Neutral Citation Number: [2014] EWCA Civ 1085

Case No: B5/2013/3615

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Lambeth County Court
Mr Recorder Matthews
3LB00797

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2014

Before :

LORD JUSTICE AIKENS
LORD JUSTICE KITCHIN
and
LORD JUSTICE UNDERHILL

- -

Between :

PATRICK KANU	**Appellant**
- and -	
THE LONDON BOROUGH OF SOUTHWARK	**Respondent**

- -
- -

Ms Catherine Rowlands (instructed by **Southwark Legal Services**) for the **Appellant**
Mr Zia Nabi (instructed by **Cambridge House Law Centre**) for the **Respondent**

Hearing date: 20 May 2014

- -

Approved Judgment

Lord Justice Underhill :

INTRODUCTION

1. This is an appeal by the London Borough of Southwark ("the Council") against a decision of Mr Recorder Matthews in the Lambeth County Court dated 22 November 2013. The Recorder quashed a decision of the Council's review officer under section 202 of the Housing Act 1996 to uphold its earlier decision that the Respondent, Mr Kanu, was not in priority need for accommodation within the meaning of section 189 (1) of the Act. The Council has been represented before us by Ms Catherine Rowlands and Mr Kanu by Mr Zia Nabi, both of whom appeared below. Their submissions were of high quality.

THE FACTS

2. Mr Kanu is aged 47. Although he is a national of Sierra Leone, he has lived in this country for many years and has indefinite leave to remain. He is married. He has a son, now aged 21, from an earlier relationship.

3. Until November 2011 Mr and Mrs Kanu were living in private rented accommodation; latterly their son was living with them too. Mr Kanu was on the Council's housing list. In 2009 he applied for "medical priority" which would entitle him to be placed in a higher band on the list. In June 2011 he made an application for accommodation on the basis that he was homeless, but this was refused on the basis that he was not (at that stage) homeless. In connection with those applications he completed a medical assessment form giving details of various medical conditions from which he was suffering. He also submitted letters from his medical notes, emanating both from the GP practice with which he was registered and from various hospitals. These revealed, in summary, that he suffered from hepatitis B (though this was chronic and not causing any acute symptoms); back pain as a result of previous surgery, which affected his mobility; high blood pressure; and haemorrhoids. The Council's internal Medical Assessment Service reported that he should be accorded medical priority and be placed in band 3. The assessment dated 1 July 2011 includes the observation that:

> "The information already with our service and the information provided by the applicant result in this chap being at greater risk than many if street homeless. This assessment has been carried out on the assumption the applicant is homeless."

This assessment did not, however, result in a property being offered to him.

4. In September 2011 Mr Kanu was given notice to quit, and on 12 October the County Court issued an eviction notice effective on 11 November. The landlord was entitled to possession not because of any default on the part of Mr Kanu but because he required the property for redevelopment. On 3 November Mr Kanu re-applied to the Council's Housing Department on the basis that he was threatened with homelessness and was in priority need. He completed a housing needs assessment form. Following his eviction he was placed in temporary accommodation in a hostel pending a decision by the Council on his homelessness status; and that remains the position.

5. Mr Kanu was interviewed on 7 December 2011 by an Assessment Officer. His wife was interviewed the following day. The interviews, of which notes were made, covered various aspects of his ability to cope if made homeless.

6. In his interview Mr Kanu referred to the medical problems of which the Council already had details from his earlier application. He also, however, referred to the fact that he had a mental disorder, involving suicidal feelings, for which he was receiving outpatient hospital treatment including medication. He submitted a further medical assessment form. On 28 December the medical assessment service provided a further recommendation addressing specifically Mr Kanu's mental health. It referred to the form which he had submitted together with a small number of reports/letters. The assessment is poorly written and set out, but in answer to the question "what impact does the medical issue have on the applicant's ability to carry out tasks of daily living ?" it says:

> "This chap has a clear direct reaction to the stated hallucinations which result in harm to self (this could lead to harm to others). This action would greatly inhibit his ability to care for self in conducting his day-to-day activities."

There is a note a little further down that "this assessment has been carried out on the assumption the applicant is homeless". The recommendation is for "medical priority to the level of band three", which "would increase to band two if HP [that is, housing priority] was issued".

7. By letter dated 9 January 2012 Mr Kanu was notified that the Council had decided that he was homeless within the meaning of Part VII of the 1996 Act but that he was not in priority need within the meaning of section 189 of the Act. The letter is lengthy and I need not set it out here. In short, it acknowledged the various health conditions from which Mr Kanu was suffering, but it said that these were well-controlled by medication and that the evidence, including the interview evidence, showed that, with the help of his wife and son where necessary, he was able to cope with day-to-day living and would be able to fend for himself as well as an ordinary homeless person: accordingly he was not viewed as vulnerable within the meaning of section 189 (1) (c).

8. By letter dated 20 January 2012 the Law Centre acting for Mr Kanu wrote to the Council requesting a review pursuant to section 202 of the 1996 Act. Representations in support of the application were made by letter dated 23 March. These referred to the views expressed by the Medical Assessment Service and to continuing medical evidence that he was suffering psychotic symptoms.

