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## **Reforming the homelessness legislation? Exploring the constitutional and administrative legitimacy of judicial lawmaking**

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### Abstract

*This paper analyses the significance from both a constitutional law and administrative law viewpoint of three recent Supreme Court decisions which offered new perspectives on the meaning of important elements of the homelessness legislation (now Part VII of the Housing Act 1996). It is suggested that the collective impact of these judgments has produced what is in formal, doctrinal terms a significant amendment of the Act, notwithstanding both that the text of the legislation remains unaltered and that the Supreme Court has declined expressly to overrule pertinent previous authorities. The article explores both the constitutional legitimacy of such judicial innovation in a theoretical sense and its likely impact in practical terms on the conduct of local authority decisionmaking and the entitlements that the homelessness legislation bestows upon homeless people.*

**Keywords** : Separation of powers; rule of law; sovereignty of Parliament; legitimacy; statutory interpretation; homelessness.

**Legislation** : Housing Act 1996 Part VII

**Case law** : *Yemshaw v Hounslow LBC* [2011] UKSC 3; [2001] 1 W.L.R. 433; *Hotak v Southwark London Borough Council (Equality and Human Rights Commission and others intervening)* [2015] UKSC 30; [2015] 2 W.L.R. 1341; *Haile v Waltham Forest London Borough Council* [2015] UKSC 34; [2015] 2 W.L.R. 1441; *Nzolameso v Westminster CC* [2015] UKSC 22; [2015] H.L.R. 22.

### **Introduction**

From both constitutional law and administrative law perspectives, a Supreme Court judgment which prima facie alters the meaning of a statutory provision imposing obligations on government bodies towards individual citizens is potentially problematic.

In constitutional terms there are – to put the matter somewhat simplistically – two concerns which arise in relation to the legitimacy of such a judgment. The first is rooted in questions of normative hierarchy. If we accept Parliament to be a superior lawmaker to the courts, then we might readily assume that if the substantive political content of laws enacted by Parliament is to change, the proper means to effect such change is through amending legislation. The

second relates to questions of legal certainty. Judicial alteration to the meaning of statutory provisions compromises such certainty both in the practical sense of upsetting the expectations of the parties (and all similarly situated bodies and persons) as to their respective obligations and entitlements,<sup>1</sup> and in the abstract sense of calling into question the competence of courts qua interpreters of legislation.<sup>2</sup> Such concerns manifestly underlie the very cautious approach the House of Lords/Supreme Court has taken to reversing its own judgments since it expressly countenanced the possibility of doing so in the 1966 *Practice Statement (Judicial Precedent)*;<sup>3</sup> but they are no less applicable to judgments which overrule longstanding decisions of lower courts as to the correct meaning of particular statutory provisions.

There are two obvious ways in which those legitimation difficulties might be overcome. The first entails a blunt judicial acceptance that the previous construction of the relevant statutory provision was simply wrong, and so should be overruled. In abstract terms, this entails acknowledging (whether expressly or tacitly) that the overruled decision improperly subverted the normative hierarchy between Parliament and the courts. In this scenario, considerations as to legal certainty in terms both of the substantive relationship which the statutory provisions created between the government body(ies) and individuals and the systemic competence of courts are outweighed by concerns about maintaining (by reassertion) the integrity of the normative hierarchy between Parliament and the judiciary.

The second, which has perhaps a lower profile than it deserves, is the presumption (albeit a contested one) that the court's task of statutory interpretation can properly be undertaken on the basis that legislative provisions are 'always speaking', and thus can acquire new meanings even though their text has not been altered. The concept is explained in this way in Bennion's influential text, *Statutory Interpretation*:

[T]he interpreter is to presume that Parliament intended the original Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly the interpreter is to make allowances for any relevant changes that have occurred, since the Act's passing, in law, social conditions, technology, the meaning of words and other matters.<sup>4</sup>

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<sup>1</sup> A concomitant aspect of this issue is that alterations in the law may have significant practical implications (whether of increase or decrease) in relation to the substantive resources that the government body must allocate to discharge its legal obligations. Doctrinal innovation may severely compromise the accuracy of a government body's financial planning, which is problematic per se and even more so if the body concerned has limited or no capacity to obtain more resources to devote to the issue if that is what required. The extent to which courts will permit legal obligations to be shaped by resource capacity in the absence of explicit statutory provision to that effect is now a well-traversed aspect of our public law; see especially *R v East Sussex County Council, ex parte Tandy* [1998] A.C. 714; *R v Gloucestershire County Council, ex parte Barry* [1997] A.C. 584 and the analyses of those cases in E. Palmer, 'Resource Allocation, Welfare Rights – Mapping the Boundaries of Judicial Control on Public Administrative Law' (200) 20 *OJLS* 63; J. King, 'The Justiciability of Resource Allocation' (2007) 70 *MLR* 197. The issue is returned to further below.

<sup>2</sup> Since, to put it prosaically, if the Supreme Court tells us now that the House of Lords 'got the law wrong' ten/twenty/thirty years ago, to what extent can we reliably assume that the Supreme Court in ten/twenty/thirty years time will not find today's interpretation to have been 'wrong' as well?

<sup>3</sup> [1996] 1 W.L.R. 1234.

<sup>4</sup> *Statutory Interpretation* (1997) p687. The principle is reconcilable in the normative hierarchy sense with Parliament's superiority to the courts on the basis of an expedient fiction that Parliament tacitly consents to such innovation.

The best known modern illustration of the principle is perhaps *R v Ireland; R v Burstow*.<sup>5</sup> The defendants had engaged in conduct, primarily by making silent and/or threatening telephone calls, which had caused their respective victims serious psychiatric harm. The issue before the court was whether such injury amounted to ‘bodily harm’ within the meaning of ss.20 and 47 of the Offences Against the Person Act 1861. While there was obvious force in the contention that psychiatric harm would not have been so regarded in 1861, Lord Steyn’s leading judgment in *Burstow* indicated that the presumption that ‘bodily harm’ should be construed in the light of contemporary understandings (be they social, cultural or medical) was constitutionally uncontentious:

Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes. Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that ‘An Act of Parliament should be deemed to be always speaking.’ Practical Legislation (1902), p. 83; see also Cross, Statutory Interpretation, 3rd ed. (1995), p. 51....[The drafting technique of Lord Thring and his successors have brought about the situation that statutes will generally be found to be of the ‘always speaking’ variety....<sup>6</sup>

Seen in the light of the light of contemporary understandings, ‘bodily harm’ could encompass actions could cause psychiatric injury.

For the purposes of this paper, the application of the principle in the more recent case of *Yemshaw v Hounslow LBC*<sup>7</sup> merits closer attention. *Yemshaw* turned on the meaning of ‘violence’ in the homelessness legislation, a term which appears in several contexts in that Act, now Part VII of the Housing Act 1996.

In 2006, in *Danesh v Kensington and Chelsea Royal London Borough Council*,<sup>8</sup> the Court of Appeal considered the term in relation to the local connection provisions; (explained further below). That part of the Act (s.198) provided that a person who applied to Council A with which he had no ‘local connection’ could not be referred by Council A to Council B – with which he did have such a connection – if he would be at risk of ‘violence’ if he returned to Council B’s area. The applicant in *Danesh* had argued that ‘violence’ in this context meant more than battery or assault occasioning actual or grievous bodily harm and could include him and/or his wife and/or his children being placed in fear of such ‘physical violence’ by the threatening and abusive behaviour of (on these facts) white racist jobs. Although that submission was successful in the county court, the Court of Appeal accepted the local authority’s argument that violence properly construed could not include actions which did not involve physical contact between the perpetrator and the victim. Actions which caused the victim severe fear or distress, or even (psychiatric) bodily harm in the *Burstow, Ireland* sense, would not be ‘violent’ for these purposes in the absence of physical contact.<sup>9</sup> A projected

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<sup>5</sup> [1998] A.C. 147. And see also *Fitzpatrick v Sterling Housing Association* [2001] A.C. 27, in which the House of Lords accepted that the term ‘members of the tenant’s family’ (a term dating from the 1920s) could by the mid-1990s be construed to embrace same sex partners.

<sup>6</sup> [1998] A.C. 147 at 158.

<sup>7</sup> [2011] UKSC 3; [2001] 1 W.L.R. 433

<sup>8</sup> [2006] EWCA Civ 1404; [2007] 1 W.L.R. 69.

<sup>9</sup> I was Mr Danesh’s counsel in the Court of Appeal. I recall being asked from the bench during argument to offer examples of ‘violence’ that did not involve physical contact between perpetrator and victim. My suggestions – among them - ‘Setting fire to a person’s car my Lord, or shooting his dog’ - drew looks of incredulity from the court. My presumption that a person who shot my dog would be engaging in a much more

appeal against that conclusion on the basis that ‘violence’ should be afforded a much broader meaning became moot when Mr Danesh – ironically – acquired a local connection with Kensington and Chelsea by taking a job as a traffic warden with the council. The matter was thus not revisited until *Yemshaw* came before the Supreme Court (just) five years later.

