Neutral Citation Number: [2013] EWCA Civ 515

Case No: B5/2012/1145

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM LAMBETH COUNTY COURT**
**HIS HONOUR JUDGE BLUNSDON DATED 27 APRIL 2012**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2013

**Before :**

**LORD JUSTICE MOORE-BICK**
**LORD JUSTICE RICHARDS**
and
**LORD JUSTICE PITCHFORD**

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**Between :**

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| **SIFATULLAH HOTAK** | **Appellant** |
| **- and -** | |
| **LONDON BOROUGH OF SOUTHWARK** | **Respondent** |

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**Paul Brown QC and Heather Emmerson** (instructed by **Centre 70 Advice Centre**) for the **Appellant**
**Kelvin Rutledge QC** (instructed by **London Borough of Southwark**) for the **Respondent**

Hearing date: 2 May 2013

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# Approved Judgment

## Lord Justice Pitchford :

### The issue

1. The issue raised in this appeal is whether, when assessing an applicant's "priority need for accommodation" under section 189(1)(c) Housing Act 1996 (that is, whether the applicant is "vulnerable" by reason of old age, mental illness or handicap or physical disability or other special reason), the housing authority is entitled to have regard to the personal support and assistance which has been and will continue to be provided to the applicant, if made street homeless, by a family member with whom the applicant is currently living.

### The factual background

2. The appellant was born on 1 May 1989 and is now aged 23 years. He is a native of Afghanistan who entered the United Kingdom in February 2008 and made an application for asylum on his arrival. He was granted leave to remain on 8 March 2011 which expires on 8 March 2016. The appellant's brother, Ezatullah Hotak ("Ezatullah"), was born on 15 June 1990 and is now aged 24 years. He entered the United Kingdom in 2006 and has since been granted leave to remain.

3. On his arrival in the United Kingdom the appellant lived in Liverpool for about 18 months supported by NASS. He was arrested for an alleged theft of £20 and was remanded in custody. On 12 July 2010 the appellant was released from custody without charge and he travelled to London to be with his brother. They lived together in a flat belonging to a friend in Peckham in the London Borough of Southwark. In March 2011 the appellant and his brother were required to leave the flat because of over-crowding. On 25 March 2011 they attended together to make an application for housing assistance from Southwark housing department ("the Council"), the local housing authority. Ezatullah was, at the time of the application, by reason of his immigration status, ineligible in his own right and the application was made by the appellant. The Council took time to make an assessment of the appellant's entitlement and needs and, in the meantime, the brothers were accommodated.

4. It is common ground that the appellant suffers learning difficulties which affect his ability to cope with daily living, has self-harmed during his period in custody and has suffered symptoms of depression and post-traumatic stress disorder; that he relies on Ezatullah for daily personal support, including prompts to undertake personal hygiene, to change his clothes, to undertake routine, and to organise health appointments, meals and finances; that but for Ezatullah's support and assistance the probability is that the appellant would be treated as "vulnerable" for the purposes of section 189(1)(c) of the 1996 Act. In the light of these mutual concessions it is not necessary for the purpose of this judgment further to describe the evidence which justified them.

### The Council's decisions

5. On 27 April 2007, after making inquiries under section 184 Housing Act 1996 the Council made a decision that the appellant was eligible for assistance, and was unintentionally homeless. However, it also found that he was not in priority need under section 189(1)(c) because he received assistance from his brother and, in a

homeless situation, he would not suffer injury or detriment or be less able to fend for himself than would the ordinary street homeless person. The appellant requested a review of this decision on 17 May 2012. On 24 June 2011 the Council notified the appellant that it was minded to uphold the decision that he was not in priority need. On 29 June the appellant made further representations. On 30 June 2011 Kojo Sarpong, the Council's review team leader, notified the appellant that he had reviewed the Council's decision pursuant to section 202 of the 1996 Act and confirmed it.

6. Relevant passages of the decision letter are as follows:

> "In deciding whether a person is vulnerable in accordance with section 189(1)(c) of the above Act the Council must ask itself whether the applicant, when street homeless, is less able to fend for himself/herself so that injury or detriment will result where a less vulnerable street homeless person would be able to cope without harmful effect. The test employed to assess whether or not clients are deemed to be vulnerable is laid down by the Court of Appeal in the case of *R v Camden LBC ex parte Pereira* [1998] 31 HLR 317.
>
> Applying that test and taking into account the information on file this authority is satisfied that Mr Hotak's medical conditions are sufficiently serious...for us to conclude that he may be vulnerable under the provisions of the Act. However, we are also satisfied that Mr Hotak may only be vulnerable if he was a single applicant. Even though we have considered the test as it applies to the individual, we have also considered the totality of factors involved in this case under the provisions of the above Act …
>
> We acknowledge that he has learning difficulties and disabilities and it would be reasonable to conclude that he may find difficulty in finding and maintaining accommodation. If on his own and street homeless Mr Hotak may also be at risk of harm insofar as it may have an impact on his health. However we are satisfied that his brother is capable of providing him with continued housing and support if they were street homeless together.
>
> Ezatullah's circumstances would not confer priority under the provisions of the Act and we are satisfied that he would not allow circumstances to arise whereby his brother is placed at risk. We are therefore not satisfied that Mr Hotak would be a greater risk than the norm if street homeless as he has a stable support network that will stay with him if he is faced with street homelessness.
>
> The Council is satisfied as a result of the above that when street homeless he would not be less able to fend for himself than an ordinary street homeless person so that injury or detriment to him would result when a less vulnerable street homeless person would be able to cope without harmful effects. As previously stated his brother is capable of continuing to care for the client and we are satisfied that he would be able to continue to do so if faced with street homelessness.

