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Hotak-article

Changing the meaning of ‘vulnerable’ under the homelessness legislation ?

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The Supreme Court judgment in *Hotak v Southwark London Borough Council (Equality and Human Rights Commission and others intervening)* [2015] UKSC 30; [2015] 2 W.L.R. 1341 appears to have significantly altered prevailing understandings of the meaning of ‘vulnerability’ within the homelessness legislation’s concept of priority need. This paper analyses *Hotak’s* doctrinal effects, and questions both the adequacy of the court’s reasoning and the likelihood of those formal doctrinal changes leading to a concomitant alteration to the content of the decisions that local authorities reach.

Keywords: homelessness; priority need; vulnerability

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Introduction

Since its introduction in 1977, (Loveland 1995 chs. 1-2; Cowan 2011 pp 146-151) the homelessness legislation has provided fertile ground for litigation and statutory amendment. The legislation (now contained in Part VII of the Housing Act 1996) provides applicants with an escalating level of entitlement dependent upon the answers given by the local authority to which an application is made to several statutory questions which function as ‘gateways’ to entitlement. Assuming that an applicant’s immigration status entitles her to assistance at all,¹ the ‘gateway’ questions (rendered here in a simplified form) are :

1. Is she ‘homeless’(per s.175-177) ?
2. Is she in priority need (per s.189) ?
3. Is she intentionally homeless (per s.191) ?

An applicant found by the local authority to be ‘homeless; and in ‘priority need’ and not ‘intentionally homeless’ is entitled to the so-called ‘full housing duty’ identified in s.193. In the early years of the legislation’s operation there was a general presumption that the ‘full

¹ Housing Act 1996 ss. 185-186. This notion of ‘eligibility’ has become an extremely complex element of homelessness law because of the frequent alterations made to the relevant regime through statutory instruments and the impact of ECJ judgments relating to the free movement of workers. See Arden et al (2012) ch. 3; Cowan (2011) ch.8.

housing duty' led to the grant of a secure local authority tenancy.² However, the formulation of the duty (per s.193(2)) is only that the authority: "shall secure that accommodation is available for occupation by the applicant" and it is now clear that this duty can be discharged in various ways other than by the authority itself offering accommodation; such as, for example, arranging for the grant of a tenancy by a private sector or social landlord.³

If the applicant is both homeless and in priority need but is also considered intentionally homeless, her entitlement is only (per s.190(2)) that the local authority secure accommodation is made available to her for such period as gives her a reasonable opportunity to find accommodation herself.⁴ The question as to intentional homelessness is of little significance however if the applicant – although homeless – is not in priority need. In those circumstances, the applicant's entitlement is only (per s.192) to 'advice and assistance' to aid her own attempts to find accommodation. That entitlement is, manifestly, of little value.

The meaning of the priority need provisions in s.189 of the Act is thus crucial: to the applicant in any given case in terms of her entitlement; and to each local authority in terms of the overall obligation that its aggregated applicants impose upon it; and to the local authority sector in general in terms of the overall obligation that the aggregated obligations of every authority imposes upon it.

Since 1997, the scheme of the legislation provides that a local authority must reach an initial decision on priority need (a so-called s.184 decision). This initial decision is then subject to what is termed by s.202 of the Act a 'review'. The s.202 review is an internal process within the local authority. The review label is rather misleading, as the s.202 decision is in effect a *de novo* decision on entitlement which must take into account all currently prevailing matters.⁵ The s.202 decision is then subject (per s.204) to 'appeal' to the county court, although this is an appeal on a point of law (ie in effect judicial review) rather than on all matters of fact and law.

The text of s.189

Much of s.189 is, both at first glance and on more careful scrutiny, tolerably clear in its meaning.

s.189 Priority need for accommodation

(1) The following have a priority need for accommodation—

- (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;

² The House of Lords concluded that this presumption was erroneous in *R v Brent LBC ex parte Awua* [1996] 1 AC 55. See (Hunter and Miles 1997) and (Cowan 1997).

³ The tenancy may be an assured shorthold tenancy, which provides the tenant with very little security of tenure. Local authorities also make increasing use of so-called non-secure tenancies in discharging their s.193 obligations to homeless persons, often in respect of housing which the authority itself has rented (sometimes at very high cost) from private sector landlords. See further the reference to s.206 of the Act at fn 37 below and accompanying text.

⁴ For a discussion of this duty see *R (Conville) v Richmond upon Thames LBC* [2006] EWCA Civ 718; [2006] 1 WLR 2808.

⁵ *Mohamed v Hammersmith and Fulham LBC* [2001] UKHL 5; [2002] 1 AC 457.

(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.⁶

However one element of s.189 has proven decidedly problematic. This is the notion of ‘vulnerable’ in s.189(c). The concept has prompted a steady stream of ‘clarificatory’⁷ case law ever since 1977. This article assesses a recent Supreme Court judgment on the issue - *Hotak v Southwark London Borough Council (Equality and Human Rights Commission and others intervening)*⁸. It is suggested that – at least at a formal doctrinal level – *Hotak* has appreciably refined the way in which vulnerability questions should be approached and appreciably affected the substantive outcomes which should be reached; albeit that the court’s analysis has merely reduced rather than removed the deficiencies of the previous approach to the vulnerability issue. It is also suggested however that the practical significance of *Hotak* may be significantly compromised by the courts’ more pervasive unwillingness to apply a rigorous degree of scrutiny to local authority’s s.202 decisions

The essential elements of the *Hotak* judgment

In the Supreme Court, *Hotak* had become consolidated with two other cases; *Johnson v Solihull MBC*⁹ and *Kanu v Soutwark LBC*.¹⁰ The issue in *Hotak* itself was a narrow one: could a local authority in deciding if a homeless person was vulnerable take into account assistance which would be given to her/him by third parties? *Kanu* and *Johnson* raised rather broader issues about the vulnerability concept, but it seems likely that the cases were joined because the Supreme Court was eager to offer a wide-ranging reconsideration of the issue.

