Neutral Citation Number: [2017] EWCA Civ 1624

Case No: B5/2016/1023 & B5/2016/3856

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
RECORDER BELLAMY & RECORDER LOWE QC
B40CL365 C40CL135

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2017

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BEATSON
and
LORD JUSTICE NEWEY

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Between :

JESSE PANAYIOTOU	**Appellant**
- and -	
LONDON BOROUGH OF WALTHAM FOREST	**Respondent**

And between

	Appellant
STEVEN SMITH	
- and -	
LONDON BOROUGH OF HARINGEY	**Respondent**

Mr Martin Westgate QC & Ms Tessa Buchanan (instructed by **Edwards Duthie**) for the **Appellant**
Mr David Lintott (instructed by **London Borough of Waltham Forest Legal Services**) for the **Respondent**

Mr Toby Vanhegan & Mr Riccardo Calzavara & Mr Matthew Lee (instructed by **Morrison Spowart Solicitors**) for the **Appellant**
Mr Sean Pettit & Mr Brynmor Adams (instructed by **London Borough of Haringey Legal Services**) for the **Respondent**

Hearing dates: 9th & 10th October 2017

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Approved Judgment

Lord Justice Lewison:

Introduction

1. No one would wish to be homeless or threatened with homelessness. But for anyone who finds himself or herself in that unfortunate position, his or her situation is greatly improved if he or she is "in priority need". In such a case a local housing authority has a positive duty to secure accommodation for such a person, either temporarily or on a longer-term basis, rather than simply providing advice and assistance. So knowing whether someone has a priority need is critical. In 2015/16 57,750 households in England were accepted as being homeless and in priority need: an increase of 6 per cent on the previous year.

2. There are some categories of person who automatically qualify as having a priority need: pregnant women, or people made homeless by flood, fire or other disaster, for example. But in other cases a comparative test needs to be applied. The particular category of person with whom we are concerned is described in section 189 (1) (c) of the Housing Act 1996:

> "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."

3. For nearly 20 years housing needs officers, reviewing officers and the courts have been guided in making the assessment by *R v Camden LBC ex p Pereira* (1999) 31 HLR 317, 330 in which Hobhouse LJ expressed the test as follows:

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

4. The *Pereira* test has been given statutory force in Wales (Housing (Wales) Act 2014, section 71); but the Supreme Court considered the correctness of this test as regards England in *Hotak v Southwark LBC* [2015] UKSC 30, [2016] AC 811. They held, consistently with *Pereira*, that the test was indeed a comparative one. However, they held that the comparator was not "an ordinary homeless person" as laid down in *Pereira*, but an ordinary person if made homeless rather than an ordinary person who is actually homeless (per Lord Neuberger at [58]) or an ordinary person who is in need of accommodation (per Lord Neuberger at [59]). In addition they held that the expression "fend for [oneself]" should no longer be used, since people who are vulnerable can sometimes fend for themselves (per Lord Neuberger at [41]).

5. Instead, Lord Neuberger said at [53]:

> "Accordingly, I consider that the approach consistently adopted by the Court of Appeal that "vulnerable" in section 189(1)(c)

> connotes "significantly more vulnerable than ordinarily vulnerable" as a result of being rendered homeless, is correct."

6. Lord Neuberger did not explain what he meant by "significantly". Therein lies the problem raised by these two appeals. Does it mean any degree of comparative vulnerability which is more than trivial; or does it mean something different? If so, what?

7. Since both these appeals are second appeals, our focus must be on the original decision letters rather than the judgments in the intermediate appeal courts.

Panayiotou v Waltham Forest LBC

8. Mr Panayiotou is a young single man. He made an application for homelessness assistance to Waltham Forest in February 2015. In March 2015, Waltham Forest decided Mr Panayiotou was not in priority need. This decision was subsequently withdrawn and a new decision made in August 2015, which also held that he was not in priority need.

9. Mr Panayiotou requested reconsideration as he was entitled to do, and Waltham Forest issued a review decision on 15 October 2015. In that decision it once again decided that he was not in priority need.

10. The reviewer referred to the decision in *Hotak* as follows:

> "In deciding whether you are vulnerable in accordance with section 189 (1)(c) of the Housing Act 1996 I must ask myself whether you would experience significantly more harm than an ordinary homeless person if homeless. The test employed to assess whether or not you are deemed to be vulnerable is laid down by the Supreme Court in [*Hotak*]."

11. It is common ground that the reference to an "ordinary homeless person" as opposed to "an ordinary person if made homeless" was no more than a slip of the keyboard.

12. The reviewer noted the evidence from Mr Panyiotou's GP, to the effect that he was vulnerable as a result of his mental health issues and had been referred to a psychiatrist, as well as the evidence from the local authority's medical adviser, NowMedical, to the effect that his difficulties were not sufficient to render him vulnerable. The reviewer considered that the local authority was entitled to prefer the evidence of NowMedical over that of Mr Panayiotou's GP. The reviewer went on to note that Mr Panayiotou had no mobility problems and was able to function independently. She took into account the information that he had provided that he had no family and that he lived in fear of gangs and of his father. He had no money, regular work or family to help him. She also noted that he was not receiving treatment for his depression and anxiety; and that he could read, write and access services. She concluded:

> "Applying the vulnerability test and taking into account the information in front of me, I am satisfied that your circumstances are not such for me to conclude that you are

> vulnerable. I am not satisfied that, as a result of your condition, you would be at more risk of harm from being without accommodation than an ordinary person would be. It is also emphasized that the comparator must be with ordinary people, not ordinary homeless people."

13. She considered the original decision and although it had applied the pre-*Hotak* test, she was satisfied that it would have been the same even if the *Hotak* test had been applied. Having referred to statutory guidance she concluded once more:

> "It is for the local authority to establish whether a person who is old, mentally disordered or disabled, or physically disabled is as a result at more risk of harm from being without accommodation than an ordinary person would be. It is a fact that everyone to some extent is at risk of harm from being without accommodation and to a certain degree "vulnerable" in the dictionary sense of being susceptible to harm. For this reason, the comparison must be considered with ordinary people generally."

