Neutral Citation Number: [2019] EWCA Civ 1758

Case No: B5/2019/0611

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIS HONOUR JUDGE BAILEY
SITTING IN THE COUNTY COURT AT CENTRAL LONDON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2019

Before :

LORD JUSTICE HENDERSON
LADY JUSTICE ROSE
and
MRS JUSTICE THEIS

- -

Between:

TROY GUISTE	**Appellant**
- and -	
THE LONDON BOROUGH OF LAMBETH	**Respondent**

- -
- -

Mr Martin Westgate QC and Mr David Cowan (instructed by **Osbornes Solicitors LLP**) for the **Appellant**
Ms Niamh O'Brien (instructed by **Lambeth Legal Services**) for the **Respondent**

Hearing date: 4th July 2019

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Approved Judgment

Lord Justice Henderson:

Introduction

1. This is a housing appeal, which as so often raises the question whether the appellant has a priority need for homelessness accommodation on the basis that he is vulnerable within the meaning of section 189(1)(c) of the Housing Act 1996. The section relevantly provides as follows:

> "(1) The following have a priority need for accommodation—
>
> …
>
> (c) a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside;
>
> …"

2. The appellant, Troy Guiste, is a young man of 23, having been born on 8 April 1996. From childhood, he lived with his mother in rented accommodation provided by the respondent housing authority, the London Borough of Lambeth ("Lambeth"). Since May 2017, however, he has been faced with the prospect of being made homeless. On 26 May 2017, his mother was found by Lambeth, on review of an earlier decision taken by a housing officer, to have made herself homeless intentionally as she had unlawfully sublet her previous home. Her application for housing assistance under Part VII of the 1996 Act was therefore refused. Since then, Mr Guiste has continued to live with his mother, but only on a temporary basis. They have been housed in interim accommodation provided by Lambeth pending the outcome of his own application for homelessness assistance (and, more recently, an application by him for judicial review, which we were told has been stayed pending the outcome of the present appeal). So Mr Guiste has not yet experienced the reality of being made homeless, but subject to the judicial review (for which permission was granted on 20 May 2019, and which challenges Lambeth's refusal to accept a fresh homelessness application by him founded on an alleged material change in his circumstances), that will as matters stand be the probable outcome if his present appeal is dismissed.

3. It is common ground that Mr Guiste has potentially serious physical and mental health issues to contend with, although there is disagreement about the precise nature and gravity of his mental health problems. As to his physical health, he has a thyroid condition called hypoparathyroidism, which can cause convulsions if untreated. Indeed, that is how it first came to light, as his consultant paediatrician (Dr Murray Bain) explained in a letter dated 26 April 2013:

> "This is to confirm that Troy has hypoparathyroidism, a condition which he will have for the rest of his life. In this condition too little parathyroid hormone is released by the parathyroid glands, and this leads to low levels of calcium in the

> blood. This low level of calcium caused Troy to have a convulsion which led to the diagnosis of this condition.
>
> Hypoparathyroidism is treated with calcium and vitamin D supplements taken by mouth. Treatment is usually lifelong. These are not dietary supplements which can be bought over-the-counter, but prescription only medicines that require careful monitoring by a doctor. If hypoparathyroidism is adequately treated with calcium and vitamin D, the prognosis is good. However, this relies on taking medication daily for life and regular blood tests so that the dose of your medication can be carefully adjusted as needed.
>
> Domestic circumstances for safe and proper storage of the medication are absolutely essential. Appropriate accommodation for good engagement with a lifelong therapeutic regimen is going to be essential as the complications of poor adherence with therapy include kidney stones, muscle cramps, numbness and even recurrence of the convulsions that brought Troy's condition to light in the first place."

4. The fullest, and on the face of it most authoritative, assessment of Mr Guiste's mental health problems is to be found in a psychiatric report dated 11 June 2018, prepared on the instructions of Mr Guiste's solicitors by Dr Judith Freedman, who is a Fellow of the Royal College of Psychiatrists and now works as an independent consultant, having previously been a consultant psychiatrist in psychotherapy at the Portman Clinic. She states that she has over 20 years' experience of preparing reports for the criminal, family and civil courts in the United Kingdom.

5. In the main body of her report, she sets out her conclusions in response to the request to assess "Mr Guiste's mental health problems; origin, diagnosis, symptoms, severity, prescribed medication and prognosis", as follows:

> "Mr Guiste reports symptoms including depression, anxiety, auditory and visual hallucinations, which have told him to harm himself, leading him to cut his fingers and try to hang himself. He also describes flashbacks to the death of his favourite aunt and a lack of self-confidence and self-esteem, which he relates to the death of his father when Mr Guiste was age 9. He has smoked cannabis since age 11.
>
> Various diagnoses have been considered for him, including severe depression and Posttraumatic Stress Disorder (PTSD).
>
> In addition, he is genetically predisposed to schizophrenia, as his father apparently had paranoid schizophrenia; his father was said to have murdered someone and then was murdered himself in prison.

> Mr Guiste's mental health presentation is complicated by him suffering from hypoparathyroidism. He is not fully compliant with taking his medication, which puts him at risk for seizures and other complications of low calcium. His doctor has wondered if some of his mental health difficulties, particularly depression and hallucinations, might be related to hypocalcaemia.
>
> Equally, depression and hallucinations, together with the paranoid thinking that Mr Guiste has expressed at times, could be associated with his chronic cannabis use, from a young age.
>
> Given these different possibilities, it is difficult to make a firm diagnosis. Certainly, he suffers from depression and anxiety, and he is at risk for harming or even killing himself by responding to command hallucinations… He is genetically vulnerable to schizophrenia, which might emerge as he reaches his late twenties or early thirties.
>
> In addition to these possibilities, I think it likely that Mr Guiste's cognitive functioning is impaired. He told me that he cannot remember his own mobile number. He has poor understanding of his medical condition, both its aetiology and the importance of him taking his medication regularly. He needs help from his mother to manage his finances. She took him out of school at secondary school level, and we do not know why. It is possible that she recognised that he had special educational needs that were not being addressed.
>
> Apart from the medication that he is taking – inconsistently – for his low calcium level, he is not taking any psycho-active medications. His GP was asked to consider antidepressant medication, but he has not prescribed it, possibly in recognition of Mr Guiste's inconsistency in taking medication.
>
> His prognosis for improvement is limited. To the extent that he may have low cognitive ability and may be prone to a schizophrenic illness, he will not improve. However, he clearly states that his mental condition has worsened when he has been threatened with eviction. His capacity is limited, and it is likely that he feels panicked and has little awareness of how to help himself, in the face of the proposed eviction."