Pereira is not ‘the test’

The s.202 decisionmakers in both *Johnson* and *Hotak* identified the question that the local authority had to ask itself in deciding if the applicant was vulnerable in virtually identical terms. In *Johnson* the question posed was:¹¹

⁶ S.189(2) empowered the Secretary of State to extend the categories of priority need through a statutory instrument. That power was exercised in 2002 in the Homelessness (Priority Need for Accommodation) Order 2002 SI No. 2051. The order specified inter alia that a person might be vulnerable as result of having previously been in various types of institutional settings or having been a victim of domestic violence. One might have thought such matters fell anyway within the scope of the ‘other special reason’ proviso in s.189(1)(c); see for example the broad view taken of that phrase in *R v Waveney DC ex parte Bowers*, and the discussion of the point in Arden (2006) pp 136-137.

⁷ As will become evident in the discussion below, the word is used guardedly if not ironically.

⁸ [2015] UKSC 30; [2015] 2 W.L.R. 1341. *Hotak* in the Court of Appeal is reported at [2013] EWCA Civ 515; [2013] PTSR 1338.

⁹ [2013] EWCA Civ 752 [2013] HLR 524.

¹⁰ [2014] EWCA Civ 1085 [2014] PTSR 1197.

¹¹ *Hotak* para 21.

“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”.

In *Hotak* it was:¹²

“[The] 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.”

Similar language was used in the s.202 decision in *Kanu*, albeit as part of the authority’s conclusion rather than as an initial question.¹³

The recurrent form of words is lifted more or less verbatim from a passage in the Court of Appeal’s 1998 judgment in *R v Camden London Borough Council, Ex p Pereira*¹⁴, where Hobhouse LJ indicated that a person would be vulnerable if she/he would be:

“when homeless less able to fend for himself than *an ordinary homeless person* so that injury or detriment to him will result when a less vulnerable man would be able to cope without harmful effects”.

Practitioners familiar with homelessness litigation over the past ten years will have seen this quotation from *Pereira* constantly invoked in s.202 decision letters. It appears to have become both a mantra and an article of faith among local authority decisionmakers. *Pereira*, it seems to be assumed within local authorities, is ‘the law’. That view has perhaps been fortified by the fact that this passage in *Pereira* has also appeared - without attribution or sourcing - in successive editions of the government’s *Code of guidance to the homelessness legislation*.¹⁵ And it has been repeatedly endorsed by subsequent judgments of the Court of Appeal.¹⁶

¹² *Hotak* at para 26.

¹³ *Hotak* at para 31.

¹⁴ (1998) 31 HLR 317.

¹⁵ At para 10.13 (with emphasis in bold type) of the 2003 edition; at para 10.13 (still in bold type) of the 2006 (and latest) edition; <https://www.gov.uk/government/publications/homelessness-code-of-guidance-for-councils-july-2006>. The Act requires local authorities to have regard to the code when making any decisions (s.182), but the code is of course merely guidance and not an authoritative statement of the meaning of any provision of the Act.

¹⁶ See for example *Griffin v Westminster CC* [2004] HLR 32 at para 16; *Osmani v Camden LBC* [2004] EWCA Civ 1706; [2005] HLR 46 at para 37. Indeed in *Osmani* the passage in *Pereira* cited above was described – extraordinarily – as: “the classic test”; per Auld LJ at para 37. It should however be noted that Auld LJ also took pains to say (at para 38) that:

“(1) It is s.189(1)(c) in its broad and immediate statutory context that a local housing authority has to apply, not the *Pereira* test as if it were a statutory formulation. The *Pereira* test is simply a judicial guide—albeit and to the extent that it is sufficiently precise, an important one—to interpretation and application of the statutory provision”.

As noted below, that cautionary emphasis is underlined in *Hotak*.

Hotak seems to tell us – and quite bluntly - that such a view is simply wrong. And it is wrong not because *Pereira* itself was incorrectly decided on its particular facts, but because its significance as to the meaning of s.189(1)(c) has been widely overstated:

“[I]t 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”.¹⁷

In simple terms, *Hotak* might be thought to indicate that a s.202 decision on vulnerability which states that *Pereira* is ‘the test’ – or uses words to similar effect – will likely be unlawful on the basis that the council has misdirected itself on a question of law: it has “asked itself the wrong question” if you will. As is suggested below, there are other elements of *Hotak* which might seem similarly straightforward to apply. But there are much more complex issues in play as well.

