In the latest instalment of a long line of Pt VII Housing Act 1996 "vulnerability" cases, Mrs Justice Rose observes—seemingly in jest—that perhaps "old Pereira habits die hard". We agree. In the wake of Hotak and Panayiotou, the judgment in Rother demonstrates the continuing challenge of what HH Judge Luba QC described in the course of oral argument in Johnson as "drinking from the pure waters" of s.189(1)(c) of the Housing Act 1996; avoiding the "dangerous … glossing" of the "primacy of the statutory words" that has characterised the interpretation of "vulnerability" in priority need homelessness assessments. Many of those key problems that characterised the "steady stream" of case law in the Pereira test live on with reference to this new Hotak formulation, albeit in a diluted form. In trying to get back to "those plain words" of s.189(1)(c), the pure waters still look decidedly murky.

In this case comment, we outline the facts and key focus of the court’s decision in Rother, before reflecting on three further issues:

1) the use of external medical advisors;

2) the lack of consideration of s.149 of the Equality Act 2010; and

3) the position in Wales following the Housing (Wales) Act 2014.

Facts

Cases on priority need generally catalogue conflicting assessments of medical reports, disagreements over physical and mental health, and a band of external "medical advisors" casting their own opinions. The facts of Rother are no different. Having slept in his car for five
weeks, the 54 year-old Mr Freeman-Roach applied for assistance under Pt VII of the 1996 Act at
Rother District Council. His application detailed two strokes—in 2006 and 2013—which had affected
his ability to communicate, and osteoarthritis in his hands, ankles and right knee. Following an initial
interview, the officer at Rother noted his speech problems and swelling caused by osteoarthritis, but
the authority’s “medical advisor” determined that neither “rendered Mr Freedman-Roach significantly
more vulnerable than an ordinary person”. Informed by the medical advisor’s report and
correspondence with Freeman-Roach’s previous GP, which did not detail his mobility being
compromised or any requirement for “input from social services”, the officer determined that he was
not in priority need of assistance.

Freeman-Roach sought a review under s.202 of the 1996 Act. In support of this review further
medical reports were obtained, including a letter from his current GP who described him as being “in
a desperate situation” and “vulnerable”. A further three reports were sought from external medical
advisors, all concluding that Freeman-Roach was not “significantly more vulnerable than an ordinary
person” as a result of his medical issues.

He was provided with interim accommodation during the period of the initial application and again at
the point of review—with a two month gap in-between the two. The authority refused to provide
interim accommodation pending appeal, but as a result of an injunction issued by the County Court,
Freeman-Roach was placed in interim accommodation pending the outcome of the present appeal.

The decision

In their decision letter, the reviewing officer had clearly applied the test laid out in Hotak: whether
Freeman-Roach was “significantly more vulnerable than an ordinary person in need of
accommodation.” Subsequent appeals remind the authors of the “tube of toothpaste” analogy for
discretion adopted by Hawkins—squeeze it at one point and it oozes out elsewhere. In an echo of
the long line of cases following Pereira, the key issue before the court was whether the reviewing
officer should define what they mean by those key elements that carry this discretionary weight:
“significantly”, “vulnerable”, or the characteristics attributed to the “ordinary person”.

Put another way, the court was tasked with considering if Tetteh remained good law post Hotak. The
principle is a well-established one: in stating reasons a reviewer officer need not “spell out
precisely what attributes of the normal homeless person he had in mind” and any decision letter
needs to be “read together as a whole”, not “dissected into small pieces”. The contention of
Freeman-Roach was that the shifting test in Hotak and the subsequent decision in Panayiotou, renders
the test more “nuanced and complex” than the longstanding Pereira formulation, and this changes the
demands of giving reasons. In other words, the issue before the court was whether it was enough to
provide a broad statement of the Hotak test at the start of a decision letter, without explicitly returning to its key elements throughout the statement of reasons.

The court decided that Tetteh did remain valid authority. Mrs Justice Rose held that:

“I consider that Tetteh remains good law post Hotak so that the review decision cannot be faulted
because it failed to define ‘vulnerable’ or ‘significantly’ or failed to list the attributes of the ordinary
person if made homeless.”

She considered that the reviewing officer had provided sufficient reasons for Freeman-Roach to understand why he had been found not in priority need, and to be satisfied that they applied the
correct test in reaching this conclusion. Importantly, however, Mrs Justice Rose introduced the
broad-ranging caveat that “how much detail needs to be given of the reasons for the council’s
decision in a particular case depends on the circumstances of that case.” Readers may assume
therefore that some unpacking of those key elements may be necessary in certain factual scenarios,
particularly, for instance, where the reviewing officer places particular reliance on the applicant being
“significantly” more vulnerable than an ordinary person.

