

The Public Sector Equality Duty in homelessness and possession cases

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Aim to:

- Set out basic statutory provisions and early case law – establishing principles about nature of the PSED
- Consider cases about the PSED as it applies to homelessness
- Consider cases about the PSED as it applies to possession claims
- Draw out some key principles about applying the PSED in the housing context

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Origins of the PSED

McPherson Inquiry

Led to amendment of the Race Relations Act 1976

Including the creation of a new 'general statutory duty', which required public authorities when carrying out their functions to 'have due regard' to the need 'to eliminate unlawful racial discrimination' and 'to promote equality of opportunity and good relations between persons of different racial groups'.

New: s.71 of the Race Relations Act 1976.

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Similar duties introduced into Sex Discrimination and Disability Discrimination Acts

- Sex Discrimination Act 1975 – section 76A
- Disability Discrimination Act 1995 – s.49A
- All now incorporated into the Equality Act 2010 – s.149.

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Equality Act 2010: nine Protected Characteristics

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race; religion or belief;
- sex; and
- sexual orientation.

The 'public sector equality duty' (PSED) applies to all the protected characteristics except marriage and civil partnership

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Public Sector Equality Duty – Section 149

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

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

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What does it mean?

Advancing equality of opportunity [149(3)]

Means: ‘... having due regard, in particular, to the need to –

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

Fostering good relations [s.149(5)]

(between those sharing a protected characteristics and those who do not)... this involves in particular having due regard to the need to ‘tackle prejudice, and ... promote understanding’.

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Disability – additional provisions [s.149(4)]

The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities’.

This refers to the ‘reasonable adjustment’ duty set out in s.20, which applies to a ‘provision, criterion or practice’ as well as to a ‘physical feature’ that puts a disabled person at a substantial disadvantage and requires the taking of reasonable steps to avoid the disadvantage.

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Which public bodies are bound by the duties?

Listed in Schedule 19, includes usual 'core' public authorities: government departments, local government.

- Some exception – e.g. age and schools/immigration and nationality/security provisions

S.149(2) persons who are not public authorities but who exercise public functions, must also comply with the duty 'in the exercise of those functions'.

S.150 defines a public function as 'a function of a public nature for the purposes of the Human Rights Act 1998'.

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SSD v Elias [2006] EWCA Civ 1293

challenge to ex gratia compensation scheme for former PoWs in Japan

It is the clear purpose of section 71 [race equality duty] to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation. ... In the context of the wider objectives of anti-discrimination legislation, section 71 has a significant role to play. I express the hope that those in government will note this point for the future.

Arden LJ at [274]

NB at appeal, equality duty was not in issue

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***Hereward and Foster Llp v The LSC* [2010] EWHC 3370**
 Challenge to the criteria for legal aid contracts - SDA 1975, s.76A

Court summarized principles from previous case law:

R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293

- compensation scheme for former prisoners of war

R (Bapio Action) v Secretary of State for the Home Department [2007] EWCA Civ 1139

- changes to the immigration rules

R (Baker) v Secretary of State for the Environment [2008] EWCA Civ 141

- planning decision – travellers’ appeal

R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 Admin

- government’s post office closure programme

R (EHRC) v Secretary of State for Justice [2010] EWHC 147 (Admin)

- agreement between the National Offender Management department and the Border Agency

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***Hereward and Foster Llp v LSC* – summary of principles**

- 1) The duty imposed by section 76A is mandatory and is an important duty;
- 2) The duty must be performed substantively and rigorously, with an open mind. It is not good enough to adopt a ‘tick-box’ approach;
- 3) A court considering a challenge founded on the proposition that due regard was not had to the matters specified in section 76A(1) is concerned with whether the substance of the duty was performed. An explicit reference to the duty is not necessary in the material preceding a decision. Similarly, a reference to the duty in the documentation generated prior to performing a function, is not sufficient to show that there was due regard
- 4) It is good practice for a decision maker to make reference to the duty and any material guidance or statutory codes, as well as to record the substance of its thinking.
- 5) Consideration of the equality duty must occur before the relevant function is carried out.
- 6) The duty is a continuing one.
- 7) There is a difference between the duties to have due regard to the need to eliminate unlawful discrimination etc. and the duty to have due regard to promote equality of opportunity. The latter is a broader duty which is not fulfilled simply by ensuring that in performing its function, the public authority commits no unlawful discrimination.

