

Homelessness and the Equality Act 2010

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Homelessness and the Equality Act 2010

How does the EA 2010 apply to how a Local Authority performs its duties under homelessness legislation?

Applications

Accommodation

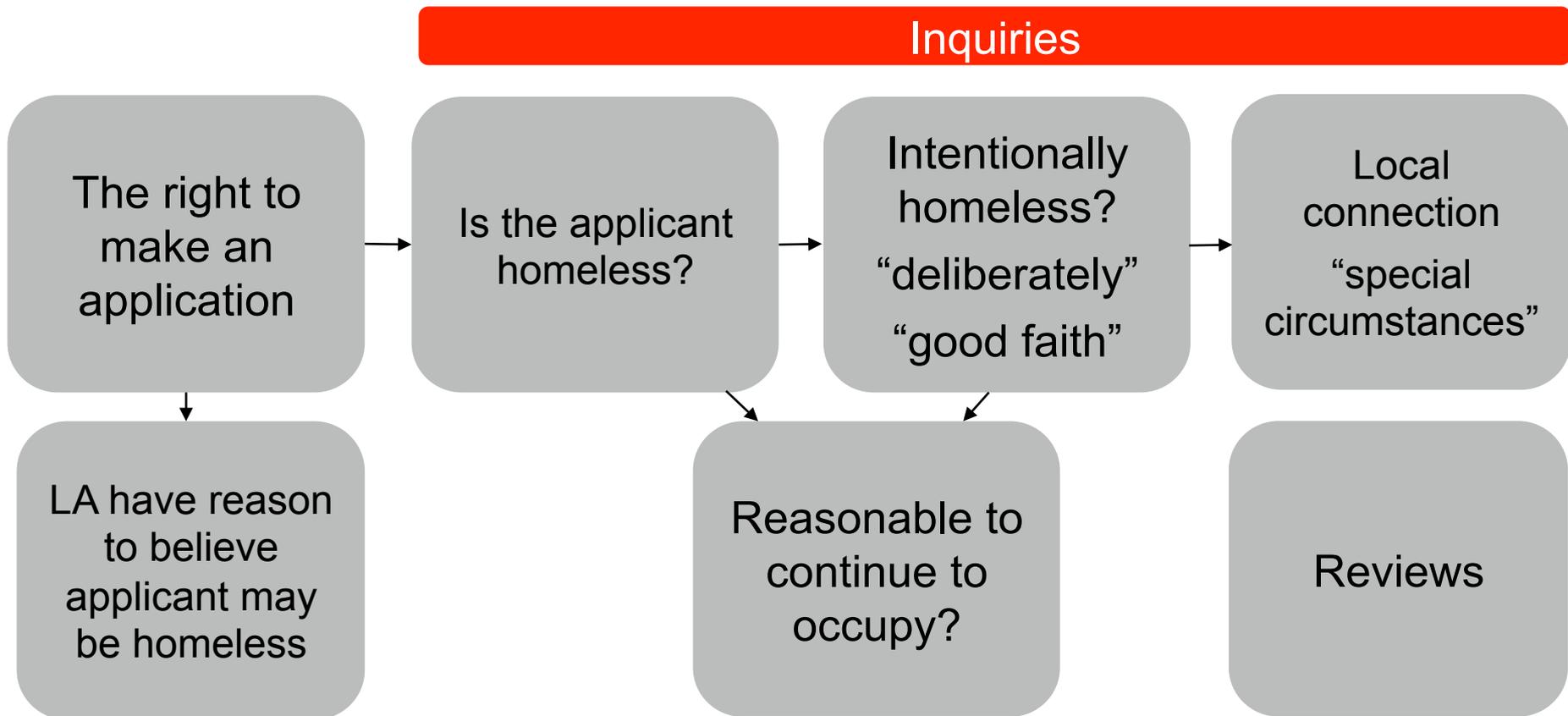
Public Sector Equality Duty

How has the law developed in England

How might it apply to homelessness law in Scotland

Housing (S) Act 1987

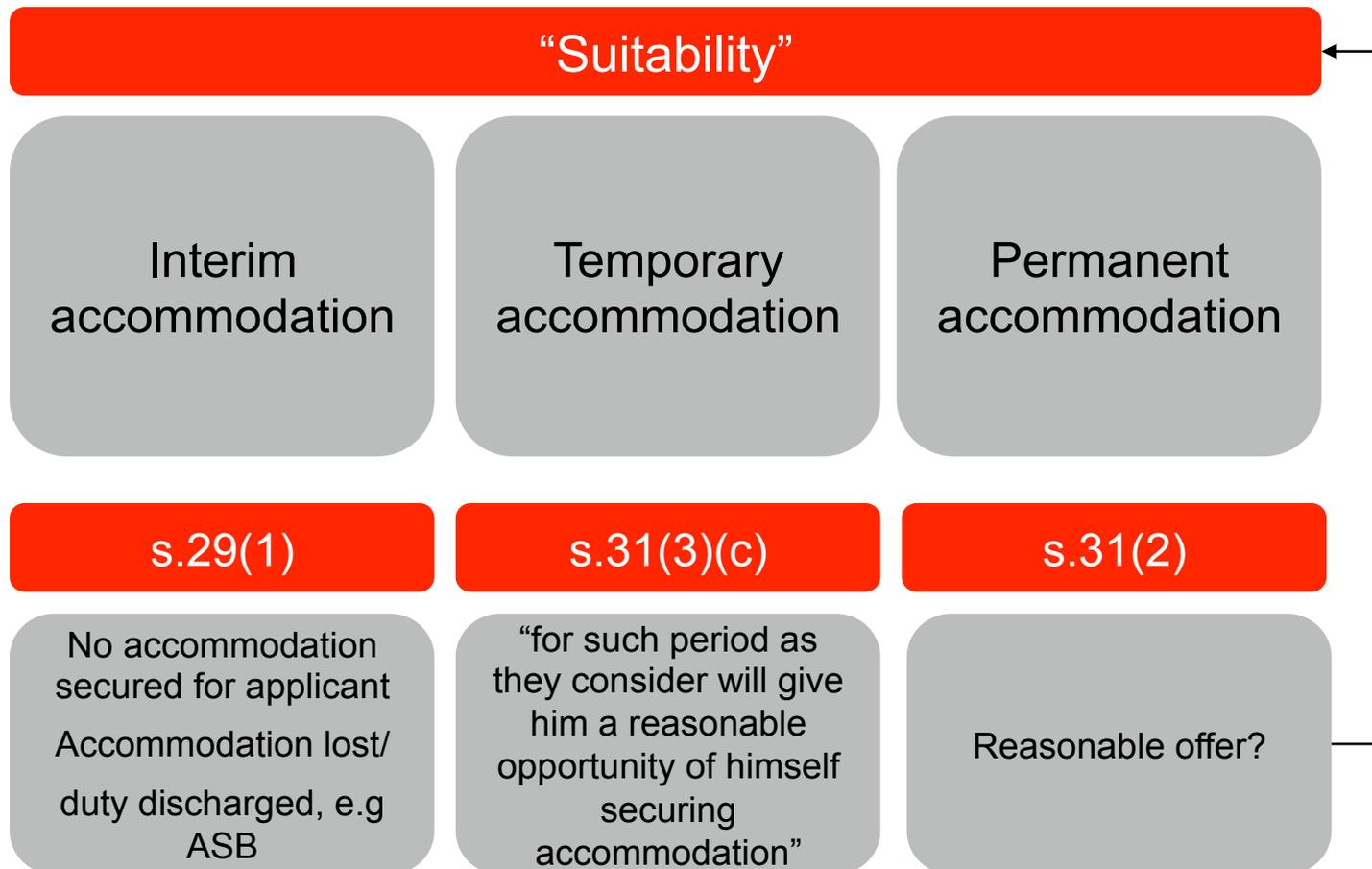
Common issues – homeless applications



Not a full overview of the homeless process

Housing (S) Act 1987

Common issues - homeless accommodation



Homeless applications

Intentionally
homeless?
“deliberately”
“good faith”

26.— Becoming homeless intentionally.



(1) A person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy.

...

(3) For the purposes of subsection (1) or (2) an act or omission in good faith on the part of a person who was unaware of any relevant fact shall not be treated as deliberate.

