



**THE EQUALITY ACT 2010 & HOUSING LAW**

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## **A: INTRODUCTION**

1. This paper seeks to provide a brief overview of the impact of the Equality Act 2010 in England in housing law cases in the areas of (a) possession proceedings against occupiers with the protected characteristic of disability; (b) homelessness; and (c) allocation of housing.

## **A LENGTHY ACT**

2. The Equality Act 2010 has 16 parts. It contains 218 sections and 28 schedules. A detailed analysis of the Act is beyond the scope of this paper, but the following provisions are of particular significance to housing lawyers:

### **a. Part 2 Equality: Key Concepts**

- i. Protected characteristics – ss. 4-12
- ii. Direct discrimination – s. 13
- iii. Discrimination arising from disability – s. 15
- iv. Indirect discrimination – s. 19
- v. Adjustments for disabled persons – ss. 20-21
- vi. Harassment - s.26
- vii. Victimisation – s.27

### **b. Part 3 Services and Public functions**

- i. Provision of services – s.29
- ii. Interpretation and exceptions – s.31

### **c. Part 4 Premises**

- i. Management – s. 35

d. **Part 9 Enforcement**

- i. Jurisdiction – s. 114
- ii. Time limits – s.118
- iii. Remedies – s. 119
- iv. Burden of proof – s.136

e. **Part 11 Advancement of Equality**

- i. Public sector equality duty – s. 149

f. **Part 16 General and Miscellaneous**

- i. General interpretation – s. 212

g. **Sch. 1 – Disability: supplementary provision**

h. **Sch. 2 – Services and public functions – reasonable adjustments**

i. **Sch. 4 – Premises: reasonable adjustments**

**B: KEY CONCEPTS**

3. The following points are of note:
  - a. **Direct discrimination** (section 13) is concerned with equality of treatment. It occurs where there is less favourable treatment “because of a protected characteristic.” Less favourable treatment is not defined in the Act. It requires a comparator but does not require there to have been any loss, and (save for age cases) does not provide the defence of proportionality. There is no need to show any motive or intent behind the discrimination.
  - b. **Discrimination arising from disability** (section 15):

- i. Also concerned with equality of treatment.
- ii. Does not need a comparator;
- iii. Less favourable treatment is “something arising in consequence of... disability”;
- iv. The “something” must be identified by the court (**P v Governing Body of a Primary School [2013] UKUT 154 [52]**) and the disabled person must have been treated less favourably “because of” that something. In a possession case the “something” will normally be the grounds for possession and will be easy to identify as rent arrears, nuisance behaviour or a breach of the tenancy. However, in a case under the accelerated procedure or in the case of introductory tenants the situation is likely to be more nuanced; in those circumstances, the court must ask what was the reason why the disabled person was treated as she was;
- v. Note that if the cause of the “something” (i.e. the behaviour or the rent arrears) is something falling within Equality Act 2010 (Disability) Regulations 2010/2128 (made under schedule 1 paragraph 1 Equality Act 2010) – and which covers a range of broadly anti-social attributes, such as a tendency to physical abuse or addictions - the person is not deemed to be disabled for that purpose. This is the case even where the excluded impairment (such as tendency to physical abuse) is caused by a disability. See e.g. **X v The Governing Body of a School [2015] UKUT 0007 [2015] E.L.R. 133** which concerned a 7 year old Autistic girl with a history of challenging behaviour and who was excluded from school for an incident that was found to be a manifestation of a “tendency to physical abuse” not attracting the protections of the Act;

- vi. However, if there is more than one reason for the less favourable treatment then if a legitimate impairment was a reason and thus an effective cause of the less favourable treatment, then prima facie discrimination is made out notwithstanding that an excluded condition also forms part of the reason for that treatment (**P v Governing Body of a Primary School [2013] UKUT 154 (AAC)**);
- vii. Ignorance of the disability is not a defence unless A can show that they could not reasonably have been expected to know of the disability;
- viii. Defence if it can be shown that the less favourable treatment is a proportionate means of achieving a legitimate aim;
- ix. Proportionality is for the alleged discriminator to prove. It is to be determined in accordance with the cumulative four-stage test set out by Lord Reed in **Bank Mellat v HM Treasury [2013] UKSC 39** at [74], namely:
  - (1) is there a sufficiently important objective (i.e. legitimate aim);
  - (2) is the measure rationally connected to that objective;
  - (3) is it the least intrusive measure which could be used without unacceptably compromising the objective; and
  - (4) in adopting the measure has the defendant struck a fair balance between the importance of securing the objective and its particular effects on the claimant's rights.