9. The Council's Review Officer replied on 3 April 2012 with an eleven-page "minded to" letter setting out the basis on which it had reached its earlier conclusion and inviting representations in response by 16 April. Although there was an extensive review of the medical materials the principal point made by the Officer was that Mr Kanu's wife and son constituted "a stable support network that will stay with him and advocate on his behalf if he is faced with street homelessness". The Law Centre replied briefly to the minded to letter, complaining of what it said was an irrational approach to the medical evidence, but it did not address the Review Officer's point about Mr Kanu's support network.

10. By letter dated 17 April 2012 the Review Officer upheld the original decision for essentially the reasons given in the minded to letter.

11. Mr Kanu appealed against that decision pursuant to section 204 of the Act. On 7 November 2012 HH Judge Blunsdon in the Lambeth County Court quashed the Review Officer's decision. I need not set out here his reasons for doing so, save to note that one of them was that she failed to make any reference in her decision letter to the public sector equality duty to which the Council was subject by virtue of section 149 of the Equality Act 2010.

12. The Council was accordingly obliged to repeat the review process. The same Review Officer undertook the review. There was a further lengthy "minded to" letter, dated 18 February 2013, which again expressed the provisional view that Mr Kanu was not in priority need: it broadly corresponds to the eventual final decision. The Law Centre responded on 25 February, though not at great length. It repeated the essential case that Mr Kanu was vulnerable because of both mental and his physical ill-health. It said that "Mr Kanu does not have an effective support system: if he had he would have been able to find accommodation". It complained that the reference now made to the public sector equality duty was inadequate. Some further documents relating to Mr Kanu's health were enclosed.

13. For the purpose of the further Review the Officer had available to her various materials post-dating her earlier assessment. These included two reports, one dated 5 June 2012 from Dr Isaac, a consultant psychiatrist instructed by the Law Centre, and the other dated 18 June 2012 from another consultant psychiatrist, Dr Pearson, to whom Mr Kanu had been referred by his GP, together with further correspondence from the GP. I should set out the key passages from the two consultants' reports.

14. The concluding section of Dr Isaac's report reads as follows:

> "**Diagnosis**
>
> 52. Diagnosis is far from straightforward here.
>
> 53. The most obvious diagnosis is of major depression with psychotic features. However, there are inconsistencies in Mr Kanu's account and I cannot escape the impression that he exaggerates his symptoms.
>
> 54. Nevertheless, psychiatric symptoms can neither be refuted nor confirmed objectively. There are no blood tests or brain scans, for example, which allow a diagnosis to be made.
>
> 55. I could not find that the psychotic symptoms, chiefly of auditory hallucinations and, in an isolated sense, visual hallucinations ("birds"), formed part of a systemised psychotic state, though they appear to be mood congruent and occur in the context of suicidal ideation.
>
> 56. I could not find evidence that Mr Kanu has taken these thoughts of self-harm any further or acted on them. There is no

> evidence that he has done so (apart from the episode when he said he swallowed washing up liquid, which I found otherwise unreported in the papers I received) and he is said to have expressed such worrying ideas consistently for at least a year.
>
> 57. There are inconsistencies in his account and he sometimes contradicts himself during the same interview. This does not necessarily mean conscious exaggeration, but I observe these symptoms appear worse when there is a crisis in his housing. Again, this does not imply conscious exaggeration. The threatened loss of accommodation would be worrying for anyone, especially if they had family responsibilities.
>
> **Vulnerability**
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> 58. Although I do not think it is entirely straightforward, I think on balance Mr Kanu is vulnerable within the test meaning of Pereira's case, in that I think he is less able than an ordinary homeless person to survive if street homeless.
>
> 59. I think this is true on psychiatric grounds – it is arguably also true on the grounds of his physical health, especially the liver disease and high blood pressure.
>
> 60. I know very little about Mr Kanu's wife and son, except that they are reportedly in good health. I do not know how this affects the Council's decision making; but if Mr Kanu is taken in isolation, I think he is, on balance, vulnerable.
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> **Treatment**
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> 61. I think treatment with an antidepressant is reasonable. Among antidepressants, SERTRALINE is one that can be helpful where there are psychotic features. However, many psychiatrists would also consider adding an antipsychotic drug in combination.
>
> 62. Medication generally, and combinations in particular, should be used cautiously in people with liver disease.
>
> 63. Perhaps this is another argument in favour of Mr Kanu's vulnerability, namely that his treatment is likely to be complex and difficult to deliver properly in conditions where his accommodation is unstable."

15. As for Dr Pearson's letter, it starts by setting out his formal diagnosis, which is "possible psychotic depression" and his current medication. It then proceeds to give a history, noting that colleagues who had seen Mr Kanu previously "had been concerned about the difference in his presentation and some inconsistency in his account". The final two paragraphs read as follows:

> "He does give an unusual history. There has been some concern that his symptoms might be related to his wish to gain support for his accommodation. However his complaints of auditory hallucinations to kill himself has been rather consistent, including the issue of him saying people are poisoning his food. I thought there was sufficient evidence of possible psychotic depression to give him a trial of psychotic medication. I therefore started him on Risperidone 1mg at night, increasing to 2mg after 3 days. I gave him a total of 17 tablets. I will review him again in 2 weeks' time. I advised him about possible side effects. I advised his wife to contact us if she notices any deterioration, and I will ask Olufemi (CPN) [the community psychiatric nurse] to contact them in a week's time to check their progress.

