PANAYIOTOU FROM A SMITH PERSPECTIVE

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Panayiotou v Waltham Forest LBC; Smith v Haringey LBC [2017] EWCA Civ 1624; [2017] HLR 48.

Aim

1. This talk will cover three issues

(1) What was argued, especially in the *Smith* appeal,

(2) What the Court of Appeal decided,

(3) Where that leaves vulnerability now.

The Smith Submissions

2. We saw *Smith* as an opportunity to get the Court of Appeal to deal finally with the issue of contracting out, as well as vulnerability.

3. We therefore spent a considerable amount of time on the contracting out points.

4. We also argued that "significantly" in the vulnerability test meant something more than minor or trivial.

5. Whereas in *Panayiotou*, the same argument was developed by a detailed analysis of what was said in *Hotak v Southwark LBC* [2015] UKSC 30; [2016] AC 811 and in the earlier cases, we took a more policy-based approach. Our argument was conventional, relying upon the inherent ambiguity of the word "significantly", and on the definition of "substantial" in the Equality Act 2010.

6. Martin Westgate QC, leading counsel for *Panayiotou*, went first. He covered all the necessary ground, and so we adopted his submissions on the law, and made submissions only on the law as it applied to our review decision letter. We then made detailed submissions on the contracting out issue.

7. Next up were the local authorities. On paper, they were arguing that "significantly" meant "a lot". But, then came the bombshell. David Lintott, for *Waltham Forest LBC*, made oral submissions to the effect that "significantly" simply meant "relevant". The Court of Appeal liked the approach. It relieved them from the task of deciding whether "significantly" meant "a little" or "a lot", and exactly how much. Sean Pettit and Brynmor Adams, counsel for *Haringey LBC*, jumped on the Lintott bandwagon.

8. Counsel for the appellants had a chat. The Lintott approach was good. The authorities were no longer arguing that "significantly" meant "a lot". This was great for homeless applicants who would not risk facing a more stringent vulnerability test. I told Martin and Tessa Buchanan, counsel for *Panayiotou*, that we too would be jumping aboard the Lintott bandwagon.

9. Martin then replied. We replied too, but made it clear that we were happy to agree that "significantly" meant "relevant", and we then made submissions mainly on the contracting out points.

<u>What the Court decided</u>

10. Since counsel were all pretty much agreed that "significantly" was not quantitative, *i.e.* it did not qualify how much harm had to be suffered or risked for a homeless applicant to be vulnerable, the Court then took the easy option and decided that "significantly" meant "relevant", *i.e.* it had to be harm that was suffered or risked when the applicant was without accommodation: it is therefore qualitative.

11. The difference can be illustrated by way of example. If an applicant has a fear of heights, that would not be significant because it would not be relevant if the applicant was homeless because his homelessness would not necessitate him climbing heights.

12. The Court then examined both review decision letters. They decided that *Waltham Forest LBC's* letter had used "significantly" in the qualitative sense and was therefore lawful. They decided that *Haringey LBC's* letter had used the word "significantly" in a quantitative sense and this was not lawful.

13. The question is why the Court took such a different approach to the letters.

14. In my view, this is explained in part by going back to the contracting out issues. The Court never really got to grips with these points. They got very upset that the points were being argued at all, and questioned whether they could be raised in a homelessness appeal. They did not really understand or engage with the arguments, and their judgment on the contracting out issue is disappointing for these reasons.

15. The Court's decision on the contracting out was probably appealable. They may have realised this. This may explain why they decided for Mr Smith on the vulnerability issue. That prevented him from being able to take the contracting out any further. He won.

Where this leaves vulnerability now

16. We now know that the vulnerability test involves a comparison with the ordinary person when homeless (see *Hotak*), and assessing whether the homeless applicant is likely to suffer or is at risk of suffering more harm when without accommodation than the comparator.

17. The comparator is therefore crucial. We need to know the characteristics of the comparator in order to assess whether the homeless applicant is at risk of more harm when homeless than the comparator.

18. *Hotak* gives us some clues. We know that the comparator is the ordinary person, and that the comparator is "robust and healthy", per Lord Neuberger at [71], and that women are "perhaps" more at risk of harm than men, per Baroness Hale at [93].

19. The next task seems to be a definition of the "ordinary person", *i.e.* the comparator. This must be the same person nationwide, whose gender is currently unclear, though the indication is that he is probably a man. Unless the reviewer defines the comparator, the comparison is virtually impossible. Unless the applicant knows who they are being compared with, it is virtually impossible to understand if they will suffer or are at risk of suffering more harm when homeless than the comparator. If the applicant suffers from depression and anxiety but the comparator does not, then the applicant would seem to be more at risk of harm and therefore vulnerable.

20. The Court of Appeal touched on this issue in argument but it was not dealt with in the judgment. Perhaps this is the next Court of Appeal vulnerability case.

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