- c. **Indirect discrimination** (section 19):
- i. Concerned with equality of outcome;
  - ii. Requires a focused identification of a provision, criterion or practice which is discriminatory in that it puts a person with a relevant protected characteristic at a particular disadvantage and it cannot be shown to be a proportionate means of achieving a legitimate aim.
  - iii. Provision, criterion or practice is not defined in the Act;
  - iv. Motive is irrelevant. Proportionality is for the alleged discriminator to prove (section 136).
  - v. Hypothetical exercise – could be assisted by statistics/expert evidence.
- d. **Duty to make adjustments for disabled persons** (sections 20-21):
- i. Concerned with equality of outcome;
  - ii. Arises where “substantial disadvantage” caused to a disabled person by a provision, criterion or practice (i.e. more than minor or trivial – see section 212) in comparison with persons who are not disabled;
  - iii. Take such steps as are reasonable to avoid the disadvantage;
  - iv. Amounts to discrimination where there is a failure to comply with the duty to make reasonable adjustments;
  - v. Note that no duty to make reasonable adjustments unless and until a controller receives a request to do so from or on behalf of a tenant or person entitled to occupy: *sch. 4 paras. 2(6) and 3(5)*

- vi. The duty to make reasonable adjustments is discharged only when the disabled person is no longer at a substantial disadvantage: **Archibald v Fife Council [2004] IRLR 651** at [15] per Lord Hope of Craighead. A landlord or public body which says 'because we did something, the duty upon us is discharged' does not satisfy the Act if the something it did was ineffective to alleviate the problem but something more would have alleviated it. The question is whether 'one more step' was required;
- vii. An example of how the duty to make reasonable adjustments can be used in housing law is the case of **Barber v Croydon LBC [2010] H.L.R. 26. CA**. The tenant had learning difficulties and a personality disorder and suffered from acute depression. He spat in the caretaker's face and kicked him in the knee causing an injury which required hospital treatment. The Court of Appeal found that the decision to seek possession was unlawful in public law terms for reasons that sound very similar to the issues that would be considered in a reasonable adjustments claim, namely that although the defendant's assault on the caretaker was serious, the landlord was required to explore options other than eviction given the isolated nature of the incident and the authority ought to have consulted other agencies on whether an alternative to eviction was appropriate;
- viii. In relation to rent arrears cases two PCPs may be relevant to the issue of reasonable adjustments, the requirement to pay rent and the landlord's policy or practice in respect of rent arrears including any informal practice as to when possession proceedings are issued. The court will be concerned with how the tenant with mental health problems or learning disabilities can be helped to pay the rent, or to clear arrears. Reasonable



steps might include reminder telephone calls, visits, the authorisation of a third party to assist, the appointment of an appointee, a referral to social services or to a support organisation, the appointment of an advocate.

- ix. An advisor representing a tenant in a settlement would be well advised to record a request for reasonable adjustments as a preamble to a general adjournment or suspension on terms, or to include a request for reasonable adjustments in a cover letter. The request, and any failure to comply, can then be used in the event that there is a subsequent breach of the order.
- e. **Duty not to discriminate in the provision of services etc.** to the public or a section of the public (section 29):
- i. The public function provisions apply in relation to a function of a public nature, exercised by a public authority or another person (including a private organisation), where the function is not covered by the services, premises, work or education provisions of the Act;
  - ii. A public function is one that is a function of a public nature for the purposes of the HRA 1998 (section 31(4) EqA)
  - iii. The authority must not, in the provision of services or the exercise of a public function, do *anything* that constitutes discrimination, harassment or victimisation (section 29(6)). Service is something provided to the public whether for payment or not. Provision of a service includes provision of facilities. Applies to the termination of services as well as their provision;