THE BACKGROUND LAW

16. Section 193 of the 1996 Act provides – taking sub-sections (1) and (2) together – that where a local housing authority is satisfied that an applicant "is homeless, eligible for assistance and has a priority need", and is not satisfied that he became homeless intentionally, it shall (subject to an immaterial exception) secure that accommodation is available for his occupation. "Priority need" is defined in section 189 of the Act. Sub-section (1) reads, so far as material, as follows:

> "The following have a priority need for accommodation –
>
> (a) – (b) …
>
> (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) …"

17. In *R v Camden London Borough Council, ex p. Pereira* (1998) 31 HLR 317 this Court held that the essential question posed by section 189 (1) (c) is whether the applicant:

> "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 man would be able to cope without harmful effects"

(see *per* Hobhouse LJ at p. 330). This is the so-called "*Pereira* test".

18. We were referred to a number of subsequent cases in which the *Pereira* test is discussed and applied, notably *Osmani v Camden London Borough Council* [2004] EWCA Civ 1706, [2005] HLR 22, which contains a very full and helpful analysis by Auld LJ at para. 38 (pp. 338-342), but for present purposes it is unnecessary to refer specifically to them.

19. The only other decision to which I need refer at this stage is *Hotak v Southwark London Borough Council* [2013] EWCA Civ 515, [2013] PTSR 1338.[1] In that case the council had found that a young asylum-seeker who would otherwise probably have fallen to be treated as vulnerable within the meaning of section 189 (1) (c), was not to be so treated because of the help and support which he was receiving from his elder brother. This Court upheld the decision of the County Court that that conclusion was open to the council. Pitchford LJ held that the relevant enquiry was "intensely fact-sensitive and practical", and that if the effect of the evidence was that the applicant would in practice be able to cope if street homeless it was immaterial that that was because of the support received from his brother: see paras. 39-41 (pp. 1355-6). However, he went on to emphasise that it could not be assumed that a support network which was available while the applicant remained housed would be available, or would be effective to prevent him being vulnerable, when he became homeless. At para. 42 (p. 1356) he said

> "... 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."

Notwithstanding that cautionary note it was held that the council had been entitled to reach the decision that it did on the evidence in the case.

20. It will be necessary in due course to consider also the provisions of section 149 of the Equality Act 2010, but it will be more convenient to set out its terms at that point.

THE DECISION OF THE REVIEW OFFICER

21. The Review Officer's decision letter is dated 21 March 2013. At para. 28 of his judgment the Recorder made some trenchant criticisms of the drafting of the letter. It is very long, running to some 15 pages in single-spaced type, and there is a good deal of repetition. Also, the structure is not well signposted, so that, in the Recorder's phrase, there is "little sense of direction". He infers that the document started with some kind of standard template onto which various case-specific passages have been somewhat artlessly bolted. He says that these failings are suggestive of haste and a "box-ticking" approach by the Officer rather than the proper exercise of a quasi-judicial function.

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[1] Permission to appeal to the Supreme Court has been given in *Hotak*. Mr Kanu applied prior to the hearing for it to be adjourned on that account; but the application was refused.

22. The Recorder's criticisms of the form of the decision letter are in my view to some extent justified. In particular, the lack of an articulated structure makes it difficult to see how the various points being made, often more than once but in slightly different terms, are meant to fit together. But I do not agree that in themselves they justify any adverse conclusion about the way in which the Review Officer approached her task. The Review Officer is not a lawyer and drafting of reasons of this kind is not an easy skill. Ms Rowlands reminded us of the guidance of Lord Neuberger in *Holmes-Moorhouse v London Borough of Richmond Upon Thames*, [2009] UKHL 7, [2009] 1WLR 413 to the effect that a benevolent approach should be taken to the interpretation of review decisions: see paras. 47-50 (p. 428). I dare say that the Officer did indeed start with some kind of standard template, but that is not necessarily a bad thing. It can be helpful to be guided into addressing the right questions in the right order, and with reference to the right statutory provisions and case-law, especially when any misdirection or omission is liable to be pounced on by an applicant's lawyers. (I suspect that that is also part of the reason for the length of the decision.) The main risk of using a standard template is indeed, as the Recorder says, that decision-making can slip into box-ticking. But I do not see any real evidence that that occurred here. The great majority of the 76 paragraphs in the letter are specific to the facts of Mr Kanu's case, and they show clear evidence of thought being applied to those facts and their implications.

23. Although for those reasons I would not endorse all the Recorder's criticisms of the decision letter, its diffuseness does make it less easy than it should be to summarise the reasoning succinctly. The following, however, should suffice.

24. Paras. 1-4 are essentially formal. Paras. 5-30 purport to record, without any discussion or analysis, the medical evidence available to the Review Officer. Paras. 5-23 set out the materials available prior to the first decision. Paras. 24 and 25 set out by way of summary various points from the reports of Dr Isaac and Dr Pearson: there is no suggestion that the summaries were not fair. Paras. 26-30 summarise further communications from and between the doctors treating Mr Kanu between July 2012 and February 2013.

25. Para. 31 refers to the facts that Mr Kanu was in receipt of Disability Living Allowance and Employment Support Allowance. Para. 32 sets out a number of points from the interviews with Mr Kanu on 7 December 2011 and with Mr and Mrs Kanu on 8 December. These include that "Mr Kanu can perform most tasks unassisted … [though] … when he was having a mental health episode he would need support"; that he was able to attend appointments and pay bills for himself, though sometimes his wife accompanied him; that he and his wife used public transport, travelling mostly by bus; and that his son "had moved in to provide additional support".

