





The PSED in homelessness

Adrian Marshall Williams, Garden Court Chambers

29th March 2023



GARDEN COURT CHAMBERS



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s. 149 Equality Act 2010

- (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.



s. 149 Equality Act 2010

(3) Having due regard to **the need to advance equality of opportunity** between persons who share a relevant protected characteristic and persons who do not share it **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;

(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;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low



s. 149 Equality Act 2010

(4) 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.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.



s. 149 Equality Act 2010

(7) The relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.



Pieretti v London Borough of Enfield [2010] EWCA Civ 1104

“31...the duty in s.49A(1) of the [Disability Discrimination Act] 1995 applies to local authorities in carrying out their functions – all of their functions – under Part VII of the Act of 1996.”

“34... little difference between a duty to "take due steps to take account" and the duty under s.49(A)(1)(d) to "have due regard to ... the need to take steps to take account”

“35. ...did she 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 subsection (1) of s.191 of the Act of 1996 and, in particular, to whether he acted "in good faith" within the meaning of subsection (2) thereof?”



Pieretti v London Borough of Enfield [2010] EWCA Civ 1104

“36... she did so fail and that, accordingly, she was in breach of her duty under s.49A(1)(d)...

...to her survey of the appellant's unusual history of payment of rent, not easily to be explained, the reviewing officer needed to add both the report of the GP that, for at least 13 years, the appellant had been suffering a depressive illness and the appellant's own claim on the second form that he was subject to a disability within the meaning of s.1(1) of the Act of 1995...

...the law required the reviewing officer (and, for that matter, the initial decision-maker) to take steps to take account of the appellant's disability, i.e. to make further inquiries into whether it existed and if so whether it was relevant to the decision under s.191.”



Where applicable

- Triggered by protected characteristic relevant to decision
- Where obvious, raised or real possibility
- Role of disability in vulnerability or suitability are just examples of where most obvious



Content of duty in vulnerability

“78...where the issue is whether an applicant is or would be vulnerable under section 189(1)(c) if homeless, an authority's equality duty can fairly be described as complementary to its duty under the 1996 Act. More specifically, each stage of the decision-making exercise as to whether an applicant with an actual or possible disability or other "relevant protected characteristic" falls within section 189(1)(c), must be made with the equality duty well in mind, and **"must be exercised in substance, with rigour, and with an open mind..."**

...the equality duty, in the context of an exercise such as a section 202 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 & Ors v Southwark LBC & Anor [2015] UKSC 30



Assessing compliance

- Substance not form

“79....in many cases, a conscientious reviewing officer who was investigating and reporting on a potentially vulnerable applicant, and who was unaware of the fact that the equality duty was engaged, could, despite his ignorance, very often comply with that duty. However, there will undoubtedly be cases where a review, which was otherwise lawful, will be held unlawful because it does not comply with the equality duty”

Deciding Mr Kanu’s case:

“82. I would not, however, have allowed his appeal based on the equality duty.
... Ms Emmanuel did approach the question of Mr Kanu's vulnerability in a sufficiently full and considered way to satisfy the equality duty. The letter appears to identify each aspect of his disability; to address with care the questions of how they would be dealt with if he was homeless; how they would affect him, if he was homeless; whether he would therefore be vulnerable; and why, in Ms Emmanuel's view, he would not.”



Assessing compliance: Not a sequential or 4 stage test

“53. ...It would be extraordinary if, having dismissed the debate about whether the assessment of vulnerability was a two-stage or a one-stage test as "arid", Lord Neuberger intended to lay down a rigid four stage test which had to be applied in all cases engaging the PSED. That would, indeed, be to force reviewing officers into a straitjacket...”

McMahon v Watford Borough Council [2020] EWCA Civ 497



Assessing compliance: Compliance without awareness?

“51. ...The answer may well lie in the focussed nature of a vulnerability assessment of a particular individual (as in Kanu)...”

McMahon v Watford Borough Council [2020] EWCA Civ 497



Assessing compliance: successful challenges

“64. Haque has been followed and applied in subsequent cases: *Lomax v Gosport BC* [2018] EWCA Civ 1846; [2018] HLR 40 (whether it was reasonable for a disabled person to continue to occupy accommodation); *Kannan v Newham LBC* [2019] EWCA Civ 57, [2019] HLR 22 (whether temporary accommodation had ceased to be suitable). **In both those cases this court held that a review decision was vitiated by non-compliance with the PSED because of a failure to take specific features of the case into account...**”

McMahon v Watford Borough Council [2020] EWCA Civ 497



Content of duty in assessing suitability: *Haque v Hackney*

- (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 (see 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: see 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: see s. 149(6).
- (vi) A review of the suitability of Room 315 as accommodation for Mr Haque which paid due regard to those matters.