- iv. Imposes a duty to make reasonable adjustments in the provision of a service, or in the exercise of a public function and a failure to do so amounts to unlawful discrimination: section 29 (7);
- v. The duty to make reasonable adjustments is owed to disabled persons generally and is an anticipatory one which means that service providers and people exercising public functions must anticipate the needs of disabled people and make appropriate reasonable adjustments.
- vi. Section 29 will apply – (1) where the provision of accommodation is generally for the purpose of short stays by individuals who live elsewhere (e.g. decants) s. 32(3)(a); or (2) where accommodation is provided solely for the purpose of providing a service or exercising a public function (e.g. homeless accommodation): s. 32(3)(b);
- vii. Examples of where the duty may bite:
  - **Provision of temporary accommodation:** applicants with specific housing needs (e.g. wheelchair users, or blind/partially sighted applicants) who are less likely to be secured suitable housing at short notice, applicants with autistic spectrum disorders, who have difficulty with change, or applicants with depressive disorders, who have difficulty with uncertainty may require the authority to plan in advance for the eviction, to enable accommodation to be provided in a timely and planned manner as opposed to leaving everything to the day of eviction;
  - A decision that the duty to provide interim accommodation has ended because of refusal of an offer of accommodation where e.g. no adjustment has been made in procedure to take

account of any difficulty in comprehension due to disability or where a person reacts impulsively and unwisely because of a mental impairment;

- Assistance with moving to temporary accommodation, arranging for furniture which may need to be adapted;
- Conduct of the application and any review. The authority should consider in advance as to how it will deal with people with learning difficulties and disabilities and those with very serious mental health conditions. In those cases, it might be appropriate to request that the applicant has an advocate or intermediary, or some particular assistance, or that staff have some particular training. In *Local Government Ombudsman complaint no 07/A/03275* the London Borough of Redbridge was found to have breached the duty to make reasonable adjustments by failing to provide staff with training for a deaf homeless applicant, by failing to provide a BSL interpreter or text phone, and by unreasonably delaying in processing the applicant's homeless application as a result.

f. **Duty not to discriminate in the management of premises** (section 35):

- i. Unlawful for a person who manages premises to discriminate against a person who occupies the premises by inter alia evicting him or by subjecting him to any other detriment;
- ii. Detriment' is to be given its ordinary meaning and does not connote any special characteristics. It is sufficient that the person might reasonably be said to be disadvantaged:  
**Shamoon v RUC (Northern Ireland) [2003] ICR 337 HL;**

- iii. Note that those who have a right to dispose of premises and managers of premises are also covered by the provisions on harassment and victimisation, both provisions that may offer additional protection and causes of action in cases of breach of quiet enjoyment and unlawful eviction;
  - iv. This provision covers anyone who “occupies” the premises and therefore as a defence, the disability related conduct of non-tenants, such as the children of the tenant, is also covered.
- g. **The public sector equality duty** (section 149):
- i. Public authorities and those who exercise public functions must have due regard to the need to inter alia advance equality of opportunity between persons who share a relevant protected characteristic and those who do not – e.g. council services only being accessible via the internet;
  - ii. A public function is one that is a function of a public nature for the purposes of the HRA 1998 (section 150 EqA)
  - iii. Public authorities are listed in sch. 19.
- h. **Proceedings** (sections 113-114, 118):
- i. There is a freestanding claim under the EqA for specified contraventions (section 114). This includes claims for contraventions of Part 3 (services and public functions) and Part 4 (premises);
  - ii. A claim under the Act must be brought within 6 months of the act complained of (i.e. issued the day before 6 months expire) unless the Court deems it just and equitable to extend time (section 118). In **Matuszowicz v Kingston upon Hull [2009] I.R.L.R. 288** it was held that the onus was on those alleging a

failure to make reasonable adjustments to identify the date by which they ought reasonable to have been made;

- iii. The relevant practice direction 'Proceedings Under Enactments Relating to Equality' provides that *"When a claim under section 114 of the 2010 Act is commenced, the claimant must give notice of the commencement of the proceedings to the Commission and file a copy of that notice"* (paragraph 2).
- iv. The Court must appoint an assessor unless the judge is satisfied that there are good reasons for not doing so (section 114(8));
- v. A claim may also be brought in judicial review proceedings (section 113(3)(a));
- vi. The Court may grant any remedy within its power including compensation for injury to feelings (section 119);
- vii. If there are facts from which the court could reasonably infer, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred unless the person shows that there was no contravention (section 136). This two-stage process aims to give full effect to the enforcement of anti-discrimination rights and recognises the difficulty that claimants face in obtaining direct evidence of discrimination.