26. Paras. 33-36 appear to be preparatory to the Officer's consideration of the material summarised in the previous paragraphs. The categories of priority need from section 189 (1) are reproduced in full. Para. 36 summarises "the *Pereira* test" in unexceptionable terms.

27. Para. 37-40 are central to the Review Officer's decision, and I should set them out in full:

"37. Applying the above test and taking into account the information on file, this Authority is of the view that if Mr Kanu was a single applicant, his medical conditions could well lead this Authority to conclude that he might be vulnerable under the provisions of the Act. Though we have considered the "Pereira test" as if Mr Kanu was a single applicant, we have also considered the totality of factors involved in this case under the provisions of the above Act, including your client's household composition.

38. We have taken into account the fact that your client is a 46 year-old man who suffers from mental health problems with psychosis features and thoughts of suicidal ideation, Hepatitis B, back problems, high blood pressure and haemorrhoids. In addition we have considered that these conditions may render your client vulnerable under the provisions of the above legislation. However we have also noted that your client has a wife and adult son included on his homelessness application who form members of his household and it has been confirmed during interviews with your client and his wife that he relies upon both his wife and son to provide him with assistance needed for him to perform the tasks of daily living which he us unable to perform himself. Mr Kanu's wife and son are in good health and are not considered to be vulnerable under the provisions of the above Act.

39. From the information available and which has been confirmed by your client's medical advocates and Support Worker from Foundation 66[2], we are satisfied that your client's wife and son possess sufficient health and capability to perform daily tasks and find and keep accommodation for the household. We are also not satisfied that if your client's household was faced with street homelessness they would be at risk of injury or detriment greater than another ordinary street homeless person due to Mr Kanu's wife and son's ability to fend for the whole household, including your client.

40. The Council acknowledges that the legislation provides for those who are deemed vulnerable in accordance with the Pereira test. However we do not believe it to be a true construction of section 189 of the above Act that an authority is required to make provisions for households who are comprised of or include adults in reasonable physical health."

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[2] Foundation 66 is a charity which had been assisting Mr Kanu.

Para. 37 is no doubt cautiously worded. Nevertheless the overall effect of these paragraphs taken together is that the Officer's essential reason for deciding that Mr Kanu did not fall within the terms of section 189 (1) (c) was that, notwithstanding that his health problems (mental and physical) might well render him vulnerable if he were on his own, his wife and son could "fend for the whole household". (This reasoning of course is similar to that on which the Council succeeded in *Hotak*. At the date of the Review Officer's decision that case had not yet been decided in this Court; but the Council's approach had already been upheld in the County Court.)

28. That conclusion, if sustainable, is decisive of the entire issue of priority need. However, the Review Officer goes on to consider a number of matters in considerable detail. How they are meant to fit in with the conclusion already reached is not spelt out: broadly, however, they seem to be intended to address points of detail underpinning the conclusion already reached. Nothing turns on the particular points addressed at paras. 41-44, though I note that para. 44 concludes:

> "We are therefore not satisfied that Mr Kanu would be at greater risk than the norm if street homeless as he has a stable support network that will stay with him if he was faced with street homelessness. Mr Kanu also benefits from the additional support of the assistance provided by Foundation 66."

29. Paras. 45-61 are, broadly, concerned with Mr Kanu's medical conditions. They are discursive and somewhat repetitive, and occasionally slip into reference to other topics; but the essential conclusion is that he has been able to cope with his problems while in hostel accommodation and that the evidence did not establish that he would be less likely to do so if street homeless: again, reference is made to support of his wife. I will return to certain particular passages in due course; but I should note one point at this stage. The Officer expressly acknowledges, at para. 57, that her conclusion that the medical evidence does not establish that Mr Kanu is vulnerable is contrary to the view of the Council's own Medical Assessment Service. But she had in the previous paragraph referred to an observation by Auld LJ in *Osmani* that, while authorities should pay close regard to medical evidence, the issue of vulnerability had to be taken by them and not by the doctors; and she continues:

> "… [W]e have made a composite assessment of all your client's medical and other circumstances and we have reached our own decision on the issue of his vulnerability. This Authority does not dispute any of the medical diagnoses given by the medical professionals involved in providing information in support of this case. However our role is to interpret the findings of those who have provided medical information and offer their professional opinion in a housing context."

30. Para. 62 is a summary paragraph essentially repeating the Officer's conclusion with specific reference to the decision of this Court in *Osmani*.

31. Paras. 63-65 are not material for present purposes.

32. Paras. 66-70 refer to the public sector equality duty: it will be recalled that the Review Officer's failure to do so in her original review was one of the reasons why Mr Kanu's first appeal to the County Court succeeded. They read as follows:

> "66. Moreover we have considered the Disability and Equality Act 2010 [*sic*] and the extent to which it applies to this case. We accept that your client suffers from the medical problems and circumstances referred to in the above paragraphs.
>
> 67. As a result we are therefore of the view that Mr Kanu may have the protected characteristic of disability as set out in the aforementioned Act. We have had due regard to how we can eliminate discrimination and advance equality of opportunity between your client, as an applicant with a protected characteristic and those who do not share it.
>
> 68. We have made enquiries into Mr Kanu's medical conditions and we have carefully considered whether these have in any way caused or contributed to his homelessness. We are however satisfied that your client's medical conditions did not cause or contribute to the circumstance which led to his current situation of homelessness.
>
> 69. In addition we have carefully considered whether your client's medical and personal problems have in any way rendered him vulnerable under the provisions of the Act. We are however satisfied that your client's medical/social conditions do not render him vulnerable and that we have assessed her [*sic*] fairly.
>
> 70. The public sector equality duty informs the decision making process; however it does not override it. Therefore after completing our enquiries, we are satisfied that your client is not in priority need."

