Neutral Citation Number: [2019] EWCA Civ 23

Case No: B5/2018/1411

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT LUTON
HHJ BLOOM
A01WD143

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2019

Before :

LORD JUSTICE McCOMBE
LORD JUSTICE HAMBLEN
and
LORD JUSTICE HENDERSON

- -

Between:

DYLAN POWELL	**Appellant**
- and -	
DACORUM BOROUGH COUNCIL	**Respondent**

- -
- -

Matthew Lee and Toby Vanhegan (instructed by ARKrights Solicitors) for the Appellant
Andrew Lane and Ruchi Parekh (instructed by Dacorum BC Legal Department) for the Respondent

Hearing date: 12 December 2018

- -

Approved Judgment

Lord Justice McCombe:

(A) Introduction

1. This is the appeal of Mr Dylan Powell ("Mr Powell") from the order of 25 May 2018 of HH Judge Bloom, sitting in the County Court at Luton, whereby the judge dismissed Mr Powell's appeal from the order of 13 June 2017 of Deputy District Judge Reissner. The Deputy District Judge had refused Mr Powell's application of 17 March 2016 for an order suspending a warrant for possession of premises at 1 Marnham Rise, Hemel Hempstead, Hertfordshire ("the Property"). The warrant had been issued at the request of the Dacorum Borough Council ("the Council"), as landlord of the Property, in enforcement of an order for possession made on 23 October 2015.

2. A number of issues were raised by Mr Powell in objection to the enforcement of the order, all of which were rejected by the Deputy District Judge. The sole remaining issue live on this appeal is whether Mr Powell's application should have succeeded on the basis that, in pursuing the enforcement, the Council acted in breach of its duty under s.149 of the Equality Act 2010, the public sector equality duty ("PSED").

3. It is necessary for present purposes to set out in a little detail the background to the Council's possession claim and some of the history of the proceedings.

(B) Background and History of the Proceedings

4. In July 2014, the Council had served on Mr Powell a notice of intention to seek possession of the Property and these possession proceedings were begun by Claim Form dated 3 November 2014. The Council claimed possession for non-payment of rent and because of breach of the tenancy agreement, and on statutory grounds, arising by reason of the arrest and his conviction for committing offences at the Property. On 5 September 2014, in the West and Central Hertfordshire Magistrates' Court, Mr Powell was conditionally discharged for 12 months for an offence of possession of cannabis.

5. As the Deputy District Judge found, Mr Powell's tenancy agreement included the following provisions:

> "45. Neither you nor anyone living with or visiting you must be guilty of conduct which is capable of amounting to anti-social behaviour …It includes (but is not limited to) …abusive or insulting words or gestures…using or allowing the Property to be used for …dealing in, cultivating…or the illegal possession or use of any controlled substances…
>
> 47. Neither you nor anyone living at or visiting you must commit any arrestable offence within the local area of your Property.
>
> 48. Neither you nor anyone living at or visiting the Property must use the Property for any illegal activity."

6. By a defence (undated and unsigned in the copy before us), settled by Mr Lee of counsel, who has acted for Mr Powell throughout, it is alleged that Mr Powell had been a tenant of the Council at the Property and at a previous property for 14 years. Mr Powell denied supplying drugs at the Property but admitted having grown cannabis there for personal use. He admitted having pleaded guilty to an offence of possession of cannabis which he said had been committed on a public street and not at the Property for which he said that he was "fined" £15. This mention of a "fine" probably refers to the imposition of the so-called Victim Surcharge, in the sum of £15, on the occasion of his conviction and conditional discharge on 5 September 2014, to which I have already referred.

7. It was pleaded in paragraph 10 of the Defence to the Council's possession claim that it was not reasonable or proportionate to order possession of the Property and that the making of such an order would amount to a breach of Article 8 of the European Convention on Human Rights and of Article 7 of the Charter of Fundamental Freedoms of the European Union. The particulars of that plea given (as far as material for present purposes) in sub-paragraphs 10.2 to 10.7 were as follows:

> "10.2. The Defendant has been a tenant of the Claimant for over 14 years.
>
> 10.3. The Defendant is in receipt of housing benefit and ESA.
>
> 10.4. The Defendant suffers with both mental and physical disabilities. He suffers with low moods, depression, drug misuse and hepatitis C. The Defendant is also a recovering alcoholic and heroin addict.
>
> 10.5. On 19 July 2011 the Defendant suffered significant injuries and attended the Urgent Care Centre following an assault. The Defendant was hit over the head with a metal bar following a road rage incident. The Assailant was not caught even though the matter was reported to the police.
>
> 10.6. The Defendant has been using cannabis to assist with his disabilities and low mood. The Defendant has been advised by medical experts that cannabis has a therapeutic and stabilising effect upon the Defendant's mental health condition. [slightly corrected by me]
>
> 10.7. The Defendant no longer smokes cannabis at all. However he does ingest cannabis but does not do this at the property. He is currently addressing his Hepatitis C with the assistance of his consultant and seeking an alternative medicine to ease the effects of his disabilities. …"

No reference was made in the Defence to the PSED.