6. In coming to these conclusions, Dr Freedman had the benefit of a lengthy interview with Mr Guiste. She provided a detailed record of it on pages 11 to 21 of her report. The record includes the following passages:

> "I asked about his physical health. He said that he is stressed at present with overthinking about housing. He has a low calcium

level, for which he has to take medication. His bones start to hurt when it is cold. He told the GP, and he increased his dose to two tablets of calcium twice per day and Vitamin D once per day. I asked if he remembers to take it. He said, "I do". He then said that sometimes he forgets, maybe once or twice in the week. His mother reminds him. He has been told that he has to take it all his life.

… I asked about his mental health problems. He said that it is about seeing and hearing things and hearing voices. It started when the housing was a problem. He said that he was about 19. There is a male voice, not one he recognises, that says to him, "You are worthless." He hears it inside his head. It used to be worse, but it has been better since he has been getting out and going to MOSAIC [*a support group*]. He last heard the voice about one month ago.

He thought that he saw people, but they were not really there. This also started when he was about 19. It is infrequent now. The last time was a couple of months ago.

The voices told him to harm himself, such as by hanging himself. They made him feel angry. He said that they should leave him alone. His mother came to calm him down. He had access to a rope at that time. His mother took it from him.

I asked what would have happened if his mother had not been there. He said that he probably would have been dead. I asked if he has harmed himself in any other ways. He said that he cut himself. He said that he cut the first two fingers on his right hand with a knife. The cuts required six sutures. He was feeling low and depressed. I asked if the voices asked him to do that. He said yes. He has not had any other suicidal or self-harming behaviour.

…

I asked what he would do if he is evicted. He said that he does not want to think about it. He would have nowhere to go. They have no relatives with whom they could stay. He does not know how he would manage if he was told to live on the streets. He said, "It's too much to take in." He blanks out thoughts about being street homeless.

I asked if he would be a risk to himself. He said that probably, he would kill himself. I asked if anything would stop him. He said no.

…

I asked if he is homeless, how he would keep track of his medication. He said, "I wouldn't, What's the point?""

7. Mr Guiste has not been examined by any qualified psychiatrist instructed on behalf of Lambeth. It is a feature of the present case that Lambeth has "outsourced" the provision of medical advice in housing cases to an organisation called NowMedical Limited ("NowMedical"). Two psychiatric advisers employed by NowMedical prepared reports for Lambeth about Mr Guiste's application for housing assistance, but (in accordance with what I understand to be NowMedical's usual practice) neither of them interviewed Mr Guiste or examined him in person. Nor were their qualifications at the same level as Dr Freedman's. Each of them was a Member, not a Fellow, of the Royal College of Psychiatrists.

8. There is nothing wrong in principle about a local authority seeking external medical assistance to help it in the often difficult task of evaluating medical evidence supplied on behalf of an applicant for housing assistance. As Sedley LJ said, delivering the judgment of this court in Shala v Birmingham City Council [2007] EWCA Civ 624, [2008] H.L.R. 8, at [19]:

> "It is entirely right that local authority officers, themselves without any medical expertise, should not be expected to make their own critical evaluation of applicants' medical evidence and should have access to specialist advice about it."

However, as Sedley LJ went on to say, at [20]:

> "It is not the doctor but the local authority who has the duty of deciding whether the statutory tests of priority need are met."

9. It follows that the function of such external advice is to enable the authority "to understand the medical issues and to evaluate itself the expert evidence placed before it." In the absence of an examination of the patient, the advice "cannot itself ordinarily constitute expert evidence of the applicant's condition": see Shala at [22]. Sedley LJ then said, at [23]:

> "There is no rule that a doctor cannot advise on the implications of other doctors' reports without examining the patient; but if he or she does so, the decision-maker needs to take the absence of an examination into account. Local authorities who rely on such advice, and doctors who give it, may therefore need to consider – as many already do - whether to ask the applicant to consent to their having their own examination. Between these two poles, however, there is a third possibility – that the local authority's medical adviser, again with the patient's consent, may speak to the applicant's medical adviser about matters which need discussion."

10. In the present case, Mr Guiste's advisers requested that the NowMedical advisers should speak to Dr Freedman, but for unspecified reasons it appears that this was "not achievable". Accordingly, the two NowMedical psychiatrists who considered Mr Guiste's application on behalf of Lambeth did so without examining him, and without (for whatever reason) taking up the invitation to discuss his case with Dr Freedman.

11. Against this background, I will now describe the main stages in the history of Mr Guiste's application for housing assistance.

The history of Mr Guiste's application

12. On or about 6 August 2017, Mr Guiste (or somebody acting on his behalf) filled in a Homeless & Emergency Services Medical Assessment Form for Lambeth. The form gave details of his hypoparathyroidism, but no other medical conditions, and authorised Lambeth's medical advisers to contact his GP. By early September 2017, it was clear to Lambeth that Mr Guiste was making a homelessness application in his own right in the light of his mother's pending eviction from their temporary accommodation.

13. On 13 September 2017, Mr Guiste attended his GP's surgery in Clapham with his mother, to discuss his mental health problems. The GP's note of the consultation records that the problems had begun after his father's murder 12 years before, but had recently become significantly worse. They seem to have been described in terms similar to those which he later related to Dr Freedman, involving paranoid thoughts, auditory and visual hallucinations, and the recent act of self harm when he had cut his fingers and needed stitches. The GP's comments read:

> "Troy and mum desperate for urgent help as feel he is at significant risk of hurting himself or ending his own life and this risk is likely to increase if evicted tomorrow. I feel needs urgent review by a psychiatrist today – mum will take him to A & E now and Troy happy to go."

14. On the same day, Mr Guiste was assessed by the Liaison Psychiatry Department at St George's Hospital in south west London. The report by the person who conducted the assessment, dated 14 September 2017, noted that Mr Guiste was not previously known to psychiatric services, and used cannabis on a daily basis. He had capacity to make decisions about his care, and although he required explanations, he could make decisions and communicate them, and ask appropriate questions. Under the heading "Risk assessment", the report noted:

> "Self-harm – previous self-harm at time of stress, ongoing thoughts of self-harm, no intent."

And under the heading "Impression":

> "Presentation in the context of likely ongoing low mood and depression in conjunction with drug use and very difficult social circumstances and traumatic childhood. Would like benefit from therapy, reduced drug use, youth inclusion and a low dose antidepressant to support resilience. Troy is able to guarantee his safety; his mum is very supportive at the detriment of her own health."

15. As a result of this assessment, Mr Guiste was not admitted to hospital, nor was he prescribed any medication. Various recommendations for further support were made. His GP was asked to consider referring him to the PTSD service, but this does not appear to have been followed up.