33. Paras. 71-76 re-state the Officer's conclusion that Mr Kanu is not in priority need and set out various consequential matters.

THE DECISION OF THE RECORDER

34. The Recorder found that the decision of the Reviews Officer was defective in four respects set out at para. 31 of his judgment. I summarise them as follows.

(1) At para. 31 (1) he said that "in circumstances where the Respondent's own medical advisers reached the view that the Appellant was vulnerable … [it] needed cogent evidence to justify its view that [he] was not vulnerable". He said that the only such evidence was he had a wife and son in the same household who could fend for them all. He continued:

> "The problem is that the reviewing officer appears to have assumed that, once there was evidence of such other members of the household, there was no longer a need to evaluate the situation. But this is not so. It is to ignore the statement of the Court of Appeal in *Hotak* (at [42]) that "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". There is nothing in the review letter to show that any such evaluation has taken place."

(2) At para. 31 (2) he held that there was no evidence to support the conclusion of the Review Officer that Mr Kanu would continue to be able to access adequate and suitable medical treatment when street homeless.

(3) At para. 31 (3) he held that the Review Officer had failed to take into account what he believed was evidence that Mr Kanu's condition "had worsened in certain respects", partly in response to the threat of eviction: he referred specifically to a letter from his GP dated 6 February 2012.

(4) At para. 31 (4) he held that the references made at paras. 66 and 67 of the decision letter to the public sector equality duty were so perfunctory that it was impossible to believe that the Review Officer had paid any real attention to it.

35. The Recorder rejected contentions by Mr Nabi that the Review Officer's decision was (save as regards the public sector equality duty) inadequately reasoned (para. 31 (5)) or irrational (para. 31 (6)), observing, as regards irrationality, that that was a "high hurdle to overcome". He did, however, find that the four defects which he had identified were sufficient to render the decision "generally unfair". Consistently with his refusal to find irrationality, he declined himself to make a finding that Mr Kanu was vulnerable within the meaning of the Act because "what has … gone wrong here is procedural": accordingly he quashed the decision and required it to be taken again (para. 34).

36. It is convenient to note at this point that the Recorder was also critical of three other passages in the Review Officer's letter, including para. 40 which I have reproduced at para. 27 above. He made it clear, however, that he did not take those criticisms into account in reaching his decision. I would certainly agree that the last sentence of para. 40 is too broadly expressed; but in context it is clear enough what point the Officer was making, and the Recorder was right not to treat it as a material misdirection. Mr Nabi sought to make something of this in his oral submissions but in truth it demonstrates no more than loose language.

THE ISSUES ON THIS APPEAL

37. The Council pleads five grounds of appeal. The first four are directed respectively to each of the Recorder's criticisms of the Reviews Officer's reasoning. The fifth is a contention that the Recorder took an unduly nit-picking approach to the reasons, but Ms Rowlands sensibly accepted that that was not in fact a separate point from the first four. There is no Respondent's Notice: that means that Mr Nabi does not contend that the decision was irrational or inadequately reasoned apart from the particular points

on which he succeeded before the Recorder. I take the Council's four substantive grounds in turn.

GROUND 1

38. It is sufficiently clear that if Mr Kanu had been on his own the Council would have accepted that the medical evidence would have required it to treat him as vulnerable within the meaning of the Act. As Mr Nabi emphasised, that had been the view of the Council's own Medical Assessment Service; and the Review Officer in substance accepted as much in the passage from her letter which I set out and discuss at para. 27 above. The crucial question is thus whether she was entitled to find that the support which he would receive from his wife and son would counter-act that vulnerability. It is established by *Hotak* that such a conclusion was available to the Review Officer in principle; but, as we have seen, the Recorder's criticism, supported by Mr Nabi, is that the Officer did not carry out the kind of fair evaluation of the post-homelessness realities which Pitchford LJ made clear was necessary if such an argument was to succeed.

39. The Recorder does not in fact specify the particular aspects of the inquiry on which the necessary evaluation was lacking or unfair. There seems to have been no suggestion that the support of Mr Kanu's wife and son would be lost if he became street homeless: rather, the element that needed to be evaluated was the risk that that support would in those circumstances be ineffective to prevent the vulnerability which he would otherwise suffer.

40. It plainly cannot be said that the Review Officer failed to evaluate that risk at all. On the contrary, at several points in her letter she makes specific findings, for which she gives reasons, about how the support of Mr Kanu's family members will operate to reduce the impact of the problems caused by his ill-health. For example, at para. 46 she says:

> "… we are satisfied that the management of his affairs would be possible if he was street homeless, especially in light of the fact he is assisted by his household members to perform tasks, such as taking medication, attending appointments, lifting heavy loads, performing self care, performing the tasks of daily living that he is unable to perform himself etc."