Baroness Hale’s leading judgment surveyed a range of domestic and international sources<sup>10</sup> to suggest that understandings of ‘violence’ had expanded sufficiently in recent years to encompass types of behaviour that did not involve ‘physical violence’ in the *Danesh* sense. Abuse or harassment or intimidation could all properly be regarded as ‘violent’ acts in some circumstances’

*Yemshaw* attracted considerable attention in academic circles,<sup>11</sup> less perhaps because of its potentially significant impact on entitlements arising under the homelessness legislation than for the scope it offered further to explore the constitutional propriety of an ‘always speaking’ dimension to the task of statutory interpretation. Although it would be correct to note that commentators offered distinctly different answers to that question - and one might dispute the desirability of the principle, or contest its application on the facts - it could not sensibly be contended that the Supreme Court in *Yemshaw* lent a new meaning to a statutory term without troubling itself to offer a well-established jurisprudential justification for the prima facie challenge that new meaning presented to the concerns of normative hierarchy and legal certainty.

The specific focus of this paper is three recent, post-*Yemshaw* Supreme Court judgments which have offered new perspectives on the meaning of other important elements of the homelessness legislation. The collective impact of these judgments has produced what is in formal, doctrinal terms a significant amendment of the Act, notwithstanding both that the text of the legislation remains unaltered and that the Supreme Court has declined expressly to overrule pertinent previous authorities, either on the basis that the previous authorities were simply ‘wrong’ when decided, or that the ‘always speaking’ principle justifies lending the relevant statutory terms a new meaning.

Consequently, it is suggested that the judgments lack legitimacy from we might term a ‘top-down’ perspective; namely their uneasy fit with orthodox concerns about normative hierarchy and legal certainty. However, the paper also questions the legitimacy of these judgments from a ‘bottom-up’ viewpoint, namely the Supreme Court’s apparently easy assumption that the doctrinal innovations it has introduced will both be readily comprehensible to the government officials whose decisions they supposedly control and that those officials are willing and able to alter their behaviour accordingly.

## **A brief overview of the scheme of the homelessness legislation**

The homelessness legislation is now some forty years old. The measure initially emerged as the Housing (Homeless Persons) Act 1977. Strictly speaking, the Act originated as a private

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violent act towards me than a person who punched me was obviously not shared by the Lord Justices. (I had bitten back the temptation to suggest that on my opponent’s case Harold Shipman was a violent man when injecting his victims with poison, but not when he had merely tipped it into their bedtime cocoa).

<sup>10</sup> See especially [2011] UKSC 3; [2001] 1 W.L.R. 433 at paras 20-21, 24, 28.

<sup>11</sup> For a fiercely critical assessment of the judgment see R. Ekins, “Updating the Meaning of Violence” (2013) 129 *Law Quarterly Review* 17. A countervailing view is offered in C. Walshaw, “Concurrent Legal Interpretation Versus Moderate Intentionalism” (2014) 35 *Statute Law Review* 244. For a perspective rather more concerned with the homelessness element of the case see C. Bevan, “Interpreting statutory purpose - lessons from *Yemshaw v Hounslow London Borough Council*” (2013) 76(4) *MLR* 742.

member's bill sponsored by the Liberal MP Steven Ross, although Ross received substantial support from the then Labour government.<sup>12</sup> The Act was vigorously opposed by the Conservative party in the Commons and Lords, largely at the behest of local authorities (primarily those under Conservative control) which feared the Act would enable people to 'jump the queue' for the grant of council housing and (relatedly) reduce councils' autonomy in allocating their housing resources.<sup>13</sup>

In simple terms, the Act obliges a local housing authority to provide applicants with varying degrees of housing assistance, dependent upon the council's evaluation of a series of entitlement questions (frequently referred to as being an 'obstacle race').<sup>14</sup> Assuming an applicant's immigration status makes her eligible for assistance under Part VII at all,<sup>15</sup> four basic issues arise. First, is the applicant 'homeless'? Second, is the applicant in 'priority need'? Third, is the applicant 'intentionally homeless'? Fourth, does the applicant have a 'local connection' with the authority?

If the council considers an applicant is *prima facie* 'homeless' (per ss.175-177) and in 'priority need' (per s.189), it must (per s.188) provide interim accommodation while it investigates those two questions and those of 'intentional homelessness' and 'local connection' more carefully. If the applicant is not 'homeless' no substantive duty is imposed on the council. If she is 'homeless' but is not in 'priority need', the substantive duty is limited to providing 'advice and assistance' in support of any attempt the applicant may make to secure new accommodation (per s.192). If the applicant is 'homeless' and in 'priority need' but is also considered to be 'intentionally homeless', the substantive duty (per s.190) is both to provide 'advice and assistance' and to secure that temporary accommodation is available to the applicant for a period that gives her a 'reasonable opportunity' to secure accommodation for herself. The so-called 'full housing duty' (per s.193) arises only in respect of an applicant who is 'homeless', in 'priority need' and **not** 'intentionally homeless'. The s.193 duty is to: 'secure that accommodation is available for occupation by the applicant'. The duty can be discharged in various ways; whether by direct provision of housing by the council itself or by arranging for housing to be provided by another social landlord or a private sector provider. Per ss.198-200, if the applicant has no 'local connection' with the applied to council but does have such a connection with another authority, the applied-to council may transfer the applicant to that second authority for discharge of the s.193 duty; (unless, per *Yemshaw*, she would be at risk of violence in the second authority's area).

The local authority is the primary decision maker on all these issues. Initially its decisions were subject to judicial review.<sup>16</sup> However the judicial review jurisdiction was replaced in

**Comment [SMS1]:** Is it not better to say that initially the only way of challenging the decisions was by Jr in action for b.s.d.? (the decisions remain technically subject to judicial review).

<sup>12</sup> This being the era of the Lib-Lab pact. On the Act's origins see I. Loveland, *Housing Homeless Persons* (1995) ch. 3.

<sup>13</sup> There was no statutory regulation of allocation policies in the 1970s, as there is now per Part VI of the Housing Act 1996.

<sup>14</sup> The term comes from P. Robson and P. Watchman, "The Homeless Persons Obstacle Race Parts I and II" (1981) *Journal of Social Welfare Law* 1 and 65.

<sup>15</sup> This has become a very complex issue given the frequency with which the details of immigration law are changed, both by domestic legislation and by EU law. See generally A. Arden et. al., *Homelessness and Allocations* ch. 3 (2012; 9<sup>th</sup> ed).

<sup>16</sup> And indeed, initially, to an action for breach of statutory duty in the county court; see *Thornton v Kirklees* [1979] QB 626. The House of Lords substantially restricted the scope for such actions in *Cocks v Thanet* [1983] 2 A.C. 286 and *O'Rourke v Camden* [1998] A.C. 188.

1996 by a two stage ‘review and appeal’ process, apparently in response to a government concern (then the second Major administration) that the High Court was being overburdened with homelessness cases.<sup>17</sup> Per s.202 provides that, the council’s initial decision may be challenged by way of an internal review in the authority; and per s.204 provides that the ‘review’ may then be challenged by way of an ‘appeal’ to the county court. The ‘review’ and ‘appeal’ labels are both misnomers, in that the s.202 review jurisdiction is to make wholly de novo decision on all matters of fact and law<sup>18</sup> (ie an appeal in the fullest sense) while the s.204 ‘appeal’, being limited to points of law, is in effect judicial review in the county court. The number of appeals seems to have remained substantial, although of course county court judgments do not feature in the law reports.<sup>19</sup>

The Act has always been accompanied by a *Code of Guidance* produced by (in 1977) the Department of the Environment, which has been occasionally updated; (the last version dating from 2006).<sup>20</sup> Councils must<sup>21</sup> have regard to the relevant parts of the *Code*, which contains in effect ‘the government’s’<sup>22</sup> views as to the meaning of the Act and its suggestions as to desirable policy objectives. As a matter of law, councils are free not to follow the *Code*’s prescriptions as long as they have been considered it and a reasoned basis is offered for not doing so.<sup>23</sup>

Although the Act has been modified by subsequent legislation, especially in 2002 with regard to how local authorities can discharge their duties to entitled applicants, its basic four question route to establishing those entitlements remains largely unchanged. However the various *contexts* of its implementation have altered markedly.<sup>24</sup>

Most obviously and significantly, in 1977 local authorities were by a substantial margin the largest providers and builders of rented housing in Britain. The council sector, containing

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<sup>17</sup> The perception was not well-founded; see M. Sunkin, “The Judicial Review Caseload” (1991) *Public Law* 491.

<sup>18</sup> See *Mohamed v Hammersmith and Fulham LBC* [2001] UKHL 57; [2002] 1 A.C. 547; *Haile v Waltham Forest LBC* [2015] UKSC 34; [2015] 2 W.L.R. 1441 at para 16.

<sup>19</sup> County court judgments are reported in a very limited fashion in the regular ‘Housing Law Update’ feature published in *Legal Action* and on the *Nearly Legal* housing law website.

<sup>20</sup> <https://www.gov.uk/government/publications/homelessness-code-of-guidance-for-councils-july-2006>;

<sup>21</sup> Now per Housing Act 1996 s.182(1).

<sup>22</sup> Although that term is used guardedly, since the current *Code* is the 2006 version, promulgated by the third Blair administration, albeit amended by supplementary guidance in 2011; (Department of Communities and Local Government, *Supplementary Guidance on the homelessness changes in the Localism Act 2011 and Homelessness (Suitability of Accommodation) (England) Order 2012* (2012); available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270376/130108\\_Supplementary\\_Guidance\\_on\\_the\\_Homelessness\\_changes\\_in\\_the\\_Localism\\_Act\\_2011\\_and\\_on\\_the\\_Homelessness\\_Order\\_2012.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270376/130108_Supplementary_Guidance_on_the_Homelessness_changes_in_the_Localism_Act_2011_and_on_the_Homelessness_Order_2012.pdf);

<sup>23</sup> *R (Khatun) v Newham LBC* [2004] EWCA Civ [2005] QB 37 para 47. The case is better known for establishing that the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) applied to tenancy agreements.

