# Housing Law Practitioners' Association

## Minutes of the Meeting held on 16 March 2016
## University of Westminster

## Homelessness

Speakers: **Liz Davies, Garden Court Chambers**
**Dominic Preston, Doughty Street Chambers**

Chair: **Giles Peaker, Anthony Gold Solicitors**

Good evening everyone. My name is Giles Peaker, Anthony Gold Solicitors and Chair of HLPA and I am pleased to welcome you all to this meeting on homelessness. Can I first ask if there are any corrections to the Minutes of the last meeting? If not, I would like to introduce our two speakers for tonight who with both be well known to you. Our second speaker will be Liz Davies of Garden Court Chambers who has literally written "The Book" on homelessness and who is the fount of all knowledge on homeless matters. Our first speaker is Dominic Preston, of Doughty Street Chambers, who possibly hasn't written "the book" on homelessness, but could.

**Dominic Preston**: Good evening everybody. Normally the first slide is just the title and nothing can be said about it but I thought I'd just point out that I am calling it *Hotak*. It is, of course, *Hotak, Johnson and Kanu*, but I have two colleagues, one who was in Johnson and one who was in Kanu and they're fighting about what it should be called. I'm going for Hotak as a consequence.

What is it that I'm going to talk to you about? It's not really just the case - although I will give a summary about it. The aim is to try and look at some of the arguments that have been raised in the knowledge that there are no cases that I know of, and I'm desperate to know of any if you know of any, that appear to be either applying for permission, have permission or going anywhere in the higher courts. Now if anybody has information please tell me at the end.

As well as giving out some information about what the case was about and going over it a little, I want to try and address some of the arguments that have been raised by local authorities. You would be forgiven for thinking that local authorities read the judgment in *Hotak* and cheered with delight because it wasn't going to change anything at all. I hope to show that this isn't quite how it should be looked at. I would have thought that you would be surprised if that was the case until you've had a case in court and you hear the arguments on the other side and you despair that you're simply back at square one.

The context, very quickly, of *Johnson, Kanu and Hotak*. Well, three fairly standard set of facts. The first was Johnson, a drug addict who claimed that he would relapse if he was put on the streets; secondly a self-harming married man who had a wife and a son who were willing to look after him but who had pretty serious mental health problems and, indeed, either before or shortly after the case was heard by the Supreme Court, died of his conditions; and the third, Mr Hotak, was somebody who was suffering from PTSD, depression but he had a caring brother. Those three cases were considered in the context of the statue, s.189(1)(c).

The beginning of s.198(1) lists those people who are in priority need of accommodation. I'll come back to that a little later but it's important to see that the list is designed to tell you who is in need of accommodation, and it tells us that one of those categories at ss.(c) are those who are vulnerable by reason of a statutory listed reason, and that includes, as you will know, subsidiary legislation as well, so there are about nine or ten and I've included them in the handout.

The third question to ask is what were the issues in the case? Well, the first was should there be a comparator when working out vulnerability? If so, who should that be?; what is the relevance of support networks, professional or personal?; what is the relevance of the Public Sector Equality Duty, if any?; and any other business.

Does *Hotak* have a moral context? When I was dealing pre *Hotak* with all these cases and with various colleagues we would just get angry all the time just thinking about them, and I'm sure that there are occasions when you read a decision and you felt fairly similarly. I don't know whether there's a moral context but it is worth quoting Baroness Hale at para. 91:

> "*We had reached the point where decision-makers were saying, of people 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".*

She seems to put it in a slightly more human way, or seems to put the context of the case in a slightly more human way.

Two additional preliminary points: It is quite clear that Neuberger, from reading the Judgment, but particularly at para. 59, was attempting to go back to the statutory provision itself. Both that first line I read of s.189 and also the word "vulnerable" itself. In rejecting the ordinary homeless as a subgroup as the comparator he did refer to the suggestion that if he had found for the authority in that case that would have resulted in situations which could only have been described as uncivilised. That's at para. 56, quoting Lord Justice Sedley.

What about the general guidance before we turn to the test that was given? I cannot do as well as Jan and everyone else who was here last year, but I will try my best, and so I will go through them one by one.

The first is that there isn't really any outright rejection of the old test. What there is, rather, is a decision about what those tests meant. So the intention so far as the Supreme Court is concerned, certainly so far as Lord Neuberger and the majority is concerned, is to take us back to what they think Hobhouse had in his head when he made his pronouncements in *Pereira.*

The second is, the Statute is concerned with the ability to cope without accommodation - first line of s.189(1). So all decisions about whether or not somebody is in priority need should be made on the basis of the assumption that you are, and the comparator is, without accommodation.

Although Neuberger refers to vulnerable when homeless, it is still without accommodation that is the test and to the extent that there is a difference, and we can say that there is a difference. Neuberger makes very clear at para. 59 that it is without accommodation that is the test, not when homeless.

There are some general obvious points:

- You must take the applicant's characteristics and abilities in the round together as a whole;
- Authorities' resources are irrelevant;

- The use of the expression "fend for oneself" is misleading. It may be factually relevant if it is the case but some people might think that you could fend for yourself but still be vulnerable, and others may say, well you might not be able to fend for yourself, but you can do so with other family members. Different ways of looking at it. So "fend for yourself", or what I might call a functional test, is potentially useful factually but is not the test as a whole; and lastly
- The use of statistical evidence is dangerous. Lots of decisions saying 10% of the population are susceptible to suicide, consequently everybody who is susceptible to suicide is not vulnerable. Those go as well.

So what is the vulnerability test? Well we have two tests. Neuberger says that the cases can note a person is vulnerable if they are significantly more vulnerable than ordinarily vulnerable as a result of being rendered homeless. I have put in bold the various different sections to try and get some idea of where the discussion might be, but **significantly** is obviously important, and **ordinarily vulnerable** has been picked up as being important as well; and the last one **being rendered homeless**. While although Lord Neuberger uses the words being rendered homeless again and again, as I mentioned before he does make the distinction between being homeless and being without accommodation, and the latter is the correct test.