8. On 23 October 2015, at a hearing at which both parties were legally represented, a suspended possession order was made by Deputy District Judge McCourt, requiring Mr Powell to give possession. It was in these terms:

> "…the court orders that
>
> 1. The defendant give the claimant possession of 1 Marnham Rise, Hemel Hempstead, Herts, HP1 3JL on or before 6 November 2015.
>
> 2. This order is not to be enforced so long as the defendant do strictly observe the above terms and conditions of the tenancy agreement in respect of the property, which for the avoidance of doubt includes those terms not related to the allegations listed in the particulars of claim.
>
> 3. This order do remain in force until 4pm on 23 October 2017, unless varied or discharged by the court.
>
> 4. The defendant do pay the claimant's costs in bringing the claim, to be subject to detailed assessment if not agreed, and strictly subject to S26 Legal Aid sentencing and punishment of offenders act 2012."

The order also recited that the court considered it was reasonable to make an order for possession, which could be suspended on the terms set out.

9. In late 2015 there were a number of incidents in which a neighbour of Mr Powell (who ultimately gave evidence at the hearing before Deputy District Judge Reissner in 2017) observed frequent comings and goings of short duration at the Property. The Deputy Judge's conclusion about these incidents was, "I find that the most likely explanation for these visits related to the unlawful supply by [Mr Powell] of controlled drugs". On 12 January 2016 the police once more raided the Property in execution of a search warrant and, amongst other things, found a number of unused cannabis dealer bags, a "crack pipe", a number of smell proof bags, a roll of cling film and two bottles of methadone – in short, a collection of drugs paraphernalia.

10. As a result, the Council sought and obtained, at the Stevenage Magistrates' Court on 25 January 2016, a Closure Order in respect of the Property under s.80(5) of the Anti-Social Behaviour, Crime and Policing Act 2014. In making the order the court found:

> "(a) that a person has engaged, or (if the order is not made) is likely to engage, in disorderly, offensive or criminal behaviour on the premises, or
>
> (b) that the use of the premises has resulted, or (if the order is not made) is likely to result, in serious nuisance to members of the public, …
>
> and that the order is necessary to prevent the behaviour, nuisance or disorder from continuing, recurring or occurring."

In view of the breaches of the suspended possession order, reflected (if by nothing else) by the findings in the Closure Order proceedings, on 23 February 2016, the Council requested the issue of a warrant to recover possession of the Property. Later, on 22 April 2016, the Closure Order was extended for a further 3 months to 25 July 2016.

11. In the meantime, before requesting the warrant and before the making of the Closure Order, the Council (through its Anti-Social Behaviour Officer, Mrs Kim Ashworth) sought to contact Mr Powell, but without success. She also contacted the local Community Mental Health Team and a drugs and alcohol support organisation called "CRI Spectrum" in Hemel Hempstead; she was told by each of them that Mr Powell was not registered with them or known to them. Mrs Ashworth also tried on a number of occasions to obtain information from Mr Powell's general medical practitioner, but she had no success there either.

12. The warrant for possession of the Property was due for execution on 17 March 2016. It was on that date that Mr Powell issued his application to the County Court for the suspension of the warrant. The application was supported by a witness statement of Mr Powell. In it he stated that he had been unwell and had failed to receive calls from the Council because he had no credit available for his telephone. He said that since the Closure Order he had been living with friends. He denied breaches of his tenancy agreement, but claimed that he had not had any illegal drugs in his home since the making of the possession order in October 2015. He said that he had been able to consult solicitors about the matter for the first time on 16 March 2016. The concluding paragraph of the statement said this:

> "11. If the Warrant of Possession is executed and I am evicted from my property permanently, I will not have anywhere else to go. I am not able to stay with any friends permanently and I will end up being street homeless. It is unlikely that the council will assist me with any other housing as I will be a person deemed to have made myself intentionally homeless. I suffer from a number of very severe health problems including anxiety, depression and Hepatitis C. I am currently awaiting treatment for Hepatitis C which can not proceed unless I am suitably housed."

Again, there was no mention of the PSED.

13. We were informed that on 17 March 2016, District Judge White directed that the application for suspension of the warrant be adjourned for a full day's hearing. Thereafter, following the expiry of the Closure Order (as extended) at the end of July 2016, Mr Powell returned to live at the Property.

14. The application for suspension of the warrant was re-listed for a date in August 2016. In July or August 2016, Mr Powell was seen by a consultant psychiatrist (Dr Stephanie Sadler) and was prescribed anti-psychotic medication. An undated letter from Dr Sadler's clinic was produced at about that time stating that Mr Powell was "…currently too mentally unwell and unstable to be participating in a Court process; such engagement at present would also be likely to destabilise his mental health even further". The opinion was expressed that improvement was expected over the next four weeks and that it would be highly likely that he would be able to participate in court proceedings at that stage. An adjournment of the August hearing was ordered by

consent. A new hearing was fixed for 4 October 2016 when, as I understand it, the case was again adjourned for procedural reasons, including the absence of an adequate trial bundle.

15. The application was brought on for full hearing on 21 February 2017, but was not concluded on that day. The hearing resumed on 21 March and the deputy judge reserved his judgment. His judgment was delivered on 13 June 2017 and Mr Powell's application was dismissed.

