Easter Term
[2015] UKSC 30
On appeal from: [2013] EWCA Civ 515, [2014] EWCA Civ 1085 and [2013] EWCA Civ 752

JUDGMENT

Hotak (Appellant) *v* London Borough of Southwark (Respondent)

Kanu (Appellant) v London Borough of Southwark (Respondent)

Johnson (Appellant) v Solihull Metropolitan Borough Council (Respondent)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Clarke
Lord Wilson
Lord Hughes

JUDGMENT GIVEN ON

13 May 2015

Heard on 15, 16 and 17 December 2014

Appellant (Hotak)
Paul Brown QC
Heather Emmerson
(Instructed by Centre 70 Advice Centre)

Respondent
Kelvin Rutledge QC
Catherine Rowlands
(Instructed by Southwark Legal Services)

Appellant (Johnson)
Jan Luba QC
Lindsay Johnson
(Instructed by Quality Solicitors Evans Derry)

Respondent
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Catherine Rowlands
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Appellant (Kanu)
Helen Mountfield QC
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Ashley Underwood QC
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Intervener (EHRC)
Karon Monaghan QC

(Instructed by Equality and Human Rights Commission)

Intervener (Shelter and Crisis)
Bryan McGuire QC
Matt Hutchings
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(Instructed by Freshfields Bruchhaus Deringer LLP)

Intervener (SSCLG)
Deok Joo Rhee
Joseph Barrett
(Instructed by Treasury Solicitors)

LORD NEUBERGER: (with whom Lord Clarke, Lord Wilson and Lord Hughes agree)

1. These three appeals raise a number of issues concerning the duty of local housing authorities towards homeless people who claim to be "vulnerable", and therefore to have "a priority need" for the provision of housing accommodation under Part VII of the Housing Act 1996. Those issues turn on the interpretation of the 1996 Act, but some of them also involve consideration of the Equality Act 2010.

Part VII of the Housing Act 1996

2. As its title indicates, Part VII of the 1996 Act is concerned with homelessness, and it imposes duties on local housing authorities to provide assistance and advice, or suitable accommodation, to those who are "homeless" or "threatened with homelessness".

3. By virtue of subsections (1)-(3) of section 175, a person is homeless if there is no accommodation (i) which is "available for his occupation", (ii) which he is entitled to occupy by virtue of an interest, by virtue of a court order, under a licence, a statute or "rule of law", (iii) to which he can secure entry or (in the case of mobile accommodation) which he can place and reside in, and (iv) which "it would be reasonable for him to continue to occupy".

4. Section 176 explains that accommodation is only to be treated as available for a person if it is also available for "any other person" who "normally resides", or who "might reasonably be expected to reside" with him. Section 177 contains examples of circumstances in which it would not be reasonable for a person to occupy accommodation which would otherwise be available to him.

5. By virtue of section 175(4) a person is threatened with homelessness "if it is likely that he will become homeless within 28 days".

6. If a person (referred to as an "applicant") applies to a local housing authority (an "authority") for "accommodation" or "assistance in obtaining accommodation", and the authority "have reason to believe that he is or may be homeless or threatened with homelessness", then, subject to certain exceptions which are irrelevant for present purposes, section 183 provides that the subsequent sections of Part VII apply. If the authority have "reason to believe that an applicant may be homeless or

threatened with homelessness", section 184 requires them to make inquiries whether an applicant is eligible for assistance and if so what duties are owed to him (and to inform the applicant of their decision).

7. Sections 188, 190, 192 and 193 impose duties on authorities depending on the status of the applicant. There are three statuses of importance when deciding on the extent of an authority's duties, namely eligibility for assistance, priority need, and intentional homelessness. Eligibility for assistance and intentional homelessness are respectively defined in sections 183(2) and 191, and neither is in point for the purposes of the instant appeals.

8. Priority need is of central relevance to these appeals, and section 189(1) identifies those who have "priority need for accommodation" as being:

> "(a) a pregnant woman or a person with whom she resides or might reasonably be expected to reside;
>
> (b) a person with whom dependent children reside or might reasonably be expected to reside;
>
> (c) a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside;
>
> (d) a person who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster."

9. Section 189(2) enables the Secretary of State "to specify further descriptions" of priority need and "to amend or repeal any part of subsection (1)". By the Homelessness (Priority Need for Accommodation) (England) Order 2002 (SI 2002/2051), the Secretary of State added four new priority need categories. They are (i) children between 16 and 18, other than certain children for whom local authority children's services have responsibility, (ii) those under 21 who were between 16 and 18, in care or fostered (other than certain students), (iii) those over 21 who are vulnerable as a result of having been in care (other than certain students), or having served in the armed forces or having been in custody, and (iv) those who are vulnerable as a result of leaving accommodation on account of violence or threats of violence.

10. Under section 188, if the authority "have reason to believe that an applicant may be homeless … and have a priority need", they must "secure that accommodation is available for his occupation pending a decision as to the duty … owed to him".

11. Section 190 is concerned with cases where an authority are satisfied that an applicant is homeless but became homeless intentionally. If such an applicant also has priority need, the authority must provide him with (a) accommodation for a period which is sufficient to give him a reasonable opportunity to find alternative accommodation, and (b) advice and assistance in securing such accommodation – section 190(2). Section 190(3) provides that, if such an applicant does not have priority need, he shall only be provided with such advice and assistance.

12. Sections 192 and 193 are concerned with cases where an authority are satisfied that an applicant is homeless, but did not become homeless intentionally. Section 192 applies where the authority are satisfied that such an applicant does not have priority need. In such a case, the authority must provide the applicant with advice and assistance in attempting to secure accommodation, and they may (but not must) secure that accommodation is available to him – section 192(2) and (3). Section 193 applies where the authority are satisfied that such an applicant has priority need. In such a case, subject to exceptions which are irrelevant for present purposes, the authority must secure that accommodation is available for the applicant.

13. Sections 195 and 196 are concerned with cases where the authority are satisfied that an applicant is threatened with homelessness, and for present purposes it suffices to say that an authority's obligations in such a case reflect the obligations in sections 190, 192 and 193 in relation to the actual homeless.

14. Section 202 entitles an applicant to seek an internal review of an authority's decision, *inter alia*, under sections 190 to 193 and 195, or as to the suitability of any accommodation offered to him. The procedure under any such review is governed by section 203. Section 204 permits any applicant who is dissatisfied with the outcome of any such review to appeal to the County Court on a point of law. An appeal lies from the decision of the County Court to the Court of Appeal, and from there to the Supreme Court, but in each case permission to appeal is needed in the normal way.

The Equality Act 2010

15. Section 4 of the 2010 Act lists "the protected characteristics", and they include "disability", which is itself defined in section 6 as including mental or physical impairment, whose nature is further explained in Schedule 1. Section 13 deals with direct discrimination generally, and it involves "A treat[ing] B less favourably than A treats or would treat others" "because of a protected characteristic". By virtue of section 15(1), discrimination against a disabled person also occurs if "(a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim". (This definition effects a statutory reversal of the majority House of Lords decision in *Lewisham LBC v Malcolm* [2008] UKHL 43, [2008] 1 AC 1399.) Section 19 deals with indirect discrimination.

16. Section 29(1) and (2) provides that a person concerned with providing a service to the public must not discriminate against a person by not providing the service or as to the terms on which the service is provided. Section 29(6) specifically outlaws discrimination by "[a] person … in the exercise of a public function" which is not the provision of a service. Section 29(7) imposes a duty to "make reasonable adjustments" on a person who provides a service to the public or who exercises another public function. Section 20(1) and (2) states that where a person, A, has to make adjustments, the obligation involves satisfying three requirements, of which only one is potentially relevant in the present context, namely that identified in section 20(3) which provides:

> "The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

17. Section 149 contains the public sector equality duty ("the equality duty") and it provides:

> "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 [which by subsection (7) includes disability] 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.
>
> …
>
> (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. …"

18. Pursuant to various provisions of the Act, the Secretary of State has power to make regulations as to the determination of disability, and that power has been exercised through the Equality Act 2010 (Disability) Regulations 2010 (2010/2128). Regulation 3 provides that, unless the addiction was "the result of medically prescribed drugs or other medical treatment", "addiction to alcohol, nicotine or any other substance is to be treated as not amounting to an impairment for the purposes

of the [2010] Act". Regulation 4 provides that certain other conditions, including "a tendency to steal" should not be treated as amounting to an impairment under the 2010 Act, but that this should not prevent them "from being taken into account … where it aggravates the effect of any other condition".