What does Hale say? Hale says: *"The person who is old, mentally disordered or disabled, or physically disabled, must, as a result, be more* - no significance here - *at risk of harm* - so not vulnerable, but at risk of harm - *from being without accommodation than an ordinary person would be.*".

And just to make sure that we're completely confused and we can't be suggesting that the two tests are different, this is what I understand Lord Neuberger advanced *Pereira* to mean by an ordinary person if homeless. I agree. So was she adding a spin, or providing a different test?

Those are, however, summaries only. They aren't really the test. To get an idea of what it is that the reviewer has to do you would expect the reviewer to drill down a little bit more into the test. So, what would you need to think about as a reviewer if you were drilling down?

Well firstly the comparator is the ordinary person nationally. Fairly straightforward. Even the ordinary person is capable of suffering harm if homeless, and I can say that this is a reviewer's favourite.

Neuberger said, at para. 52: "*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*". And just while you have the opportunity, note he uses the word "harm" not "risk of harm". He uses the word "suffering", not "risk of suffering".

Hale, at para. 93: "*The problem is that we are all, to some extent, at risk of harm* - note the difference - *from being without accommodation, women perhaps more than men, and it is easy to understand how rapidly even the strongest person is likely to decline if left without anywhere to live, so this is why a comparison must be applied"*. I'll return to that a little bit later again.

Must be more vulnerable - Hale; significantly more vulnerable - Neuberger. I've highlighted that already, but significant is undefined. We all know that's the biggest problem but there are others as well.

Does the dictionary meaning of "vulnerable" have any relevance? Hale notes the dictionary meaning is susceptible to harm, and she talks about risk of harm again and again. Did Neuberger mean something else? Did he mean it to be a different test, just harm itself? Did he mean the reviewer to find, as a fact, that harm would occur rather than might occur? Unlikely it seems to me. In particular he references that he is simply following what he thinks the old law should have said and *Pereira* talks

about suffering injury or detriment and detriment and, as we all know from the case of *Griffin*, includes the risk of suicide, or risk of other harm.

Now you may think why on earth am I going down this road? That's because of what local authorities have been saying. So I'll come to that a little later.

One other point on the risk of harm versus harm argument. To my mind whether something will or won't happen is only one factor. The other factor when you're looking at risk of harm or whether harm will or won't occur is the consequence. You might have a 90% risk of getting a cold, but the consequence is probably not going to be fatal. On the other hand, a 10% risk of suicide means death. Therefore it seems to me that talking about whether something will or won't happen does not make any sense. I can't believe that's what Neuberger had in mind.

What about support networks? Well, they can be taken into account. Both professional and personal support networks are relevant, access to doctors etc. It's a question of fact whether or not the support will be available. So it's for the reviewer to make a judgment on. But it must be available on a consistent and predictable basis. Now that was the easy part, because I haven't really got anything else to say about that.

The only other thought is the reviewer must still consider whether there is a continuing risk of harm, even if the support is available. So they still need to work out what will happen with that support and then work out whether or not it will be more or more significant than that which would be suffered by the ordinary person.

Relevance of the PSED, the third big issue in the case. Just to recap quickly, when does it apply? Well there must be a disability; physical or mental impairment having a substantial and long term impact on the ability to carry out normal day to day activities. The guidance makes clear that risk of suicide might actually be included. But, importantly, addictions to alcohol and drugs, Mr Johnson in particular, is excluded, so Mr Johnson did not have a disability in that case.

It applies to public authorities carrying out their functions. We all know from *Pereira*, and we now know from *Hotak* that includes Part 7 functions, and the duty is to have due regard to the needs of those who have a disability. That is shorthand, but I hope it's a shorthand that isn't too bad for the purposes of this talk.

But that means, of course, that it is not an outcome duty, it is a duty about how the authority conducts itself when carrying out a decision. So it's a duty to have due regard, not to come to a particular result. It's described as a complementary duty throughout. Heightens the need to enquire and explain but does not dictate a result.

So what relevance is there to the PSED? How does it help? Well, the main piece of help is at para. 78 because Lord Neuberger says it requires the authority to focus sharply on any disability, on the effect of the disability on the applicant, if without accommodation; and how that impact compares with the impact on the ordinary person. What that passage helps with is that it tells you it's a linear set of questions that the reviewer has to look at. What's going to happen to the applicant as a consequence of the disabilities? What's going to happen to him if he is without accommodation? And, having decided what is to happen, how does that compare to the ordinary person? That is extremely useful when you look at the way in which decisions are written.

So that requirement to focus sharply on those issues is important, and the need is for sharp focus by the reviewer, but of course that increases the degree to which the court needs to be satisfied that the reviewer has indeed focused properly on those issues.

So it's not that the emphasis tells us any more about what the reviewer has to do, but it gives us a message and that message is emphasised by para. 79 where there is talk about the *Holmes Moorhouse* dicta, in which Neuberger makes clear that the court needs to be satisfied that there has been a sharp focus on those issues. Now we've been saying that's the case for years and years, but it's useful to have somebody else say it. And I think to that extent the PSED helps.

What it does, I think more importantly, is that it lowers, to my mind, the *Holmes Moorhouse* defence that Judges have when they look at these decisions. It heightens your ability if you're representing the Applicant to say: You really need to look at these decisions closely. I'm not nit-picking. You need to be satisfied to a greater extent than might normally be the case, because PSED applies, that sharp focus has indeed been placed on the relevant issues in the case.

So it helps you in traditional grounds: failure to consider grounds or reasons challenges. It may not add anything new but it certainly helps in that respect. And of course we all know that *Pieretti* was approved and it helps us with an easier enquiries test which I am sure you all know, the test being real possibility rather than rationality.

So just to recap, it's not that the PSED creates a new ground of appeal. You don't even need to quote the PSED as a ground of appeal in my view. You might in certain cases need to do so. But it's that it assists you in the deployment of your traditional grounds of appeal: failure to consider; failure in terms of reasons; failure in terms of enquires.