<sup>24</sup> Other contextual factors are also obviously relevant; for example the closure of residential mental health hospitals and the introduction of ‘community care’ for mentally ill people; the nature of support offered to persons with substance abuse problems; and most obviously the increase in the cost of housing (whether owner-occupied or rented) relative to increases in average earnings and/or the amounts provided under the housing benefit scheme.

some six and a half million dwellings, was more than twice the size of the housing association and private rented sectors combined. That picture had shifted markedly by 1997. The council sector had declined from some six and a half million dwellings to fewer than four and a half million. The reduction was attributable primarily to sales under the right to buy legislation, to a very substantial reduction in the rate of new building, and – to a lesser extent – transfers of local authority housing to ‘Housing Action Trusts’ or housing association landlords. By this point, the local authority was still – but only just – larger than the private rented and housing association sectors combined.

In crude terms, the overall size of the housing stock had approximately increased by over four million dwellings in that period. The population had grown by only two million over those years. It would nonetheless appear to be the received wisdom (then and now) that ‘the housing crisis’ had worsened between 1977 and 1997. This seems attributable primarily to the issue of the decreasing affordability of available accommodation rather than its existence *per se*,<sup>25</sup> and to a lesser extent to trends towards more atomistic household structures.<sup>26</sup>

By 2014, the private rented sector had become larger than the local authority and social rented sectors combined. Of a total of 27.3 million dwellings, 1.7 million (7.3 %) were let by local authorities; 2.33 million (10%) were let by social rented sector landlords; and 4.2 million (18%) were let by private landlords. Owner-occupation remained the dominant tenure, with some 14.7 million (63%) dwellings. The rebalancing within the rented sector reflected the continuation by the Blair/Brown and Cameron governments of the Thatcher/Major administrations unwillingness to allow councils to build new housing and by the apparent success of the policy enacted in the Housing Act 1996 to provide that new private sector lettings would presumptively be assured shorthold tenancies, which afforded tenants no meaningful security of tenure.

[INSERT TABLE 1 (somewhere close to this point in text) – at end of paper]

The 1977-2014 era was also marked by a substantial reduction in local authorities’ fiscal autonomy, such that even those councils which might have wished to devote considerable resources to meeting their obligations under the homelessness legislation simply lacked the capacity to do so.

One consequence of these contextual shifts has been a steady flow of articles in the specialist and mainstream press speaking to the scale (large and growing) and nature (complex and intractable) of our current homelessness problem.<sup>27</sup> The courts’ role in addressing that

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<sup>25</sup> See the extremely informative study by C. Belfield, D. Chandler, and R. Joyce, *Housing; Trends in Prices, Costs and Tenure*, (2015) especially tables 2.4b and 2.2 (available at <https://www.ifs.org.uk/uploads/publications/bns/BN161.pdf>;

<sup>26</sup> Cf. N. McDonald and P. Williams, *Understanding Recent changes in Household Formation Rates and Their Implications for Planning for Housing in England* (2014); A. Holmans, *New Estimates of Housing Demand and Need in England, 2011 to 2033* (2013).

<sup>27</sup> For instance S. Fitzpatrick, G. Bramley, B. Watts, B. Wilcox and H. *The Homelessness Monitor* (2016), a rolling study conducted under the auspices of the Joseph Rowntree Foundation ; available at <http://www.crisis.org.uk/pages/homelessnessmonitor.html>; C. Robb, “Britain Is Heading For a Homelessness Crisis” (2016) *New Statesman*, September 1 (<http://www.newstatesman.com/politics/staggers/2016/09/britain-heading-homelessness-crisis-how-stop-it>);

H. Agerholm, “Homelessness Crisis Reaches New High As 19,000 Private Renters Forced Onto Streets In Just Year” (2016) *Independent*, September 28; <http://www.independent.co.uk/news/uk/home-news/homelessness-crisis-new-high-19000-private-renters-forced-onto-streets-year-a7335756.html>;



problem is manifestly both very limited and essentially reactive and individuated in nature. Judicial decisions cannot mandate the construction of more houses in the public or private sectors; they cannot enhance local authorities' fiscal autonomy; they cannot lower the cost of such housing as there is. They can however produce changes – and ostensibly significant changes – in the meaning of the homelessness legislation. And in three recent decisions, the Supreme Court appears to have done just that.

Before turning to those judgments, one further contextual factor – which we might term the broad judicial approach to the oversight of local authority decision making should be mentioned. Counsel for the respondent in s.204 appeals will usually refer the court – often at the outset of written and oral submissions - to this passage in Lord Neuberger's concurring opinion in the House of Lords' 2009 judgment in *Holmes-Moorhouse v Richmond-Upon-Thames LBC*:<sup>28</sup>

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.

Such 'benevolence' may prove of considerable assistance to local authorities in rebutting s.204 challenges. It rather suggests of course that this facet of government decision making is being subjected only to a significantly diluted version of the rule of law, a matter which perhaps merits further and more systematically considered attention.

### **Priority need – the assessment of 'vulnerability'**

A person who is 'homeless' per the Housing Act 1996 ss.175-177 but not in 'priority need' per s.189 garners little benefit from the homelessness legislation. A local authority must (per s.192) offer such persons 'advice and assistance' to find accommodation for themselves. The text of the Act does not require that such advice and assistance be successful, and there is no judicial authority to support such a construction. An applicant who hopes that the Act will require the local authority actually to find her or provide her with accommodation must therefore successfully surmount this hurdle.

Most routes to priority need are straightforwardly laid out in s.189:

#### **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;
- (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;

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<sup>28</sup> [2009] UKHL 7: [2009] 1 W.L.R. 413.

(d) a person who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster.

The provision that has traditionally presented both administrators and courts with interpretive difficulty has been s.189(1)(c); namely the meaning of ‘vulnerable’. For many years, local councils and courts fixated on the Court of Appeal’s judgment in *R v Camden London Borough Council, Ex p Pereira*<sup>29</sup> as the authoritative source for determining what was meant by ‘vulnerable’. That this fixation ever arose, still less that it endured, is really quite puzzling, as what the Court of Appeal said in *Pereira* makes very little sense. Per Hobhouse LJ, said 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”.<sup>30</sup>

The several shortcomings of this formula are readily apparent. Firstly, a vast range of matters might be encompassed by ‘injury’, ‘detriment’ and ‘harmful effects’, labels presumably intended to be interchangeable.<sup>31</sup> Is this limited to such extreme matters as freezing to death on an icy street, or does it also encompass (severe or minor) adverse physical or psychiatric health consequences, or exposure to physical or sexual abuse? The use of ‘will’ rather than ‘might’ suggests that whatever the harmful effects might be, an authority would be entitled to find that a person was not in priority need if it was not satisfied that the harmful effects/injury/detriment/ was certain rather than (very) likely to occur. The major difficulty however was that the applicant’s vulnerability was not to be assessed against some kind of objective yardstick, but against homelessness people (and presumably hypothetical homeless people) who were ‘less vulnerable’ than the applicant. While it might sound facetious to say so, the test offered by the Court of Appeal boiled down essentially to the nonsensical proposition that; “You are not vulnerable if you are less vulnerable than someone who is more vulnerable than you”. One might as well suggest – equally nonsensically – that a person would be ‘homeless’ within the meaning of the Act if she was ‘more homeless than someone who is less homeless than her’.<sup>32</sup> Notwithstanding its logical shortcomings, *Pereira* remained ‘good law’<sup>33</sup> (for almost twenty years) until the Supreme Court’s judgment in *Hotak v Southwark London Borough Council (Equality and Human Rights Commission and others intervening)*.<sup>34</sup>

*Hotak* is a difficult judgement to understand in terms both of its reasoning in an abstract sense and its likely practical impact.<sup>35</sup> On one point, namely the comparator against whom

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<sup>29</sup> (1999) 31 H.L.R. 317.

<sup>30</sup> Ibid at 330. A similar formulation had been offered before by Waller LJ in *R v Waveney DC, ex parte Bowers* [1993] Q.B. 238 at 244-245.

<sup>31</sup> Although one might credibly suggest that ‘harmful effects’ encompassed the earlier concepts of ‘injury’ and ‘detriment’, and that ‘injury’ relates to health matters while ‘detriment’ concerns non-health issues.

<sup>32</sup> Or, to focus on illogicality more abstractly, a person is obese/annoying/attractive if she/he is more obese/annoying/attractive than someone less obese/annoying/attractive than he/she is.

<sup>33</sup> Despite its rather obvious inadequacies, *Pereira* was consistently approved by the courts; see for example *Griffin v Westminster CC* [2004] HLR 32 *Osmani v Camden LBC* [2004] EWCA Civ 1706; and the formula was reproduced (with emphasis in bold type) in successive (the 2003 and 2006) editions of the *Code of Guidance*.

<sup>34</sup> [2015] UKSC 30; [2015] 2 W.L.R. 1341.