The facts of the three appeals in summary

19. *Johnson v Solihull Metropolitan Borough Council*. Craig Johnson was born in 1975 and has been a persistent offender since 1991. He has been convicted of 78 offences, mostly stealing, and has been in and out of prison. Shortly following his most recent release in April 2010, he made an unsuccessful application to Solihull Metropolitan Borough Council ("Solihull") for accommodation under Part VII, on the ground that he had priority need under section 189(1)(c). He made a further application in October 2011. He claimed to be vulnerable because (i) he had become addicted to heroin while in prison, (ii) he had "lower back trouble" and "can't climb up stairs", (iii) he suffered from sleeping problems, depression and paranoia, and (iv) he suffered from asthma.

20. Solihull considered his application and rejected his contention that he was vulnerable and therefore in priority need. He exercised his right to seek a review. On 8 May 2012, Gemma Thompson of Solihull's Housing Strategy, Policy and Spatial Planning Services Department notified him of the outcome of the review. She rejected his claim to be vulnerable and therefore in priority need.

21. In the review letter, Ms Thompson said:

i) She should ask herself "whether [Mr Johnson], when homeless, would be less able to fend for [himself] than an ordinary homeless person so that injury or detriment to [him] would have resulted when a less vulnerable person would be able to cope without harmful effect", and explained that her conclusion was that he "would not be less able to fend for [himself] than an ordinary homeless person" for reasons she proceeded to give.

ii) She was "not satisfied that [Mr Johnson is] suffering from depression or had suffered from depression".

iii) She also "highlight[ed] that research from Homeless Link has shown that mental health problems and homelessness are closely linked both as a cause and as a result of homelessness", and after quoting some figures continued "[t]his clearly shows that the fact that [Mr Johnson

is] suffering from depression does not necessarily mean that [he is] vulnerable". "Given that [he is] not receiving any treatment for depression, [she was] not satisfied that [he] suffer[ed] from a particular form of depression that would make [him] vulnerable".

iv) "Despite … suffering from knee and back pain it has no significant impact upon [Mr Johnson]" and "[he] would be able to continue with treatment provided by [his] GP and/or physiotherapist".

v) So far as drug use is concerned, "[a]lthough [he is] taking heroin at present [he does] not appear to have suffered any irreversible secondary medical problems". The evidence shows that "[Mr Johnson has] the ability to remain abstinent from drugs [and] whilst … it may be harder for [Mr Johnson] to remain off drugs while street homeless, nevertheless … [he] can maintain the support that [he] currently ha[s] … and would reasonably be able to remain off drugs", and "[e]ven if [he does] slip back into using drugs, this would not necessarily be anything unusual in relation to homeless people", as shown by a survey.

vi) She acknowledged that Mr Johnson had "been in and out of prison since the age of 16", but she was not satisfied either that he had been "instititutionalised", having been "out of prison for two years and managed [his] affairs", or that he would "suffer injury or detriment if [he was] street homeless".

vii) Finally, she "consider[ed] 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".

22. Mr Johnson appealed to the Birmingham County Court and His Honour Judge Oliver-Jones QC dismissed his appeal, on the ground that the review did not include any significant misdirection of law and resulted in a conclusion which a reasonable reviewer could have arrived at. Mr Johnson's appeal to the Court of Appeal was also dismissed effectively on the same ground – [2013] EWCA Civ 752, [2013] HLR 524. In the course of her *ex tempore* judgment (with which Jackson and McCombe LJJ agreed), Arden LJ said at para 6 that, when determining whether a person is "vulnerable" within the meaning of section 189(1)(c), a local housing authority "must pay close attention to the particular circumstances of the

individual", but also was "bound to discharge its obligations by taking into account its own burden of homeless persons and finite resources".

23. *Hotak v Southwark London Borough Council*. Sifatullah Hotak was born in Afghanistan 25 years ago and was granted leave to remain in the UK as a refugee in 2011. He has significant learning difficulties, with a measured IQ on one test of 47, a history of self-harming, and symptoms of depression and post-traumatic stress disorder. His brother, Ezatullah, entered the UK in 2006, and has recently been granted leave to remain, albeit for a limited period. Sifatullah Hotak is reliant on his brother to prompt him to carry out such routine activities as washing, changing his clothes, and undertaking personal care routines, and to organise health appointments, meals, the making of benefit claims, and the finding of accommodation.

24. The two brothers lived in a room in a flat in Peckham, Southwark, from July 2010, until they had to vacate in March 2011 because the flat was overcrowded. Ezatullah Hotak was ineligible under Part VII owing to his immigration status, but he arranged for his brother, who was not ineligible, to apply to Southwark London Borough Council ("Southwark") for accommodation for both of them on the ground that Sifatullah Hotak was in priority need, by virtue of section 189(1)(c), and his brother was a person with whom he resided – and indeed could reasonably be expected to reside.

25. Southwark provided the brothers with temporary accommodation under section 188, but in due course rejected the application for accommodation under section 193 on the ground that, while Sifatullah Hotak was homeless, eligible for assistance, and had not become homeless intentionally, he was not in priority need because, if homeless, he would be provided with the necessary support by his brother. Southwark nonetheless rightly accepted that they were obliged to provide advice and assistance to Sifatullah Hotak under section 192. Sifatullah Hotak, through his brother, sought a review of that decision, and the review, carried out by Kojo Sarpong, Southwark's Review Team Leader, confirmed the decision, and declined to exercise the discretionary power to provide accommodation under section 192(3).

26. The review letter is dated 30 June 2011, and it runs to almost six fairly closely typed pages. It includes the following statements:

i) "[T]he Council must ask itself whether the applicant, when street homeless, is less able to fend for himself/herself so that injury or detriment will result where a less vulnerable street homeless person would be able to cope without harmful effect."

ii) "[W]e do not believe [that under] section 189 … an authority is required to make provisions for households who are comprised of adults in reasonable physical health."

iii) "[I]t is reasonable to expect a fit and healthy adult to attempt to house and support his brother whilst they are homeless together. In addition [Ezatullah Hotak] has confirmed that he currently looks after [his brother] and he would continue to do so if they were street homeless together."

iv) "We acknowledge that [Sifatullah Hotak] has learning difficulties and disabilities and it would be reasonable to assume that he may find difficulty in finding and maintaining accommodation. If on his own and street homeless [he] may also be at risk …. However, we are satisfied that his brother is capable of providing him with continued housing and support if they were street homeless together".

v) "Even though we acknowledge that he has learning disabilities and difficulties, we are satisfied that Ezatullah [Hotak] would assist him if street homeless and his circumstances do not confer priority need …"

27. Sifatullah Hotak, again acting through his brother, appealed against this review to the Lambeth County Court. His Honour Judge Blunsdon dismissed his appeal, and his decision was upheld by the Court of Appeal for reasons given by Pitchford LJ, with whom Moore-Bick and Richards LJJ agreed – [2013] EWCA Civ 515, [2013] PTSR 1338.

28. The sole point in the Court of Appeal, as in this Court, was whether, as a matter of law, the reviewing officer was entitled to take into account the fact that Sifatullah Hotak could be expected to receive help and support from his brother if he was homeless. If, as the Court of Appeal held, that fact could be taken into account, then it is conceded on Sifatullah Hotak's behalf that this appeal must fail whereas, if it could not be taken into account, Southwark concedes that Sifatullah Hotak would be "vulnerable" and his appeal must succeed.

29. *Kanu v Southwark London Borough Council*. Patrick Kanu is currently aged 48, and has physical problems, including back pain, hepatitis B, hypertension and haemorrhoids, as well as psychotic symptoms and suicidal ideation. His wife assists him in taking the necessary drugs, but stress raises his hypertension to what his doctors characterise as "quite dangerous levels", which requires an increase in the dose of the relevant drugs.