16. On 22 September 2017, Mr Guiste's application was reviewed for the first time by a NowMedical adviser, Dr Giovanna Hornibrook. She noted that there was nothing to suggest that he required any further investigation or treatment for his hypoparathyroidism, but he had recently presented to his GP with hallucinations, depression and suicidal thoughts, and had been referred to A & E for an urgent psychiatric review. The outcome of that review had not yet been provided to Dr Hornibrook, so she said that "it would be prudent to obtain a report from his recent psychiatric assessment and we will happily review his case again with this further information."

17. On 7 November 2017, Mr Guiste's physical health issues were again considered by Dr Hornibrook. She noted that the medication for his hypoparathyroidism had to be taken daily, which did not appear to be an arduous task. She expressed the view that these medical issues did not make Mr Guiste significantly more vulnerable than an ordinary person, so she made "no housing recommendations on specific medical grounds".

18. On 6 December 2017, a report was provided to Mr Guiste's GP by a community psychiatry nurse (Chris Ogedegbe) at the Lambeth Living Well Network Hub, to which Mr Guiste had been referred. It appears from this assessment that Mr Guiste had reportedly tried to kill himself recently in a police cell following his arrest on suspicion of robbery, and he had also been hearing voices about two weeks previously telling him to kill himself when he was "feeling down". The assessment continued:

> "He denied any active plans/intent of committing suicide, or of harming himself or others."

There is no doubt that this report from the Living Well Network was placed on Mr Guiste's medical file and made available to Lambeth, because it is expressly referred to in the first decision letter dated 15 May 2018: see [21] below. Indeed, the writer of that letter, Michelle Barnett, said she did not doubt that Mr Guiste had experienced suicidal ideations and attempted to take his own life in the past.

19. Michelle Barnett was one of Lambeth's homeless assessment officers. On 6 April 2018, she interviewed Mr Guiste, noting that he had "severe mental health concerns including suicidal thoughts", and that the last time he had such thoughts was four weeks previously.

20. On 9 May 2018, another NowMedical adviser, Dr Jamil Rahman, gave advice to Lambeth on Mr Guiste's mental health problems. Dr Rahman was not a qualified psychologist. He noted that when Mr Guiste had been referred to St George's Hospital, he had been assessed as having no active suicidal intent and had not been admitted as a patient. He continued:

> "There is no indication that he has any severe or enduring mental illness such that would significantly affect his cognition or

> rational thought. He does not appear to require treatment with any mental health related medication.
>
> … No other new relevant medical information has been presented to us.
>
> In summary, based on the information available and for the reasons given, I don't think the specific medical issues in this case are of particular significance compared to an ordinary person."

21. On 15 May 2018, as I have already said, Michelle Barnett issued Lambeth's original decision under section 184 of the 1996 Act. She said she was satisfied that Mr Guiste was homeless and eligible for assistance, but not that he was in priority need. On a point of detail, she appears to have confused the incident when Mr Guiste cut some of his fingers in an act of self harm with a different incident when he had to visit the A & E department at St George's Hospital as a result of an accident when cooking. On the other hand, as I have already noted, Ms Barnett did not doubt Mr Guiste's statement that he suffered from depression and had attempted to take his own life in the past. She then referred to the medical advice obtained from NowMedical, and said that she agreed with it. She was therefore satisfied that Mr Guiste was "not significantly vulnerable on medical grounds, or as a result of any health concerns or mental or physical disabilities."

22. Mr Guiste, through his solicitors, then exercised his right to request a review of the decision under section 202 of the 1996 Act. The review was conducted by Dorothy Ubiam, an external reviews officer employed by RMG Limited to whom Lambeth had contracted out the function of carrying out homelessness reviews. It was at this stage that Dr Freedman was instructed, and she produced her report, as I have said, on 11 June 2018.

23. On 21 June 2018, Mr Guiste's solicitors, Osbornes Law, made extensive representations in support of the review. It is in my view regrettable that this letter contained some inflammatory and ill-considered accusations about Lambeth's conduct of the case, and the advice provided by Dr Hornibrook, as well as setting out the main material upon which Mr Guiste relied, including (now) Dr Freedman's report.

24. In the light of Dr Freedman's report, Ms Ubiam sensibly decided to seek further medical advice from NowMedical. The file was then considered for the first time by a qualified psychiatrist, Dr Noha Eskander MRCPsych, on 26 June 2018. However, Dr Eskander dealt with the matter quite briefly, under the heading "? Anxiety/depression":

> "Further to our previous advice, I note further correspondence in this case. The applicant is a 22 year old man who had presented to emergency services on one occasion with suicidal thoughts. He does not present with active risk related behaviours.
>
> The facts in this case are that he was not picked up by psychiatric services, nor admitted to a psychiatric facility and he was not prescribed any psychotropic medication.

> The applicant does not suffer from a psychotic disorder; having hallucinations does not necessarily mean that it is psychosis. He is not subject to an enhanced care programme approach. Moreover, there is no evidence of significant impairment in functioning as a result of his mental health.
>
> In summary, I am unable to find evidence of a severe and enduring mental disorder. I therefore cannot find that the issues raised in this case have a particular significance compared to any ordinary person. I make no housing recommendations based on psychiatric grounds."

Nothing specific was said about Dr Freedman's report, although Dr Eskander recorded that it formed part of the information which she had considered.

25. An equally short report was provided on the same occasion by another NewMedical adviser, Dr Clare Hurle, dealing with Mr Guiste's hypoparathyroidism. She said there was nothing to suggest that he had suffered any further seizures since his original diagnosis in 2013, and she would not expect his condition to have a significantly adverse effect on him on a day to day basis once he was on the correct dose of medication. Dr Hurle's comments indicate that she may not have noticed in the medical records (and in the summary of them contained in Dr Freedman's report) that on 11 May 2015 Mr Guiste had attended his GP's surgery complaining among other matters of "muscular pain/convulsions/not taking medications on occasions…" At the very least, this record suggests that he may have suffered further convulsions in 2015, as well as those which led to the original diagnosis in 2013.

26. On 4 July 2018, Ms Ubiam issued a "minded to" letter pursuant to regulation 7(2) of the Allocation of Housing and Homelessness (Review Procedures) Regulations 2018 (SI 2018/223). In the letter, she set out the reasons for her "likely decision" that Mr Guiste was not in priority need within the meaning of the legislation. In relation to Mr Guiste's mental health issues, she referred in some detail to the record of his attendance at St George's Hospital in September 2017, and quoted in full Dr Eskander's views as set out above, but she said comparatively little about Dr Freedman's report. In relation to the part of the report which she did discuss, she thought that there was a contradiction (with regard to Mr Guiste's cognitive ability) with the assessment previously made at St George's Hospital.