<sup>35</sup> For more extensive analysis see I. Loveland, “Changing the Meaning of ‘Vulnerable’ Under the Homelessness Legislation?” (2017) *Journal of Social Welfare and Family Law* – forthcoming.

the applicant must be evaluated, the Supreme Court's conclusion is clear. The correct comparator is no longer to the (hypothetical) 'ordinary homeless person', but rather the (again hypothetical) 'ordinary person when homeless'. The change in the wording is not a mere question of semantics. Although the Court does not spell out the significance of the change, its potential impact in macro-terms must lie in the presumption<sup>36</sup> that 'homeless people' (ie the *Pereira* formula) are as a group much more likely than 'ordinary people' to have personal characteristics (for example mental or physical illness, a history of substance abuse, an inability to hold down a job, no financial resources, no close family or friends to offer assistance) which would make being homeless a more difficult situation for such people to manage or escape from. If the 'new comparator group' is a group prima facie more able to cope with the challenges of homelessness than the 'old comparator group', then the likelihood of any given applicant being less able to cope than the comparator must increase. But matters are complicated when one considers a second dimension of the judgment.

The Court recognised and was bluntly critical of the tautological nature of the *Pereira* test, describing it as: "logically circular and therefore highly questionable".<sup>37</sup> That circularity of reasoning is not per se removed simply by changing the comparator group. That could presumably only be achieved – and the 'logical circularity' removed - by dropping the comparator group entirely, and directing the vulnerability inquiry to articulating an objective set of 'harms' of varying levels of intensity, identifying a threshold point at which the harm is sufficiently severe to be unacceptable and then gauging in the light of an applicant's personal circumstance the likelihood of that harm eventuating. *Pereira* then, surely, was 'wrong' and should be overruled ?

But rather than taking this course, Lord Neuberger offered up the following (new and improved (?) formula:

**Comment [SMS2]:** Do you mean possibly improved?

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.

That form of words is peculiar in three senses. The first is that it is no less tautological than the (disapproved) version given in *Pereira*. The second is that it saves the court from having to overrule by *Pereira* by reading into that judgment a qualificatory adjective ('significantly') which manifestly is not there. The third is that the addition of 'significantly' must make it less likely (perhaps even significantly less likely) that a person will be vulnerable, a conclusion which in policy results runs directly counter to the more (to applicants) helpful revamping of the appropriate comparator group. Unhappily therefore, in overall terms, *Hotak* perhaps adds to, rather than reduces, the 'circularity' of the vulnerability concept in formal doctrinal terms.

This may overstate the position somewhat from a judicial perspective; ie that of judges hearing subsequent s204 appeals on the point. Lord Neuberger took pains in his judgment to underline the point that the *Pereira* was not and had never been 'the law', but was rather just a helpful guide to the meaning of s.189 itself. And now we presumably have courtesy of *Hotak* a new helpful guide. But that cautionary note, while obviously correct from an abstract constitutional perspective, may further increase the complexity of vulnerability decision making (from a council officer's perspective) and so make it less and less likely that 'the law' is properly applied within local authorities themselves.

<sup>36</sup> There was no evidence before the court on the point; it was perhaps a matter too obvious to require discussion.

<sup>37</sup> [2015] UKSC 30; [2015] 2 W.L.R. 1341.

There is – from that perspective – an acute irony in practical terms flowing from the *Hotak* judgment. There is now a relatively substantial body of academic literature, generated both by lawyers and sociologists, offering empirical studies of homelessness decision making. A recurrent theme in that literature has been the often limited familiarity of council officers both with judicial decisions specifically<sup>38</sup> addressing the homelessness legislation and with general principles of administrative law. The irony arises because one of the most recent empirical studies suggests that council officers displayed an unusually high level of legal awareness and evaluative rigour when applying the *Pereira* test.<sup>39</sup> Post-*Hotak*, it seems such investment of time and effort may have all been in vain.

One might therefore wonder if local authority decision makers en masse will both understand and accept as legitimate the nuanced alterations to the meaning of vulnerability that *Hotak* advances. And while those officers are grappling with that difficulty, they will also have to get to grips with a contemporaneous change to the meaning of the Act's 'intentional homelessness' provisions flowing from the Supreme Court's judgment in *Haile v LB of Waltham Forest*.<sup>40</sup>

### **Intentional homelessness – a question of causation ?**

*Pereira* dominated the vulnerability landscape for nearly twenty years. At much the same time as the Supreme Court undermined *Pereira*'s significance in *Hotak*, it also turned its attention to a much more longstanding feature of the legislation's cartography; the 1981 House of Lords' judgment in *Din (Taj) and Another v Wandsworth London Borough Council*.<sup>41</sup>

At the heart of the intentional homelessness concept are the familiar issues of causation and remoteness. The phraseology used in the Act in its original form was (so far as relevant) that:

S.17.

Subject to subsection (3) below, for the purposes of this Act a person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy....

Those provisions now appear in s.191(1) of the Housing Act 1996.

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<sup>38</sup> For example, from a lawyer's perspective, I. Loveland, *Housing Homeless Persons* (1995); D. Cowan *Homelessness: the 'Inappropriate' Applicant* (1997); D. Cowan and S. Halliday, *The Appeal of Internal Review* (2003); S. Halliday (2004) *Judicial Review and Compliance with Administrative Law* (2004). Informative recent studies by non-lawyers include S. Alden, 'Welfare Reform and the Street Level Bureaucrat in Homelessness Services' (2015) *International Journal of Sociology and Social Policy* 359; 'On the Frontline: the Gatekeeper in Statutory Homelessness Services' (2015) *Housing Studies* 924.

39 C. Hunter et al, "Legal Compliance in Street-Level Bureaucracy: a Study of UK Housing Officers" (2016) *Law and Policy* 81. A slightly less complimentary picture is painted in J. Bretherton, C. Hunter and S. Johnsen, "You Can Judge Them on How They Look: Homelessness Officers, Medial Evidence and Decision-Making in England" (2013) *European Journal of Homelessness* 69; C. Hunter, "Denying the Severity of Mental health problems to Deny Rights to the Homeless" (2008) *People, Place and Policy* 18.

<sup>40</sup> [2015] UKSC 34; [2015] 2 W.L.R. 1441.

<sup>41</sup> [1981] 3 W.L.R. 918; [1983] 1 A.C. 657. The case began as a breach of statutory duty action in the county court, a route largely closed off to applicants by *Cocks v Thanet DC* [1983] 2 A.C. 286 and *O'Rourke v Camden LBC* [1988] 1 A.C. 188.

As noted above, the significance of the local authority finding an applicant intentionally homeless is that it substantially reduces the applicant's entitlement to assistance; the authority's obligation (per s.190(2)) to such an applicant (who is eligible, homeless and in priority need) is merely to secure her/him (temporary) accommodation for such reasonable time as would enable her /him to secure accommodation for her/himself.

The parliamentary history of the 1977 bill indicates that the intentionality provision had two aspects. The first – and perhaps dominant - motive among MPs was to ensure that 'undeserving' applicants (ie those who had become homeless because they had not paid their rent or mortgages, or had been evicted because of anti-social behaviour) did not secure rehousing. This appeared to be in part a simple question of moral desert to prevent people escaping the adverse consequences of their misbehaviour, and in part to spare local authorities from being landed with undesirable tenants. A second concern was that, at a time when local authorities tended to allocate their housing on a simple waiting list basis, the new Act might tempt some households voluntarily to leave their current (and in their view less satisfactory) housing in the hope they would be granted a local authority tenancy.<sup>42</sup>

The initial case law on the meaning of s.17 was not conceptually problematic: leaving tied accommodation, being evicted from rented accommodation for not paying one's rent or engaging in anti-social behaviour or acquiescing in the anti-social behaviour of one's children or spouse were all held to be courses of conduct which would justify a council finding an applicant to be intentionally homeless.<sup>43</sup> A more difficult question was posed in *Din*.

The applicants in *Din* were a family who had left rented accommodation (flat 1) after falling into debt and accumulating substantial rent and rates arrears. They moved into temporary accommodation with friends (flat 2), but were asked to leave after a few months. When they then applied as homeless to Wandsworth they were found homeless and in priority need, but were considered intentionally homeless because they had left flat 1 when they were not required (ie by a court order) to do so. The council had accepted the Dins's contention that because of their accumulating rent arrears they would by the time they left flat 2 have been evicted by their landlord for non-payment of rent had they stayed in flat 1.<sup>44</sup> But the council

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<sup>42</sup> See Loveland *op. cit.* (1995) ch. 3. In 1977 local authority tenancies were not secure, and could be determined unilaterally by a council simply by serving a valid notice to quit; see *Shelley v London County Council* [1949] A.C. 56. It was not until the late 1970s that the courts accepted that general administrative law principles applied to such decisions; cf. *Camock Chase DC v Kelly* [1978] 1 W.L.R. 1. Both the 'undeserving tenant' concern and the 'queue-jumping' concern become more acute in 1980 when the secure tenancy (and right to buy) were introduced by the Housing Act 1980. There is no evidence that those developments were anticipated by MPs during the passage of the 1977 Act.

<sup>43</sup> See for example *R v North Devon DC, ex parte Lewis* [1981] 1 W.L.R. 328; *R v Ealing LBC, ex parte Sidhu* (1982) 2 H.L.R. 45; *Devenport v Salford CC* (1983) 8 H.L.R. 54; *R v Eastleigh BC ex parte Beattie (no.1)* (1983) 10 H.L.R. 134. For a discussion of how such judgments affected (in the early 1990s) the way that council officers actually made decisions see I. Loveland, 'The Politics, Law, and Practice of Intentional Homelessness: I - Housing Debt' (1993) *Journal of Social Welfare and Family Law* 113; 'The Politics, Law, and Practice of Intentional Homelessness: 2 - Abandonment of Existing Housing' (1993) *Journal of Social Welfare and Family Law* 185.