16. By letter dated 16 February 2017 from Dr Sadler to Mr Powell's solicitors, produced to the Council in the immediate run-up to the adjourned hearing, Dr Sadler reported that Mr Powell suffered from psychotic illness and a depressive episode. Dr Sadler wrote that, upon first meeting Mr Powell in July 2016, she had noted the presence of paranoid delusions and auditory hallucinations, which had been treated with medication with a good response. Since that time there had been relapse of a more longstanding mood disorder, requiring an increase in anti-depressant medication. The doctor said that the continuing court process and uncertainty over housing made it unlikely that Mr Powell would achieve full remission of depressive symptoms. She confirmed that she had had information from Mr Powell's GP that he suffered from Hepatitis C and was under care of liver specialists. Mr Powell was, said the doctor, on a "3 year treatment pathway" for his mental health issues and that homelessness would put him at risk of relapse. The letter also stated, however, that Mr Powell had not attended his last four out-patient appointments.

17. Following sight of that letter, the Council's officer, Mrs Kim Ashworth, carried out a proportionality assessment, in the light of the material now disclosed. It is dated 17 February 2017. In that document, s.149 of the Act is expressly addressed in these terms:

> "I have also considered section 149 of the Equality Act 2010. I am aware of the Defendant's medical issues and have balanced his needs and interests against those of others who need accommodation. There is nothing to suggest that the Defendant will suffer any particular hardship which he cannot fairly be asked to bear. He does not suffer from any complex housing needs which cannot be met by the provision of accommodation elsewhere. There is nothing to suggest he would be unable to find accommodation elsewhere. He has done so whilst the Closure Order has been in place and he has not requested to return to his flat to gather any belongings. He was also given a tagged curfew in September 2016 for crimes committed in April 2014 to reside at 47 Martindale Road between the hours of 1900 and 0700, evidence that Mr Powell is capable and able to find alternative accommodation when necessary. In view of the seriousness and repeat criminal behaviour of Mr Powell, I feel it is necessary, proportionate and reasonable to seek possession of 1, Marnham Rise."

18. It is important, in my view, in order to deal with the one outstanding issue in the proceedings to set out the salient findings, including the important findings of fact, made by the Deputy District Judge.

(C) The Deputy District Judge's judgment

19. The Deputy District Judge concentrated first upon the question of whether Mr Powell had broken the terms of the suspended possession order. This was the main issue at the hearing before him. He accepted the evidence of the neighbour who spoke of the various incidents of fleeting visits to the Property by a number of people. He found that Mr Powell had lied to the court about this aspect of the case. He found that the serious allegations of drug dealing made by the Council had been proved and that there was, on each occasion, a breach of the terms of the tenancy agreement and of the terms upon which the possession order had been suspended.

20. I can leave aside the judge's finding that the Council had failed properly to investigate an allegation of racism made by Mr Powell against the neighbour for the same reason as the judge considered it to be of little relevance – namely, that this allegation by Mr Powell had been an entirely false one in the first place.

21. The judge considered Mr Powell's claim that the Council had failed to comply with its own Anti-Social Behaviour Policy. He quoted relevant parts of the policy as follows:

> "13 …
>
> - "We will thoroughly investigate complaints…"
> - "…We have a statutory duty to inform other services…if there are …adults who may be vulnerable…"
> - "We will consider all possible powers, civil and criminal, available to use to take appropriate action"
> - The Claimant will "fully investigate the complaint which may involve interviewing any alleged perpetrator and may involve interviewing third party witnesses"
> - "ASB will be dealt with, fairly and proportionately ["]
>
> Our policy is to:
>
> 3.1 Take any necessary early action to protect people and property
>
> 3.2 Investigate the circumstances and seek to understand all the facts of the matter reported to us
>
> 3.3 Seek always to resolve cases at the lowest level of intervention, taking formal action when the ASB is serious or persistent or when it threatens people's safety or health
>
> 3.4 Use any of the tools and powers available to us under the law and Council policy according to our best professional judgment

> 3.5 Take into account (and adjust our approach as necessary) when a victim or perpetrator is a vulnerable person…"

He noted that the policy also included reference to the Equality Act 2010 requiring that disability be taken into account when deciding to proceed with legal action.

22. After making his finding as to persistent breaches of the tenancy agreement and of the October 2015 order, the Deputy District Judge considered whether, all things being equal, it would be reasonable now to enforce the order. He found that Mr Powell's drug dealing was "not a direct or indirect consequence of his own drug abuse or mental health problems nor, for completeness, did it contribute to the drug dealing". He said that he would deal separately with the argument about alleged discrimination by the Council in relation to Mr Powell's health. The Deputy District Judge noted as a "powerful factor", in Mr Powell's favour, that there had been no further complaints about him since he had returned to the Property in July 2016. His conclusion on the issue of "reasonableness", however, was:

> "I have asked myself if the absence of a complaint since July 2016 is sufficiently persuasive to allow me to conclude that there is a sound basis that the Defendant's previous conduct will not recur. I regret that it is not…In this case, the Defendant has a long history of drug abuse, and although he may have ceased using it since July last year, I do not have cogent evidence that there will be no recurrence of cannabis use or drug dealing."

23. The Deputy District Judge considered the possibility of further conditions to justify a continued suspension of enforcement, but he concluded:

> "…a social landlord does not have to accept a tenant who sets out to breach terms of his tenancy and disables the landlord from providing accommodation in more deserving cases. Here I also consider it is appropriate to have regard to the effect that drug dealing has had on the Defendant's neighbours, who should not have to put up with it, and they should not have to live with the worry that it will recur."