> Ezatullah has consistently shown an ability to engage with external agencies such as Mr Hotak's GP, his psychologist, social services, the Home Office, your [the solicitor's] services and our services. In addition Mr S Hotak is in receipt of benefits which means that he will also be eligible for housing benefit if he found private sector accommodation.
>
> This authority is satisfied that their personal circumstances do not prevent them from engaging with services in order to find accommodation. Ezatullah is able to effectively manage his daily affairs and we are also satisfied that he can continue to provide support to Mr Hotak. In addition Ezatullah independently manages finances of the household and he is capable to managing his own affairs and the affairs of Mr Hotak. We are satisfied that all of the above would still be possible were they to become street homeless …
>
> We have looked at Mr Hotak's vulnerability as a composite assessment of his circumstances and have also borne in mind the ability of his brother to find and keep accommodation like others who have similar housing and other circumstances to them. Even though we acknowledge that he has learning disabilities and difficulties we are satisfied that Ezatullah would assist him if street homeless and his circumstances do not confer priority need under the provisions under the above Act."

## Appeal to the County Court

7. The appellant challenged the Council's decision by appeal to the County Court on a point of law under section 204 of the 1996 Act. The appellant contended that (i) the Council had misdirected itself in law when assessing his vulnerability by reference not just to his personal disabilities but also to the support available to him from his brother and (ii) there was no evidence to justify the conclusion that Ezatullah would be able to provide the support identified. On 27 April 2012 His Honour Judge ("HHJ") Blunsdon, sitting at Lambeth County Court, dismissed the appeal. The judge held that the Council had not erred in its approach to section 189(1)(c) Housing Act 1996. It had been entitled to conclude on the evidence that the appellant was not in priority need because he received and would continue to receive the support of his brother in the event that they became street homeless. There was nothing in either the Secretary of State's Code of Guidance (issued July 2006), or in section 189(1)(c), or in authority, that precluded consideration of the support and assistance of the appellant's brother by the housing authority for the purpose of assessing vulnerability. On the contrary, although not decisive, the Court of Appeal had, in *Osmani v London Borough of Camden* [2004] EWCA Civ 1706, [2005] HLR 22 taken account of such support in concluding that a housing authority had been entitled to decide that an applicant was not vulnerable within the meaning of paragraph (c). The judge concluded at paragraph 37 of his judgment:

> "37...Am I therefore to blinker myself, ignore the dynamics of their relationship, and assume, although wholly unrealistically, that the support and assistance that the brother has provided will not continue if they become street homeless? Is it realistic to assume that on becoming street homeless, the brother will cease to provide for the appellant, or rather am I prevented even from considering that matter by the statute? I think not. There is nothing in my reading of section 189(1)(c) or the code which, in my judgment, excludes a consideration of family support when assessing whether a person is vulnerable when street homeless. It is a matter of fact and degree to be evaluated by the reviewing officer. The weight to be attached will vary in each case, but clearly the less likely comprehensive support, the less weight will be attached to the input of the third party. The fact that I may have reached a different conclusion is not relevant if I am satisfied that the authority reached a decision within the range of decisions I described earlier."

8. This is the appellant's appeal against HHJ Blunsdon's finding in law. It is no longer contended that if the Council *was* entitled to take account of Ezatullah's support, the decision was nevertheless perverse. Therefore, the sole issue which this court is required to resolve is whether the judge erred in directing himself as to the circumstances which were material to the statutory assessment.

**The statutory scheme**

9. The 'homelessness' provisions are set out in Part 7 of the Housing Act 1996. The appellant maintains that he is owed a statutory duty by the Council under section 193 of the Act which, for present purposes, provides:

> "**193 Duty to persons with priority need who are not homeless intentionally**
>
> (1) This section applies where the local housing authority are satisfied that an applicant is homeless, eligible for assistance and has a priority need, and are not satisfied that he became homeless intentionally.
>
> (2) Unless the authority referred the application to another local housing authority (see section 198), they shall secure that accommodation is available for occupation by the applicant."

10. There is no issue in the present case that the appellant is homeless within the meaning of section 175, eligible for assistance within the meaning of section 185, and is not intentionally homeless within the meaning of section 191. The point at issue was whether the appellant had a priority need under section 189 supplemented by the Homeless (Priority Need for Accommodation) (England) Order 2002 (2002 SI 2051) (the "2002 Order"). Section 189 in its relevant parts reads:

> "**189 Priority need for accommodation**

(1) The following have a priority need for accommodation-

(a) a pregnant woman or a person with whom she resides or might reasonably expected to reside;

(b) a person with whom dependent children reside or might reasonably be expected to reside;

(c) a person who is 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;

(d) a person who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster.

(2) The Secretary of State may by order-

(a) specify further descriptions of persons as having a priority need for accommodation, and

(b) amend or repeal any part of sub-section (1)."

11. The 2002 Order created further categories of priority need, none of which apply to the appellant. In the exercise of its functions relating to homelessness the Council was required by section 182(1) of the 1996 Act to have regard to any guidance given by the Secretary of State.