<sup>44</sup> It is not clear on what legal basis the Dins occupied flat 1. If they had a Rent Act 1977 tenancy, any attempt by their landlord to regain possession on the basis of rent arrears would have had to surmount the substantial hurdles both of convincing the court that it would be reasonable to make a possession order, and that any such order should not be suspended to afford the Dins the chance to pay off their arrears. The Dins had not invoked in 'the reasonable to continue to occupy' phrase in s.17 to argue that it would not have been reasonable for them to stay in flat 1 because they could not afford the rent. That omission has now been rectified by legislation; the 'affordability' of accommodation is a matter councils must consider when assessing if a person is homeless and intentionally homeless; Homelessness (Suitability of Accommodation) Order 1996 SI 1996/3204.

maintained that this was not relevant to the question of intentionality; what was in issue was their voluntary departure from flat 1 prior to any possession action having been started.

The House of Lords divided 3-2 (Lords Wilberforce, Lowry, and Fraser for the majority; Lords Russell and Bridge dissenting) in the council's favour on that question. The clearest statement of the majority position was apparently offered by Lord Fraser:

The material question is why he [the applicant] became homeless, not why he is homeless at the date of the inquiry. If he actually became homeless deliberately, the fact that he might, or would, have been homeless for other reasons at the date of the inquiry is irrelevant.<sup>45</sup>

To read s.17 (now s.191) in that way is obviously consistent with s.17's literal terms: the Dins *became* homeless<sup>46</sup> when they left flat 1 when they were not legally obliged to do so. The majority viewpoint reinforced that literalist approach by assuming s.17 was underlain by a parliamentary purpose to ensure that applicants who had made themselves homes from 'secure' accommodation could not escape the disentitling consequences of having done by engineering a brief sojourn in precarious housing. The majority was also exercised by the administrative/decision making difficulties that councils would face if they had to reach decisions on the basis of 'hypothetical scenarios'.<sup>47</sup> That seems a curious cause for concern. As suggested in the discussion of *Pereira* above, resort to 'hypothetical' factors was – and even post-*Hotak* remains – a central ingredient of vulnerability decision making. There is no obvious reason for it being acceptable as a means to resolve one question of entitlement but not another. A rule which excluded 'hypothetical matters' from intentionality decision making would presumably make the decision making process more straightforward.

However, the rather blunt expression of the majority opinion in the passage cited above was tempered (or perhaps complicated) somewhat by Lord Fraser's conclusion - shared by Lords Wilberforce and Lowry – that there had to be a 'continuing causal connection'<sup>48</sup> between the deliberate act which produced the initial state of homelessness and the homelessness which existed at the time of the application. The irresistible inference arising from that aspect of the majority judgment is that councils would have to engage with notions of causal proximity and remoteness, in both a quantitative (ie chronological) sense and a qualitative (ie had a relevant novus actus intervenus occurred) sense. So, for example, if the Dins had remained in flat 2 for five or six or more years before being asked to leave would their departure from flat 1 have 'expired' or 'become spent' for the purposes of an intentionality decision? Or if they had left flat 1 for a secure tenancy in a house which burned down three months after they moved in, at which time flat 1 remained in perfect condition, would the fact that their security in the house was as great or greater than in flat 1 knock the departure from flat 1 entirely out of any intentionality equation. These were just two examples of a potentially wide range of causation problems that *Din* would pose for local authorities.

The cogency of the majority conclusion is further weakened by the presence of two dissents, from Lords Russell and Bridge. Lord Russell's conclusion was put in simple terms:

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<sup>45</sup> [1983] 1 A.C. 657 at 691.

<sup>46</sup> As the Act was then understood, taking up temporary accommodation did not bring a pre-existing state of homelessness to an end. The House of Lords modified that view in *R v Brent LBC, ex parte Awua* [1996] A.C. 55.

<sup>47</sup> [1983] 1 A.C. 657 at 667.

<sup>48</sup> *Ibid* at 672.

If in the past the [the applicant] has become homeless intentionally and but for that he would not now be homeless... well and good: that is why he is homeless now. But if on the facts as established in the present case he would be homeless now in any event, the past circumstances in which the homelessness originated appear to me to be no longer of any relevance: the past actions of the applicant are spent.

That judges were not uniformly persuaded by the logic of the majority's reasoning is suggested by a sprinkling of post-*Din* decisions which insisted on a quite tight causal link between the applicant's initial homelessness (hereafter 'initial homelessness') and her homelessness when she made her application (hereafter 'application homelessness') within a steady stream of judgments which upheld a distinctly relaxed view of causation.<sup>49</sup>

*Din* had therefore remained authoritative for over thirty years by the time Ms Haile's case came before the Supreme Court. The applicant in *Haile v Waltham Forest London Borough Council*<sup>50</sup> was young single woman who up until October 2011 had been living in a bedsit in a hostel. She voluntarily left the hostel in October 2011, and, after short term stays in various accommodation, made a homelessness application in August 2012, by which time she had given birth to a child. She was thus in priority need. Waltham Forest considered her intentionally homeless because of her voluntary departure. Ms Haile's argument apparently attacked *Din* head-on: that argument being that the hostel allowed only single person occupancy of its bedsits, and so on the birth of her child (some months prior to making her homelessness application in August 2012) she would have had to have left the hostel in any event.

Lord Reed delivered the main judgment, joined by Baroness Hale, Lord Clarke and (in a concurring opinion) Lord Neuberger. Lord Reed concluded that Waltham Forest had erred in law in not considering Ms Haile's 'I would have been homeless by then anyway' argument. One might instinctively assume therefore that *Haile* had 'reversed' or 'overruled' *Din*, but Lord Reed did not follow that path. Rather, as Lord Neuberger put it: "we are distinguishing it on a fairly fine basis".<sup>51</sup>

That 'fairly fine basis' seems to hinge in part on the presumption that *Din* would have been approached on a different basis today: firstly because of changes in the legislative scheme, and in particular the 1996 statutory reform<sup>52</sup> which expressly identifies the affordability of accommodation as a matter to be taken into account in assessing if it would be reasonable per s.191 for an applicant to have remained in the accommodation she has left/been evicted from; and secondly because of the court's acceptance in 1995 that occupation of temporary accommodation could indeed mean that one was no longer homeless.<sup>53</sup>

However the larger presumption seems to be that Lord Fraser's above cited reference to the need for a continuing causal connection was the true core of the majority ratio in *Din*, and his blunt dismissal – quoted verbatim above - of the relevance of events subsequent to the applicant's initial homelessness should not ever have been taken as the crucial element of the decision.

That Lords Russell and Bridge in *Din* evidently so took it rather weakens the force of Lord Reed's reasoning. He finds support for that reading of *Din* however in some post-*Din*

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<sup>49</sup> The leading cases are summarised at Arden et al op. cit pp 166-175.

<sup>50</sup> [2015] UKSC 34; [2015] 2 W.L.R. 1441. The bench was Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Clarke of Stone-cum-Ebony, Lord Reed, Lord Carnwath JJSC.

<sup>51</sup> Ibid at para 69.

<sup>52</sup> See fn 44 above; [2015] UKSC 34; [2015] 2 W.L.R. 1441 at para 62.

<sup>53</sup> See fn 46 above; [2015] UKSC 34; [2015] 2 W.L.R. 1441 at para 37.

judgments which supported a tight rather than a relaxed causal connection between the 'initial homelessness' and the 'application homelessness'. Lord Reed invoked as an example *R v Basingstoke and Deane BC ex parte Bassett*<sup>54</sup> (decided shortly after *Din*). In *Basset*, The applicant and her husband had left a secure tenancy to emigrate to Canada. The couple were deported as illegal overstayers, and returned to live in temporary accommodation as guests of the husband's sister. The marriage then broke down and the applicant was required to leave her sister-in-law's house. The council found the applicant intentionally homeless on the basis that she voluntarily gave up her secure tenancy. The High Court held however that it was not her 'initial homelessness' that was relevant here, but her 'application homelessness'. Since the cause of the latter was the breakdown of the marriage, which was not a deliberate act on her part, she could not be intentionally homeless.<sup>55</sup>

Lord Reed suggests (at para 46) that *Basset* is 'directly relevant' to his re-evaluation of *Din*, but that is manifestly incorrect. *Din* was argued on the accepted factual basis that had the Dins not left flat 1, they would because of their escalating rent arrears have been evicted from by the time they made their homelessness application. It was not accepted in *Basset* that had the applicant not gone to Canada the breakdown of her marriage (if indeed it would have happened) would necessarily have led to the loss of her secure tenancy. *Basset*, and the other cases Lord Reed relies on, are simply not *Din* cases on the facts. This analysis leads Lord Reed however to the following conclusion:

55...The importance of the marital breakdown, so far as the purposes of the legislation are concerned, is not that it resulted in a slightly earlier cessation of occupation of temporary accommodation than would otherwise have been the case. It is important because it is an involuntary cause of homelessness which may be regarded in certain circumstances as interrupting the causal connection between the applicant's current homelessness and her earlier conduct, for example in surrendering a secure tenancy.

56... Giving the legislation a purposive application, she has not therefore jumped the queue as a result of her earlier decision to surrender the tenancy. That might be the position, for example, in a case where a marriage broke down at some point after the couple had left secure accommodation, if it appeared that the marriage would probably have broken down, and the applicant would have been rendered homeless, in any event. The ordinary requirement that the cause of an event should be a sine qua non of that event would not then be satisfied.