24. The Deputy District Judge accepted that indirect discrimination might occur as a result of Mr Powell's mental illness and because of the effect that homelessness might have on his treatment. He went on to consider whether the eviction would be a proportionate measure to achieve the legitimate objectives underlying the Council's action in enforcing the order. At paragraph 161 of his judgment, he said this:

> "161. …I have found that after the original possession order was suspended, the Defendant repeatedly breached it. Even though there is no evidence of conduct giving rise to complaint since the defendant returned to the premises in July 2016, I consider there is a real risk that if the warrant is suspended, the Defendant, with his long criminal record relating to possession and possession with the intent to supply drugs, and the breaches of the SPO, will resume those activities. Such resumption would have a severe

> impact on others living near the premises and on the ability of the Claimant to meet its legitimate objectives."

The Deputy District Judge considered again whether the Council's legitimate aims could be achieved while proportionately preserving Mr Powell's occupation of the Property and he found they could not.

25. Finally, the Deputy District Judge addressed the question of the PSED. He set out s.149 of the 2010 Act in full and then said this, at paragraphs 168 to 171:

> "168. Even if I had found that there was a breach of the Public Sector Equality Duty by seeking a warrant before considering the need to remove from the Defendant the disadvantage of his impaired mental health. I accept Miss Parekh's submission that any breach could be remedied by giving proper consideration at a later stage: Barnsley Metropolitan Borough Council v Norton [2011] EWCA Civ 834.
>
> 169. I accept Mrs Ashworth's evidence that she carried out a proportionality assessment, albeit after the warrant had been issued, having seen Dr Sadler's letter.
>
> 170. The Claimant was criticised for failing to consider a lower level of intervention. For the reasons given elsewhere in this judgment, I do not consider a lower level of intervention would have been appropriate in the light of the breaches of the SPO and the effect of the Defendant's ASB on others who live near the premises.
>
> 171. In the circumstances, I consider that the Public Sector Equality Duty does not provide grounds for suspending the warrant."

He dismissed Mr Powell's application.

(D) The Appeal to HH Judge Bloom

26. Mr Powell sought permission to appeal on a number of grounds. That application came before HH Judge Clarke who, by order of 4 October 2017, refused permission on all grounds except one. The single ground was:

> "Ground 3 – in the exercise of his discretion the Learned Judge reached a decision that was plainly wrong in finding that…
>
> (xii) There was no breach of the Public Sector Equality Duty and/or the Equality Act 2010 elements of its ASB policy when Mrs Ashworth stated in evidence:
>
> a) She did not know whether drug dependency, anxiety and depression made him vulnerable.

b) She did not know that Hepatitis C could make someone disabled under s6 of the Equality Act 2010.

c) That any breach of a suspended possession order would cause the Respondent to execute the order.

d) That she did not consider whether a positive condition may work at this stage.

e) That there were no contemporaneous documents showing Equality Act considerations and that the only consideration was in a document titled "proportionality assessment" however it was admitted that her Barrister had told her to do that and her boss just signed it.

f) That she had no training on the Equality Act and did not know what was meant by public sector equality duty or a "*proportionate means of achieving a legitimate aim*".

27. In a careful judgment, which it is not necessary to summarise in any great detail, HH Judge Bloom reviewed the authorities cited to her, and found that there had been no breach by the Council of the PSED at the stage at which the issue of the warrant was requested. She decided that what was known to the Council at that stage about Mr Powell's health (i.e. that he had Hepatitis C) did not constitute a disability for the purposes of the Act and that the mental health problems did not appear to have emerged until after the decision to request the issue of the warrant. The judge said this at paragraph 39 of her judgment:

> "39. In these circumstances it is my conclusion, having reviewed the evidence, that the original decision to issue a warrant was not in breach of the PSED as there was no evidence of a disability despite the enquiries made by the council. In this case where Mr Powell had had solicitors involved as recently as October 2015 without medical evidence or PSED being referred to, I consider that the enquiries made were sufficient. She did not know of his disabilities despite efforts to enquire about the same and hence the PSED was not engaged at that time. The judge was therefore plainly entitled to conclude there was no breach of the duty. Further if in error, he failed to address this issue adequately in his judgment, I have concluded that there was no breach in any event."

28. The judge also considered that, even if there had been a breach of the PSED, having regard to the proportionality assessment made after the production of Dr Sadler's letter revealing Mr Powell's mental health problems, the Council complied with the duty at that later stage. The judge relied upon part of the judgment of Carnwath LJ (as he then was) in *Barnsley MBC v Norton* [2011] HLR 46 where he said that applying "a practical approach", the judge in that case had been entitled to find that consideration of the

relevant person's disability would not have made any difference to the authority's decision to seek possession even if the PSED had been observed.