**The Homelessness Code of Guidance 2006**

12. The Department for Communities and Local Government: London published the Homelessness Code of Guidance for Local Authorities in July 2006. Guidance as to the assessment of priority need is given in chapter 10, parts of which make specific reference to the circumstances which the housing authority should consider. Chapter 10.12 lists those categories of persons who may qualify for priority need *on the ground of vulnerability* either under section 189(1) or the 2002 Order:

"VULNERABILITY

10.12 A person has a priority need for accommodation if he or she is vulnerable as a result of:

(i) old age *[section 189(1)(c)]*;

(ii) mental illness or learning disability (mental handicap or physical disability *[section 189(1)(c)]*;

(iii) having been looked after, accommodated or fostered and is aged 21 or more *[2002 Order, paragraph 5(1)]*;

(iv) having been a member of Her Majesty's regular naval, military or air forces *[2002 Order, paragraph 5(2)]*;

(v) having been in custody or detention *[2002 Order, paragraph 5(3)]*;

(vi) ceasing to occupy accommodation because of violence from another person or threats of violence from another person which are likely to be carried out *[2002 Order, paragraph 6]*; or

*(vii)* any other special reason *[section 189(1)(c)]*. *[attributions added]*

In the case of (i) (ii) (vii) only, a person with whom a vulnerable person lives or might reasonably be expected to live also has a priority need for accommodation and can therefore make an application on behalf of themselves and that vulnerable person.

**10.13 It is a matter of judgment whether the applicant's circumstances make him or her vulnerable. When determining whether an applicant in any of the categories set out in paragraph 10.12 is vulnerable, the local authority should consider whether, when homeless, the applicant would be less able to fend for him/herself than an ordinary homeless person so that he or she would suffer injury or detriment, in circumstances where a less vulnerable person would be able to cope without harmful effects.**

**10.14 Some of the factors which may be relevant in determining whether a particular category of applicant is vulnerable are set out below. The assessment of an applicant's ability to cope is a composite one taking into account all of the circumstances. The applicant's vulnerability must be assessed on the basis that he or she is or will become homeless and not on his ability to fend for him or herself while still housed."** [original emphasis]

The reference in chapter 10.14 to the need, when assessing the applicant's ability to cope, to take into account "all of the circumstances" was of particular relevance to the appellant's application.

13. The Code proceeds to examine the separate categories of applicants listed in chapter 10.12. In the case of vulnerability arising from mental illness or learning disability the guidance states at chapter 10.16:

"10.16 … In considering whether such applicants are vulnerable, authorities will need to take account of all relevant factors including:

(i) the nature and extent of the illness and/or disability which may render the applicant vulnerable;

(ii) the relationship between the illness and/or disability and the individual's housing difficulties; and

(iii) the relationship between the illness and/or disability and other factors such as drug/alcohol misuse, offending behaviour, challenging behaviours, age and personality disorder."

The guidance makes no specific reference to the relevance, if any, of personal support which the applicant may receive and continue to receive from a source other than the housing authority.

14. In the case of those who may be vulnerable "having been looked after, accommodated or fostered and aged 21 or over", or "having been a member of the armed forces", or "having been in custody or detention", or "having left accommodation because of violence" the Code advises that a housing authority "may wish to consider", amongst other things, *whether the applicant has any existing support networks including family or friends* (chapter 10, paragraphs 20 (iv), 23 (vi), 25 (iv) and 29 (iii)). In the case of those who may be vulnerable for some "other special reason" chapter 10.30 states:

> "10.30 Section 189(1)(c) provides that a person has priority for accommodation if he or she is vulnerable for any "other special reason". A person with whom such a vulnerable person normally lives or might reasonably be expected to live also has a priority need. The legislation envisages that vulnerability can arise because of factors that are not expressly provided for in statute. Each application must be considered in the light of the facts and circumstances of the case. Moreover, other special reasons giving rise to vulnerability are not restricted to physical or mental characteristics of a person. *Where applicants have a need for support but have no family or friends on whom they can depend they may be vulnerable as a result of another special reason.*" [italics added]

15. At chapter 10.33 the Code recognises, as an example of a category of persons who may be vulnerable for another "special reason", young people under the age of 25 (who do not otherwise qualify) who do not have a degree of support from family and friends, and may not have the ability to cope with the "practicalities and cost of finding, establishing and managing a home for the first time".

**The cases**

16. The Code has from time to time been modified so as to reflect decisions of this Court upon the interpretation of section 189 and the correct approach to the assessment of vulnerability. The guidance as to assessment given in chapter 10.13 and 14, for

example, largely follows the decisions of the Court of Appeal in *R v Waveney District Council, ex parte Bowers* [1983] 1 QB 238, 4 HLR 118 and *R v Camden London Borough Council ex parte Pereira* [1998] 31 HLR 317, confirmed and applied by the Court in *Osmani v Camden London Borough Council* [2004] EWCA Civ 1706, [2005] HLR 22.

