Neutral Citation Number: [2020] EWHC 3100 (Admin)

Case No: CO/3138/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 November 2020

Before :

MATHEW GULLICK
(sitting as a Deputy Judge of the High Court)

- -

Between :

KYLE BANKOLE-JONES **Appellant**

- and –

WATFORD BOROUGH COUNCIL **Respondent**

- -
- -

Toby Vanhegan (instructed by **ARKrights Solicitors**) for the **Appellant**
Catherine Rowlands (instructed by **Legal Department, Watford Borough Council**) for the **Respondent**

Hearing date: 8 October 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:30 am on Tuesday 24 November 2020.

Deputy Judge Mathew Gullick:

Introduction

1. This is a statutory appeal under section 204 of the Housing Act 1996 ("the 1996 Act") against a decision of the Respondent local authority made on review pursuant to section 202 of that Act. That decision was to the effect that the Appellant was homeless and eligible for assistance, but that he was not in priority need. There are four grounds of appeal, by which the Appellant challenges the Respondent's conclusion on priority need. The first two are said by the Appellant to raise issues going wider than the individual circumstances of his case. For that reason, the Appellant applied in his Appellant's Notice to transfer the appeal from the County Court to this court. An order to that effect was made by His Honour Judge Vavrecka, sitting in the County Court at Watford, on 9 July 2020.

2. The appeal proceeded before me by way of a remote video hearing using the Microsoft Teams platform. The Appellant was represented by Mr Toby Vanhegan and the Respondent by Ms Catherine Rowlands. I am very grateful to Counsel for the clear and well-structured written and oral submissions that were made on both sides.

Jurisdiction

3. Before turning to the substance of the appeal, I should first deal with an issue that has been raised by the Respondent regarding this court's jurisdiction to deal with it. Section 204 of the 1996 Act provides that an applicant who is dissatisfied with a review conducted under section 202 may appeal to the County Court on any point of law arising from that decision:

> "(1) If an applicant has who has requested a review under section 202 –
>
> (a) is dissatisfied with the decision on the review…
>
> he may appeal to the county court on any point of law arising from the decision or, as the case may be, the original decision."

4. The Appellant's Notice in this case was filed in the County Court. It contained the Appellant's request that the appeal should be transferred to the High Court. The order transferring the appeal was made by Judge Vavrecka on consideration of the papers and was expressed to be an order made of his own motion. It contained a provision permitting either party to apply, within seven days, for an oral hearing to vary the order or to set it aside. The Respondent thereby had the right to an oral hearing on the question of whether the appeal should be transferred. The Respondent did not make any application to that effect. Nor did the Respondent seek to appeal against the order for transfer or to take any other action to challenge it after it was made.

5. Although the Respondent did not make an application to reopen the issue of whether or not the appeal should have been transferred to this court, in her skeleton argument for the hearing of the appeal Ms Rowlands raised the question of whether this court, notwithstanding the order for transfer, had any jurisdiction to hear the appeal at all. A number of procedural issues might have arisen had this submission been correct, including in particular that the Respondent had never sought to overturn Judge

Vavrecka's order of 9 July. However, for reasons which I will endeavour to explain, I am satisfied that the learned Judge did have the power to transfer the appeal to this Court and so the procedural consequences of a finding to the contrary do not, therefore, arise.

6. Ms Rowlands' submission was to the effect that the transfer of the appeal had not been validly made because section 42 of the County Courts Act 1984 prohibited such a transfer. That section provides:

> "**Transfer to High Court by order of the county court**
>
> (1) Where the county court is satisfied that any proceedings before it are required by any provision of a kind mentioned in subsection (7) to be in the High Court, it shall–
>
> (a) order the transfer of the proceedings to the High Court; or
>
> (b) if the court is satisfied that the person bringing the proceedings knew, or ought to have known, of that requirement, order that they be struck out.
>
> (2) Subject to any such provision, the county court may order the transfer of any proceedings before it to the High Court.
>
> (3) An order under this section may be made either on the motion of the court itself or on the application of any party to the proceedings.
>
> (4) The transfer of any proceedings under this section shall not affect any right of appeal from the order directing the transfer.
>
> (5)Where proceedings for the enforcement of any judgment or order of the county court are transferred under this section–
>
> (a) the judgment or order may be enforced as if it were a judgment or order of the High Court; and
>
> (b) subject to subsection (6), it shall be treated as a judgment or order of that court for all purposes.
>
> (6) Where proceedings for the enforcement of any judgment or order of the county court are transferred under this section—
>
> (a) the powers of any court to set aside, correct, vary or quash a judgment or order of the county court, and the enactments relating to appeals from such a judgment or order, shall continue to apply; and
>
> (b) the powers of any court to set aside, correct, vary or quash a judgment or order of the High Court, and the enactments relating to appeals from such a judgment or order, shall not apply.
>
> (7) The provisions referred to in subsection (1) are any made–

(a) under section 1 of the Courts and Legal Services Act 1990; or

(b) by or under any other enactment."

7. There are two ways in which proceedings in the County Court can be transferred to this court under section 42 of the 1984 Act. There is a requirement to transfer certain types of proceeding under section 42(1). There is a discretion to transfer other types of proceeding under section 42(2). Ms Rowlands submitted, correctly, that the present appeal was not a case to which the requirement to transfer under section 42(1) of the 1984 Act applied. Ms Rowlands further submitted that the power to transfer under section 42(2) of the 1984 Act was not available to the County Court in the present case, because section 204 of the 1996 Act was a provision of the type referred to in subsection (7) and, therefore, one to which the discretion to transfer in section 42(2) did not apply at all because of the words "subject to any such provision" which appear at the beginning of that subsection.

8. I reject Ms Rowlands' submission. In my judgment, the reference to "any such provision" in section 42(2) of the 1984 Act is to a provision of the type set out in subsection (1), i.e. to a provision which is made under one of the types of legislation referred to in subsection (7) and which requires the proceedings to be in the High Court. If Parliament had intended to exclude all situations in which legislation specifies that proceedings should be brought in the County Court from the power to transfer under subsection (2) then, in my judgment, it would not have used the words "any such provision" at the beginning of subsection (2). The effect of sections 42(1) and (2) is therefore, in my judgment, that proceedings brought in the County Court which are required to be before the High Court must be sent there and that other proceedings brought in the County Court may be sent to the High Court. Section 42(2) does not, in my judgment, exclude from the discretion to transfer cases to this court situations such as the present where an enactment specifies that an appeal should be brought in the County Court. The words "subject to such provision" in subsection (2) merely serve to exclude, from the otherwise general power to transfer proceedings before the County Court to this court, cases to which subsection (1) applies, i.e. where the relevant legislation requires proceedings to be before the High Court. There is, in my judgment, no such jurisdictional difficulty as is now suggested by Ms Rowlands with the transfer of an appeal under section 204 of the 1996 Act to this court; indeed, I note that this point does not appear to have been raised in any previous case where a statutory housing appeal has been transferred from the County Court to this court.

9. During oral argument, Ms Rowlands requested that I should give guidance to judges of the County Court about when it might be appropriate to transfer statutory housing appeals to this court. I decline to give any such guidance. The issue of whether this appeal should or should not have been transferred by the County Court to this court might have been addressed by the Respondent in a number of ways, including in particular by seeking to set aside or otherwise to challenge the order made by Judge Vavrecka. That was not done. Nor did Ms Rowlands make any application to me, in the alternative to the argument on jurisdiction, to transfer the appeal back to the County Court. In those circumstances, there is no issue before me as to the appropriateness of the order for transfer. It is neither necessary nor appropriate in these circumstances for me to attempt to give any sort of guidance to judges of the County Court in this regard.

Factual background

10. The Appellant is now 29 years old. On 17 January 2019, he was granted a licence of a room at the YMCA hostel in Watford. On 22 July, he was given notice to leave that room by noon on 31 July due to issues with his behaviour, breaches of rules of the hostel and the non-payment of rent.

11. By letter dated 30 July 2019, the Appellant's solicitors made an application to the Respondent for homelessness assistance under Part VII of the 1996 Act, on the basis that after leaving the YMCA the Appellant would have nowhere else to go and would be street homeless. The letter stated that the Appellant suffered from severe anxiety, depression, Post-Traumatic Stress Disorder ("PTSD") and suicidal ideation and that he was in priority need because he was vulnerable under section 189(1)(c) of the 1996 Act. The Appellant completed a questionnaire giving further details of his health issues. In that questionnaire, the Appellant stated, amongst other things, that he was able to carry out the tasks of daily living such as washing and dressing himself, doing his own laundry and cooking, and administering his medication.

12. From 31 July 2019, the Respondent provided the Appellant with temporary accommodation in York House, a hostel in Watford. This accommodation was provided by the Respondent under section 188(1) of the 1996 Act, i.e. because the Respondent had reason to believe that the Appellant was homeless, eligible for assistance and in priority need. The Appellant was given a licence to occupy his accommodation pending the completion of the Respondent's investigations and a final decision on his homelessness application. The licence was terminable by the Respondent in the event of a breach of the conditions of occupancy.

13. On 1 August 2019, one of the Appellant's treating General Practitioners ("GPs"), Dr Hyde, wrote a letter "To Whom it May Concern" stating that hostel accommodation was unsuitable for the Appellant and that he needed urgent placement in self-contained accommodation to support his mental health. The Appellant was referred by his GP to the Community Mental Health Team ("CMHT") for an urgent assessment. The Appellant was reviewed by the CMHT on 2 August and again on 15 August. On the latter occasion, an initial care plan was agreed, involving a number of features including the discussion of the Appellant's case by a Multi-Disciplinary Team (including a Consultant Psychiatrist), a social outcomes assessment and referral to services to enable the Appellant to maximise his income and to return to employment. The Appellant was also offered an outpatient appointment, if required.