30. An order for possession had been made against Mr Kanu in respect of his home, a flat in Devonshire House, London SE1, in January 2011. Having made an initial application (which was rejected by Southwark on grounds which were subsequently found to be bad), Mr Kanu applied in early November 2011 to Southwark for accommodation on the ground that he had not become homeless intentionally and in priority need under section 189(1)(c). Although their Medical Assessment Service advised that he should be treated as having priority need because he was at risk of self-harming and of harming others, Southwark decided that Mr Kanu, had not become homeless intentionally and eligible for advice and assistance, was not in priority need. Mr Kanu sought a review of this decision, and a review dated 17 April 2012 confirmed the decision. However this review was quashed by an order made by HHJ Blunsdon in the Lambeth County Court. This led to a further review, contained in a letter dated 21 March 2013 which also confirmed the decision, and went on to consider and reject the possibility of voluntarily providing Mr Kanu with accommodation under section 192(3).

31. The review, which was carried out by Bernadette Emmanuel, a Reviews Officer of Southwark, runs to no less than 14 fairly closely typed pages. The letter includes the following:

i) While accepting that Mr Kanu may be "vulnerable", Ms Emmanuel "noted that [he] has a wife and adult son included on his homelessness application, who form members of his household and it has been confirmed during interviews with [Mr Kanu] and his wife that he relies upon both his wife and son to provide him with assistance needed for him to perform the tasks of daily living that he is unable to perform for himself".

ii) Ms Emmanuel was "not satisfied that if [Mr Kanu's] household was faced with street homelessness they would be at risk of injury or detriment greater than another ordinary street homeless person due to Mr Kanu's wife and son's ability to fend for the whole household, including [Mr Kanu]".

iii) She did "not believe … that an authority is required to make provisions for households who are comprised of or include adults in reasonable physical health."

iv) Mr Kanu "has been able to continue any treatment even when he was threatened with homelessness, when he became homeless … and during periods when he stated that his illness was severe enough to require him to visit hospital on an emergency basis".

v) Ms Emmanuel referred to the medical evidence that Mr Kanu had thoughts of self harming but had not done so, and said that she was "not satisfied that [he] would be more at risk of committing suicide than another ordinary homeless street person", and she also considered that Mrs Kanu "has already demonstrated an ability to prevent him from self harming".

vi) Mr Kanu "had not encountered any significant difficulties maintaining" his present accommodation and that he "has been actively seeking employment", and that he would "be able to fend for himself if street homeless".

vii) As to the haemorrhoids, Ms Emmanuel said that he was not being treated for them and they would not lead to problems.

viii) In respect of the hepatitis B and high blood pressure, the doctors had "prescribed … medication and medical treatments … and the information available shows that [Mr Kanu] with assistance from his family has been compliant with his treatments and [Ms Emmanuel was] satisfied that he could continue to do so if street homeless".

ix) The letter also stated that consideration had been given to the "Disability and Equality Act 2010" and that the "public sector equality duty informs the decision making process; however it does not override it".

32. Mr Kanu appealed to the Lambeth County Court, where Mr Recorder Matthews allowed his appeal. This was mainly on the ground that the review had wrongly proceeded on the basis that the view that, if homeless, Mr Kanu would be looked after by his family was not on its own sufficient to prevent him from being vulnerable: Ms Emmanuel should have gone on to ask herself whether he would nonetheless be vulnerable, and she failed to do so. The Recorder also considered there was no evidence that Mr Kanu would get adequate access to treatment "when street homeless", as well as thinking that the review had not taken into account the evidence that Mr Kanu's condition had "worsened in certain respects". He also considered that the references to the equality duty were so perfunctory that they showed that no real regard had been had to it.

33. Southwark appealed to the Court of Appeal and their appeal was successful – [2014] EWCA Civ 1085, [2014] PTSR 1197. In his judgment (with which Aikens and Kitchin LJJ agreed), Underhill LJ considered each of the grounds upon which

the Recorder had allowed Mr Kanu's appeal and held that they were ill-founded. Essentially, he considered that the main ground amounted to a criticism that Ms Emmanuel should have checked with the medical experts before concluding that Mr Kanu would, when homeless, not be vulnerable if looked after by his wife. However, said Underhill LJ, there was "ample evidence" in relation to his physical health and "a good deal of evidence" as to his mental health to enable Ms Emmanuel to reach a conclusion on an issue which "doctors were [not] peculiarly qualified to answer" (para 42). He was similarly unimpressed with the other grounds, holding that the public sector equality duty "add[ed] nothing to the duty under section 193(2) so far as the issue of priority need is concerned" (para 55), and that, "in the particular circumstances of this case", it "add[ed] nothing … to the enquiry under section 189(1)(c)" (para 57).

The principal issues raised in these appeals

34. These three appeals all thus concern the assessment of an applicant's vulnerability for the purpose of determining whether he can claim to have a priority need under section 189(1)(c) of the 1996 Act. The issues which section 189, and in particular subsection (1)(c), throws up were well described by Lord Walker of Gestingthorpe in *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 AC 430, para 114. He said that "[e]stablishing priority need may call for the exercise, and sometimes for a very difficult exercise, of evaluative judgment" and "the identification of a 'vulnerable' person may present real problems".

35. The three principal issues which have been discussed in these appeals are as follows:

i) Does the assessment of whether an applicant is vulnerable for the purposes of section 189(1)(c) of the 1996 Act involve an exercise in comparability, and, if so, by reference to which group of people is vulnerability to be determined?

ii) When assessing vulnerability, is it permissible to take into account the support and assistance which would be provided by a member of his family or household to an applicant if he were homeless?

iii) What effect, if any, does the public sector equality duty under section 149 of the 2010 Act have on the determination of priority need under section 189 of the 1996 Act in the case of an applicant with a disability or any other protected characteristic?

36. Although these were the three issues which were identified as being in dispute on these appeals, a number of other points emerged during the hearing which should also be mentioned, and I shall turn to them before addressing the three main issues.

Some points of significance

37. First, the vulnerability with which section 189(1)(c) is concerned is an applicant's vulnerability if he is homeless. It is true that para (c) uses the present tense and does not expressly link the word "vulnerable" to any specific situation. However, the context of the word renders it clear that it is concerned with an applicant's vulnerability if he is not provided with accommodation. Part VII is concerned with the provision of accommodation, and section 189 is directed to those who are entitled to accommodation rather than advice and assistance in finding it. Thus, the plain inference is that section 189(1)(c) directs an enquiry as to the applicant's vulnerability if he remains or becomes a person without accommodation. As was said by Lord Griffiths in *R v Oldham Metropolitan Borough Council, Ex p Garlick* [1993] AC 509, 519E, when referring to Part III of the Housing Act 1985, the predecessor of Part VII of the 1996 Act, it "is primarily to do with the provision of bricks and mortar and not with care and attention for the gravely disabled which is provided for in other legislation" – and see the fuller discussion in *R (M) v Slough Borough Council* [2008] UKHL 52, [2008] 1 WLR 1808, paras 7-29 per Lady Hale.

38. Secondly, when assessing whether or not an applicant is vulnerable, an authority must, as Arden LJ said in para 6 of her judgment in the *Johnson* case, "pay close attention to the particular circumstances of the" applicant. Indeed, as Ms Thompson, the reviewing officer in Mr Johnson's case rightly said (see para 21(vii) above), the issue of vulnerability must be determined not so much by reference to each of the applicant's problems, but by reference to them when taken together. Thus, the question whether an applicant is vulnerable must involve looking at his particular characteristics and situation when homeless in the round.

39. Thirdly, Arden LJ was not right to go on to say that the authority must, or even can, "tak[e] into account its own burden of homeless persons and finite resources" when assessing whether an applicant is vulnerable. In making that observation it may well be that Arden LJ thought that she was following earlier guidance given by Auld LJ in *Osmani v Camden London Borough Council* [2004] EWCA Civ 1706, [2005] HLR 325, para 38(4) which she had quoted in the preceding paragraph of her judgment. However, as all counsel in these appeals rightly agreed, an authority's duty under Part VII of the 1996 Act is not to be influenced or affected by the resources available to the authority. Once they have determined the status of an applicant under Part VII of the 1996 Act, their duty to that applicant is as defined in the Act: the fact that the authority may be very short

of money and/or available accommodation cannot in any way affect whether an applicant is in priority need. In so far as a balancing exercise between housing the homeless and conserving local authority resources is appropriate, it has been carried out by Parliament when enacting Part VII. Of course, an authority's resources may be relevant in relation to a number of aspects of its duty under Part VII of the 1996 Act (see eg per Lord Hoffmann in *Holmes-Moorhouse v Richmond upon Thames London Borough Council* [2009] UKHL 7, [2009] 1 WLR 413, para 13), but they can have no part to play when assessing whether an applicant is vulnerable.

