# Equality Act 2010 and homelessness (Housing Act 1996, Part 7)

**17 May 2017**

**Paper produced and presented by LIZ DAVIES, Barrister at Garden Court Chambers**

Equality Act 2010

1. Protected characteristics:
    a. Age (s.5);
    b. Disability (s.6 and Schedule 1);
    c. Gender reassignment (s.7);
    d. Marriage and civil partnership (s.8);
    e. Race including colour, nationality, ethnic or national origins (s.9);
    f. Religion (including a lack of religion) or belief (any religious or philosophical belief including a lack of belief) (s.10);
    g. Sex (s.11);
    h. Sexual orientation (s.12).

2. Guidance from EHRC:

    https://www.equalityhumanrights.com/en/publication-download/essential-guide-public-sector-equality-duty**;**

    https://www.equalityhumanrights.com/sites/default/files/odi_definition_of_disability_equality_act_guidance_may.pdf

Housing Act 1996

Homelessness Code of Guidance 2006


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3. Introduction para 7: heading "equality and diversity" refers to duty to promote race equality at Race Relations Act 1976 and duty to promise equality for disabled people s.49A Disability Discrimination Act 1995. Also reference to the then forthcoming Equality Act 2006. Para 13: "*housing authorities should ensure that their homelessness strategies and homelessness services comply with existing equality and diversity legislation and new legislation as it comes into force*".

Consideration in the Courts

4. Pieretti v Enfield LBC[1]: Wilson LJ:

*"31 I therefore have no hesitation in concluding that the duty in s.49A(1) of the Act of 1995 applies to local authorities in carrying out their functions—all of their functions—under Pt VII of the Act of 1996. Although others of the five aspects of the duty set out in the subsection could be relevant to the exercise of those functions (Ms Monaghan, for example, refers in this regard to the aspect specified at (a), namely the need to eliminate such discrimination as is unlawful under the Act), I am clear that the substantial effect of my conclusion is in relation to the aspect specified at (d), namely that, in making determinations under Pt VII in the areas in which a person's disability could be of relevance, a local authority shall "have due regard to … the need to take steps to take account of disabled persons' disabilities". As indicated in [27] above, Mr Rutledge himself identifies three such areas in particular: the priority of need, the intentionality of homelessness and the suitability of accommodation.*

*32 It was in July 2005 that Brooke L.J. articulated his well-known dictum in the case of Cramp , set out in [21] above. It was in December 2006 that s.49A came into force. It follows from my conclusion that his dictum now requires qualification. In circumstances in which a reviewing officer under s.202 (or indeed the initial decision-maker under s.184 ) is not invited to consider an alleged disability, it would be wrong, in the light of s.49A(1) , to say that he should consider disability only if it is obvious . On the contrary. He needs to have due regard to the need for him to take steps to take account of it.*

*33 But the law does not require that in every case decision-makers under s.184 and s.202 must take (active) steps to inquire into whether the person to be subject to the decision is disabled and, if so, is disabled in a way relevant to the decision. That would be absurd. What, then, is the extent of their duty under s.49A(1)(d) ? No doubt the aspect of the duty*

[1] [2010] EWCA Civ 1104, [2011] HLR 3, CA

*under s.49A(1) specified at (d) would have been easier to understand if it had been formulated as "to take due steps to take account of disabled persons' disabilities …". "Due" means "appropriate in all the circumstances" (see R. (on the application of Baker) v Secretary of State for Communities and Local Government [2008] EWCA Civ 141 , per Dyson L.J. at [31]) so the simple task would have been to survey all the circumstances and then to ask what steps it would be appropriate to take in the light of them. Instead, however, the aspect of the duty specified at (d) is to "have due regard to … the need to take" such steps. In R. (on the application of Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin) the Divisional Court of the Queen's Bench Division (Scott Baker and Aikens L.JJ.) at [84] described the phraseology of s.49A(1)(d) as "convoluted". The court helpfully proceeded, at [90]–[96], to identify six general principles referable to the duty to have "due regard" in all six of the aspects specified in the subsection, including, secondly, *61 that it demanded "a conscious approach" and, thirdly, that it should be performed "in substance, with rigour and with an open mind".*

*34 For practical purposes, however, I see little difference between a duty to "take due steps to take account" and the duty under s.49(A)(1)(d) to "have due regard to … the need to take steps to take account". If steps are not taken in circumstances in which it would have been appropriate for them to be taken, i.e. in which they would have been due, I cannot see how the decision-maker can successfully claim to have had due regard to the need to take them."*