14. The reviewer went on to consider whether Mr Panayiotou might be "vulnerable for any 'other special reason' because of a <u>combination of factors</u> which taken alone may not necessarily lead to a decision that they are vulnerable". She said:

> "Having considered the totality of your medical problems, unsettled lifestyle singularly and as a composite and having applied all of the above facts to the question of vulnerability, I am satisfied that you do not have any illness [or] disability or special reason that taken individually or collectively would render you significantly more vulnerable than an ordinary person who is homeless as described in the test case above …
>
> I have considered that you are a 19 year old man. You said that you have recently obtained a sales job with Topshop for 8 hours a week, as you also attend College on a fulltime basis. I am aware you suffer from health issues including depression … for which you said you are now taking Fluoxetine 20mg to control the symptoms. I have taken into account that you lost your mother and brother at a very young age, leaving you in the care of your father … It is also alleged that he was abusive towards you and that you had to look after him more than he did you.
>
> Although I sympathise with your situation, I do not think that your circumstances when considered as a whole are of an unusual degree or gravity, so that they amount to an 'other special reason' to render you vulnerable …
>
> It is stated you have had little or no family support while growing up and that this was not considered in the council's decision. As I have already acknowledged your circumstances

> above, I have considered whether you are vulnerable as a result … There is no evidence to establish that you are so affected that it impedes on your ability to carry out daily tasks including communicating effectively or engaging when required with services."

15. The reviewer went on to consider the public sector equality duty ("PSED"). As mentioned, she accepted that Mr Panayiotou had a disability within the meaning of the Equality Act 2010 (namely his depression and anxiety), and said that she had considered the impact of that disability in coming to the conclusion that he was not in priority need for housing.

16. Mr Panayiotou's appeal to the county court against that decision was dismissed.

Smith v Haringey LBC

17. Mr Smith was born on 23 June 1990. He suffers from mental health problems and chronic leg pain. In the course of 2013, he was admitted to hospital on a number of occasions. He was sectioned in April 2013 because of violent behaviour and intrusive thoughts, and was subsequently diagnosed with a personality disorder. In June 2013 he was admitted to hospital following a 'drug infused episode'; and in December 2013 he had an intramedullary nailing of a tibial shaft fracture (marking the onset of his leg pain). In December 2013 he made an application to Haringey for homelessness assistance.

18. In February 2014 Haringey determined that Mr Smith was not in priority need. He requested a review, and in February 2015 a reviewer at Housing Reviews Limited (HRL), on behalf of Homes for Haringey, upheld the decision. Mr Smith appealed, and by agreement the decision was remitted for fresh consideration. The reviewer at HRL, Mr Minos Perdios, who is very experienced in these matters, had before him (among other things) Mr Smith's medical records, evidence from Mr Smith's GPs and psychiatrist, and the opinion of Haringey's psychiatric adviser, who considered that Mr Smith was not 'disabled' within the meaning of the Equality Act 2010 because "the applicant's condition has to have been present for more than one year, and has to have caused significant impairment in functioning. The applicant's clinical history suggests an intermittent pattern of impulsive behaviour rather than an enduring pattern of inability".

19. By a letter received on 15 March 2016, Mr Perdios again decided that Mr Smith was not in priority need.

20. Under the heading "Test of Vulnerability" he referred to *Hotak* and continued:

> "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, as a result of being rendered homeless, is "significantly more vulnerable than ordinarily vulnerable"."

21. He went on to quote what Lord Neuberger had said in *Hotak* at [53] and added:

> "I agree that this is the correct assessment and that the correct comparator is an ordinary person if made homeless."
>
> 3. Applying that test I must ask myself whether, as a result of being made homeless, you are significantly more vulnerable than an ordinary person. It is acknowledged that anyone who is homeless is vulnerable and that virtually everyone who is homeless suffers harm by undergoing the experience. However, I must consider whether you are significantly more vulnerable than the ordinary person if made homeless …
>
> [Mr Perdios explained that the assessment is a 'practical and contextual assessment of the applicant's situation if and when homeless', and continued:]
>
> 8 … I would like to deal with what 'more vulnerable' means. [He set out paragraphs 52 and 53 of *Hotak*, and continued:] This clearly shows that a person is not vulnerable simply because they will suffer from harm. They are vulnerable if, when homeless, they will suffer significant more harm or even more harm than an ordinary person if made homeless. It is without doubt that you will suffer harm by being homeless but I am not satisfied that this is to the extent that you will suffer from harm that means that you are significantly more vulnerable than ordinarily vulnerable. For this reason I do not consider that you [are] "vulnerable" within the meaning of Section 189 (1) (c) of the Housing Act 1996."

22. Mr Perdios went on to state that he had reached his decision "with the public sector equality duty well in mind", and that he had "focused very sharply on (i) whether [Mr Smith was] under a disability (or have another relevant protected characteristic), (ii) the extent of such disability, (iii) the likely effect of the disability, when taken together with any other features, on [Mr Smith] if and when homeless, and (iv) whether [he] as a result [was] 'vulnerable'". He went on to describe Mr Smith's conditions, and noted his GPs' evidence that they did not mean he required overnight care or assistance in carrying out day to day activities, which indicated that Mr Smith was "not a person who has a disability as defined by the Equality Act 2010".

23. In determining that Mr Smith was not 'vulnerable', Mr Perdios accepted that he had emotionally unstable personality traits and suffered from low mood, but said that this did not render him vulnerable since he did not need overnight care or any assistance with the activities of daily life, and there was no evidence of psychosis. Mr Perdios said at paragraph 15 that he was not satisfied that Mr Smith's diagnosis "has a significant impact on your ability to look after yourself and deal with being homeless." Mr Smith had:

> "sufficient capabilities/resources to ensure that you do not come to significant more harm, injury or detriment than an ordinary person if made homeless, or indeed, more harm, injury or detriment".

24. He noted Mr Smith's GP's opinion that his mental state would deteriorate if he continued to be homeless, but considered that "this would not be anything different to what I will find with an ordinary person if made homeless" – pointing to Mr Smith's

ability to engage constructively with advocates, medical practitioners and social workers, as well as the lack of evidence that he was genuinely suicidal.