So I have bored you with what you all know. I will now move on to some of the arguments which the local authorities have been advancing - which either their reviewers have ben advancing or which their representatives have been advancing - and I'm open to any others that you have seen. Can I emphasise that I did not invent these arguments, therefore when you look at them and they look illogical, please do not blame me for writing them up on the board.

General strategy is quite straightforward. You build in as much discretion as possible and you heighten the harm suffered by the ordinary person, so you change your comparator by saying that they would suffer harm anyway and you build in as much discretion in any way you possibly can so we, or rather the local authority, can say it's for the judgment of the reviewing officer.

Examples:

- Well the obvious one, which I'll come to in a while. Significance is a question of judgment for the reviewer, does not need definition, is not restricted to more than merely trivial.
- Functionality test - coping test - is still highly relevant. Rarely is anything more necessary
- Neuberger says that the ordinary person will suffer harm. The fact that the applicant is suffering harm is consequently not significant.
- Neuberger never mentions risk of harm, therefore dictionary meaning susceptible to harm is irrelevant, and it is harm that counts, not the risk of harm and whatever vulnerable might mean is a matter for the good judgment of the reviewer. I've seen decisions which add on to that and, of course, the risk of suicide therefore can be ignored. Now I've obviously paraphrased the way in which the reviewer said it, so it's perhaps not quite as bad as that, but it's close.
- One that's particularly interesting - the factual assumption when applying the test is when homeless is not without accommodation, and there is a difference between the two, and reviewers like the former rather than the latter. How many times have I said this - I'll come to that in a moment!

- Last one, or rather there are others, but PSED makes no real difference. Decisions must still be considered benevolently.

So those are some of the arguments that have come through. I wanted to deal with two what I call Howlers, and the first is the functional test.

Howler No 1 - The Functional Test

The functionality test can be relevant, but it is not the whole of the test. Why is it important to make the distinction? Because reviewers and medical advisers are obsessed with your ability to cope and manage your daily affairs and their decisions go on and on about how you are able to do all of these things. In particular you can crawl to the front door of the homeless persons' unit, you can cook, you can do all the other things, but what they tend to ignore are two additional harms.

Firstly is the exacerbation of symptoms. Now if you have a PTSD case, someone is suffering flashbacks, anxiety or lack of sleep, and as a consequence of you being street homeless someone says you will suffer more of those - remembering flashbacks is not, oh I've got a bad memory, it is you actually think that you are somewhere else for that period of time - the exacerbation of those conditions are all harm, and one would be able to say harm, that would not be suffered by the ordinary person. But it might also be that you are already homeless, or you have spent a period of homelessness, and the reviewer says: "Well, whilst you were homeless your conditions didn't get any worse". There you might suggest that the reviewer is ignoring those things which the applicant would not suffer if he was housed. So by obtaining housing those symptoms might become less. You would have fewer flashbacks, less anxiety, less lack of sleep as a consequence of which it can be said that if you were street homeless you would suffer more harm because you have missed the opportunity of avoiding that harm.

So these are two potential other harms beyond functioning, as it were, that reviewers very often avoid - I think deliberately avoid - talking about, and which, when you read medical reports, is usually the issue - particularly in mental health cases - that the psychiatrist is most worried about. So your reports tend to be directed towards those types of harm.

The functionality test in the context of PTSD or depression or personality disorders often fail to look at those other potential harms caused by the absence of accommodation. So we know that that is utterly wrong. And we know that because of para. 41. So why is it that local authority reviewers are still making decisions of that kind? No comment.

The second howler - and I've entitled this Another Perdios.

So what is it, what is the Perdios in this case? Well if you have the handout in front of you, can I ask you to turn to paragraph 6.2.

Firstly I'll read the first paragraph - this is a direct quotation.

> *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.* Correct. *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.*

Why is Perdios mentioning the case of Ali in this context? Has anybody seen that particular paragraph before? I have seen it with two decision makers. One in Haringey and one in Southwark, and it would appear that Perdios is selling his standard form decisions. What is it that he's actually saying? Well let me tell you what he's saying - and please don't laugh.

The test is to be applied on the assumption of when homeless per Neuberger. So Neuberger talks about when homeless all the time. When homeless includes when accommodated, pursuant to Ali, e.g. homeless at home. You have been homeless and are still homeless even though we have provided you with accommodation, indeed you've been homeless with us for six months. Your doctors say that if you're without accommodation you'll relapse into severe depression. Terrible. But you've copied while you were homeless in our temporary accommodation. So everything's fine. In my view, therefore, when homeless you're not more vulnerable than anyone else when homeless.

Now if you think I'm joking I've put all three paragraphs in there. Read them at your leisure. Wholly wrong. Neuberger at para. 59 and Hale at para. 93 make absolutely clear that it is when you are without accommodation that is the test, to the extent - and Neuberger acknowledges that there might not be a difference between "when homeless" and "without accommodation" - but to the extent that there is a difference he expressly says that it's "without accommodation" which is correct. He keeps us busy doesn't he?

The More Difficult Arguments

**Significant**. I don't know of any cases going up. I would like to know if there are any.

I've had mixed responses from different judges. What do the applicants say? They say it means more than trivial. Why do we say that? Because there are examples from Equality law, *Igen and Wong* is an example. s.212 which talks about substantial brought in the *Igen and Wong* meaning, which is "more than trivial", and that is now in the Equality Act 2010. There should be symmetry between the Public Sector Equality Duty which is, after all, in s.149 of the Equality Act 2010, and therefore with that symmetry we really should have the same meaning. Not the best argument, I have to say.

We also have a case called *Ex p Carroll* in that, although it was looking at the word "significant" in a Code of Guidance, nevertheless the judge in that case said, well it obviously means more than *de minimis*. Again it's in a different context and isn't necessarily the strongest case.

But we do have those early points I made, talking about: Well, what result are you looking for? We're looking for civilised results. What is it we're looking to do? We're looking to go back to the statute. That tenor in *Hotak* I think is particularly important.

