13 May 2015

PRESS SUMMARY

Hotak and others (Appellants) v London Borough of Southwark and another (Respondents) [2015] UKSC 30
On appeal from [2013] EWCA Civ 515

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Clarke, Lord Wilson, Lord Hughes.

BACKGROUND TO THE APPEALS

Under s. 188 of the Housing Act 1996 ("the 1996 Act") local authorities have a duty to secure that accommodation is made available for applicants who are homeless and have priority need. Priority need is defined in section 189(1) of the 1996 Act and includes at paragraph (c) persons who are "vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside."

The Appellants applied for accommodation on the basis that they had priority need. The First Appellant has very significant learning difficulties and symptoms of depression and PTSD. He is cared for by his brother. Southwark Borough Council ("Southwark") refused his application on the grounds that, if homeless, he would be provided with the necessary support by his brother. The Second Appellant has multiple physical problems as well as psychotic symptoms and suicidal ideation. He was deemed by Southwark not to be in priority need because he would not be at a greater risk of injury or detriment than an ordinary street homeless person due to the ability of his wife and son to fend for the whole household. The Third Appellant claimed to be vulnerable because he had become addicted to heroin while in prison and was in poor physical and mental health. Solihull Metropolitan Borough Council ("Solihull") found that he was not in priority need on the basis that he would not be less able to fend for himself than an ordinary homeless person.

The First and Third Appellants were unsuccessful in the courts below. The Second Appellant succeeded in the County Court but lost in the Court of Appeal. Three issues arise in the present appeal:

(1) Does the assessment of whether an applicant is vulnerable for the purposes of s. 189(1)(c) of the 1996 Act involve an exercise in comparability, and, if so, by reference to which group of people is vulnerability to be determined?
(2) When assessing vulnerability, is it permissible to take into account the support which would be provided by a family member to an applicant if he were homeless?
(3) What effect, if any, does the public sector equality duty under s. 149 of the Equality Act 2010 ("the 2010 Act") have on the determination of priority need under the 1996 Act in the case of an applicant with a disability or any other protected characteristic?

JUDGMENT

Lord Neuberger (with whom Lord Clarke, Lord Wilson and Lord Hughes agree) dismisses the First Appellant's appeal, but Lady Hale would have allowed his appeal. All five Justices allow the Second Appellant's appeal and dismiss the Third Appellant's appeal.

REASONS FOR THE JUDGMENT

On the first issue in the appeal, "vulnerable" in section 189(1)(c) connotes that the applicant must be significantly more vulnerable than an ordinary person who happened to be in need of accommodation **[55, 59]**. The decisions of the Court of Appeal on this issue have all accepted that vulnerability has to be assessed comparatively **[48]**-**[50]**. This is correct; "vulnerable" carries a necessary implication of relativity. It can fairly be said that anyone who is homeless is vulnerable. So, it follows that s. 189(1)(c) must contemplate homeless people who would be more vulnerable than many others in the same position **[51]**. Parliament probably did not intend vulnerability to be judged by reference to what a housing officer thought to be the situation of an actual homeless person. Such an approach would be more likely to lead to arbitrary and unpredictable outcomes. The comparator could not be an ordinary homeless person in the area of the relevant authority as this could lead to unacceptable outcomes with vulnerable people being put out on the streets **[56]**. The 1996 Act does not refer to "street homeless" as a category or distinguish between the situations which may constitute homelessness; this calls into question the authority making use of the term in assessing their duty to an applicant **[42]**

As to the relevance of support from family members, an applicant's vulnerability under s. 189(1)(c) has to be assessed by reference to his situation if and when homeless, which involves a contextual and practical assessment of the applicant's physical and mental ability when homeless. As such, any services and support that would be available to the applicant if he were homeless must be taken into account **[62]**. This conclusion is supported by the purpose of the legislation in question. Those who are more vulnerable in practice if they are homeless can be expected to receive priority treatment. It would be contrary to common sense to ignore any aspect of the actual or anticipated factual situation when assessing vulnerability **[63]**. It does not matter whether the support is provided pursuant to a legal obligation, but housing authorities can only take third party support into account where they are satisfied that it will be provided on a consistent and predictable basis **[65]**. The primary focus of s. 189(1)(c) is on the applicant, not the benefit of the third party and it would place an excessive burden on housing authorities if family support were disregarded. However, the mere fact that support is available does not of itself prevent the applicant from being vulnerable; there must be a case-specific analysis of whether the support can obviate the vulnerability **[69]**-**[70]**.

On the third issue in the appeal, the weight and extent of the public sector equality duty are highly fact-sensitive and dependent on individual judgment **[74]**. The authority's equality duty was complementary to its duty under the 1996 Act. Each stage of the decision must be made with the equality duty well in mind and the officer must focus very sharply on: (i) whether the applicant has a relevant protected characteristic, (ii) its extent, (iii) its likely effect, when taken together with any other features, on the applicant if and when homeless, and (iv) whether the applicant is vulnerable as a result **[78]**.

Lady Hale would have allowed the First Appellant's appeal. She concludes that, while any statutory services which will be available to an applicant should be taken into account when assessing his vulnerability, family support should not **[93]**. It is not consistent with the intention of the statute to take into account help which may be available from other members of the household. Both the vulnerable person and their non-vulnerable family member qualify as being in priority need. The 1996 Act permits the non-vulnerable family to apply on behalf of both themselves and the vulnerable person. Parliament did not intend applications to be made by a family member who was not looking after the vulnerable person **[95]**. There is House of Lords authority for this proposition and none for the suggestion that the existence of a carer within the same household can mean that a person who is otherwise obviously vulnerable is not to be treated as such **[99]**.

References in square brackets are to paragraphs in the judgment