In the previous paragraph, to which we were particularly referred by Ms Rowlands, she had made the point that Mr Kanu had managed to maintain continuity of medical treatment during several recent vicissitudes in his life. At para. 48, in connection specifically with the risk of suicide, she said:

> "… [I]t is the case that your client has sought medical assistance and has demonstrated an ability to cope when he was previously threatened with homelessness. It has also been confirmed that your client's wife has prevented him from self harming. We consider that as your client's wife has already demonstrated an ability to prevent him from self-harming over a sustained period and through crisis situations, she could continue to do so even if the household were street homeless."

At para. 55, in connection with his hepatitis, she said:

> "[Your client's medical advocates][3] have prescribed your client medication and medical treatments as they see fit and the information available show that your client with assistance from his family has been compliant with his treatments and we are satisfied that he could continue to do so if street homeless."

There are other passages to the same effect.

41. What we are thus left with is the Recorder's finding that that evaluation is "unfair". It is important to bear in mind that that is not a finding that it was irrational or unreasoned: see para. 35 above. The nature of the unfairness is not spelt out, but Mr Nabi's essential submission before us was that it was unfair of the Council to make any decision without going back to the Medical Assessment Service, or any doctor, to ask whether the support of Mr Kanu's wife and son would be sufficient to eliminate the vulnerability which they had previously found that he would suffer.

42. I do not accept that the Review Officer was obliged to take that step. Even where the cause of the putative vulnerability in a given case is a medical condition, the question whether the sufferer will as a result of that condition be less able to cope with homelessness than "the ordinary homeless person" is not necessarily a purely medical question. It will depend on the nature of the condition and the problems to which it gives rise. In this case the Review Officer had ample evidence about Mr Kanu's various physical illnesses, and it seems that the problems in relation to them which he was liable to encounter if made street homeless would be mainly to do with keeping appointments and taking medication. There was no need for a further referral to enable the Office to form a fair view about the effectiveness of his family support in this regard. The real focus, however, was on his mental health, which had been the subject of the more recent evidence and of the Law Centre's representations. As to this, the Officer had a good deal of evidence, notably from the two consultants but supplemented by more recent correspondence from the GP; but the question was how the condition there described (in fairly equivocal terms) would impact on his ability to cope with street homelessness, given that he would have the support of his wife and his son. That was not a question which the doctors were peculiarly qualified to answer, and indeed at para. 60 of his report Dr Isaac carefully qualified his opinion in this respect. The Officer had the benefit of the notes of two lengthy interviews with Mr and Mrs Kanu and was in my view entitled to form her own judgment. It is important not to lose sight of the fact that senior housing officers in a local authority will have a good deal of practical experience of the impact of street homelessness.

GROUND 2

43. The Review Officer made explicit findings, in more than one place, that if he were made street homeless Mr Kanu would continue to be able to access treatment for his various conditions. I take for example para. 45, which reads:

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[3] The jargon "medical advocates" appears to be used by the Officer simply to mean those involved in Mr Kanu's medical care.

> "The overwhelming evidence available confirmed that your client, with the support/assistance he receives is largely compliant with the medical treatments available for his medical conditions and that he is proactive in attending appointments for medical treatments at his GP surgery and hospital. Your client and the medical information available also confirm that he is able to access medical treatment in an emergency or as and when required without any problems. This is evidenced by the fact that Mr Kanu has been able to attend the A&E department for treatment and from the GP letters is able to seek medical assistance when he faces crisis. Additionally, we are satisfied that your client's medical conditions are being managed by his GP, CPN [community psychiatric nurse], Psychiatrist and hospital consultants. In addition, your client has been able to continue any treatment even when he was threatened with homelessness, when he became homeless, during periods when he has changed addresses and during periods when he stated that his illness was severe enough to require him to visit hospital on an emergency basis."

Paras.47-49 are to similar effect. The Officer returned to this issue at para. 61, where she listed a number of organisations which would assist him in, *inter alia*, "[making] important telephone calls which would link him to his advocates".

44. The Recorder's essential point is that the Review Officer was not entitled to make such a finding without specific evidence – apparently from doctors – of the availability of treatment. Mr Nabi reinforces that submission by reference to Dr Isaac's statement that treatment was likely to be difficult to deliver properly in conditions where Mr Kanu's accommodation is unstable (see para. 63 of his report). He submits that the accessibility of medical treatment is (at least partly) a medical question, and the Officer had effectively introduced "[her] own medical input": he referred to *Shala v Birmingham City Council* [2007] EWCA Civ 624, [2008] HLR 8.

45. I do not believe that the Recorder's criticism is well-founded. Mr Kanu had settled access to medical treatment through his GP and the hospital doctors to whom he was referred; and he also, as the Review Officer observed, had support through Foundation 66. It is unnecessary to adduce medical evidence for the proposition that a person registered with a GP does not automatically lose his right to treatment if he becomes homeless. There may indeed be practical difficulties, particularly about communication and (perhaps) transport, but the impact of those difficulties is a matter for the factual assessment of the Council. The Officer paid them specific attention and reached a conclusion that was open to her. If there were particular reasons why this would not be possible in Mr Kanu's case it was for him to raise them. Ms Rowlands pointed out that he had the opportunity to do so in his response to the minded to letter, but he did not. I should add that the Officer at para. 55 of her letter expressly addressed Dr Isaac's point about possible difficulties in treating Mr Kanu if he did not have stable accommodation but said that that was not decisive in view of his actual experience in accessing treatment in the past.