25. Mr Perdios found that Mr Smith's leg injury did nothing to change the position, since there was no evidence that the level of pain was disabling, or that his ability to mobilise or manage stairs was in any way restricted. He also found that Mr Smith's history of cannabis abuse did not render him vulnerable: although it appeared to be causative of his anger management problems, he had not suffered any irreversible health issues as a result. Further, he could abstain from or reduce his drug use, and in any event his drug use had no impact on his "ability to manage [his] own affairs and deal effectively with being homeless".

26. Mr Perdios also considered Mr Smith's various issues 'taken together', and concluded:

> "43 … I am satisfied that there is nothing that significantly differentiates you from ordinary people who are homeless for the reasons given above. It does appear to me that your capabilities are not significantly compromised and you are quite capable of managing independently. Whilst I appreciate that it would be stressful being homeless nevertheless I am satisfied that you have sufficient capabilities/resources to ensure that you were not significantly more vulnerable than an ordinary person if made homeless.
>
> …
>
> 45 I appreciate that Dr Daley and/or others have stated that they consider you a vulnerable adult. Vulnerability has a very specific definition within S189 Housing Act 1996. It is for me to consider whether you are vulnerable as defined by the Supreme Court in [*Hotak*]. Given all the information available to me I do not agree that you are. It may very well be the case that you are more vulnerable than ordinarily vulnerable but I am not satisfied that you are significantly more vulnerable or even [more] vulnerable than ordinarily vulnerable.
>
> 46… I would like to highlight that the Supreme Court acknowledged that anyone who is homeless suffers harm by undergoing the experience. However, I must consider whether you are significantly more vulnerable than ordinarily vulnerable and the evidence in front of me does not lead me to conclude that this is the case. It is evident to me that you are resourceful enough to prevent yourself from being significantly more vulnerable than ordinarily vulnerable or even more vulnerable than ordinarily vulnerable."

27. Mr Smith's appeal to the county court against that decision was dismissed.

The issues

28. There is one issue of general application which is common to both appeals and raises the question I have posed above: what is the meaning of "significantly" in this context?

29. Mr Smith wishes to raise a second series of issues (some of which are also raised by other pending cases)

    i) Was Haringey precluded either (a) by the terms of section 149 of the Equality Act 2010 which imposes the PSED or (b) by the terms of its constitution from contracting out the function of conducting homelessness reviews?

    ii) If not, in conducting its procurement exercise did it fail to comply with the PSED and if so, what are the consequences?

30. In relation to this series of issues, there is a preliminary procedural issue; namely whether Mr Smith is entitled to raise these arguments at all. It is correctly said (and acknowledged by Mr Vanhegan on Mr Smith's behalf) that issues i) (b) and ii) were not raised in the county court and were not grounds of appeal against the review decision. However, Mr Vanhegan ripostes that these issues are pure questions of law and that, in any event, Mr Smith was granted unrestricted permission to appeal by Patten LJ.

31. To deal with the latter point first, the mere fact that an appellant has been granted permission to appeal on a particular ground does not preclude a respondent from successfully taking the point that the ground had not been argued below and should not be considered in appeal. As Lloyd LJ put it in *Mullarkey v Broad* [2009] EWCA Civ 2 at [29]:

> "However, the grant of permission, on which the Respondent was not heard, only shows that there were thought to be reasonable prospects of success. It does not amount to a grant of leave, binding on both parties, to rely on the new point. All it means is that the Appellant was given the right to argue in favour of this at a full hearing."

32. The good sense of this is obvious. It would be thoroughly unjust to deprive a respondent of his right to object to a new point being taken without giving him an opportunity to be heard.

Vulnerability

33. After *Hotak*, it is perhaps rather easier to say what the law is not rather than what it is. Lord Neuberger identified two flaws in the *Pereira* test:

    i) The phrase "fend for himself" was inappropriate for two reasons. First, a person may be vulnerable even though he can "fend" for himself (*Hotak* at [41]). Second, whether a person is vulnerable must be decided having regard to what support is available to him including support from family members (*Hotak* at [49]). Accordingly "for himself" may be misleading. Although it was argued that "cope without harm with homelessness" might be a better

concept than "fend for himself", that argument was rejected, because virtually everyone who is homeless suffers harm (*Hotak* at [52]). Unfortunately Lord Neuberger did not propose any alternative, although at [56] he posited the comparison between "the ordinary person if rendered homeless, and considers how the applicant would fare as against him".

ii) The comparator used in the *Pereira* test ("an ordinary homeless person") was wrong. The correct comparator is an ordinary person if made homeless (*Hotak* at [57]).

34. However, at [53] Lord Neuberger said that:

> "… the approach consistently adopted by the Court of Appeal that "vulnerable" in section 189(1)(c) connotes "significantly more vulnerable than ordinarily vulnerable" as a result of being rendered homeless, is correct."

35. Despite the fact that "significantly more vulnerable than ordinarily vulnerable" appears in inverted commas or quotation marks in Lord Neuberger's judgment it is not, so far as anyone knows, a phrase that had been previously used in any judgment of the lower courts. Yet Lord Neuberger clearly saw that phrase as expressing an approach consistently adopted by this court. One of the themes that runs through previous decisions of this court is that there must be a causal link between the particular characteristic (old age, physical disability etc) and the effect of homelessness: in other words some kind of functionality requirement. We now know that the functionality is not an ability to "fend for oneself" nor an ability "to cope with homelessness without harm". But if it is not that, what is it? The nearest that Lord Neuberger came to providing an answer was in saying that section 189 (1) (c) is concerned with:

> "an applicant's vulnerability if he is not provided with accommodation." (*Hotak* at [37])

36. Lady Hale expressed a similar view at [93]. She posed the question: what did "vulnerable" add to the group of characteristics mentioned in section 189 (1) (c)? Her answer was:

> "To answer that, one needs to know what they will be vulnerable to or at risk of harm from. The obvious answer is that they must be at risk of harm from being without accommodation: the object of the section is to identify those groups who have a priority need for accommodation. Is that enough by itself? The problem, of course, is that we are all to some extent at risk of harm from being without accommodation—women perhaps more than men, but it is easy to understand how rapidly even the strongest person is likely to decline if left without anywhere to live. So this is why a comparison must be implied. The person who is old, mentally disordered or disabled, or physically disabled, must as a result be more at risk of harm from being without accommodation than an ordinary person would be. This is what I understand

> Lord Neuberger of Abbotsbury PSC to mean by "an ordinary person if homeless". I agree."

