separate area.

Contributor from SSP Law: This is a question to Zia in that the definition of disabled in the Equality Act is without modification, without adaptation. Is that form of argument a different concept than the Disability Act?

Zia Nabi: Yes. The full statutory scheme was laid before the court. We did argue that when you are looking at disability you are meant to ignore medication or adaptation and therefore you should ignore it for vulnerability as well.

Jan Luba QC: The basic problem is that the Equality Act does not amend the homelessness legislation so the logically prior question is what does it mean? What does the homelessness legislation mean, then what does the Equality Act add.

Chair: If there are no other questions I would like to thank the speakers once again and remind everyone that the next meeting will take place on 15 July on the topic of Defending Possession Claims.