17. Section 59(1)(c) Housing Act 1985 was in identical terms to section 189(1)(c) of the Housing Act 1996. In *Pereira* the court explained and applied the test identified by the Court in *R v Waveney District Council, ex parte Bowers*, namely that a "vulnerable" person is someone who is "less able to fend for [him]self so that injury or detriment will result when a less vulnerable man will be able to cope without harmful effects" (per Waller LJ at page 244H). First instance decisions which followed *Bowers* had suggested that the test had developed and mutated. The Court in *Pereira* held that the correct test was as the Court of Appeal had defined it in *Bowers*, subject only to a recognition that a comparison was to be made between the applicant and the average or ordinary homeless person identified by Lord Prosser sitting in the Outer House of the Court of Session in *Wilson v Nithsdale District Council* [1992] SLT 1131. In his conclusion, Hobhouse LJ with whom Waller LJ and Walker LJ agreed, said at page 330 of *Pereira*:

> "The Council must consider whether Mr Pereira is a person who is vulnerable as a result of mental illness or handicap or for other special reasons. Thus the Council must ask itself whether Mr Pereira is, when homeless, less able to fend for himself than an ordinary homeless person so that injury or detriment to him will result when a less vulnerable person would be able to cope without harmful effects. The application of this test must not be confused with the question whether or not the applicant is at the material time homeless. If he is not homeless, the question whether he is in priority need becomes academic. The question under paragraph (c) can only arise if (or on the assumption that) he is at the material time homeless. A particular inability of a person suffering from some handicap coming within paragraph (c) to obtain housing for himself can be an aspect of his inability as a homeless person to fend for himself. *Such an individual may suffer from some mental or physical handicap which makes him unable to obtain housing unaided and thus makes him unable to cope with homelessness in a way which does not apply to the ordinary homeless person.* But it is still necessary, as is illustrated by the decided cases, to take into account and assess whether in all the circumstances the applicant's inability to cope comes within paragraph (c). *It must appear that his inability to fend for himself whilst homeless will result in injury or detriment to him which would not be suffered by an ordinary homeless person who is able to cope. The assessment is a composite one but there must be this risk of injury or detriment. If there is not this risk, the person will not be vulnerable*." [italics added]

18. In *Osmani* the court was considering a case with some factual parallels with the present appeal. Mr Osmani, who was a native of Kosovo, was granted indefinite leave to remain. In October 2001 he and his wife moved into rented accommodation. When in January 2003 they were served with a notice to quit they sought housing assistance. The claim that Mr Osmani was in priority need was rejected and the rejection was maintained after two statutory reviews. Mr Osmani's appeal to the County Court was also dismissed. The application for assistance as a vulnerable person in priority need was made under section 189(1)(c) of the 1996 Act. Among the factual assessments made by the Council's reviewing officer were the following (paragraph 18 *Osmani*):

> "I noted...that you were fully mobile, you can use public and private transport, you can manage shopping and you can manage stairs...With respect to your personal activities of daily living, Dr McNicol noted that you could wash, cook and dress independently and administer your own medication...Further to the above, I noted that since your arrival you have managed [to] find and maintain private and rented accommodation, you have applied to this authority for housing assistance, you have sought medical treatment from your GP, as well as from the trauma clinic. You have applied [for] and obtained benefits and you have sought independent legal advice when an adverse decision was made against you. In considering your case *I also took into account* that you are being treated at present for your medical problems and *that your condition is being carefully monitored by your GP and Ms Dionisio at the trauma clinic and that you are engaging with this treatment and have good attendance. I considered also that alongside the above support you continue to receive support from your wife, your GP [Dr McNicol] have (sic) also acknowledged this and there is no evidence that this will cease*." [italics added by Auld LJ in his judgment]

Auld LJ, with whom Judge LJ, as he then was, and May LJ agreed, returned to the reasoning of Hobhouse LJ in *Pereira.* He noted that at page 319 of *Pereira* Hobhouse LJ identified a distinction between section 59(1)(c) and the other paragraphs of sub-section (1). Hobhouse LJ had said:

> "In practice paragraphs (a), (b) and (d) have not proved difficult to apply; each of these paragraphs can be applied by asking and answering a simple factual question. Paragraph (c) is different. It involves a question of judgment and causation. It is necessary to assess whether a person is "vulnerable". It is also necessary to consider whether such vulnerability is as a result of one of the four identified causes or some other "special reason". Whether one approaches the question of construction by looking at the language of the paragraph as a composite whole (see the discussion in *Ex-parte Kihara* 29 HLR 147) or by considering the question of vulnerability in cause separately, the problems of interpretation remain. These problems are not made easier by the statutory context. Within section 59(1) there is a potential contrast. Paragraphs (a), (b) and (d) do not touch upon the ability of a

> person to find accommodation without assistance. A pregnant woman has a priority need for accommodation simply by reason of her being pregnant. It is irrelevant to her qualifying as a person with priority need that she has an unimpaired ability to find and obtain accommodation suitable for her needs. By contrast the word "vulnerable" used in paragraph (c) at least potentially may raise the question whether there is some special reason which peculiarly handicaps the relevant person in obtaining suitable accommodation; indeed this may be the primary source of his vulnerability."