Lord Neuberger's 'fine basis' characterisation of the majority judgment perhaps understates the case. The majority, in declining to overrule *Din*, is essentially telling local authorities that although *Din* was correct, we have all for 30 years not properly understood what it said, and in any event much of what the judgment does say has been overtaken by subsequent legislative and judicial events. From the practical perspective of local authority decision makers, but also from the theoretical perspective of maintaining a rigorous approach to the rule of law, this will likely have unhappy consequences if the administrative reality into which the judgement will emerge is – as per Lord Neuberger in *Moorhouse-Williams* – one in which:

[R]eview 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.

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<sup>54</sup> (1983) 10 H.L.R. 125.

<sup>55</sup> Lord Reed refers also (paras 49-51) to *R v Harrow LBC, ex parte Fahia* [1998] 1 W.L.R. 1396 : and (para 52) *R v Camden LBC, ex parte Aranda* (1997) 30 H.L.R. 76.



But while it is not ‘appropriate’ to subject s.202 decisions to rigorous judicial analysis, it is apparently ‘appropriate’ to present those housing officers with a judicial explanation of their statutory responsibilities which as well as being according to one member (Lord Neuberger) of the five person court difficult to reconcile with previous authority, and according to another (Lord Carnwarth who dissented in *Haile*) impossible to reconcile, is couched in terms of bewildering opacity; a good many angels are dancing one might think on the head of the pin of Lord Reed’s ruminations on the nature of causation within s.191.

While the Supreme Court’s primary responsibility is to resolve the case before it, its judgment in so doing necessarily has an expansive hortatory effect. One of the few (very few, and all of them by practitioners) comments on the case concluded with the suggestion that: “One thing is certain however: that in consequence of the decision in *Haile*, if they have not done so already, local authorities will need urgently to review their decision making on intentional homelessness”.<sup>56</sup> Producing an accurate response to *Hotak* presents s.202 decision makers with a stiff challenge: the challenge presented by *Haile* is stiffer still. It is not credible therefore to dispute that the effect of *Hotak* and *Haile*, in isolation and/or combination is to complicate the process of deciding which applicants are indeed entitled to the ‘full housing duty’. The third Supreme Court judgement considered here attaches further complications to just what the substance of that ‘full housing duty’ might be.

## Discharging the duty – ‘out-of-area-placements’

A now longstanding consequence of the high cost and short supply of housing in London has been the use by London local authorities of so-called ‘out of area placements’ to discharge their various Part VII obligations.<sup>57</sup> The practice initially manifested itself in inner-London authorities, especially Westminster and Kensington and Chelsea, which placed applicants in outer-London boroughs, frequently in accommodation leased from private providers and then sub-leased on a non-secure tenancy basis to homeless applicants.

Initially the practice was used primarily in respect of the temporary duty arising under s.188, which requires councils to accommodate applicants who are prima facie homeless and in priority need pending full determination of their applications. It has increasingly been used however in relation to councils’ full duties under s.193.<sup>58</sup> The mechanics of such placements takes various forms. Some councils have leased accommodation from private providers and

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<sup>56</sup> M. Hutchings, (2015) ‘*Haile v Waltham Forest LBC - Intentional Homelessness, Queue Jumping and the "I Would Have Been Homeless Anyway" Argument*’ (2015) *Journal of Housing Law* 116. A forceful and more wider-ranging critique is offered in A. Arden, ‘All Change - the Supreme Court in 2014-2015’ (2015) *Journal of Housing Law* 79.

<sup>57</sup> The only surprising feature of the story about the practice in *The Guardian* on 16.01.2017 was that the authors seemed surprised by it; P. Butler and R. Booth, “Westminster Could Send Its Homeless to Coventry” *The Guardian* 16.01.2017. For earlier reports see London Councils, *The Placement of Homeless Households Outside of London* (2014); [www.londoncouncils.gov.uk/node/1724](http://www.londoncouncils.gov.uk/node/1724); <http://www.independent.co.uk/news/uk/home-news/over-50000-families-shipped-out-of-london-in-the-past-three-years-due-to-welfare-cuts-and-soaring-10213854.html>; [http://www.newhamrecorder.co.uk/news/newham\\_s\\_housing\\_crisis\\_is\\_only\\_going\\_to\\_get\\_worse\\_says\\_council\\_1\\_4485024](http://www.newhamrecorder.co.uk/news/newham_s_housing_crisis_is_only_going_to_get_worse_says_council_1_4485024);

<sup>58</sup> The issue can seem perverse in practice. In 2016 I was briefed to represent a client whom Brent had offered to accommodate in Walsall on the basis that there was no affordable housing in Brent, and then briefed the next day for a client whom Tower Hamlets had offered to accommodate in Brent.

then sub-leased the properties on a non-secure tenancy basis to homeless applicants. Others have made arrangements on a collective or individuated basis with housing associations. Some have simply assisted applicants on a case by case basis in renting from private sector landlords. In an extreme manifestation of the phenomenon, Canterbury City Council found itself outbid by Redbridge Borough Council (in outer East London) in the purchase of some 200 Ministry of Defence properties in Canterbury in 2016.<sup>59</sup>

Such initiatives will often be unwelcome to those outlying authorities whose housing market is invaded or colonised by London authorities; in part because it will reduce their capacity to meet the housing needs of their own population and also because the incoming residents may place additional and unplanned for demands on other council services. A council's capacity to make out of area placements has prima facie been constrained by various provisions of the Act, subordinate legislation and the *Code of Guidance*. S.208(1) provides that: "So far as reasonably practical a local authority shall in discharging their housing functions under this Part secure that accommodation is available for the occupation of the applicant in their district". S.206 also provides that any accommodation secured for applicants be 'suitable', a concept readily understood to include the accommodation's location. The 2006 version of the *Code of Guidance* (para 17.41) advised authorities to have regard to such matters as proximity to applicant's workplaces and their children's schools, and the desirability of maintaining established links with social work or medical support facilities.

Notwithstanding these provisions, the Con-Lab coalition government considered that some councils were resorting too readily to out of area placements,<sup>60</sup> and invoked s.210 to issue delegated legislation specifying various matters which councils had to take into account in assessing the suitability of accommodation - the Homelessness (Suitability of Accommodation) (England) Order 2012 SI 2012/2601, and a supplement to the *Code Of Guidance* explaining the Order more fully.<sup>61</sup>

The applicant in *Nzolameso v Westminster CC*<sup>62</sup> had been offered a large house in Milton Keynes, which she rejected on the basis that having to leave Westminster where she had lived for some years would disrupt her children's schooling and compromise her own access to the quite extensive medical support she required. Her s.202 challenge to the suitability of the accommodation was rejected by the council. The s.202 decision letter did not engage expressly with the terms of the 2012 Order or the *Supplementary Guidance*, but was limited in general terms to explaining that the offer was suitable because of the lack of accommodation in Westminster, because the children were not currently taking exams, and because the applicant could find alternative medical support in Milton Keynes.

The s.202 decision was upheld both in the county court and Court of Appeal. Both judgments illustrate the very helpful effect that *Holmes-Moorhouse* can have for councils, in

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<sup>59</sup> D. Gayle, "Londoners To Be Sent to Canterbury" (2016) *The Guardian* 25.05.2016; <https://www.theguardian.com/society/2016/may/25/londoners-sent-to-canterbury-council-bidding-war-housing-borough-redbridge>;

<sup>60</sup> Department for Communities and Local Government, *Homelessness (Suitability of Accommodation) (England) Order 2012 – Government's Responses to Consultation* (2012); [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/11314/homelessness\\_sor.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/11314/homelessness_sor.pdf);

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[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270376/130108\\_Supplementary\\_Guidance\\_on\\_the\\_Homelessness\\_changes\\_in\\_the\\_Localism\\_Act\\_2011\\_and\\_on\\_the\\_Homelessness\\_Order\\_2012.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270376/130108_Supplementary_Guidance_on_the_Homelessness_changes_in_the_Localism_Act_2011_and_on_the_Homelessness_Order_2012.pdf);

<sup>62</sup> [2015] UKSC 22; [2015] H.L.R. 22. The bench was Lady Hale, Lord Clarke, Lord Reed, Lord Hughes and Lord Toulson.

that both rested essentially on the (from an orthodox rule of law perspective quite bizarre) assumption that the s.202 decision maker *must* have taken the Order and the Supplementary Guidance into account: it was for the applicant to prove to the contrary and the mere absence of reference to specific matters in the text of the s.202 decision did not suffice for that purpose.<sup>63</sup>

The Supreme Court (Baroness Hale giving the sole judgment) adopted a quite different approach, seemingly for two interconnected reasons. Shelter had intervened in the Supreme Court to alert the court to the potential relevance of the Children Act 2004 s.11 to out-of-area-placement decisions. S.11(2) imposes a general duty on (inter alia) local authorities to ensure that: “their functions are discharged having regard to the need to safeguard and promote the welfare of children...”. Although s.11 had by then in force for over 10 years, *Nzolameso* appears to be the first case in which it occurred to anyone that it might be relevant to homelessness decision making. That penny having been dropped, the Supreme Court picked it up as a basis for applying a rather more rigorous oversight of this facet of Part VII decision making than the *Moorhouse-Williams* rationale dictated:

27 The question of whether the accommodation offered is “suitable” for the applicant and each member of her household clearly requires the local authority to have regard to the need to safeguard and promote the welfare of any children in her household. Its suitability to meet their needs is a key component in its suitability generally. In my view, it is not enough for the decision-maker simply to ask whether any of the children are approaching GCSE or other externally assessed examinations. Disruption to their education and other support networks may be actively harmful to their social and educational development, but the authority also have to have regard to the need to promote, as well as to safeguard, their welfare. The decision maker should identify the principal needs of the children, both individually and collectively, and have regard to the need to safeguard and promote them when making the decision.

