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HOTAK, KANU & JOHNSON

**REBOOTING THE STATUTORY TEST:
THE RELEVANCE OF SUPPORT & THE PSED**

ZIA NABI

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MR KANU

Physical and mental problems including

- Hypertension raised by stress
- Psychotic symptoms and suicidal ideation
- Back pain
- Hepatitis B

Members of household: wife and adult son
Wife helped him take drugs
Stress raised hypertension, requiring increase in drugs

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DISABILITY: EqA 2010

- Physical or mental impairment
- Has a **substantial** and **long term effect** on ability to carry out normal day to day activities

Section 6 EqA 2010

- “**Substantial**” = “More than minor or trivial”: s. 212(1)
- “**Long term**” = Lasted at least 12 months or likely to last for at least 12 months: **Sch. 1 Part 1 [2]**
- Ignore effect of medical treatment: **Sch. 1 Part 1 [5]**

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PSED (1): EqA 2010

Section 149

“(1) A public authority must, in the exercise of its functions, have **due regard to the need to—**

(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”

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PSED (2): EqA 2010

Section 149

“(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”

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PSED (3): HOTAK, KANU & JOHNSON

- PSED must be exercised in substance, with rigour and an open mind [75]
- PSED may extend scope of inquiry into an application [77]
- In vulnerability cases, PSED is complementary to duty under 1996 Act [78]
- Cannot be said that PSED adds nothing in vulnerability cases [79]

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PSED (4): HOTAK, KANU & JOHNSON

Reviewing officer must focus “very sharply” on:

1. Is applicant disabled (or have any other protected characteristic)?
1. What is extent of disability?
1. What is likely effect of disability (and any other relevant matters) on applicant, if and when homeless? [78]

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HOW DOES THIS WORK (1)?

The comparator is a non-disabled, robust and healthy homeless person who has a need for accommodation

SC at [71] approve passage at [42] in *Hotak* in CA
 “...For example, the old age or mental ill health or physical disability of the applicant may be such that no amount of support will enable the applicant to cope with homelessness as would a **robust and healthy homeless person**.”

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HOW DOES THIS WORK (2)

Support may taken into account
BUT

- There must be a careful contextual and practical assessment of physical and mental ability [62]
- Will the person be more likely to suffer illness or require attention of other social services? [63]
- A non vulnerable or non disabled household member cannot be forced to support the disabled person [66] [67]

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HOW DOES THIS WORK (3)?

- The authority must have due regard to the need to:
 - advance equality of opportunity **to enjoy good health** between disabled and non disabled persons in making its decision
 - **foster good relations** between persons who share a relevant protected characteristic and persons who do not share it
 - **remove or minimise disadvantages** suffered by persons who share a relevant protected characteristic that are connected to that characteristic

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WHAT DOES THIS MEAN IN PRACTICE (1)?

Authority must expressly consider whether any medical treatment or support from fellow non disabled members may have its own negative consequences

SO CONSIDER WHETHER:

- increased medication may have increased side effects and risks?
- medication will be preventative or addressing consequences of deterioration?
- there is a risk of hospitalisation?
- family relations may be negatively affected?

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WHAT DOES THIS MEAN IN PRACTICE (2)?

- The decision letter will need to be structured to take account of the PSED, but no magic formula
- The Court will subject reasoning (at least) in PSED cases to a greater level of scrutiny and *Holmes-Maarhouse* must be read accordingly
- (Arguably) a lower threshold than irrationality

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CONCLUDING THOUGHTS (1)

- Vulnerable means significantly more vulnerable than ordinary vulnerable person [53]. Using definition in EqA 2010, "significant" simply means more than minor or trivial.
- Presumption that persons in receipt of DLA/PIP are prima facie vulnerable?
- Does there need to be a lowering of the near unmeetable *Wednesbury* threshold for effective court review?

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CONCLUDING THOUGHTS (2)

- Use of expert evidence at the appeal stage in disability cases?
- PSED and exercise of discretion in cases where a person is disabled but not vulnerable (*section 192 HA 1996*)

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