Vulnerability decisions post *Hotak, Kanu and Johnson*
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1. Introduction

1.1 Given the euphoria with which applicant advisers welcomed *Hotak v Southwark LBC; Kanu v Southwark LBC; Johnson v Solihull MBC* [2015] 2 WLR 1341, they might be forgiven for the current frustration and bemusement in the face of decisions from local authorities and submissions from their legal representatives that suggest that the Supreme Court had in fact been attempting to strengthen the hand of local authorities in the face of austerity.

1.2 A year on there do not appear to be any cases going further despite the prolific number of cases on priority need in the County Court. This paper attempts to identify the battle lines and to give some sense to the continuing lack of common approach between the two camps.

2. The context of *Hotak*

2.1 **Johnson** - A drug addict who asserted that he was at risk of relapse if made homeless; **Kanu** - mental health and physical problems (from which he eventually died) at risk of self-harm, harming others and unable to care for himself but whose wife and son were said to be willing to help; **Hotak** - PTSD and depression whose symptoms included needing a prompt to undertake personal hygiene, dress, go to appointments, eat or deal with finances but whose brother was willing to care for him.

2.2 The statutory provision: an applicant has priority need if he or she or a member of his or her household is a person who **is 'vulnerable' by reason of** any of the following: old age; mental illness; mental handicap; physical disability; been in care (and are now 21 or over); been in the armed forces; been in custody; fled actual or threatened violence; or any other special reason (s. 189(1)(c) of the Housing Act 1996; Homelessness (Priority Need for Accommodation)(England) Order 2002 (SI 2002/2051)).

2.3 Issues to be decided by the Supreme Court in *Hotak*:

(1) Was priority need a comparative test - if so who should be the comparator? The ordinary person or the ordinary 'homeless person'?
(2) On the basis of what assumptions should the comparison be made? Street homeless or some other definition?
(3) Having regard to what assistance and support? Institutional? Friends and family?
(4) Was the Public Sector Equality Duty of any significance? Did it matter that the authority was required to carry out its functions 'having due regard to the need to remove or minimise disadvantages suffered by

persons who are disabled as compared to those who are not (Equality Act 2010, s. 149(1)(b) and (3)).

2.4 Baroness Hale expressed the context as follows at [91]:

> *Yet we had reached the point where decision-makers were saying, of people E who clearly had serious mental or physical disabilities, that "you are not vulnerable, because you are no more vulnerable than the usual run of street homeless people in our locality"; and further, that "if a person living with you, or who might reasonably be expected to live with you, is able and willing to look after you on the streets then you are not vulnerable".*

3. <u>The key points decided by the Supreme Court in *Hotak*</u>

3.1 ***Preliminary points***:

(1) Supreme Court was of the view that the errors of the past required a need to now emphasise the primacy of the statutory words - Per Neuberger at [59];

(2) What was being advocated by local authorities, that the comparator should be the ordinary 'homeless person' within the authority's district (i.e. the homeless population within the district) was contrary to that which was required in a civilised society. There would be a real risk (Per Neuberger at [56] quoting Sedley LJ in *ex p. Fleck*) that:

> *'"a sick and vulnerable individual (and I do not use the word 'vulnerable' in its statutory sense) is going to be put out on the streets", which [Sedley LJ] described as a "reproach to a society that considers itself to be civilised"'*

3.2 ***General guidance and comments***:

(1) The statute is concerned with an applicant's vulnerability if he is not provided 'with accommodation' (Per Neuberger at [37]; Hale at [93]). That did not strictly mean 'street homeless' (an undefined expression that was disparaged at [42]) but it might mean 'homeless' in the statutory sense. Insofar as 'being homeless' and 'being without accommodation' were different, the latter was the correct test (Neuberger at [59]);

(2) applicant's circumstances and characteristics needed to be considered with close attention 'in the round' or 'taken together' (Neuberger at [39];

(3) resources are irrelevant to priority need (Neuberger at [39]);

(4) the expression 'fend for oneself' might be a useful tool for analysing a particular factual situation but it was not the statutory test. Some might well look at a person who is able to fend for himself and still consider him vulnerable. It has the ability to mislead. (Neuberger at [41]);

(5) The use of statistics to determine whether someone was vulnerable was a dangerous exercise given the limitations of statistical evidence when dealing with cause and effect (Neuberger at [43]);

(6) The statute required the authority to decide whether a person was (i) vulnerable and (ii) whether it was for a statutory reason. Whether that required the authority to treat the test as a single or two stage test was left undecided but a preference for a one stage test was expressed by Neuberger given the potential for multiple causes (at [46]).

