When is an applicant "significantly" more vulnerable than ordinarily vulnerable?

INTRODUCTION

1. In this article I consider a legal argument which is currently being raised in s. 204 Housing Act 1996 appeals where the issue is whether or not the applicant is in priority need due to vulnerability.

2. The argument is part of the post-*Hotak* fallout, and demonstrates once again that no matter how many judgements are handed down on the meaning of Part 7 of the 1996 Act, there is seemingly always scope for a new argument to be raised.

3. Although the issue has only been considered at County Court level for now, the Court of Appeal will undoubtedly have to grapple with it in due course.

THE ISSUE

4. In order to be owed the main housing duty under s. 193 of the Housing Act 1996, an applicant needs to have a priority need for housing. There are a number of categories of priority need set out in s. 189, but the most contentious concerns persons who are "vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason" (s. 189(1)(c)).

5. Readers will be well aware that in *Hotak v LB Southwark* [2015] UKSC 30, [2015] 2 WLR 1341 the Supreme Court departed from the previously-applied test, derived from *R v LB Camden ex p. Pereira* (1999) 31 HLR 317, CA, to hold that an applicant was 'vulnerable' for the purposes of s. 189(1)(c) if he was "significantly more vulnerable" than an ordinary person if made homeless.

6. As with the *Pereira* test before, this involves a comparative exercise. It is necessary to compare the position of the applicant if made homeless with the position of an ordinary person if made homeless.

7. So far, so good. However, in a number of recent cases in the County Court applicants have sought to challenge s. 202 review decisions on the basis that the reviewing officer has fallen into error by failing to define what he or she understands the concept of being "significantly more vulnerable" to mean.

8. Unfortunately the judgements of the Supreme Court in *Hotak* do not contain any further explanation as to what is meant by "significantly" for these purposes. Hence the issue is up for grabs.

THE ARGUMENTS

Appellants

9. The argument on behalf of appellants is that it is necessary for the reviewing officer to explain how great the "gap" must be between the harm that would be suffered by an ordinary person if rendered homeless, and the harm that would be suffered by the applicant if rendered homeless, before it can be said that the applicant is "significantly" more vulnerable that the ordinary person.

10. In using the word "significantly", does the reviewing officer mean "to a greater extent than simply insignificant or peripheral", or does he mean "something really serious"?

11. It is said that, unless this is explained, the applicant is not in a position to understand the basis upon which an adverse decision has been reached. Viewed in that way, the argument is essentially a reasons challenge.

12. Appellants argue that in order to be considered "significantly" more vulnerable, it is only necessary for the local authority that to find that the applicant would suffer harm which was more than minimally worse than the harm that would be suffered by an ordinary person. In other words, the "significantly more vulnerable" test only excludes cases where the degree of 'additional' harm the applicant would suffer is *de minimis*.

Local authorities

13. The first argument on behalf of local authorities is that it is not appropriate to attempt any further definition of the word "significantly".

14. The concept of being "significantly" more vulnerable is not one which is found in the statute but is a judge-made concept, which has itself been developed to guide interpretation of the word "vulnerable". To attempt further definition of the phrase is inappropriate because:
    a. The word 'significantly' is an ordinary English word which local authorities are capable of understanding and applying when reaching a judgment, no further elaboration is needed;
    b. It is not a statutory phrase (or a phrase used in statutory guidance) which requires judicial interpretation;

c. It is generally undesirable to seek to add additional glosses or definitions to judicial dicta;
d. If the Supreme Court had intended to provide further elaboration on the meaning of 'significantly', no doubt it would have done so.

15. The question of whether an applicant is "significantly more vulnerable than an ordinary person" involves a classic exercise of judgement and requires the weighing up of a variety of factors, which will differ from case to case. The exercise is not susceptible to the application of a bright line threshold.

16. It is also argued that the same definitional issues which are raised in respect of the word "significantly" also arise with other potential formulations; for example what does "greater than a minor or trivial gap" mean? It is not possible to accurately quantify or define in words "how great the gap between an ordinary person if rendered homeless, and an applicant" must be.

17. Finally it is argued that the mere exclusion of trivial or minor cases is no more than an application of the general principle that the law is not concerned with trivial things (*de minismis non curat lex*), and therefore the Supreme Court must have intended to imply a higher threshold than this. The word 'significant' is defined in the shorter OED (in its adjectival form) as meaning "full of meaning or import; important, notable", which implies a higher threshold than suggested by the Appellant.

18. Alternatively it is argued that if the reviewing officer does define what he or she understands "significantly" to mean, the actual decision as to which definition is chosen is a matter of judgement for him/her.