What do local authorities say in response? They say, well Neuberger dealt with just about everything. In fact he went on so long that there are lecturers out there sending people to sleep talking about it. He did not define "significant". That was deliberate. Therefore it is a matter for the authority using its judgment. There is no need for definition. It means "significant" in the context of the case. Some judges are going for that, some aren't. I've had about two go one way and three go the other. I would be interested to know what non Central London County Court judges are saying, but I think that is up for grabs.

What about the other way in which local authorities try, not sensibly, but at least with some logic, to make the test a little bit more palatable for them. Well, the local authorities say the ordinary person, the comparator, has a particular meaning. Neuberger talked about the ordinary person who will suffer harm, not who is at risk of harm. Hale talked about even the strongest person will decline and will do so rapidly. Consequently we now know that the ordinary person will decline rapidly and suffer harm. If everybody is going to suffer harm it is going to be harder to beat that person in a pecking order, as a comparator.

What do applicants say about it? They say, well that's taking it completely out of context. Neither Neuberger nor Hale are saying that anybody will suffer harm, they're only saying that some will suffer harm, perhaps even the strongest. A very different thing. In reality both are speculating about the risk of harm: Hale expressly; Neuberger impliedly, and I refer you to my earlier slide.

Even if the ordinary person is going to suffer harm, the court does not say what sort of harm, and it's no way, you will say, at the same level as that likely to be suffered by your client. Common sense approach - I've talked about the cold versus suicide as an example. It doesn't make sense to think in those ways. It's always about risk. You're trying to work out a hypothetical that might happen in the future.

I have two others which I will mention quickly.

The PSED. Does that assist us? I think *Shala* is boosted a little bit in that context. Just a suggested ground when you look at these reports when they come in - reviewers need to be aware of the deficiencies of the advice that they are given. When I compiled this I was taking ideas from other people.

Classic is Dr Wilson of Now Medical. Anybody come across Dr Wilson before? Does he know the test? Well, what does he say in his two paragraphs? He says: vulnerable as defined, not significantly more vulnerable than the ordinary person when homeless. A summary of a very complex test. That is something that we should say in our submissions leading up to the 202 review. What on earth does Dr Wilson think the test is? Do you even know? Answer is they probably don't, and they probably don't want to know, so they're not going to ask.

The advice is always couched in functional terms. Not always, but certainly with Dr Wilson it's very often in functional terms, and no comment on those other types of harm, the exacerbation of conditions or, if there is comment, it's usefully in the context of: well, you've done OK, and then no comment about what might happen if you're without accommodation.

What about the qualifications? Well, Dr Wilson would not appear to be practising and Stuart Aherne has done a lot of enquiries on this, and I think Jamie Burton has also cross examined Dr Wilson and tried to get some information, but it would appear that although he's a registered psychiatrist, that only means 30 months of qualification, and that he's been registered for some time, and that he is without a job in a hospital. Versus your expert who has been around for xyz and you can obviously bump up their qualifications.

What about the time he spends on advice. Conservatively it is suggested that he might be doing 10,000 reports, two paragraphs long, for £35 and those stats come from the amount of money that Now Medical makes, and making a few assumptions, but you can come up with a figure, and then you say to a reviewer these are the figures, why don't you ask him. And guess what, he never says.

So the £35 timeframe, if I can put it that way, compared to your consultant who has spent xyz number of occasions looking at your client in much more depth. That is something that needs to be taken into account.

Not only do local authority reviewers tend not always to acknowledge that there's been no examination, but they don't tend to acknowledge that the opinion very often drifts into diagnosis or prognosis. It cannot be relied on by the reviewer if it drifts into those areas.

Does the decision acknowledge and deal with those deficiencies expressly? I know Dr Wilson has said this. I know about his qualifications. I'm drawing the line here. If not, can it be said that the reviewer has focused sharply on what will or will not happen if without accommodation? I think that's where the PSED really helps.

The last one is the glib dismissal that you get, so your client might be on DLA, mobility as an example; might be somebody who cannot walk or they're on the Employment and Support Allowance support group, i.e. they don't have to work; or there's a social services decision about your client; or there's a reablement team saying we should be giving support but we don't have resources, or whatever. Those are often dismissed as being decisions about different tests without acknowledging the underlying factual matrix. He was applying a different test. I take it into account but a different test has been applied without acknowledging actually what it required for those decisions to be made.

The classic example is, as I said, inability to walk. I use that because it's so obviously part of the DLA mobility. If you're virtually unable to walk how can it be said that you are will be able to find food, shelter, assistance, medication, carry all your possessions etc whilst you're without accommodation?

So those glib responses I think allow you again to say in your submissions: Has this reviewer really focused sharply on the facts of the case?

**Liz Davies**: My paper, like Dominic's, is also headed One Year On From The Supreme Court, but it has in bold the cases of *Haile v Waltham Forest* and *Nzolameso v City of Westminster*. Before moving on to that I would like to make a few points on *Hotak* as well, because I do think we're going to spend most of the question time discussing Dominic's points on vulnerability.

The first is to emphasise the two significant points that Dominic made: the question of what does "significantly" mean; and the question of whether or not somebody should be assessed as likely to suffer risk of harm as homeless in a temporary hostel or as actually street homeless, which was always the law from *Osmani* onwards. Those two questions are absolutely important and one side or another has to get them to the Court of Appeal at some point fairly soon. We really do need clarification on that because local authorities are just churning this out, and quite routinely certainly on the significant point, not getting away with it in 204 appeals, but they are still churning it out.

Second point to make is Dominic's excellent summary of Public Sector Equality Duty in relation to disability. It's worth remembering it doesn't just apply to disability. I've pleaded it a couple of times on gender where I've had women who have had a history of being victims of sexual assault and saying well that's clearly something that's relevant if you were street homeless. It's hard to know how you would be able to sleep safely on a park bench if you've got a history of being sexually assaulted. You're therefore much more scared than somebody else, so gender can come into that. Obviously men can also have a history of sexual assault but it's more frequent for women. So I think it's worth occasionally thinking about whether we have any other protected characteristics here, because the reviewing officer certainly won't. Reviewing officers focus on: "I have focused on whether you have a disability with rigour and a sharp focus and an open mind etc, etc", and then they don't actually say whether or not they've decided that you have a disability, but they're certainly not thinking of any other protective characteristics. So if you have got a protective characteristic point to make in your representations on review then do so.