3.3 ***The vulnerability test***

3.3.1 The test - or more accurately a ***summary*** **of the test**:

- Per Neuberger: A person is vulnerable if they are **significantly more vulnerable than ordinarily vulnerable as a result of being rendered homeless** (Neuberger at [53]);
- Per Hale at [93]:

  The person who is old, mentally disordered or disabled, or physically disabled, ***must as a result be more at risk of harm from being without accommodation than an ordinary person would be****. This is what I understand Lord Neuberger of Abbotsbury PSC to mean by "an ordinary person if homeless". I agree.*

3.3.2 The following needs to be added to the summary:

3.3.3 The comparator is the 'ordinary person' 'in England' (and not the homeless in the authority's district; per Hale at [93] and Neuberger at [58])

3.3.4 The ordinary person to whom the comparison should be made is himself *capable* of suffering harm if without accommodation:

- Per Neuberger at [52] (when rejecting the notion that there should be no comparator and that the vulnerability test should be 'anyone who cannot cope without harm' when homeless):

  '*Virtually everyone who is homeless suffers "harm" by undergoing the experience, and therefore one is thrown back on the notion of a homeless person who suffers more harm than many others in the same position*

- Per Hale at [93]

  To answer that, one needs to know what they will be vulnerable to or at risk of harm from. The obvious answer is that they must be at risk of harm from being without accommodation: the object of the section is to identify those groups who have a priority need for accommodation. Is that enough by itself? The problem, of course, is that we are all to some extent at risk of harm from being without accommodation women perhaps more than men, but it is easy to understand how rapidly even the strongest person A is likely to

decline if left without anywhere to live. So this is why a comparison must be implied.

3.3.5 When making the comparison, the applicant must be 'more' vulnerable than the comparator (per Hale at [93]) and 'significantly more' vulnerable per Neuberger (at [53).

3.3.6 The test is to be carried out on the factual assumption that the applicant is 'without of accommodation' or 'in need of accommodation' (Neuberger at [59]).

3.3.7 Lady Hale makes the point that vulnerable means (in the dictionary sense) 'susceptible to harm' and speaks of the applicant being vulnerable because of the 'risk of harm' [93].

3.3.8 Lord Neuberger said very little about 'risk of harm', preferring the word 'vulnerable'. He nevertheless makes clear that he is not seeking to set aside all of the judge made law on vulnerability. Indeed when formulating his test of vulnerability at [53] he asserts that it is the previous caselaw (having earlier noted *Pereirra*) that 'connotes' his formulation of the test. That earlier case law includes references to 'injury or detriment'. Detriment can include, per *Griffin v Westminster CC* [2004] HLR 32 at [16], a risk of harm.

3.4 ***Support networks***

3.4.1 Whilst support networks (whether professional or personal) ***are*** relevant to vulnerability, local authorities can *only* take them into account if the support will be provided on a ***consistent and predictable basis*** (per Lord Neuberger with whom the majority agreed on this point at [65]; see also [69]-[71]).

3.5 ***The relevance of the Public Sector Equality Duty***

3.5.1 *Relevance to deference given to authorities by the courts when analysing reasons given in decision letters*: In determining the adequacy of any explanation of how matters have been dealt with, the public sector equality duty is highly relevant. In particular:

(1) The PSED requires public authorities to have 'due regard' (when exercising their public functions) to the need, amongst other matters, to advance equality of opportunity between those who have a disability and those who do not (s. 149(1) of the Equality Act 2010).
(2) The duty applies when deciding the issue of priority need (*Hotak*).
(3) It is a duty that must be exercised in *'substance, with rigour and with an open mind'* (*Hotak* at [75]).