Homeless review - intentionality

Case study

- Homeless applicant left private let at expiry of notice
- Alleged rent arrears
- Found intentionally homeless
- Review submitted: “mental health has affected my ability to deal with this. I have dyslexia and find it difficult to read and deal with correspondence.”
- Decision: “failed to take adequate steps to prevent your homelessness and did not pay all rent due by you”
- No reference to mental health or dyslexia in decision letter
- **Grounds for further challenge?**

Public Sector Equality Duty

Equality Act 2010

149 Public sector equality duty

- (1) A public authority must, in the exercise of its functions, have **due regard** to 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.

PSED

Protected characteristics – s149(7)

- **age**
- **disability**
- **gender reassignment**
- **pregnancy and maternity**
- **race**
- **religion or belief**
- **sex**
- **sexual orientation.**

Public authority

Public functions

- **s. 50 EA 2010 and schedule 19, parts 1 and 3**
- **A council constituted under Local Government etc. (Scotland) Act 1994 is a public authority.**
- **The discharge of statutory powers and duties in relation to housing and homelessness is a function of a Scottish local authority.**
- **s 150(5) public function - “a function of a public nature for the purposes of the Human Rights Act 1998”**
- **RSLs in Scotland exercise a public function under the Housing (Scotland) Act 2001**
- **See EHRG: Public Authorities in Scotland: Who is covered by the Specific Duties? (July 2017)**

Disability

s.6 EA 2010

A person has a disability if—

- (a) The person has a physical or mental impairment, and**
- (b) the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities.**

See also:

- Schedule 1 to the Act**
- Equality Act 2010 (Disability) Regulations 2010**
- Equality Act 2010 Guidance - Guidance on matters to be taken into account in determining questions relating to the definition of disability**

PSED and disabled persons

advance **equality of opportunity**
S149(1)(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
S149(3)(b)

The steps involved in **meeting the needs of disabled persons** that are different from the needs of persons who are not disabled include, in particular, **steps to take account of disabled persons' disabilities.**
S149(4)

eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act
S149(1)(a)

may involve **treating some persons more favourably than others**
S149(6)

PSED

S153 - Additional specific duties may be imposed on public authorities

Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, as amended.

Equality Impact Assessment

- **Regulation 5 - imposes a duty to assess the impact of applying a proposed new or revised policy or practice against the needs in section 149(1) of the Act.**
- **Local authorities constituted under section 2 of the Local Government etc. (Scotland) Act 1994 are listed by the regulations, as bodies covered by the specific duties.**

CONSIDER: What if a homeless service changes its application procedure? Or how it allocates accommodation?

Pieretti v Enfield LBC [2010] EWCA Civ 1104

- Mr P and wife applied as homeless following eviction
- Rent arrears had accrued due to rent being withheld wrongly having followed incorrect advice
- After eviction order granted, arrears cleared
- GP report: Mr P suffering a depressive reaction diagnosed 1995
- not on any regular medication and had mainly been treated with psychological support from the practice.
- Wife “quite disabled with her chronic depression and her physical problems”.
- **Enfield did not seek to obtain further medical evidence about the appellant and his wife.**

Pieretti

191.— Becoming homeless intentionally.



(1) A person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy.

(2) For the purposes of subsection (1) an act or omission in good faith on the part of a person who was unaware of any relevant fact shall not be treated as deliberate.

- **LA decided that the appellant and his wife had become homeless intentionally because they had delayed in paying rent**
- **Mr P argued in reaching their decision, the authority were in breach of their equality duty towards him under [s.49A\(1\) of the Disability Discrimination Act 1995](#) .**

Pieretti v Enfield LBC [2010] EWCA Civ 1104

Brought under DDA (comparisons of equality duties)

Section 49A DDA 1995

“(1) Every public authority shall in carrying out its **functions** have **due regard** to –

(a) the need to eliminate discrimination that is unlawful under this Act;

(b) the need to eliminate harassment of disabled persons that is related to their disabilities;

(c) the need to **promote equality of opportunity** between disabled persons and other persons;

(d) **the need to take steps to take account of disabled persons' disabilities**, even where that involves treating disabled persons more favourably than other persons [...]