14. On 8 August 2019, another of the Appellant's treating GPs, Dr Ahmad, completed a Medical Assessment Questionnaire. Dr Ahmad stated that the Appellant's condition might improve with support and treatment over time, but that the period for recovery could not currently be predicted. Dr Ahmad stated that the Appellant had no difficulties with mobility or any need for help with the activities of daily living. He stated that the Appellant's risk of self-harm might be high in his current accommodation and that self-contained accommodation would be helpful for his recovery.

15. During August 2019, the Appellant challenged the suitability of his accommodation at York House, contending that he required self-contained accommodation due to his mental health, including the traumatic effect that living in hostels as a child had on him. The Respondent however maintained its stance that York House was suitable for the

Appellant, including after receiving further information about the Appellant from a review by the CMHT.

16. On 16 August 2019, Dr Wilson, an agency Psychiatrist employed to advise the Respondent, produced a short report stating his opinion, on considering the documents available to him, that:

> "Given the concerns expressed by the applicant's GP emergency accommodation may be justified and on this basis he would be considered vulnerable as defined."

17. On 21 August 2019, Respondent accepted that it owed the Appellant the housing duty under section 189B(2) of the 1996 Act, and drew up a Personalised Housing Plan. He remained at York House.

18. On 2 September 2019, the Appellant was given notice to leave his temporary accommodation at York House by 7 October, because of arrears of rent. That notice was superseded by a further notice on 26 September, when the Appellant was given notice to leave on 30 September because of complaints about his behaviour towards the Respondent's staff. The Appellant left York House on 30 September 2019. He has been without accommodation since then; as I understand the position, he has been both 'sofa surfing' and living on the streets in a tent.

19. On 1 October 2019, the Respondent notified the Appellant it was minded to find he was not in priority need for the purposes of Part VII of the 1996 Act. The Appellant's solicitors made representations in response to that notification on 2 October, in which they repeated their earlier argument that the Appellant was in priority need because he was vulnerable as defined by section 189(1)(c) of the 1996 Act.

20. The Appellant saw a Psychiatrist, Dr Karunaratne, as an outpatient on 21 November 2019. By this time, the Appellant had commenced full-time work; he had also stopped taking his medication. Dr Karunaratne recorded that at this point he was 'sofa surfing'. A Care Plan was agreed; however, no further medication appears to have been prescribed and no further outpatient appointments were considered necessary. It was considered that the Appellant would benefit from a social outcomes assessment, which had also been recommended in August by the CMHT.

21. On 26 November 2019, a further Medical Assessment Questionnaire was completed by one of the Appellant's treating GPs. This repeated the earlier statements made by Dr Ahmad that the Appellant had no difficulties with mobility or with managing the activities of daily living.

22. At some point prior to 11 February 2020, the Appellant was awarded the standard rate of the daily living component of Personal Independence Payment ("PIP") by the Department for Work and Pensions ("DWP"). A letter from the DWP of that date, which was in the evidence before the Respondent, states that the award was for the period 20 June 2019 to 18 February 2022. That letter appears merely to confirm an award that had been made on an earlier date, rather than to constitute the decision to award PIP. I was not shown either the decision to award PIP or the detailed reasoning of the DWP, or any of the underlying evidence (including any professional assessment that may have been conducted for the purposes of the PIP decision) or the PIP

application form completed by the Appellant. The DWP's letter of 11 February 2020 records that the Appellant was entitled to eight points for four of the ten activities and descriptors making up the Daily Living Component of PIP, as follows:

i) Preparing food: two points, on the basis that the Appellant needed prompting from another person to prepare or cook a simple meal.

ii) Washing and bathing: two points, on the basis that the Appellant needed supervision or prompting from another person to wash or bathe.

iii) Dressing and undressing: two points, on the basis that the Appellant either needed another person to tell him to get dressed or undressed, how to do it or when to keep his clothes on, or that he needed prompting or assistance to select appropriate clothing.

iv) Mixing with other people: two points, on the basis that the Appellant needed to be prompted by another person to engage with other people.

23. On 4 March 2020, Dr Eskander, an agency Psychiatrist employed to advise the Respondent, produced a report in the following terms, having reviewed a variety of documentation in relation to the Appellant including material from his GPs, the CMHT and Dr Karunaratne:

> "The subjective description of the symptoms from the applicant does not amount to clinical criteria of either severe depression / anxiety or PTSD. He is not subject to a care plan from secondary mental health services, nor has he had any psychiatric admissions in the past. The psychotropic medication prescribed comprises two standard anti-depressants at their lowest possible therapeutic doses. There is no evidence of psychosis. There is also no evidence of significant impairment in activities of daily living.
>
> In summary, there is not evidence that the applicant suffers from a severe and enduring mental disorder. I therefore do not find the specific psychiatric issues raised to be of particular significance compared to any ordinary person made homeless. I do not make any housing recommendations based on mental health grounds."

24. On 13 March 2020, the Respondent made a decision under section 184 of the 1996 Act that the Appellant, although homeless and eligible for assistance, was not in priority need. It is not necessary to set out the terms of that decision, because the present appeal is against the subsequent review decision. The Appellant's solicitors responded by email that afternoon, requesting a review pursuant to section 202 of the 1996 Act and that the Appellant should be provided with accommodation pending the review. On 19 March, the Appellant's solicitors wrote a detailed letter requesting that he should be provided with temporary accommodation pending the review. The request for accommodation pending the outcome of the review was refused by the Respondent on 20 April.

25. On 25 March 2020, the Respondent acknowledged the request for a review under section 202 of the 1996 Act, stating that a decision would be made by 8 May. The letter

invited the Appellant to submit any further representations or information within 14 days.

26. On 2 April 2020, the Appellant was offered emergency accommodation by the Respondent as part of the national response to the COVID-19 viral pandemic which had spread throughout the United Kingdom during the preceding weeks. That accommodation was a room in a 'Bed & Breakfast' establishment, Phoenix Lodge. The Appellant did not accept the offer of accommodation, stating through his solicitors that it was highly unsuitable and that he required self-contained accommodation due to his mental health issues.

27. On 14 April 2020, Dr Ahmad, the Appellant's GP, wrote a letter "To Whom it May Concern", stating that the Appellant had, in his view, priority need for accommodation due to his multiple conditions and that shared accommodation would be unsuitable for him due to the nature of his conditions. Dr Ahmad stated that the Appellant was suffering from seizures and was awaiting neurological investigation. Dr Ahmad noted that the Appellant was by that point unemployed and also in receipt of PIP. A further letter, in similar terms, was written on 30 April by the Appellant's other GP, Dr Hyde. On 16 April, an agency doctor employed to advise the Respondent, Dr Hornibrook, produced a short assessment stating her view to the contrary, i.e. that shared accommodation was not unsuitable for the Appellant on mental health grounds.

28. On 1 May 2020, the Appellant's solicitors wrote a letter to the Respondent stating that they were drafting substantive representations in respect of the review under section 202 of the 1996 Act. They again requested that the Appellant should be provided with temporary accommodation pending the outcome of the review. On 5 May, the Appellant's solicitors made detailed submissions to the Respondent in respect of the review. The letter asserted that:

    i) The Appellant was vulnerable under section 189(1)(c) of the 1996 Act. The Respondent had set too high a threshold regarding the extent of vulnerability that an applicant must suffer for the purposes of section 189(1)(c). The Appellant suffered from significant mental health conditions; the 'ordinary person' comparator would not. The Appellant would be at significant risk of more harm compared to an ordinary person who was homeless. It was, moreover, highly unsafe for the Appellant to be homeless during the COVID-19 pandemic, which would make his mental health conditions significantly worse. The Appellant was in receipt of PIP. He had stopped working in December 2019 due to his health conditions.

    ii) The Respondent had breached the Public Sector Equality Duty by failing to recognise the Appellant's disability.

    iii) The Respondent had failed to contact the Appellant's GP to establish the state of his health. The housing file had not been updated with the supporting medical evidence and the evidence provided to the Respondent regarding the award of PIP.

29. Further evidence was provided by the Appellant's solicitors in support of their submissions. This material included the letters dated 14 April 2020, from Dr Ahmad and 30 April 2020, from Dr Hyde.

30. On 14 May 2020, the Respondent sent out a seven-page letter containing the decision that it was minded to make on the review under section 202 of the 1996 Act, which was again to the effect that the Appellant although homeless and eligible for assistance was not in priority need. The Respondent proposed to give the Appellant a further opportunity to submit representations prior to making a final decision on the review.

31. The Appellant's solicitors responded to the 'minded to' letter on 18 May 2020. They criticised, in some detail, the reasoning in the Respondent's letter and asserting that the Appellant was indeed vulnerable under section 189(1)(c) of the 1996 Act. This letter also included, for the first time, an argument that the Appellant was in priority need as a result of section 189(1)(d) of the 1996 Act, which was advanced in the following terms:

> "Without prejudice to the fact that our client is vulnerable for the purposes of section 189(c) [sic] of the Housing Act 1996 he can also be classed as being in priority need in accordance with section 189(d) [sic] of the Housing Act 1996 which states that 'a person who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster.' Our client was offered the phoenix lodge [sic] as a result of the pandemic however this was not suitable accommodation as shared accommodation cannot be classed as suitable accommodation in light of the pandemic. Without prejudice to the fact that shared accommodation is not suitable for our client in any event, the Council should never have offered our client the phoenix lodge [sic] in light of the pandemic therefore our client can be classed as being homeless as a result of the pandemic as he was offered unsuitable accommodation. In other words, he is homeless or threatened with homelessness as a result of an emergency or other disaster (i.e. the COVID 19 pandemic) for the purposes of section 189(d) [sic] of the Housing Act 1996."

32. On 21 May 2020, the Respondent issued its decision on the review, which is the decision that is now appealed. That decision was, again, to the effect that whilst the Appellant was homeless and eligible for housing assistance, the Appellant was not in priority need for rehousing. The reviewing officer was Ms Sally Kaissi. At the beginning of the letter, Ms Kaissi stated that she had taken into account all the information that had been submitted, including all the information on the housing file. She then set out a list of some of the documents that she had specifically considered. These included the various representations made by the Appellant's solicitors, the letters from the Appellant's GPs and the assessment forms they had completed, the health questionnaire completed by the Appellant on 30 July 2019, the plans from the CMHT, the advice received from the Respondent's own medical advisers and the DWP's letter of 11 February 2020 stating that the Appellant was entitled to PIP.

