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Murky Waters: The ongoing evolution of vulnerability under s.189 Housing Act 1996

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Subject: Homelessness. **Other related subjects:** Local government. Priority Need.

Case:

Rother District Council v Stephen Freeman-Roach [2018] EWCA Civ 368

Introduction

In the latest instalment of a long line of Part VII Housing Act 1996 ‘vulnerability’ cases, Justice Rose observes – seemingly in jest – that perhaps ‘old *Pereira* habits die hard.’¹ We agree. In the wake of *Hotak*² and *Panayiotou*³, the judgment in *Rother* demonstrates the continuing challenge of what HHJ Luba QC described in the course of oral argument in *Johnson*⁴ as ‘drinking from the pure waters’ of s.189(1)(c) of the Housing Act 1996; avoiding the ‘dangerous...glossing’⁵ of the ‘primacy of the statutory words’⁶ that has characterised the interpretation of ‘vulnerability’ in priority need homelessness assessments. Many of those key problems that characterised the ‘steady stream’⁷ of case law in the *Pereira* test live on with reference to this new *Hotak* formulation, albeit in a diluted form. In trying to get back to ‘those plain words’⁸ of s.189(1)(c), the pure waters still look decidedly murky.

In this case comment, we outline the facts and key focus of the court’s decision in *Rother District Council v Stephen Freeman-Roach* [2018] EWCA Civ 368, before reflecting on three further issues: (i) the use of external medical advisors, (ii) the lack of consideration of s.149 Equality Act 2010, and (iii) the position in Wales following the Housing (Wales) Act 2014.

Facts

Cases on priority need generally catalogue conflicting assessments of medical reports, disagreements over physical and mental health, and a band of external ‘medical advisors’ casting in their own opinion. The facts of *Rother* are no different. Having slept in his car for five weeks, the 54 year-old Mr Freeman-Roach applied for assistance under Part VII of the 1996 Act at Rother District Council. His application detailed two strokes – in 2006 and 2013 – which had affected his ability to communicate, and osteoarthritis in his hands, ankles and right knee.⁹ Following an initial interview, the officer at Rother noted his speech problems and

¹ *Rother DC v Freeman-Roach* [2018] EWCA Civ 368 [31] (per Justice Rose).

² *Hotak v Southwark LBC* [2015] UKSC 30.

³ *Panayiotou v Waltham Forest LBC* [2017] EWCA Civ 1624.

⁴ Heard in a joined appeal with *Hotak* (n 2). *Johnson v Solihull MBC* [2015] UKSC 30.

⁵ *Hotak* (n 2) [91] (per LJ Hale).

⁶ *Ibid.* [59] (per LJ Neuberger)

⁷ Ian Loveland, ‘Changing the Meaning of “Vulnerable” under the Homelessness Legislation?’ (2017) 39 *Journal of Social Welfare and Family Law* 298. 299.

⁸ *ibid.* 301.

⁹ *Rother* (n 1) [5].

swelling caused by osteoarthritis,¹⁰ but the authority's 'medical advisor'¹¹ determined that neither 'rendered Mr Freedman-Roach significantly more vulnerable than an ordinary person.'¹² Informed by the medical advisor's report and correspondence with Freeman-Roach's previous GP, which did not detail his mobility being compromised or any requirement for 'input from social services'¹³, the officer determined that he was not in priority need of assistance.

Freeman-Roach sought a review under s.202 of the 1996 Act. In support of this review further medical reports were attained, including a letter from his current GP who described him as being 'in a desperate situation' and 'vulnerable'.¹⁴ A further three reports were sought from external medical advisors, all concluding that Freeman-Roach was not 'significantly more vulnerable than an ordinary person' as a result of his medical issues.¹⁵

He was provided interim accommodation during the period of the initial application and again at the point of review – with a two month gap in-between the two.¹⁶ The authority refused to provide interim accommodation pending appeal, but as a result of an injunction issued by the County Court in the earlier instance, Freeman-Roach was placed in interim accommodation pending the outcome of the present appeal.¹⁷

The decision

In their decision letter, the reviewing officer had clearly applied the test laid out in *Hotak*: whether Freeman-Roach was 'significantly more vulnerable than an ordinary person in need of accommodation.'¹⁸ Subsequent appeals remind the authors of the 'tube of toothpaste' analogy for discretion adopted by Hawkins¹⁹ – squeeze it at one point and it oozes out elsewhere. In an echo of the long line of cases following *Pereira*, the key issue before the Court was whether the reviewing officer should define what they mean by those key elements that carry this discretionary weight: 'significantly', 'vulnerable', or the characteristics attributed to the 'ordinary person'.

