



Homelessness and allocations: case law update

Connor Johnston

Barrister

30 November 2016





PART 1: HOMELESSNESS



2015 -

- *Hotak, Kanu & Johnson* [2015] UKSC 30, [2015] 2 WLR 1341 – vulnerability & PSED.
- *Haile v Waltham Forest London Borough Council* [2015] UKSC 34, [2015] HLR 24 – intentional homelessness.
- *Nzolameso v Westminster CC* [2015] UKSC 22, [2015] HLR 22 – out of borough placements and the ‘best interests of the child’.



Purpose of this part of session

- To discuss recent developments and emerging themes following *Hotak, Haile* and *Nzolameso*.
- N.B. the handout also contains a roundup of the other key homelessness decisions from 2016.



Hotak, Kanu and Johnson

Three questions:

(i) Whether the test for vulnerability for the purposes of s189(1)(c) Housing Act 1996 involved a comparator and if so what was the comparator to be?

(ii) In assessing vulnerability, is it permissible to take into account the support which would be provided by a family member or member of the applicant's household?

(iii) What effect, if any, does the public sector equality duty under s149 Equality Act 2010 have on the determination of vulnerability?

The comparator

- An ordinary person if made homeless.
- Ordinary person generally not locally.
- Is the applicant 'significantly more vulnerable' or 'more at risk of harm' than an ordinary person without accommodation?

- When applying the test, a local housing authority should not rely on statistics as to the characteristics of the ordinary person.
- The ordinary person should be taken to be 'robust and healthy'.
- The resources of the local housing authority have no relevance to the assessment of vulnerability.

Third party support

- Relevant. But LHA must be satisfied that such support will be available on a consistent and predictable basis and be sufficient to prevent the applicant from being vulnerable.
- Must be based on evidence not presumptions.

Public Sector Equality Duty

Decision must focus sharply on:

- (i) whether the applicant is under a disability (or has another protected characteristic);
- (ii) the extent of such disability;
- (iii) the likely effect of the disability, when taken together with any other features, on the applicant when homeless; and
- (iv) whether the applicant is, as a result, vulnerable.

One year on...

Vulnerability

- No CoA guidance yet.
- A number of first instance and High Court decisions.
- Three points of general application.

(i) The ordinary person

- Some ambiguity about the characteristics of the ‘ordinary person’.
- See *Hotak* at [71].
- Robust and healthy.
- A contrary view would need to be substantiated with reasons.

(ii) Meaning of significant

- More than minor or trivial?
- Something very large?
- Or a factual judgment best left to the reviewing officer?



CoA

*Jesse Panayiotou v Waltham Forest
LBC*

To be heard on 10 or 11 May 2017.



(iii) Tendency to overlook effects of street homelessness

- Focus on applicant's ability to manage while accommodated.
- Focus on applicant's ability to undertake everyday tasks (e.g. catching bus, attending appointments).
- Effects of street homelessness overlooked.
- SC avoided reference to this. But still relevant.

One year on...

PSED

- A number of first instance and High Court decisions.
- One CoA decision – *Poshteh* (on appeal to SC).
- Three points of general application.



- The duty to make inquiries e.g. *Brown v Southwark LBC*.
- The duty to give reasons e.g. *Shaja Butt v Hackney LBC*.
- The appropriate level of scrutiny e.g. *R (Barrett) v Westminster CC* [2015] EWHC 2515 (Admin).



Miscellany

- Disability is not the only protected characteristic.
- Deemed disabilities (e.g. HIV).

Nzolameso

- Section 11 fell for consideration in Nzolameso.
- Case involved mother with five children aged 8-14.
- Offered accommodation by Westminster in Bletchley.
- Accommodation refused. Family split up.

Breach of s208 HA 1996

- So far as ‘reasonably practicable’ accommodation should be secured within the district of the local housing authority, s208 Housing Act 1996.
- Where that is not possible it should be ‘as close as possible to where they were previously living’. See paras 16.7 and 17.41 of the Code of Guidance.

Breach of s11 CA 2004

- Where s11 engaged, decision maker must identify principal needs of children in question, individually and collectively, and have regard to the need to safeguard and promote them when making the decision, *Nzolameso* at [27].
- Decisions must contain sufficient reasons to evidence that this has been done. See [32].

One year on...

- *Forsythe-Young v Redbridge LBC* - failure to identify which school would be best for child.
- *Begum v Tower Hamlets LBC* - daily commute of five hours to school and back each day.