40. Fourthly, certain expressions seem to have entered the vocabulary of those involved in homelessness issues, which can lead to difficulties when they are applied to strictly legal problems. In particular, for instance, "street homelessness" and "fend for oneself" are expressions which one finds, in one or more of the review letters in the present appeals. Such expressions may be useful in discussions, but they can be dangerous if employed in a document which is intended to have legal effect. There are obvious dangers of using such expressions. They may start to supplant the statutory test, which is normally inappropriate in principle, and, when they originate from a judgment, they may be apt for the particular case before the court, but not necessarily for the general run of cases. Additionally, they may mean different things to different people.

41. The expression "fend for oneself" was used by Waller LJ in *R v Waveney District Council, Ex p Bowers* [1983] QB 238, 244H, and no doubt was a useful way of expressing oneself in the context of that case (which was concerned with section 2(1)(c) of the Housing (Homeless Persons) Act 1977, which was effectively identical to section 189(1)(c) of the 1996 Act). However, it is not the statutory test, and at least to some people a person may be vulnerable even though he can fend for himself. Furthermore, the expression could mislead. For instance, where, as in two of the instant appeals, the issue is whether an applicant is vulnerable if he will be fully supported by a family member, the answer most people would give would be "no", if the test is literally whether he could fend for himself.

42. The expression "street homeless" is also much used, but it is not to be found in the 1996 Act (although it is to be found, and indeed defined in section 71 of the Housing (Wales) Act 2014, which is concerned with the "meaning of vulnerable"). It seems to have entered into the Court of Appeal's vocabulary in the judgment of Auld LJ, in *Osmani* – see paras 23-28 and para 38(7). When Lord Hughes raised the question of the precise meaning of "street homeless" with counsel during argument, it took until the following day before he got a clear answer. The expression can plainly mean somewhat different things to different people. "Homeless", as defined in the 1996 Act, is an adjective which can cover a number of different situations, and the very fact that the statute does not distinguish between them calls into question the legitimacy of doing so when considering the nature or extent of an authority's duty to an applicant.

43. Fifthly, as Ms Rhee pointed out, the use of statistics to determine whether someone is vulnerable is a very dangerous exercise whatever the correct test of vulnerability under section 189(1)(c) may be. The point was very well put by Underhill LJ in *Ajilore v Hackney London Borough Council* [2014] EWCA Civ 1273, para 58, where he was discussing statistical evidence relied on in a section 202 review in relation to an applicant who was said to be a suicide risk if he was made homeless:

> "[E]ven if it is right, as seems plausible enough even in the absence of statistics, that the incidence of suicide is higher among homeless people than in the remainder of the population, I am not sure how that is relevant to the question which the reviewing officer had to decide. It might show only that a disproportionate number of people with the kind of history or personality that renders them specially liable to attempt suicide tend to be made homeless. The fact that there might be disproportionately many such people in the homeless population would not in itself mean that they were any the less vulnerable within the meaning of section 189 (1)(c) - any more than it would if there were a disproportionately large number of homeless people suffering from severe mental illness. The question of who constitutes the 'ordinary homeless person' … cannot be answered purely statistically."

44. Sixthly, to characterise those who fall within paragraphs (a), (b) and (d) of section 189(1) as "vulnerable" is a mistake. I mention that because it was suggested that this was a helpful approach when deciding how to interpret paragraph (c). The linking characteristic of the people who fall within the four paragraphs is that they have "priority need", not that they are "vulnerable". The statute only uses the word "vulnerable" in paragraph (c), and that is because not all those who fall within the specific classes referred to in that paragraph, namely "old age, mental illness or handicap or physical disability", are within the scope of the paragraph: it is only those who are vulnerable. On the other hand, Parliament has decided that everyone who is pregnant, living with dependent children, or is homeless as a result of an emergency is in priority need. The Secretary of State drew the same distinction between the first two and the last two of the additional categories added by the Order referred to at para 9 above.

45. Seventhly, the reviews in the *Hotak* and *Kanu* cases reveal a belief on the part of some reviewing officers which is quite mistaken and should be recorded as such. Thus, in her review in the *Kanu* case, Ms Emmanuel suggested that a local housing authority was not "required to make provisions for households who are comprised of or include adults in reasonable physical health" – see para 31(iii) above – and the same point was made (I think) in the *Hotak* review – see para 26(ii) above. This is plainly wrong. It is clear from the wording of section 189(1)(c) that (i) an applicant

can be vulnerable even if he resides or can be expected to reside with a third party, and (ii) once an authority has decided that an applicant is vulnerable, then the duty to house him extends to such a third party. It is nothing to the point that the third party is not vulnerable. Of course, if the support which the third party would give to the applicant can be taken into account when deciding whether the applicant is vulnerable (the second issue identified in para 35(ii) above), then the fact that the third party is in good physical and mental health may be of some relevance, but that is as far as the third party's state of health can go in playing any part in determining an applicant's vulnerability.

46. Eighthly, the cases reveal a disagreement as to whether section 189(1)(c) gives rise to a two-stage test – (i) whether the applicant is "vulnerable", and (ii) whether it is as a result of "old age, mental illness or handicap or physical disability or other special reason" – or whether there is a single, composite test. This is a somewhat arid argument, and I am unconvinced that it is sensible to force housing authorities and reviewing officers into a straitjacket on this sort of issue. In any event, the correct answer may depend on the facts of the particular case. However, given the reference to "other special reason" , and given the fact that in many cases there will be a mixture of reasons as to why an applicant is said to be vulnerable, I suspect that the one-stage test will probably be more practical in most cases.

47. I turn now to the three issues which have been argued between the parties, and, having considered them, I will deal with the three appeals.

Vulnerability: a comparative concept, but compared with what?

48. There have been a number of decisions of the Court of Appeal on the issue of whether or not an applicant was vulnerable within the meaning of section 189(1)(c) or its statutory predecessor. When it comes to the proper approach to the issue, there are two decisions which have been frequently referred to. The first is *Ex p Bowers* [1983] QB 238, where at pp 244H-245A, Waller LJ said "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". The second, which has proved particularly influential, is *R v Camden London Borough Council, Ex p Pereira* (1998) 31 HLR 317, where at p 330 in the last paragraph of his judgment, Hobhouse LJ gave fuller guidance. In a passage similar to that in *Bowers*, but with an important addition, he said that the authority must ask themselves whether the applicant "when homeless [will be] 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" (emphasis added). To the same effect, he said this a little later: "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."

49. Waller LJ's formulation suffers from the rather fundamental defect that it seeks to explain who is a vulnerable person by reference to a "less vulnerable" one, which is logically circular and therefore highly questionable. Although the first of the two sentences I have quoted from Hobhouse LJ's judgment suffers from the same problem, his guidance is potentially more helpful. However, I think that it should be approached with caution essentially for two reasons. First, it has been treated in some decisions of courts and reviewing officers almost as a statutory definition, when it was simply intended to be guidance to Camden housing authority as to how to approach Mr Pereira's application, which was being remitted for reconsideration. Thus, no doubt because there was no question of Mr Pereira being supported by a family member, Hobhouse LJ used the expression "fend for himself", which I have discussed above. The second reason for treating Hobhouse LJ's guidance with caution is that the term "ordinary homeless person" can plainly be interpreted in more than one way, as Mr McGuire QC rightly submitted.

50. One feature which the reasoning in all the previous cases share in this connection is the notion that vulnerability has to be assessed comparatively - as is clear from the two cases just referred to. However, in these appeals, it is argued on behalf of Mr Johnson that this is wrong, and that there is no need for a comparable against which to judge whether an applicant is vulnerable for the purposes of section 189(1)(c).