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Baker – Lord Dyson endorses principles set out in **Brown**:

- 1) The public authority decision maker must be aware of the duty to have 'due regard' to the relevant matters;
- 2) The duty must be fulfilled before and at the time when a particular policy is being considered;
- 3) The duty must be exercised in substance, with rigour, and with an open mind'. It is not a question of ticking boxes; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
- 4) The duty is non-delegable; and
- 5) Is a continuing one.
- 6) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

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Baker – Lord Dyson [31]

[It] is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to have due regard to the need to achieve these goals. The distinction is vital. Thus the Inspector did not have a duty to promote equality of opportunity between the appellants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity. She had to take that need into account, and in deciding how much weight to accord to the need, she had to have due regard to it. What is due regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.

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R (Hurley & Moore) v SS Business, Innovation and Skills
[2012] EWHC 201 (Admin)

One of first cases about PSED under EA 2010 – challenge to regulations introducing tuition and maintenance fees in higher education, alleging breach on grounds of race, sex and disability

Claim was dismissed.

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Hurley & Moore, Elias LJ at [78]:

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. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making.

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***(Bracking) v SSWP* [2013] EWCA (Civ) 1345**

Challenge to the closure of Independent Living Fund – for disabled people

McCombe LJ summarises the principles set out in the earlier cases:

- 1) Equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
- 2) Recording the steps taken by the decision maker in seeking to meet the statutory requirements is an 'important evidential element' in demonstrating the discharge of the duty.
- 3) The relevant duty is upon the Minister or other decision maker personally and they cannot be taken to know what their officials know or may have been in their minds when proffering their advice.
- 4) A Minister must assess the risk and extent of any adverse impact and how the risk may be eliminated *before* adopting a proposed policy, not merely as a 'rearguard action', following a concluded decision.
- 5) General regard to issues of equality is not the same as having specific regard, by way of a conscious approach to the statutory criteria.

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Plus:

decision makers must be properly informed (*Bracking*)

While it is for the decision maker to decide how much weight to give to various factors,

'the duty of due regard .. requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required'

As was held in *Brown* ...

the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.

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So, summary of principles established so far

- Public bodies must give 'advance consideration' to 'equality objectives' before making policy decisions that may be affected by them – mandatory consideration
- Duty must be performed substantively and rigorously, with an open mind
- Explicit reference to the duty not necessary but good practice to record substance of thinking (e.g. EIA)
- Duty is a continuing duty
- Duty is not to achieve a result, but to have 'due regard' to need to do so
- Due regard is the 'regard appropriate in all the circumstances'
- May need to gather relevant information to discharge the duty (e.g. EIA/consultation)

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But,

- **PSED = Mandatory consideration** but, if there has been a proper and conscientious focus on the statutory criteria (not just general awareness of desirability of desirability of equality) it is for the decision maker to decide what weight to give to relevant factors (including the equality implications of the decision)
- Court will only intervene if decision on weighting of competing factors is irrational.

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PSED in relation to decisions about individuals

R (JL) v Islington LBC [2009] EWHC 458 (Admin)

Challenge to new eligibility criteria devised by a local authority for the allocation of disabled children's services, **and** to the particular application of the criteria to the claimant.

Held breach of disability equality duty

The duty in s.49A applies both when the local authority is drawing up its criteria and when it applies them in an individual case, both of those being an aspect of carrying out its functions.

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The housing cases

Main focus in the housing cases is on the protected characteristic of disability

Different issues arise in relation to

- Homelessness
- Possession proceedings

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***Pieretti v Enfield LBC* [2010] EWCA Civ 1104.**

Appeal against finding of intentional homelessness following eviction for rent arrears – application forms referred to applicants' disability

Defendant authority argued:

- Can't raise equality duty point at appeal because not raised on review
- Duty only applies to general formulation of policy not individual cases
- Legal framework for homelessness decision making comprehensively addresses the rights and needs of the disabled, so no need for further protection of s.49A of DDA 1995
 - (priority need; good faith provisions re intentional homelessness; assessing suitability of accommodation)

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***Pieretti* - Court of Appeal rejected authority's arguments**

For disability to play its rightful part in determinations made by public authorities ... there must be a culture of greater awareness of the existence and legal consequences of disability, including of the fact that a disabled person may not be adept at proclaiming his disability. The six specified aspects of the duty in s.49A(1) complement the duties of local authorities under Part VII.