5. Hotak v Southwark LBC[2]: Lord Neuberger:

*"78 In cases such as the present, where the issue is whether an applicant is or would be vulnerable under section 189(1)(c) if homeless, an authority's equality duty can fairly be described as complementary to its duty under the 1996 Act. More specifically, each stage of the decision-making exercise as to whether an applicant with an actual or possible disability or other "relevant protected characteristic" falls within section 189(1)(c) , must be made with the equality duty well in mind, and "must be exercised in substance, with rigour, and with an open mind". 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*

[2] [2015] UKSC 30, [2016] AC 811, SC


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*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".*

*79 Mr Ashley Underwood QC argued that the equality duty added nothing to the duty of an authority or a reviewing officer when determining whether an applicant is vulnerable. I quite accept that, in many cases, a conscientious reviewing officer who was investigating and reporting on a potentially vulnerable applicant, and who was unaware of the fact that the equality duty was engaged, could, despite his ignorance, very often comply with that duty. However, there will undoubtedly be cases where a review, which was otherwise lawful, will be held unlawful because it does not comply with the equality duty. 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.*

*80 Ms Karon Monaghan QC supported Ms Mountfield's case that the equality duty would apply in a case where an applicant had a relevant protected characteristic. She also suggested that the effect of section 15 of the 2010 Act was to render unlawful a decision that such an applicant was not vulnerable because he could rely on the support of a third party. I do not accept that submission. Even assuming that it can be said that section 15(1)(a) is satisfied and such a decision amounted to what may be *843 characterised as prima facie unlawful discriminatory treatment (which I would leave open, not least because it was not fully argued before us or even raised below), it seems to me that the treatment would be lawful pursuant to section 15(1)(b) on the basis that it was "a proportionate means of achieving a legitimate aim".Section 189(1)(c) is part of a scheme whose aim is to assist homeless people generally, and in particular to allocate the scarce resource of accommodation available to an authority to particular classes of homeless people. In section 189(1) , Parliament has decided the principles by reference to which that allocation is to be effected, and those principles cannot possibly be described as unreasonable. When an authority assesses what support and care would be available to an applicant with a relevant protected characteristic, and whether that would, as it were, take him out of section 189(1)(c) , it is simply putting Parliament's decision into effect."*


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6. Wilson v Birmingham City Council[3]: A refused a final offer of accommodation on the eighth floor and the local authority discharged duty. She sought a review. On 29 October 2014, the reviewing officer wrote to the appellant to notify her that he was minded to find that the eighth floor flat was suitable, notwithstanding her children's fear of heights. He also stated that there was no information to suggest that any member of her household had a disability. The appellant did not respond to this letter and, on 7 November 2014, the officer issued his decision that the eighth floor flat was suitable for the appellant and her children and that her refusal of the offer had brought the authority's duty under s.193(2) to an end. The appellant appealed to the county court. Prior to the hearing, a psychiatrist assessed the younger son as being autistic and suffering from a fear of heights and lifts with the consequence that he experienced panic attacks when entering a lift or looking out of a window in a tall building. A circuit judge allowed the appeal, holding that the evidence available to the reviewing officer raised a real possibility that the younger son had a mental disability so that he should have made further enquiries about the son's medical condition to satisfy the public sector equality duty in s.149 of the Equality Act 2010 .

7. Sales LJ said:

"*Mr Carter sought to suggest that a combination of the information provided by Ms Wilson in the Homeless Decision Review Form and in the telephone interview on 10 October ought to have raised in Mr Kennelly's mind that there was a "real possibility" (to use Wilson LJ's language) that Romareo had a disability for the purposes of the 2010 Act. I do not agree. By the time Mr Kennelly took the final decision on 7 November, he had gone through a process of inquiry which allowed him rationally to decide that, whatever might have been the position at the start of his investigation, there was no real possibility at the end of it, on the information available, that either child had a disability for the purposes of the 2010 Act. In the absence of any indication that Ms Wilson thought that any issue of such gravity had arisen as to need her to address it by seeking any professional advice or diagnosis, Mr Kennelly could rationally assess the position to be one where the children's fear of heights*