19. As to the challenge in *Osmani* based on perversity Auld LJ concluded at paragraph 40:

> "40. As to perversity, it has to be kept in mind that vulnerability under section 189(1)(c), depending upon the nature and extent of the reason for it, is not exclusively or even necessarily a medical question. There was no doubt here that Mr Osmani suffered from a depressive illness, but it was not such at the time of the decision letter, when he was still being housed by the Council, as to prevent him from fending for himself and his wife in maintaining all their normal support systems and in his daily activities. The question for the reviewing officer, which he addressed, was one of assessing the further risks to those capabilities if and when he were to become homeless. *Would his condition deteriorate such that he would not be able to do anything about his homelessness unaided and/or to harm him more than it would "an ordinary homeless person"?* In my view the reviewing officer's conclusion that the risk was not such as to make him vulnerable for either of those purposes was for the reason she gave, one which was reasonably open to her." [italics added]

As to the complaint that the reasons for the decision were insufficiently explained Auld LJ continued at paragraph 41:

> "41. On the barely separate issue in the circumstances of the sufficiency of the reviewing officers reasons, it is plain, as I have said from the passages in the decision letter that I have set out and which I have emphasised, that she had regard to all relevant factors on a proper understanding of the *Pereira* test. That is, on the basis of the evidence before her, she took account of what Mr Osmani could do at the time when housed and made a risk assessment as to what he would be able to do if he were to become homeless. Necessarily his past history and current pattern of ability to fend for himself contributed to, but did not determine, her decision as to the future. As to the future she expressly justified her decision by reference to (1) that he was undergoing and co-operating with treatment for his depressive condition; (2) that Dr McNicol and Ms Dionisio were carefully monitoring his condition; (3) *that he continued to receive support from his wife in all this; and (4) that,*

> *thus aided, he was therefore likely to be able to fend for himself as well as others without such mental conditions.*" [italics added]

**Appellant's submissions**

20. It is submitted on behalf of the appellant that the support of family or friends provided to an applicant for homelessness assistance is irrelevant in the assessment of vulnerability. Mr Paul Brown QC argues that section 189(1) of the 1996 Act and the 2002 Order identified those with particular characteristics which, without proof of vulnerability, would establish a priority need. Expanding upon the observation of Hobhouse LJ in *Pereira* that section 189(1)(c) was the only paragraph which (then) required an assessment of vulnerability, Mr Brown argues that there is no reason why a "vulnerable" person should be excluded from assistance on the ground that support was available elsewhere when a pregnant woman (paragraph (a)), for example, would be entitled to assistance even if, with her husband's support, she would be in no worse position than if she were not pregnant.

21. On the contrary, it is submitted, in all of the cases mentioned in section 189(1)(a) to (c) priority is given not only to the person who qualifies but also to the person with whom the applicant resides or with whom the applicant may reasonably be expected to reside. It is the scheme or policy of the legislation that where people share a household and one of them is in priority need by reason of his or her particular circumstances they should both, rather than neither, be entitled to be treated as in priority need. It would be a surprising legislative objective, it is submitted, if the goodwill of a family member who lived with the applicant should disqualify both the family member and the applicant. On the other side of the same coin is the prospect that a family member providing support can avoid the unwelcome consequence of his support for the qualifying applicant by a cynical refusal to continue to give it. The legislative context, Mr Brown submits, points towards a narrow assessment of the applicant's vulnerability without reference to means of support within the applicant's household. Paragraph (c) requires no wider analysis of the consequences of the qualifying illness, handicap or disability than its effect upon the applicant personally.

22. Mr Brown points out that there were repeated references by the Court in *Pereira* to the ability of the applicant "to fend for himself". It is submitted that the court had in mind only the ability of the individual, unassisted by persons in the same household, to fend for *himself*, not some collective ability. Mr Brown suggested that the judge failed to confront this aspect of the court's conclusion in *Pereira.*

23. Thirdly, it is contended that the judge erred in treating *Osmani* as any support for the proposition that assistance from a member of the same household was relevant. The court in *Osmani* adopted the *Pereira* test which involved no such consideration. The Court was not confronted with the specific issue now raised. In his written argument Mr Brown submitted that the court's reference in *Osmani* to the support given by Mr Osmani's wife was not directed to assistance which would be given to Mr Osmani for the purpose of alleviating the consequences of homelessness, but to monitoring his depression so as to ensure that he received the necessary treatment for it. It was the impact of depression upon Mr Osmani's ability to cope on which the Court was focusing its attention. In oral argument Mr Brown acknowledged that the lack of

particulars given in the judgment as to the nature of the support provided by Mrs Osmani meant that on one construction the Court's reasoning in *Osmani* was against him.

24. Fourthly, the appellant submits that the Secretary of State's Code of Guidance cannot provide assistance as to the correct interpretation of section 189(1)(c). The question whether circumstances extraneous to the appellant's qualifying condition are relevant to whether he would be "vulnerable" if homeless is a matter of law.

**Respondent's submissions**

25. Mr Rutledge QC identified the legislative history. Section 21(1)(b) National Assistance Act 1948 gave the power to social services authorities to provide:

> "… temporary accommodation for persons who are in urgent need thereof, being need arising in circumstances which could not reasonably have been foreseen or in such other circumstances as the authority may in any particular case determine."

In a joint circular from the Departments of the Environment, and Health and Social Security issued on 7 February 1974, the Government declared its objective of shifting the responsibility for providing temporary accommodation to the homeless from social services to housing authorities, where the burden properly lay under powers bestowed in Part V of the Housing Act 1957, save in the case of sudden large scale emergencies beyond the resources of the housing authority.