The question was whether the reviewing officer had failed to make sufficient further inquiry, in light of the evidence suggesting the applicant was disabled in a way that could be relevant to whether he had acted deliberately and, in particular, in good faith.

'in the circumstances the law required the reviewing officer (and, for that matter, the initial decision-maker) to take steps to take account of the appellant's disability, i.e. to make further inquiries into whether it existed and if so whether it was relevant to the decision [that he was intentionally homeless]. Those further inquiries she never made.

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Pieretti

- PSED applies to decisions about individuals, not just policy formulation
- PSED requires “a culture of greater awareness of the existence and legal consequences of disability, including of the fact that a disabled person may not be adept at proclaiming his disability”
- So important that can be considered even if not raised on review
- May mean decision-maker has duty to be proactive in inquiring about disability and impact of disability in relation to a particular decision

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Barnsley MBC v Norton [2011] EWCA Civ 834, 21 July 2011

Possession claim against school caretaker who had been dismissed – no security of tenure. Daughter was disabled and authority had not considered impact of eviction on her.

Authority argued, no duty to do so as this would be taken into account if and when a rehousing/homelessness application was made.

Court of Appeal rejected that – authority exercising a function to which the disability equality duty applied, and failed to comply with the duty.

BUT, refused to set aside the possession order – duty could be satisfied at a later stage when council deciding on rehousing

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Homelessness –developments since *Pieretti*

Main focus has been on:

- **Priority need**
- **Suitability of accommodation**

But also,

- Definition of homelessness

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Priority need – vulnerability

Hotak v Southwark LBC, Johnson v Solihull MBC; Kanu v Southwark LBC [2015] UKSC 30,

Priority need, includes being 'vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason'.

Authorities argued that PSED added nothing to the exercise since the statutory test expressly requires the authority to decide whether a person is vulnerable as a result of disability.

This was rejected, Lord Neuberger made clear that the PSED requires the decision maker 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'. [78]

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Hotak

BUT Neuberger continued

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. [79]

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R (McDonald v RBKC [2011] UKSC 33

Needs assessment of disabled person criticised for no mention of disability equality duty

This argument too is in my opinion hopeless. Where, as here, the person concerned is ex-hypothesi disabled and the public authority is discharging its functions under statutes which expressly direct their attention to the needs of disabled persons, it may be entirely superfluous to make express reference to s.49A and absurd to infer from an omission to do so a failure on the authority's part to have regard to their general duty under the section. That, I am satisfied, is the position here. The question is one of substance, not of form. This case is wholly unlike Pieretti ... (which held that the s,49A duty complements a housing authority's duties to the homeless under Part 7 of the Housing Act 1996). [24]

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PSED and priority need/vulnerability, cont/..

McMahon v Watford Borough Council, Kiefer v Hertsmere Borough Council, [2020] EWCA Civ 497

Single male adults suffering from a combination of health issues whom the authorities had decided were not vulnerable and therefore not in priority need

- **McMahon** – didn't argue that wrong test applied, but that no reference to PSED in the decision letter
- **Kiefer** – also no mention of PSED but reviewing officer had made finding that not 'relevantly disabled'

Both appeals dismissed by Court of Appeal

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McMahon and Kiefer

The greater the overlap between the particular statutory duty under consideration and the PSED, the more likely it is that in performing the statutory duty the authority will also have complied with the PSED even if it is not expressly mentioned: [McDonald v RBKC]. By the same token, the more that a particular decision to which the PSED applies is tailored to the facts of a particular case, rather than being a broad formulation of policy, the closer will be the connection between the PSED and consideration of the facts of a particular case. [67]

In the case of a vulnerability assessment, there is substantial overlap between the requirements of the homelessness code and the PSED. In addition, any vulnerability assessment will be concentrated on the particular facts of the case in question. What the reviewing officer must consider is whether a person is vulnerable as a result of mental illness or handicap or physical disability': '[i]t is difficult to see how that task can be performed without a sharp focus on the extent of the illness, handicap or physical disability; and its effect on the person's ability to deal with the consequences of homelessness. What matters is the substance of the assessment not its form.' [68]

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Homelessness - *Lomax v Gosport BC* [2018] EWCA Civ 1846

Being 'Homeless' includes being entitled or permitted to occupy accommodation but not reasonable to continue to occupy it - Housing Act 1996, s.175(3).