From a lawyer's viewpoint, it is ostensibly something of a mystery that this passage in *Pereira* ever acquired much currency as an aide to construing s.189. What the passage seems to be saying is that a person is vulnerable per s.189(1)(c) if she is more vulnerable than someone who is less vulnerable than she is.¹⁸ As a test, this is deficient in part because it is essentially tautological. The Supreme Court was alert to this deficiency in *Hotak*, describing Hobhouse LJ's formulation as suffering from the problem of being: “logically circular and therefore highly questionable”.¹⁹

But the deficiency also arises – and here one stands as a conservatively inclined constitutional lawyer rather than as a logician – because the passage in *Pereira* misreads the plain words of s.189(1)(c). Those plain words indicate that Parliament did not provide that an applicant is in priority need because she is ‘quite vulnerable’ or ‘very vulnerable’ or ‘extremely vulnerable’. She is either vulnerable – and therefore in priority need - or she is not. There is no textual basis in the Act for introducing *degrees of vulnerability* into the decisionmaking equation.²⁰

It may seem odd that that a person can be ‘vulnerable’ without being in priority need. And that is, despite the clear words of the Act, the proposition that *Pereira* seems to support. There are perhaps some unspoken assumptions at work here that need to be drawn out. It is easy to see from a local authority's perspective why a notion of ‘relative vulnerability’ might be attractive, and thus why the *Pereira* formula has acquired such prominence in s.202 decisions. A conclusion that a single applicant is in priority need rather than not has mildly negative resource implications for a local authority. In a limited procedural sense the implications would be the authority also needs to consider if the applicant is intentionally

¹⁷ *Hotak* at para 49.

¹⁸ See for example Mason (2005). It may be that the explanation is that the judgment attracted far more attention in the professional than academic press, where the author's concern was how best to argue a case (whether for appellant or respondent) within ‘the law’ than to question the adequacy of ‘the law’ itself. See also Nicol (2007). A Westlaw ‘journal article’ search linked to *Pereira* identifies a good many ‘professional’ articles dealing with the case, but none at all in academic journals.

¹⁹ *Ibid*. That is a polite way of putting it. “How does one tell if a person is fat or slim ?” “Well she is fat/slim because she is more fat/slim than someone who is less fat/slim than she is?” One would not expect a five year old to be satisfied by that explanation.

²⁰ This point did not escape Baroness Hale's attention in *Hotak*; see para 92.

homeless, and if she is not whether she has a local connection. Assuming that the applicant is not intentionally homeless, the resource implications then become substantive, in that the applicant is owed the 'full housing duty' under s.193. But, of course, as the number of applicants who are in priority need rather than not grows, so the (procedural and substantive) negative resource implications also increase.²¹

Prima facie (or, if one prefers, on a strict construction of s.189(1)(c)), Parliament has settled that resource allocation issue by enacting that everyone who is 'vulnerable' is in priority need. If so, a local authority can only avoid the resource allocation implications of finding a person to be in priority need per s.189(1)(c) by concluding she is not 'vulnerable'. But such a conclusion may often seem difficult to square with everyday understandings of what vulnerable would mean in the context of a person who is homeless. If we accept – as the Concise Oxford Dictionary tells us – that 'vulnerable' in the ordinary sense means exposed to damage or harm, and if we accept that having a home is essential to a person's physical and mental well-being, then many if not most homeless people would seem to be vulnerable. A (mis-)reading of s.189(1)(c) in terms of relative degrees of vulnerability, especially when given the imprimatur of successive Court of Appeal judgments and an emphasised prominence in the *Code of guidance*, enables a local authority to square that particular circle by reasoning that an applicant while 'vulnerable', is not vulnerable *enough* to merit being given priority need status.

As noted above, Lord Neuberger was concerned with the prominence accorded to the *Pereira* test not just by local authorities but also by the courts. That (appellate) judges embraced the idea for so long rests perhaps on an assumption that is not so much unspoken as inadequately reasoned.

The notion of 'harm' makes occasional express and implied appearances in the priority need case law. Almost as prominent in local authority and judicial discourse around vulnerability as the *Pereira* passage is an idea first deployed by Waller LJ in *R v Waveney DC, ex parte Bowers*:²²

The question we have to consider is whether or not the applicant is vulnerable and secondly whether the vulnerability is as a result of old age, mental illness or handicap or physical or other special reason. Dealing first with the meaning of "vulnerable," vulnerable literally means "may be wounded" or "susceptible of injury" (see The Concise Oxford Dictionary, 6th ed. (1976), p. 1305). In our opinion, however, vulnerable in the context of this legislation means less able to fend for oneself so that injury or detriment will result when a less vulnerable man will be able to cope without harmful effects.

The reasoning in *Bowers* is at first glance feeble stuff. It offers no justification for departing from the literal meaning of the text. It is also afflicted by the same circularity that was later endorsed in *Pereira*. But, further, no attempt is made in *Bowers* to get to grips with the notion of 'injury or detriment'; (this idea will be referred to as 'harm' hereafter). The concept of 'fending for oneself' and avoiding harm are obviously two sides of the same coin – if one can

²¹ There is certainly some evidence in empirical studies of homelessness administration that both the conduct and outcome of officer decisionmaking is heavily influenced by perceptions of the resources available to the authority; cf. in particular Halliday's 'siege mentality' characterisation of the process (Halliday 2004 p55) and more generally Loveland (1991); Cowan (1997).

²² [1993] QB 238 at 244-245.

fend for oneself one will not suffer harm.²³ However it takes but little reflection to appreciate that ‘harm’ is a very expansive concept, and one that requires consideration to be given to (a) the severity of the injury or detriment a person might experience; (b) the prevalence of that particular injury or detriment among the homeless population en masse; and (c) the likelihood of the detriment occurring in a particular individual’s case. This is not a line of inquiry that the Court of Appeal followed in *Bowers* (or in *Pereira*), but one might wonder if the apparently bizarre notion of someone being vulnerable because she is more vulnerable than someone less vulnerable than her is an intuitive (and so unsatisfactorily reasoned) response to that question.