29. Judge Bloom here decided that the proportionality assessment properly complied with the Council's PSED obligations. It is, I think, helpful to quote the judge's conclusion on this issue in paragraph 44 of her judgment as follows:

> "44. If one stands back and reads the proportionality assessment and considers the overall evidence of the council and the medical evidence, it is plain that the council has had due regard to the PSED. The substance of the proportionality assessment does not demonstrate a failure to consider other options as Mr Lee argues. If one reads the document as a whole it is quite clear that the council have considered that they have run out of options since they issued a NSP in 2014. They had tried visiting and engaging with him, Mrs Ashworth made clear she would have offered support if he was willing to engage, they have served a NSP, they have issued possession proceedings and agreed a SPO. None of it has stopped him from continuing to not only possess but to deal drugs at his premises. He has continued to contest his responsibility even as at 2017. The council had concluded that if he "remains a DBC tenant he will continue to breach his tenancy agreement. This will simply put a further strain on resources and deeply affect the lives of those living around him". The assessment referred to Section 149 and had due regard to his medical issues which were set out in the assessment but concluded that he could find other accommodation and that his health needs were not so complex that they could not be met by finding alternative accommodation. It was pointed out that he had found alternative accommodation during the closure order. The weight to be attached to the factors is a matter for the council not the court. The assessment plainly had due regard to the consequences of eviction on Mr Powell given his disabilities and nonetheless concluded that to continue with the eviction was the only option. The fact that the council do not consider an injunction as an option is not a reason to challenge their conclusion. The council are at the end of a long and arduous procedure whereby various lesser options have been considered. The council were satisfied (as the judge also found) that Mr Powell would not change his ways going forward and hence the only option at this time was eviction notwithstanding his disabilities. The assessment plainly took account of the PSED and the judge was right to so conclude."

30. Judge Bloom also agreed with the Deputy District Judge that the Council had not failed to comply with its own Anti-Social Behaviour Policy. On this point, her conclusion was this (at paragraphs 49 and 50 of the judgment):

> "49. Having read the evidence and the findings of fact, had there been any defects in the judge's reasoning, I would nonetheless have upheld his decision as I am entirely satisfied that the

> council had complied with the policy throughout and had continued to review the situation in the light of new medical evidence. The proportionality assessment plainly demonstrated that it continued to assess the position when new evidence came to light and was very much alive to the policy issues.
>
> 50. Indeed a different conclusion would have likely led to an argument that his decision was perverse given the overwhelming evidence against Mr Powell and the findings of fact that Mr Powell was still lying to the court as to his involvement in drug dealing. …"

(E) The Appeal to this Court

31. As indicated already, the appeal to us is confined to the question of whether the findings below that there was no breach of the PSED or of the Council's own ASB policy, so far as it relates to Equality Act issues, was wrong, and whether, if there were any such breaches, they were capable of remedy and were remedied by the proportionality assessment made in February 2017. Further, and in any event, under its Respondent's Notice, the Council argues that, irrespective of any breach of the PSED that may have occurred, the Deputy District Judge was entitled to dismiss the application in any event, because a full consideration of the PSED by the Council would not have affected its decision.

32. At the hearing of the appeal, Mr Lee for Mr Powell realistically accepted that he could not go behind the making of the October 2015 suspended possession order, even if it were arguable that there had been PSED breaches before that stage. He accepted that, for present purposes, that order was unimpeachable. However, he argued that the absence of proper PSED compliance at the earlier stages could affect the assessment of whether the Council's later actions were properly compliant with the duty overall at the later stages of the proceedings. Mr Lee accepted that the only challenges that could properly be maintained on PSED grounds were in respect of the decision by the Council to request the issue of the possession warrant and its decision not to accede to Mr Powell's later application for suspension of the warrant as issued.

33. Mr Lee placed emphasis on the summary of the law encapsulated in my own judgment in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at paragraph 26, which he invited us to read in full, as follows:

> "26. (1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
>
> (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23 – 24].

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:

i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;

ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

iv) The duty is non-delegable; and

v) Is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74-75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both

enquiring and reporting to them": *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77-78]

"[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

[78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

(ii) At paragraphs [89-90]

"[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (para [85]):

'….the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant

> information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'
>
> [90] I respectfully agree……."

The case has been cited, with apparent approval, in judgments in the Supreme Court in *Hotak v Southwark London Borough Council* [2016] AC 811, 841, paragraph 73, per Lord Neuberger of Abbotsbury and in *R (MA & others) v Secretary of State for Work and Pensions* [2016] 1 WLR 4550, 4562, paragraph 24, per Lord Toulson.

34. Mr Lee argued that it could not be shown that the Council had given any consideration to the PSED at the important stages of this appeal, namely on making the request for the issue of the warrant and when Mr Powell presented his application to suspend its execution. He relied in particular upon a passage in his cross-examination of Mrs Ashworth before the Deputy District Judge. It is recorded in the transcript for 23 February 2017 at p. 22, line 23 to p. 23, line 29, as follows:

> "Q … The next part I need to take you to is important. Do you know what the public sector equality duty is?
>
> A No.
>
> Q So, when you say "I have also considered section 149 of the Equality Act", that is the public sector equality act.
>
> A Right, well, I've not heard----
>
> Q You couldn't have.
>
> A -- I've not heard it put in that----
>
> Q So you couldn't have considered it properly.
>
> A Well, the Equality Act, I've considered Mr Powell's disabilities according to the latest letter, and the fact that, when the closure order was in place, he found alternative accommodation and, when he was allowed back into the property, he had been sentenced and he was curfewed to another address between the hours of, I think it was, seven at night until seven in the morning, so he stayed at another property. So, despite Mr Powell having these disabilities, if you like now, I don't see – I have considered that and I don't see – that that would impact him finding alternative accommodation.
>
> Q Yes, if I put it to you in questions, tell me if I'm right. So, you now accept that he has a section 6 equality disability?
>
> A Well, that's what we've received on the letter.