27. The "minded to" letter then prompted a further round of written submissions from Osbornes Law, contained in a letter dated 9 July 2018. The letter again contains intemperate criticisms of Lambeth's reliance on NowMedical, while also making some pertinent criticisms of the reasoning in Ms Ubiam's letter. For example, Osbornes Law said:

> "There is a general theme throughout the minded to letter of considering our client's mental and physical health at this stage, as opposed to how he would suffer if made homeless. Our client is currently accommodated pending review and has never actually been homeless. Dr Freedman on the other hand focuses her mind on how homelessness would affect our client. She considers in particular whether he would continue to take

> medication for hypoparathyroidism (she considers that he would not and specifically explains why), how not taking the medication would affect him (passive suicide), how homelessness would affect his mental health (worsening of symptoms and risk of self-harm and suicide in response to his auditory hallucinations). It is not as if our client has not self-harmed before and indeed the previous incident occurred when faced with the prospect of homelessness…"

28. Osbornes Law's letter also proposed a discussion between the NowMedical advisers, Dr Freedman and Dr Bain (who was still Mr Guiste's treating consultant paediatrician). As I have explained, however, nothing came of this proposal.

29. In the light of these representations, Ms Ubiam sought a further review of the medical evidence from a second psychiatric adviser at NowMedical, Dr James Wilson MRCPsych. He provided this in a report dated 24 July 2018. The substance of his report reads as follows:

> "The applicant is stated to have a history of low mood and symptoms of anxiety as well as substance misuse. He has possible features of post-traumatic stress disorder and reports auditory hallucinations. However, there is no evidence of a severe or enduring psychotic illness and his auditory hallucinations appear intermittent only and probably related to substance misuse including alcohol and cannabis. The applicant presented to a local A & E department in Sept 17 and at that stage he was not under the care of secondary mental health services and it was felt that his presentation was consistent with social difficulties rather than a significant mental illness as well as in the context of ongoing substance misuse. The applicant reports intermittent self harm in times of acute stress, although there is no evidence of active suicidal intent or planning.
>
> I note the new representations by the applicant's legal advisers. I cannot find anything in these submissions that would change my view. I acknowledge that the applicant reports occasional suicidal thinking and has a history of self harm and auditory hallucinations, although these appear related to social circumstances and substance misuse. My view would therefore be that the applicant does not have psychiatric issues of particular significance when compared to an ordinary person if homeless. On this basis, I would not make any housing recommendations."

30. Dr Wilson's reference to misuse of alcohol by Mr Guiste seems to have been an error. The St George's Hospital assessment in September 2017 expressly says "Denies alcohol use", and Mr Guiste said the same in his interview with Dr Freedman. There is nowhere any suggestion that he was not telling the truth in this regard.

31. At the same time as Dr Wilson provided his further advice, another NewMedical adviser, Dr Ashe Thakore, provided further advice concerning Mr Guiste's

hypoparathyroidism. This was in similar terms to the advice previously tendered by Dr Hurle.

The decision on review

32. On 26 July 2018, Ms Ubiam issued her review decision ("the Review Decision") upholding Lambeth's original section 184 decision that Mr Guiste was not in priority need for homelessness assistance.

33. Ms Ubiam directed herself on the relevant law in terms which are agreed to be substantially correct, referring to the guidance given by the Supreme Court in Hotak v Southwark London Borough Council [2015] UKSC 30, [2016] AC 811. She also referred to the further guidance given by this court in Panayiotou v Waltham Forest London Borough Council [2017] EWCA Civ 1624, [2018] QB 1232. At paragraphs 24 and 25 of the Review Decision, Ms Ubiam described the nature of the Hotak test in terms of which no criticism has been made:

> "24. … It is to focus on the individual applicant, whether he or she is vulnerable. Whether a person is considered to be vulnerable requires comparison between the ordinary person who is homeless, not the ordinary homeless person. The test connotes being "*significantly more vulnerable than ordinarily vulnerable as a result of being rendered homeless*" as per Lord Neuberger in *Hotak* at [53].
>
> 25. The assessment should be based on whether when compared to an ordinary person if made homeless, the applicant would suffer or be at risk of suffering harm or detriment which the ordinary person would not suffer or be at risk of suffering such that the harm or detriment would make a noticeable difference to his ability to deal with the consequences of homelessness."

34. Ms Ubiam then referred to the medical evidence. As in the "minded to" letter, she set out at some length the assessment made at St George's Hospital in September 2017, and Dr Eskander's report (while acknowledging that Mr Guiste had not been examined by Dr Eskander). She also quoted almost verbatim the further reports provided by Dr Wilson and Dr Thakore, but nowhere did she provide a detailed summary of Dr Freedman's evidence.

35. Ms Ubiam expressed her main conclusions under the sub-headings "Physical Disability" (paragraphs 63 to 65) and "Mental Health Issues" (paragraphs 66 to 75). Under the former heading, she noted that Mr Guiste would have to take his medication daily for life, but commented:

> "Although, this might be inconvenient and may sometimes be difficult to remember, it does not appear to involve a great deal of effort to adhere to."

She said she was satisfied that he would not be significantly more vulnerable than an ordinary person if made homeless as a result of his thyroid condition, "as long as you adhere to your treatment."

36. In her discussion of the mental health issues, Ms Ubiam referred to part of the passage in Dr Freedman's report where she gave her opinion on the questions whether Mr Guiste was vulnerable in the Hotak sense, and (if so) what harm or detriment he would suffer or be at risk of suffering which an ordinary person would not. Dr Freedman had answered the two questions together, as follows:

> "Although I do not have a firm diagnosis for him, the array of symptoms I described above constitute a vulnerable state. He functions at a low cognitive level, and he would find it more challenging than an ordinary person made homeless to understand his options, how he might manage, and how to keep himself safe if made homeless.
>
> He also is at physical risk of failing to take his medication for hypocalcaemia, secondary to hypoparathyroidism. As his doctors have stressed to him, failure to take his medication regularly would place him at risk for significant physical harm, if not death. He told me that if he was made homeless, he would not keep track of his medication. He added, "What's the point?" In other words, his depression in the face of an overwhelming situation, with which he would not know how to cope, would place him at risk for passive suicide by failing to take his medication.
>
> With regard to his mental health, if he is made homeless, he would be at risk for a worsening of his symptoms, including even lower self-esteem and confidence, increased use of cannabis and in turn worsening of his depression, hallucinations, and paranoid thinking. He particularly would be at risk for command hallucinations, demanding that he self-harm and/or hang himself."