33. Ms Kaissi dealt with the question of whether the Appellant was vulnerable under section 189(1)(c) of the 1996 Act. She referred to a number of appellate decisions, including *Hotak v Southwark London Borough Council* [2015] UKSC 30, [2016] AC 811 ("*Hotak*"), *Panayiotou v Waltham Forest London Borough Council* [2017] EWCA Civ 1624, [2018] QB 1232 ("*Panayiotou*") and *Guiste v Lambeth London Borough Council* [2019] EWCA Civ 1758 ("*Guiste*"). Ms Kaissi stated:

> "… In deciding whether a person is vulnerable in accordance with section 189(1)(c) of the above Act the Council must ask itself whether the applicant, when homeless, is significantly more vulnerable than an ordinary person.
>
> When considering if Mr Bankole-Jones is a vulnerable person, we must be satisfied that he would be significantly more vulnerable than an ordinary person who is made homeless. It is acknowledged that virtually anyone who is homeless is vulnerable to some degree. However, we need to be satisfied his circumstances are such that he is significantly more vulnerable than an ordinary person who is made homeless…"

34. I will now set out the material parts of the Respondent's review decision in full:

> "The information on Mr Bankole-Jones' housing file states that he currently suffers from recurrent seizure like episodes and is awaiting neurological investigation. Mr Bankole-Jones' GP provided this information in April 2020 but did not provide any further information in regards to these seizures and there is no information to suggest that Mr Bankole-Jones have [sic] been prescribed with any medication to control the seizures or that he required any hospital admissions as a result. In your submission of 14th May 2020 you argue that Mr Bankole-Jones was taken to hospital in November 2019 due to the seizures however there are no hospital admission letters provided and his GP did not mention such information in their recent letter. The information on his housing file confirm[s] that he does not require any support with his daily living and he has been living independently at his YMCA property.
>
> Therefore I am not satisfied that Mr Bankole-Jones is vulnerable based on his physical health issue above.
>
> In reaching my decision I have considered Mr Bankole-Jones' mental health issues and I note that he has been diagnosed with severe depression, anxiety and PTSD. On 30th April 2020 [Mr] Bankole-Jones' GP stated that he also has a history of suicidal ideations which makes him significantly more vulnerable. I note Mr Bankole-Jones' reported some history of taking impulsive overdoses to Colne House in August 2019 however he confirmed to Dr Karunaratne on 12th December 2019 that there are no active plans and his daughter is a protective factor in his life. There is no information to suggest Mr Bankole-Jones had attempted self-harm or that he required any hospital admission as [a] result.
>
> In your submission of 14th May 2020 you argue that Mr Bankole-Jones' GP comments in regards to his suicidal ideations should be considered over Dr Karunaratne's comments because the assessment was carried out six months ago whilst the GP letter was written in April 2020. However the information on Mr Bankole-Jones' housing file is clear that he only has a history of suicidal ideations and this is what his GP confirmed too. I think it's correct to conclude that the GP's reference of 'history of suicidal ideations' is the same as what Mr Bankole-Jones

reported to Dr Karunaratne in December 2019. There is no information to suggest that he had recently reported any suicidal ideations to his GP or that he is regarded [as] at risk.

Furthermore, you argue that my decision not to accept about that Mr Bankole-Jones is vulnerable as he has no recent attempted at self-harming is outrageous however in reaching my decision I have considered all of Mr Bankole-Jones' medical information and considered all the comments made by health professions [sic] in regards to his mental health. I am satisfied that Mr Bankole-Jones was assessed three times by mental health professionals and they all acknowledged his difficulties however they confirmed that he does not require ongoing mental support from their services and that a social outcome assessment was recommended. It's important to note that Mr Bankole-Jones has no history of suicidal attempts and no history of any active plans therefore I am satisfied that his ideation can be managed by his GP and he remains able to approach mental health services when support is required.

In regards to Mr Bankole-Jones' depression, anxiety, PTSD I note he was referred to Watford Mental Health Services on 2nd August 2019 where he had an initial telephone assessment. He was then assessed by Kristy Williams on 15th August 2019 and it was agreed that he is referred for a social outcome assessment in order to address any support issues which he might require to reintegrate him into the community. Ms Williams was contacted by Watford Council on 25th September 2019 and she confirmed that although Mr Bankole-Jones was still open to the service however he had made no contact following his consultant psychiatrist appointment in November 2019.

I note Mr Bankole-Jones was assessed by a Consultant Psychiatrist on 21st November 2019 and it was again agreed for [a] social outcome assessment to be carried out. I note he was restarted on his antidepressant and was discharged from the service. The information on the housing file confirm[s] that Mr Bankole-Jones is currently prescribed 15mg Mirtazapine (anti-depressant), 3.75 Zopiclone (sleeping tablets) and 10mg Propranolol (used for the treatment of anxiety). On 30th April 2020 Mr Bankole-Jones' GP confirmed that his PTSD is due to childhood traumas where he had to flee domestic violence with his mother. It's important to note that the GP confirmed that the letter was written upon Mr Bankole-Jones' request to help with his housing issues. There is no evidence to suggest that an urgent referral to Secondary Mental Health Services have [sic] been made and there is no change of medication or treatment to suggest that his health is severely affected by his homelessness.

Although I acknowledge Mr Bankole-Jones' current health problems however it's evident that he is well aware of his conditions and well aware of the services available to him. He is currently in receipt of medication from his GP which he is able to administer these [sic] orally and there is no information to suggest that he requires any ongoing support from mental health services or any other supporting groups.

I have carefully consider the facts, paying close attention to Mr Bankole-Jones' particular circumstances. However, the issue of vulnerability must be determined not so much by reference to each of the applicant's problems, but by reference to them when taken together. Thus, the question whether an applicant is vulnerable must involve looking at his/her particular characteristics and situation when homeless in the round which I have so done and I am satisfied that Mr Bankole-Jones is not in priority need, despite these circumstances. I note that Mr Bankole-Jones' situation of being homeless is far from ideal but it is nonetheless the case that he is not vulnerable for the purpose of this application.

Although Mr Bankole-Jones suffers with medical conditions, but [sic] I am satisfied that his functionality is not so restricted by his health problems and that he would be significantly more vulnerable than an ordinary person in a homeless situation. Mr Bankole-Jones was able to approach the Council for housing assistance once he was faced with homelessness and he is able to approach support groups.

Furthermore I have considered the current situation around COVID-19 and I note the current government's advice to all UK citizens to remain home and to self-isolate if [they] suffer any symptoms. It's important to note the current advice applies to everyone and not just people with medical health problems. Currently there is no information to suggest that Mr Bankole-Jones had suffered any symptoms or that he tested positive for the illness.

In your submission of 14th May 2020 you argue that the Mr Bankole-Jones is vulnerable due to the current pandemic and recent evidence which shows that black males are more vulnerable compared to others. However current government guidelines suggests [sic] that everyone is at risk and although some news suggested that certain ethnic minorities have suffered more than others however there is no confirmation of this set out by the government. There is no information to suggest that Mr Bankole-Jones had received a letter from the NHS to regard him as vulnerable or [as a] shielded person.

Furthermore, you argued that as Mr Bankole-Jones is in receipt of PIP then he should be regarded as disabled and vulnerable however its [sic] evident from the PIP letter submitted that Mr Bankole-Jones has been rewarded [sic] the standard rate because he only requires some help in preparing food, washing, dressing and communicating with others. I am satisfied that Mr Bankole-Jones is able to do all of these tasks independently and he has done so for many years. There is no medical information to suggest Mr Bankole-Jones requires any ongoing support or that he has been referred to any supporting groups.

Therefore I am not satisfied that Mr Bankole-Jones is vulnerable based on his current health problems.

Special

> I have also considered whether Mr Bankole-Jones is vulnerable by virtue of a special reason in line with section 189 of the Act (as amended) however there are none. He is a single person who suffers from mental health problems and he is known to his GP. There is no information to suggest that Mr Bankole-Jones will be unable to approach his GP or that he will be unable to manage his daily living activities unaided if he is without accommodation.
>
> I note you argued that the current pandemic should be regarded as a 'special reason' in determining Mr Bankole-Jones' vulnerability however as stated above, there is no information to suggest that Mr Bankole-Jones had received a letter from the NHS which regarded him as vulnerable or [as a] shielded person. It's important to note that Mr Bankole-Jones was offered temporary accommodation by Watford Council in line with their COVID-19 response however he turned down the offer.
>
> **Cumulative circumstances**
>
> Having considered the totality of Mr Bankole-Jones' circumstances, and unsettled lifestyle singularly and as a composite and having applied all of the above facts to the question of vulnerability, I am not satisfied that he does have any illness or special reason that taken individually or collectively that [sic] would render him significantly more vulnerable than an ordinary person who is homeless as described in the test case above.
>
> There is nothing from Mr Bankole-Jones' medical information suggestive of an inability to carry out daily living activities. I have taken into account his overall circumstances to determine if such a reason exists. I am satisfied that Mr Bankole-Jones does not have such health issues that would impair his ability to cope with homelessness. He is clearly able to access services, communicate clearly as demonstrated at face to face interviews with Housing officers and also seek legal advice when required."

35. The review decision did not address the argument that the Appellant was in priority need because of section 189(1)(d) of the 1996 Act, which had been raised by the Appellant's solicitors in their letter of 18 May.

36. On 28 May 2020, the statutory appeal against the review decision was filed in the County Court at Watford. It was transferred to this court by Judge Vavrecka's order of 9 July.