The third point is that I've certainly found with a number of these review decisions that they take the same glib approach not only to some of the points that Dominic was making but also to the availability of support. They take *Hotak* and they say, "Well you might be vulnerable but you've got support because we have day centres in our area". They do not focus on where the support is actually available and whether, even if it were available, you might still be vulnerable, even with the help from your brother or the day centre. I think this is a point worth picking up.

Let me move on to my brief, which is, first of all the implications of *Haile* and secondly the implications of *Nzolameso*. So let's start with *Haile*. It's worth looking at *Haile* not least because, if *Hotak* can occasionally be impenetrable, then *Haile* is far more so, and it makes your head spin.

Miss Haile, a single woman, was living in a hostel. She left the property because of unpleasant smells. So that's a bad reason for leaving a property, we all know that. But at the time that she left it she was

about four months pregnant and her occupancy agreement said that her room in the hostel was for a single person only, that was the terms and conditions for the whole of the hostel, and therefore once the baby was born she would have had to leave the hostel anyway. She stayed with friends for a while and then she made her homeless application. It is important that both the s.184 decision and the review decision were made after the birth of the baby and therefore at a time when, had she stayed at the hostel, she would still have had to leave and would still be homeless.

So the facts are relatively straightforward, and I have to say, all credit to Hackney Law Centre and Kerry Bretherton for taking this on to the Supreme Court because I think most of us would have said, "Well, you know, you did leave the hostel for a bad reason and they're entitled to look back at that", and maybe put it to the County Court but not much more so. So that was real bullish litigating on behalf of their client and, in fact, on behalf of many other homeless people as well as it turned out.

The big problem, of course, is the authority of *Din v Wandsworth* way back in 1983 in the House of Lords, and I set it out at paragraph 4 of the paper. In *Din v Wandsworth* a family was living in accommodation which had become unaffordable and they had fallen into financial difficulties and so they were in serious rent arrears. They decided to leave and they were able to get some other accommodation for about four or five months but that was always temporary and not settled, although this is 1983 and a lot of the phrases that we routinely use were not being used at that point. The homeless legislation had only been around for about six years.

The second accommodation comes to an end, for reasons that were not their fault, and they make a homeless application and Wandsworth says: "Well you are intentionally homeless because you left the first accommodation and you were in rent arrears and it was your fault that you were in rent arrears." The question about whether or not that accommodation was reasonable to continue to occupy was not a live one because that provision - reasonable to continue to occupy - was not in the original 1977 Act, so there was no concept of it. They said, "Well we would have been homeless anyway because we were in rent arrears and the landlord was going to bring possession proceedings against us". Wandsworth said: "You deliberately left it, despite the fact that you were in rent arrears. You effectively left it too soon. He didn't take possession proceedings. We're not going to speculate about what would have happened, and you went into your own privately arranged temporary accommodation, so we're not going to look at that."

The House of Lords had decided that that was a perfectly proper approach by Wandsworth, that they looked back to the deliberate act of leaving the accommodation and that they did not speculate about what might have happened had the family stayed. For that reason everybody, including, it has to be said, Ms Haile's legal advisers, thought that what they needed to do in the Supreme Court in *Haile* was to try and overturn *Din v Wandsworth*, and that's what was argued by Ms Haile's legal advisers.

But in fact the majority, four of them, came up with something completely different and they said that when deciding whether or not somebody has become homeless intentionally, in order to decide whether or not the main housing duty at s.193 applies, then there is a two stage test. So this is all very innovative. None of us really knew this.

The first is the straightforward part. Section 191. Did somebody deliberately do, or fail to do, anything in consequence of which he or she ceased to occupy accommodation which it would have been reasonable to continue to occupy? And the answer to that in Ms Haile's case was, of course, yes. She left. That was a deliberate act in leaving, and her argument that it wasn't reasonable for her to continue to occupy because of the bad smells wasn't really ever going to get anywhere. So yes, she was intentionally homeless under s.191 but that isn't the whole of the test.

The second question to be asked is: Is his or her current homelessness caused by that intentional conduct, and the four Justices of the Supreme Court said that it clearly was not. Had Waltham Forest asked that question then, because by the time of the 184 decision and the review decision, she had

her baby, she would not have been allowed to stay in the hostel, she would have been homeless in any event, then for the purposes of deciding whether or not the main housing duty applies, she is not intentionally homelessness, because her current homelessness was not caused by her earlier decision to leave the hostel.

How do we then distinguish *Din v Wandsworth*, because the Supreme Court did not overturn it? It's taken me some considerable time to work this out and actually there is an excellent article by Matthew Hutchings in the Journal of Housing Law in about November. I give you the reference in the paper, but the key point is that Lord Reed for the Supreme Court, giving the main judgment, says that *Din v Wandsworth* involved speculation about what the landlord might have done. Hypothetical event. Would the landlord have brought possession proceedings, and if so, what would have happened? So the Supreme Court said the House of Lords back in 1983 was completely right. It is wrong to engage in hypothetical speculation.

But in *Haile* we have two actual events. Verifiable events. The first is the birth of the baby, which everybody agrees is an actual event that is verifiable and is not speculation. The second actual event, or at least Waltham Forest, who I don't think knew what had hit them, were prepared to treat it as an actual event, was the argument that as soon as she had the baby, or presumably shortly before she had the baby, she would have been required to leave the hostel. So Waltham Forest accepted that that was a fact, not a hypothetical speculation. On that basis then the Supreme Court applies its two stage test: Did she deliberately do something? Yes she did. Was that the cause of her current homelessness? No, because as a result of two actual facts, the birth of the baby and the consequence of being required to leave the hostel, her homelessness now is not due to her deliberate act in leaving earlier, effectively, than she should have done.