Content of duty in assessing whether reasonable to continue to occupy

“43. In the light of these authorities Mr Lewin proposed the following structure as applied to this case:

- i) A sharp focus on whether Ms Lomax was disabled.
- ii) A sharp focus on the extent of her disabilities.
- iii) A sharp focus on the likely effect of the disabilities, when taken together with any other features, on Ms Lomax for as long as she continued to occupy the property.
- iv) A sharp focus on Ms Lomax' particular needs in relation to accommodation which arise from her disabilities and the extent to which her current accommodation meets those needs.
- v) A comparison between Ms Lomax' accommodation needs and the accommodation needs of people without her particular disabilities.
- vi) A recognition that when considering whether it was reasonable for her to continue to occupy her property Ms Lomax might need to be treated more favourably than others without her disabilities.”

Lomax v Gosport Borough Council [2018] EWCA Civ 184



Content of duty in assessing whether reasonable to continue to occupy

“45....in performing a comparative exercise between Ms Lomax' particular needs and disabilities on the one hand, and general housing conditions in Gosport on the other, there is a serious danger that the sharp focus becomes blunted. Although he did not go so far as to say that section 177 (2) was irrelevant in such a case, he stressed that any consideration of general housing conditions must be astute to identify the appropriate comparators, and must take account of the real differences between Ms Lomax' housing needs and the needs of others without her particular disabilities.”

“50. I agree with Mr Hodgson that a generalised reference to the situation of people on the council's housing list, who may or may not have disabilities, let alone disabilities as severe as Ms Lomax', does not have the required sharp focus on Ms Lomax' particular disabilities and the consequences for her of remaining in her current accommodation; and the particular reasons why continuing to occupy her current accommodation would continue to damage her mental health (and in due course her physical health).”



Failure to comply: *Kannan v Newham LBC* [2019] EWCA Civ 57

“21. The reviewing officer's treatment of Mr Kannan's disability was also highly unsatisfactory. The reviewing officer acknowledged in paragraph 14 of his decision Mr Kannan's description of "severe pain" after climbing the stairs; but by paragraph 20 it had been down-graded, without any explanation, to "uncomfortable and inconvenient"...

...His unexplained down-grading of the severe pain felt by Mr Kannan cannot be described as a sharp focus on Mr Kannan's disability, its extent or its likely effect. It also overlooks Dr Thakore's opinion that a ground floor flat (or a flat accessible by lift) was not a matter of convenience, but a housing need.”

23. While it is legitimate for a reviewing officer to consider housing conditions in the locality, when he does so through the lens of the public sector equality duty it is not adequate simply to refer to the generality of persons who are not living in ideal conditions. The reviewing officer did not consider whether any of those who were not living in ideal conditions had disabilities.”



PSED and inquiries

Biden v Waverley Borough Council [2022] EWCA Civ 442

“43. The issue that we must decide to determine this appeal is a very narrow one, namely: should Ms Donaldson have made the inquiries she deemed necessary on matters relating to the incidence of gender reassignment hate crime in the area of the accommodation offered to Mrs Biden of a Lesbian, Gay, Bisexual, Transgender (LGBT) liaison officer rather than the PCSO?”

“59. I agree with Mr Rutledge's analysis when he aligns the details of Ms Donaldson's review decision against the suggested requirements of the discharge of PSED in the Haque case at paragraph 43....”



Future cases

- Use of wider range of protected characteristics
- Consider structural effects of discrimination which need to be eliminated
- Focus on identifying adverse impact to be assessed
- Cases where less clear alignment of PSED and issue in the decision
- Identifying framework of issues to consider following *Hotak* and *Haque* to put forward issues for consideration and assess substantive compliance



Challenges to policies / procedures

114. ...The nature of the system, which involved matching properties based on time on the waiting list, did not of itself demonstrate that Birmingham had had regard to the impact on a disabled person of the period of time spent on the waiting list waiting for suitable accommodation. In those circumstances, the Judge was also entitled to find that Birmingham had not established that it had had due regard to the matters referred to in section 149 of the 2010 Act.

R (Elkundi) v Birmingham City Council [2022] EWCA Civ 601







Going Forward

The PSED and housing law

Nick Bano, Garden Court Chambers

29th March 2023



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PSED toolbox

- *TM v Metropolitan* [2022] 1 WLR 1261 (tenant's lawyers' favourite case because the PSED point actually succeeded in a court of record).
- *Patrick v London & Quadrant* [2020] HLR 3 (High Court gives guidance on PSED in possession proceedings).
- *Forward v Aldwyck* [2020] 1 WLR 584 (approach to remedy, and the CA approves the *Patrick* guidance).
- *Bracking v SSWP* [2014] EqLR 60 (guidance on the broader principles of the PSED, not specific to possession cases)
- *Rosebery v Williams* [2021] 12 WLUK 464 (thorough first-instance judgment from HHJ Luba KC, allowing the PSED defence).



Our first task: ‘triggering’ the PSED

- Can we show that they already knew about a disability/relevant PC?
- If not, how can we prove disability/relevant PC?
- Can we prove the relevance of the disability/relevant PC to the possession claim?
- E.g. *Forward*: his defence was “I was ‘cuckooed’ because of my mental ill-health”, but he only managed to prove a physical disability so the PSED was irrelevant to his case.
- E.g. *TM*: litigant was prejudiced by a breach of the PSED because he had to face proceedings in which he could not take part, due to capacity.
- Our job is to provide the material that they’ll have to consider in their PSED assessment. The less room for manoeuvre we give them, the better.