## C: POSSESSION PROCEEDINGS

### Disability

4. By *section 6 EqA 2010*, a person has a disability if he has a mental or physical **impairment** which has a **substantial and long term** adverse effect upon his ability to carry out normal day to day activities.
5. “Substantial” means more than minor or trivial (*section 212*), and “long term” means the effect has lasted at least 12 months, is likely to last at least 12 months, or is likely to last the rest of the person’s life (*Schedule 1 para 2 EqA 2010*).
6. “Likely” should be interpreted as meaning that it could well happen rather than it is more probable than not that it will happen” (**Boyle v SCA Packaging [2009] ICR 1056**).
7. It is an error of law to focus on the **cause** of the impairment. A person may not have been diagnosed with any disorder and may be under investigation. The focus should be on the symptoms and the effect on day to day activities (**Urso v Department for Work and Pensions UKEAT/0045/16/DA**).

### Defence of lack of knowledge

8. A service provider must do all they can reasonably be expected to do to find out if a person has a disability” as the defence is only available if A can show that they could not be reasonably be expected to have known of the disability (*section 15(2) EqA 2010*).
9. Further, even if A could not be reasonably be expected to have known of the disability when they issued proceedings, but was then made aware of the same and decided to continue with the eviction process then A would be caught by *section 35(1)(b)* which states that A must not discriminate against B who occupies premises by evicting B or “taking steps for the

purpose of securing B's eviction". Thus if A, with knowledge of the disability, continues to seek possession, there could be an unlawful act of discrimination, unless A can justify the treatment as a proportionate means of achieving a legitimate aim.

### Proportionality

10. A landlord seeking to justify the unlawful treatment can avoid liability if she can show that the treatment was a proportionate means of achieving a legitimate aim.
11. Thus the first step will be for the landlord to identify the legitimate aim. The aim must correspond to a "real need" **R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213** [151]. The burden of proof is on the landlord and summary disposal will rarely be appropriate, even where no security of tenure.
12. Proportionality under the Equality Act 2010 is a more significant hurdle for the landlord to surmount than proportionality under article 8.
13. In **Aster Communities Ltd v Akerman Livingstone** [2015] UKSC 15 [2015] 2 WLR 721, Baroness Hale stated:

"No landlord is allowed to evict a disabled tenant because of something arising in consequence of the disability, unless he can show eviction to be a proportionate means of achieving a legitimate aim... The structured approach to proportionality asks **whether there is any lesser measure** which might achieve the landlord's aims **[31]**; Emphasis supplied

There may also be cases where a discrimination defence is so lacking in substance that summary disposal is merited. The test is whether the claim is "genuinely disputed on grounds that appear to be substantial". I agree with Lord Neuberger (at [59]) that the case could be summarily disposed of **if the landlord could show** (i) that the

defendant had no real prospect of proving that he was disabled within the meaning of the Act; or (ii) that it was plain that possession was not being sought because of something arising in consequence of his disability; or (iii) that bringing and enforcing the claim were plainly a proportionate means of achieving a legitimate aim. Like him, I suspect that **such cases will be rare.** [36] Emphasis supplied.

14. Lord Neuberger stated:

“Provided that a defendant establishes that the landlord is (or at a summary stage, may well be) seeking to evict him “because of something arising in consequence of [his] disability”, the landlord faces a significantly more difficult task in having to establish proportionality than does a landlord who faces an art.8 defence” [58];

Possession could be ordered summarily if the landlord could establish that (i) the defendant had no real prospect of establishing that he was under a disability, (ii) in any event, it was plain that possession was not being sought “because of something arising in consequence of [the] disability”, or (iii) in any event, the claim and its enforcement plainly represented “a proportionate means of achieving a legitimate aim” [59];

Each of the three types of issue referred to in the immediately preceding paragraph would often give rise to disputed facts or assessments, e.g. whether the defendant suffers from a physical or mental disability, whether it has led to the possession claim, and where the proportionality balance comes down. Summary judgment is not normally a sensible or adequate procedure to deal with such disputes, which normally require disclosure of documents, and oral and/or expert evidence tested by cross-examination. There will no doubt be cases where a landlord facing a s. 35(1)(b) defence may be



well advised to seek summary judgment, but they would, I suspect, be relatively rare [60].