We might begin (and it is accepted the following schemata is rather simplistic) by identifying qualitatively different types of harm (in a non-technical sense) that homeless people might suffer. The worst harm (we might call it Category 1) would presumably be death. Category 2 might encompass severely adverse consequences to one’s physical or psychiatric health. Category 3 could comprise mildly adverse consequences to one’s physical or psychiatric health. And Category 4 might embrace many of those beneficial aspects of modern life which are facilitated by having a home – such as finding and keeping a job, maintaining a family life, building a network of social and cultural contacts, acquiring a sense of personal stability and security and so on.²⁴ Furthermore (and again the schemata is simplistic) it is surely not contentious to suggest that the less severe the type of harm in issue, the more likely it is that a homeless person will suffer it and so the more prevalent it will be among the homeless population en masse.

Because the question of priority need only arises in respect of people who are ‘homeless’ in the sense used in the Act, it must follow that being and remaining ‘homeless’ is not per se a ‘harm’ for priority need purposes. That would seemingly lead to the conclusion that harms which are an almost inevitable (Category 4) or perhaps very likely (Category 3) consequence of homelessness - and so are very prevalent among the homeless population overall - cannot be priority need harms either. It would therefore be only those harms (Category 1 and 2) which go above and beyond the almost inevitable or very likely consequences of being homeless that might raise vulnerability issues.

But in addressing this question, we must presumably recall that there are many different sets of personal circumstances which amount to ‘homelessness’ under the relevant statutory definition, s.175 of the 1996 Act.²⁵ This is not to say that a person is ‘homeless’ per s.175

²³ Cf Arden et al (2006) p 133 and the reference to *Bellouti v Wandsworth LBC* [2005] EWCA Civ 602; [2005] HLR 46.

²⁴ See for example Fox (2002): Latham (2011).

²⁵ **Housing Act 1996 s. 175 Homelessness and threatened homelessness.**

(1) A person is homeless if he has no accommodation available for his occupation, in the United Kingdom or elsewhere, which he—

(a) is entitled to occupy by virtue of an interest in it or by virtue of an order of a court,
(b) has an express or implied licence to occupy, or
(c) occupies as a residence by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of another person to recover possession.

(2) A person is also homeless if he has accommodation but—

because she is more homeless than some who is less homeless than she is; rather that there is a threshold/line above/beyond which people are homeless and below/within which they are not.

A person (A) who regularly has no accommodation at all (and sleeps in shop doorways or on park benches) is obviously 'homeless'. But so too is a person (B) who could reliably access safe and warm accommodation, if the accommodation was only made available to her on a night by night basis and/or as a matter of short term indulgence by the accommodation provider rather than as of right. Clearly, *ceteris paribus*, A is more likely to suffer Category 1 or Category 2 harms than B. In other words, the nature and quality of a person's homelessness has an obvious bearing on the likelihood of her being vulnerable per s.189(1)(c).

This must be the explanation for the sporadic appearance in the priority need case law of the notion of 'street homelessness' (in effect person A) as a sub-category of the much broader concept of homelessness under s.175 as the only type of homelessness to which the vulnerability question should be directed.²⁶ The sub-categorisation is obviously pertinent: an applicant in situation of person A is so much less likely than an applicant in the situation of person B to get regular access to the resources (shelter, food, healthcare) which will prevent her suffering Category 1 or 2 harms that she is correspondingly so much more likely to be vulnerable.

But this is not to compare (as has misleadingly perhaps been done in *Bowers* and *Perieira*) person A with person B. Rather it entails assessing where person A or person B as individual applicants should be placed on the yardstick of harm. Nor, even when one's inquiry is confined to applicants in the person A situation, are we really engaged in a comparison between person A1 and A2. The evaluative task is still one of deciding how much harm person A1 might suffer and how likely that harm is to occur. Some people might be more obviously likely to be considered vulnerable than others, but this should surely be – quite simply – because they are at serious risk of suffering substantial harm, not because they are at more risk of suffering more harm than someone who is at less risk of so doing. To proceed on any other basis obscures the point that a person who crosses the vulnerability threshold by just a little bit is no less vulnerable for s.189(1)(c) purposes than a person who crosses it by a vast distance.

Unhappily however, the Supreme Court was unwilling to pursue this reasoning to its obvious conclusion; ie that a person is vulnerable or she is not. Having criticised the *Pereira* and *Bowers* tests for their circularity, Lord Neuberger then came to this conclusion on 'the test' that should be applied:

(a) he cannot secure entry to it, or

(b) it consists of a moveable structure, vehicle or vessel designed or adapted for human habitation and there is no place where he is entitled or permitted both to place it and to reside in it.

(3) A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy.

(4) A person is threatened with homelessness if it is likely that he will become homeless within 28 days.

²⁶ The point was first (clearly) made in *Osmani v Camden LBC* [2004] EWCA Civ 1706; [2005] HLR 22 at para 38.

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.

It does seem rather odd that – having criticised *Bowers* and *Pereira* for the circularity of their reasoning – *Hotak* appears to embrace much the same approach. Lord Neuberger’s formula assumes that every homeless person is vulnerable, but that there is a hierarchy of vulnerability, at the bottom of which sit the ‘ordinarily vulnerable’, and at the top of which we find the ‘significantly more vulnerable than ordinarily vulnerable’; and presumably at points inbetween we find, inter alia, the ‘little bit more vulnerable than ordinarily vulnerable’, the ‘quite a bit more vulnerable than ordinarily vulnerable’ and so on. And one has to go a long way up the hierarchy before a vulnerable person is s.189(1)(c) vulnerable. Indeed, at first glance, the insertion of the word ‘significantly’ into this formula would seem to *reduce* the number of people found to be vulnerable while maintaining the supposedly illogical circularity of *Pereira*. How therefore can it be sensibly argued that *Hotak* may increase rather than decrease the number of people who are found to be vulnerable. To make more (or perhaps any) sense of this we have to move to the next stage of the court’s analysis.