Statutory provisions

37. I will now set out the material provisions of Part VII of the 1996 Act. Section 175 provides, relevantly:

> "**Homelessness and threatened homelessness**

> (1) A person is homeless if he has no accommodation available for his occupation, in the United Kingdom or elsewhere, which he—
>
> (a) is entitled to occupy by virtue of an interest in it or by virtue of an order of a court,
>
> (b) has an express or implied licence to occupy, or
>
> (c) occupies as a residence by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of another person to recover possession.
>
> …
>
> (3) A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy.
>
> …"

38. Section 177 of the 1996 Act provides, as relevant:

> "**Whether it is reasonable to continue to occupy accommodation**
>
> …
>
> (2) In determining whether it would be, or would have been, reasonable for a person to continue to occupy accommodation, regard may be had to the general circumstances prevailing in relation to housing in the district of the local housing authority to whom he has applied for accommodation or for assistance in obtaining accommodation.
>
> (3) The Secretary of State may by order specify—
>
> (a) other circumstances in which it is to be regarded as reasonable or not reasonable for a person to continue to occupy accommodation, and
>
> (b) other matters to be taken into account or disregarded in determining whether it would be, or would have been, reasonable for a person to continue to occupy accommodation."

39. Section 182 of the 1996 Act provides:

> "**Guidance by the Secretary of State**
>
> (1) In the exercise of their functions relating to homelessness and the prevention of homelessness, a local housing authority or social services authority in England shall have regard to such guidance as may from time to time be given by the Secretary of State.

(2) The Secretary of State may give guidance either generally or to specified descriptions of authorities."

40. Section 183 of the 1996 Act provides, as relevant:

"**Application for assistance**

(1) The following provisions of this Part apply where a person applies to a local housing authority in England for accommodation, or for assistance in obtaining accommodation, and the authority have reason to believe that he is or may be homeless or threatened with homelessness.

(2) In this Part—

"applicant" means a person making such an application,

"assistance under this Part" means the benefit of any function under the following provisions of this Part relating to accommodation or assistance in obtaining accommodation, and

"eligible for assistance" means not excluded from such assistance by section 185 (persons from abroad not eligible for housing assistance) or section 186 (asylum seekers and their dependants).

…"

41. Section 184 of the 1996 Act provides, as relevant:

"**Inquiry into cases of homelessness or threatened homelessness**

(1) If the local housing authority have reason to believe that an applicant may be homeless or threatened with homelessness, they shall make such inquiries as are necessary to satisfy themselves—

(a) whether he is eligible for assistance, and

(b) if so, whether any duty, and if so what duty, is owed to him under the following provisions of this Part.

…

(3) On completing their inquiries the authority shall notify the applicant of their decision and, so far as any issue is decided against his interests, inform him of the reasons for their decision.

…

(5) A notice under subsection (3) or (4) shall also inform the applicant of his right to request a review of the decision and of the time within which such a request must be made (see section 202).

…"

42. Section 188 of the 1996 Act provides, as relevant:

"**Interim duty to accommodate in case of apparent priority need**

(1) If the local housing authority have reason to believe that an applicant may be homeless, eligible for assistance and have a priority need, they must secure that accommodation is available for the applicant's occupation.

(1ZA) In a case in which the local housing authority conclude their inquiries under section 184 and decide that the applicant does not have a priority need—

(a) where the authority decide that they do not owe the applicant a duty under section 189B(2), the duty under subsection (1) comes to an end when the authority notify the applicant of that decision, or

(b) otherwise, the duty under subsection (1) comes to an end upon the authority notifying the applicant of their decision that, upon the duty under section 189B(2) coming to an end, they do not owe the applicant any duty under section 190 or 193.

…

(2A) For the purposes of this section, where the applicant requests a review under section 202(1)(h) of the authority's decision as to the suitability of accommodation offered to the applicant by way of a final accommodation offer or a final Part 6 offer (within the meaning of section 193A), the authority's duty to the applicant under section 189B(2) is not to be taken to have come to an end under section 193A(2) until the decision on the review has been notified to the applicant.

(3) Otherwise, the duty under this section comes to an end in accordance with subsections (1ZA) to (1A), regardless of any review requested by the applicant under section 202.

But the authority may secure that accommodation is available for the applicant's occupation pending a decision on review."

43. Section 189 of the 1996 Act provides, as relevant:

"**Priority need for accommodation**

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

…

(c) a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside;

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

44. Section 189A of the 1996 Act provides:

"**Assessments and personalised plan**

(1) If the local housing authority are satisfied that an applicant is—

(a) homeless or threatened with homelessness, and

(b) eligible for assistance,

the authority must make an assessment of the applicant's case.

(2) The authority's assessment of the applicant's case must include an assessment of—

(a) the circumstances that caused the applicant to become homeless or threatened with homelessness,

(b) the housing needs of the applicant including, in particular, what accommodation would be suitable for the applicant and any persons with whom the applicant resides or might reasonably be expected to reside ("other relevant persons"), and

(c) what support would be necessary for the applicant and any other relevant persons to be able to have and retain suitable accommodation.

(3) The authority must notify the applicant, in writing, of the assessment that the authority make.

(4) After the assessment has been made, the authority must try to agree with the applicant—

(a) any steps the applicant is to be required to take for the purposes of securing that the applicant and any other relevant persons have and are able to retain suitable accommodation, and

(b) the steps the authority are to take under this Part for those purposes.

(5) If the authority and the applicant reach an agreement, the authority must record it in writing.

(6) If the authority and the applicant cannot reach an agreement, the authority must record in writing—

(a) why they could not agree,

(b) any steps the authority consider it would be reasonable to require the applicant to take for the purposes mentioned in subsection (4)(a), and

(c) the steps the authority are to take under this Part for those purposes.

(7) The authority may include in a written record produced under subsection (5) or (6) any advice for the applicant that the authority consider appropriate (including any steps the authority consider it would be a good idea for the applicant to take but which the applicant should not be required to take).

(8) The authority must give to the applicant a copy of any written record produced under subsection (5) or (6).

(9) Until such time as the authority consider that they owe the applicant no duty under any of the following sections of this Part, the authority must keep under review—

(a) their assessment of the applicant's case, and

(b) the appropriateness of any agreement reached under subsection (4) or steps recorded under subsection (6)(b) or (c).

(10) If—

(a) the authority's assessment of any of the matters mentioned in subsection (2) changes, or

(b) the authority's assessment of the applicant's case otherwise changes such that the authority consider it appropriate to do so,

the authority must notify the applicant, in writing, of how their assessment of the applicant's case has changed (whether by providing the applicant with a revised written assessment or otherwise).

(11) If the authority consider that any agreement reached under subsection (4) or any step recorded under subsection (6)(b) or (c) is no longer appropriate—

(a) the authority must notify the applicant, in writing, that they consider the agreement or step is no longer appropriate,

(b) any failure, after the notification is given, to take a step that was agreed to in the agreement or recorded under subsection (6)(b) or (c) is to be disregarded for the purposes of this Part, and

(c) subsections (4) to (8) apply as they applied after the assessment was made.

(12) A notification under this section or a copy of any written record produced under subsection (5) or (6), if not received by the applicant, is to be treated as having been given to the applicant if it is made available at the authority's office for a reasonable period for collection by or on behalf of the applicant."

45. Section 189B of the 1996 Act provides, as relevant:

"**Initial duty owed to all eligible persons who are homeless**

(1) This section applies where the local housing authority are satisfied that an applicant is—

(a) homeless, and

(b) eligible for assistance.

(2) Unless the authority refer the application to another local housing authority in England (see section 198(A1)), the authority must take reasonable steps to help the applicant to secure that suitable accommodation becomes available for the applicant's occupation for at least—

(a) 6 months, or

(b) such longer period not exceeding 12 months as may be prescribed.

(3) In deciding what steps they are to take, the authority must have regard to their assessment of the applicant's case under section 189A.

(4) Where the authority—

(a) are satisfied that the applicant has a priority need, and

(b) are not satisfied that the applicant became homeless intentionally,

the duty under subsection (2) comes to an end at the end of the period of 56 days beginning with the day the authority are first satisfied as mentioned in subsection (1).

… "

46. Section 202 of the 1996 Act provides, as relevant:

"**Right to request review of decision**

(1) An applicant has the right to request a review of—

(a) any decision of a local housing authority as to his eligibility for assistance,

…

(3) A request for review must be made before the end of the period of 21 days beginning with the day on which he is notified of the authority's decision or such longer period as the authority may in writing allow.

(4) On a request being duly made to them, the authority or authorities concerned shall review their decision."

47. Section 203 of the 1996 Act provides:

"**Procedure on a review**

(1) The Secretary of State may make provision by regulations as to the procedure to be followed in connection with a review under section 202.

Nothing in the following provisions affects the generality of this power.

(2) Provision may be made by regulations—

(a) requiring the decision on review to be made by a person of appropriate seniority who was not involved in the original decision, and

(b) as to the circumstances in which the applicant is entitled to an oral hearing, and whether and by whom he may be represented at such a hearing.

(3) The authority, or as the case may be either of the authorities, concerned shall notify the applicant of the decision on the review.

(4) If the decision is—

(a) to confirm the original decision on any issue against the interests of the applicant, or

(b) to confirm a previous decision—

(i) to notify another authority under section 198 (referral of cases), or

(ii) that the conditions are met for the referral of his case,

they shall also notify him of the reasons for the decision.

(5) In any case they shall inform the applicant of his right to appeal to the county court on a point of law, and of the period within which such an appeal must be made (see section 204).

(6) Notice of the decision shall not be treated as given unless and until subsection (5), and where applicable subsection (4), is complied with.

(7) Provision may be made by regulations as to the period within which the review must be carried out and notice given of the decision.

(8) Notice required to be given to a person under this section shall be given in writing and, if not received by him, shall be treated as having been given if it is made available at the authority's office for a reasonable period for collection by him or on his behalf."

48. Section 204 of the 1996 Act provides, as relevant:

"**Right of appeal to county court on point of law**

(1) If an applicant who has requested a review under section 202—

(a) is dissatisfied with the decision on the review, or

(b) is not notified of the decision on the review within the time prescribed under section 203,

he may appeal to the county court on any point of law arising from the decision or, as the case may be, the original decision.