37. This echoes another theme that has run through previous decisions of the courts. In *R v Bath City Council ex p Sangermano* (1984) 17 HLR 94 Hodgson J held that vulnerability was to be considered "loosely in housing terms or in the context of housing". In *R v Lambeth LBC ex p Carroll* (1987) 20 HLR 142 Webster J explained that as meaning "less able to fend for oneself when homeless or in finding and keeping accommodation."

38. In *Pereira* Hobhouse LJ said:

> "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 was 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."

39. Likewise in *R v Kensington & Chelsea LBC ex p Kihara* (1997) 29 HLR 147 Neill LJ (with whom Waite LJ agreed said):

> ""Vulnerable" means vulnerable in the context of a need for housing accommodation."

40. In *Osmani v Camden LBC* [2004] EWCA Civ 1706, [2005] HLR 22 Auld LJ said:

> "In its immediate context, *Pereira* established that a homeless applicant's lesser ability than that of "an ordinary homeless person" to fend for himself in finding suitable accommodation may, on its own or in combination with other circumstances, amount to vulnerability for this purpose. However, the test does not impose as the sole, or even an integral, requirement of the notion of fending for oneself that an applicant should also be less able than normal to fend for himself in finding accommodation."

41. Mr Westgate QC, for Mr Panayiotou, argued that a person's ability to find accommodation for himself was irrelevant to the question whether that person is vulnerable. The comparative exercise had to be undertaken on the basis that the applicant is homeless, not on the basis that he will be able to escape from

homelessness by finding accommodation. I agree that a person's ability to find accommodation is not relevant to the question whether he is homeless. But I do not agree that it is irrelevant to the question whether he is vulnerable. First, it is contrary to a long line of cases in this court. Second, the exercise that must be carried out is to be both practical and contextual. Since one practical way of dealing with homelessness is to find accommodation, I cannot see that it makes sense to exclude a person's future ability to find accommodation from consideration. I am not, of course, suggesting that a person should be treated as actually having accommodation when in fact he has not, but the question whether someone is (now) in priority need is assessed, at least in part, by reference to the risks of what will or may happen to him in the future. Third, the submission seems to me to be contrary to the decision in *Hotak* itself at [62] that in making the assessment the assessor must "take into account such services and support that would be available to [the applicant] if he were homeless" and at [63] that it would be "contrary to common sense ... to ignore *any* aspect of the actual or anticipated factual situation when assessing vulnerability." (Emphasis added). If the support that would be available to an applicant were to include the provision of accommodation common sense would suggest that that part of the factual situation should not be ruled out of account.

42. These explanations of the context in which vulnerability is to be assessed also fit with the statutory scheme. Take, for example, a person who has a priority need but who is intentionally homeless. In the case of such a person the housing authority's duty under section 190 (2) is to:

> "(a) secure that accommodation is available for his occupation for such period as they consider will give him a reasonable opportunity of securing accommodation for his occupation, and
>
> (b) provide him with (or secure that he is provided with) advice and assistance in any attempts he may make to secure that accommodation becomes available for his occupation."

43. The focus of these duties is to ensure that a person (even one who is vulnerable) is supported in an attempt to secure accommodation. That focus on securing accommodation is repeated in the duties owed to persons who have not become homeless intentionally but who do not have a priority need. Thus section 192 (2) imposes on a local housing authority the following duty:

> "The authority shall provide the applicant with (or secure that he is provided with) advice and assistance in any attempts he may make to secure that accommodation becomes available for his occupation."

44. It seems reasonable to conclude, therefore, that the relevant effect of the feature in question is an impairment of a person's ability to find accommodation or, if he cannot find it, to deal with the lack of it. The impairment may be an expectation that a person's physical or mental health would deteriorate; or it may be exposure to some external risk such as the risk of exploitation by others.

Significantly

45. The first question is whether we should attempt any further exegesis of what Lord Neuberger meant, and whether reviewing officers should explain what they mean by "significantly". Judges in the county court have given different answers to that question. HHJ Lamb QC (in *HB v Haringey LBC*) and HHJ Luba QC (in *Butt v Hackney LBC*) have both held that a reviewing officer must do so. By contrast Recorder Powell QC (in *Ward v Haringey LBC*) and both the judges in these two appeals have taken the view that "significantly" is an ordinary English word that needs no further explanation. That is the position taken by Mr Pettit on behalf of Haringey. He says that the word "significantly" is an ordinary English word and that it is neither necessary nor advisable to attempt to redefine it.

46. In *Hotak* Lady Hale said at [91] that glossing the words of a statute is a dangerous thing. It might be thought to be even more dangerous to gloss the words of a gloss. In his skeleton argument, prepared on Mr Smith's behalf, Mr Vanhegan referred us to *R v Golds* [2016] UKSC 61, [2016] 1 WLR 5231. The case concerned the meaning of the phrase "substantially impaired" as part of the defence of diminished responsibility. The appellant admitted having killed his partner. His defence was one of diminished responsibility on the ground that he was suffering from a mental abnormality which "substantially" impaired his ability to understand the nature of his acts, to form a rational judgment and to exercise self-control. His complaint was that in summing up to the jury the trial judge had refused to give them any explanation of what "substantially" meant. Lord Hughes, giving the judgment of a panel composed of seven judges, said at [27]:

> ""substantial" is capable of meaning either (1) "present rather than illusory or fanciful, thus having some substance" or (2) "important or weighty", as in "a substantial meal" or "a substantial salary". The first meaning could fairly be paraphrased as "having any effect more than the merely trivial", whereas the second meaning cannot. It is also clear that either sense may be used in law making."

47. In the context of diminished responsibility, the word was used in the second of the two senses. However, at [37] Lord Hughes warned that:

> "the understandable itch of the lawyer to re-define needs to be resisted. Any attempt to find synonyms for such ordinary English expressions, although they involve questions of degree, simply complicates the jury's exercise, and leads to further semantic debate about the boundaries of meaning of the synonym."