Medical evidence: as much as possible, as soon as possible

- *Patrick* is a cautionary tale. High Court said ‘eleventh hour’ disability evidence might lead to a less thorough PSED exercise.
- This may no longer be good law: the medical evidence was raised at a similar time in the *TM* case, and the Court of Appeal was very critical of the landlord’s ‘confirmation bias’.
- Cases from other contexts also suggest that *Patrick* might be wrong: *R (Rowley) v Cabinet Office* [2021] 1 WLR 1189 at [43] (“*the standards of scrutiny remain the same*”).
- But don’t risk it!
- If you really can’t get medical evidence at an early stage, it may be worth writing to the landlord to point out the PSED puts duty of inquiry on them (*R (Sheakh) v Lambeth* [2022] PTSR 1315 at [10]).



Relationship with discrimination defences

- Before *TM*, landlords' lawyers often used to argue that the PSED couldn't work independently of discrimination: if you lost on discrimination, you lost on the PSED.
- High Court judgment in *TM* shows that the s.15 EqA defence failed at trial and on appeal.
- Court of Appeal allowed the appeal and dismissed the claim in *TM* on the sole ground of a breach of the PSED.
- But they do work well together. In *R (Coll) v SoS for Justice* [2017] 1 WLR 2903, Baroness Hale suggested that public authorities will struggle to prove 'proportionality' if they have not complied with the PSED.



Retrospective compliance: how do we shoot at moving targets?

- Because the PSED is a continuing duty, landlords often re-comply as the case proceeds.
- It is (probably) lawful to comply late, or to re-comply in light of new evidence (*TM*).
- BUT there are hints & suggestions from the courts that late compliance should be subject to greater scrutiny (*TM* at [39, 65], *Ward & Gullu v Hillingdon* [2019] PTSR 1738 at [76]).
- The question is: are there any continuing consequence of a breach?
- Good material for final witness statements:
 - Stress of litigation;
 - Exacerbating disabilities;
 - Intensifying neighbour disputes;
 - What the client thinks the landlord should have done differently, or would have done if they had understood the disability (e.g. *Rosebery* on ‘specialist expertise’).



Race in the social housing context

- Racial bullying & discrimination is not uncommon – take early instructions. What is the underlying nature of the neighbour dispute?
- Section 149(1)(a) includes “*harassment, victimisation and any other conduct that is prohibited under this act*”.
- “Harassment” could include racial comments, taunts, jibes, ‘banter’, etc. The landlord must have due regard to the need to eliminate it!
- See, e.g., *Guinness v England (Legal Action, October 2019)*: racial bullying emerged during trial.
- See e.g. *TJ v London & Quadrant (Nearly Legal, 20th December 2020)*: a neighbour with a long & undisclosed history of racial harassment.



Institutional prejudices: using publicly available material

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NEWS

Clarion accuses Londoners of making it difficult for tradespeople to complete repairs so they can claim more money in damages

Susan Clinton blamed people's "chaotic lifestyles" for delaying tradespeople being able to make repairs

 Peter Apps
@PeteApps

Shocked to hear a source say that when landlords talk about 'ritual bathing' in the context of damp, it's a reference to Muslim families washing hands, face and feet before prayers. If that is the case, it's about the most ignorant, xenophobic and disgusting thing I've ever heard




Refugees

Social landlord in England said mould was 'acceptable' in refugees' homes

Rochdale Boroughwide Housing's failure to treat severe mould led to the death of two-year-old Awaab Ishak

Robert Booth *Social affairs correspondent*

Tue 28 Mar 2023 06.00 BST

A social landlord claimed refugee tenants were lucky to have a roof over their heads and that mould was "acceptable" in their homes, an investigation has found.

A manager at Rochdale Boroughwide Housing (RBH), the housing provider whose failure to treat severe mould **led to the death** of two-year-old Awaab Ishak, made the remark to a colleague, according to a damning report into the landlord's wider



Monitoring & data gathering: borrowing a JR tactic

- What is the broader impact of eviction policies and decisions on protected groups? If the landlord doesn't know, that might – itself – be a problem.
- The PSED can include a duty to monitor policies & collect impact evidence (*R (Khalsa Academies Trust) v SoS for Education* [2021] EWHC 2660 at [111(ii)]).
- Does the landlord's ASB enforcement policy or 'mandatory grounds' policy affect people with behavioural disabilities?
- Does the landlord's rent recovery or evictions policy affect benefits-capped single-parent households, who are more likely to be women? (*R (SG) v SSWP* [2015] 1 WLR 1449 at [2]).



Impact of an eviction

- How would a disabled person fare if evicted? Successful point in *Luton v Durdana* [2020] HLR 19 at [21-22].
- Would the client be subject to broader disadvantage/discrimination in the private sector?
- ‘No DSS’ will have a particular impact on several protected groups.
- Research from Heriot-Watt University shows that people from Black & minoritised racial backgrounds are significantly more likely to face homelessness & discrimination by PRS landlords.
- The government’s own assessment of the ‘right to rent’ scheme showed that one in five landlords admitted to being aware of racial discrimination in private letting in their area.



Thank you

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