3.5.2 Having due regard includes a duty to have regard to the need to (a) remove or minimise disadvantages suffered by the disabled where the disadvantage is connected to the fact that they are disabled; and (b) take steps to meet the needs

of the disabled where those needs are different to the needs of those who are not disabled (s. 149(3)).

3.5.3 The authority must give such weight to those factors as is appropriate in the circumstances. What is appropriate will be highly fact sensitive (*Hotak* at [74]) but the court must be satisfied that there has been a rigorous consideration of, and a proper and conscientious focus on, the duty (*Hotak* at [76]).

3.5.4 When considering priority need, the PSED is complementary to the duties under the 1996 Act. In the context of a section 202 review Lord Neuberger said in *Hotak* at [78]:

> *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".*

3.5.5 Assessing priority is therefore a *linear* exercise. The authority must ascertain what will (or might) happen to the applicant if he is without accommodation and then determine whether that is a harm or a risk of harm that is significantly more than that which would be suffered by the ordinary person.

3.5.6 It is the duty of the **court** to ensure that the reviewer has undertaken that exercise with rigour: Per Lord Neuberger at [79] where he comments on in his dicta in *Holmes Moorhouse v Richmond LBC*:

> *In the Holmes-Moorhouse case [2009] 1 WLR 413, 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.*

3.5.7 *PSED and its relevance to inquiries*. In the absence of the PSED an authority will only have failed to make all necessary inquiries if no authority, acting reasonably, would have made the decision made without first making additional inquiries (*R v Nottingham CC, ex p. Costello* (1989) 21 HLR 301 QBD at 309).

3.5.8 *Pieretti* was approved so that, if the PSED is engaged, the duty to make inquiries will include a duty to make inquiries where there is a *real possibility* that such inquiries will reveal information about a disability that is relevant to the

statutory question being considered (*Pieretti v Enfield LBC* [2010] EWCA Civ 1104; [2011] HLR 3 at [35] and [36]).

4. Local authority approach to *Hotak*

4.1 The general strategy for local authorities is to build into the test as much discretion for the decision maker/reviewer as possible so that the authority can assert that the comparator is still likely to suffer harm and the applicant's prospects without accommodation is not very different or 'significant'.

4.2 The following are common assertions in either decisions or in court:

(1) A 'functionality test' is sufficient given that the purpose is to show the applicant will manage if homeless;
(2) Given that the comparator is the ordinary person and that the ordinary person *will* suffer harm, the fact that the applicant will suffer harm is no different to what might happen to the ordinary person;
(3) The task is to ascertain what harm *will* happen - not what harm *might* happen. It is not the 'risk of harm' that is being compared. Rather it is harm itself. Therefore we can ignore the risk of suicide as it is a low risk even if a real risk.
(4) The dictionary meaning of vulnerable may be 'susceptible to harm' but that is irrelevant. The test is 'significantly more vulnerable' which is a matter for the reviewer;
(5) The PSED has made no real difference to Holmes Moorhouse. Decisions must still be looked at 'benevolently'.
(6) The factual assumption is 'when homeless'. This excludes 'street homelessness' but can include times when the applicant is accommodated (per *R (Aweys) v Birmingham City Council* [2009] 1 WLR 1506, HL also known as 'Ali v Birmingham').
(7) The test requires the applicant's vulnerability to be 'significantly greater'. Significant is an issue for the reviewer, does not need definition and is not restricted to 'more than merely trivial'.

5. Howler No. 1 - using the functional test to the exclusion of other harms

5.1 *The functional test*: Never expressly stated but often implicit in a decision continually noting what the applicant can do (cook, shop, engage with lawyers, engage with the housing office, take medication etc), but ignoring other types of harm:

(1) medical symptoms getting worse (e.g. PTSD causing increased episodes of flashbacks, anxiety attacks, distress, lack of sleep); or
(2) the absence of those symptoms being avoided - if the applicant had accommodation his symptoms would disappear, but they won't if he is without accommodation. He therefore suffers the harm of having to continue to suffer his symptoms at the current level.