51. Although the argument was advanced by Mr Luba QC with his usual ability and fluency, it is not right. As Lord Wilson pointed out in argument, "vulnerable", like virtually all adjectives, carries with it a necessary implication of relativity. In the very type of case under consideration, it can fairly be said that anyone who is homeless is vulnerable, as Lord Glennie pointed out in *Morgan v Stirling Council* [2006] CSOH 154, [2006] HousLR 95, para 4. Accordingly, as he went on to suggest, it follows that section 189(1)(c) must contemplate homeless people who would be more vulnerable than many others in the same position (especially given the words "or other special reason" which show that vulnerability arising from many causes is covered).

52. Mr Luba contended that anyone who cannot "cope without harm" with homelessness is "vulnerable". But that formulation merely restates the problem – and does so by reference to non-statutory wording (including the word "cope" which may have similar problems to the expression "fend for himself"). Virtually everyone who is homeless suffers "harm" by undergoing the experience, and therefore one is thrown back on the notion of a homeless person who suffers more harm than many others in the same position.

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. But that leaves open the question of the comparator group. In *Ex p Pereira* 31 HLR 317, 330, as explained above, Hobhouse LJ suggested that the comparator was "the ordinary homeless person", which is, as I have mentioned, an uncharacteristically imprecise expression. It could mean (i) the ordinary person if rendered homeless, or (ii) the ordinary person who is actually homeless (a) viewed nationally, or (b) viewed by reference to the authority's experience.

54. At least judging from the decisions to which we were referred, this uncertainty was initially not resolved – thus, it seems to have been left open in Auld LJ's summary of the legal principles in *Osmani*, at para 38(4) and (5). However, shortly thereafter, in *Tetteh v Kingston upon Thames London Borough Council* [2004] EWCA Civ 1775, [2005] HLR 21, para 21, Gage LJ seems to have assumed that "the ordinary homeless person" was a notional homeless person based on the particular authority's experience. That also seems to have been the approach of Arden LJ in *Johnson* [2013] HLR 524, at paras 18 and 20, as pointed out by Gloster LJ in *Ajilore*, at para 14, an approach which she also adopted. While it is not entirely clear, this suggests that the test being adopted is possibility (ii)(b), but it may be (ii)(a).

55. Despite the argument of Mr Rutledge QC to the contrary, in my judgment that is not the right approach. I do not consider that it would be right for the comparison to be based on the group of people in England and Wales who are homeless - ie possibility (ii)(a); still less do I consider that the comparison should be based on the group of people who are homeless in the area of the relevant authority– ie possibility (ii)(b). In my view, possibility (i) is correct.

56. It does not seem probable that Parliament intended vulnerability to be judged by reference to what a housing officer thought to be the situation of an ordinary actual homeless person. Such an assessment would be more likely to lead to arbitrary and unpredictable outcomes than if one takes the ordinary person if rendered homeless, and considers how the applicant would fare as against him. Equally importantly, if the comparison is with the ordinary actual homeless person, then – especially if possibility (ii)(b) were correct – as Sedley J pointed out in *R v Hammersmith & Fulham London Borough Council, Ex p Fleck* (1997) 30 HLR 679, 681, there would be a real risk that "a sick and vulnerable individual (and I do not use the word 'vulnerable' in its statutory sense) is going to be put out on the streets", which he described as a "reproach to a society that considers itself to be civilised".

57. In my opinion, properly understood, both Waller LJ in *Bowers* and Hobhouse LJ in *Pereira* intended the vulnerability comparison under section 189(1)(c) to be

with an ordinary person if made homeless, not with an ordinary person actually homeless. That seems to me to be apparent from Waller LJ's reference to "a less vulnerable man", as opposed to "a less vulnerable homeless man". I think it also follows from Hobhouse LJ's reference (in a passage at p 330 which I have not so far quoted) to "an individual" who "suffer[s] from some mental or physical handicap which … makes him unable to cope with homelessness" as someone who would fall within section 189(1)(c). There was no suggestion that, if such a person could be said to be ordinary in the context of the actual homeless, he would fall outside the section.

58. Accordingly, I consider that, in order to decide whether an applicant falls within section 189(1)(c), an authority or reviewing officer should compare him with an ordinary person, but an ordinary person if made homeless, not an ordinary actual homeless person.

59. In fact as Lady Hale has pointed out, comparing an applicant with other "homeless" people is not the precisely accurate comparison. Section 189 is concerned with those who have "need for accommodation". Accordingly, strict accuracy suggests that, when assessing his vulnerability for the purposes of section 189(1)(c), an applicant should be compared with an ordinary person who is in need of accommodation. I am unpersuaded that that could ever lead to a different result from a comparison with an ordinary person who is homeless, but, given that I have been anxious to emphasise the primacy of the statutory words, it would be wrong not to acknowledge this point.

60. Before leaving this point, I should mention that Mr Rutledge argued that Parliament had impliedly approved what was said by Hobhouse LJ in *Pereira* by having made subsequent amendments to Part VII of the 1996 Act without in any way amending section 189(1)(c). This is a useful opportunity to emphasise that this is a misconceived argument for the reasons which Lady Hale and I gave in *R (N) v Lewisham London Borough Council* [2014] UKSC 62, [2014] 3 WLR 1548, paras 167-168 and 143-148, which, albeit in dissenting judgments, represent the law on this topic. As Mr Luba rightly said, there is a stronger argument that the substantial re-enactment of section 21(1)(c) of the 1977 Act as section 189(1)(c) of the 1996 Act can be said to suggest Parliamentary approval of *Bowers*, but even that is a weak argument, as (i) it is not a powerful point of principle (see the citations in paras 145-146 of *R (N) v Lewisham London Borough Council*), (ii) the re-enactment was not in identical language, (iii) there is nothing to suggest that *Bowers* had been viewed by the courts as laying down a definition of universal application, (iv) there is nothing to suggest that Parliament was aware of the decision as laying down a principle, and (v) in any event, the passage relied on is logically flawed in so far as it is said to be a definition (see para 49 above).

Vulnerability: the relevance of support from family members

61. In *Hotak*, the reviewing officer, His Honour Judge Blunsdon, and the Court of Appeal all came to the conclusion that an applicant who would otherwise be vulnerable within section 189(1)(c) might not be vulnerable if, when homeless, he would be provided with support and care by a third party (often no doubt a family member with whom he was living). In my judgment, that conclusion, which was subsequently followed in *Kanu*, is correct, but it has to be applied with considerable circumspection.

62. As explained in para 37 above, an applicant's vulnerability under section 189(1)(c) has to be assessed by reference to his situation if and when homeless. In other words, it is not so much a clinical assessment of his physical and mental ability (to use a shorthand expression): it is a contextual and practical assessment of his physical and mental ability if he is rendered homeless (which, as just explained, must be compared with the ability of an ordinary person if rendered homeless). The fact that it is a contextual and practical question points strongly in favour of the conclusion that, when deciding if he is "vulnerable", one must take into account such services and support that would be available to the applicant if he were homeless.

63. Such a conclusion is also supported by consideration of the purpose of Part VII of the 1996 Act generally and section 189 in particular. Part VII is aimed at assisting the homeless, and as Lord Hoffmann observed in *O'Rourke v Camden London Borough Council* [1998] AC 188, 193, it involves "public money [being] spent on housing the homeless not merely for the private benefit of people who find themselves homeless but on grounds of general public interest". As he went on to explain, "for example, proper housing means that people will be less likely to suffer illness, turn to crime or require the attention of other social services". Virtually everyone is better off housed than homeless, but it is those people who will be more vulnerable in practice if they are homeless who could be expected to receive priority treatment. It would seem contrary to common sense if one were to ignore any aspect of the actual or anticipated factual situation when assessing vulnerability. It is also relevant to note that paras (a), (b) and (d) of section 189(1) are all concerned with practical situations.