15. In **Birmingham City Council v Stephenson** [2016] EWCA Civ 1029, [2016] HLR 44, CA, Mr. Stephenson, who suffered from mental illness and had the protected characteristic of disability, was the introductory, non-secure tenant of premises in respect of which possession was sought following allegations of serious anti-social behaviour. At the first hearing of the claim, he was represented by the Duty Solicitor. The hearing was adjourned for 10 weeks to enable him to file a defence. At the restored hearing, solicitors who had recently been instructed (but were from the same firm who had been acting as duty solicitors) requested a further adjournment. This was refused, and a possession order made. Mr. Stephenson's appeal against the refusal to adjourn to the Circuit Judge was dismissed. The Court of Appeal gave permission for a second appeal and allowed Mr. Stephenson's appeal.
16. Lewison LJ with whom Moore-Bick LJ agreed held:
  - (a) The CPR envisaged that at the time of the first hearing, or indeed at a subsequent hearing, the tenant may well not have served a defence and that judgment should not be entered in default of defence [13];
  - (b) The existence of what appeared to be a genuine dispute on substantial grounds was not a precondition to the giving of case management directions under r.55.8 (1)(b) [13];
  - (c) The question of proportionality under the Equality Act 2010 should be approached in a structured way, if it was arguable that there was a sufficient causal link between mental disability and the conduct on which the decision to evict was based, then the burden would shift to the council to establish that evicting Mr. Stephenson was a proportionate means of achieving a legitimate aim [22];

- (d) For both the Council and the Court the question of proportionality **was not a binary choice** between eviction, on the one hand, and doing nothing on the other hand [22] [25];
- (e) The burden was on the Council could show that **nothing less** than eviction would do [22].
17. This is potentially a very important decision whose significance is yet to be fully appreciated. By criticising the adoption of a binary approach by the landlord, the Court of Appeal is effectively providing a form of security of tenure for disabled persons where there is a link between the disability and the possession proceedings.

#### **D: HOMELESSNESS AND THE PUBLIC SECTOR EQUALITY DUTY**

18. The PSED requires a public authority in the exercise of its functions **to have due regard** to three discrete and separate statutory equality needs. These are the need to (a) **eliminate** discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) **advance** equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) **foster** good relations between persons who share a relevant protected characteristic and persons who do not share it (section 149(1) EqA 2010).
19. Having due regard involves having due regard, in particular, to the need to (a) **remove or minimise disadvantages** suffered by persons who share a relevant protected characteristic that are connected to that characteristic; and (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it (section 149(3)(a)(b)) EqA 2010). Due regard must take place on a proper informed footing and decision makers must find out the relevant facts before consideration of the equality duty (**R (Lunt) v Liverpool City Council [2009] EWHC 2356 (Admin) [43-44]**).

20. The positive duty to have due regard to advance equality of opportunity goes beyond the need to avoid discrimination (**R (Baker) v Secretary of State for Communities and Local Government [2008] EWCA Civ 141 [2009] PTSR 809**).
21. In the context of homelessness, the public sector equality duty was considered in **Pieretti v Enfield LBC [2010] EWCA Civ 1104 [2011] PTSR 565**.
22. Wilson LJ rejected the authority's arguments (that the duty to have due regard to the need to take steps to take account of the disability of any disabled person did not apply to homeless applications. He held:
  - a. the equality duty applied both when the local authority was drawing up its criteria and when it applied them in an individual case, both of those being an aspect of carrying out its functions. Its purpose was to:

*"secure the brighter illumination of a person's disability so that, to the extent that it bears upon his rights under other laws, it attracts a full appraisal"* (at [26]).
  - b. It was "clearly wrong" to submit that Part 7 HA 1996 addressed the rights and needs of the disabled so comprehensively (that there was no room for introduction into the scheme for making provision for the homeless of further protection for the disabled as exemplified by the equality duty. He held that there had to be "a culture of greater awareness of the existence and legal consequences of disability" and the equality duty complemented the Part 7 duties.
  - c. The carrying out of inquiries under section 184 and review under section 202 were also exercise of relevant functions.
23. In **Pieretti** the authority was held to have failed to make sufficient inquiry to comply with the equality duty when considering if the applicants were intentionally homeless. The relevant question which arose by reference

to the public sector equality duty was expressed by Wilson LJ (at [35]) to be:

*“did (the reviewing officer) **fail to make further inquiry** in relation to some such feature of the evidence presented to her as raised a real possibility that the appellant was disabled in a sense **relevant to whether he acted “deliberately”** within the meaning of subs. (1) of s.191 of the Act of 1996 and, in particular, to whether he acted “in good faith” within the meaning of subs. (2) thereof?”*

24. **Hotak & Others v LB Southwark & Others [2015] UKSC 30 [2016] AC 811 (SC (E))** considered the applicability of the PSED in cases of vulnerability. The Supreme Court held that the PSED must be exercised in substance, with rigour, and with an open mind and the court had to be satisfied that there had been a **rigorous consideration** of the duty so that (in that case) the Council had to focus “very sharply” on whether the applicant was disabled and the extent and effect of the disability [75] [78].