5.2 Quite obviously wrong to ignore those other harms given Neuberger at [41] (albeit whether the reviewer has actually applied the wrong test may be more difficult to show).

6. Howler No. 2: the assumption to be applied when considering the test.

6.1 *Applying the test by reference to 'when homeless' rather than 'without accommodation'.* Reviewer says: assumption is 'when homeless' per Neuberger; when homeless includes 'when accommodated' notably pursuant to Ali ('homeless at home'); you have been homeless; we provided you with accommodation; still homeless when in that accommodation; your doctors say if you are without accommodation you will relapse; You have coped whilst you have been in our temporary accommodation; I must look at you 'if you were homeless'; you have been fine whilst housed but homeless and you are therefore not more vulnerable than anyone else if homeless.

6.2 Possibly the brainchild of Minos Perdios: A quotation from one of his decisions:

> *There are some key points and passages that I think are important for me to a) explain and b) set out why they are relevant to my reasons for the conclusion that I make when reviewing your case. The first is homelessness is defined with the homelessness act and there is no specific mention of street homelessness. This was set out in the judgment handed down in Hotak. There is also case law by the name of Birmingham V Ali & Others 2009, which expressly deals with the question of what is accommodation and when an applicant should be considered as homeless.*
>
> *Applying the above to your case, As I understand the guidance from the case of Ali, an applicant in temporary accommodation is a person that can be considered as rendered homeless, and there are a number of other factors or situations that could have the same effect of a person being considered as homeless although they may have a roof over their head or short term respite or otherwise. In my opinion this type of situation applies to you and you are homeless. The assessment is not a clinical assessment, it should be a practical assessment of your situation and what has occurred or would occur when you are compared to an ordinary person, if rendered homeless, taking into close consideration your medical or any other relevant factors.*
>
> *Having reviewed your GP patient summary record there is no information to suggest or indicate that you have ever not been compliant with your medication or that in a situation of the social stressors you have not been able to access services, gain support, direction and guidance to any situation that you have had even with the diagnosis of depression and anxiety. This provides further evidence that you can think, plan and organise your life and manage the homeless situation in a similar way to an ordinary person if made homeless. I am of the view*

that your solicitor perspective is more about the speculation of the risks that may happen rather than the evidence of what has occurred to date.

6.3 Wrong: *Hotak* at [59] and [93] - to the extent that 'when homeless' and 'in need of accommodation' mean something different (doubted by Neuberger), 'in need of accommodation' is the correct assumption (Per Neuberger at [59]) because that is what section 189(1) speaks of. It lists those 'who have a priority need for accommodation'.

7. Uncertainty No 1 - what is meant by 'significantly more vulnerable'.

7.1 Applicant's are currently arguing that 'significant' means 'more than trivial'. It is clear that in the context of equality law and discrimination, significant means 'more than trivial or minor': See *Igen v Wong* [2005] EWCA Civ 142; [2005] ICR 931 at [37], now incorporated (by reference to 'substantial') into s. 212 of the Equality Act 2010; See also in a different context (albeit still priority need) *R v Lambeth LBC Ex p Carroll* (1988) 20 HLR 142, 145.

7.2 Authorities argue that, if the Supreme Court had intended to define 'significant', they would have - after all they covered everything else. It therefore means 'significant having regard to the circumstances of the case' and is for the reviewer to decide exercising his judgment. (Mixed response from judges at county court level …)

8. Uncertainty No. 2 - how much would the ordinary person suffer? Is Hotak authority for the proposition that everyone *will* suffer harm if without accommodation?

8.1 The authority argument relies on Neuberger at [52]. An ordinary person, by being homeless, will suffer harm. Baroness Hale at [93] said : 'it is easy to understand how rapidly even the strongest person is likely to decline if left without anywhere to live'. Does that mean that everyone, nay the strongest, who are without accommodation ***will*** suffer harm. If so, is the height of the bar over which the applicant must pass in order to be vulnerable, artificially raised?