I mention in the paper that one of the five Justices of the Supreme Court, Lord Carnworth, who himself has a housing and homelessness law background, did not agree. He dissented. He took the view that the Supreme Court was being asked to overturn *Din v Wandsworth*. He wasn't prepared to do that and he did not regard the approach of the majority as an appropriate distinction. So that's where we are. We have this very nice and very neat two stage test.

What sort of circumstances could it apply to? There is one case that has appeared in Legal Action's Recent Developments since *Haile* came out, and that's the case of *Magoury v Brent*. I have to say I was involved in that. On its facts that was interesting, and raised one particular scenario, and there are some other scenarios to consider. Ms Magoury was an assured shorthold tenant in private rented accommodation. She was receiving full housing benefit and she accrued rent arrears of about £2000 and the landlord brought possession proceedings. She subsequently made an application as homeless and said that it was not her fault about the rent arrears and Brent decided that against her. They decided that she had not passed on all the housing benefit to the landlord. Nothing you could do about that decision. But, about four days before the warrant of execution is executed - before the bailiffs were turning up - she received a letter from housing benefit which said: You are subject to the benefit cap - this was September 2013 - your housing benefit is going to be reduced by £134 per week - which was about a third of the rent. She was evicted six days later because of her earlier rent arrears.

The point was taken against Brent that we have a *Haile* situation here. That, yes, she had committed a deliberate act in accruing the rent arrears that otherwise would render her intentionally homeless, but at the date of her actual homelessness, when the bailiffs are evicting her, she would have been homeless in any event because the accommodation would have become unaffordable and therefore it would not have been reasonable to continue to occupy. Indeed, one could start speculating that the landlord would bring a separate set of possession proceedings, but you don't want to speculate, you want to concentrate on actual events. The actual event was the reduction of the housing benefit by a phenomenal amount that would have rendered the accommodation unaffordable. So there is one scenario for you about that sort of intervening event, and HHJ Collender sitting in the Mayors and

City of London County Court held that the *Haile* analysis was the correct analysis, and that Brent had failed to look at that. I have to say they didn't defend it on the basis that it was the incorrect analysis. They agreed with our analysis and said they had looked at it in any event, but the Judge found that they hadn't and they were casting around.

So that's the only one that's come up. I've given you some other scenarios at paragraph 10 and the obvious scenario where *Haile* would apply is when people leave early. It happens all the time, that people want to leave because there is a possession order against them or a s. 21 notice or they've had notice of a warrant. They go along to make a homeless application and the homeless people say, well come back the day before, or the day of the eviction, and then they go and see you and you write a cross letter about how it's not reasonable to continue to occupy until the actual moment when your furniture is being piled on the street. Post *Haile*, it seems to me that if somebody leaves early and they are definitely going to be evicted in any event then they will not be intentionally homeless for leaving early. They may be intentionally homeless for other reasons. There may be a reason why they were being evicted and so forth, but leaving early has been a problem and I think *Haile* means that it will no longer be a problem.

You can have scenarios really very like *Haile* where you leave and then subsequently your household expands, birth of a baby, elderly mum comes to live with you, and that would have rendered the accommodation unreasonable to continue to occupy because it was overcrowded. I asked colleagues in Garden Court for some examples and one colleague came up with a woman who had left her husband and applied as homeless, but then the husband moved his new woman into the property so her argument was that that would have happened in any event and the accommodation would have been unreasonable to continue to occupy. Similarly maybe somebody leaves accommodation and then gets a very serious illness or injury, or disability, so the accommodation would have been unreasonable to continue to occupy. I've given you some ideas. We don't know whether or not they would work. The main point to remember is that you have to concentrate on the intervening events: the birth of the baby; the requirement to leave the hostel, as being actual events and not hypothetical events. If you start writing: Well we think the landlord would have brought possession proceedings, you're in Din v Wandsworth territory. If you're able to write: the landlord has confirmed that he would not have allowed my client to stay with a shortfall of £134 per week from the rent, then you're on much stronger territory.

Those are my thoughts on *Haile*. Moving on to *Nzolameso*, again I think we're seeing a lot of these moving outside London decisions, and although I think it's heresy when I say this to our audiences, but I do feel sorry for councils in this situation. They are stuck between a rock and a hard place. Private rents in London are extraordinary and they can't afford them. On the other hand, moving people out to Stoke and Birmingham and all the rest of it is dreadful, and they're getting condemned by the Government for doing that when the Government is hardly tackling the problem of escalating private rents.

The statutory background to *Nzolameso* is quite important. Section 208 of the Housing Act is a basic prohibition on accommodating people outside borough: (and I'm paraphrasing) "So far as reasonably practicable a housing authority shall accommodate people in borough." And s.208 has been there since the 1996 Act and was probably in the earlier predecessors. It's always been there. There is an expectation that you should be accommodated in borough. There are a number of reasons for that, not least that if you're accommodated out of borough the original local authority that you apply to maintains its homelessness duties to you, but social services functions, education functions, obviously health, all go on the borough where you're living, where you're temporarily accommodated. We have had that confirmed most recently in the case of *AM v Havering and Tower Hamlets* - a very unseemly squabble between two local authorities about who had social services responsibilities.

So s.208 has always been with us. When the Government brought in the Localism Act 2011, which allowed local authorities to make private rented sector offers, they also published the Statutory Instrument called the Suitability of Accommodation England Order 2012, and Article 2, which I've given you at paragraph 12, sets out a number of considerations that have to be taken into account in a structured approach by the local authority if they are placing outside borough. It was that, and then the Guidance that the Government issued, which I've given you from paragraph 13 onwards, that really caused Westminster problems in *Nzolameso*.

So there are eleven paragraphs with Secretary of State's Guidance on location, all of which I've set out for you. They're all obtainable from the Code, and they really flesh out the considerations about disruption to education, disruption to caring responsibilities, disruption to employment and support needs. Paragraph 48 states: "Where it's not possible to secure accommodation within district and an authority has secured accommodation outside their district, the authority is required to take into account the distance of that accommodation from the district of the authority." In other words, you're supposed to find accommodation as close to your borough as possible. You're not supposed to say: "We always put people in Stoke, without thinking about whether you can put them in Watford or Hemel Hempstead or wherever it happens to be." That paragraph was, frankly, completely ignored by local authorities.