When deciding whether it is reasonable for a person to remain in occupation of accommodation, an authority may have regard to 'the general circumstances in relation to housing in the district'. s177(2). [But not if domestic abuse makes it unreasonable to occupy]

Ms Lomax: a disabled woman occupying an adapted housing association bungalow in an isolated rural area; a wheelchair user who needed 24-hour care which her partner had been providing, but he was leaving. Her family lived 70 miles away in Gosport, and she applied to Gosport so as to be able to receive care and support from them. Medical evidence submitted confirmed she was depressed and the depression made worse by isolation.

The authority decided that her current accommodation was suitable for her physical needs and, in light of the general housing need in the area and the fact that other people occupied accommodation that had a 'medical or social impact', she could not be considered homeless.

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Lomax: PSED requires 'sharp focus' on disability

Court of Appeal held:

Authority had failed to comply with the PSED. This required a 'sharp focus' on the extent of Ms Lomax's disability, the likely effect of the disability if she were to remain in her home, the housing needs to which her disabilities gave rise and the extent to which her current accommodation met those needs.

Under s149(3) and (4), authority had a duty to have due regard to the need to take steps to meet the different needs of disabled people as compared to those who are not disabled which may mean treating the applicant more favourably than a non-disabled person. The comparative exercise undertaken by the review officer, referring broadly to other people whose housing had a medical or social impact, failed to do this. Despite express references to compliance with the PSED, significant errors in the approach to the issue meant that had the reviewing officer properly complied with the PSED the conclusion would have been different.

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Suitability - *Hackney LBC v Haque* [2017] EWCA Civ 4

Homeless applicant with mobility problems and depression. Found to be in priority need and provided with hostel accommodation. He complained that this was not suitable for reasons related to his disability and his need to socialise and receive support. The review decision letter focused on his disability and the impact of the disability in the accommodation provided but made no reference to the PSED. It concluded that the accommodation was suitable.

The appeal succeeded in the county court. It was held that review officer must spell out expressly whether the applicant had a protected characteristic, whether the PSED was in play and how the duty had been complied with.

Court of Appeal reversed this: where all of the criticisms of the adequacy of the accommodation related to specific aspects of an applicant's disabilities, a conscientious reviewing officer considering the objections in good faith and in a focused manner would be likely to comply with the PSED even if unaware of its existence as a separate duty, or of the terms of EA 2010 s149.

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***Hackney LBC v Haque* - What was required to comply with PSED:**

- i) a recognition that the applicant was disabled;
- ii) a focus on the specific aspects of his impairments, as they related to the suitability of the accommodation;
- iii) a focus on the consequences of the impairments, in terms of the disadvantages he may suffer in the accommodation, as compared to people without those impairments;
- iv) a focus on his particular needs in relation to the accommodation arising from those impairments, again by comparison with the needs of those without such impairments, and the extent to which the accommodation met those particular needs;
- v) a recognition that his particular needs, arising from the impairments, might require him to be treated more favourably than people who were not disabled;
- vi) a review of the suitability paying due regard to those matters.

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Suitability - *Kannan v Newham LBC*

[2019] EWCA Civ 57, 4 Feb 2019

Hotak/Haque

Can comply with PSED without any reference to PSED, but converse also applies: a formulaic reference to the duty and the relevant case law will not save a decision where there has been no substantial compliance.

Kannan

Court of Appeal found that the reviewing officer had 'recited' the formulation set out by Lord Neuberger in *Hotak* but failed to apply the 'sharp focus' required. The decision was not '*saved by the reviewing officer's subsequent reference to the public sector equality duty. The mere recitation of Lord Neuberger's formula ... is no substitute for actually doing the job.*' [24]

Further, it must be emphasized that Lord Neuberger [in Hotak] was instructing the reviewing officer how to go about his task. He was not providing a reviewing officer with a defensive ritual incantation. [9]

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***Kannan* – what does the 'sharp focus' mean?**

While it is legitimate for a reviewing officer to consider housing conditions in the locality, when he does so through the lens of the public sector equality duty it is not adequate simply to refer to the generality of persons who are not living in ideal conditions. The reviewing officer did not consider whether any of those who were not living in ideal conditions had disabilities. That, too, shows that there was not the required sharp focus on Mr Kannan's disability and the impact it had on his housing needs.