- But c.f. *Mohamoud v Kensington and Chelsea RLBC* [2015] EWCA Civ 780, [2015] HLR 38.
- Also *Huzrat v Hounslow LBC* [2013] EWCA Civ 1865, [2014] HLR 17.
- Best interests relevant to exercise of discretion/evaluative judgment.





Haile

- Lead case on causation in context of intentional homelessness.
- Facts involved an applicant who would have become homeless anyway.
- *Din* distinguished. A new approach.



Two stage test

1. Did app deliberately do something in consequence of which he/she ceased to occupy accommodation (s191(1))?
2. If so, is that the cause of app's current homelessness or has causal chain has been broken by subsequent events (s193(1))?

One year on...

- Decisions relatively rare.
- Possibly owing to distinction between *Din* and *Haile*.
- Possible application: birth of child (*Haile*); benefits changes (*Magoury v Brent LBC*); B&Bs?



PART 2: ALLOCATIONS



Introduction

- The current statutory framework for the allocation of social housing came into effect in 1997.
- A series of successful challenges followed.
- *R (Ahmad) v Newham LBC* [2009] UKHL 14, [2009] HLR 31 brought these to an abrupt halt.



‘...as a general proposition, it is undesirable for the courts to get involved in questions of how priorities are accorded in housing allocation policies. Of course, there will be cases where the court has a duty to interfere, for instance if a policy does not comply with statutory requirements, or if it is plainly irrational. However, it seems unlikely that the legislature can have intended that Judges should embark on the exercise of telling authorities how to decide on priorities as between applicants in need of rehousing, save in relatively rare and extreme circumstances.’



What has changed since *Ahmad*?

- Equality Act 2010
- Localism Act 2011
- Development of existing legal principles such as ‘best interests of the child’ (s11 Children Act 2004) and ECHR discrimination

R (Jakimaviciute) v H&F LBC

- Homeless applicants in long term, suitable, temporary accommodation under the main homelessness duty excluded.
- Fundamentally at odds with duty to secure reasonable preference.
- 87% homeless applicants excluded – irrational to conclude scheme gave reasonable preference.

R (Alemi) v Westminster CC

- Homeless applicants unable to bid for 12 months following acceptance of duty.
- Exclusion failed to give reasonable preference to homeless applicants.
- Impermissible exclude sub group of reasonable preference class with reference to time bar.

R (HA) v Ealing LBC

- 5 year residence requirement.
- HA was victim of DV from out of borough.
- Residence requirement unlawful as excluded sub group of reasonable preference classes.
- Also discriminatory contrary to ECHR and EA 2010 and breach of s11 Children Act 2004.



R (A) v Ealing LBC

- Application for mandatory order in previous case.



R (H) v Ealing LBC

- 20% of lettings reserved for working households and model tenants.
- Unlawful discrimination against women, disabled and elderly persons contrary to s19 Equality Act 2010.
- ECHR discrimination against women, children, disabled and elderly persons and non-council tenants contrary to Art.8 and 14 ECHR.

- In adopting and maintaining the scheme, Ealing was in breach of the public sector equality duty.
- In adopting and maintaining the scheme Ealing was in breach of s11 Children Act 2004.

R (Woolfe) v Islington London Borough Council

- Points based allocation scheme - applicants with less than 120 points unable to bid.
- Failure to properly apply scheme on facts of case.
- BUT points threshold lawful as not same as exclusion from the scheme.
- No breach of s11 CA 2004 as children considered.

R (YA) v H&F LBC

- Claimant's spent convictions had wrongly been taken into account c.f. Rehabilitation of Offenders Act 1974.
- BUT scheme did not unlawfully discriminate against care leavers contrary to Articles 8 and 14 ECHR.



R (Jones) v Luton Borough Council

- Failure to grant tenancy to failed successor in accordance with terms of allocation scheme.





How does all this fit with *Ahmad*?

See [37] per Lord Neuberger:

‘...subject to complying with the other provisions of s167, and subject to rationality and compliance with any other relevant legislation, the terms of the allocation scheme are a matter for the local housing authority.’





Themes

- compliance with s167 (now s166A in England)
- rationality
- compliance with other legislation
 - s11 Children Act 2004
 - ECHR
 - Equality Act 2010
 - Rehabilitation of Offenders Act 1974



Conclusion

- *Ahmad* set down limits on justiciability of allocation schemes.
- Limits being tested.
- Remains to be seen what direction law will move in in CoA.
- But categories outlined today should give some idea of the current issues and arguments.



Connor Johnston
Garden Court Chambers
November 2016