(2) An appeal must be brought within 21 days of his being notified of the decision or, as the case may be, of the date on which he should have been notified of a decision on review.

…

(3) On appeal the court may make such order confirming, quashing or varying the decision as it thinks fit.

…"

49. I should also set out the provisions of the legislation that applies in Wales that were referred to during the course of argument. Section 70 of the Housing (Wales) Act 2014 sets out the basis upon which applicants for assistance in Wales are considered to be in priority need, as follows:

"**Priority need for accommodation**

(1) The following persons have a priority need for accommodation for the purposes of this Chapter—

…

(c) a person—

(i) who is vulnerable as a result of some special reason (for example: old age, physical or mental illness or physical or mental disability)…

(d) a person—

(i) who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster…"

50. Section 71 of the 2014 Act contains the statutory definition of vulnerability that applies in Wales:

> "**Meaning of vulnerable in section 70**
>
> (1) A person is vulnerable as a result of a reason mentioned in paragraph (c) … 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" ("digartref ac ar y stryd"), in relation to a person, means that the person has no accommodation available for the person's occupation in the United Kingdom or elsewhere, which the person—
>
> (a) is entitled to occupy by virtue of an interest in it or by virtue of an order of a court,
>
> (b) has an express or implied licence to occupy, or
>
> (c) occupies as a residence by virtue of any enactment or rule of law giving the person the right to remain in occupation or restricting the right of another person to recover possession;
>
> and sections 55 and 56 do not apply to this definition."

51. Section 98 of the Housing (Wales) Act 2014 contains provision similar to that in section 182 of the 1996 Act, as follows:

> "**Guidance**
>
> (1) In the exercise of its functions relating to homelessness, a council of a county or county borough must have regard to guidance given by the Welsh Ministers.
>
> (2) Subsection (1) applies in relation to functions under this Part and any other enactment.
>
> (3) The Welsh Ministers may—
>
> (a) give guidance either generally or to specified descriptions of authorities;

(b) revise the guidance by giving further guidance under this Part;

(c) withdraw the guidance by giving further guidance under this Part or by notice.

(4) The Welsh Ministers must publish any guidance or notice under this Part.

Government guidance and correspondence

52. I was taken by Mr Vanhegan to a number of pieces of correspondence and the statutory guidance issued by the UK Government and by the Welsh Government. As will be apparent from the statutory provisions set out above, housing is a devolved matter in Wales and is governed by separate legislation. Nonetheless, Mr Vanhegan submitted that guidance given by the Welsh Government was of relevance to the present appeal.

53. On 26 March 2020, Luke Hall MP, the UK Government Minister for Local Government and Homelessness, wrote to local authorities in England. Mr Hall's letter stated *inter alia*:

> "… It is our joint responsibility to safeguard as many homeless people as we can from COVID-19. Our strategy must be to bring in those on the streets to protect their health and stop wider transmission, particularly in hot spot areas, and those in assessment centres and shelters that are unable to comply with social distancing advice.
>
> This approach aims to reduce the impact of COVID-19 on people facing homelessness and ultimately on preventing deaths during this public health emergency. Given the nature of the emergency, the priority is to ensure that the NHS and medical services are able to cope and we have built this strategy based on NHS medical guidance and support.
>
> The basic principles are to:
>
> • focus on people who are, or are at risk of, sleeping rough, and those who are in accommodation where it is difficult to self-isolate, such as shelters and assessment centres
>
> • make sure that these people have access to the facilities that enable them to adhere to public health guidance on hygiene or isolation, ideally single room facilities
>
> • utilise alternative powers and funding to assist those with no recourse to public funds who require shelter and other forms of support due to the COVID-19 pandemic
>
> • mitigate their own risk of infection, and transmission to others, by ensuring they are able to self-isolate as appropriate in line with public health guidance…"

The Minister went on to state:

> "Given the Prime Minister's announcement on Monday night that the public should be staying in their homes wherever possible, it is now imperative that rough sleepers and other vulnerable homeless are supported into appropriate accommodation by the end of the week…"

54. On 28 April 2020, Julie James AM, the Welsh Government Minister for Housing and Local Government, wrote a letter to local authorities in Wales in which she stated *inter alia*:

> "… Following the publication of our guidance relating to rough sleeping during the pandemic, I think it would be helpful to provide further clarification of our expectations during this emergency period. This letter and the attached guidance is intended to assist you as authorities in your actions, in accordance with current legislation, to reduce the exposure of people sleeping rough and other homeless people who are in vulnerable situations as a result of the COVID19 pandemic. These are unprecedented times, and I know you recognise the responsibility we all have to protect the people who are more at risk of homelessness and exposure to COVID19, and also the opportunity to work with individuals who may not previously have come into services. The assistance being offered now can provide the foundation to rebuild lives once this crisis ends.
>
> Our very clear expectation is that every Local Authority continues to do all it can to ensure no one is sleeping rough. As Minister for Housing and Local Government I am clear that no one should be without suitable accommodation and support during this pandemic. This includes those, who are currently sleeping rough, and those who are under threat of having to do so, for example, those who are leaving prisons or other institutions without any accommodation to go to, and those who are precariously reliant on others such as people sofa surfing or in unsuitable temporary accommodation.
>
> Given the severity of the current situation I am providing you with additional guidance in relation to the homelessness legislation set out in the Housing (Wales) Act 2014, specifically in relation to 'priority need' and 'vulnerability'. This additional guidance is set out in the attached Guidance Note…"

55. The Guidance Note attached to the Welsh Minister's letter was issued under section 98 of the Housing (Wales) Act 2014. It referred to the COVID-19 pandemic as "an unprecedented global public health emergency". The material parts of the Guidance Note were as follows:

> "**Priority need for accommodation - People sleeping rough during the Covid-19 pandemic**
>
> In considering whether an applicant who is rough sleeping has a priority need for accommodation, local authorities should consider, amongst other matters, section 70(1)(c)(i) of the Act. Section 70(1)(c)(i) provides that a person who is vulnerable as a result of some special reason has a

> priority need for accommodation. The provision sets out a non-exhaustive example list of special reasons which includes old age, physical or mental illness or physical or mental disability. There may, of course, be other special reasons, including the current Covid-19 pandemic and the actions required to be taken in response to it, for example the need to self-isolate and to socially distance.
>
> **Meaning of vulnerable in section 70 - People sleeping rough during the Covid-19 pandemic**
>
> In considering whether an applicant is vulnerable, local authorities must consider section 71 of the Act which defines who is vulnerable under section 70. Section 71 provides that a person who is vulnerable would be less able than an ordinary homeless person to fend for himself or herself, if the person were to become street homeless. Additionally, a person who is vulnerable would suffer more harm than an ordinary homeless person would suffer.
>
> The Covid-19 pandemic presents a grave and exceptional risk to those persons who are homeless. Such persons may be unable to adhere to health advice, to self-isolate or socially distance, or to maintain the necessary hygiene requirements. This is not the level of risk to which an 'ordinary homeless person' is exposed.
>
> In determining the vulnerability of an applicant, the comparison to be made is by reference to an 'ordinary homeless person' and not to the most vulnerable homeless person. An ordinary homeless person may be street homeless but will **not** be at risk of contracting Covid-19 or suffering from Covid-19 symptoms, and trying to adhere to health advice.
>
> During this Covid-19 pandemic it appears almost inevitable that a person who is either street homeless or faced with street homelessness is less able than an ordinary homeless person to fend for himself or herself and would suffer more harm than an ordinary homeless person would suffer.
>
> A local authority which decides that a person who is either street homeless or faced with street homelessness (the latter would include, for example, a prison leaver with no accommodation available) during this Covid-19 pandemic is not vulnerable for the purpose of section 70 must have a documented and robust evidential basis for its determination which will withstand rigorous scrutiny and legal challenge."
>
> (emphasis in the original)

56. On 28 May 2020, the UK Government Minster, Mr Hall, wrote a further letter to local authorities regarding the next phase of support for rough sleepers, following the easing of lockdown restrictions. The letter stated, *inter alia*:

> "In terms of move-on accommodation all options need to be considered, we ask:

> o That you seek to encourage people, where appropriate and possible, to return to friends and family.
>
> o That you seek to find as many sustainable move-on options for people as possible. This should begin with an assessment of the availability of stock locally followed, where applicable, by work in partnership with Housing Associations to increase the supply of move-on accommodation available for your COVID-19 response, whether through acquisitions, repair and refurbishment or long-term leasing arrangements. Where appropriate, individuals should be supported to move into the private rented sector.
>
> o That, where sustainable move-on options aren't available, you put in place short term accommodation to ensure that people do not have to return to the streets whilst you work to find longer term options for them."

57. Chapter 8 (Priority Need) of the Ministry of Housing, Communities and Local Government's Homelessness Code of Guidance for Local Housing Authorities was also updated to reflect the COVID-19 pandemic. This guidance is statutory guidance, to which local authorities in England are required to have regard under section 182 of the 1996 Act:

> "**8.44 COVID-19:** Housing authorities should carefully consider the vulnerability of applicants from COVID-19. Applicants who have been identified by their GP or a specialist as clinically extremely vulnerable are likely to be assessed as having priority need. The vulnerability of applicants who are clinically vulnerable should also be considered in the context of COVID-19. Some applicants may report having medical conditions which are named in the guidance but have not yet been identified by a health professional as being clinically extremely vulnerable or clinically vulnerable, in which case it may be necessary to seek a clinical opinion in order to confirm their health needs.
>
> **8.45** Housing authorities should also carefully consider whether people with a history of rough sleeping should be considered vulnerable in the context of COVID-19, taking into account their age and underlying health conditions. Further guidance on clinical support for people with a history of rough sleeping can be found in the COVID-19 clinical homeless sector plan."