[23]

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So, following confirmed in homelessness cases:

- Can comply with PSED even if no mention of PSED in decision letter, provided evidence of consideration of relevant factors
- But, mentioning PSED won't save a decision
- Sharp focus means considering a particular person's disability and the impact of that disability
- If comparative exercise re a disabled person's situation, must focus on disability and its impact
- Where a decision requires specific focus on disability and amounts to an assessment of a factual situation, more likely that a conscientious decision maker will comply with PSED – even if unaware of the duty.

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Some recent cases

R (Ahamed) v Haringey LBC [2023] EWCA Civ 975 – 11 August 2023

Suitability/JR challenge re suitability of hostel accommodation – appeal against refusal of permission

Webb-Harnden v Waltham Forest LBC [2023] EWCA Civ 992, 22 August 2023

Appeal against dismissal of county court appeal re suitability of s.193 offer

R (AB and CD) v Westminster CC [2024] EWHC 266 (Admin) 9 Feb 2024

Suitability/JR challenge to failure to secure suitable accommodation for couple fleeing violence and needing support dog

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R (Ahamed) v Haringey LBC

[2023] EWCA Civ 975

Main issue, about accommodation being suitable for short term occupation/not reasonable to continue to occupy

PSED point – authority was aware of applicant’s disability and had taken account of medical info. So, on facts, had regard to s.149 duty.

Some criticism of issues about suitability being raised in a Judicial Review and not by way of county court appeal.

... given the existence of s.202 and 204 of the 1996 Act, challenging to decisions of local housing authorities relating to homelessness should generally be pursued under those provisions and not by way of judicial review. [68]

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Webb-Harnden v Waltham Forest LBC

[2023]EWCA Civ 992, 22 August 2023

Challenge to suitability of out-of-borough offer of PRSO accommodation

Court of Appeal held that the reviewing officer had had due regard to matters set out in s.149 in deciding that the offer of private out-of-borough accommodation to a homeless single mother was reasonable and suitable

Dismissed contention that the policy of offering private sector tenancies discriminated against those subject to the benefit cap.

Court said - challenge was an attempt to use s.149 to arrive at a different outcome and that was not the purpose of s.149. **Duty was not a freestanding duty.** It applied to the way in which public authorities exercised their functions. Its purpose was not to require authorities to perform functions in a different way with different legal consequences (*McMahon*)

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***R (AB and CD) v Westminster CC* [2024] EWHC 266 (Admin)**

Judicial Review of decision on suitability of accommodation provided to couple. Both disabled and had fled home area where faced risk. Needed accommodation with support dog. Authority accepted it was in breach of duty before a certain date, thereafter claimed accommodation provided was suitable. Claimants argued it was not.

One of issues on appeal was alleged breach of PSED – alleged failed to follow the approach in *Haque*. Rejected by the court:

75. ... well-established that the PSED imposes a duty of process rather than result, and that 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 it is for the decision-maker to decide how much weight should be given to the various factors informing the decision” [Bridges]

... The way the PSED operates, therefore, is that it makes the potential impact of a decision on equality objectives, and the desirability of promoting those objectives, mandatory relevant considerations for the decision-maker. The decision-maker has no discretion as to whether to consider those matters. In determining a PSED challenge, it is, therefore, for the court to decide whether there were any potential equality issues which required consideration and whether due regard was had to them. If due regard was had to equality issues, it is then a matter for the decision-maker, subject to a review on a rationality basis, to decide how much weight to give to equality considerations, to determine how to balance them against other factors, and, ultimately, to decide what substantive decision to take.

79 ... It is impossible to see how there will be a breach of the PSED in assessing the suitability of accommodation where it is accepted the accommodation is not suitable because of the individual's disability.