37. In relation to Mr Guiste's cognitive ability, Ms Ubiam thought there was a contradiction between Dr Freedman's evidence and the observations made during the September 2017 consultation at St George's Hospital: see paragraph 68 of the Review Decision. Ms Ubiam then referred to Dr Eskander's evidence about conditions which Mr Guiste did not suffer from, before saying at paragraph 70:

> "From the information [*before*] me, although you have advised of having suicidal thoughts, there is no intent to act on it and [*you*] have not required referral to secondary care services as a result. Neither is there any evidence that your mental health issues significantly impedes your day to day functioning. There is no indication that you are diagnosed with having a severe or enduring psychotic illness. It is thought that your hallucinations might be related to cannabis use, therefore was advised to abstain, in order to have a clear diagnosis."

38. There then follows a rather disjointed series of observations, including (at paragraph 72) an unacknowledged and almost verbatim quotation from the judgment of Baroness Hale of Richmond in Hotak, before this conclusion:

> "74… You have informed of having suicidal thoughts and intermittent self-harm in times of acute stress, although there is no evidence of active suicidal intent or planning. According to the medical information before me, you have not presented with active risk related behaviours.
>
> 75. In summary, I do not think that your psychiatric issues are of particular significance when compared to an ordinary person if homeless. This is not to say, that further suicidality in response to various life stressors is unlikely. However, I do not think there is current evidence to indicate you would experience harm or deterioration as a result of homelessness."

39. Ms Ubiam then correctly directed herself, at paragraph 76, that the question whether a person is vulnerable is one of fact and degree for the local housing authority to determine, and is not a question that can be delegated to a doctor, nurse, consultant or anyone else. The remainder of the Review Decision contains nothing to which I need draw particular attention.

Mr Guiste's appeal to the County Court

40. Under section 204(1) of the 1996 Act, an applicant who is dissatisfied with the decision on a review may appeal to the County Court "on any point of law arising from the decision". On such an appeal, "the court may make such order confirming, quashing or varying the decision as it thinks fit": section 204(3). Mr Guiste exercised this right, and his appeal was heard by His Honour Judge Bailey on 14 and 15 January 2019. The first three grounds of appeal sought to challenge the correctness in law and rationality of the Review Decision, while a fourth ground, for which permission was granted by His Honour Judge Hellman on 31 October 2018, challenged the authority of Ms Ubiam to conduct the review process at all, based on an alleged failure by Lambeth to comply with its own standing orders when contracting out the conduct of statutory reviews under section 202 to RMG Limited.

41. In his careful reserved judgment dated 29 January 2019, Judge Bailey dismissed all four grounds of appeal. After rejecting the procedural challenge, he dealt with the substantive grounds of appeal at paragraphs 42 to 67 of his judgment. The judge's clear and cogently expressed views appear with sufficient clarity from the following extracts from this part of his judgment:

> "60. I agree with Miss O'Brien that Ground 1 is not made out. There are matters arising in the medical material which give pause for thought, but nothing which cries out for a finding of vulnerability. The report of Dr Judith Freedman requires careful consideration and, with some assistance from NowMedical, the review officer thought it through and engages with it throughout the review decision. I fear that the Appellant's legal advisers have set too much store by Dr Freedman's report. Indeed it founds the third ground of appeal, that of irrationality. But the review officer was perfectly entitled to conclude that this report did not "prove vulnerability" either by itself or in conjunction with the other medical material.

> 61. Ground 2 raises the question, I am tempted to say perennial question, of the NowMedical "reports". The Appellant asserts that the reports themselves are "vitiated" by a failure to consider the Appellant's various conditions and their effects, and by referring to irrelevant considerations such as active suicidal intent, or mental illness which would significantly affect the Appellant's cognition or rational thought….
>
> 62. The use of NowMedical by any local housing authority to advise on medical material is plainly a matter for the authority concerned. Those authorities who use NowMedical will be aware that they have been subject to widespread criticism, sometimes warranted but often misplaced. But there is always the risk that if a housing or review officer does not obtain help and assistance in understanding medical material they will be criticised on the basis that they proceeded to make a decision without a proper understanding of the medical material…
>
> 63. It is evident that the review officer in this case, Ms Ubiam, has neither fallen into the error of believing that any of the five NowMedical "reports" constituted anything other than advice as to the various pieces of medical material from others which had been obtained in relation to the Appellant's physical and mental condition, nor has she forgotten that the decision as to vulnerability is hers and hers alone…
>
> 64. There is nothing in this second ground of appeal.
>
> 65. Finally, Ground 3, the assertion that the review officer's decision was irrational "in light of the extensive and coherent medical and other evidence provided by the Appellant". In reality this is a complaint that the review officer did not take Dr Judith Freedman's report as substantiating the claim as to vulnerability. The remainder of the material would never lead a reasonable review officer to conclude that there was vulnerability.
>
> 66. As I have observed above, a careful analysis of Dr Freedman's report does not lead inevitably to the conclusion sought by the Appellant. It was perfectly open to this review officer, as a reasonable review officer, to reach the conclusion that the Appellant is not vulnerable for the purposes of priority need under the 1996 Act. This ground of appeal must fail also."

Mr Guiste's appeal to this court

42. Mr Guiste now appeals to this court, on three grounds for which I granted permission on 20 May 2019. I will not set out those grounds, as they cover essentially the same ground as the three substantive grounds considered by Judge Bailey, and in any event, there is a considerable degree of overlap between them. I refused Mr Guiste permission to pursue a further ground of appeal, which sought for the first time to challenge

Lambeth's decision to contract out the conduct of reviews to RMG Limited on the basis that it was affected by an irrelevant consideration, namely the significant reduction in the number of decisions overturned on review since November 2015 when RMG Limited were first engaged to conduct reviews on behalf of Lambeth. This contention was quite separate from the argument about failure to comply with standing orders which had been pursued before the County Court, but which Mr Guiste's advisers did not wish to take any further. In refusing permission, I considered that it would be unfair to Lambeth to permit an entirely new case of this nature to be advanced for the first time in the Court of Appeal. This was therefore not a suitable opportunity for the Court of Appeal to consider the important question whether it is open to an appellant to raise jurisdictional issues of that nature on a homelessness appeal under section 204 of the 1996 Act: see the obiter observations of Lewison LJ in Panayiotou at [90].

43. It is common ground that, on a second appeal to this court, our task is not to consider whether the judge below erred in law in dismissing the appeal under section 204, but rather whether the reviewing officer erred in law in the Review Decision: see Danesh v Kensington and Chelsea RLBC [2006] EWCA Civ 1404, [2007] 1 WLR 69, at [30], per Neuberger LJ.