The Court also indicated that the need for an atypically rigorous approach to decision making on this issue was warranted by the fact that in 2011/2012 the then government has expressed concern about the undesirable policy implications of out-of-area placement **and** produced both *Supplementary Guidance* to the *Code* and a statutory instrument to regulate council decision making on the point. Indeed, the Court was invited to reach this conclusion by an intervention for the Department of Communities and Local Government.<sup>64</sup> The intervention was couched in terms of the need to embrace a more rigorous understanding of the rule of law on this issue:

35 The Secretary of State complains that the effect of this approach would be to encourage courts to infer, on no other basis than the assumed experience and knowledge of a local authority, that the authority knew of the Code and Guidance and had taken it into account; that the authority had considered and rejected the possibility of providing closer accommodation than that offered; and that the authority had good reasons for their decision in this particular case. If the courts are prepared to assume all this in the authority's favour, this would immunise from judicial scrutiny the “automatic” decisions to house people far from their home district, which was just what the 2012 Order and Supplementary Guidance were designed to prevent.

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<sup>63</sup> [2015] UKSC 22; [2015] P.T.S.R 549 at paras 33-34. A s.204 appeal is de fact a judicial review hearing. It is almost unheard of for there to be oral evidence (and hence cross-examination) and very rare that either party produces a witness statement; see (by analogy) *R v City of Westminster, ex parte Ermakov* [1996] 2 All E.R. 302. Usually the only ‘evidence’ before the court is the s.202 decision letter.

<sup>64</sup> *Nzolameso* was heard in the Supreme Court on 17.03.2015, so the intervention came from the coalition government, not the subsequent Conservative administration, although the Secretaries for State in 2015, Eric Pickles and Greg Clarke, were both Conservatives.

It remains to be seen if this second strand of the Court's reasoning will suffice to require more rigorous than usual council decision making in out-of-area-placements that do not involve applicants with children. Perhaps more significantly, Baroness Hale indicated that it might not suffice for local authorities to adopt this newly rigorous standard in response to individual claims; they should also address the matter pre-emptively and collectively by formulating and publishing policies dealing with various aspects of their respective approaches to out-of-area placements:

39 Ideally, each local authority should have, and keep up to date, a policy for procuring sufficient units of temporary accommodation to meet the anticipated demand during the coming year. That policy should, of course, reflect the authority's statutory obligations under both the 1996 Act and the [Children Act 2004](#). . . . and, ideally, it should be made publicly available. Secondly, each local authority should have, and keep up to date, a policy for allocating those units to individual homeless households. Where there was an anticipated shortfall of "in borough" units, that policy would explain the factors which would be taken into account in offering households those units, the factors which would be taken into account in offering units close to home, and if there was a shortage of such units, the factors which would make it suitable to accommodate a household further away. That policy too should be made publicly available.

The reference to 'ideally' may provide a lifeline in subsequent litigation for authorities which have not taken this 'guidance' on board. There is curiously no explicit reference in *Nzolameso* to the *Moorhouse-Williams* rationale and consequently no explicit departure from it.<sup>65</sup> But it is hard to resist the conclusion that the administrative consequence of *Nzolameso* is that – at least as matter of legal theory - council decision makers now have to appreciate that there is one aspect of Part VII where decision making processes will need to need pass what is in effect a strict scrutiny standard of review, even though the rest of the Act's implementation evidently remains subject only to the *Moorhouse-Williams* 'benevolent' level of judicial supervision. How well they do so remains to be seen.<sup>66</sup>

## Conclusion

Judicial construction of the homelessness legislation has retained (at best) a Cinderella status among academic lawyers, whether from a public law or housing law perspective. *Hotak*, *Haile* and *Nzolameso* have attracted little attention in academic journals.<sup>67</sup> That lacuna is

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<sup>65</sup> Baroness Hale does counsel courts against 'nitpicking' at para 32, but given that the substance of her judgment is to find fault with the council's decision because of its failure to engage overtly with the various criteria of the 2102 Order and the *Supplementary Guidance*, we would presumably have to accept that those matters are not 'nits', even if other parts of the *Code* have that status in relation to other parts of the Act.

<sup>66</sup> By way of anecdote, in the two cases referred to at fn 58 above, the local authorities concerned accepted their s.202 decisions to be unlawful as soon as they received the grounds of appeal, which averred in some detail that they had failed to comply with *Nzolameso* in several distinct respects.

<sup>67</sup> Thus far the only extensive discussion of the cases has been in a professional journal; see Arden, *op.cit.*; (I have found that article very helpful in shaping the views expressed here). *Hotak* was quite widely noted in the professional press, but in the academic world has been discussed only in a brief note - J. Meers, "A Return to Purer Waters? 'Vulnerability' Under s.189 Housing Act 1996" (2015) *Journal of Social Welfare and Family Law* 473 and a more extensive analysis in Loveland *fn xx supra*. Other than a passing mention in a paper in the *Conveyancer* (I. Loveland, "Affordability and Intentional Homelessness" (2015) *Conveyancer and Property Lawyer* 146, *Haile* has received no academic coverage at all. Readers interested in seeing an alternative to reasoned analysis of the judgments might refer to A. Dawar, "Homeless migrant mum-of-five refuses to live in council house OUTSIDE London" *Sunday Express* 04.02.2015 and the comments posted thereafter; ([http://www.express.co.uk/news/uk/556012/Titina-Nzolameso-migrant-mum-court-fight-new-London-home](http://www.express.co.uk/news/uk/556012/Titina-Nzolameso-migrant-mum-court-fight-new-London-home;));

perhaps unfortunate, as this area of government activity raises a host of important interconnected questions in respect of constitutional and administrative law as well as social welfare provision.

For housing lawyers and activists whose professional activities primarily comprise defending possession proceedings and acting for homeless people, judgments such as *Hotak*, *Haile* and *Nzolameso* might well be regarded as a cause of celebration. But such celebration is of course constructed within a very bounded rationality; namely one is which one's focus as a lawyer is consumed (most narrowly) by winning one's client's case and then (slightly less narrowly) by invoking the judgment for future clients in subsequent cases. If one seeks views the issue in a more systemic fashion, one might initially suppose that any extension of the (formal) entitlements the homelessness legislation grants to applicants qua group must impose correlative burdens on local authorities. But it is readily apparent that the notionally bipolar entitlement-burden conflict set up by litigation under the homelessness legislation obscures several crucial constitutional and governmental realities.

The first reality is of course that local authorities have a very limited capacity to shoulder any increased burden because of their effective lack of (in a general sense) fiscal autonomy and of (in more specific sense) any meaningful power to increase housing supply or reduce housing demand in their areas, even if – and given the political complexion of many local authorities that is a very big 'if' – they were ideologically inclined to do so. Legal responsibility without political power might be thought an unhappy position for any governmental body to occupy.

These three judgments (along with *Yemshaw*) make little further contribution to the debate surrounding the difficult-to-reconcile couplet of House of Lords judgments from the late 1990s on resource issue considerations; *R v East Sussex County Council, ex parte Tandy*<sup>68</sup> and *R v Gloucestershire County Council, ex parte Barry*.<sup>69</sup> In *Barry* a divided court<sup>70</sup> had held that a council could take into account its resources when assessing the 'needs' of a person under the Chronically Sick and Disabled Persons Act 1970 s.2(1). A year later in *Tandy*, a differently constituted court<sup>71</sup> decided unanimously that resource considerations were not a relevant factor in determining the needs of children under s.298 of the Education Act 1993. The *Tandy* court made a rather limp effort to distinguish *Barry* rather than disapprove its reasoning.<sup>72</sup> The defensibility of the judgments on that point has been well-cavassed in the academic literature and need not be revisited here.<sup>73</sup>

There are two further two issues arising from *Tandy* and *Barry* which are perhaps of interest to the argument offered in this paper. The first is that no suggestion seems to have been made in either case that hugely significant changes in resource contexts might amount to an

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<sup>68</sup> [1998] A.C. 714.

<sup>69</sup> [1997] A.C. 584.

<sup>70</sup> Lords Nicholls, Hoffmann and Clyde for the majority; Lords Lloyd and Steyn dissenting.

<sup>71</sup> Only Lord Steyn sat in both cases. The other judges in *Tandy* were Lords Browne-Wilkinson, Slynn, Nolan and Hutton.

<sup>72</sup> Lord Brown-Wilkinson delivered the only judgment. The relevant passage is at [1998] A.C. 714 at 748 A-F.

<sup>73</sup> In addition to the sources cited at fn 1 above, see A. Sculley-Hill, "Judicial Review - Scarce Resources - Children's Welfare - Children In Need - Accommodation" (2000) *Journal of Social Welfare and Family Law* 169; D. Monk, "Duties, Resources and the Right to 'Education Otherwise'" *Child and Family Law Quarterly* 425.

alteration in what Bennion (at p 2 above) termed as ‘social conditions’ or ‘other matters’ which could trigger an ‘always speaking’ approach to statutory construction. Exploring the qualitative and quantitative preconditions for legitimate application of the ‘always speaking’ principle is a task which perhaps has yet to receive the attention it deserves, and falls beyond the scope of this paper. The second issue is rather more prosaic, and is encapsulated by Lord Browne-Wilkinson’s blunt observation in *Tandy* that the obvious solution to the council’s resource difficulties was to divert money from elsewhere in its budget.