48. He concluded at [43]:

> "(1) Ordinarily in a murder trial where diminished responsibility is in issue the judge need not direct the jury beyond the terms of the statute and should not attempt to define the meaning of "substantially". Experience has shown that the issue of its correct interpretation is unlikely to arise in many

> cases. The jury should normally be given to understand that the expression is an ordinary English word, that it imports a question of degree, and that whether in the case before it the impairment can properly be described as substantial is for it to resolve.
>
> (2) If, however, the jury has been introduced to the question of whether *any* impairment beyond the merely trivial will suffice, or if it has been introduced to the concept of a spectrum between the greater than trivial and the total, the judge should explain that whilst the impairment must indeed pass the merely trivial before it need be considered, it is not the law that *any* impairment beyond the trivial will suffice." (Emphasis in original)

49. In that case, despite resistance to the "lawyer's itch" to redefine, Lord Hughes did think it necessary to do so where there were "two identifiable and different senses in which the expression in question may be used."

50. These appeals have been brought to give such guidance as we can. There are also a number of applications for permission to appeal raising the same point which have been adjourned to await the result in this case. Clearly Lord Neuberger's use of the adverb is causing practical difficulty. Despite my reluctance to do so I think that we should make the attempt, acknowledging as I do that (a) we will replace one imprecise formulation of the test with another and (b) whatever the correct formulation is, its application to a particular set of facts will be a matter of evaluative judgment for the reviewer. We were referred to the dictionary definitions in the Oxford English Dictionary of "significant" which bear out the two shades of meaning to which Lord Hughes referred:

> "a. Sufficiently great or important to be worthy of attention; noteworthy; consequential, influential.
>
> b. In weakened sense: noticeable, substantial, considerable, large."

51. It is, perhaps, also worth referring to one of the dictionary definitions of "significantly":

> "To a significant degree or extent; so as to make a noticeable difference; substantially, considerably"

52. What, then, did Lord Neuberger mean by "significantly"? Paragraph [53] is the only paragraph in his judgment in which he himself used the word "significantly." But it does crop up in two other places in the law report. One of the cases heard with that of Mr Hotak was that of Mr Johnson whose appeal was dismissed. Lord Neuberger summarised the conclusion that the reviewer reached in his case as follows:

> "Finally, she "[considered] whether [his] circumstances taken as a whole [made him] vulnerable", and stated that his "ability to fend for [himself] is not significantly compromised", and

> that she was "satisfied that there is nothing that differentiates you from other homeless people". "

53. Commenting on that decision Lord Neuberger said:

> "[84] …The review letter in his case is in my opinion a clear example of a review whose conclusion is not impeached by the fact that the proper comparator was not invoked—nor indeed by the fact that the reviewing officer inappropriately relied on statistical evidence. Thus, it appears clear from the review letter that Ms Thompson concluded that Mr Johnson did not suffer from depression, and therefore her comparison with ordinary actually homeless people and her reliance on the statistics were irrelevant as they would only come into play if he did suffer from depression: see para 21(ii) above. She also found that his physical ailments were irrelevant to the issue of vulnerability, for reasons which seem to me to be unexceptionable: see para 21(iv) above. Similarly, she concluded that his experiences in prison did not render him vulnerable: see para 21(vi) above.
>
> [85] As to Mr Johnson's heroin problem, assuming (without deciding) that actual or potential problems with drugs fall within the expression "other special reason", it appears to me that the finding that Mr Johnson was not vulnerable on this ground cannot be faulted. It is true that the passages from the review letter quoted at para 21(v) above include references to the wrong comparator and statistical evidence. However, as with the depression and physical complaints, I consider that those references are irrelevant. That is because the earlier passages, read fairly, amount to a finding that his drug problems would have no significant effect on Mr Johnson's situation if he was homeless as he was not misusing drugs, and, even if he did misuse them, "he [would] maintain the support that he currently [had]". It is fair to say that the passage dealing with Mr Johnson's drugs problem is not conspicuous for its clarity, but that appears to be its effect."

54. There is no criticism here either of the use of the word "significantly" or of the fact that the reviewer did not explain what she meant by that word. The other place where the concept was used was in the submissions made by Mr McGuire QC on behalf of Shelter and Crisis. He is recorded as having argued:

> "The appropriate test is that laid down in section 189 without any judicial gloss: is the applicant "a person who is vulnerable" on the assumption he has no accommodation? That means: is the person susceptible to significant harm? A demonstrated liability to a real or serious risk of significant harm from homelessness thus renders a person vulnerable within the meaning of the statute."

55. It seems to me to be probable that that submission is the source of Lord Neuberger's phrase.

56. The appellants in both appeals draw the analogy with the definition of "disability" in the Equality Act 2010. For the purposes of that Act section 6 provides that a person has a disability if he has a physical or mental impairment which has "a substantial and long-term effect" on his ability to carry out normal day-to-day activities. Section 212 of that Act defines "substantial" as "more than minor or trivial". If a person has a disability as so defined, then not only is it unlawful to discriminate against him on that ground, but in addition certain categories of person, for example employers, partnerships, local authorities and public service providers have a positive duty to make reasonable adjustments.

57. I do not think that this is a helpful analogy. In the first place the defined term is a different word. Second, although it is true that there is a blanket prohibition on discrimination on the ground of disability, there is also a positive duty to treat a disabled person more favourably. That duty is a duty to make "reasonable adjustments". What those adjustments are in any particular case must depend on the extent of the disability in question. By contrast, if a homeless person has a priority need and has not become homeless intentionally the local authority owes the same duty to that person, namely to secure the provision of accommodation, irrespective of whether the test (whatever it is) is only just satisfied or is obviously satisfied by a wide margin. The degree of disability will no doubt go to the fulfilment of that duty by securing the provision of suitable accommodation, but the duty itself will have been triggered. Third, whereas the test of disability in the Equality Act takes an ability to carry out normal day to day activities as its reference point, Part VII of the Housing Act 1996 is all about finding accommodation. It is also important to emphasise that an assessment of whether someone is vulnerable within the meaning of section 189 (1) (c) is a "contextual and practical" assessment (*Hotak* at [62]). In the case of a person who falls within the category of "old age" the focus is not on his or her chronological age but on the effect of old age on his or her ability to deal with being homeless. Likewise in the case of a disabled person the focus is not on the extent of his or her disability, but on the impact of that disability, together with whatever support is available, to deal with being homeless. By contrast the definition of "disability" in the Equality Act is concerned with an individual's unaided capacity to carry out normal day-to-day activities. Fourth, the use of the definition in the Equality Act focusses on only some of the characteristics in section 189 (1) (c) whereas the concept of vulnerability applies to all of them.