Put another way, the court was tasked with considering if *Tetteh*²⁰ remained good law post *Hotak*. The principle is a well-established one: in stating reasons a reviewer officer need not 'spell out precisely what attributes of the normal homeless person he had in mind'²¹ and any decision letter needs to be 'read together as a whole', not 'dissected into small pieces.'²² The contention of Freeman-Roach was that the shifting test in *Hotak* and the subsequent decision in *Panayiotou*, renders the test more 'nuanced and complex'²³ than the longstanding *Pereira*

¹⁰ Ibid [6].

¹¹ Ibid [7].

¹² Ibid [8].

¹³ Ibid.

¹⁴ Ibid [10].

¹⁵ Ibid.

¹⁶ Ibid [12].

¹⁷ Ibid [13].

¹⁸ See *Hotak* (n 2) [64] (per L Neuberger).

¹⁹ Keith Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in Keith Hawkins (ed), *The Uses of Discretion* (OUP 1992). 11.

²⁰ *Tetteh v Kingston upon Thames RLBC* [2004] EWCA Civ 1775

²¹ Ibid [21] (per LJ Gage).

²² Ibid [22].

²³ *Rother* (n 1) [34].

formulation, and this changes the demands of giving reasons. In other words, the issue before the court was whether it was enough to provide a broad statement of the *Hotak* test at the start of a decision letter, without explicitly returning to its key elements throughout the statement of reasons.

The court decided that *Tetteh* did remain valid authority. Justice Rose held that:

I consider that *Tetteh* remains good law post *Hotak* so that the review decision cannot be faulted because it failed to define 'vulnerable' or 'significantly' or failed to list the attributes of the ordinary person if made homeless.²⁴

She considered that the reviewing officer had provided sufficient reasons for Freeman-Roach to understand why he had been found not in priority need, and to be satisfied that they applied the correct test in reaching this conclusion. Importantly, however, Justice Rose introduced the broad-ranging caveat that 'how much detail needs to be given of the reasons for the council's decision in a particular case depends on the circumstances of that case.'²⁵ Readers may assume therefore that some unpacking of those key elements may be necessary in certain factual scenarios, particularly, for instance, where the reviewing officer places particular reliance on the applicant being 'significantly' more vulnerable than an ordinary person.

The second key strand to the court's reasoning was a potent re-statement of the principle laid out by Lord Neuberger in *Holmes-Moorhouse*²⁶ that courts must not be 'not be too zealous in the examination of a reviewing officer's decision in order to identify errors of law'²⁷, and should avoid a 'nit-picking approach'.²⁸ Loveland's concerns about the 'indulgent benevolence'²⁹ of this sentiment are clearly set to endure, with concurring judgments from Lords Lewison and Longmore underscoring that 'the reviewing officer is not writing an examination paper in housing law.... nor is he required to expound on the finer points of a decision of the Supreme Court...'³⁰ and that 'it is not for the decision letter to "demonstrate" anything; it is for the applicant to demonstrate an error of law.'³¹ As observed by Cowan, where no such meaning needs to be specified, 'pity my poor students who have to write examination essays on the meaning of vulnerability.'³²

Analysis

Perhaps the most striking feature of the case for any reader, particularly those less familiar with assessments under Part VII of the 1996 Act, is the sheer volume of medical advisors and GPs involved in the assessment of the applicant's medical issues. There are no fewer than five medical professionals detailed in the judgment who provide varying assessments of Freeman-Roach: Drs Cooper, Arokadare, Rubery, Thakore, and Hornibrook – three of whom were instructed by the Council as 'medical experts'. Importantly, these instructed advisors did not offer general assessments of Freeman-Roach's health, but instead endeavoured to make

²⁴ Ibid.

²⁵ Ibid.

²⁶ *Holmes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7.

²⁷ *Rother* (n 1) [34].

²⁸ Ibid [32].

²⁹ Loveland (n 4). 311.

³⁰ *Rother* (n 1) [52] (per LJ Lewison).

³¹ Ibid [56].

³² David Cowan, 'More vulnerability' (Nearly Legal, 2018) <<https://nearlylegal.co.uk/2018/03/more-vulnerability/>> accessed 15th May 2018.

specific conclusions based on the language adopted in *Hotak*: namely, whether the applicant was rendered ‘more vulnerable than an ordinary person’³³ by virtue of their medical needs.