Q Now?

A Now, yeah.

Q Yes. You've then considered the position that, when he was out of the property, he was able to find a place to stay, you say.

A Hmm hmm.

Q And so you say, based on that, it was reasonable to conclude that, if he is evicted, he will be able to find somewhere to stay?

A Yeah, why wouldn't he?

Q The public sector equality duty goes slightly further than that, and it is to do with having due regard – have you heard the expression "due regard"?

A Hmm hmm.

Q What do you understand by "having due regard"?

A I think so.

Q Sorry, what do you understand----

A Oh sorry, no.

Q -- to having due regard to the public sector equality duty? What do you understand by that expression?

A I'm not sure that I could explain it, to be honest, other than that you've taken it into consideration, and I believe I've taken it into consideration.

Q But is it only what you've just told me you took into consideration, or was there something else that's not on here?

A No, that's what I've just told you.

Q (After a pause) I am sorry about this. (After a pause) Have you considered how you could foster good relationships between people who have the same disability as Mr Powell and people who don't at all?

A What do you mean?

Q Section 149. That's one of the considerations you have to do.

A How I could foster good relations?

Q Sorry, have I told you something completely new?

A No, you haven't You've just worded it----"

At that stage the learned judge intervened to say that he was not going to permit Mr Lee to conduct a "testing" process of the witness's knowledge of the PSED in general.

35. It was submitted that the passage demonstrated that Mrs Ashworth, as the Council's responsible officer, had no understanding of the requirements of the PSED and that the Council could not, therefore, have satisfied the requirements of the statute at the important stages. Mr Lee also relied upon Mrs Ashworth's acknowledgement that she had not been trained in the requirements of the PSED.

36. Mr Lane for the Council argued that Mr Lee's submissions took the statements from earlier cases assembled in paragraph 26 of the *Bracking* case too far in their application to the present facts. He submitted that it had to be recognised that this was a case where the court had made a possession order, suspended on terms, which had been agreed by both parties who were each legally represented. The order had been found by the court to be reasonable. This was in the face of the pleas advanced in paragraph 10 of the Defence quoted above, including allegations that Mr Powell suffered from then undefined mental and physical disabilities. There was no suggestion at any time, up to the making of the order, of any failure to have regard to the PSED.

37. Mr Lane pointed out that when the Council became aware of the serious continuing breaches of the tenancy agreement and of the terms of suspension of the order, Mrs Ashworth had sought to discover what Mr Powell's personal circumstances were, but she was met by a steadfast lack of engagement by Mr Powell and an absence of information from his GP, the CMHT and the local drug and alcohol support unit. She had no reason, therefore, to suspect that there were any changes in Mr Powell's circumstances from those pertaining when the order was made in October 2015.

38. For my part, I would add that Mr Lee's reading of the cross-examination which I have quoted above was too simplistic. Clearly, Mrs Ashworth was aware of s.149 of the Act, as she had quoted it specifically in the proportionality assessment which she had drafted only a few days previously. One can see that in the broken answers at the beginning of the passage quoted, she was trying to say that she had quoted the section in her document, to which Mr Lee was referring her, but was not able to complete her answer before a further question was put. Her statement that she did not know what "the public sector equality duty" is may have been referring to the use of that "short-hand" terminology rather than to the existence and content of that duty under s.149 of the Act.

39. Mr Lane relied upon the recent decision of this court in *Paragon Asra Housing Ltd. v Neville* [2018] EWCA Civ 1712 in which it was held that when making a possession order in a case where a tenant raises a discrimination claim under the 2010 Act, the court must undertake an enquiry as to the proportionality of making an order. In doing so, it must have been satisfied that if the order is suspended, it can be lawfully enforced in accordance with its terms; once made the order is binding on the parties and, absent a relevant change of circumstances, a tenant cannot require the court to re-consider "proportionality" when the landlord seeks to enforce it. In that case, the Recorder in the

county court had held that the matter had to be reconsidered at the enforcement stage. The leading judgment in this court was given by Sir Colin Rimer, with whom Simon and Asplin LJJ agreed. At paragraphs 50 and 51 of his judgment, Sir Colin said this:

> "50. …The Recorder, in [7] of his judgment, was of the opinion that *Aster Communities* showed that it was the eviction itself that was the central act in the drama of possession proceedings against a disabled tenant, and that even though the court may earlier have held that the making of a suspended order for possession was not discriminatory, it nevertheless had, of its own motion, to reconsider the same question at the point when such an order came to be enforced.
>
> 51. In my judgment, there is nothing in the judgments in *Aster Communities* supporting such an approach and I respectfully regard the Recorder's different view as wrong. The logic of his view is that in a case in which, following a s.15(1)(b) proportionality analysis, a court makes a lawful outright 28-day possession order with which the tenant fails to comply, so that the landlord has then to issue a warrant for possession, the tenant is at that point entitled to require the court to embark afresh upon the same proportionality exercise that it had made when ordering possession. That is also the logic of Mr Fitzpatrick's submission. The suggestion is, in my judgment, mistaken and I would reject it. When making the possession order, the court has undertaken the relevant proportionality inquiry. It has satisfied itself that possession must be given and that, if it is not, the order can lawfully be enforced. The order is binding between the parties. The tenant can have no right, absent any relevant change of circumstances, to require the court to re-consider the same question upon the landlord's claim to enforce the order. The recognition of such a right would be a recipe for repeated applications of a vexatious nature. There is no such right."