#### **Cases post Hotak**

##### **Birmingham City Council v Wilson [2016] EWCA Civ 1137**

25. This appeal concerned the extent of a housing authority’s duty of inquiry, in light of the PSED, into whether an applicant for homelessness assistance had a disability requiring special arrangements to be made. Ms. Wilson had refused an offer of high-rise accommodation leading to a discharge of duty decision.
26. Her case was that a member of her household suffered from a disability, (extreme fear of heights) even though at the time of her application she had stated that no one in her household suffered from a mental or physical disability.
27. A minded to letter had been sent during the review where the officer had stated that there was no information that any member of the household was disabled. There was no reply to the minded to letter. The appeal was allowed in the County Court on the basis that the review decision was

unlawful in that it was based on inadequate inquiries into Romareo's fear of heights and claustrophobia, and whether those conditions amounted to a disability for the purposes of the EqA 2010.

28. It was agreed that the question whether the evidence presented raises a "real possibility" that any applicant for housing assistance was disabled was to be assessed by looking to see (a) whether the review officer subjectively considered that such a "real possibility" existed or (b) acted in a *Wednesbury* irrational way in concluding that it did not.
29. The Court of Appeal allowed the Council's appeal finding that the RO had not acted unlawfully in concluding that there was no information that any member of the household was disabled. In so doing, the Court relied on the facts that:
  - a. The officer had recognised that there was an issue as to whether high rise accommodation was suitable;
  - b. He was entitled to expect Ms. Wilson to bring forward any information which she had which might bear on that issue both as a matter of general common sense and because she was living in interim accommodation in a tower block and had not reported any issues as a result;
  - c. she had been expressly asked to provide any further information;
  - d. the "minded to " letter had set out the Council's provisional reasoning clearly and had not been challenged.

#### **Hackney LBC v Haque [2017] EWCA Civ 4**

30. This appeal concerned the impact of the PSED, upon an assessment of suitability. Mr. Haque was a man in his early forties with serious neck and back pain. He also suffered from depression. His disability had caused him to lose his job as a bus driver in 2011. Following the acceptance of the

main housing duty, he was offered a room in a hostel with a “No Visitors” policy. A review of suitability concluded that the accommodation was suitable. The appeal in the County Court succeeded on the basis that the reviewing officer had not considered whether Mr. Haque was disabled. HHJ Luba QC held:

“48. ....The terms of the [78] of the *Hotak* judgment, read together with the duty to give reasons for a reviewing officer’s decision, (themselves contained in section 203 of the Housing Act 1996 ), oblige a reviewing officer to be transparent in his treatment of the issues of whether an applicant does or does not have a protected characteristic and as to whether the public sector equality duty is in play and with what effect. In my judgment, that will in almost all circumstances, require a reviewing officer to spell out, at least in summary form, his decisions on those matters. Indeed, he should go further and spell out what follows from an affirmative finding that a protected characteristic is established and that the public sector equality duty is in play.

49. In this particular reviewing officer’s decision there is not, in my judgment, the material to demonstrate those matters. I accept that in some rare cases a reviewing officer’s decision might be upheld, even though these matters are not clear on the face of the decision letter, if the pith or gist of what is required can be garnered from the wording used.”