NB. the challenge was to the specific assessments of suitability in relation to particular applicants, not a challenge to the authority's policy

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PSED and possession proceedings

Some key features of possession proceedings to bear in mind:

- A long process, involving many different decisions:
 - to service Notice Seeking Possession;
 - to issue claim;
 - what kind of possession order to seek;
 - to enforce possession order
- Most claims involve serious breaches of tenancy agreement and often serious anti-social behaviour – so landlord is weighing up needs of other tenants
- Breach of PSED not the same as defence of indirect discrimination – many appeal cases are considering PSED after other defences have been dismissed

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***Powell v Dacorum BC* [2019] EWCA Civ 23**

Possession order - rent arrears, drug dealing and serious anti-social behaviour by the tenant. Prior to action to enforce the possession order, evidence of the tenant's mental health issues was sent to the landlord and the housing officer carried out what was described as a 'proportionality assessment' and decided to pursue the eviction.

In the Court of Appeal, the only live issue was the effect of the breach of the PSED at the earlier stage in the proceedings. McCombe LJ, referring to his own dicta in *Bracking*, said at [44]:

The impact of the PSED is universal in application to the functions of public authorities, but its application will differ from case to case, depending upon the function being exercised and the facts of the case. The cases to which we have been referred on this appeal have ranged across a wide field, from a Ministerial decision to close a national fund supporting independent living by disabled persons (Bracking) through to individual decisions in housing cases such as the present. One must be careful not to read the judgments (including the judgment in Bracking) as though they were statutes. The decision of a Minister on a matter of national policy will engage very different considerations from that of a local authority official considering whether or not to take any particular step in ongoing proceedings seeking to recover possession of a unit of social housing'.

The Court of Appeal upheld the finding of the county court that any breach of the PSED at the earlier stage of decision-making was made good when the council considered the medical evidence during the course of the application for the suspension of the warrant, and carried out its 'proportionality assessment':

It has been held in this court in the Barnsley case, that in proceedings of this type, it is open to a social housing landlord to remedy any defect in compliance with the PSED at a later stage in the proceedings. [50]

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***London & Quadrant v Patrick* [2019] EWHC 1263**

Possession claim made on the grounds of a breach of an anti-social behaviour injunction, a mandatory ground for possession. The tenant's disability was raised for the first time when the defence was filed.

High Court found that the trust had complied with the PSED and that 'the steps required to fulfil the duty required considerably less formality than would otherwise have been the case on account of the disability being revealed very late in the day'. The Trust had considered Mr Patrick's disability and decided it was appropriate to pursue the possession claim and had given more detailed and formal consideration prior to enforcing the order. Even if the Trust had been in breach of the PSED at the time of the hearing, any breach had been superseded by a later assessment by the housing officer.

Further, any breach would not have led to a materially different decision.

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Forward v Aldwick Housing Group Ltd [2019] EWCA Civ 1334

Possession claim based on allegations of serious anti-social behaviour, including drug use and drug dealing at the premises. The tenant was disabled and at the possession hearing the landlord admitted a failure to comply with the PSED because the 'PSED assessment' completed by the housing officer, after issue but before trial, was admitted to be inadequate: no medical advice about the disability had been before the officer and they had not considered any alternatives to possession proceedings, so had not carried out the assessment with an open mind.

The main focus was not whether late compliance had remedied an earlier breach but whether it would have made any difference had the landlord complied with the PSED. It was held that

*... it was open to the judge to make the possession order ... if on the facts, there was only one answer to the claim for possession. Just as in **Barnsley v Norton** the court could be satisfied that consideration of [the] disability would not have made any difference to the local authority's decision to seek possession, so the district judge in this case could, if the facts of the case warranted it, conclude that compliance with its duty in respect of Mr Forward's disability would likewise have made no difference to the landlord's decision to seek possession. The question therefore is whether this was an appropriate case so to conclude on the facts. [32]*

The Court of Appeal held that it was since at trial it had been held that there was no viable option other than to seek possession and it was highly important for the landlord to bear in mind the position of the other tenants in the block whose lives were blighted by Mr Forward's breach of the terms of his tenancy. On any view their position was of great importance. [34]

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Luton v Durdana [2020] EWCA Civ 445, 26 March 2020

Possession order made because tenancy obtained by way of a false statement. Tenant's daughter was disabled and the council purported to comply with PSED but the officer who completed an 'Equality Act assessment' accepted that she had no knowledge of the effect of the daughter's disability on her day-to-day life, or how she would be impacted by eviction. Further, she did not, nor would have, considered any alternative to eviction.

The trial judge dismissed the possession claim on the basis of the breach of the PSED.