58. In both *Mohammed v Southwark LBC* and *Butt v Hackney LBC* the county court held that the test under the Housing Act 1996 was the same as the test under the statutory definition of "substantial" in the Equality Act 2010. In my judgment, for the reasons I have given, that was the wrong approach.

59. One important point is that in using the phrase "significantly more vulnerable" Lord Neuberger described that as encapsulating the approach of this court in previous cases. So we need to look back to see what this court has said in previous cases about the difference between a person who has a priority need and one who does not. In looking at the citations, however, it is important to bear in mind that in the light of *Hotak* each of them uses the wrong comparator.

60. In *R v Waveney DC ex p Bowers* [1993] 1 QB 238, 244 Waller LJ said:

> "In our opinion, however, vulnerable in the context of this legislation means less able to fend for oneself so that injury or detriment will result when a less vulnerable man will be able to cope without harmful effects."

61. This formulation does not presuppose a quantitative test. In *Pereira*, in a passage I have already quoted, the test was expressed thus:

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

62. Again, no quantitative test was envisaged. In *Osmani* Auld LJ put the test thus:

> "One has only to attempt 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 an "ordinary homeless person", to see what a necessarily imprecise exercise of comparison it imposes on a local housing authority."

63. Imprecise or not, even this formulation does not require a quantitative threshold to be passed.

64. I do not, therefore consider that Lord Neuberger can have used "significantly" in such a way as to introduce for the first time a quantitative threshold, particularly in the light of his warning about glossing the statute. Rather, in my opinion, he was using the adverb in a qualitative sense. In other words, the question to be asked is whether, when compared to an ordinary person if made homeless, the applicant, in consequence of a characteristic within section 189 (1) (c), would suffer or be at risk of suffering harm or detriment which the ordinary person would not suffer or be at risk of suffering such that the harm or detriment would make a noticeable difference to his ability to deal with the consequences of homelessness. To put it another way, what Lord Neuberger must have meant was that an applicant would be vulnerable if he were at risk of more harm in a significant way. Whether the test is met in relation to any given set of facts is a question of evaluative judgment for the reviewer.

Failure to make findings of fact

65. Mr Panayiotou complains that the reviewing officer did not make findings of fact about whether his allegations (and in particular his allegation of abuse by his father) were true. This is a very short point which in my judgment is wrong. The reviewing officer recorded Mr Panayiotou's fear of his father as being part of the "information you provided". She then said that in applying the vulnerability test she had "tak[en] into account the information provided". In other words she accepted Mr Panayiotou's account.

Did the reviewing officers apply the correct test?

66. I have already quoted the relevant parts of both review decisions. In Mr Panayiotou's case I consider that the reviewing officer plainly applied the correct test. To repeat one of the paragraphs in which she expressed her conclusions:

> "I am not satisfied that, as a result of your condition, you would be at more risk of harm from being without accommodation that an ordinary person would be."

67. There is no trace of any quantitative threshold being applied. It is clear that she simply asked herself whether as a result of a characteristic within section 189 (1) (c) Mr Panayiotou would suffer "more harm" than an ordinary person in consequence of being without accommodation. That was the correct legal test. I would therefore dismiss Mr Panayiotou's appeal.

68. In the case of Mr Smith the position is different. As I have said Mr Perdios is an extremely experienced reviewer. In *De-Winter Heald v Brent LBC* [2009] EWCA Civ 930, [2010] 1 WLR 990 he was said to have carried out some 3,500 homelessness reviews. No doubt in the intervening years he has carried out many more. In his decision Mr Perdios began his discussion by setting out in three numbered paragraphs a summary (together with quotations) of what the Supreme Court had decided in *Hotak*. I have no doubt at all that in making his decision Mr Perdios conscientiously tried to apply that test. In paragraph 8 of his decision he said:

> "a person is not vulnerable simply because they will suffer from harm. They are vulnerable if, when homeless, they will suffer significant more harm or even more harm than an ordinary person if made homeless. It is without doubt that you will suffer harm by being homeless but I am not satisfied that this is to the extent that you will suffer from harm that means that you are significantly more vulnerable than ordinarily vulnerable."

69. It may be that by a benevolent interpretation of this paragraph (as required by *Holmes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7, [2009] 1 WLR 413) one could draw the conclusion that Mr Perdios was simply equating "significantly more harm" with "even more harm than an ordinary person," in which event I would not have thought that he had made an error of law. Given the premise that an ordinary person suffers harm by being made homeless, the differentiating feature is that the applicant will suffer even more harm than that. The same is true of his expressions of the test in paragraphs 15, 18, 24 and 26. However, in paragraph 45 he said:

> "It may very well be the case that you are more vulnerable than ordinarily vulnerable but I am not satisfied that you are significantly more vulnerable or even [more] vulnerable than ordinarily vulnerable."

70. If Mr Perdios concluded, as he said he had, that Mr Smith might well be "more vulnerable than ordinarily vulnerable" he seems to me to have performed the

comparative exercise required by *Hotak*. At that point he ought to have concluded that Mr Smith had priority need. In the context of that sentence I am reluctantly driven to the conclusion that Mr Perdios must have interpreted "significantly" as importing a quantitative threshold or what Mr Vanhegan called "more harm plus". I would therefore allow Mr Smith's appeal.

Outsourcing and Public Sector Equality Duty

71. In the light of my conclusions on Mr Smith's appeal it might be said that the remaining issues do not arise. Tempting though it might be thus to conclude, if we remit Mr Smith's application for redetermination for a third time the question will inevitably arise whether Mr Perdios is entitled to make the decision. Thus I think that there is no escape from having to decide the remaining issues.

72. Part VII of the Housing Act 1996 imposes duties on "local housing authorities". Section 70 of the Deregulation and Contracting Out Act 1994 gave ministers power by order to authorise certain functions of local authorities to be exercised by "such person (if any) as may be authorised in that behalf by the local authority whose function it is." Acting under that power the relevant ministers made The Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996, made on 20 December 1996. Article 3 of that Order provides:

> "Any function of an authority which is conferred by or under Part VII of the Act (homelessness), except one which is listed in Schedule 2 to this Order, may be exercised by, or by employees of, such person (if any) as may be authorised in that behalf by the authority whose function it is."