64. As Lord Wilson pointed out, this conclusion is supported by considering an applicant with a physical or mental condition which, if not treated, would render him vulnerable, but which can be satisfactorily treated by regular medication. If such an applicant, when homeless, would be perfectly capable of visiting a doctor to obtain a prescription and a pharmacist to collect his medication, and then of administering the medication to himself, it would be unrealistic to describe him as "vulnerable", when compared with an ordinary person when homeless. Mr Brown QC tried

valiantly to meet that point, but it does not appear to me that it is answerable. Once one accepts that point, it is very hard to see any logical reason for ignoring any support or assistance which an applicant would receive when homeless. For similar reasons, it is also very hard to see any principled basis for disregarding support or assistance simply because it would come from the authority (eg through its social services department) or from a family member.

65. Unlike Lady Hale, I do not consider that it matters, at least in principle, whether the support is provided pursuant to a legal obligation. As I see it, although I have sympathy with the notion in terms of policy, the conclusion that support only qualifies if provided pursuant to a legal obligation involves implying a limitation into the statute. Having said that, I agree with Lady Hale that housing authorities can only take third party support into account where they are satisfied that, as a matter of fact, the third party will provide such support on a consistent and predictable basis. In that connection, the question whether there is a legal obligation on the third party to provide the support could sometimes be relevant, in that it may be said to be intrinsically more likely that a person will continue to provide support if he or she has a legal obligation to do so. So, where an otherwise vulnerable applicant would not be vulnerable if he was receiving third party support, the question is simply one of fact: will the third party provide the support on a consistent and predictable basis?

66. Mr Brown did, however, make one very powerful point. Section 189(1)(c) extends priority need not only to a vulnerable applicant but also to a person with whom he resides or could be expected to reside. If such a person is prepared to look after the applicant when they are both homeless, then the applicant may not qualify as having priority need and they will not receive accommodation, whereas if that person refuses to look after the applicant, they will both qualify under section 189(1)(c) and receive accommodation. That indeed is the effect of the decisions in *Hotak* and *Kanu*. Further, as Lady Hale pointed out, an even starker example could arise where a mother, who has been provided with accommodation for herself and her disabled child under section 189(1)(b), loses priority status when her child comes of age. In such circumstances, her child might only be vulnerable if she was not prepared to look after him if homeless, so they would both be housed if she refused to care for the child, but they would not be housed if she acted as any caring mother would be expected to act.

67. This point gives rise to a real concern whether the view I have expressed in paras 62-64 above can be correct. However, in the end, I do not consider that it undermines it. The curious, indeed somewhat distasteful, consequence of that conclusion where it is a family member (as it normally would be) residing with the applicant who provides the support cannot justify changing that conclusion generally: it would involve the tail wagging the dog. Nor can one imply an exception into the general principle that support is to be taken into account when assessing

vulnerability: at least on its own, the fact that a statutory provision is capable of producing a distasteful result in some circumstances cannot justify some sort of judicially created legislative exception.

68. While it cannot be denied that Mr Brown's point has force, I think that the apparent paradox which he identifies is, on analysis readily explicable. The primary focus of section 189(1)(c) is on the putative vulnerable applicant, and the inclusion of a third party in the provision of accommodation is either to avoid breaking up the household or family unit or to benefit the vulnerable person, and not to benefit the third party. If one is looking at the applicant, the only relevant factual question when it comes to the issue of support is what support he would receive; the fact that the answer to this question may produce counter-intuitive results in relation to a third party with whom he lives is therefore not as surprising as it seems at first blush. The purpose of Part VII of the 1996 Act is not to reward the virtuous, but to deal with a practical problem. In any event, it is by no means obvious that the curious outcome identified by Mr Brown is attributable to a Parliamentary oversight. While some may think that it would be appropriate to make an exception for care when provided by a family member, it may equally be thought that, if such care is provided, it would place an excessive burden on housing authorities and work unfairly on other applicants, if it was disregarded when assessing the applicant's vulnerability, however perverse the result may seem when viewed from the perspective of the family member's position.

69. While an otherwise vulnerable applicant may not be vulnerable if he would be provided with care and support when homeless, it is very important indeed to emphasise that the mere fact that such support would be available may not prevent the applicant from being vulnerable. Thus, the observation in the *Hotak* review that, because Ezatullah Hotak "looks after" his brother "and he would continue to do so if they were street homeless together" (see para 26(iii) above) does not of itself mean that Sifatullah Hotak would therefore not be vulnerable. It is still incumbent on the reviewing officer to ask whether, even when looked after by his commendable brother, he would be vulnerable. The same point applies in *Kanu*, where the review letter relied on "Mr Kanu's wife and son's ability to fend for the whole household, including [Mr Kanu]" – see para 31(ii) above: this conclusion does not of itself necessarily mean that Mr Kanu would not be vulnerable.

70. Equally dangerous is the preceding sentence in the *Hotak* letter, namely "it is reasonable to expect a fit and healthy adult to attempt to house and support his brother while they are homeless together", at least if it is intended to suggest that there was an irrebuttable, or even a strong, presumption that a person will do what it is reasonable to expect him to do. I accept that it is not unreasonable to expect members of the same family to support each other if they are living together, but (i) whether a particular applicant will in fact receive support and if so what support, must be a case-specific question, to which the answer must be based on evidence

(which can of course include appropriate inferences), (ii) in a particular case, the level of support may have to be so high to obviate vulnerability that it goes beyond what can be expected on any view, and (iii) as already explained, the fact that there may very substantial support does not of itself necessarily mean that the applicant will not be vulnerable. Thus, in some cases, the support may be every bit as good as the applicant would receive if he were housed, but it would still not prevent him from being vulnerable. Accordingly, the reviewing officer must always consider very carefully whether the applicant would be vulnerable, after taking into account any support which would be available.

71. The point was very well made by Pitchford LJ in para 42 of his judgment in *Hotak*, where he said this (albeit that it must be corrected to allow for the fact that fending for oneself is not quite the appropriate test):

> "Even if the reviewing officer is satisfied that the support network would remain in place it may not, in a situation of homelessness, be sufficient to enable the applicant to fend for himself as would the average homeless person. For example, the old age or mental ill-health or physical disability of the applicant may be such that no amount of support will enable the applicant to cope with homelessness as would a robust and healthy homeless person."

The Equality Act 2010

72. The complaint raised under the 2010 Act against the review in the *Kanu* case by Ms Mountfield QC is that it failed to comply with the equality duty in that Ms Emmanuel accorded insufficiently careful or critical scrutiny to Mr Kanu's disability, and to the consequences to him of the adverse decision that he was not vulnerable.

73. The equality duty has been the subject of a number of valuable judgments in the Court of Appeal. Explanations of what the duty involves have been given by Dyson LJ (in relation to the equivalent provision in the Race Relations Act 1976) in *Baker v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, [2009] PTSR 809, paras 30-31,Wilson LJ (in relation to section 49A of the Disability Discrimination Act 1995, as inserted by section 3 of the Disability Discrimination Act 2005, the predecessor of section 149 of the 2010 Act) in *Pieretti v Enfield London Borough Council* [2010] EWCA Civ 1104, [2011] PTSR 565, paras 28 and 32, and McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] Eq LR 40, para 26 which pulls together various dicta, most notably those of Elias LJ in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), paras 77-78

and 89. I do not propose to quote those passages *in extenso*: they are not challenged in these appeals, and in my view, at least as at present advised, rightly so.

74. As Dyson LJ emphasised, the equality duty is "not a duty to achieve a result", but a duty "to have due regard to the need" to achieve the goals identified in paras (a) to (c) of section 149(1) of the 2010 Act. Wilson LJ explained that the Parliamentary intention behind section 149 was that there should "be a culture of greater awareness of the existence and legal consequences of disability". He went on to say in para 33 that the extent of the "regard" which must be had to the six aspects of the duty (now in subsections (1) and (3) of section 149 of the 2010 Act) must be what is "appropriate in all the circumstances". Lord Clarke suggested in argument that this was not a particularly helpful guide and I agree with him. However, in the light of the word "due" in section 149(1), I do not think it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment.

75. As was made clear in a passage quoted in *Bracking*, the duty "must be exercised in substance, with rigour, and with an open mind" (per Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1506, para 92. And, as Elias LJ said in *Hurley and Moore*, it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that "there has been rigorous consideration of the duty". Provided that there has been "a proper and conscientious focus on the statutory criteria", he said that "the court cannot interfere … simply because it would have given greater weight to the equality implications of the decision".