This use of external medical advisors is not surprising; this is in an area of law that sustains such an eco-system. Perhaps the most high profile company, NowMedical,³⁴ details their capacity to turn around a ‘report with reasons in one working day’ with ‘reference to relevant legislation and case law, including Johnson/Hotak.’³⁵ Indeed, medical assessments, given the sheer complexity of the issues often under consideration, must surely be a useful part of any decision for a homelessness officer tasked with such a difficult assessment of an individual’s comparative vulnerability, especially where this is based on pre-existing medical reports which may be ill-suited to the task.

The conclusions of these assessments that appear to shoulder much weight, however, sit oddly alongside the key sentiment in the judgment in *Hotak* – echoed by Justice Rose – to ‘avoid expressions which risk supplanting the statutory test’ and ‘which may mean different things to different people.’³⁶ Lord Neuberger’s concern was that ‘certain expressions seem to have entered the vocabulary of those involved in homelessness issues’³⁷, or as put more colourfully by Lady Hale, ‘glossing the plain words of statutory provisions is a dangerous thing.’³⁸ Here, this same reliance on formulations which characterised the much derided *Pereira* test, seems to be bleeding over into the axiom ‘significantly more vulnerable than an ordinary person’. This language is found not just in the assessment of the homelessness officer tasked with the decision, as would be expected, but also as the conclusions of medical reports commissioned to support it.

Second, the judgment does not consider the application of the ‘public sector equality duty’ (PSED) under s.149 Equality Act 2010. The judgment in *Hotak* clearly rejected the view that the duty has nothing to add to s.189, instead describing it as a ‘complementary duty’, requiring the reviewing officer to ‘focus very sharply’ on: (i) whether the applicant has a protected characteristic under Chapter 1 of the 2010 Act, (ii) the extent of this, (iii) the likely effect of the protected characteristic in the broader context of the applicant’s position if they were to be made homeless, and (iv) whether this results in them being ‘vulnerable’ under s.189.³⁹

Although the reviewing officer is not required to refer expressly to the PSED – indeed, the Court in *Hotak* acknowledges that many lawful decisions will naturally consider these issues⁴⁰ – given the high bar accorded in *Holmes-Moorhouse*,⁴¹ the potential for the duty to extend the scope of inquiry demanded of reviewing officers in certain circumstances may signal what Loveland describes as a ‘retreat from the indulgent benevolence’⁴² generally accorded to s.189 decision-making. Taking the definition of ‘disability’ under s.6 Equality Act 2010, it would

³³ For example, see *Rother* (n 1) [7], with reference to Dr Cooper’s report commissioned by Rother District Council.

³⁴ For a more detailed assessment of the role of NowMedical, see: Caroline Hunter, ‘Denying the Severity of Mental Health Problems to Deny Rights to the Homeless’ (2007) 2 People, Place & Policy Online 17.

³⁵ See NowMedical’s website: <https://nowmedical.co.uk/vulnerability.html>

³⁶ *Rother* (n 1) [17].

³⁷ *Hotak* (n 2) [40].

³⁸ *Ibid* [91].

³⁹ *Ibid* [78].

⁴⁰ *Ibid*.

⁴¹ *Holmes-Moorhouse* (n 26).

⁴² Loveland (n 4). 311.

appear that Freeman-Roach would aptly meet the requirements of having a ‘physical or mental impairment’ that ‘has a substantial and long-term adverse effect on [his] ability to carry out normal day-to-day activities’⁴³, and would consequently fall under the scope of the PSED.

The Pereira Test in Wales

Housing lawyers are acutely aware of the complexities that arise from devolution, and the assessment of priority need is no different. Following concerns by the Welsh Equalities and Local Government Committee on defining vulnerability during the scrutiny of the Housing (Wales) Bill,⁴⁴ the Pereira Test was put on the face of the Act, elevating its status from judicial guidance to statutory formulation. Readers may already note the irony of Lord Neuberger being ‘anxious to emphasise the primacy of the statutory words’ in *Hotak*, leading the court away from the Pereira formulation, whereas Wales has opted to adopt this much maligned formulation as the statutory words themselves.

Section 71 of the 2014 Act states:

- (1) A person is vulnerable as a result of a reason mentioned in paragraph (c) or (j) of section 70(1) if, having regard to all the circumstances of the person’s case, —
 - (a) the person would be less able to fend for himself or herself (as a result of that reason) if the person were to become street homeless than would an ordinary homeless person who becomes street homeless, and
 - (b) this would lead to the person suffering more harm than would be suffered by the ordinary homeless person; this subsection applies regardless of whether or not the person whose case is being considered is, or is likely to become, street homeless.
- (2) In subsection (1), “street homeless” in relation to a person, means that the person has no accommodation available for the person’s occupation in the United Kingdom or elsewhere.