The second key strand to the court’s reasoning was a potent re-statement of the principle laid out by
Lord Neuberger in Holmes-Moorhouse that courts must “not be too zealous in the examination of a
reviewing officer’s decision in order to identify errors of law”, and should avoid a “nit-picking
approach”. Loveland’s concerns about the “indulgent benevolence” of this sentiment are clearly set
to endure, with concurring judgments from Lord Justices Lewison and Longmore underscoring that
“the reviewing officer is not writing an examination paper in housing law ... nor is he required to
expound on the finer points of a decision of the Supreme Court” and that “it is not for the decision
letter to ‘demonstrate’ anything; it is for the applicant to demonstrate an error of law”. As observed by Cowan, where no such meaning needs to be specified, "pity my poor students who have to write examination essays on the meaning of vulnerability”.

Analysis

Perhaps the most striking feature of the case for any reader, particularly those less familiar with assessments under Pt VII of the 1996 Act, is the sheer volume of medical advisors and GPs involved in the assessment of the applicant’s medical issues. There are no fewer than five medical professionals detailed in the judgment who provide varying assessments of Freeman-Roach: Drs Cooper, Arokadare, Rubery, Thakore, and Hornibrook—three of whom were instructed by the Council as "medical experts". Importantly, these instructed advisors did not offer general assessments of Freeman-Roach’s health, but instead endeavoured to make specific conclusions based on the language adopted in Hotak: namely, whether the applicant was rendered "more vulnerable than an ordinary person" by virtue of their medical needs.

This use of external medical advisors is not surprising; this is in an area of law that sustains such an eco-system. Perhaps the most high profile company, NowMedical, details their capacity to turn around a "report with reasons in one working day" with "reference to relevant legislation and case law, including Johnson/Hotak". Indeed, medical assessments, given the sheer complexity of the issues often under consideration, must surely be a useful part of any decision for a homelessness officer tasked with such a difficult assessment of an individual’s comparative vulnerability, especially where this is based on pre-existing medical reports which may be ill-suited to the task.

The conclusions of these assessments that appear to shoulder much weight, however, sit oddly alongside the key sentiment in the judgment in Hotak — echoed by Mrs Justice Rose— to “avoid expressions which risk supplanting the statutory test” and "which may mean different things to different people". Lord Neuberger’s concern was that “certain expressions seem to have entered the vocabulary of those involved in homelessness issues”, or as put more colourfully by Lady Hale, “glossing the plain words of statutory provisions is a dangerous thing”. Here, this same reliance on formulations which characterised the much derided Pereira test, seems to be bleeding over into the axiom "significantly more vulnerable than an ordinary person”. This language is found not just in the assessment of the homelessness officer tasked with the decision, as would be expected, but also as the conclusions of medical reports commissioned to support it.

Second, the judgment does not consider the application of the "public sector equality duty" (PSED) under s.149 of the Equality Act 2010. The judgment in Hotak clearly rejected the view that the duty has nothing to add to s.189, instead describing it as a “complementary duty”, requiring the reviewing officer to "focus very sharply" on:

- whether the applicant has a protected characteristic under Chapter 1 of the 2010 Act;
- the extent of this;
- the likely effect of the protected characteristic in the broader context of the applicant’s position if they were to be made homeless; and
- whether this results in them being "vulnerable" under s.189.

Although the reviewing officer is not required to refer expressly to the PSED—indeed, the Court in Hotak acknowledges that many lawful decisions will naturally consider these issues—given the high...
bar accorded in *Holmes-Moorhouse*, the potential for the duty to extend the scope of inquiry demanded of reviewing officers in certain circumstances may signal what Loveland describes as a "retreat from the indulgent benevolence" generally accorded to s.189 decision-making. Taking the definition of "disability" under s.6 of the Equality Act 2010, it would appear that Freeman-Roach would aptly meet the requirements of having a "physical or mental impairment" that "has a substantial and long-term adverse effect on [his] ability to carry out normal day-to-day activities", and would consequently fall under the scope of the PSED.

**The Pereira Test in Wales**

Housing lawyers are acutely aware of the complexities that arise from devolution, and the assessment of priority need is no different. Following concerns by the Welsh Equalities and Local Government Committee on defining vulnerability during the scrutiny of the Housing (Wales) Bill, the Pereira Test was put on the face of the Act, elevating its status from judicial guidance to statutory formulation. Readers may already note the irony of Lord Neuberger being "anxious to emphasise the primacy of the statutory words" in *Hotak*, leading the court away from the Pereira formulation, whereas Wales has opted to adopt this much maligned formulation as the statutory words themselves.

Section 71 of the 2014 Act states:

1. "A person is vulnerable as a result of a reason mentioned in paragraph (c) or (j) of section 70(1) if, having regard to all the circumstances of the person’s case, —

   a. the person would be less able to fend for himself or herself (as a result of that reason) if the person were to become street homeless than would an ordinary homeless person who becomes street homeless, and

   b. this would lead to the person suffering more harm than would be suffered by the ordinary homeless person; this subsection applies regardless of whether or not the person whose case is being considered is, or is likely to become, street homeless.

2. In subsection (1), "street homeless" in relation to a person, means that the person has no accommodation available for the person’s occupation in the United Kingdom or elsewhere."