[3] [2016] EWCA Civ 1137, [2017] HLR 4, CA


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*was within the normal spectrum and not indicative of any possibility that they had a disability within the meaning set out in the 2010 Act.*

*The rationality of that conclusion is underwritten, in particular, by the fullness of the reasons set out by Mr Kennelly in his "minded to find" letter of 29 October, in which in effect he explained that he considered that the children's fear of heights was within the normal range and hence that they did not have a disability. His explanation was not in technical language and I think was readily understandable by an ordinary person. Ms Wilson must have understood that if she wished to contest that assessment or could point to anything which indicated that it was wrong, and that in fact Romareo's fear of heights was something outside the normal range, now was the time to do so. Yet she did not respond to that letter to contest Mr Kennelly's assessment, despite the invitation to do so.*

*Hence by the time of the final review decision by Mr Kennelly on 7 November, he had correctly focused on the question of the difficulties experienced by Ms *51 Wilson's children owing to their fear of heights; he had taken reasonable steps according to the Khatun standard to gather information on that topic (including by asking Ms Wilson for anything further she could bring forward); and he had concluded—and concluded rationally—that there was no real possibility that either of the children was disabled for the purposes of the 2010 Act. According to the guidance given by Wilson LJ in Pieretti , therefore, by 7 November Mr Kennelly was not subject to any further obligation of investigation by virtue of s.149 of the 2010 Act.*

*In my view, with respect to the judge, he erred at [13] of his judgment in his application of the Pieretti guidance in the context of this case. He applied his own judgment to the question whether there was a real possibility of there being mental disability (holding that there was), rather than asking the correct question, which was whether Mr Kennelly could rationally conclude by the end of his investigation that there was no real possibility of either child having a mental disability*."

*8.* Hackney LBC v Haque[4] the parties agreed that the Public Sector Equality Duty was engaged in suitability reviews. The parties were not in agreement however as to how the

[4] [2017] EWCA Civ 4, [2017] HLR 14, CA


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duty should be complied with. Mr Haque was a disabled person who was unintentionally homeless and was in priority need. He suffered severe back and neck problems which had resulted in depression. The local authority had provided him with temporary accommodation, to meet its duties under the Housing Act 1996 s.193. The accommodation comprised a single room on the third floor of a hostel. The respondent complained that it was unsuitable because its small size exacerbated his back condition; the "no visitors" policy isolated him and exacerbated his depression, and as there were no on-site laundry facilities. The local authority reviewing officer, Mr Banjo, concluded that the room was suitable for his needs. He found that the room was an adequate size, it was accessible by a lift, and the respondent could meet friends outside the hostel. The reviewing officer also stated that the "no visitors" policy could be relaxed to allow friends to collect and return the respondent's laundry from a nearby launderette.

9. HHJ Luba QC concluded that the reviewing officer should have spelt out that the protected characteristic of disability had been established, that the public sector equality duty was applicable and the effect the duty had on the exercise of his review function. He therefore quashed the reviewing officer's decision.

10. The Court upheld Hackney's appeal on the basis that the lower court was wrong to require reviewing officers in every case to spell out in express terms reasoning about whether an applicant does or does not have a protected characteristic, whether the PSED duty is in play and if so with what precise effect, even though the adoption of such a disciplined approach may in many cases put the issue of compliance with the PSED beyond reasonable doubt.

11. The Court sought to limit the 4 stage test identified in Hotak to vulnerability cases and provided different guidelines to suitability reviews.

12. A 6 stage test was recommended for officers considering the suitability of a property where an applicant had raised medical issues. In Mr Haque's case, it was put as follows:

    i) A recognition that Mr Haque suffered from a physical or mental impairment having a substantial and long term adverse effect on his ability to carry out normal day to day activities; i.e. that he was disabled within the meaning of EA s. 6, and therefore had a protected characteristic.


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ii) A focus upon the specific aspects of his impairments, to the extent relevant to the suitability of Room 315 as accommodation for him.

iii) A focus upon the consequences of his impairments, both in terms of the disadvantages which he might suffer in using Room 315 as his accommodation, by comparison with persons without those impairments (see s. 149(3)(a)).

iv) A focus upon his particular needs in relation to accommodation arising from those impairments, by comparison with the needs of persons without such impairments, and the extent to which Room 315 met those particular needs: see s. 149(3)(b) and (4).

v) A recognition that Mr Haque's particular needs arising from those impairments might require him to be treated more favourably in terms of the provision of accommodation than other persons not suffering from disability or other protected characteristics: see s. 149(6).

vi) A review of the suitability of Room 315 as accommodation for Mr Haque which paid due regard to those matters.