Choosing right comparator

The reasoning deployed in *Hotak* does not cure the deficiencies of the approach adopted in *Bowers* and *Pereira*. But whatever view one might take of that reasoning in terms of its logic or constitutional propriety, it is ‘the law’ for the purposes of making s.202 decisions and running s.204 appeals. If we are to retain the notion that a person is only ‘vulnerable’ if she is ‘significantly more vulnerable than someone less vulnerable’ we are going to have to engage in the task of finding comparators. At this point, matters once again become complicated. And it is in resolving this complication that *Hotak* departs significantly from *Pereira* in a direction which might be expected to increase the number of people found in priority need through s.189(1)(c).

Lord Neuberger framed and resolved the issue in this way:

53In *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 the *Osmani* case [2005] HLR 325, para 38(4) and (5). However, shortly thereafter, in *Tetteh v Kingston on Thames Royal London Borough Council* [2005] HLR 313, 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 the *Johnson* case [2013] HLR 524, paras 18 and 20, as pointed out by Gloster LJ in the *Ajilore* case [2014] HLR 710, 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 ...[I]n 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.

One might initially think we are in the realm of angels on the head of a pin here. But the distinction between ‘an ordinary homeless person’ and an ‘ordinary person who becomes homeless’ is readily comprehensible, albeit not terribly well-explained in *Hotak*. To make

sense of the distinction, we have to form some view – at least in general terms – of why it is that homeless people have become (and remain) homeless.

We ought not glibly assume that what we might mean by ‘ordinary’ is uncontentious.²⁷ It would however seem uncontentious for example, and is thus a matter of which the court should take judicial notice, that the percentage of homeless people who suffer from severe psychiatric or psychological disorders is much higher than among the ‘ordinary population’.²⁸ To put it another way, an ‘ordinary person’ is unlikely to have such problems. No doubt an ‘ordinary person’ who becomes (street) homeless will have very little money, will very likely be unemployed and with little imminent prospect of securing the employment that will furnish her with the income to bring her homelessness to an end. But the ‘ordinary’ person will not lack the basic physical and psychological capacity to navigate herself around the challenging environmental and institutional terrain into which her homelessness has plunged her, at least to the extent of being able to avoid such acute harms as freezing to death on an icy December night, or such chronic harms as becoming severely malnourished or developing and leaving untreated serious physical or psychiatric health impairments.

The local authority in *Johnson* brought this issue into particularly sharp relief by its reliance on some statistical ‘evidence’ in its s.202 decision.²⁹ The gist of this evidence was – unsurprisingly – that significantly higher percentage of the homeless population suffered from mental illness than the population at large. This (one might think perfectly plausible) conclusion was then it seems invoked by the authority to sustain the proposition that because so many homeless people were mentally ill, being mentally ill per se did not suggest that an applicant was ‘less able to cope than an ordinary homeless’ precisely because the ordinary person was likely to be mentally ill. Lord Neuberger characterised the use of statistics to determine vulnerability as a ‘very dangerous exercise’ in principle, presumably because the determination must be focused squarely on the individual applicant herself.³⁰ But when, as here, those statistics were deployed to support an incorrectly identified comparator, the authority decision would clearly be unlawful.³¹

Crudely stated, the significance of this element of the judgment is the Supreme Court’s recognition that ‘ordinary people’ provide a much more ‘capable’ comparator population than ‘ordinary homeless people’. Since vulnerability is concerned with lack of such capacity, it must follow that – if assessing vulnerability is really a comparative exercise – the *Hotak* rationale should mean that larger numbers of applicants will be found to be vulnerable. And this may in turn significantly affects the resource implications that ‘vulnerability’ has for local authorities both singly and en masse. Which simple observation takes us to the next intriguing element of the *Hotak* judgment.

²⁷ See the brief discussion of the point in Bates (2015).

²⁸ Manifestly, not all departures from the ‘ordinary’ point towards a finding of vulnerability. A person with only one eye is not ‘ordinary’, but that ‘extraordinary’ feature does not render her less able to avoid suffering serious harm if her vision in her other eye is unimpaired

²⁹ See paras 21, 43 and 84 of the judgment.

³⁰ At para 43.

³¹ At para 84.

The local authority's resources are not a relevant consideration...

It was suggested above that a s.202 decision letter that proclaims it has deployed *Pereira* as the test might be thought likely to be unlawful. For an appellant and her counsel that is an easy point to plead and to argue. At the level of a county court appeal, the logical or constitutional inadequacies of the way *Hotak* deals with *Pereira* are an irrelevance: as a controlling precedent it is simply 'right'. Much the same view can be take of another element of the judgment which seems to offer a perfectly clear rule for lower to courts to follow that makes absolutely no sense at all.

Lord Neuberger firmly disapproved the assumption made by Arden LJ in the Court of Appeal in *Johnson* that an authority's 'resources' were relevant in assessing whether an applicant was vulnerable:

39.....[A]n 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](#).....

Arden LJ's 'error' on this point is perhaps readily understandable, given the following passage in the Court of Appeal's 2004 judgment in *Osmani*:

"Given that each authority is charged with local application of a national scheme of priorities put against its own burden of homeless persons and finite resources, such decisions are often likely to be highly judgmental. In the context of balancing the priorities of such persons a local housing authority is likely to be better placed in most instances for making such a judgment."³²

In *Hotak*, Lord Neuberger seems to be reaching out to notions of the separation of powers, and thence onwards and upwards in terms of constitutional theory to the principle of parliamentary sovereignty. In effect the argument is that if Parliament had wanted the notion of priority need through vulnerability to be a flexible concept, varying between authorities (and within the same authority over time) according to the 'resources' at the authority's disposal, then Parliament would have said so clearly in s.189. And since Parliament did not say so, it did not want the concept to be flexible. And it would therefore presumably be – Lord Neuberger does not make the point expressly – 'a naked usurpation of the legislative function under the thin guise of interpretation'³³ for the court to read such a qualification into the words of the Act.