149 Public sector equality duty

(1) A public authority must, in the exercise of its **functions**, have **due regard** to 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;

(4) **steps to take account of disabled persons' disabilities.**

(6) may involve treating some persons more favourably than others

Pieretti – argued by local authority:

1. The duty only applied to **the formulation of an authority's policy and did not apply to individual cases;**
2. The **homeless provisions** were a complete code that comprehensively **addressed the rights and needs of disabled people**, to which **the duty added nothing** (i.e priority need, good faith in terms of intentionality, suitability of accommodation)
3. **A decision** on a homeless application **was not a “function”** within the meaning of s.49A(1) of the 1995 Act;
4. In any case, **the authority had not been obliged to make further inquiries relating to any disability** suffered by the appellant or his wife because they had not been asked to consider it.

Does the duty apply?

“The duty in [s.49A](#) applies both when the local authority is drawing up its criteria **and when it applies them in an individual case**, both of those being an aspect of carrying out its functions ...

... Of course public bodies must factor their duty under [s.49A\(1\)](#) into the planning of their services; and it may well be that the section does not create new individual rights.”

“The part of it with which we are concerned is designed 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.”

Homeless provisions sufficient to take into account disability?

“...There must ... be a culture of greater awareness of the existence and legal consequences of disability, including of the fact that a disabled person may not be adept at proclaiming his disability.

The six specified aspects of the duty in s.49A(1) **complement the duties of local authorities** under Pt VII. Thus it is that, in the guidance issued under ... the Act ... the terms of s.49A are set out.”

Code of Guidance 2005



Para 4.8 – 4.10

4.8 It is essential that applications are handled in a **non-discriminatory way, at minimum taking account of local authorities' duties under **relevant equal opportunities legislation**...**

4.9 As a matter of good practice local authorities should consider **all equalities issues, not just those enshrined in legislation, when handling applications.**

4.10 It should also be noted that section 106 of the 2001 Act **requires the encouragement of equal opportunities and the **observance** of equal opportunity **requirements** in the provision of housing and related services by Registered Social Landlords and **in the exercise of the functions given under the 2001 Act by local authorities.****

Functions?

“... I therefore have no hesitation in concluding that the duty in [s.49A\(1\)](#) of the Act of 1995 applies to local authorities in carrying out their functions— **all of their functions** —under [Pt VII](#) of the Act of 1996. [see also para 15 *Barnsley MBC v Norton* [2011] EWCA Civ 834]

... namely that, **in making determinations under [Pt VII](#) in the areas in which a person’s disability could be of relevance**, a local authority shall “have due regard to ... the need to take steps to take account of disabled persons’ disabilities”.

Inquiries

“Did [the Decision Maker] **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” and, in particular, to whether he acted “in good faith” [35]

“In my view the answer to that question is that she **did so fail** and that, accordingly, she was in **breach of her duty** under [s.49A\(1\)\(d\)](#)”

Pieretti

Summary

The equality duty:

- Does not confer a private right but applies to exercise of functions in **individual cases**
- **Complements** existing homelessness functions and duties
- Sufficient **inquiries** should be made

Hotak v Southwark LBC [2015] UKSC 30

Kanu v Southwark LBC

Johnson v Solihull MBC



Hotak concerned whether the applicants were vulnerable so as to be in priority need

The equality duty and **Pieretti approach applies to the PSED** under 2010 Act [73]

Intention of Act there should be a **culture of greater awareness of the existence and legal consequences of disability** [74]

The duty “must be exercised in **substance, with rigour, and with an open mind**” [75]

The public sector equality duty applies to an authority **when performing its functions under homeless legislation** [76]

Hotak

What steps should the decision maker take?

“It is therefore appropriate to emphasise that the equality duty, in the context of an exercise such as a review, does require the reviewing officer to **focus very sharply** on:

- (i) **whether the applicant is under a disability (or has another relevant 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 if and when homeless; and**
- (iv) **whether the applicant is as a result “vulnerable”.**”

Hotak – reasoning in decision letters

Lord Neuberger at [79]

In **Holmes-Moorhouse [2009] 1 W.L.R. 413** at [47]–[52], I said that a “benevolent” and “not too technical” approach to s.202 review letters was appropriate, that one should not “search for inconsistencies”, and that immaterial errors should not have an invalidating effect. I strongly maintain those views, but **they now have to be read in the light of the contents of [78] above in a case where the equality duty is engaged.**

Revisiting Case study



26.— Becoming homeless intentionally.