The approach to be applied on a statutory appeal

58. The primary decision maker on the issues of whether an applicant for assistance is homeless, eligible for assistance and in priority need is the responsible local authority. The right of appeal to the court under section 204 of the 1996 Act does not result in the court determining the application afresh by way of rehearing, as in some other types of statutory appeal. Rather, the appellate jurisdiction is limited expressly by section 204 to points of law. In relation to points raised for the first time on the statutory appeal, in *Cramp v Hastings Borough Council* [2005] EWCA Civ 1005 at [14], the Court of Appeal described the approach of the court:

> "… Given the full-scale nature of the review, a court whose powers are limited to considering points of law should now be even more hesitant than the High Court was encouraged to be at the time of *ex p Bayani* [(1990) 22 HLR 406] if the appellant's ground of appeal relates to a matter which the reviewing officer was never invited to consider, and which was not an obvious matter he should have considered…"

59. The following is a summary of the principles, based on the decided appellate cases, which are set out in the judgment of Lewison LJ in *McMahon v Watford Borough Council* [2020] EWCA 497, [2020] PTSR 1217 ("*McMahon*") at [14-21]:

    i) It is for the appellant to demonstrate that the reviewing officer has made an error which undermines the decision.

    ii) In examining the reasons for the decision, the court should adopt a benevolent approach. It should not take too technical a view of the language used, or search for inconsistencies, or adopt a nit-picking approach. Its assessment must be realistic and practical.

    iii) The assessment of vulnerability under section 189(1)(c) of the 1996 Act is a comparative exercise. The comparison is between the applicant and an ordinary person if made homeless. The assessment is a practical and contextual one taking into account all relevant features. If the applicant can be expected to receive services, support or help from third parties, that forms part of the assessment. The relevant feature which is said to give rise to vulnerability must have a causative link with the effect of homelessness on the applicant; an impairment of a person's ability to find accommodation or, if he cannot find it, to deal with the lack of it. The overall question is whether, taking everything into account, the applicant is 'significantly more vulnerable than ordinarily vulnerable' as a result of being rendered homeless. Whether the test is met in relation to any given set of facts is a question of evaluative judgment for the reviewer. There is no added requirement of 'functionality', over and above the comparative exercise.

The grounds of appeal

60. There are four grounds of appeal against the Respondent's review decision which challenge the conclusion that the Appellant was not in priority need:

    i) Ground 1: that the Respondent's review did not address the question of whether or not the Appellant was vulnerable under section 189(1)(d) of the 1996 Act because he was homeless, or threatened with homelessness, as a result of the COVID-19 pandemic.

    ii) Ground 2: that the Respondent did not deal adequately with the argument that the Appellant was vulnerable under section 189(1)(c) of the 1996 Act.

    iii) Ground 3: that the Respondent's conclusion that the Appellant could carry out daily living tasks independently was contrary to the basis upon which the Appellant had been awarded PIP, and did not adequately take into account the evidence regarding the award of that benefit.

iv) Ground 4: that the Respondent's review decision erroneously applied a functionality test when assessing the Appellant's vulnerability.

Discussion

Ground 1

61. The premise of the Appellant's argument on this ground of appeal, by which he contends that he should have been found by the Respondent to have priority need under section 189(1)(d) of the 1996 Act, is threefold. Firstly, that he is homeless. Secondly, that the COVID-19 pandemic is an "emergency" within the meaning of section 189(1)(d). Thirdly, that the Appellant is homeless as a result of that emergency. The first of those propositions is not in dispute.

62. For the Appellant, Mr Vanhegan submitted that it was obvious that the COVID-19 pandemic is an "emergency" for the purpose of section 189(1)(d), and that an "emergency" should not be defined narrowly and is not limited to a single incident of relatively short duration. Mr Vanhegan submitted that the main issue on this ground of appeal was whether the Appellant was homeless as a result of the pandemic, or for some other reason. He submitted that the relevant question was not why the Appellant had become homeless in 2019; it was why the Appellant had no accommodation when the Respondent's decision was made in May 2020, and that a broad view should be taken of the issue of causation when answering it. He relied on the discussion on causation in *Haile v Waltham Forest London Borough Council* [2015] UKSC 34, [2015] 1 AC 1471 ("*Haile*"), where Lord Reed (giving the leading judgment for the majority of the UK Supreme Court) stated at [63], when considering the issue of whether the appellant was intentionally homeless:

> "… As counsel for the appellant submitted, the decision whether an applicant is intentionally homeless depends on the cause of the homelessness existing at the date of the decision. That has to be determined having regard to all relevant circumstances and bearing in mind the purposes of the legislation. As I have indicated, a later event constituting an involuntary cause of homelessness can be regarded as superseding the applicant's earlier deliberate conduct, where in view of the later event it cannot reasonably be said that, but for the applicant's deliberate conduct, he or she would not have become homeless. Where, however, the deliberate conduct remains a "but for" cause of the homelessness, and the question is whether the chain of causation should nevertheless be regarded as having been interrupted by some other event, the question will be whether the proximate cause of the homelessness is an event which is unconnected to the applicant's own earlier conduct, and in the absence of which homelessness would probably not have occurred."

63. Mr Vanhegan submitted that although the Appellant's departure from the YMCA hostel in the summer of 2019 had been caused by his own conduct, the onset of the COVID-19 pandemic in early 2020 was a later event which could be regarded as superseding that conduct as the cause of the Appellant's homelessness. Alternatively, he submitted that if the pandemic did not break the chain of causation then it was nonetheless the proximate cause of the Appellant's homelessness. The basis of these submissions was

the proposition that the Appellant would have become homeless in any event by the time of the Respondent's review decision in May 2020 because he would not have been able to comply with requirements including social distancing or (if necessary) self-isolation, adopted following the onset of the pandemic, if he had remained in the YMCA hostel. Mr Vanhegan submitted that the analogy drawn in the cases discussed in by Lord Reed in *Haile* at [50], where it was suggested that if the property had been destroyed by fire then that would result in an interruption of the causal connection was of assistance. Mr Vanhegan submitted that although the YMCA had not burned down, it would have been unreasonable for the Appellant to continue to occupy his accommodation there during the pandemic.

64. Mr Vanhegan submitted that because of the failure of the Respondent to address section 189(1)(d) in its review decision, the disposition of the appeal would turn on the materiality of his argument, i.e. whether (despite the Respondent not having addressed the point in the decision appealed) it was not arguable that the Appellant was homeless "as a result of an emergency" for the purposes of section 189(1)(d) of the 1996 Act.

65. For the Respondent, Ms Rowlands disputed the premise on which Mr Vanhegan's argument was based, i.e. that it would not have been reasonable for the Appellant to continue to occupy his accommodation in the YMCA hostel during the COVID-19 pandemic. She submitted that not only had this point not been raised with the Respondent, but there was no evidence that shared accommodation of this sort was unsuitable for occupation as a result of the COVID-19 pandemic. Ms Rowlands submitted that, in any event, the Appellant could not be said to be homeless "as a result of" the COVID-19 pandemic. He had become homeless because he had breached the terms of his occupancy of the YMCA hostel. That was well before the pandemic had spread to the United Kingdom. Ms Rowlands submitted that the real and operative cause of the Appellant's homelessness was the loss of the accommodation at the YMCA. Ms Rowlands further submitted that the COVID-19 pandemic, even though a public health emergency, was not an "emergency" for the purpose of section 189(1)(d) of the 1996 Act, given the types of "emergency" which are set out in the non-exhaustive list of examples given in the statute.

66. Although the argument for the Appellant on this ground of appeal was put most attractively by Mr Vanhegan, I reject it for the following reasons:

i) This argument was not raised with the Respondent prior to the decision that is now appealed being taken. The Appellant's solicitors did not refer to section 189(1)(d) of the 1996 Act at all prior to their final letter of 18 May 2020. In that letter, the Appellant's solicitors raised section 189(1)(d) for the first time but in terms which did not reflect the argument now advanced on the statutory appeal. The argument put in the Appellant's solicitors' letter of 18 May was that the Appellant was homeless "as a result of an emergency" because he had been offered unsuitable accommodation by the Respondent in Phoenix Lodge in April 2020. The Appellant did not pursue that argument on appeal, and Mr Vanhegan conceded that the offer of accommodation at Phoenix Lodge was irrelevant to the point being pursued. Although the Respondent did not address section 189(1)(d) in the review decision, I do not regard the bare fact that section 189(1)(d) was referred to in the letter of 18 May 2020 as justifying this court setting aside the Respondent's decision for error of law where an entirely different argument is pursued on the statutory appeal. It is unsurprising that the

Respondent did not deal in the decision letter with the point that is now made on appeal. The failure of the Respondent to deal with the irrelevant argument that was actually advanced does not give rise to a material error of law in the review decision. The failure to deal with the argument now pursued on the appeal but which was not put to the Respondent discloses no error of law, and I do not regard the point as it is now put as being so obvious that the Respondent ought to have dealt with it.

ii) In any event, even if it were now open to the Appellant to take the point on this appeal, I accept Ms Rowlands' submission that there is no evidence (and nor was there even any allegation made by the Appellant's solicitors in their various letters to the Respondent) that the YMCA accommodation that the Appellant was occupying in 2019 prior to the onset of the COVID-19 pandemic would have become unsuitable for him to occupy at any point during the pandemic. Whilst the generalised reference to shared accommodation being unsuitable during the COVID-19 pandemic was made in the letter of 18 May 2020 (in connection with the argument that Phoenix House was unsuitable accommodation), no reasons were given for this assertion by the Appellant's solicitors. In my judgment, there is no sufficient evidence to support the proposition advanced by Mr Vanhegan that the particular accommodation which the Appellant was previously occupying at the YMCA hostel would, had he not been required to leave it, have become unsuitable for him to occupy as a result of the COVID-19 pandemic.

67. This ground of appeal fails on the facts. It raises an argument which was never put to the Respondent and for which – unsurprisingly, given it has been raised for the first time on the statutory appeal to this court – there is, in my judgment, an insufficient evidential basis.