Constitutional traditionalists would no doubt applaud such Diceyan rigour. And then scratch their heads in wondering how to reconcile this judicial deference to Parliament with the reasoning offered earlier in *Hotak* that tells us when Parliament used the word 'vulnerable' without giving any textual hint that that this concept embraced degrees of vulnerability and that only the **most** vulnerable people were **actually** vulnerable, it is that unspoken and unhinted at result that Parliament did indeed enact.

³² [2004] EWCA Civ 1706; [2005] HLR 22 at para 38.

³³ The quotation is of course from Lord Simonds judgment in *Magor and St Mellens RDC v Newport Corporation* [1952] 2 AC 189 at 191.

We might stop scratching when we see that at various points in the Act ‘resources’ are identified as relevant considerations. It seems clear that in two of the ‘gateway’ questions it is quite proper for a council to take account of prevailing housing circumstances. That consideration is expressly identified as relevant in the statutory definition of ‘homelessness’. One element of that concept is whether the applicant currently has accommodation which it would be reasonable for her to continue to occupy, and per s.177(2) (emphasis added):

“In determining whether it would be, or would have been, reasonable for a person to continue to occupy accommodation, **regard may be had to the general circumstances prevailing in relation to housing in the district of the local housing authority** to whom he has applied for accommodation or for assistance in obtaining accommodation”.

So, for example, it may not be ‘reasonable’ per s.177(2) for a couple with two young children to occupy a high-rise two bedroom flat if in their area (and we can suspend disbelief for a moment) there is a copious supply of affordable three bedroom houses with gardens. If however it is the case that many such families live in two bed high rise flats and there are no or hardly any 3 bed houses with gardens for them to move into, it would be reasonable for the family to stay where it is.

By (strong and textual) implication the same conclusion can be drawn in respect of the intentional homelessness gateway. S.181(3) uses the same ‘reasonable to continue to occupy’ phrase which appears in s.177(2), albeit that no express reference to housing circumstances is made. The words of s.181(3) provide a textual peg on which to hang the housing circumstances criterion.

But that concept does not feature either expressly or by textual implication in s.189. This perhaps explains in part the conclusion in *Hotak* that such resources are not a relevant consideration. It may be that the Supreme Court was also led to this conclusion by a presumption that vulnerability is a concept concerned essentially with the personal characteristics and circumstances of the individual applicant, and not with the resource and housing context in which she is located.

This line of argument depends of course on one accepting that the housing circumstances in a given area are an important element of a local authority’s ‘resources’. Given that the Act is dealing with the issue of homelessness, it would seem a fairly obvious proposition - even without Lord Neuberger’s reference to ‘available accommodation’ - that the supply of accommodation and related services actually or potentially under a local authority’s direct or indirect control would be an essential element of the ‘resources’ it deploys to discharge its obligations under the homelessness legislation.³⁴

For applicants (and their advisers), the words “the fact that the authority may be very short of money **and/or available accommodation**” (emphasis added) may be of particular significance. This is because, as experienced practitioners will attest, the phrase “I have taken account of the housing circumstances in the borough” (or words to similar effect) appear with great regularity in s.202 decisions on any and all aspects of the legislation. And the phrase is generally used to buttress a decision which is not in the applicant’s favour. If we follow

³⁴ Cf. the comment in Arden et al (2006 p354 n.73): “it may be said that consideration of the general housing circumstances of an area as an element in a decision on homelessness, and on intentionality, might be said to import ‘resources’ by the back door”.

Hotak – as in drafting the grounds of a s.204 appeal we must – one might think that a s.202 decision containing such statements is likely to be unlawful.

We return to that point below. Here one might note that it is quite bizarre that a local authority decisionmaker might think that invoking a lack of resources could make it easier to justify a conclusion that an applicant is not vulnerable, because that is to get the matter completely the wrong way round. For surely, the fewer the resources available in a local authority's area the more likely it is that any given 'street homeless' applicant should be adjudged vulnerable because it is also more likely that she will suffer serious harm. And as resources get more and more limited, so that likelihood of serious harm occurring will correspondingly increase. So, for example, if a local authority itself runs a network of night shelters (or can place people in private sector shelters or can rely on charities or housing associations to do so) where a homeless person can always find a bed for the night, eat breakfast and dinner, and access basic medical services, then presumably the only homeless people who would be vulnerable are those whose personal characteristics and circumstances are such that they could not sensibly be expected to access those resources. But if there are no (or patently inadequate) such resources, with the result that that all or most street homeless people are constantly exposed to the elements, and frequently go without food, or cannot find medical treatment for initially minor ailments (whether physiological or psychiatric) which if untreated soon stop being minor, then more of those people will (eventually) become vulnerable.

This would suggest that resource availability is an essential element of assessing vulnerability. The Supreme Court's conclusion to the contrary is quite extraordinary. It is hard to believe that the court in *Hotak* thought that by rendering 'resources' an irrelevant consideration in vulnerability decisions it would be *reducing* the number of people who ought to be identified as vulnerable, but if one thinks through the argument carefully that is the (presumably) perverse effect that the court's conclusion may have.