31. The Court of Appeal allowed the Council’s appeal. It held:
  - a. [78] and [79] of Lord Neuberger’s judgment in *Hotak* were plainly and precisely directed to the conduct of a vulnerability assessment rather than, for example, to a suitability assessment or to the question whether an applicant has made himself intentionally homeless;
  - b. When considering suitability the reviewing officer in this case needed:
    - i. a recognition that Mr. Haque suffered from a physical or mental impairment having a substantial and long term adverse effect on his ability to carry out normal day to day activities; i.e. that he was disabled within the meaning of EA s.6 , and therefore had a protected characteristic;

- ii. a focus upon the specific aspects of his impairments, to the extent relevant to the suitability of Room 315 as accommodation for him;
  - iii. a focus upon the consequences of his impairments, both in terms of the disadvantages which he might suffer in using Room 315 as his accommodation, by comparison with persons without those impairments: (s.149(3)(a));
  - iv. a focus upon his particular needs in relation to accommodation arising from those impairments, by comparison with the needs of persons without such impairments, and the extent to which Room 315 met those particular needs: (s.149(3)(b) and (4));
  - v. a recognition that Mr. Haque's particular needs arising from those impairments might require him to be treated more favourably in terms of the provision of accommodation than other persons not suffering from disability or other protected characteristics: s.149(6);
  - vi. a review of the suitability of Room 315 as accommodation for Mr. Haque which paid due regard to those matters
- c. The PSED did not require the reviewing officer to consider whether Mr. Haque needed accommodation which was more than suitable for his particular needs. It required him to apply sharp focus upon the particular aspects of Mr. Haque's disabilities and to ask himself with rigour, and with an open mind, whether the particular disadvantages and needs arising from them were such that Room 315 was suitable as his accommodation;
- d. The reviewing officer was no less obliged to apply rigour to the question whether Mr. Haque's challenges to the suitability of Room

315 as his accommodation were made out in fact, than in any other suitability review, whether or not initiated by a person with protected characteristics;

- e. Where all the applicant's criticisms of the adequacy of his accommodation derived from precisely identified aspects of his disabilities, and from their alleged consequences, a conscientious reviewing officer considering those objections in good faith and in a focussed manner would be likely to comply with the PSED even if unaware of its existence as a separate duty, or of the terms of s.149;
- f. Section 149 EqA did not require the decision maker to give any reasons for a decision to which the PSED applied;
- g. A fair "stand-back" reading of the decision as a whole, in its context, made it plain in my view that the reviewing officer appreciated that Mr. Haque both alleged, and indeed suffered from, a relevant disability
- h. There had been an appropriate focus on Mr. Haque's alleged and real needs, and upon the extent to which accommodation at Room 315 reasonably met them, bearing in mind that the PSED attributed no specific weight to the considerations.

### **Poshteh v RLBC Kensington & Chelsea [2017] UKSC 36**

32. This was a discharge of duty case by reason of refusal of an offer. The PSED was deal with very shortly. It was argued that the review decision had failed to give the required "sharp focus" to the fact of the applicant's disability. The SC rejected this submission stating that

"Viewed as a whole, it reads as a conscientious attempt by a hard-pressed housing officer to cover every conceivable issue raised in the case."



## E: ALLOCATIONS

33. Allocation of housing accommodation is governed by Part 6 Housing Act 1996 and falls within section 29 EqA 2010.

34. The Code of Guidance provides:

**3.20** In framing their qualification criteria, authorities will need to have regard to their duties under the equalities legislation, as well as the requirement in s.166A(3) to give overall priority for an allocation to people in the reasonable preference categories.

...

### *Medical and welfare grounds*

**4.9** The medical and welfare reasonable preference category includes people who need to move because of their disability or access needs, and this includes people with a learning disability as well as those with a physical disability.

## R (HA) v Ealing LBC [2015] EWHC 2375 [2016] PTSR 16

35. The Claimant and her five children were victims of domestic violence. They left the London Borough of Hounslow to escape further domestic violence and applied to Ealing who accepted a full housing duty to her under section of the Housing Act 1996. However, her application to join Ealing's housing register was rejected as she had not been resident in the borough for five years.

36. The residence qualification was held to be unlawful for failing to give reasonable preference to a person to whom a reasonable preference was owed. In addition Goss J held that the residence qualification **breached section 29 Equality Act 2010** as (a) it disproportionately affected women as, ..., they are far more likely to be victims of domestic violence than men and so are significantly less likely to be able to establish sufficient residency criteria to meet the blanket qualifying criteria and (b) there was no sufficient evidence of justification.

37. It was pointed out that the relevant statutory guidance encouraged local housing authorities to consider adopting an exemption to protect the victims of domestic violence when formulating their residence rules.<sup>1</sup> Ealing’s scheme included no such exemption.