68. I have considered whether it would be appropriate, given the basis upon which this ground of appeal has failed, for me to express an *obiter* view on the other issues which were argued by Counsel. I decline to do so. The issue of whether the Appellant was homeless "as a result of an emergency" is inextricably linked to the factual question of whether, and if so when and for what reasons, the YMCA accommodation which the Appellant was required to leave would have become unsuitable for him to occupy. I do not consider that it would be appropriate for me to opine, in the absence of a proper factual basis, on the issues of causation and of the scope of the definition of "emergency" in section 189(1)(d) that would have arisen for decision if there had been better evidence supporting the Appellant's case.

Ground 2

69. On this ground of appeal, the Appellant's primary submission was that all rough sleepers fall to be categorised as vulnerable under section 189(1)(c) of the 1996 Act by reason of the COVID-19 pandemic, and that constitutes a "special reason" for a finding of vulnerability under paragraph (c). The Appellant's alternative argument is that the Appellant is himself vulnerable, based on the particular facts of his case. Mr Vanhegan submitted that the Respondent's review decision had not dealt adequately with the Appellant's argument under section 189(1)(c) of the 1996 Act. He submitted that being a rough sleeper was sufficient to engage the duty under section 189(1)(c) and that it was unnecessary to consider particular risk factors arising in individual cases. He referred

me to the guidance issued by the Welsh Government, which I have set out above, as well as to the correspondence sent by the Minister to local authorities in England. Mr Vanhegan accepted that the Welsh Government's guidance was not directly applicable to England, but contended that what was said in it applied with equal force to the Appellant's situation and that it was clear that the Welsh Government regarded the pandemic as constituting a "special reason" for vulnerability to be established.

70. Ms Rowlands submitted that not only was the Welsh Government's guidance not applicable in England, but that the relevant statutory provision in Wales, section 71(1)(a) of the Housing (Wales) Act 2014, was materially different to section 189(1)(c) of the 1996 Act. She submitted that the UK Supreme Court's decision in *Hotak* established that it was not permissible to distinguish between rough sleepers, as a sub-category of homeless persons, and other homeless people. Ms Rowlands submitted that the UK Government Minister's correspondence with local authorities did not directly address the issue arising under this ground of appeal because it was directed more at preventing transmission of the disease rather than the issue of vulnerability arising under section 189(1)(c) and that, in any event, it could not override the terms of the statute. Nor, Ms Rowlands submitted, did the UK Government's guidance support the Appellant's case that all rough sleepers should be considered vulnerable for the purposes of section 189(1)(c), as it requires an assessment of the individual circumstances of the particular case.

71. In my judgment, the correspondence and guidance issued by the UK Government and by the Welsh Government, which I have set out above, does not support the proposition advanced by Mr Vanhegan that all rough sleepers should be considered as vulnerable under section 189(1)(c) of the 1996 Act, by reason of the COVID-19 pandemic. The Welsh Government's guidance does not suggest that a need for a consideration of each individual's circumstances is obviated, and nor is it to the effect that all rough sleepers must be considered as vulnerable for the purposes of the relevant legislation; although it suggests that such an outcome is highly likely, it does not go as far as the submission now made on behalf of the Appellant. I also accept Ms Rowlands' submission that the guidance issued by the Welsh Government is addressed to a different statutory definition of vulnerability, i.e. that in section 71(1)(a) of the Housing (Wales) Act 2014. It is, therefore, of limited assistance in the present context, as the discussion in Lord Neuberger's judgment in *Hotak* about the relevance for the purposes of the 1996 Act of certain terms that appear in the definition in section 71 of the Housing (Wales) Act 2014 demonstrates:

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

> run of cases. Additionally, they may mean different things to different people.
>
> 41. The expression "fend for oneself" was used by Waller LJ in *R v Waveney District Council, Ex p Bowers* [1983] QB 238, 244H, and no doubt was a useful way of expressing oneself in the context of that case (which was concerned with section 2(1)(c) of the Housing (Homeless Persons) Act 1977, which was effectively identical to section 189(1)(c) of the 1996 Act). However, it is not the statutory test, and at least to some people a person may be vulnerable even though he can fend for himself. Furthermore, the expression could mislead. For instance, where, as in two of the instant appeals, the issue is whether an applicant is vulnerable if he will be fully supported by a family member, the answer most people would give would be "no", if the test is literally whether he could fend for himself.
>
> 42. The expression "street homeless" is also much used, but it is not to be found in the 1996 Act (although it is to be found, and indeed defined in section 71 of the Housing (Wales) Act 2014, which is concerned with the "meaning of vulnerable"). It seems to have entered into the Court of Appeal's vocabulary in the judgment of Auld LJ, in *Osmani* – see paras 23-28 and para 38(7). When Lord Hughes raised the question of the precise meaning of "street homeless" with counsel during argument, it took until the following day before he got a clear answer. The expression can plainly mean somewhat different things to different people. "Homeless", as defined in the 1996 Act, is an adjective which can cover a number of different situations, and the very fact that the statute does not distinguish between them calls into question the legitimacy of doing so when considering the nature or extent of an authority's duty to an applicant."

72. This difference between the statutory definitions of vulnerability that apply in England and in Wales was noted by Lewison LJ in *Panayiotou*:

> "3. For nearly 20 years housing needs officers, reviewing officers and the courts have been guided in making the assessment by *R v Camden LBC ex p Pereira* (1999) 31 HLR 317, 330 in which Hobhouse LJ expressed the test as follows:"
>
> > "The council must consider whether Mr Pereira is a person who is vulnerable as a result of mental illness or handicap or for other special reason. Thus, the council must ask itself whether Mr Pereira is, 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."
>
> 4. The *Pereira* test has been given statutory force in Wales (Housing (Wales) Act 2014, section 71); but the Supreme Court considered the correctness of this test as regards England in *Hotak v Southwark LBC* [2015] UKSC 30, [2016] AC 811. They held, consistently with *Pereira*, that the test was indeed a comparative one. However, they held that the

> comparator was not "an ordinary homeless person" as laid down in *Pereira*, but an ordinary person if made homeless rather than an ordinary person who is actually homeless (per Lord Neuberger at [58]) or an ordinary person who is in need of accommodation (per Lord Neuberger at [59]). In addition they held that the expression "fend for [oneself]" should no longer be used, since people who are vulnerable can sometimes fend for themselves (per Lord Neuberger at [41]).
>
> 5. Instead, Lord Neuberger said at [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.""

73. Nor do the terms of the letters sent to English local authorities by the UK Government, or the UK Government's statutory guidance, establish the proposition for which Mr Vanhegan contends, either, for the reasons given by Ms Rowlands. In any event, I accept Ms Rowlands' submission that Ministerial correspondence to local authorities cannot override the application of the relevant statutory language and guidance.

74. The question asked under section 189(1)(c) of the 1996 Act requires an assessment of whether the individual who has applied for assistance is significantly more vulnerable to harm than an ordinary person when homeless. I accept Ms Rowlands' submission that the contention advanced on behalf of the Appellant that all those sleeping rough during the COVID-19 pandemic meet the statutory test seeks to introduce a distinction between different categories of homeless persons which is not present in the legislation, and which Lord Neuberger said at [42] of his judgment in *Hotak* should not be made. The comparison that the statute requires to be made is between the applicant and the ordinary person if made homeless (see *Hotak* at [58]). It is not between rough sleepers, as a sub-category of homeless people, and others.

75. Turning to the Appellant's particular circumstances, I accept Ms Rowlands' submission that the Respondent was entitled to conclude that the Appellant had not identified any particular health issue meaning that he was more vulnerable to harm than an ordinary person as a result of being homeless (whether generally or as a result of the COVID-19 pandemic) and that it was entitled to conclude, on the material before it, that he was not significantly more at risk, when homeless, than an ordinary person would be. The Appellant had not, for example, been determined to be either "clinically extremely vulnerable" or "clinically vulnerable", in the context of the COVID-19 pandemic (see paragraph 8.44 of the statutory guidance applicable in England, set out at paragraph 57 above).

76. Mr Vanhegan submitted that the Appellant should have been assessed as vulnerable under section 189(1)(c) because he was at particular risk of catching COVID-19 as a result of sleeping rough and that his vulnerability derived from being 'street homeless'; but that submission again seeks to introduce into the required comparative exercise precisely the same distinction between all rough sleepers and other types of homeless people which the Supreme Court said in *Hotak* should not be made. In any event, as Ms Rowlands submitted, there was no evidence before the Respondent that a person sleeping rough was (for that reason alone) more likely to catch COVID-19; the terms

of paragraphs 8.44 and 8.45 of the statutory guidance applicable in England are to the effect that the risk will vary between individuals (including rough sleepers), depending on their individual circumstances, including their underlying health conditions.

77. In my judgment, the Respondent's review decision gave adequate consideration to this issue and reached a permissible conclusion on the point having regard to the circumstances of the Appellant's particular case. It was not erroneous in law.

Ground 3

78. In respect of this ground of appeal, Mr Vanhegan submitted that the letter of 11 February 2020 from the DWP demonstrated that the Appellant did require assistance with basic daily tasks and that the reviewing officer had fundamentally misunderstood the basis of the award of PIP when deciding whether the Appellant was vulnerable for the purposes of section 189(1)(c) of the 1996 Act. Ms Rowlands submitted that the evidence which the Appellant had provided to the Respondent was taken into account, together with other evidence going to this issue, and that the Respondent reached a permissible conclusion which was not liable to be set aside on appeal for error of law.

79. In my judgment, this ground of appeal must be rejected. No evidence was supplied to the Respondent (or, for that matter, to this court), beyond the DWP's letter of 11 February 2020, to explain the basis upon which the Appellant had been awarded PIP. As I have already noted, the Appellant might have provided a health professional's assessment (if one had been prepared for the DWP in connection with the claim for PIP), or a more detailed and specific statement of the DWP's reasons for making the award. He did not do so. In those circumstances, the Respondent's conclusion, taking into account all the evidence before it, that the Appellant could sufficiently carry out the tasks of day-to-day living, in the context of its analysis of whether he was vulnerable for the purposes of section 189(1)(c) of the 1996 Act, was one which it was entitled to reach on the evidence before it. There was no error of law which affected the conclusion reached. The Respondent expressly took the letter and the award of PIP into account, but it also had other material which did not support the Appellant's case on this point: for example, the treating GP assessments and the questionnaire that the Appellant had completed, both of which indicated clearly that he was able to complete such tasks. The Respondent was not bound to reach the opposite conclusion on vulnerability to the one that it did simply because of the fact that the Appellant had been awarded PIP, or by the terms of the letter of 11 February 2020 setting out, in general terms, the basis for that award.