GROUND 3

46. The Recorder's criticism is that the Review Officer failed to take into account evidence of a deterioration in Mr Kanu's condition contained in his GP's letter of 6 February 2012. That letter is addressed "to whom it may concern", and reads as follows:

> "Problems:
>
> 1. Severe High Blood Pressure exacerbated by stress
>
> 2. Suicidal Ideation
>
> As it would appear Mr Kanu is currently quite stressed by the prospect of eviction from his accommodation, his blood pressure has risen to quite dangerous levels warranting change of management plan and close monitoring. He is undergoing regular close surveillance for his mental health problem by our CPN. Favourable consideration and assistance with his accommodation is likely to have a positive impact on his current health status."

47. This letter does not of course demonstrate any recent deterioration in Mr Kanu's condition as the time of the second review decision. It in fact pre-dates the first decision, and I note in passing that it does not appear to have been relied on in the first appeal to the County Court. It also pre-dates the reports of the two consultant psychiatrists on which Mr Kanu principally relied. The Review Officer did clearly take those into account, and it is surprising to find her being criticised for failing to attach weight to an earlier and less authoritative letter.

48. Nevertheless I will address the criticism in its own terms. If the suggestion is that the Officer overlooked the letter of 6 February 2012 altogether, that is incorrect, since she referred to it at para. 21 of her decision letter, as part of her summary of the medical evidence. But it is true that she made no further reference to it and did not conclude that it showed a significant deterioration in Mr Kanu's health which was relevant to his vulnerability. But I can see no reason why she should have done so. The letter says that Mr Kanu's blood pressure has been raised to dangerous levels, apparently in response to the stress of his impending eviction (though I should note that he had a long history of hypertension); that he had continuing mental health problems; and that assistance with his accommodation would have a positive impact on his health. As Ms Rowlands observed, the latter point could be made in almost any case of threatened homelessness. Homelessness is stressful, and stress is liable to have an adverse effect on a wide range of health conditions; but the risk of such an adverse effect does not in itself mean that a person threatened with homelessness is vulnerable. Rather, the question for the Review Officer was whether by reason of his health problems Mr Kanu was likely to be less well able to cope with homelessness than a normal homeless person. That brings us back to the question already considered of whether the Review Officer was entitled to find that Mr Kanu would be able if homeless to continue to access the medical care (which would include treatment for his high blood pressure) that he required; and for the reasons already given I believe that she was.

49. In his oral submissions Mr Nabi referred us a more recent letter from Mr Kanu's GP, dated 20 February 2013 and addressed to the Maudsley Hospital , which reads as follows:

> "I would be grateful if you see Patrick as soon as possible, as he has relapse of his psychotic symptoms, he says he is hearing voices telling him that his wife poisoning him, and also telling him to jump on the train, and to take over dose of medications. He also feels suicidal. He thinks the medication that he is taking at the moment not helping him much, and he is keen to try different medications to stop his suicidal ideas and psychotic symptoms."

This too was identified by the Reviews Officer in her account of the medical evidence but not otherwise specifically referred to. Since this letter was not relied on by the Recorder it may not strictly be open to Mr Nabi to rely on it before us. But in any event it does not seem to me to advance Mr Kanu's case, for essentially the reasons which I have given in relation to the earlier letter.

GROUND 4

50. Section 149 of the 2010 Act reads (so far as material) as follows:

> "*Public sector equality duty*
>
> (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.
>
> (2) …
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves 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.
>
> (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.
>
> (5)-(6) …
>
> (7) The relevant protected characteristics are—
>
> …
> disability
> …
> (8)-(9) …"

51. There is no doubt that section 149 (1) applied to the Council in the performance of its functions under sections 193 and 202 of the 1996 Act: see *Pieretti v London Borough of Enfield* [2010] EWCA Civ 1104, [2011] PTSR 565, at para. 31 (p. 577) *per* Wilson LJ[4]. As others have observed before me, the drafting of section 149 is convoluted, but its application in the present case can be analysed as follows. If Mr Kanu was disabled (that being the only protected characteristic which is potentially in play) the Review Officer was under a duty, by virtue of sub-sections (1) (b), (3) (b) and (4), to have due regard to the need to take steps to take account of his disabilities[5]. As Wilson LJ said in *Pieretti* (see para. 34 (p. 578)), that can safely be paraphrased as a duty to take due steps – that is, such steps as are appropriate in all the circumstances (see *Pieretti* at para. 33 (p. 577G)) – to take account of those disabilities. Even as compressed in that way, the duty is formulated in very general terms: both the term "due" and the phrase "take account of" reflect the fact that what the duty will require will be sensitive to the nature of the function being performed, or the decision being taken, by the authority and to the circumstances of the particular case. In *Pieretti* the question was whether the Review Officer should have taken account of the fact that the applicant was disabled in deciding whether the non-payment of rent which had led to his becoming homeless was intentional. This case is different. Here the function being performed by the Review Officer was to decide whether Mr Kanu was in priority need, and specifically whether he was vulnerable within the meaning of

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4 *Pieretti* was in fact concerned with the predecessor duty under the Disability Discrimination Act 1995, but the provisions are substantially identical.