44. We have had the benefit of clear and helpful submissions, both written and oral, from Martin Westgate QC (who did not appear below), leading David Cowan, for Mr Guiste, and from Niamh O'Brien appearing (as she did below) for Lambeth.

The law

45. As I have said, there is no disagreement about the legal principles which apply in deciding whether an applicant is vulnerable within the meaning of section 189(1)(c) of the 1996 Act. They are mainly derived from the two leading cases of Hotak (in the Supreme Court) and Panayiotou (in this court).

46. In their skeleton argument, counsel for Mr Guiste submit (and I would agree) that the following principles may be derived from Hotak:

> (a) Section 189(1)(c) is concerned with an applicant's vulnerability if he is homeless. It directs an enquiry as to his situation if he remains or becomes a person without accommodation: see the judgment of Lord Neuberger of Abbotsbury PSC at [37].
>
> (b) Vulnerability requires a comparative assessment: see [51]. A person is vulnerable for the purposes of the section if he is significantly more vulnerable than the ordinary person who is in need of accommodation as a result of being rendered homeless: see [53], [55], [58] and [59].
>
> (c) The question of whether an applicant is vulnerable involves considering his particular characteristics and situation when homeless in the round: [38].
>
> (d) The assessment of an applicant's vulnerability is a contextual and practical assessment of his physical and mental ability if he is rendered homeless, and in carrying out this assessment the local authority must disregard the impact on its own resources and its burden of homeless people: [39] and [62].

(e) An applicant who would otherwise be vulnerable might not be vulnerable if, when homeless, he would be provided with services, support and care by a third party: see [61] and [64].

(f) A housing authority may only take third party support into account where it is satisfied that, as a matter of fact, the third party will provide such support on a consistent and predictable basis: [65].

47. At the most basic level, therefore, Hotak tells us that the test of vulnerability is a comparative one; that the comparison has to examine the position if the applicant is made homeless; and that the comparison which must be made is between the applicant (if homeless) and the ordinary person who is in need of accommodation as a result of being made homeless. If the result of this comparison is that the applicant would be "significantly more vulnerable than ordinarily vulnerable" as a result of being made homeless, then the test is satisfied and the applicant has a priority need.

48. In Panayiotou, the leading judgment was given by Lewison LJ with whom Beatson and Newey LJJ agreed. The judgment provides important clarification of what is meant by the concept of being "significantly more vulnerable than ordinarily vulnerable". As Lewison LJ pointed out at [35], although that phrase appears in inverted commas in Lord Neuberger's judgment, it does not seem to be a phrase previously used in any judgment of the lower courts. Lewison LJ continued (ibid):

> "Yet Lord Neuberger PSC clearly saw that phrase as expressing an approach consistently adopted by this court. One of the themes that runs through previous decisions of this court is that there must be a causal link between the particular characteristic (old age, physical disability etc) and the effect of homelessness: in other words some kind of functionality requirement. We now know that the functionality is not an ability to "fend for oneself" nor an ability "to cope with homelessness without harm". But if it is not that, what is it? The nearest that Lord Neuberger came to providing an answer was in saying that section 189(1)(c) is concerned with: "an applicant's vulnerability if he is not provided with accommodation": the *Hotak* case, at para 37."

49. Lewison LJ went on to hold, at [41], that a person's ability to find accommodation is not irrelevant to the question whether he is vulnerable:

> "I agree that a person's ability to find accommodation is not relevant to the question whether he is homeless. But I do not agree that it is irrelevant to the question whether he is vulnerable. First, it is contrary to a long line of cases in this court. Second, the exercise that must be carried out is to be both practical and contextual. Since one practical way of dealing with homelessness is to find accommodation, I cannot see that it makes sense to exclude a person's future ability to find accommodation from consideration… the question whether someone is (now) in priority need is assessed, at least in part, by reference to the risks of what will or may happen to him in the future."

50. At [44], Lewison LJ concluded that "the relevant effect of the feature in question", such as physical disability or mental illness, is:

> "an impairment of a person's ability to find accommodation or, if he cannot find it, to deal with the lack of it. The impairment may be an expectation that a person's physical or mental health would deteriorate; or it may be exposure to some external risk such as the risk of exploitation by others."

51. On the meaning to be attached to the adverb "significantly", Lewison LJ concluded after a full discussion which runs from [45] to [63]:

> "64. I do not, therefore consider that Lord Neuberger PSC can have used "significantly" in such a way as to introduce for the first time a quantitative threshold, particularly in the light of his warning about glossing the statute. Rather, in my opinion, he was using the adverb in a qualitative sense. In other words, the question to be asked is whether, when compared to an ordinary person if made homeless, the applicant, in consequence of a characteristic within section 189(1)(c), would suffer or be at risk of suffering harm or detriment which the ordinary person would not suffer or be at risk of suffering such that the harm or detriment would make a noticeable difference to his ability to deal with the consequences of homelessness. To put it another way, what Lord Neuberger PSC must have meant was that an applicant would be vulnerable if he were at risk of more harm in a significant way. Whether the test is met in relation to any given set of facts is a question of evaluative judgment for the reviewer."

52. It follows that one of the questions that a reviewing officer needs to consider is whether, when making the comparison required by <u>Hotak</u>, the harm or detriment caused to the applicant as a consequence of his mental or physical ill health (or other characteristic falling within the scope of section 189(1)(c)) would make a noticeable difference to his ability to deal with the consequences of homelessness.

53. Finally, we were helpfully reminded by Ms O'Brien of the approach which a court should adopt to the consideration and interpretation of review decisions: see the judgment of Lord Neuberger in <u>Holmes-Moorhouse v Richmond Upon Thames London Borough Council</u> [2009] UKHL 7, [2009] 1 WLR 413, at [45] to [51]. As Lord Neuberger there pointed out, such decisions are prepared by housing officers who are not lawyers and their decisions usually go into considerable detail. A benevolent approach should therefore be adopted, and the court "should not take too technical a view of the language used, or search for inconsistencies, or adopt a nit-picking approach, when confronted with an appeal against a review decision": see [50]. Further, "a decision can often survive despite the existence of an error in the reasoning advanced to support it": see [51], and the examples there given.

<u>Discussion</u>

(1) Physical health

54. Hypoparathyroidism is clearly a serious medical condition which (if left untreated) has the potential to cause grave physical harm. Lambeth rightly accepts that it is a physical disability within the meaning of section 189(1)(c) of the 1996 Act. The Hotak comparison must therefore be made with an ordinary person who is in normal health and does not have hypoparathyroidism (or indeed any other physical or mental illness, or disability of the type that might render him vulnerable within the meaning of section 189(1)(c)): compare Freeman-Roach v Rother District Council [2018] EWCA Civ 368, [2019] PTSR 61, at [32], per Rose J (as she then was), with whose judgment Lewison and Longmore LJJ both agreed.