(1) A person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy.

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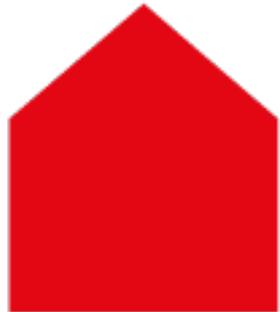
(3) For the purposes of subsection (1) or (2) an act or omission in good faith on the part of a person who was unaware of any relevant fact shall not be treated as deliberate.

Intentionally
homeless?

“deliberately”

“good faith”

- **Decision: “failed to take adequate steps to prevent your homelessness and did not pay all rent due by you”**
- **No reference to mental health or dyslexia in decision letter**
- **To what extent were any acts or omissions in relation to payment of rent affected by mental impairment relevant to whether they were deliberate or in good faith**
- **Consider: E.g. problems dealing with official correspondence, Housing Benefit. What about misunderstanding rights?**



Homeless accommodation



Case study

“suitable accommodation”

- Homeless applicant suffers from COPD, due to breathlessness upon exertion; utilises wheelchair
- Is provided accommodation on 5th floor of high rise
- Lifts often break down
- **CONSIDER: Is there a basis to challenge on basis PSED has not been complied with?**
- **CONSIDER: Is there a difference to the argument that could be made for interim v. permanent offer of accommodation?**
- **CONSIDER: What if this was a family and the dependent child was a wheelchair user or had housing needs due to disability?**

Hackney LBC v Haque



Applicant suffered from pain in his back, shoulder, neck and legs as well as depression and anxiety.

He requested a review of the suitability of the hostel room, stating as follows:

- the room was so small that it restricted his movement and exacerbated pain
- the room's size and policy of not allowing visitors, left him isolated and prevented him from receiving visits from his children, which exacerbated his depression and anxiety;
- the hostel did not have laundry facilities and his physical disability prevented him from carrying substantial amounts of laundry to the launderette; and
- as a result of all of these issues, the dosage of his anti-depressant medication had been increased.

Hackney LBC v Haque

[2017] EWCA Civ 4 [2017] H.L.R. 14

“The question, raised by an applicant to whom the full duty was owed, whether the accommodation already provided was “suitable” within the meaning of [HA ss.206 and 210](#).”

HA s.206 Discharge of functions by local housing authorities



(1) A local housing authority may discharge their housing functions under this Part only in the following ways—

- (a) By securing that suitable accommodation provided by them is available ...

Underlying Principles of PSED

Haque [21] – [24]

“The aim is to bring **equality issues into the mainstream**, so that they become **an essential element in public decision making** ... of any kind ”

“The duty must be exercised in **substance, with rigour and with an open mind**. It is not a question of ticking boxes.”

“Third, the concept of due regard is to be distinguished from a requirement to give the PSED considerations specific weight. **It is not a duty to achieve a particular result**”

“What emerges as a general principle is the **sharp focus** required of the **decision maker** upon the **relevant aspects of the PSED** where it is engaged by the contextual facts about each particular case”

Haque

Required a sharp focus of decision maker:

- 1. to recognise that the appellant had a disability [s6 EA 2010];**
- 2. to focus upon specific aspects of his impairments to the extent that they were relevant to the suitability of the accommodation;**
- 3. to focus on the disadvantages he might suffer when compared to a person without those impairments;**
- 4. to focus on his accommodation needs arising from those impairments and the extent to which the accommodation met those needs;**
- 5. to recognise that the appellant's particular needs might require him to be treated more favourably than a person without a disability;
and**
- 6. to review the suitability of the accommodation, paying due regard to those matters.**

PSED – approach Scots law context

No homeless decisions but consider *Hunter v SaaS* [2016] CSOH 71; 2016 S.L.T. 653 at [73] – [78]



SMs amended regs in relation to age limitation on student loan eligibility

“The duty on the public authority arises not only in respect of policies but to the **“exercise of their functions”. It arises not only into the “formulation” of policies or changes made, **but also to their implementation.**”**

R (BAPIO Action Ltd) v Royal College of General Practitioners [2014] EWHC 1416 (Admin) at 29 where it states:

“If there are **grounds to believe that the manner in which public functions is being exercised is not fulfilling the statutory goals then **due regard** must be had to exercising them in a manner which does”**

Permanent accommodation and PSED

Scotland

“... secure that permanent accommodation becomes available for his occupation.”