Because, of course the unhappy reality is that most local authorities are in dire (and increasingly so) straits in housing resource terms. They are not building new homes. They cannot buy new accommodation. They face massive and growing demand for the homes they already possess. They face escalating charges for short term leases of private sector accommodation (which may frequently turn out to be former council properties sold off under the right-to-buy).³⁵

Whatever the reason for the court's conclusion, its meaning and effect are clear. A s.202 decision on vulnerability which states that the decisionmaker has taken account of the authority's resources and/or the housing circumstances in the area will be unlawful on the basis of the irrelevant considerations doctrine. The point is easy for the Appellant to plead and argue, and easy for the court to apply.³⁶ That is 'the law'. But 'the law' is a bit of a nonsense in substantive terms.

If vulnerability is (or should be) a matter concerned with evaluating the likelihood of a particular (street) homeless person suffering serious harms, then the resource context in

³⁵ Copley (2014).

³⁶ So, in the post-*Hotak* s.204 mentioned above, the s.202 Lambeth's decisionmaker had said in the s.202 notice one argues a point, expecting to win it, and so assuming it has irrefutable merit in the immediate litigation context, while thinking (wearing an academic hat) that the point has no merit at all.

which the decision on vulnerability is both obviously and highly relevant. As indeed, the Supreme Court itself then seemed to accept.

....But ‘assistance’ from ‘third parties’ can be

The essentially incoherent nature of the *Hotak* reasoning on the ‘resources’ issue is underlined when one considers the court’s treatment of the matter on which Southwark had relied when finding Mr Hotak was not ‘vulnerable’. It was not in dispute that Mr Hotak suffered from an extensive catalogue of disabilities:

23 Sifatullah Hotak was born in Afghanistan 25 years ago and was granted leave to remain in the United Kingdom 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.

The only issue in contention before the Supreme Court in *Hotak* itself was whether it could be proper for Southwark to take into account the assistance which Mr Hotak’s brother provided to him in deciding if Mr Hotak was vulnerable.³⁷ In addition to answering that question in the affirmative, the court also concluded that a council could also take into account other: “services and support” that would be available to the applicant if he were homeless”.³⁸ This was because, as Lord Neuberger put it:

62[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..... It would seem contrary to common sense if one were to ignore any aspect of the actual or anticipated factual situation when assessing vulnerability.

This seems very curious, given the court’s earlier insistence that a local authority could not take into account its own resources or the accommodation available to it when deciding if a person was vulnerable. Those matters - or the lack of them - would seem an essential element of the ‘services and support’ available.

It was not in dispute that Mr Hotak, left to his own devices on the street, would be vulnerable, presumably because it was unlikely that he would be able to find any accommodation on a regular basis, or feed himself adequately, or take medication, or seek medical assistance if his condition worsened. His brother, however, could perform all these tasks for him, and thus in effect compensated for or cancelled out Mr Hotak’s own

³⁷ Southwark’s s.202 decision was afflicted with some of the other difficulties which were dealt with in respect of the *Johnson* and *Kanu* appeals, but those points had not been pleaded and were not argued by Mr Hotak’s counsel before the Supreme Court; see *Hotak* at paras 86-89.

³⁸ *Hotak* at para 62.

inadequacies. And the provision of similar support by the authority (or presumably another authority)³⁹ or a charity could have the same effect. Lord Neuberger stressed that a local authority would have to be sure that such support would be forthcoming: “on a consistent and predictable basis”.⁴⁰ That caveat may impose a significant investigatory and evidential burden on an authority, but the substantive benefit of negating an applicant’s priority need by establishing the compensatory impact of third party resource provision may make those burdens seem very worthwhile.

The analytical incoherence, however, remains. Had the court limited its observations to support provided by an applicant’s family members or close friends, it could be suggested that the use of the word ‘contextual’ in para 62 remained tied to the applicant’s personal circumstances, and did not extend to the broader housing/care circumstances facilities which were available to her; ie to the ‘resources’ which an earlier part of the judgment told us had no bearing on the vulnerability question. But the concept was not so limited. This evidently means that ‘resources’ are both relevant and not relevant to assessing vulnerability.

One might try to resolve this apparent inconsistency by suggesting that ‘the resources’ (or lack of them) which a local authority cannot take into account are those which enable it to discharging whatever entitlement obligation it owes to an applicant per s.193 (if she is not intentionally homeless) or per s.190(2) (if she is intentionally homeless). In contrast the ones it can take into account are those which would prevent an entitlement arising in the first place. While that dichotomy may sound conceptually neat, it takes but little reflection and a passing reference to s.206⁴¹ to appreciate that some (perhaps many) ‘resources’ (supported accommodation provided by a charity is an obvious example) will fall into both camps. It will be fascinating to see what s.202 decisionmakers and county court judges make of this conundrum.

Conclusion

Notwithstanding the difficulties that *Hotak* creates, one would expect that the court’s deployment of a more restrictive comparator in assessing vulnerability should lead to an increase (though it is impossible to quantify how much of an increase) in the number of homeless applicants who qualify for the ‘full housing duty’ per s.193.⁴² But there may be a large caveat that should be attached to any such assumption.

³⁹ London boroughs are of course both housing and social services authorities. Elsewhere in the country, most housing authorities are not also social services authorities.

⁴⁰ *Hotak* at para 65.

⁴¹ **S.206 Discharge of functions by local housing authorities.**

(1) A local housing authority may discharge their housing functions under this Part only in the following ways—
(a) by securing that suitable accommodation provided by them is available,
(b) by securing that he obtains suitable accommodation from some other person, or
(c) by giving him such advice and assistance as will secure that suitable accommodation is available from some other person.