80. Whilst Mr Vanhegan also suggested that the material relied on by the Respondent which was created during 2019 may have pre-dated an award of PIP made on 11 February 2020 (and so was of limited, if any, relevance), I am not satisfied that is the correct construction of the DWP's letter of 11 February, which begins as follows:

> "Thank you for asking for a copy of your Personal Independence Payment (PIP) Statement of Entitlement."

The DWP's letter therefore appears only to confirm the terms of an existing award of PIP, rather than to constitute the decision on the award. I do not consider that the Respondent's decision is open to criticism on the basis that there had necessarily been

a material change in circumstances between the creation of the material relied on by the Respondent and an award of PIP on 11 February 2020.

81. In my judgment, the Respondent's review decision was not erroneous in law on this issue.

Ground 4

82. Mr Vanhegan submitted that the Respondent had, in the review decision, applied a 'functionality test', contrary to the approach set out by the Court of Appeal in *Guiste*, where Henderson LJ stated:

> "68. First, Ms O'Brien submitted to us that there is an additional requirement of "functionality" which needs to be satisfied by an applicant for priority need under section 189(1)(c). She said that this requirement flows from the observations of Lewison LJ in Panayiotou at [35], and that the relevant question is whether the particular circumstances of Mr Guiste would affect his *functionality* (my emphasis) so as to make a noticeable difference to his ability to deal with the consequences of being homeless.
>
> 69. I am unable to accept this submission, which would import an extra layer of complexity into a test which is already far from simple to expound. Lewison LJ's observations on functionality were made in the context that there must be a causal link between the particular characteristic relied on under section 189(1)(c) and the effect of homelessness. They were not in my judgment intended to introduce a new and additional test, over and above the requirement for a causal link between the relevant characteristic and the effect of being made homeless. Nor is it clear to me how this supposed further requirement should be formulated, or what the minimum ingredients of such functionality would be. Ms O'Brien provided us with a list of such factors in her oral submissions, while acknowledging that the precise content of the requirement would always depend on the circumstances of the case; but she was unable to cite any authority for this approach, apart from the passage in Panayiotou which, as I have explained, goes only to the question of causation.
>
> 70. Furthermore, if the submission were correct, it would have some surprising consequences. Mr Westgate gave the example of a person who, by application of the Hotak comparison, is found to be likely to become seriously ill, as a direct result of being made homeless. Provided that the necessary causal link exists between the illness and the relevant protected characteristic under section 189(1)(c), it is hard to see any reason why the applicant should also have to satisfy some ill-defined test of impairment of functionality."

83. In *Panayiotou*, Lewison LJ had said this at [35], referring to Lord Neuberger's judgment in *Hotak*:

> "Despite the fact that "significantly more vulnerable than ordinarily vulnerable" appears in inverted commas or quotation marks in Lord Neuberger's judgment it is not, so far as anyone knows, a phrase that had been previously used in any judgment of the lower courts. Yet Lord Neuberger clearly saw that phrase as expressing an approach consistently adopted by this court. One of the themes that runs through previous decisions of this court is that there must be a causal link between the particular characteristic (old age, physical disability etc) and the effect of homelessness: in other words some kind of functionality requirement. We now know that the functionality is not an ability to "fend for oneself" nor an ability "to cope with homelessness without harm". But if it is not that, what is it? …"

At [44], after referring to a number of the decided cases, Lewison LJ stated:

> "It seems reasonable to conclude, therefore, that the relevant effect of the feature in question is an impairment of a person's ability to find accommodation or, if he cannot find it, to deal with the lack of it. The impairment may be an expectation that a person's physical or mental health would deteriorate; or it may be exposure to some external risk such as the risk of exploitation by others."

84. Mr Vanhegan relied both on the use of the word "functionality" in the Respondent's decision and on the general approach adopted by the reviewing officer, which he contended disclosed that a 'functionality test' had been applied. Ms Rowlands submitted that the use of the word "functionality" did not mean that such a test had applied and that, reading the decision as a whole, it was clear that there was no error of law.

85. In my judgment, the Respondent did not apply a functionality test of the type deprecated in *Guiste* when determining whether or not the Appellant was in priority need. Firstly, it is clear from the decision itself that the reviewing officer had regard to both *Panayiotou* and *Guiste*, and the Appellant makes no criticism of the reviewing officer's self-direction on the law. The reviewing officer would therefore have been aware of what Henderson LJ had said in the passage from *Guiste* which is relied on by the Appellant. Secondly, in my judgment it is clear that whilst the Respondent's review decision did use the word "functionality" at one point, no additional 'functionality test' of the type deprecated by the Court of Appeal in *Guiste* was in fact applied. The single reference to "functionality" is, in my judgment, not in and of itself indicative of an incorrect legal approach; the word was used in a section of the decision dealing with question of whether there was a causal link between the Appellant's conditions and the effects of being made homeless (see the passages from *Guiste* and *Panayiotou* cited at paragraphs 82-83 above). The review decision also dealt with the issue of whether the Appellant would become ill as a result of being homeless, which the Court of Appeal in *Guiste* considered, at [70], was not compatible with the application of a 'functionality test'.

86. I remind myself that the approach on appeal is that set out by the Court of Appeal in *McMahon* (see paragraph 59 above); I accept Ms Rowlands' submission that insofar as it relies on the use of the word "functionality" at one point, the Appellant's case reads too much into one word from one paragraph of a lengthy decision and that the reviewing

officer did ask herself, in the context of a detailed review of the evidence, the correct question of whether there was a causal link between the relevant characteristics and the effects of being made homeless. I also consider that the decision must, as Ms Rowlands submitted, be read as a whole. The law was set out correctly at the beginning of the decision, in the passage I have set out at paragraph 33 above. The concluding passage of the decision also makes clear that the reviewing officer applied the correct legal test to the assessment under section 189(1)(c):

> "Having considered the totality of Mr Bankole-Jones' circumstances, and unsettled lifestyle singularly and as a composite and having applied all of the above facts to the question of vulnerability, I am not satisfied that he does have any illness or special reason that taken individually or collectively that [sic] would render him significantly more vulnerable than an ordinary person who is homeless as described in the test case above.
>
> There is nothing from Mr Bankole-Jones' medical information suggestive of an inability to carry out daily living activities. I have taken into account his overall circumstances to determine if such a reason exists. I am satisfied that Mr Bankole-Jones does not have such health issues that would impair his ability to cope with homelessness. He is clearly able to access services, communicate clearly as demonstrated at face to face interviews with Housing officers and also seek legal advice when required."

In my judgment, the reviewing officer did apply the correct legal test and did not fall into the error of applying a 'functionality test' identified in *Guiste*.

87. Nor do I accept that the review decision in this case impermissibly concentrates on what the Appellant can do, rather than what he cannot do. Mr Vanhegan contended that the decision was contrary to what Wilson LJ had stated in *Pieretti v Enfield London Borough Council* [2010] EWCA Civ 1104, [2011] PTSR 565 at [23]:

> "If Brooke LJ's dictum in the case of *Cramp* remains good law, the judge certainly had to address the *obviousness* of any need to consider disability but, as Mr Rutledge concedes, he went far too far in finding that the appellant was not disabled. First, the judge's function was not to find facts. Second, the whole issue arose from the fact that, rightly or wrongly, Enfield had not seen fit to collect any significant amount of information relevant to whether the appellant was disabled, with the result that the picture before the judge was too sketchy to enable a finding to be made. Third, it is dangerous to assess whether a person is disabled by reference to what he is *able* to do without consideration of what he may be *unable* to do: see para. 8 of section B of the guidance issued under s.3 of the Act of 1995."
>
> (italicisation in the original)

88. The difficulty with Mr Vanhegan's argument is that this part of Wilson LJ's judgment is directed to the question of whether or not the appellant in that case was disabled within the meaning of section 1(1) of the Disability Discrimination Act 1995, in

connection with that argument that the local authority had breached its duty under section 49A of that Act. That is not a question – now arising under the provisions of the Equality Act 2010 which have superseded those of the 1995 Act – raised by this appeal. It is not the same as the question that arises under section 189(1)(c) of the 1996 Act. In the *McMahon* case, Mr Vanhegan advanced a similar argument in support of his contention in that appeal that the Public Sector Equality Duty had been breached by the Respondent's review decision, which was dealt with by Lewison LJ at [56]:

> "Mr Vanhegan submitted that in considering whether a person suffered from an impairment of their abilities to carry out normal day to day tasks, it was necessary to concentrate on what a person could not do, rather than on what they could do. He also submitted that a disability could also consist of an impairment in carrying out day-to-day tasks at work, as well as in and about the home. As an elucidation of the meaning of disability in the abstract that is no doubt right. But that is not the task that Parliament has set for the reviewing officer. As Lord Neuberger's third question makes clear, what is under consideration is the likely effect of the disability, when taken together with any other features, on the applicant if and when homeless. An inability to work is only relevant if it would have an effect on the applicant if and when homeless. In other words, what needs to be considered in an assessment of vulnerability is that which is relevant to a person's ability to deal with the consequences of being homeless."

89. What the Court of Appeal considered in *McMahon* was the correct question was the likely effect of any disability, taken together with any other features, on the applicant if and when homeless. The material matters are those relevant to a person's ability to deal with the consequences of being homeless. In my judgment, the review decision in the present case correctly approached this issue, considering in some detail the effect of the Appellant's conditions, and the other features of his case, on his ability to deal with the consequences of being homeless. There was no error of law.

Conclusion

90. None of the four grounds of appeal is made out. The appeal is dismissed.