Permanent accommodation

S32(5):

s.31(2)

“accommodation” does not include accommodation—

(a) that is overcrowded within the meaning of section 135 or which may **endanger the health** of the occupants,

(b) that does not meet any **special needs** of the applicant and any other person referred to in section 24(2), or

(c) that it is **not reasonable for the applicant to occupy**.

Permanent accommodation - Scotland

In deciding to make an offer, sharp focus by decision maker:

1. to recognise that the applicant had a disability
2. to focus upon specific aspects of her impairments to the extent that they were relevant to **whether the accommodation was reasonable to occupy** by the applicant;
3. to focus on the disadvantages she might suffer when compared to a person without those impairments;
4. to focus on his accommodation needs arising from those impairments and the extent to which the accommodation met those **special needs**;
5. to recognise that the applicant's particular needs might require him to be treated more favourably than a person without a disability; and
6. to review whether the accommodation was **reasonable to occupy**, paying due regard to those matters.

Haque

What about interim accommodation

Consider how might apply in our case study

Interim
accommodation

s.29(1)

- **In Haque - Analysis of PSED was in the context of English Housing Act:**
 - **“substantial, but not complete overlap b/w those with priority need for accommodation and those with protected characteristics”**
 - **S206(a) “... by securing that suitable accommodation provided by them is available”**

Haque

Scotland?

- No priority need
- Interim accommodation under s29 1987 Act:
 - “they shall secure that accommodation is made available for his occupation”
- No “suitability” requirement (but see The Homeless Persons (Unsuitable Accommodation) (Scotland) Order 2014)
- Recall in Hotak:

The public sector equality duty applies to an authority when performing its functions under homeless legislation [76]- approved Pieretti “**all of their [homeless] functions**”

Why is PSED important

Further points

- **A decision which was otherwise lawful, may be held unlawful at JR because it does not comply with the equality duty (Hotak) – standalone ground for JR**
- **Failure to comply with the PSED may adversely affect an authority's ability to show that it has complied with the anticipatory duty to make reasonable adjustments for disabled people [s 29(7)]**
- **If equality duty not met may be more difficult for an authority to justify the discriminatory effect of a provision, criterion or practice (PCP) as being a “proportionate means of meeting a legitimate aim”, under section 19(2)(d) (indirect discrimination),**

Inquiries

s28 1987 Act... they shall make such inquiries as are necessary

Birmingham City Council v Wilson [2016] EWCA Civ 1137, LJ Sales at [33]