8.2 Answer: cannot be right - Baroness Hale and Neuberger are both speculating that everyone is at *risk* of harm, of not coping, or of suffering in some other way. Even the strongest *can* suffer harm, that does not mean that they *will* suffer harm - only that *some* will suffer harm. Even then, the degree of harm being envisaged by the Supreme Court was not set out. A common sense approach is required.

9. Relevance of PSED - the court's obligation to be satisfied that the authority have sharply focused on the applicant's disability and the consequent harm that might be suffered if without accommodation.

9.1 The obligation to consider relevant issues and to give sufficient reasons for the applicant to know whether the authority have erred in law are often two sides of the same coin (*Crossley v Westminster CC* [2006] EWCA Civ 140; [2006] HLR 26 at [28]; see also *Thornton v Kirklees MBC* [1979] QB 626, CA; *R v LB Croydon, ex p. Graham* (1993) 26 HLR 286 CA at p. 291-292; *Holmes-Moorhouse v Richmond-Upon-Thames LBC* [2009] UKHL 7; [2009] 1 WLR 413 at [46]-[51]). The degree to which reasons are required depends on the context (*Farah v Hillingdon LBC* [2014] EWCA Civ 359; [2014] HLR 24 at [31].) Now also depends on whether the PSED applies to the case. Two examples follow.

9.2 ***The use of advisors - notably Dr Wilson of Now Medical***. Dr Wilson classically expresses his advice in terms of an ability to carry out 'daily living skills', restricts his opinions to assessments of achievements to date whilst housed, and includes the mantra 'not vulnerable as defined'.

9.2.1 Reviewers tend to acknowledge that he has not examined the applicant without noting other deficiencies or issues with Dr Wilson's evidence. They will often say it is for them to decide what weight to apply to Dr Wilson's evidence without noting the other *Shala* or relevant points. Those 'other' points can include the following:

(1) Dr Wilson has not explained his understanding of the *Hotak* test – do we know what he means by 'as defined' or that he understands the test is he simply says 'not significantly more vulnerable than the ordinary person when homeless';
(2) whether his advice is couched in terms of function and whether he has failed to address, for example, exacerbated symptoms if without accommodation (e.g. worsening symptoms).
(3) Dr Wilson is a psychiatrist but would appear not to have practiced after qualifying (or is unwilling to say if he did). Although a member of the Royal Society of Psychiatrists, registration only requires 30 months training – what are his other qualifications. Has the reviewer compared them to those of *your* expert;
(4) Dr Wilson is usually being required to look at complicated factual situations but summarises them in two paragraphs for a fee of only £35 – has he given due care and attention to the papers?;
(5) Dr Wilson is potentially undertaking over ten thousand reports each year - suggesting a lack of care and attention;
(6) he never examines the applicant despite which he freely offers advice on both diagnosis and prognosis. Has the reviewer noted that his report has crossed the line and noted what *cannot* be relied upon

9.2.3 Sharply focusing on a persons disabilities and their impact (as required by the PSED) must include the court being satisfied that the reviewer has noted the deficiencies in advice that the applicant can cope or otherwise will not suffer harm. How those deficiencies are factored in needs to be explained by the reviewer. Failing to do so suggests a failure to consider and focus upon them.

9.3 ***Glib dismissal of evidence that other decision makers have found the applicant lacks an ability to carry out tasks*. E.g. decisions in the social security context that an applicant is entitled to DLA or *Employment and Support Allowance (Support Group).***

9.3.1 Very common for reviewers to say that those agencies are applying a different test *without* acknowledging that those awards required a finding that a factual situation existed for the award to be made and that the factual premise of the social security decision may be relevant to the review decision.

9.3.2 E.g. DLA because an applicant can barely walk cannot be dismissed as 'someone else's test' where it includes a finding (on assessment) that the applicant might be unable to walk. Highly relevant if street homeless or without accommodation, given that the applicant will find it very difficult to consequently find food, shelter, assistance etc. each night.

9.3.3 PSED extremely helpful in highlighting lack of reasons. Sharp focus required. In absence of any proper explanation for how relevant information was factored in, court required to quash decision. Lesser deference by the courts, greater likelihood of finding fault in the decision.