55. On the other hand, it is fortunately a condition which (at least in straightforward cases, of which Mr Guiste's appears to be one) is easy to treat with calcium and vitamin tablets taken orally on a daily basis. Provided this regime is adhered to, and provided the patient remembers to obtain the necessary prescriptions and take the tablets every day, he or she should be able to lead a normal life without any significant immediate or long term complications. Mr Guiste was diagnosed with the condition in 2013, but apart from a possible recurrence in 2015 of the convulsions which led to the original diagnosis, and occasional difficulties in remembering to take his medication, particularly when feeling depressed, there is nothing to suggest that the condition impacts in a significant way on Mr Guiste's ability to lead a normal life. The relevant question, however, is whether this would continue to be the case if he were made homeless, with a consequential risk of his suffering harm or detriment which the ordinary person would not suffer, and which would make a noticeable difference to his ability to deal with the consequences of homelessness: Panayiotou at [64]. On this issue, the reviewing officer had the benefit of Dr Freedman's considered professional opinion that, if Mr Guiste was to become street homeless, he would "[*i*]n the not too distant long-term… be at risk for passive suicide by not taking his medication for hypocalcaemia": see page 5 of her report.

56. This opinion was, however, based, at least in part, on Mr Guiste's self-reported views that, if he were made homeless, he would not keep track of his medication, and would see no point in doing so. Dr Freedman was of course fully entitled to form her own view on the basis of what Mr Guiste told her, but it does not follow that the reviewing officer was also obliged to accept Mr Guiste's evidence at face value: compare the observations of Briggs LJ (as he then was) in Haque v Hackney London Borough Council [2017] EWCA Civ 4, [2017] PTSR 769, at [45]. I also agree with Ms O'Brien that this must be the case whether the applicant's assessment of his own medical condition is contained in his own direct evidence, the representations he makes through his legal representatives, or through his own description of his situation as recorded in a medical report. The reviewing officer was also entitled to take into consideration the views expressed by the NowMedical doctors who had considered the point, albeit without having interviewed Mr Guiste themselves. She was also entitled to use her own common sense, and form her own assessment of the probable impact of homelessness on the practical ability of Mr Guiste to remember to take his daily calcium and vitamin D tablets. In this connection, Dr Bain had said in his letter of 26 April 2013 that "[d]omestic circumstances for safe and proper storage of the medication are absolutely essential", but the basis of that assertion is not clear. The medication takes the form of packs of ordinary tablets which may be stored at ambient temperature and taken with a glass of water. It cannot be the case that every person who takes prescribed medication of this straightforward kind must be treated as in priority need.

57. With these considerations in mind, I am not persuaded that any error of law can be detected in the way Ms Ubiam dealt with this issue, or in the conclusion which she reached. She correctly understood the general nature of Mr Guiste's hypoparathyroidism, and she took account of the fact that it might at times be inconvenient or difficult for him to remember to take his medication. She was clearly entitled to form the view that it would not involve a great deal of effort for Mr Guiste to adhere to this regime if he were made homeless, which is in essence the conclusion she drew in paragraphs 63 and 65 of the Review Decision.

58. It is true that Ms Ubiam did not deal explicitly with Dr Freedman's opinion on this part of the case. I accept that it would have been better if she had done so. But that is a counsel of perfection, and to insist on it would run counter to the benevolent approach which must be adopted when interpreting a review decision. Ms Ubiam said, in paragraph 27, that she had considered the medical material provided by Mr Guiste's advisers, including Dr Freedman's report. In the absence of any clear indication to the contrary, it must be assumed that Ms Ubiam was telling the truth, and that she had indeed read and considered the report. Having done so, it was not an error of law for her to fail to mention each and every occasion where she disagreed with Dr Freedman's assessment of what Mr Guiste had told her. I remind myself that, as Longmore LJ aptly said in Freeman-Roach at [55], "it is for the applicant to demonstrate that the reviewing officer has made a material error of law, not for the council to demonstrate that he has not made an error of law."

59. For these reasons, I would dismiss Mr Guiste's appeal in so far as it seeks to establish an error of law in the way the Review Decision dealt with his physical ill-health.

(2) Mental ill-health

60. I have found the issue of Mr Guiste's mental ill-health considerably more difficult to evaluate. I will go straight to the area that causes me most concern: the evidence that Mr Guiste has a history of depressive illness leading to acts of self-harm and/or attempted suicide at times of high stress, or at least to the contemplation of such acts, and the risk that homelessness might significantly increase the probability of Mr Guiste carrying out such acts, with or without fatal consequences.

61. I have already rehearsed the main evidence relating to this issue, all of which was before the review officer. It includes, notably:

> (a) the record of Mr Guiste's examination at St Georges' Hospital, following an urgent referral by his GP, in September 2017;
>
> (b) the assessment provided by Mr Ogedegbe of the Lambeth Living Well Network Hub on 6 December 2017;
>
> (c) the notes on the file of Mr Guiste's GP practice;
>
> (d) the record of the homelessness assessment carried out for Lambeth by Michelle Barnett on 6 April 2018; and
>
> (e) Dr Freedman's report, including her detailed record of her interview with him.

All of these are primary sources, in the sense that they record the views of medical, healthcare or housing professionals who had interviewed him and/or had the opportunity to observe his conduct, and had heard what he had to say first-hand.

62. The most significant incidents of actual self-harm or possible attempted suicide disclosed by this material are the following:

> (a) the incident, apparently in mid-2017, when Mr Guiste deliberately cut some of the fingers on his right hand, and had to attend hospital in order to have the wounds stitched;
>
> (b) the episode when he said he tried to kill himself in police custody following his arrest for suspected robbery, as reported by Mr Ogedegbe and also recorded by Dr Freedman in her review of Mr Guiste's medical records; and
>
> (c) the various episodes when voices told him to harm himself, for example by hanging himself, including one occasion when he had access to a rope and his mother came to calm him down and took the rope from him (page 19 of Dr Freedman's report).

It should be noted that Mr Guiste does not appear to have mentioned the episode in the police cell during his interview with Dr Freedman, although he did tell her about the voices telling him to harm himself, the incident with the rope, and the self-harm to his fingers. He also told her that he had "not had any other suicidal or self-harming behaviour".