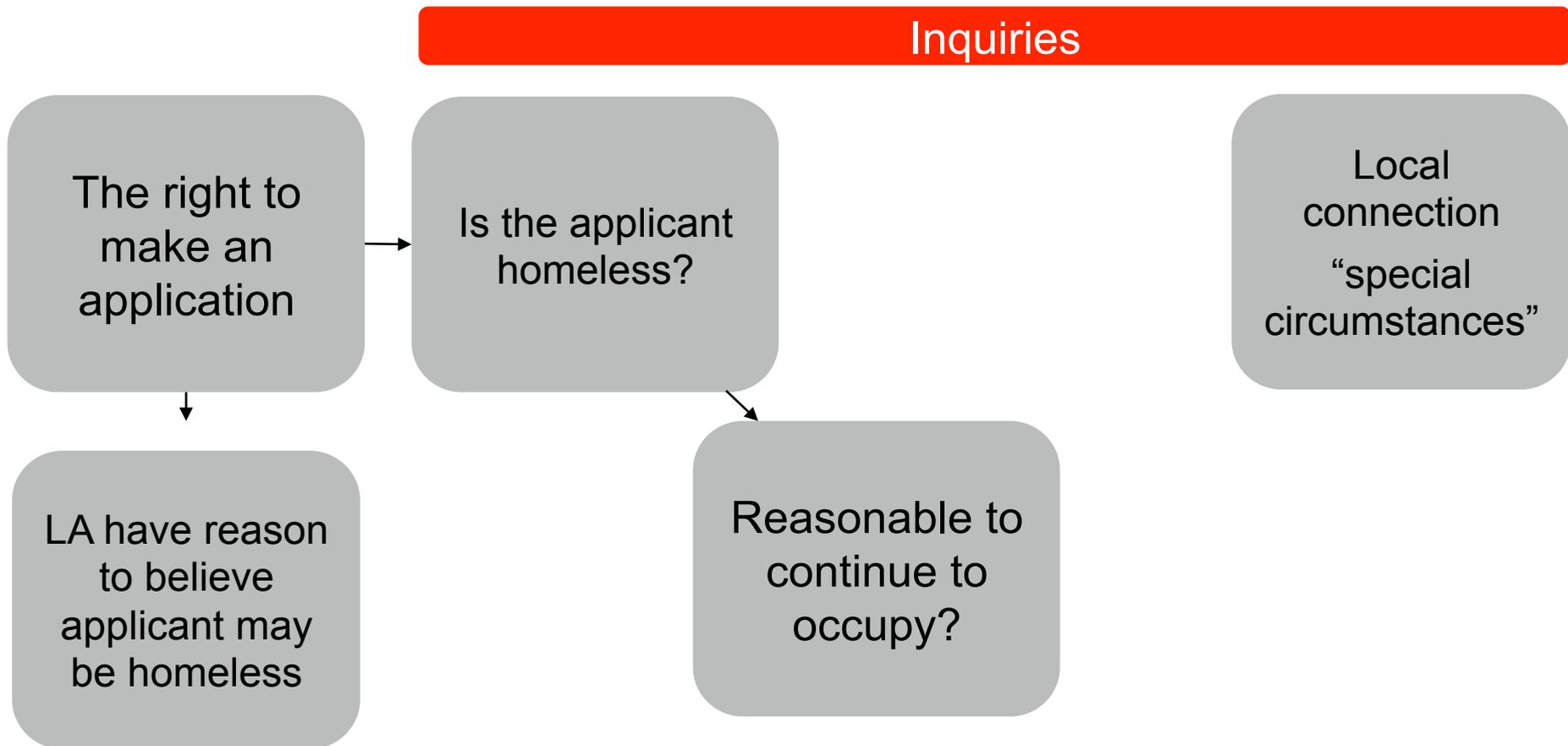
- **The authority has a duty to take reasonable steps to inform itself ... in a manner compatible with the PSED.**
- **It is for the decision-maker, and not the court, to decide upon the manner and intensity of enquiry to be undertaken [see also *Poshteh v RLBC Kensington & Chelsea* [2017] UKSC 36 [38-41]]**
- **A court should be hesitant to uphold a ground of appeal which relates to a matter which the authority was never invited to consider, and which was not an obvious matter that it should have considered.**
- **Where a decision-maker is not *invited* to consider an alleged disability, it would be wrong, in light of the PSED, to say that he should consider disability only if it is obvious. The decision-maker needs to have due regard to the need for him to take steps to take account of a disability.**

Inquiries

Birmingham CC v Wilson. The key question is therefore:

Did the authority fail to make further inquiry, in relation to some such feature of the evidence presented to it, which raised a *real possibility* that the appellant was disabled, in a sense relevant to its assessment under the homelessness legislation?

How PSED might apply to these other homeless application issues?



How PSED might apply to these other accommodation issues

Interim accommodation

s.29(1)

Accommodation lost/
duty discharged, e.g
ASB

Consider e.g.

mental health problems, which in the past have given rise to behaviour perceived as threatening or antisocial.

Temporary accommodation

s.31(3)(c)

“for such period as they consider will give him a reasonable opportunity of himself securing accommodation”

The PSED may be engaged if due to e.g. a mental disability, it is more difficult for the applicant to secure his own accommodation.

i.e. consider ability to bid, literacy issues, support needs etc

Conclusion

Sharply focus!



Equality Act 2010

CHAPTER 15

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PART 2

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CHAPTER 1

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