73. In *De-Winter Heald v Brent LBC* [2009] EWCA Civ 930, [2010] 1 WLR 990 this court held that the review of homelessness decisions was a function that could lawfully be contracted out under this power. Section 72 of the 1994 Act deals with the effect of contracting out. It provides:

> "(1) This section applies where by virtue of an order made under section … 70 above a person is authorised to exercise any function of a … local authority.
>
> (2) Subject to subsection (3) below, anything done or omitted to be done by or in relation to the authorised person (or an employee of his) in, or in connection with, the exercise or purported exercise of the function shall be treated for all purposes as done or omitted to be done—
>
> (a)…;
>
> (b) in the case of a function of a local authority, by or in relation to that authority."

74. The first argument under this head advanced on Mr Smith's behalf is that since the creation of the PSED it is no longer possible to contract out any function which is subject to the PSED because a local authority's PSED is non-delegable.

75. The PSED is laid down by section 149 of the Equality Act 2010 and provides, so far as relevant:

> "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) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
>
> (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 . . . ."

76. A similar duty, but limited to cases of disability, was contained in section 49A of the Disability Discrimination Act 1995. It was inserted by the Disability Discrimination Act 2005 with effect from 4 December 2006. So that duty was in force at the time when *De-Winter Heald* was decided; and also when the 1996 Order was made. There is no doubt that the PSED applies to the actions of a local housing authority in exercising its functions under Part VII of the Housing Act 1996: *Pieretti v Enfield LBC* [2010] EWCA Civ 1104, [2011] PTSR 565, approved in *Hotak* at [76].

77. Does the existence of this duty preclude contracting out? Mr Vanhegan and Mr Lee (who argued this part of the case) relied in particular on the decision of the Divisional Court in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1506, which was also approved in *Hotak*. The case concerned a scheme promulgated by the Secretary of State for the closure of certain Post Offices. The scheme was to be implemented by Post Office Ltd. Aikens LJ formulated a number of propositions about the way in which the duty under section 49A of the Disability Discrimination Act 1995 worked. For present purposes it is only necessary to quote the fourth of the principles at [94]:

> "Fourthly, the duty imposed on public authorities that are subject to the section 49A (1) duty is a non-delegable duty. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the section 49A (1) duty. In those circumstances the duty to have "due regard" to the needs identified will only be fulfilled by the relevant public authority if (i) it appoints a third party that is capable of fulfilling the "due regard" duty and is willing to do so; and (ii) the public authority maintains a proper supervision over the third party to ensure it carries out its "due regard" duty: compare the remarks of Dobbs J in *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2007] EWHC 1941 (Admin) at [92] and [95]."

78. Based on this principle Mr Lee argued that it was no longer possible to contract out homelessness functions, because the local housing authority could not delegate to an independent reviewer its PSED in the performance of its functions under Part VII of the Housing Act 1996. The implications of that submission are startling. Section 49A was concerned only with disability discrimination. The PSED as now contained in the Equality Act 2010 applies to the relevant protected characteristics. The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation: Equality Act 2010 s 149 (7). Every person who might be affected by the performance of any function of a local authority across the whole range of functions which a local authority has must have at least three protected characteristics: age, race and sex. If the argument is right it would seem to have the consequence that a local authority cannot contract out any function which involves interaction with human beings. It would also mean that the 1996 Order (which post-dated the duty imposed by section 49A) was *ultra vires* and that *De-Winter Heald* was decided *per incuriam*.

79. The first answer to this argument lies, in my judgment, in the combination of section 149 (2) of the Equalities Act 2010 and section 72 of the Deregulation and Contracting Out Act 1994. When Haringey contracted out its homelessness functions (as permitted to do by the 1996 Order) the exercise of its functions was transferred to HRL. Anything done by HRL was treated as having been done by Haringey. Moreover, section 149 (2) of the Equalities Act 2010 imposed the PSED on HRL, so there was no gap in the application of that duty. None of this, in my judgment, amounts to a breach of the principle that the PSED is non-delegable. Moreover, any pronouncement of a court in the course of giving judgment, even if expressed in

general terms, must be read in the light of the issue raised by the case. Mr Vanhegan, in the course of his reply, referred us to authority on the meaning of "delegation" when used in a statute. But the principle formulated by Aikens LJ is not a statute, and was not directed to a case in which the transfer of a function is expressly authorised by legislation.

80. In addition, Aikens LJ expressly contemplated that someone other than the public authority could be authorised to implement a policy laid down by the public authority. In this case, it is not a question of implementing a policy: it is a question of fulfilling obligations laid down by Part VII of the Housing Act 1996. But even if it were, the contracting out arrangements do no more than enable HRL to carry out the practical implementation of those statutory obligations. Moreover, clause 14 of the contract contains extensive provisions for monitoring and supervision by council officers, including regular liaison meetings and the provision of progress reports; and clause 16 expressly required compliance with the PSED. I reject this argument.

81. The second argument is that Haringey was not entitled to contract out its homelessness functions because of a restriction in its constitution. This is a new point which was not taken below. Nevertheless it is a point of law, and Mr Pettit accepts that the course of the proceedings below would not have taken any different course if this point had been raised at the time. Even so an appeal court has a discretion to refuse to allow a new point, even a point of law, to be taken for the first time on appeal. Under normal circumstances I would have refused permission to argue this point. However, since the decision in Mr Smith's case must be remitted for consideration, we need to decide whether the contracting out was permitted by Haringey's constitution.

82. The relevant article is article 11.06 which provides:

> "The Council for non-executive functions, and the Leader, or the Cabinet with the Leader's agreement, for executive functions, may contract out to another body or organisation functions which may be exercised by an officer and which are subject to an order under section 70 of the Delegation [sic] and Contracting Out Act 1994, or under contracting arrangements where the contractor acts as the Council's agent under usual contracting principles, provided there is no delegation of the Council's discretionary decision-making."