THE JUDGMENTS SO FAR

With thanks to the Nearly Legal blog for all but the last of the case notes below.

HB v LB Haringey. Mayors & City of London Court, 17 September 2015

19. In this case HHJ Lamb, allowing the appeal and quashing the review decision, concluded that it was impossible to discern from the reviewing officer's decision:
    a. How he defined vulnerability
    b. What, if any attributes of vulnerability he had ascribed to the ordinary person comparator.
    c. How he defined the word 'significantly' – where on a spectrum of meaning between 'noticeable' and 'substantial' he had placed 'significantly'.
    d. Whether he considered the applicant to be more or less vulnerable than the ordinary comparator.

e. Whether he considered the applicant to be invulnerable or without vulnerability, and
f. If he considered the applicant to be more vulnerable than the ordinary comparator, whether and to what extent and why the difference was insignificant.

20. It appears that the judge did not reach a conclusion himself as to what "significantly" means in this context, but did agree that the reviewing officer needs to pin his or her colours to the mast on the issue and provide an explanation of "how big the gap needs to be" between the applicant and the ordinary person before he will consider the applicant vulnerable.

Mohammed v Southwark LBC. County Court at Central London, 18 December 2015

21. In this case Recorder Hochauser QC was prepared to reach a view as to the meaning of "significantly", finding that it should be construed by analogy with the word 'substantial' in the Equality Act 2010, as meaning 'more than minor or trivial'. Therefore provided the applicant was likely to suffer more harm by the exacerbation of (in that case) his mental illness by reason of becoming homeless than an ordinary person would, then he should be regarded as vulnerable for the purpose of s.189(1)(c) Housing Act 1996.

Ward v LB Haringey. County Court at Central London. 22 Feb 2016

22. The Judge in this case was not prepared to reach any further definition of the word "significant", but concluded that on any definition, the applicant's vulnerability was with the meaning of the word. The appeal was allowed and the decision was quashed.

Butt v London Borough of Hackney. County Court at Central London. 22 February 2016

23. Although the local authority argued that the word "significantly" was "an ordinary English word and it falls to be given its ordinary meaning", HHJ Luba QC observed that the word had "at least two potential meanings or shades of meaning. It could mean, as I have indicated, 'something more than trifling' or 'more than insignificant', or it could mean 'something of real importance' or 'of real and significant extent'".

24. Although it was not obvious which meaning had been applied by the reviewing officer, "certain of the language used … does suggest that he is applying an approach which requires a substantial or extensive difference between the Applicant and that of others".

25. HHJ Luba held that the obligations on the reviewing officer to give reasons and to direct himself in accordance with *Hotak* meant that he was required "to identify the sense in which he is using the term 'significantly'". There had been a failure to do that sufficiently, and therefore insufficient reasons had been given.

DT v LB Lambeth. County Court at Central London, 31 August 2016

full disclosure: I acted for the local authority in this case

26. In this case HHJ Gerald QC allowed the appeal on other grounds and expressly declined to determine the issue one way or the other, but said that if he had needed to decide the point he would have concluded that the multi-faceted nature of the comparative exercise being undertaken takes in any number of often conflicting matters which may interrelate on each other in ways different on one case compared with another; and that it was simply not possible for any further clarity to be given to the comparative exercise.

27. It was not possible to define in clear percentage or quantitative ways what the outcome of vulnerability comparison exercise would be. It was a statement of the obvious that, when carrying out the comparative exercise, insignificant or trivial matters are to be ignored. Those which are of materiality to making the applicant vulnerable as compared to the ordinary person are to be taken into account.

CONCLUSION

28. As can be seen from the summaries above, the County Court has to date not adopted a consistent line on the issue. In some cases judges are declining to determine the point, or concluding that the word “significantly” cannot be defined with further clarity. In other cases judges are agreeing that the reviewing officer needs to say what they understand the word to mean, but not venturing to say which definition is correct. In yet further cases judges are holding that “significantly” simply means “more than trivial”.

29. There does appear to be a trend towards the conclusion that, at the very least, decision makers need to say what definition they are applying. Of course, if that is done then there is an inevitable risk that the definition which is selected will in due course be held by the Court of Appeal to have been wrong.

30. Needless to say, this is a critical issue. Vulnerability decisions are among the most commonly litigated. The “more than de minimis” definition of “significantly” sets the threshold for vulnerability very low. If that is ultimately the definition which is favoured it is likely to mean that many more applicants ought to be accepted as being vulnerable by local authorities than is currently the case.

31. Unfortunately, both applicants and local authorities will have to wait (and may have to wait for a considerable time, based on current Court of Appeal listings) for a definitive answer.

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