**R (XC) v Southwark LBC [2017] EWHC 736 (Admin) [2017] HLR 24**

38. XC was a single, disabled woman. It was her case that she was unable to carry out paid employment or voluntary work because of her disability and because she had caring responsibilities for her adult son.
39. The Council’s allocation scheme gave priority within bands by means of a priority star system. One priority star was awarded to an applicant in a “working household”.
40. One of the issues in the judicial review was whether the design or operation of the Council’s priority star scheme indirectly discriminated against the disabled or against women whose caring responsibilities prevented or reduced their ability to work, either for pay or as volunteers.
41. Dismissing the claim for judicial review, the Court found that:
- a. The effect of the priority star scheme was indirectly to discriminate against those with disabilities and against women;
  - b. The policy had a legitimate aim, namely, as set out in the scheme, the creation of sustainable and balanced communities and encouraging residents to make a contribution to the local community;
  - c. The priority stars had a rational connection to that objective;

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<sup>1</sup> 3.22 When deciding what classes of people do not qualify for an allocation, authorities should consider the implications of excluding all members of such groups. For instance, when framing residency criteria, authorities may wish to consider the position of people who are moving into the district to take up work **or to escape violence**, or homeless applicants or children in care who are placed out of borough (June 2012 statutory guidance, issued pursuant to section 169 HA 1996)

- d. The priority scheme was the least intrusive measure that could be used without unacceptably compromising the objective and so the discrimination could be justified.

**R (C) v LB Islington [2017] EWHC 1288 (Admin) [2017] HLR 32**

42. The Claimant was a profoundly deaf mother of three. She had been living with her husband in the London Borough of Southwark, where she was subject to domestic violence. She left her husband and moved to Islington.
43. The Council's allocations scheme was points based. The Claimant was ineligible to bid for social housing under the allocation scheme as she did not have enough points.
44. The allocations scheme included a local lettings policy, which stated that if new homes were constructed on existing estates, the authority gave priority to residents on those estates. The Claimant alleged inter alia that the local lettings policy unlawfully discriminated against homeless people, victims of domestic violence and therefore women, contrary to art.14 read with art.8 of the European Convention on Human Rights, ss.29 and 149 of the Equality Act 2010.
45. The Court found that there was a clear difference in treatment, which unless justified was unlawful. This was because "those who have had to move from the area in which they had been living due to domestic violence, and have thereby become homeless, will be unable to compete for new housing on the same favourable terms as the tenants of social housing situated in the area in which the new homes have been built. Moreover, that because of the high likelihood of victims of domestic violence being women, that this also amounts to discrimination on the grounds of sex" [75].

46. Further, it accepted that “it is a matter for the court to determine the question of proportionality on the basis submitted by the claimant; albeit, as the policy also concerns the allocation of finite resources, namely social housing, by a body that not only has considerable expertise and experience in these matters, but has been entrusted with this task by Parliament, significant weight should be accorded to the defendant’s decision” [81].
47. However, it found the discrimination to be justified as it struck a fair and proportionate balance between the severity of the consequences for the claimant, and the importance of the aim (meeting the needs of existing tenants and new applicants for social housing, whilst making best use of their stock).

**LB Ealing v R(H & Others) [2017] EWCA Civ 1127 [2018] PTSR 541**

48. In *R (H & Others) v Ealing LBC* [2016] EWHC 841 (Admin) it was held at first instance that the allocations scheme which sought to remove 20% of all available lettings from the general pool and reserve them for model tenants or working households indirectly discriminated against (inter alia) disabled persons because they were much less likely to be able to satisfy the criteria of working 24 hours a week. Further, this discrimination was not justified because the method employed of simply removing 20% of the accommodation was not the least intrusive way of pursuing the rational and legitimate aim being pursued (to encourage tenants to work and be well behaved).
49. The Court of Appeal allowed the Council’s appeal. It held:
  - a. The scheme indirectly discriminated against women, disabled people and the elderly, whom the Council accepted were less likely to be in work than others;

- b. However, the Judge was not entitled to reject the justification defence because it was not open to him on the material before him to find that the method employed by the Council was not the least intrusive way of pursuing the rational and legitimate aim being pursued;
- c. In view of the pending general review of Ealing's Housing Policy, there was no purpose in remitting the issue of justification under EA 2010 s.19(2)(d) and Article 14 for further consideration.

Zia Nabi

Doughty Street Chambers

14 May 2018

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