The legislation was passed as the *Hotak* appeal was ongoing. As the Supreme Court case related to the Housing Act 1996, the judgment does not easily apply to the Housing Wales Act 2014. This incongruous position clearly presents a challenge for those charged with drafting guidance on the Welsh legislation. The first Code of Guidance was published in 2015, with a revised version following in 2016 which took account of the judgment of the Supreme Court. This revised Guidance emphasises that the Local Authority must undertake a thorough assessment when looking at issues of vulnerability, and that this must take account of whether, “the individual is less able to fend for themselves if they were to become street homeless, than an ordinary homeless person who becomes street homeless”.⁴⁵ This individual also needs to be at risk of suffering more harm where an ‘ordinary homeless person’ would be able to cope if they became street homeless.

⁴³ S.149(1) Equality Act 2010.

⁴⁴ Helen Taylor, ‘The Housing (Wales) Act: What’s Philosophy got to do with it?’ in. Sarah Nason. (ed) *Administrative Justice in Wales and Comparative Perspectives* (University of Wales Press, 2017)

⁴⁵ Welsh Government (2016) *Code of Guidance to Local Authorities on the Allocation of Accommodation and Homelessness 2016*. Available at: <<https://gov.wales/docs/desh/publications/160324-code-of-guidance-for-local-authorities-on-allocation-of-accommodation-and-homelessness-en.pdf>> accessed May 2018. 263.

In line with the Supreme Court ruling, the Guidance states that when Local Authorities are assessing vulnerability, they “should not equate that person [the ordinary homeless person who becomes street homeless] to a chronic rough sleeper with the associated social, mental, and physical health problems that they can display”.⁴⁶ Furthermore, and again referencing *Johnson v Solihull*, it is noted that; “the assessment of an applicant’s ability to cope is a composite one taking into account all of the circumstances including the level of support available to the application if he or she were to become street homeless”.⁴⁷ The Guidance clarifies that the definition of an ‘ordinary homeless person’ should not be that of a ‘chronic rough sleeper’ but of an individual who is homeless and becomes a rough sleeper.

Although the Guidance has been amended to take account of the Supreme Court ruling, a number of issues still remain. First, the ‘ordinary homeless person’ comparator is still being used.⁴⁸ Second, the 2014 Act still uses the definition, ‘street homeless’. This could lead to confusion in implementing the legislation, especially the move away from the *Pereira* formulation in England. Third, the Guidance can be amended at the discretion of a Minister without scrutiny from the Assembly, and a revised Code of Guidance has already been issued. Finally, the composite nature of the assessment as outlined in the 2016 Guidance highlights that all available support for individuals who become street homeless should be taken into account. This could potentially be used to deny the existence of a statutory duty to provide housing, if support such as hostels and homelessness services were in place in the area where the assessment was being made. The Guidance does not clarify this issue. Recently, however, the Minister for Housing and Regeneration has announced her intention to review the priority need category more broadly.⁴⁹ As part of the Rough Sleeping Action Plan, the Welsh Government have committed to considering the case for modifying priority need categories through secondary legislation to potentially include rough sleepers.

Summary

The decision in *Rother*, outlined in this case comment, demonstrates the continued struggle over the assessment of ‘vulnerability’ in priority need assessments under s.189 Housing Act 1996. The adverb ‘significantly’ carries a sizable weight in assessments following *Hotak*, with echoes of the problems following *Pereira* being pushed elsewhere. We outline three further points of reflection which arise from the decision: the central role of medical advisors, the lack of regard for the PSED, and the complex position which endures in Wales. In keeping with Justice Rose’s observation in *Rother*, notwithstanding the move away from the controversial *Pereira* formulation, ‘old *Pereira* habits die hard.’⁵⁰

⁴⁶ Welsh Government (2016) *Code of Guidance to Local Authorities on the Allocation of Accommodation and Homelessness 2016*. Available at: <https://gov.wales/docs/desh/publications/160324-code-of-guidance-for-local-authorities-on-allocation-of-accommodation-and-homelessness-en.pdf> (Accessed in: May 2018). 264.

⁴⁷ *Ibid.*

⁴⁸ Helen Taylor, ‘Rawls’ difference principle’: a test for social justice in contemporary social policy’ (PhD Thesis: Cardiff University, 2017).

⁴⁹ Welsh Government (2018). *Rough Sleeping Action Plan*. Available at: <https://gov.wales/docs/desh/publications/180206-rough-sleeping-action-plan-en.pdf> (Accessed in: May 2018).

⁵⁰ *Rother* (n 1) [31].