(The reference to "*Aster Communities*" is to *Aster Communities Ltd. v Akerman-Livingstone* [2015] UKSC 15.)

40. Mr Lane submitted that, by analogy, the question of proper consideration of the PSED can be taken to have been satisfied by the authority at the time of the making of the possession order and that, accordingly, absent change of circumstances, the matter cannot be re-opened when it comes to enforcement. In this case, Mr Lane argued, there was no evidence of change of circumstances at the warrant stage at all; further the matter had been reconsidered when Dr Sadler's new letter was produced just before the final hearing in February 2017.

41. Mr Lee relied in contrast upon a number of passages in the *Barnsley* case (supra) in which Lloyd LJ (with whom Maurice Kay LJ agreed) said that an authority in whose favour a possession order had been made remained under the duty imposed by s.149.

42. The *Barnsley* case concerned premises occupied by a school caretaker and his family as an incident of his employment. The caretaker had a severely disabled child (called

"Sam") whose interests had to be considered by the local authority employer in deciding to recover possession of the tied premises when the caretaker's employment ended. At paragraph 22 of the judgments in the case, Lloyd LJ said,

> "22. However, in the discharge of its duties under Part VII of the 1996 Act the council is subject to the duty under section 49A(1)(d) of the 1995 Act, and now under section 149 of the 2010 Act, as is shown by the decision in *Pieretti's* case itself. In any event, since the council is aware that Sam has special needs because of her disability, it will have to take those into account in deciding whether accommodation to be offered to her is suitable, and it may need to undertake an up-to-date assessment of those needs for this purpose. Because the accommodation in which Sam is currently housed belongs to the council, the council will have control over the process of enforcing any possession order, and any decision to enforce that order would itself be subject to the duty now imposed by section 149 of the 2010 Act."

43. However, also appearing in paragraph 34 of Lloyd LJ's judgment is a statement upon which Mr Lane relied, indicating that even if there was at one stage of proceedings a failure to comply with the PSED, it could be remedied at a later stage up to the point of execution of the possession order. At paragraph 34, Lloyd LJ said:

> "34. Mr Read submitted that the possession order should be set aside and the possession proceedings dismissed. I can see no proper basis for such an order. Even though, on the basis on which I proceed, the council was in breach of its duty before the proceedings were started, it would be open to it to remedy that breach by giving proper consideration to the question at any later stage, including now in the light of our decision. What is needed is for the council to give proper consideration to the factors which are relevant under section 49A(1)(d) of the 1995 Act, above all to the need for suitable accommodation to be found for Sam, her parents and her baby. We were told that an application has now been made for assistance under Part VII of the 1996 Act, though only as recently as the week before the hearing of the appeal. In practical terms the council will have to offer reasonably suitable alternative accommodation to the Norton family, and the Norton family must accept that it will have to move when suitable alternative accommodation is made available. One side effect of the relatively active debate between counsel and the court in the course of the hearing was that it will have become clear that what is needed is that both sides should address, in a collaborative way, the need for suitable alternative accommodation to be made available, sooner rather than later. As mentioned earlier, the council can decide whether, and if so when, the possession order is to be enforced, and its decision in that respect is also one in taking which it is under the section

> 49A(1)(d) duty, or rather, now, the equivalent duty under section 149 of the Equality Act 2010."

(See also paragraphs 26 and 34 to the same effect.)

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

45. Briggs LJ (as he then was) made this point in *Haque v Hackney LBC* [2017] EWCA Civ 4 where he said this (at paragraph 41):

> "41. In my judgment the starting point is to be appropriately cautious when invited to treat any part of the judgment in a leading case as if it were of statutory force, with a general effect dissociated from the particular facts under review. Parts of both paras 78–79 of Lord Neuberger PSC's judgment in Hotak's case are plainly and precisely directed to the conduct of a vulnerability assessment rather than, for example, to a suitability assessment (as here) or to the question whether an applicant has made himself intentionally homeless (as in *Pieretti's case [2011] PTSR 565*). Thus the four-stage approach calling for sharp focus in para 78 is plainly aimed at assisting the reviewing officer in deciding whether the applicant is vulnerable. Equally, Lord Neuberger PSC's acceptance that "in many cases" a reviewing officer might discharge a PSED even if ignorant of it was expressly directed to the conduct of a vulnerability assessment. What emerges as a general principle is the sharp focus required of the decision-maker upon the relevant aspects of the PSED where it is engaged by the contextual facts about each particular case."