26. At paragraphs 8-12 the circular identified those who it was proposed should form the priority groups in this shift of responsibility:

> "PRIORITY GROUPS
>
> 8. Homelessness is almost always the extreme form of housing need. The Government believes that all those who have no roof, or who appear likely to lose their shelter within a month, should be helped to secure accommodation by advice, preventative action or, if these are not enough, the provision permanently or temporarily, of local authority accommodation.
>
> 9. It should be possible to extend some form of help to all who are homeless, whether families with children, adult families or people living alone. In areas where the housing situation is particularly difficult, however, it will not be possible to help all to the same extent and first claim on the resources available must be given to the most vulnerable, referred to in this circular as "Priority Groups".
>
> 10. The **Priority Groups** comprise families with dependent children living with them, or in care; and adult families or people living alone who either become homeless in an emergency such as

> fire or flooding or are vulnerable because of old age, disability, pregnancy or other special reasons.
>
> 11. For these Priority Groups the issue is not whether, but by what means, local authorities should provide accommodation themselves or help those concerned to obtain accommodation in the private sector. Authorities will not wish to add the stress of uncertainty to the other stresses of those facing homelessness; and where a family or someone else in a priority group seems certain – despite their own efforts and those of the council – to lose their roof, the authorities should accept an obligation at least 7 days before the event and should tell the applicants that they will, in fact, secure accommodation for them.
>
> 12. Where a family has children there is no acceptable alternative to accommodation in which the family can be together as a family. The social cost, personal hardship, and long term damage to children, as well as the expense involved in receiving a child in care rules this out as an acceptable course, other than in the exceptional case where professional social worker advice is that there are compelling reasons apart from homelessness for separating children from their family; the provision of shelter from which the husband is excluded is also not acceptable unless there are sound social reasons as, for example, where a wife is seeking temporary refuge following a matrimonial dispute and it is undesirable that she should be under pressure to return home."

27. The circular did not bring about the desired result nationally and the Housing (Homeless Persons) Act 1977 was enacted. Homelessness functions were removed from social services and the obligation placed unequivocally on the housing authority. Section 2(1)(b) (although not section 2(1)(a)) of the National Assistance Act 1948 was repealed by schedule 1 to the 1977 Act. Section 2 of the 1977 Act provided:

> "(1) For the purposes of this Act a homeless person or a person threatened with homelessness has a priority need for accommodation when the housing authority are satisfied that he is within one of the following categories:
>
> (a) he has dependent children who are residing with him or who might reasonably be expected to reside with him;
>
> (b) he is homeless or threatened with homelessness as a result of any emergency such as flood, fire, or any other disaster;
>
> (c) he or any person who resides or might reasonably be expected to reside with him is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reasons.
>
> (2) For the purposes of this Act a homeless person or a person threatened with homelessness who is a pregnant woman or resides or

> might reasonably be expected to reside with a pregnant woman has a priority need for accommodation."

These provisions of the 1977 Act were subsequently consolidated into Part III of the Housing Act 1985. Section 59(1) of the 1985 Act was, as I have observed, in identical terms to the present section 189(1) of the 1996 Act.

28. It is submitted that from its inception the legislation has distinguished between the qualifying standard for families with children and pregnant women, for whom priority need is assumed, and other individuals who may qualify by reason of their vulnerability. In the latter case, the Court of Appeal resolved as long ago as 1982 that the exercise was a comparative one. In *Waveney District Council ex parte Bowers* the Court held that the test was whether the applicant was (for one or more of the statutory reasons) "less able" to fend for himself so that injury or detriment would result when a less vulnerable man (later, an average or ordinary homeless person) would be able to cope without harmful effects. It is submitted that the questions whether (1) the applicant when homeless is less able to fend for himself than the average homeless person so that (2) injury or detriment to him will befall him which would not befall the average homeless person must be answered by reference to all the applicant's circumstances. Surely, it is submitted, relevant personal circumstances must include sources of assistance available to the applicant which render him no worse off than the average homeless person. Contrary to the appellant's argument, it is contended that the reference in section 189(1) to other members of the household demonstrates that Parliament had in mind not just individual circumstances but also household circumstances. Indeed in section 185(4), when Parliament intended that an individual should be left out of account when determining priority need, it said so:

> "(4) A person from abroad who is not eligible for housing assistance shall be disregarded in determining for the purpose of this part whether another person … (b) has a priority need for accommodation."

29. It is argued that section 189(1) does not reveal a legislative policy favourable to both members of the household to the exclusion of an examination whether the qualifying applicant is vulnerable in *all* the circumstances. Section 189(1)(c) gives to a person who resides with a vulnerable person an equal right only if that other person is "vulnerable". The appellant's argument, it is contended, begs the question whether the qualifying person is vulnerable. If a person is not and would not be vulnerable by reason of the support he would receive, while street homeless, of a person with whom he is currently living, then neither has the right to be treated as having a priority need. If, on the other hand, even with that support the qualifying applicant would be vulnerable if street homeless, then both are in priority need (c.f. the speech of Lord Griffiths in *R v Tower Hamlets London Borough Council ex parte Ferdous Begum* [1993] AC 509 at page 519F-G). It is acknowledged that if a supporter chose to cease supporting the qualifying applicant the Council would have to make an assessment of vulnerability on that factual basis. But that is not an argument, it is submitted, for assessing vulnerability in fictional rather than actual circumstances. If circumstances change, a safety net is present in the form of a fresh application based upon the changed circumstances.

30. The joint circular of February 1974 demonstrates, the Council submits, the priority given to family members. Where, however, the needs of an individual who claims to be vulnerable requires evaluation, consistent with section 189 (1)(a) and (b) those needs should be assessed in the context of the household rather than the individual. The Council does not argue that the application must fail if there are members of the household *capable* of fulfilling the role of supporter; only that if a member of the household does and will perform that function, those are the among the circumstances against which the need must be assessed.