83. A constitution in almost identical terms was considered by Jay J in *Tachie v Welwyn Hatfield BC* [2013] EWHC 3972 (QB), [2014] PTSR 662. It appears to be a form in widespread use which originates in a central government publication suggesting model constitutions for local authorities: *Tachie* at [20]. Jay J dealt with the argument that the constitution precluded contracting out of homelessness reviews as follows:

> "[26] In my judgment, it is necessary to construe the term "discretionary decision-making" in the context of a constitutional provision clearly intended to have application across the whole range of the council's functions and responsibilities. "Discretionary decision-making" is a term intended to capture the range of relatively high-level policy or

> strategic decisions which the council would be wishing to retain for itself, for good and obvious reason. One may envisage a spectrum of decision-making within a local authority which entails the highest level "political" decisions at the top end and Mr Vanhegan's "robotic" decisions at the very bottom, with a significant grey area in between. Within this grey area one may well discern "elements of discretion", but I would prefer to characterise these as evaluative judgments which entail an assessment and interpretation of the available material, and the drawing of inferential conclusions from the facts as found by the local authority. I cannot accept that decisions of this nature amount to "discretionary decision-making" within the meaning of the exception to article 11.4. I should not be understood as expressing a comprehensive view about everything which is or may be within the grey area; each statutory provision would need to be looked at on its own merits with the objective of determining on which side of the line it may fall. I am confining my observations to the type of decisions I have sought to identify.
>
> [27] Applying this approach to the context of homelessness, I agree with Mr Bhose that Part VII of the 1996 Act amounts to a tightly controlled statutory scheme, regulating the conditions as to entitlement of access to social welfare, which scheme the decision-maker has to consider and apply to the facts of individual cases, and reach a decision according to law. The focus of this process is to establish the duties, if any, owed by the local authority to a particular applicant. Different reasonable local authorities may reach different decisions on the same evidence, but that does not convert the process into "discretionary decision-making". Evaluative, yes; but policy or strategic decision-making, no."

84. I agree. This description of the nature of the exercise to be performed under Part VII of the Housing Act 1996 tallies exactly with the headnote summary of the decision of the Supreme Court in *Ali v Birmingham CC* [2010] UKSC 8, [2010] 2 AC 39 which was recently approved and followed by the Supreme Court in *Poshteh v Kensington and Chelsea Royal LBC* [2017] UKSC 36, [2017] 2 WLR 1417. Mr Vanhegan argued that there was no linguistic warrant for this interpretation to be found in the constitution itself. There are two points to make about that. If the kind of decision in issue in this case is "discretionary decision-making" then the proviso would preclude contracting out almost any function. A decision to repair this pothole rather than that one; to sue this tenant for possession on the ground of anti-social behaviour while entering into an acceptable behaviour contract with that one; to collect rubbish on Wednesday rather than Thursday would all count as discretionary decision-making. Interpreted in that way the proviso would be repugnant to the operative article of the constitution. Second, the article distinguishes between functions which may be exercised by an *officer* and discretionary decisions taken by the *Council*. In other words it is decisions that would be made by the Council (i.e. the elected members) which may not be contracted out. Decisions under Part VII of the Housing Act 1996

would, in the absence of contracting out, be taken by officers. They do not, therefore, fall within the proviso.

85. The third argument is that the procurement process itself was flawed. Mr Vanhegan fastens on two officers' reports: one to the Cabinet dated 15 December 2009 and the other to the Leader which is undated but appears to have been prepared in the spring of 2014. The first of these contains the following:

> "**13. Equalities and Community Cohesion Comments**
>
> Not applicable as this report does not relate to a change or introduction of policy."

86. The second contains the following:

> "**8. Equalities and Community Cohesion Comments**
>
> 8.1 There are no equalities implications."

87. Mr Vanhegan argued that these passages showed that the Council had not considered the PSED. To my mind these passages demonstrate the opposite. They show that the Council did consider whether there were any equalities implications and decided that there were not. It is not suggested that the Council were perverse in that regard. Indeed, Mr Vanhegan never explained what he said the equality issues were. I struggle, therefore, to understand what significance the alleged failure had; or how it is said that Haringey's decision might have been any different. Reliance on the PSED in this context and on the facts of this case seems to me to be no more than what Lord Neuberger in *Hotak* described as a "mantra".

88. I would dismiss these grounds of appeal.

Result

89. I would dismiss Mr Panayiotou's appeal. I would allow Mr Smith's appeal on the limited ground that the test in *Hotak* was incorrectly applied, and remit his case for redetermination.

Postscript

90. I cannot leave this case without expressing my disquiet that such wide ranging challenges to the actions of a local authority as Mr Smith has argued are permitted to arise in appeals under section 204 of the Housing Act 1996. The scope of such an appeal was not argued in *De-Winter Heald* and although in *Tachie* Jay J held that such arguments were available to an appellant under section 204, I would not regard the point as by any means settled. The original right to apply to the Administrative Court for judicial review was transferred to the county court because county courts were thought to have expertise in *housing*, not in administrative law generally. The right of appeal against a decision on review is a right limited to a point of law arising from the review decision, whereas in substance the points raised are challenges to Haringey's antecedent decision to contract out its functions. The right of appeal under section 204 is unfettered, whereas an applicant for judicial review requires the permission of the Administrative Court. Time for the making of an appeal under section 204 runs from

the date when the appellant is notified of the review decision, whereas the substantive decision to contract out may have been made many years beforehand; and an application for judicial review would therefore be out of time. In addition challenges to public procurement decisions are in general susceptible to challenge under the prescriptive regime laid down by the Public Contracts Regulations 2015. Mr Vanhegan referred us to the decision of this court in *R (Chandler) v Secretary of State for Children, Schools and Families* [2009] EWCA Civ 1011, [2010] PTSR 749. In that case it was decided that a person might be able to challenge a public procurement decision by judicial review if he has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way; and that he may have such an interest if he can show that performance of the competitive tendering procedure might have led to a different outcome that would have had a direct impact on him: see [77]. This is certainly not an invitation to pursue technical points that do not affect the individual. Mr Smith was entitled to a decision which was lawful in the sense that the test required by the Housing Act 1996 had to be correctly applied, irrespective of the person who applied it. This question was not, however, formally in issue on this appeal and Mr Vanhegan fairly argued that we ought not to decide it. I reluctantly agree; so what I have said on this topic is entirely *obiter* (a practice which I usually deprecate).

Lord Justice Beatson:

91. I agree.

Lord Justice Newey:

92. I also agree.