76. *Pieretti* is particularly in point as it concerned the interrelationship of Part VII of the 1996 Act and what is now the 2010 Act, and the Court of Appeal rightly held that what is now the public sector equality duty applied to a housing authority when performing its functions under Part VII. At para 28, Wilson LJ referred to "the six specified aspects of the duty" in the predecessor to subsections (1) and (3) of section 149 as "complement[ing] the duties of local authorities under Part VII".

77. The specific issue in the case was whether the reviewing officer had complied with what was the statutory predecessor of the equality duty, when deciding that the applicant and his wife were voluntarily homeless because they had failed to pay the rent due on their previous home as a result of which they were evicted. The Court of Appeal held that, on the specific facts of the case, the reviewing officer was in breach of her duty under section 49A(1)(d), because "she fail[ed] to make further inquiry in relation to some such feature of the evidence presented to her as raised a real possibility that the applicant was disabled in a sense relevant to whether he acted 'deliberately' … and in particular to whether he acted 'in good faith'" – per Wilson LJ at paras 35-36.

78. In cases such as the present, where the issue is whether an applicant is or would be vulnerable under section 189(1)(c) if homeless, an authority's equality duty can fairly be described as complementary to its duty under the 1996 Act. More specifically, each stage of the decision-making exercise as to whether an applicant with an actual or possible disability or other "relevant protected characteristic" falls within section 189(1)(c), must be made with the equality duty well in mind, and "must be exercised in substance, with rigour, and with an open mind". There is a risk that such words can lead to no more than formulaic and high-minded mantras in judgments and in other documents such as section 202 reviews. It is therefore appropriate to emphasise that the equality duty, in the context of an exercise such as a section 202 review, does require the reviewing officer to focus very sharply on (i) whether the applicant is under a disability (or has 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 the applicant if and when homeless, and (iv) whether the applicant is as a result "vulnerable".

79. Mr Underwood QC argued that the equality duty added nothing to the duty of an authority or a reviewing officer when determining whether an applicant is vulnerable. I quite accept that, in many cases, a conscientious reviewing officer who was investigating and reporting on a potentially vulnerable applicant, and who was unaware of the fact that the equality duty was engaged, could, despite his ignorance, very often comply with that duty. However, there will undoubtedly be cases where a review, which was otherwise lawful, will be held unlawful because it does not comply with the equality duty. In *Holmes-Moorhouse* [2009] 1 WLR 413, at paras 47-52, I said that a "benevolent" and "not too technical" approach to section 202 review letters was appropriate, that one should not "search for inconsistencies", and that immaterial errors should not have an invalidating effect. I strongly maintain those views, but they now have to be read in the light of the contents of para 78 above in a case where the equality duty is engaged.

80. Ms Monaghan QC supported Ms Mountfield's case that the equality duty would apply in a case where an applicant had a relevant protected characteristic. She also suggested that the effect of section 15 of the 2010 Act was to render unlawful a decision that such an applicant was not vulnerable because he could rely on the support of a third party. I do not accept that submission. Even assuming that it can be said that section 15(1)(a) is satisfied and such a decision amounted to what may be characterised as *prima facie* unlawful discriminatory treatment (which I would leave open, not least because it was not fully argued before us or even raised below), it seems to me that the treatment would be lawful pursuant to section 15(1)(b) on the basis that it was "a proportionate means of achieving a legitimate aim". Section 189(1)(c) is part of a scheme whose aim is to assist homeless people generally, and in particular to allocate the scarce resource of accommodation available to an authority to particular classes of homeless people. In section 189(1), Parliament has decided the principles by reference to which that allocation is to be effected, and

those principles cannot possibly be described as unreasonable. When an authority assesses what support and care would be available to an applicant with a relevant protected characteristic, and whether that would, as it were, take him out of section 189(1)(c), it is simply putting Parliament's decision into effect.

Conclusions on these appeals

81. Mr Kanu's appeal should be allowed, and Southwark's decision quashed. The review letter is a full and considered document, but it suffers from the errors of (i) assessing Mr Kanu's vulnerability by reference to "another ordinary street homeless person", and (ii) assuming that an authority is entitled to treat members of a household as not vulnerable if one of them is mentally and physically healthy - see paras 31(ii) and (iii) above. It is plain that an appeal against a review cannot succeed in every case where the wrong comparator has been invoked or a wrong legal assumption is made. Indeed, I do not think that Mr Kanu's appeal could succeed if the only error was the reference to "*street* homeless". But in this case, the important factor to my mind is that Mr Kanu had and has what appears to be a pretty strong case for claiming to be vulnerable. It is therefore quite conceivable that the review would have gone the other way if the right comparator had been used.

82. I would not, however, have allowed his appeal based on the equality duty. While some might find the outcome of the review surprising, in my view, albeit in a rather prolix and slightly confusing way, Ms Emmanuel did approach the question of Mr Kanu's vulnerability in a sufficiently full and considered way to satisfy the equality duty. The letter appears to identify each aspect of his disability; to address with care the questions of how they would be dealt with if he was homeless; how they would affect him, if he was homeless; whether he would therefore be vulnerable; and why, in Ms Emmanuel's view, he would not. In forming this view, I do not place significant weight on the fact that she specifically mentioned the equality duty (although she gave the 2010 Act the wrong name) – see para 31(ix) above. If the earlier part of the letter had not complied with the duty, I doubt very much that the throw-away reference to the equality duty could have saved it.

83. We were told that Mr Kanu's medical condition had deteriorated since the review decision had been made, and that he was in hospital. We were also told that, to their credit, Southwark had written to his solicitors indicating that he should make a fresh application as his deteriorating health justified a fresh Part VII application being made (following the guidance in *Tower Hamlets London Borough Council v Rikha Begum* [2005] EWCA Civ 340, [2005] 1 WLR 2103).

84. Mr Johnson can raise the same argument as Mr Kanu as to the use of the wrong comparator, and he can also raise the argument that the reviewing officer, Ms

Thompson, wrongly relied on statistical evidence - see para 21(i) and (iii) above. Nonetheless, I would dismiss his appeal. 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. It is also germane to bear in mind that the equality duty does not extend to Mr Johnson's misuse of drugs (or to his predilection for thieving) in the light of the Regulations referred to in para 18 above

86. I turn, finally to Mr Hotak. It is clear that his appeal must be dismissed as it was agreed between counsel that the outcome of the appeal turned entirely on the answer on the second main issue, and, as I am against Mr Hotak in relation that point, his appeal must fail.

87. However, I must confess to real disquiet about that conclusion. It does appear to me that the reviewing officer in his case went wrong in the same way as the reviewing officer in Mr Kanu's case – compare paras 26(i) and (ii) with paras 31(ii) and (iii) above – and he also appears to have proceeded on the basis that he was entitled to assume that Ezatullah Hotak would continue to support Sifatullah Hotak if he was homeless – see para 26(iii) above. I readily accept that even the combination of the errors of (i) using a comparator based on the ordinary actual homeless person, (ii) referring to "street homeless", (iii) apparently thinking that there was no duty to provide accommodation, and (iv) apparently thinking that a person could be assumed to support a vulnerable brother may not render a review

decision bad in law. Thus, there is a powerful case for saying that the third and fourth points were merely badly expressed (as otherwise it is unclear why the letter went on to consider Sifatullah Hotak's situation). However, given the fact that Sifatullah Hotak appears to have had a strong case for saying that he did fall within section 189(1)(c), I would have taken the same view of his appeal as that of Mr Kanu. However, I do not think that it would be right to allow Mr Hotak's appeal on a ground which has not been raised on his behalf at any stage of these proceedings – not even in writing or orally on his appeal to this court.

88. We were told that, very properly, Southwark were continuing to house the Hotak brothers pending the outcome of this appeal. I am well aware of the pressures on both the personnel and the financial resources of housing authorities in general, and of Southwark in particular. However, in the light of his unusual degree of disability and concerning circumstances, I would very much hope that, despite the fact that we are dismissing his appeal, Sifatullah's potential homelessness will be reconsidered by Southwark.

89. Since we made this judgment available in draft to counsel for the parties, an application was made on behalf of Mr Hotak requesting the court to consider whether to quash the review letter in his case in the light of what is said in paras 87 and 88 above and by Lady Hale in para 102 below. Rather than delay handing down the decision, we have asked Southwark to make submissions on this application, whereupon we will decide how to dispose of it.