*13.* The Court held that, contrary to the views of the lower court, there were no set standard of reasons was needed to show compliance with the PSED – it was fact dependent . Further the EA 2010 imposed no separate requirement to give reasons, the normal duty under s.203(4)(a) applied.

Outstanding issues

Protected characteristic as precedent fact and/or subject of inquiries?

*14.* Following on from Wilson, is it right that it is for local authority to decide whether or not someone is disabled (or has another protected characteristic)? Should the issue of whether or not a person is a disabled person be a precedent fact for the Court to determine rather than something which may or may not call for the making of inquiries by the local housing authority? Courts will be very reluctant to hear or determine evidence as to whether or not someone is – objectively – a disabled person: Bubb v Wandsworth LBC[5].

[5] [2011] EWCA Civ 1285, [2012] HLR 13, CA



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15. Alternatively, once the issue of a protected characteristic is raised as a possibility, surely it is incumbent on a local authority to make all necessary inquiries and decide? How should the local housing authority conduct its inquiries?

*16.* Note Elias LJ in R (Hurley & Moore) v Secretary of State for Business, Innovation & Skills: *"Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson L.J. in Baker (at [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision. The concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors."* [77] – [78].

Relevance of medication/other treatment

*17.* Definition of disability: note that para 5, Schedule 1 Equality Act states: "*An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—*

*(a) measures are being taken to treat or correct it, and*

*(b) but for that, it would be likely to have that effect.*"

18. In other words, disability should be considered regardless of treatment eg medication.

19. Contrast that with the well-known paragraph in Hotak on "vulnerable": *"As Lord Wilson JSC pointed out, this conclusion is supported by considering an applicant with a physical or*


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*mental condition which, if not treated, would render him vulnerable, but which can be satisfactorily treated by regular medication. If such an applicant, when homeless, would be perfectly capable of visiting a doctor to obtain a prescription and a pharmacist to collect his medication, and then of administering the medication to himself, it would be unrealistic to describe him as "vulnerable", when compared with an ordinary person when homeless*." [64].

20. It follows that the availability of medication is relevant to the evaluative assessment of whether or not someone is vulnerable. However, that person may still be a disabled person (assessment ignoring the alleviating effects of medication). The local housing authority would then have to balance the availability of medication with the finding that someone is disabled when deciding whether or not that person is vulnerable.

Whole range of protected characteristics

21. Protected characteristics not just disability. Two cases on gender:
    a. Barrett v Westminster City Council[6]: woman submitted that she was at particular risk of sexual violence;
    b. MQ v Southwark LBC: appeal against review decision that woman not vulnerable. Her solicitors had submitted that she was a disabled person and also that, given her experience of sexual violence, she was terrified of being street homeless. The Respondent found in its s.203 review decision that the Appellant was a disabled person but also that she was not vulnerable. HHJ Walden-Smith held that the decision was not clear as to whether the Respondent had considered the extent of that disability, the likely effect of that disability together with her other personal circumstances, and whether she was vulnerable as a result. She quashed the review decision on that ground, and also held that the Respondent had failed to consider that the Appellant's gender was a protected characteristic.

22. Don't forget: age, gender reassignment, race, religion. Suitability of accommodation near an abattoir? Age &/or gender reassignment potentially relevant to issue of vulnerable.

[6] (2015} Legal Action February 2016, Central London County Court


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Personalised duties

23. Case-law has held that s.149 is relevant to decision-making on becoming homeless intentionally, priority need and issue of suitability. It must follow that it is relevant to other evaluative judgments made by local housing authorities. Including the period that would afford an applicant a "reasonable opportunity" of securing his or her own accommodation having been found homeless intentionally: R (Conville) v Richmond upon Thames RLBC [2006] EWCA Civ 718, [2006] 1 WLR 2808, CA.

24. When the Homelessness Reduction Act 2017 comes into force (anticipated April 2018), local housing authorities will have to draw up an assessment of an applicant's case and a personalised plan to prevent homelessness and/or help to secure accommodation: new ss.189A, 189B and 189C to be inserted into HA 1996. The assessment and plan must be individual to the applicant. So the PSED will obviously be relevant.

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