The other point that Westminster came completely a cropper on is s.11 of the Children Act 2004 which we had all been using for a number of years, but the Supreme Court and the wonderful Lady Hale in particular absolutely underlined was a key consideration when it came to suitability of accommodation. I would also mention Public Sector Equality Duty. It's not referred to in *Nzolameso*, but it seems to me obvious that when considering suitability, local authorities also have to take into account the Public Sector Equality Duty, any protected characteristics and so forth. There hasn't been a case arguing that but it seems to me obvious and some text books soon to be published might make that point.

So that's the statutory background. Ms Nzolameso refused s. 193 five bedroom accommodation in Bletchley, obviously without having gone to any of you first, because we would all have told her to have taken it. It was too far from the children's schools; she and they had a support network in Westminster; it was too far from her GP. Again this is very, very normal. Both her response and refusal and Westminster's response, which was: "Well they're not sitting any significant exams, they're all quite young children, they can move schools, they have GPs in Bletchley, and we have a severe shortage of accommodation." So again, very like *Haile*, a normal situation that we see all the time. Then the Supreme Court and Lady Hale was very, very clear that what Westminster had not done was embarked on a structured approach, and that all of that statutory background, but most importantly s.11 of the Children Act 2004, meant that local authorities should do far more than just say: "Oh well there aren't any important exams coming up" when it came to the children; that they did have to identify the principal needs of the children, both individually and collectively, when making the decision; they had to consider not just whether there would be disruption to education or disruption to other support networks, but whether that disruption might harm the social and educational development of the children.

Other than Westminster's stance of: "We've got a severe shortage and things are alright in Bletchley and they can move schools", there was no explanation of the decision. There was certainly no structured approach as required both by Article 2 in the Code and by the Children Act of going through those various considerations and dealing with them. No indication, other than we have a severe shortage, of whether accommodation was available in Westminster. Absolutely no consideration of whether there was somewhere between Westminster and Bletchley that would have been suitable. She acknowledges the severe difficulties on local authorities and she says: "But you need proper

policies. You should have two policies: one is how to procure sufficient units of temporary accommodation; and the other is, having procured it, how you allocate that temporary accommodation when you're allocating outside borough."

I haven't yet had the time to do a search of London local authority websites. I've been aware that Harrow, certainly, have adopted those policies as required. They adopted them in November/December. I'm not clear whether others have. Clearly those policies should be published as part of your homelessness strategy or your housing strategy. One would expect them to be published, and you would then expect, of course, once polices are adopted, for local authorities to apply the policy and to go through the structured decision making.

There is one case in Recent Developments which is a s. 204 County Court case where Ms Forsythe-Young turned down accommodation. Again it was about children that shouldn't be required to move schools and Redbridge had not engaged in the *Nzolameso* structured approach. I imagine there are several others coming up and we'll see them, or maybe local authorities are giving in. They are probably on fairly strong ground if they are able to show the structured approach in their letter, and show why they thought about how there was nothing between Westminster and Bletchley and they genuinely thought about, not just in broad terms that the children can move schools, but actually each individual child, should they be required to move school and so on and so forth. GPs are available in Bletchley, schools are available in Bletchley, you can't argue with that. You can argue that there is a particular relationship with a GP or a school or whatever.

So if they have a policy and they have apply it. If they have a proper structured approach local authorities would be able to survive challenges, but if they just write you can move school and we've got a severe shortage then they're in difficult territory.

In the housing world s.11 Children Act 2004 was brought up in an allocations JR called *HA v Ealing*, which is now going to the Court of Appeal. Ealing have obtained permission and Ms HA got part of the allocation scheme struck down for a number of reasons, one of which was that there was no application either in the allocations scheme or in the consideration of Ms HA's own application of structured s.11 Children Act approach.

And it's a real crisis. Last year there were 1653 placements outside London and in the previous year 2013/2014 it was 600 odd placements, so it's more than doubled, which is the key point. As I say, again in the paper, a number of local authorities just recently have been lobbying the Government because they basically want Article 2 toned down and they want freedom to be able to place outside London without any of these pesky housing lawyers getting involved, requiring them to make a structured approach and so forth.

The very last thing to say on *Nzolameso* - again huge congratulations to her legal advisers for taking this as far as the Supreme Court, and huge congratulations to her. She turned down accommodation in Bletchley - reckless obviously, none of us would have advised her to do that - and as a result she was not accommodated by Westminster. She lost a number of JRs seeking accommodation pending appeal, and she ended up with her five children in s.20 Children Act accommodation. In other words the children were accommodated by social services away from her, so that was a huge personal cost that came about as a result of her decision to turn down the property in Bletchley, but her and her lawyers' showed real courage in going as far as the Supreme Court.

So I'm very happy to deal with any questions, but mainly I want to hear what people have been doing about both *Haile* and *Nzolameso* on the ground.

**Chair**: So Liz is it right that local authorities are lobbying to have the locality issue removed from suitability? It's in Westminster's submissions to the CLG Select Committee Enquiry and it's in Newham's, and Westminster's evidence actually opens up at about the third bullet point with: We've had enough of legal challenges to accommodating out of borough…

**Liz Davies**: The point about that is it's cross party, and there are about eight of them. Westminster, Kensington & Chelsea and then some of the Labour ones.

**Dominic Preston**: Are there any other argument that local authorities are running which you are aware of which I haven't mentioned, and does anybody know of any case that are going up at all?

**Chair**: That was my question. Out of curiosity, because I've seen Southwark's current formulation of the *Hotak* test is wrong, but really quite perverse, it reinstates Pereira by adding an extra vulnerable in there, but what sort of ways have people seen the *Hotak* vulnerability test stated?

**Dominic Preston**: There are many County Court decisions. Having gone from doing lots of intentionality two years ago leading up to *Hotak*, there are still a large number of them.