The legislation was passed as the *Hotak* appeal was ongoing. As the Supreme Court case related to the Housing Act 1996, the judgment does not easily apply to the Housing (Wales) Act 2014. This incongruous position clearly presents a challenge for those charged with drafting guidance on the Welsh legislation. The first Code of Guidance was published in 2015, with a revised version following in 2016 which took account of the judgment of the Supreme Court. This revised Guidance emphasises that the Local Authority must undertake a thorough assessment when looking at issues of vulnerability, and that this must take account of whether, "the individual is less able to fend for themselves if they were to become street homeless, than an ordinary homeless person who becomes street homeless". This individual also needs to be at risk of suffering more harm where an "ordinary homeless person" would be able to cope if they became street homeless.

In line with the Supreme Court ruling, the Guidance states that when Local Authorities are assessing vulnerability, they appear that Freeman-Roach would aptly meet the requirements of having a "physical or mental impairment" that "has a substantial and long-term adverse effect on [his] ability to carry out normal day-to-day activities", and would consequently fall under the scope of the PSED.
"should not equate that person [the ordinary homeless person who becomes street homeless] to a chronic rough sleeper with the associated social, mental, and physical health problems that they can display."  

Furthermore, and again referencing Johnson v Solihull, it is noted that

"the assessment of an applicant's ability to cope is a composite one taking into account all of the circumstances including the level of support available to the application if he or she were to become street homeless".  

The Guidance clarifies that the definition of an "ordinary homeless person" should not be that of a "chronic rough sleeper" but of an individual who is homeless and becomes a rough sleeper.

Although the Guidance has been amended to take account of the Supreme Court ruling, a number of issues still remain. First, the "ordinary homeless person" comparator is still being used. Second, the 2014 Act still uses the definition, "street homeless". This could lead to confusion in implementing the legislation, especially the move away from the Pereira formulation in England. Third, the Guidance can be amended at the discretion of a Minister without scrutiny from the Assembly, and a revised Code of Guidance has already been issued. Finally, the composite nature of the assessment as outlined in the 2016 Guidance highlights that all available support for individuals who become street homeless should be taken into account. This could potentially be used to deny the existence of a statutory duty to provide housing, if support such as hostels and homelessness services were in place in the area where the assessment was being made. The Guidance does not clarify this issue. Recently, however, the Minister for Housing and Regeneration has announced her intention to review the priority need category more broadly. As part of the Rough Sleeping Action Plan, the Welsh Government have committed to considering the case for modifying priority need categories through secondary legislation to potentially include rough sleepers.

Summary

The decision in Rother, outlined in this case comment, demonstrates the continued struggle over the assessment of "vulnerability" in priority need assessments under s.189 of the Housing Act 1996. The adverb "significantly" carries a sizable weight in assessments following Hotak, with echoes of the problems following Pereira being pushed elsewhere. We outline three further points of reflection which arise from the decision: the central role of medical advisors, the lack of regard for the PSED, and the complex position which endures in Wales. In keeping with Mrs Justice Rose’s observation in Rother, notwithstanding the move away from the controversial Pereira formulation, "old Pereira habits die hard".

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J.H.L. 2018, 21(4), 76-81

2. Rother [2018] EWCA Civ 368 at [31], per Mrs Justice Rose.


10. Rother [2018] EWCA Civ 368 at [5].

11. Rother [2018] EWCA Civ 368 at [6].

12. Rother [2018] EWCA Civ 368 at [7].

13. Rother [2018] EWCA Civ 368 at [8].


15. Rother [2018] EWCA Civ 368 at [10].

16. Rother [2018] EWCA Civ 368 at [10].

17. Rother [2018] EWCA Civ 368 at [12].

18. Rother [2018] EWCA Civ 368 at [13].


24. Rother [2018] EWCA Civ 368 at [34].

25. Rother [2018] EWCA Civ 368 at [34].

26. Rother [2018] EWCA Civ 368 at [34].


28. Rother [2018] EWCA Civ 368 at [34].

29. Rother [2018] EWCA Civ 368 at [32].


31. Rother [2018] EWCA Civ 368 at [52], per LJ Lewison.

32. Rother [2018] EWCA Civ 368 at [56].


34. For example, see Rother [2018] EWCA Civ 368 at [7], with reference to Dr Cooper’s report commissioned by Rother District Council.

35. For a more detailed assessment of the role of NowMedical, see: Caroline Hunter, "Denying the Severity of Mental health Problems to deny Rights to the Homeless" (2007) 2 People, Place & Policy Online 17.

36. See NowMedical’s website: https://nowmedical.co.uk/vulnerability.html [Accessed 7 June 2018].

37. Rother [2018] EWCA Civ 368 at [17].


44. Equality Act 2010 s.149(1).


49. Helen Taylor, "Rawls’ ‘difference principle’: a test for social justice in contemporary social policy" (PhD Thesis: Cardiff University, 2017).


51. Rother [2018] EWCA Civ 368 at [31].