90. In the event, however, I would dismiss the appeals in *Hotak v Southwark London Borough Council* (subject to what I say in para 89 above) and in *Johnson v Solihull Metropolitan Borough Council*, and would allow the appeal in *Kanu v Southwark London Borough Council*. Counsel can no doubt agree appropriate forms of order.

LADY HALE: (dissenting in part)

91. Glossing the plain words of statutory provisions is a dangerous thing, as these cases show only too clearly. The statutory provision says simply that:

> "The following have a priority need for accommodation - ... (c) a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside."

Yet we had reached the point where decision-makers were saying, of people who clearly had serious mental or physical disabilities, that "you are not vulnerable, because you are no more vulnerable than the usual run of street homeless people in our locality"; and further, that "if a person living with you, or who might reasonably be expected to live with you, is able and willing to look after you on the streets then you are not vulnerable". In my view, both of those propositions are wrong.

92. The first question is whether it is necessary to introduce any comparison into the word "vulnerable". Adjectives are capable of bearing an objective meaning: one can say that a person is "mentally ill" without setting a comparative standard. But I appreciate that there usually is some comparative standard implicit – if I say that a person is "tall", I probably mean that he is taller than average or perhaps taller than me. It is also the case that many old people and most people who suffer from mental illness or handicap or physical disability are for that reason alone "vulnerable" in the dictionary sense of being susceptible to harm. But the legislator did not provide that they were all in priority need, only that they are in priority need if they are vulnerable as a result. The concept of being "vulnerable" must therefore have been intended to add something to those other characteristics. But what?

93. 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 to mean by "an ordinary person if homeless". I agree. The comparison is with ordinary people, not ordinary homeless people, still less ordinary street homeless people. And it is ordinary people generally, not ordinary people in this locality.

94. It is when we come to the second proposition that I venture to disagree with Lord Neuberger's view. In my view, the source of the predicted third party support makes a difference. I accept that, when considering whether the person concerned is more at risk of harm from being without accommodation than others, it is right and proper to take into account the statutory services which will be available to him in any event. He will still be able to get the medication he needs. He should still be able to obtain medical and nursing care from the National Health Service. He should still be able to obtain counselling and other community services available for people with mental disorders or disabilities. There is a statutory duty to supply such services and a corresponding right to receive them.

95. Charitable services are another matter, unless these are provided by arrangement with the statutory services in fulfilment of their statutory duties. There is no legal obligation to provide charitable services. Charitable services may come and go – there may be a regular soup or sandwich run in some places at some times but not everywhere always. Charitable services will set their own criteria for whom they will help and whom they will turn away. Charitable services may run out of money. I appreciate that the days are long gone when we could even think that the statutory services have a bottomless pit of money. But we are all agreed that this is not a context in which local authorities are entitled to take their own resources into account. But if they are entitled to take third party support into account, it must at the very least be consistent and predictable and reasonable to expect the third party to provide it for this particular person.

96. That is one reason for doubting whether it is appropriate to take family support into account – but there is another more important one. I do not see how it can be consistent with the intention of the statute to take into account help which may be available from other members of the household, that is, those already living with the vulnerable person or those who might reasonably be expected to do so. These will usually be other family members, including cohabitants, although they might be friends who have been sharing a home together. Most people who live together help one another to some extent, and especially if the person who needs help is old, mentally disordered or disabled, or physically disabled. It would be a sad world indeed if they did not. I do not believe that this provision was catering only for that sad world. It is premised on there being at least one member of the household who is vulnerable and one or more others who are not. Both the vulnerable and the non-vulnerable qualify as being in priority need. The non-vulnerable can apply on behalf of them both. It is difficult to think that Parliament contemplated that the non-vulnerable could only apply on behalf of them both if he was *not* looking after the vulnerable one. Why on earth would Parliament want to give such a heartless person priority and priority over the person who was fulfilling his familial duties?

97. This is a separate point from the perverse incentive that taking into account help from household members would produce. It is a point about the people whom Parliament is most likely to have wanted to single out as having a priority need. The section draws no distinction between those who are and those who are not providing help to their old or disabled house-mate, but if Parliament had wanted to distinguish between the two, it would surely have found the helpful one more worthy of priority than the unhelpful.

98. This view of the matter is at least consistent with that of all members of the House of Lords in *R v Tower Hamlets London Borough Council, Ex p Ferdous Begum*, reported with *R v Oldham Metropolitan Borough Council, Ex p Garlick* [1993] AC 509. The applicant was a 24 year old Bangladeshi woman who lacked all

hearing, speech and education. She could communicate only through a form of sign language unique to her. She arrived in the United Kingdom with her parents, sisters and a brother. Her father's application for accommodation under the forerunner to the 1996 Act was declined on the ground that the family had become homeless intentionally, having left accommodation in Bangladesh which it was reasonable for them to continue to occupy. The daughter, with the help of her father and solicitor, then made her own application, contending that because of her incapacity she could not have acquiesced in any act or omission of her father rendering her homeless. The local authority held that if she could not acquiesce in her father's behaviour, neither could she acquiesce in making her own application. The majority of the House of Lords accepted, not only that she could not apply, but also that her father could not apply on her behalf. But this was very clearly on the basis that, had the family not become homeless intentionally, the father would have been in priority need because of his daughter's vulnerability. Lord Griffiths said this (p 519G):

> "Many vulnerable people are cared for in the community by their relatives or other good-hearted people with whom they live. If such a 'carer' should have the misfortune to become homeless then [section 189(1)(c)] gives him the status of priority need, and provided his homelessness was not intentional, he will qualify for an offer of accommodation which will enable him to continue to look after the vulnerable person."

99. Lord Slynn of Hadley disagreed with the majority. In his view the father could apply on behalf of the daughter who lacked the capacity to do so. But he agreed with them on the point made above, at p 522E:

> "If the vulnerable person is alone with no existing carer, he may need special accommodation. ... If he is not alone but has an existing carer or family 'who might reasonably be expected to reside with him' then the accommodation must be available for their occupation also."

100. It might, of course, be said that no-one took the point which is now taken in this case. In fact the reverse was the case. It was an essential part of the argument of counsel for the local authority, Mr Underwood QC, that, if a homeless person was mentally incapable of making an application, but had a carer in the same household who was unintentionally homeless, the carer would be entitled to accommodation (under the predecessor to section 189(1)(c)) for them both. Counsel in this case has cited no authority at all for the proposition that the existence of a carer within the same household can mean that a person who is otherwise obviously vulnerable is not to be so taken. *Ex p Ferdous Begum* is the closest the cases get to discussing the point and it is all the other way.

101. In my view, therefore, Sifatullah Hotak remains "vulnerable" for the purpose of section 189(1)(c) of the 1996 Act despite the devoted care which he receives from his brother Ezatullah. As it is clear that the authority would have accepted that he was vulnerable were it not for his brother's support, I would allow the appeal and declare that the appellant is in priority need.

102. But even if I were wrong about that, I would allow his appeal. It is true that the issue of law upon which Mr Hotak was given permission to appeal to this court was whether the local authority was entitled to take into account the existence of third party support and assistance. But within the grounds of appeal was an attack upon the courts' application of the principles laid down in *R v Camden London Borough Council, Ex p Pereira* (1998) 31 HLR 317 and *Osmani v Camden London Borough Council* [2004] EWCA Civ 1706. This court has agreed upon a substantial modification of those principles, with the result that the local authority misdirected themselves in law in at least two respects: "We do not believe ... that an authority is required to make provisions for households who are comprised of adults in reasonable physical health", and "… we are not satisfied that he will be at more risk of harm, injury or detriment than another ordinary street homeless person if he were street homeless ... " There is, as it seems to me, good reason to predict that, even taking into account his brother's help, the local authority would now conclude that Mr Hotak remained more vulnerable than an ordinary person. To decline to give him the same relief as we have given for those reasons to Mr Kanu is surely the triumph of form over substance. Had his counsel been asked whether he also adopted the argument of counsel for Mr Kanu, should he fail on his main point, he would, I am sure, have said "yes".