5 Mr Nabi did not in fact specifically identify which of the heads under sub-section (3) he was invoking, but head (b) seems the best fit. But the issues before us would not be substantially different if it were head (a).

section 189 (1) (c). The question thus is what, if anything, the public sector equality duty required her to do which she did not do.

52. Ms. Rowlands' essential submission was that section 149 (1), in a case involving a disability, did not require the Review Officer to do any more than she was already required to do under the provisions of the 1996 Act itself. Section 193 (2), read with section 189 (1) (c), required the Council to treat Mr Kanu as being in priority need if he was vulnerable as a result of "mental illness or handicap or physical disability". Although that phrase does not directly track the definition of "disability" in section 6 of the 2010 Act[6], it would cover most cases falling within that definition, and it certainly does so here[7]. Thus the Council is required under the 1996 Act to treat any person who is disabled within the meaning of the 2010 Act as in priority need – and thus (subject to the questions of intentional homelessness and eligibility for assistance) to secure them accommodation – if their disability renders them vulnerable. That fully satisfies the duty to take due steps to take account of their disability.

53. In my view that submission is well-founded. I cannot see how the public sector equality duty can extend to requiring a housing authority to secure accommodation for a disabled person in circumstances where their disability did not render them vulnerable. It is true that the definition of "vulnerable" adopted in the case-law means that it is not enough to say "I am disabled and homelessness will have an adverse impact on me": he must be able to say "by reason of my disability I will be less able to cope with homelessness than a non-disabled person". But applying that test – which is the test prescribed by Parliament – does not mean that the authority is not taking due steps to take account of the disability: rather, it puts the focus where it should be, on the disadvantage which he suffers as a result of his disability.

54. Mr Nabi's submissions in support of the Judge's decision fell, in effect, under three heads, which I take in turn.

55. First, he relied on the fact that the Review Officer did not make a clear finding that Mr Kanu was disabled: she said only that he "may" have a disability (see para. 67). In the circumstances of this case I do not believe that that is objectionable. If, as I believe, the public sector equality duty adds nothing to the duty under section 193 (2), so far as the issue of priority need is concerned, it was not in fact necessary for her to consider it further at all. But, more generally, I can see no reason in principle why an authority should not in a particular case where the public sector equality duty may have an effect (say, a case of the *Pieretti* type) choose to proceed on the basis of an assumption that a person's physical or mental impairment amounts to a disability within the meaning of the 2010 Act without making a definitive finding to that effect. It is not a course that I would generally recommend, because of the risk that it may lead to the authority failing in its duty to make an informed assessment of the effect of

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6 "Disability" is not a defined term in the 1996 Act. The words which I have quoted have their origin in the homelessness provisions of the Housing Act 1985 (specifically, in section 59 (1) (c)), which pre-date the first legislation outlawing disability discrimination.

7 There are some physical conditions which are deemed to be disabilities within the meaning of the 2010 Act even where they may not produce any patent disability in the ordinary sense of the word. But I need not consider cases of that kind here.

the impairment in question. But there are cases where the issue whether a physical or, still more, a mental impairment satisfies the statutory definition is far from straightforward: it is necessary not simply to establish whether the person suffers from that impairment but also to make a judgment whether the impairment has a substantial and long-term adverse effect on his ability to carry on normal day-to-day activities (a formulation which is elaborately glossed in Schedule 1 of the Act and subject also to a good deal of case-law). In such cases it may make sense simply to give the applicant the benefit of the doubt.

56. Secondly, he submitted that the public sector equality duty supported his submission which I have already considered (see paras. 44-45 above) that the Review Officer was obliged to seek further medical evidence before concluding that the support which Mr Kanu would receive from his wife and his son would enable him to cope if he became street homeless. I do not accept that it adds anything. If the material before her entitled the Officer to reach that conclusion, as I believe that it did, it does not matter whether the relevant duty arose under section 193 of the 1996 Act or section 149 of the 2010 Act.

57. Thirdly, he repeated the Judge's criticisms of the perfunctory nature of the Review Officer's treatment of the issue under the 2010 Act. He submitted that paras. 66-70 of her letter appeared to be formulaic. They contain no reference to the specific circumstances of Mr Kanu's case. Para. 68 addresses a question – namely whether his condition had contributed to his becoming homeless – which was not in issue in his case; and the reference to having "assessed *her* fairly" in para. 69 suggested that some cutting-and-pasting had been going on. There is some force in these points. But if, as I believe, section 149 of the 2010 Act adds nothing, in the particular circumstances of this case, to the enquiry under section 189 (1) (c) there was in truth no need for the Officer to repeat the analysis which she had already performed in great detail in the preceding paragraphs.

CONCLUSION

58. For those reasons I would allow the appeal, with the result that the decision of the Review Officer stands. It is not difficult to sympathise with Mr Kanu, facing the prospect of homelessness with, on any view, real health problems (whatever the doubt as to their precise extent). But the decision whether those problems are such as to render him vulnerable was for the Council, and not the Court, to take. It has not been submitted that the Review Officer's decision that the support of his family meant that Mr Kanu would be no less able to cope than a homeless person without those problems was irrational or perverse. In those circumstances her decision must stand unless it was vitiated by some specific legal flaw or was in some way procedurally unfair. In my view none of the criticisms made by the Recorder support that conclusion.

Lord Justice Kitchin:

59. I agree.

Lord Justice Aikens:

60. I also agree.