**Liz Davies**: Yes, there seem to be. Vulnerability and placement outside London are what I see all the time. But you are all slowing down the review process, so it's taking time to come through. There are several first instance decisions reported in Recent Developments from about October onwards and they deal with significant and PSED, so they are worth looking at.

**Dominic Preston:** Some of the argument that are being raised by reviewers that I've given as examples aren't necessarily being backed up by the lawyer in court, so it's not that in court they're running crazy arguments, but they're saying "Oh well, you must take it as a whole and benevolently", and that's not really what they meant. But the quotation I gave in terms of without accommodation, the assumption to be made, that has quite obviously been pasted and copied into lots of decisions. So this is a policy decision to adopt that argument, and yet when you get to court it's not defended as a proper argument, which is obviously right, but in the meantime all these decisions are still going on and still being made and nobody from the housing office is turning up and watching their decisions being trashed.

**Liz Davies:** Can I also ask how successful are you finding that on review? Are you getting positive reviews from negative 184?

**Contributor:** This was actually more of an observation that would answer that. I think on the point of leaving early, Haile's been really helpful. There's actually some specific quotation of the Guidance in the Judgment which I just quote in full and that's been successful on several occasions. So I think on that specific issue particularly, you know, we're stopping things at the review stage.

**Liz Davies:** I think some of you might be on vulnerability as well. Have some of you had positive decisions?

**David Foster, Foster & Foster Solicitors**: We have numerous decisions outstanding with Perdios on vulnerability where it is taking months and months to get a decision, so we're waiting. Examples of the arguments that have been given tonight we've seen both with Now Medical and being already homeless when you're in temporary accommodation, so that's the first point.

The second point is that I'd be interested to know how many colleagues are actually still doing s.202 reviews under legal aid and legal help. The position with the Legal Aid Agency in assessing costs for doing these cases is that they're beginning to say that they expect you to spend no more than 90 minutes on making s.202 representations and if you spend more then you have to give specific

justification and it may even have to be signed off by a supervisor. So I would be interested to hear comments on those points.

**Dominic Preston**: Most of the decisions that I'm looking at are after quite hefty representations and they would relate to probably most recently, probably October/November 2015, but I would have thought that they'd been done free. Some of them are extremely long decisions and I would have thought the number of hours involved to be quite hefty. So whether they're paid or not is another matter.

**Lou Crisfield, Miles & Partners Solicitors:** We're still doing homeless reviews and we're getting paid for them. All the escape cases are being authorised and I'm definitely spending way more than 90 minutes on them as a file review rep, so it's not causing us a problem yet, although maybe that's a warning for us all.

**Contributor:** Well the warning is this. The way it's enforced is that under your contract you have a key performance indicator which states that you must have no more than 10% knocked off your escape cases on review, so if you're put under the spotlight on that and they're doing the assessment then sanctions can be applied for having reductions of more than 10%.

**Ed Fitzpatrick, Garden Court Chambers:** It's quite interesting. There's been a lot of vulnerability cases and I think there's been a very good success rate, but the surprise is that cases haven't been appealed. I heard of one decision recently with Judge Luba where they went to the trouble of typing up the judgment and were passing it round the chambers when I heard Mr Purdiss' cases. I think it was struck down partly because of the lack of consideration of the Equality Act duty and there was obviously quite a lot of consideration being given as to whether to take it on appeal but at the moment they seem not to be. There are a couple of examples in past cases where the expectation was that they were going to try and take it further, but there's a lack of confidence at the minute to do that.

**Chair**: And I think a lack of budget as well. Because I know Southwark are worried about how much money they've spent in the Court of Appeal and the Supreme Court

**Nik Antoniades, Powell & Co Solictors:** Bromley Council's policy "pursuant" to *Nzolameso* doesn't even pay lip service to such an approach. It prospectively tries to justify decisions that they make to place people out of borough. Just to bear that in mind if anybody does any work with Bromley Council.

**Liz Davies:** I was at a fascinating conference last summer, after *Nzolameso* had come out, that was attended mainly by housing officers and all the out of London councils were ganging up on the London councils and they were saying: When you place people in our areas, first of all you don't tell us, which of course they are required to do under s.208; secondly we have our lists of landlords, you're procuring your own landlords and a lot of them are on our bad list, in other words we've made a conscious decision not to use those landlords; and you're paying much higher rent than we are prepared to pay, so therefore the rents for temporary accommodation in Birmingham and Gravesend and various other places are all skyrocketing up, and they were all absolutely furious and the London boroughs were squirming actually. I gather that since then, I don't know whether as a result of that conference or other political approaches, but there have been some more agreements made between London and out of London councils on issues like use of lists of landlords and on the amounts paid to landlords. None of that helps our clients very much. And yes, you're right Nik, they're not lobbying for tougher duties. They're lobbing a little for the ability to build affordable houses, but that's a long way off solving Ms Nzolameso not having to go to Bletchley.

**Contributor:** I have an ongoing review involving a *Nzolameso* type point. I previously worked on a review that went to appeal and one of the things that I've noticed is that in some cases you have very concrete reasons why people need to be in London, such as an ongoing job for which they have accrued contractual and statutory rights. The approach that is very often taken is to try to simply revert to speculation, saying that you can get a new job in Bletchley, never mind the fact that you don't speak English yet, you'll learn English in due course and never mind you'll find suitable childcare compatible with your job in due course so you don't need to access your existing free childcare from friends in London.

**Chair:** Exactly that. Sara Stephens has just had a case with Brent where *Nzolameso* was completely ignored. It was leave - and she was employed I think full time, and the response was, well she can get a job there. They caved in the end but they fought it for quite a while. So yes, that's certainly happening.

**Dominic Preston**: There are certain communities in London that ought to be giving our clients lectures and advice themselves. There is one community I can think of that are very good at finding four hours in the week jobs in cleaning services, for instance, and I wish all of my clients were doing that. Not only does it tend to help with eligibility it also helps immediately with suitability of placement and accommodation. It doesn't need to be a full time job, it can be short term.

**Chair**: If there are no other questions I would like to thank both of our speakers for their excellent talks. The next meeting will take place on 11 May on the topic of Anti-social Behaviour Update.