31. The Council submits that the fact of support from Mrs Osmani to her husband was treated by the court in *Osmani* as a material consideration. If, applying the *Pereira* test, the support of his wife was an immaterial consideration, the Court could be expected to have said so.

32. Mr Rutledge agrees that the Homelessness Code of Guidance is unable to assist the issue of statutory construction which arises in this appeal.

**Discussion**

33. In *Osmani* the Court held that the *Pereira* test should not be read by housing authorities as if it were a statute. It is section 189(1)(c) in its the broad and immediate statutory context that a housing authority must apply. That context was the assessment by a housing authority of the priorities to be applied in the distribution of limited public resources. The *Pereira* test is only a judicial guide, although an important judicial guide, to interpretation of the statutory provisions (*Osmani* paragraph 38(1)). The housing authority will address the statutory context of establishing priority need by examining a number of circumstances, including vulnerability (paragraph 38(3)). One only has to apply the *Pereira* test to any particular case by asking the question whether the applicant would, "by reason of whatever condition or circumstances assail him", suffer greater harm from homelessness than would an ordinary homeless person, to see what an imprecise exercise it imposes on a housing authority. Such decisions are likely to be highly judgmental (paragraph 38(4)). In the present case the circumstances were unusual. As the reviewing officer found, the appellant was young and physically fit and at a disadvantage only to the extent that he needed regular reminders to fulfil the requirements of his daily living. His brother was committed to providing the personal support necessary to ensure that the appellant would not come to any harm or suffer any disadvantage by reason of homelessness.

34. Counsel could find no previous occasion on which this Court has unequivocally addressed the question whether *all* the applicant's circumstances may be considered when making the evaluation of vulnerability, including assistance available to the applicant to avoid harm that would otherwise be caused by his qualifying condition. In *Waveney District Council ex parte Bowers* the applicant was a 59 year old man living alone at a 'night centre'. In *Wilson v Nithsdale District Council* the applicant was a single woman aged 18 with no family support. The House of Lords considered in *R v Tower Hamlets Borough Council ex parte Ferdous Begum* the situation of a 24 year old applicant without mental capacity who lived with and was cared for by members of her family. However, the issue was not whether the family circumstances could be considered but whether the housing authority was required to consider an application made by a person with no mental capacity to make a judgement. In *Kihara* all four applicants were homeless asylum seekers living alone and without support.

Mr *Pereira* was a recovering drug addict who sought housing assistance without which he claimed he was liable to relapse. At the time of his application he was living temporarily with a friend who could not provide the housing assistance he claimed he required to prevent a relapse.

35. At paragraph 40 of *Osmani* Auld LJ posed the question whether Mr Osmani's condition would deteriorate so that he would not be able to do anything about his homelessness *unaided* and/or his condition would harm him as it would not an ordinary homeless person (paragraph 19 above). HHJ Blunsdon considered that Auld LJ meant by the word "unaided", "unaided by anyone", not "unaided by the housing authority", but did not find in the use of the word "unaided" any assistance as to the materiality of support available from within the household. With respect I disagree with the judge's interpretation of the use of these words. It seems to me that Auld LJ was posing the same question as that posed by Hobhouse LJ at page 330 of *Pereira* (paragraph 17 above). The Court in *Osmani* was applying and explaining the *Pereira* test. In *Pereira* Hobhouse LJ was considering the obligation of the housing authority to provide housing assistance to a man who if homeless would be alone, and the word "unaided" in the context in which Hobhouse LJ used it referred, in my view, to the ability of the applicant to fend for himself without assistance from the housing authority. Confusingly, however, Auld LJ used the word "aided" in a different sense in paragraph 41. There he was clearly referring to the support received from Mr Osmani's wife. I agree, however, that, whatever may be the correct understanding of the word "unaided" as used at page 330 of *Pereira* and paragraph 40 of *Osmani*, it is not possible to derive an explicit finding that other means of support were or were not material to the issue of vulnerability.

36. In *Osmani* the Court does not appear to have been requested to address the specific question which arises in the present appeal. The expert evidence as to the effect of Mr Osmani's mental disorder on his ability to cope with homelessness was conflicting. It is clear from the reviewing officer's reasons (paragraph 18 above), upheld by the Court (paragraph 19 above), that the principal explanation for the reviewing officer's decision was that Mr Osmani retained his ability to function normally in his daily living and that with medical assistance and the support of his wife there was no reason to doubt that his normal functioning would survive homelessness. It seems to me that the parties and the Court treated as material to the application of the *Pereira* test the existence of support systems (medical and personal) which would have the effect of maintaining the stability of the applicant's mental health and his capacity to function normally in his daily life. Dr McNicol, by inference the applicant's GP, supported the application for homelessness assistance but, as the reviewer reasoned, Dr McNicol acknowledged the support Mr Osmani was receiving from his wife and the fact that her support would continue. I think it unlikely that the Court was confining the relevance of Mrs Osmani's support to her role as a monitor of her husband's mental health. At paragraph 19 of his judgment, Auld LJ explained why he had applied italicised emphasis to parts of the reviewing officer's reasons in his preceding paragraph (see paragraph 18 above), including the reference to Mrs Osmani's continuing support:

> "19...[T]he reviewing officer...broadly applied the *Pereira* test as she described it at the beginning of her letter, namely in the general sense as to Mr Osmani's ability to fend for himself in his daily activities, as well as to

> his ability to seek and obtain housing unaided. In addition, in passages that I have emphasised, she clearly had in mind his ability to fend for himself *if and when he became* homeless." [original emphasis]

It is plain to me that Auld LJ regarded as material to the question whether the applicant could fend for himself when homeless the fact that he received and would continue to receive the support of his wife, as acknowledged by Dr McNicol.