The Court of Appeal found that the Trust was *highly likely* to have made same decision even if it had complied with the PSED and that the claim for possession should not have been dismissed. However, it decided it would not be appropriate for the Court of Appeal to make a possession order and the case was remitted to the County Court for consideration of the reasonableness of a possession order.

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***Taylor v Slough*, [2020] EWHC 3520.**

Tenant suffered from bipolar disorder. Closure order had been made following allegations of anti-social behaviour and drug dealing from the premises. The officer who decided to pursue the possession order was aware of the tenant's disability and had made enquiries of two agencies providing mental health support for further information. The Council had also taken various other steps: working closely with the police, including supporting a referral to intensive support services; investigating (in light of the expert evidence) what could be done to enable the tenant to obtain a supported placement from another provider (the Council being unable to offer that type of housing); and visiting the tenant with the police to discuss her housing needs.

The court held: not necessary for the Council to adduce evidence of a particular moment when it 'sat down' and decided to pursue the proceedings with due regard to the PSED. The judge's task was to consider, based on all the evidence, whether the Council's decision to continue with the proceedings, once it appreciated Ms Taylor's disability, was taken with due regard to the PSED (as a matter of substance, rigour and with an open mind).

Held: council had substantively complied. So, unnecessary to deal with question of whether non-compliance made a difference to the outcome.

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***Metropolitan Housing Trust Ltd v TM* [2021] EWCA, Civ 1890, 4 Nov 2021**

Court of Appeal set aside a possession order, on the basis of a breach of the PSED.

The tenant was an assured shorthold tenant, in supported accommodation and had committed acts of serious anti-social behaviour, including an assault on a support worker. However, he was not only disabled but found to lack litigation capacity and the trial judge had found 'no blame at all on TM' and that his conduct was 'the consequences of his illness for which he required help from everyone concerned'.

Officer who decided to commence the proceedings had conducted an assessment in accordance with the PSED but subsequently received a psychiatric report about TM's lack of capacity. In the course of his oral evidence during the trial the officer stated that if he had he seen the report at an earlier stage he would probably not have issued the proceedings but would have sought an alternative course of action. Nevertheless, he confirmed that he still felt it reasonable and proportionate to pursue the eviction and a possession order was made.

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Metropolitan Housing Trust Ltd v TM

Court of Appeal considered whether the breach of the PSED had been remedied by the officer while giving evidence. Given that the officer had confirmed that he would have made a different decision in light of the report, the Court of Appeal found it impossible to conclude that ‘in effect he went through the assessment in the witness box and thereby remedied the breach.’

The PSED requires the assessment to be carried out with an open mind ... and it is good practice for a decision maker to keep records demonstrating consideration of the duty, as proper record-keeping encourages those carrying out the relevant function to undertake their disability equality duties conscientiously (Brown at [96], Bracking at [26(5)(vi)]). And even though the reasonableness and proportionality of continuing to seek possession may be an appropriate way of characterising the ultimate decision to be made, that is not the same as saying that all that is needed is a proportionality assessment; what is needed is the open-minded conscientious inquiry referred to in the authorities [see Luton v Durdana, at [27]]

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***Reading Borough Council v Tina Holland* [2023] EWHC 1902**

Tenant in sheltered accommodation – had ‘emotionally unstable personality disorder’

Again, court held not necessary to demonstrate a single formal exercise of considering the impact of eviction of a disabled tenant, with the sharp focus referred to in *Kannan*. An Equality Assessment had, the trial judge found, fallen short of complying with the PSED, but court was entitled to look at compliance on a wider basis. A note of a multi-agency meeting showed that the the impact had been considered and officer entitled to decide not to obtain medical opinion on specific impact of eviction in light of tenant’s particular disability. Judge had been right to find it was proportionate for the tenant to be evicted even though suitable alternative accommodation was not available.

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Some key principles from the possession cases

- Landlord not required to show that there was a single point in time when duty of due regard satisfied
- Can look at the whole process to see if substantive compliance
- The duty is a continuing one
 - Means that an earlier breach may be remedied at a later point in time
 - But not in the witness box!
 - Also means that information obtained after claim commenced or after possession order made, must be taken into consideration
- Court may decide that 'it would have made no difference' and that the making of a possession order was only possible outcome

NB. These decisions are made when the 'countervailing factors' will often include the needs/rights of other tenants