In respect of the homelessness legislation, it is clear the resources available to councils<sup>74</sup> to accommodate applicants who were in priority need and/or were not intentionally homeless would affect how burdensome *Hotak* and *Haile* would prove to local authorities if those judgments do indeed enhance applicants’ entitlement. The Court of Appeal in *Hotak* had accepted that resources (or rather a lack of them) was an appropriate factor for the council to consider in making priority need decisions,<sup>75</sup> but Southwark had not pressed the point in the Supreme Court, which made it clear that the contention would have failed:

[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.....

The obvious consequence of that reasoning is presumably supposed to be that if priority need is to become a more difficult status for applicants to establish because of growing pressure on councils’ financial resources, that result can only be achieved by amendment to the text of the Act, and not by indulgent judicial interpretation. That the judgment might be seen as having just the opposite effect without the need for amendment to the text seemed to have escaped the court’s attention.

But in reaching that conclusion the court offered no insight however with regards to the question of how many previously ‘not vulnerable people’ would now become so as a result of the changes in doctrine the judgment introduced; its quantitative significance is unknown and perhaps unknowable.<sup>76</sup> The resources issue was raised but not pursued with any vigour by Westminster in *Nzolameso*. But is it notable that judgment also formed no view as to how many applicants previously placed (far) ‘out of area’ would now be placed in or less far from the relevant council’s district. Similarly, in *Haile*, where the question was not raised, no attention was paid to how many previously ‘intentionally homeless’ people would no longer be so. Nor in *Yemshaw*, to how many more people would now be regarded as victims of violence.

And as well as ignoring the *outcome implications* of the judgments, the Supreme Court gave no consideration to their *process implications*. *Nzolameso* speaks most loudly to that issue; councils which use out-of-area-placements will have to devote officer and member time (and so money) to devising such policies and keeping them under review,<sup>77</sup> and presumably the

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<sup>74</sup> And to several hundred other councils with Part VII obligations.

<sup>75</sup> [2013] EWCA Civ 515; [2013] P.T.S.R. 1338.

<sup>76</sup> Department of Communities and Local Government, *Live Tables On Homelessness; Table 784 Local Authorities’ Actions under the Homelessness Provisions of the Housing Acts, Financial Years 2004-2005 – 2015-2016*: (2016) <https://www.gov.uk/government/statistical-data-sets/live-tables-on-homelessness>;

<sup>77</sup> The courts have not suggested that councils must produce policies to structure their discretion towards others facet of Part VII decisionmaking: ‘homelessness’ or ‘priority need’ or ‘intentionality’ for example.

atypically rigorous framework which the case applies to this one aspect of Part VII will entail s.202 decision makers devoting more time and care (and so, again, money) to their task if they are to produce lawful decisions. *Hotak* and *Pereira* impose lesser process burdens, but both judgments present councils with more complicated questions than was previously the case.

Those omissions are perhaps a necessary consequence of the court's reactive and individuated constitutional role; it is settling an inter partes dispute not designing a social policy system. Those unasked questions are however important one from both a constitutional and administrative law perspective if we are to assume that the Supreme Court does not promulgate doctrinal innovations in the expectation that government decision makers will ignore them and that those government decision makers are aware of and seek to respond in good faith to those innovations. Cases such as *Hotak*, *Haile* and *Nzolameso* offer very fertile ground for empirically based, front line impact analysis studies of the practical effect of doctrinal norms on the governmental process, and it is to be hoped that such studies will be undertaken in the near future.

A third important unasked question, also ripe for empirical inquiry, is whether and if so to what extent a judicially triggered shift in one element of the 'homeless person's obstacle race' might have displacement effects in respect of council decisions on other aspects of an applicant's case. Lord Browne-Wilkinson's suggestion the council in *Tandy* that it just transfer resources from elsewhere to meet the particular obligation in issue was presumably offered on the assumption that such a transfer would be transparent. But that may not always be the case. If a (doctrinal) consequence of *Hotak* is that is now 'easier' for an applicant to satisfy the priority need criterion through the vulnerability route, but there has been no commensurate increase in local authorities' capacity to meet the housing needs of such vulnerable applicants, might the result be that the effect of *Hotak* is either pre-emptively negated by councils taking a more restrictive approach to deciding if the person concerned is homeless or reactively curtailed by councils taking a more restrictive approach to the question of intentional homelessness?<sup>78</sup> For example, Department of Communities and Local Government statistics record a (modest) fall in the number of Part VII applicants (in England only) found homeless but not in priority need from 20,420 in 2014-2015 to 19,570 in 2015-2016. *Hotak* was handed down on 13 May .05.2015. The statistics hint at but offer no means to establish a causal link between the fall in applicants found not in priority need and the judgment. Similarly, a plausible consequence of *Nzolameso* is that applicant households without children will be bumped up the 'out of area placement' queue to accommodate (no pun intended) applicants with children within or much closer to the authority's own area.

Such scope for concealed displacement is one might think (obviously) reduced if the courts simultaneously produce a cluster of judgments relating to different aspects of the Act, all of which prima facie point to an expansion of entitlement. That would seem to be the collective effect of *Hotak*, *Haile* and *Nzolameso*. But many other facets of the Act remain unaffected, and so can function as potential venues for entitlement displacement. That possibility is of course enhanced if in respect of most Part VII decisions judicial oversight remains couched at the *Moorhouse-Williams* rather than *Nzolameo* level of intensity.

Equally one might wonder if all three judgments will provoke in some councils an adjustment – expressly or more likely implicitly – in the outer limits of (to applicants) 'favourable' decisions by local authorities. That *Pereira* might have *enabled* a council authority to have concluded that a person was not vulnerable did not *require* the council to do

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<sup>78</sup> In 2014-2105, the number of applicants accepted as homeless and in priority need who were also found intentionally homeless was 8,990. In 2015-2106, that figure had increased to 9,560; *ibid*.

so, any more than *Din* required a council to find an applicant intentionally homeless or *Danesh* required a council to conclude that a person was not a victim of violence. Relatedly – although the point seems rarely if ever to be noticed by local authorities – the Act (per s.192(3)) expressly permits councils to accept the full housing duty towards applicants who are not in priority need. That provision will perhaps now be exercised less often.

As suggested above, that local authorities are subjected (*prima facie*) to judicially engineered increases in their legal responsibilities which are imposed without a commensurate increase in the councils' capacity to discharge the responsibilities would be regarded from some perspectives as problematic in both a constitutional and policy sense. For the Supreme Court of course, the constitutional position is entirely the reverse: its power over homelessness decision making is untrammelled by any responsibility for the allocation of resources.

It is at best a facile oversimplification to suggest that *Hotak*, *Haile* and *Nzolameso* have not 'changed' the law. In formal legal terms, the decision in *Nzolameso* is readily defensible on the basis that the general approach to be taken to applying Part VII was modified by Parliament in its enactment of s.11 of the Children Act 2004, albeit that no-one noticed the point for ten years. *Hotak* and *Haile* are however clearly unsatisfactory from the perspectives both of normative hierarchy and legal certainty, and cannot be 'saved' from those weaknesses – as was *Yemshaw* – by invoking the always speaking paradigm. One might wonder if the Supreme Court's refusal in both *Hotak* and *Haile* formally to overrule the previous decision from which it has obviously and significantly departed is a *sub silentio* device to sustain the conclusion that if the judgments do cause difficulties to local authorities, the responsibility for those difficulties lies with Parliament in having enacted and left unchanged the relevant statutory provision.

As we entered 2017, Parliament did step back on to the homelessness stage. A private members bill was before the Commons which would if enacted impose on local councils slightly more extensive substantive duties towards homeless people. The May government was apparently supporting the bill, and made much in January 2017 of a promise to offer councils (*en masse*, not each) an additional £48 million pounds of funding towards meeting the costs of the new obligations.<sup>79</sup> The average purchase cost of a 3 bedroom house/flat in Westminster in 2017 was apparently £2.7 million, with the cheapest of them approaching £1 million; the least expensive 3 bedroom rental advertised by one leading estate agent was listed at £595 per week.<sup>80</sup> £48 million, we might think, is not going to take us very far.

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<sup>79</sup> <https://www.gov.uk/government/news/government-backs-homelessness-bill-with-48-million-for-councils>

<sup>80</sup> <https://www.foxtons.co.uk/living-in/westminster/house-prices/>; accessed 20.01.2017.



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**Table 1. Households by tenure in Great Britain 1977, 1997 and 2014**

<b>Tenure</b>	<b>1977</b>	<b>1997</b>	<b>2014</b>
Owner occupied	11,026,000	16,649,000	17,199,000
Private rented	2,567,000	2,387,000	5,213,000
Housing association	300,000	1,147,000	2,755,000
Local authority	6,455,000	4,415,000	2,075,000
Total dwellings	20,378,000	24,731,000	27,306,000
Total population	54,666,000	56,643,000	62,756,300

Sources: Department for Communities and Local Government, *Live Tables on Dwelling Stock: Table 102 by Tenure, Great Britain (Historical Series)* (2016)

<https://www.gov.uk/government/statistical-data-sets/live-tables-on-dwelling-stock-including-vacants>;

Office for National Statistics, *Great Britain Population Mid-Year Estimate* (2016)

<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/timeseries/gbpop/pop>;

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