37. I conclude that in *Osmani* the Court and the parties treated as axiomatic the proposition that medical treatment and other support was relevant to the issue whether, by reason of his mental disorder, Mr Osmani would, by comparison with a homeless person without his disorder, be "less able to fend for himself so that injury or detriment to him will result". Since Mr Osmani was making a perversity challenge to the decision, it is my view that, had it occurred to anyone that Mrs Osmani's 'support' was irrelevant to the decision, the issue would have formed a significant part of the judgment.

38. I do not consider that the Code of Guidance can assist interpretation of section 189(1)(c); nor do I consider that any inference can be drawn from the express reference to the support of family or friends or, in one case (chapter 10.20(iv)), the support of a mentor, in the case of some categories of vulnerability but its absence in the case of others. The Code has grown incrementally and it does not seem that the authors of the 2006 Code started from scratch in order to ensure consistency of approach between different categories of vulnerability. Nonetheless, the repeated reference in the Code to the need to consider all the circumstances of an applicant who may be vulnerable seems to me to accord with commonsense.

39. I return to the statutory qualifying words "a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason" which, in my view, provide the answer to the issue of law we have to resolve. As Hobhouse LJ emphasised in *Pereira* (paragraph 16 above) these words import a requirement of cause and effect between the paragraph (c) qualifying condition (in this case mental handicap or other special reason) and a relevant vulnerability. A relevant vulnerability may include but is not limited to an inability to obtain housing unaided by the housing authority. It embraces any homelessness context in which the applicant may be less able to fend for himself so that injury or detriment may be suffered by him which would not befall the average homeless person. As the cases emphasise, the assessment process is not a purely theoretical but an intensely fact sensitive and practical one, for the purpose of identifying the priority need for allocation of resources. The decision maker will have a variety of information and opinion upon which to make the assessment. An important part of the assessment involves a judgement as to the harm or detriment which may befall the applicant *once he is made homeless*. If the effect of the evidence is that, by reason of the personal support of his brother, willingly given, the applicant will be no less able to fend for himself than would a man without a qualifying disability, the applicant will not have demonstrated that he is, for the purpose of paragraph (c), "vulnerable as a result of mental...handicap...or other special reason". I cannot accept Mr Brown's argument that section 189(1) requires an assessment to be made on a factual premise which is known to be untrue. It seems to me that all and any of the applicant's personal circumstances *may* be relevant to the statutory assessment.

40. Parliament specified the qualifying categories in section 189 and the 2002 Order. Those which require only that the primary facts are established do not involve any assessment of cause and effect, nor, therefore, any comparison between the ability of the applicant and the average homeless person to cope with the effects of homelessness. It may be that the evolution of the distinction between the two groups can be found in paragraph 10 of the joint circular of February 1974. "Priority Groups" were to comprise, on the one hand, families with dependent children or children in care and, on the other, "adult families or people living alone who either become homeless in an emergency such as fire or flooding or are vulnerable because of old age, disability, pregnancy or other special reasons". It will be noted that in section 2(2) of the 1977 Act "pregnancy" was removed from the category in which vulnerability needed to be demonstrated and was placed in the category which presumed priority need. Mental illness, handicap and physical disability were added to the category of applicants for whom vulnerability must be established. The distinction between the two groups is a consequence of Parliament's decision to create a presumption of priority need in some circumstances but not in others. The fact that for some categories no judgement of the effect of the qualifying factor upon the applicant's ability to cope with homelessness is required does not, in my view, inform the question what facts are relevant to the assessment of vulnerability in the other category.

41. I conclude that the judge was correct in law. The reviewing officer was not required to make an assessment of vulnerability in isolation from the applicant's known personal circumstances. Those personal circumstances may in any case serve to emphasise the applicant's vulnerability (for example, because he is living alone without support) or to demonstrate that, despite the existence of the qualifying reason, the applicant is not vulnerable (because he has support which so compensates him that he would be in no worse position if made homeless than the average homeless person).

42. I also agree with the judge, however, that the weight to be given to the evidence is a separate and important consideration. The reviewing officer is required to assess the vulnerability of the applicant as it will be when he is made homeless. The effect of a support network in the applicant's existing home is unlikely to be the same as the effect of a similar support network when the applicant is made homeless. Even if the reviewing officer is satisfied that the support network would remain in place it may not, in a situation of homelessness, be sufficient to enable the applicant to fend for himself as would the average homeless person. For example, the old age or mental ill health or physical disability of the applicant may be such that no amount of support will enable the applicant to cope with homelessness as would a robust and healthy homeless person. It seems to me that a fair evaluation of all the evidence is critical to the sustainability of the reviewing officer's decision. In this appeal it is no longer argued that the reviewing officer did not have material upon which to conclude that Ezatullah's continuing support of his brother was decisive. The judge was careful to point out that the question for him was not whether he would have reached the same decision but whether there was relevant evidence upon which the reviewing officer could have reached the decision he did.

## Conclusion

43. For the reasons I have given I conclude that the judge made no error of law and I would dismiss the appeal.

## Lord Justice Richards

44. I agree.

## Lord Justice Moore-Bick

45. I also agree.