46. *Haque's* case involved a challenge to a local authority housing officer's review decision as to suitability of certain accommodation for a person with a disability. A little after the passage just quoted, Briggs LJ said this (at paragraphs 46 and 47):

> "46. Nor in my judgment does the engagement of the PSED in a particular case absolve the reviewing officer from taking into account factors relevant to suitability other than those thrown into focus by the terms of section 149, such as those specified in the HA section 210 (and orders made pursuant thereto) and those

> set out in the code of guidance. As McCombe LJ said in *Bracking's case [2014] Eq LR 60*, para 60, considerations required to be taken into account are to be placed side by side with all other pressing circumstances of whatever magnitude.
>
> 47. I consider that the judge was wrong to base his analysis upon a supposed general principle "in almost all circumstances" requiring the reviewing officer to spell out in express terms reasoning about whether an applicant does or does not have a protected characteristic, whether the PSED duty is in play and if so with what precise effect, even though the adoption of such a disciplined approach may in many cases put the issue of compliance with the PSED beyond reasonable doubt. In a case such as the present, where all the applicant's criticisms of the adequacy of his accommodation derive from precisely identified aspects of his disabilities, and from their alleged consequences, it seems to me that, adapting Lord Neuberger PSC's words in *Hotak's case [2015] PTSR 1189*, para 79, a conscientious reviewing officer considering those objections in good faith and in a focused manner would be likely to comply with the PSED even if unaware of its existence as a separate duty, or of the terms of section 149."

47. Thus, in the present case, Mrs Ashworth was confronted with a situation in which a possession order had been made, suspended on terms, which she was entitled to think (all things being equal) was enforceable in the circumstances identified in it. The evidence shows that when it became clear that Mr Powell was continuing to engage in drug dealing at the property, she tried to obtain up to date information about his personal circumstances, including as to his health. Her enquiries, including those directed at an unco-operative Mr Powell, demonstrated no change in circumstances from those pertaining at the date of the possession order. She had no reason to believe that Mr Powell was suffering from any disability different from any condition he had (or alleged that he had) in October 2015. Her enquiries, as she said in evidence, were directed to providing him with such support as she could. She was conscientiously considering Mr Powell's circumstances in good faith in a focused manner calculated to comply with the PSED "even if unaware of its existence as a separate duty, or of the terms of section 149" (c.f. the passage from the judgment of Briggs LJ in *Haque* quoted above).

48. Given what was known to the Council, through Mrs Ashworth, I consider that it would be grotesque in these circumstances to say that the Council had failed to comply with its statutory duty when it decided to seek a warrant for possession of the Property. The Council was dealing with a person, Mr Powell, who (it had been alleged) had ill-defined health problems in 2015, but who (with legal advice) had agreed to the order made in October 2015, without mention of any alleged non-compliance with the PSED. He was a habitual drug dealer and was continuing to deal in drugs notwithstanding the order. Attempts were made to find out whether circumstances had changed and nothing new was revealed. It seems to me that the situation is entirely similar to that considered by Sir Colin Rimer in the *Paragon* case (supra). There could be no reason for the Council to think that it was no longer entitled to enforce the order in accordance with its terms, whether for want of compliance with the PSED or otherwise.

49. During the course of the application for suspension of the warrant, new medical material was ultimately provided: first, a short letter of 21 April 2016 from Mr Powell's GP; and latterly, the letter from Dr Sadler. When this material emerged, the Council prepared the proportionality assessment. That gave express attention to s.149 of the Act and made an assessment of the position accordingly.

50. It has been held in this court in the *Barnsley* case, that in proceedings of this type, it is open to a social housing landlord to remedy any defect in compliance with the PSED at a later stage in the proceedings. As I have said, I do not consider that the Council could be said to have been in breach of the duty when it decided to request the warrant, but even if it was in such breach, I consider that it remedied the matter by its assessment of the situation in the light of Dr Sadler's letter and Mr Powell's up-to-date medical condition.

51. In my judgment, the *Barnsley* case is not inconsistent with anything said later in the *Bracking* case, in which I sought to draw together a number of threads from different types of cases. Obviously, local authority landlords have to have proper regard to the duty under s.149 and I would hope that the headings collected together in paragraph 26 of my judgment in *Bracking* will assist authorities in meeting their responsibilities in these as in other cases. However, the decision to seek possession of a social housing unit in respect of which a court has already made a possession order is different in character from the decision under consideration in *Bracking*.

52. I consider, therefore, that the Council did comply with its duty at the relevant times by the conscientious actions of Mrs Ashworth in trying to find out what Mr Powell's circumstances were. No change was revealed. Then when, very belatedly, new information came to light, it was fully assessed and the decision to recover possession was confirmed. This, to my mind, is entirely within what Lloyd LJ envisaged in the *Barnsley* case.

53. I do not find it necessary, therefore, to determine whether it would be open to the court, having found a breach of the duty, to decide that had it been properly complied with, it would have made no difference to the Council's assessment of the situation. It is not necessary to consider whether the statement in the last sentence of Carnwath LJ's judgment in the *Barnsley* case is of general application. In that sentence, Carnwath LJ said that the application of "a practical approach" meant that the judge in that case had been entitled to find that even if the disabled child's interest had been properly considered, it would not have made any difference. Neither Lloyd LJ nor Maurice Kay LJ made mention of that "practical approach" in their judgments.

(F) Proposed Result

54. I would dismiss this appeal.

Lord Justice Hamblen:

55. I agree.

Lord Justice Henderson:

I also agree.