⁴² The government’s latest homelessness statistics record some 27,500 applications having been made between April and June 2015. 17% of those applicants (around 4,600) were found not to be in priority need; (Department

For local authorities and their counsel in s.204 appeals, the first port of call – irrespective of the nature of the decision in issue – is often this passage Lord Neuberger’s concurring opinion in the House of Lords’ 2009 judgment in *Holmes-Moorhouse v Richmond-Upou-Thames LBC*:⁴³

47 ...[A] judge should not adopt an unfair or unrealistic approach when considering or interpreting such review decisions. Although they may often be checked by people with legal experience or qualifications before they are sent out, review decisions are prepared by housing officers, who occupy a post of considerable responsibility and who have substantial experience in the housing field, but they are not lawyers. It is not therefore appropriate to subject their decisions to the same sort of analysis as may be applied to a contract drafted by solicitors, to an Act of Parliament, or to a court’s judgment.....

50 Accordingly, a benevolent approach should be adopted to the interpretation of review decisions. The court should not take too technical a view of the language used, or search for inconsistencies, or adopt a nit-picking approach, when confronted with an appeal against a review decision. That is not to say that the court should approve incomprehensible or misguided reasoning, but it should be realistic and practical in its approach to the interpretation of review decisions.

One need not be a seer to envisage that applicants will find – in the aftermath of *Hotak* – a great many s.202 decisions on vulnerability by many local authorities which contain muddled, confusing and internally contradictory text. The rigour with which a court approaches the task of lending meaning to that text will have a very substantial impact on whether a particular vulnerability decision is found unlawful. And the more ‘benevolent’ that process of construction in a systemic sense, the fewer the overall number of such decisions will be found unlawful and so the less significant the effect of *Hotak* will be. There are several reasons why this pervasively diluting effect is unfortunate.

In a formalistic sense, Lord Neuberger’s comment is at best obiter. Further it was a comment that was endorsed by Lord Walker in *Holmes-Moorhouse*, but not by Lord Hoffman (who gave the leading judgment) Baroness Hale or Lord Scott. It is not, in any proper legal sense, ‘an authority’.

More importantly however, Lord Neuberger fosters the misleading impression that it is the housing officer who wrote the s.202 decision who is under review. One can certainly feel great sympathy for housing officers who make s.202 decisions. They are often required to deal with complex sets and of facts and complex points of law. Perhaps (we, like Lord Neuberger, have no empirical evidence on the point) few of them are lawyers and few have had much legal training whether pre- or during employment. Perhaps many of them have very heavy caseloads and are not especially well paid. But housing officers are **not** the Respondent. The Respondent is a large government body with a large income and many employees, and extensive experience of litigation on all sorts of housing, welfare and public law issues, which has chosen to make the housing officer responsible for discharging this particular statutory responsibility. The Respondent is a perfect example of the ‘repeat player’ in Marc Galanter’s classic use of the term.⁴⁴ If a s.202 decision is to be ‘benevolently

for Communities and Local Government. 2015). It is not possible to deduce from the figures how many such people were found not to be vulnerable per s.189(1)(c).

⁴³ [2009] UKHL 7: [2009] 1 WLR 413. See the comments on the point in Cowan (2011) pp 175-177.

⁴⁴ Galanter (1974).

construed’, that should be because of the nature of the decision, not the misidentification of the Respondent.

It may be however that we should properly see *Hotak* as beating something of a retreat from the indulgent benevolence of *Holmes-Moorhouse*. This is because it will surely often be the case that the issue of vulnerability under s.189 will overlap with the question of whether a person is ‘disabled’ per s.6 of the Equality Act 2010, in which event the local authority fielding a homelessness application will also have to comply with its responsibilities under the Equality Act 2010 s.149. The s.149 duty is to have ‘due regard’ to the matters listed in s.149(1)(a)-(c). *Hotak* tells us that ‘due regard’ requires a multi-stage decisionmaking process, and that the inquiry at each stage: “must be exercised in substance, with rigour and with an open mind”.⁴⁵

The reason that we cannot be sure on this point is the equivocal way in which Lord Neuberger expresses himself:

79..... In the *Holmes-Moorhouse* case [2008] 1 WLR 413, 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.

One might think ‘rigour’ would result in decisions that were defensible in ‘technical’ terms, and which did not contain ‘inconsistencies’, and thus that decision which had those undesirable qualities could not be ‘rigorous’. As it stands, para 79 of *Hotak* may turn out to be a source of some confusion.

For this and the other reasons alluded to above, housing officers will likely find applying *Hotak* to be a substantial challenge. A benevolent construction of their s.202 decisions on vulnerability will also likely doubt spare many of those decisions from being quashed. The ECtHR has very recently concluded for the first time – in *Ali v United Kingdom*⁴⁶ – that entitlements under the homelessness legislation can amount to a ‘civil right’ for the purposes of Art 6 ECHR (and thence – very probably – also for the purposes of Art 6 of Sch. 1 of the Human Rights Act 1998). The ECtHR was also however satisfied that the s.202/s.204 regime provided an adequate degree of independent and judicial oversight of council decisionmaking to satisfy Art 6’s procedural requirements (at paras 83-86).⁴⁷ No reference is made in *Ali* to Lord Neuberger’s notion of benevolent construction. One can envisage that disappointed applicants and challenged local authorities will be soon presenting county courts with differing views as to the crucial issue of the rigour of judicial scrutiny which *Ali* requires. The practical impact of *Hotak* may owe rather more the answers given to that question than to the detailed contents of the *Hotak* judgment itself.

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⁴⁵ At para 78.

⁴⁶ Application number 40378/10; 20 October 2015.

⁴⁷ At paras 83-86.

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