63. When asked to provide her opinion on how homelessness would affect Mr Guiste's mental health, Dr Freedman's opinion was clear (on page 5 of her report):

> "In the short term, I think that Mr Guiste would have increased depression and anxiety. He would be at risk for self-harm and suicide, particularly in response to his auditory hallucinations."

I have also already set out Dr Freedman's opinion on the question whether Mr Guiste was vulnerable in the relevant sense, where she said that, if he were made homeless, his symptoms would be at risk of worsening, and he would particularly "be at risk for command hallucinations, demanding that he self-harm and/or hang himself."

64. This evidence, from a distinguished consultant psychiatrist, and directed to the key legal point in issue, could not in my view be disregarded, and if the review officer was going to depart from it, I think it was necessary for her to provide a rational explanation of why she was doing so. The difficulty which I have is that, even on a benevolent reading, I am unable to find any such rational explanation in the Review Decision. On the contrary, I find it very hard, if not impossible, to trace a coherent line of reasoning in paragraphs 66 to 75 of the Review Decision. Furthermore, in paragraph 75 Ms Ubiam appears to have accepted that "further suicidality in response to various life stressors" was not unlikely, which on the face of it appears to be consistent with Dr Freedman's own prognosis. In the very next sentence, however, Ms Ubiam said she thought there was no current evidence to indicate that Mr Guiste would experience harm or deterioration as a result of homelessness. That appears to amount to a rejection of Dr Freedman's firmly stated opinion to the contrary, but I am unable to find any clear

indication why Ms Ubiam took this view, especially as she appeared to accept the likelihood of further suicidality. Instead, the ensuing paragraphs of the Review Decision veer off into generalities and paraphrases of Hotak. If Ms Ubiam was intending to base her conclusion on the views of the two psychiatrists instructed by NowMedical, she needed to explain why their views should prevail over that of Dr Freedman, when they were less highly qualified that she is, and (more importantly) they had never met or interviewed Mr Guiste. Equally, I find it hard to see how Ms Ubiam could rationally have given more weight to the report of the consultation at St George's Hospital in September 2017 than to the more recent and much fuller report of Dr Freedman, which (unlike the earlier report) also focused on the critical question of the effect that homelessness would have on Mr Guiste's mental health.

65. In view of these shortcomings, I am driven to the conclusion that the Review Decision simply does not do justice to this crucial part of Mr Guiste's case. The question whether Mr Guiste's mental illness makes him more vulnerable than an ordinary person to the risk of suicide if made homeless is self-evidently a very serious matter, which requires careful consideration of all the relevant evidence and an adequately reasoned conclusion. While I have every sympathy for Ms Ubiam in the difficult task which she had to perform, I have to say that in my judgment the parts of the Review Decision dealing with this critical issue do not meet the requisite standard. Such a failure is in my view properly characterised as an error of law, because there has been a breach of the principles of rationality and fair decision-making.

66. I do not, however, consider the answer to be so clear that we can properly conclude, on the basis of the material now before us, that the issue of priority need must inevitably be determined in Mr Guiste's favour. Mr Westgate invited us to take this course, but the question should in my view be reconsidered by an experienced review officer other than Ms Ubiam. Accordingly, if the other members of the court agree, that is the order I would propose to make.

67. In conclusion, I should mention two other matters on which we heard submissions.

68. First, Ms O'Brien submitted to us that there is an additional requirement of "functionality" which needs to be satisfied by an applicant for priority need under section 189(1)(c). She said that this requirement flows from the observations of Lewison LJ in Panayiotou at [35], and that the relevant question is whether the particular circumstances of Mr Guiste would affect his *functionality* (my emphasis) so as to make a noticeable difference to his ability to deal with the consequences of being homeless.

69. I am unable to accept this submission, which would import an extra layer of complexity into a test which is already far from simple to expound. Lewison LJ's observations on functionality were made in the context that there must be a causal link between the particular characteristic relied on under section 189(1)(c) and the effect of homelessness. They were not in my judgment intended to introduce a new and additional test, over and above the requirement for a causal link between the relevant characteristic and the effect of being made homeless. Nor is it clear to me how this supposed further requirement should be formulated, or what the minimum ingredients of such functionality would be. Ms O'Brien provided us with a list of such factors in her oral submissions, while acknowledging that the precise content of the requirement would always depend on the circumstances of the case; but she was unable to cite any

authority for this approach, apart from the passage in Panayiotou which, as I have explained, goes only to the question of causation.

70. Furthermore, if the submission were correct, it would have some surprising consequences. Mr Westgate gave the example of a person who, by application of the Hotak comparison, is found to be likely to become seriously ill, as a direct result of being made homeless. Provided that the necessary causal link exists between the illness and the relevant protected characteristic under section 189(1)(c), it is hard to see any reason why the applicant should also have to satisfy some ill-defined test of impairment of functionality.

71. Secondly, Lambeth submits by a respondent's notice that, if we considered there had been an error of law, we should consider the question of relief in the light of section 31(2A) of the Senior Courts Act 1981, and withhold relief if satisfied that in the circumstances of this case it is "highly likely" that the outcome for Mr Guiste would not have been substantially different.

72. Section 31(2A) of the 1981 Act applies to applications to the High Court for judicial review, and provides that:

> "The High Court –
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

Subsection (2B) then provides that the court may disregard the requirements of subsection (2A)(a) and (b) "if it considers that it is appropriate to do so for reasons of exceptional public interest." Ms O'Brien accepts that section 31(2A) does not impose a duty on the County Court hearing appeals under section 204 of the 1996 Act, but submits that the same test for refusing relief as in judicial review proceedings in the Administrative Court should be applied here by analogy.

73. The short answer to this submission, on the facts of the present case, is that even if it were appropriate to apply section 31(2A) of the 1981 Act by analogy to housing appeals under section 204 of the Housing Act 1996, I am far from satisfied that it is "highly likely" that the outcome for Mr Guiste would have been the same if the errors of law in the Review Decision which I have identified had not occurred. On the contrary, there must in my view be a very real chance that, upon reconsideration, Mr Guiste will be found to satisfy the test for priority need under section 189(1)(c). There may also be a more fundamental objection. In provisional agreement with the submissions of Mr Westgate, I am inclined to think that there is no proper basis for extending the scope of the new test in section 31(2A), by judicial decision, to statutory housing appeals under section 204 of the 1996 Act. The question is not free from difficulty, however, and in a very recent decision of this court, handed down on 29 July 2019, it was held that

section 31(2A) does apply to a public law defence to a private law possession claim in the County Court: see Forward v Aldwyck Housing Group Ltd [2019] EWCA Civ 1334, at [36] per Longmore LJ. Since it is unnecessary for us to decide the question, I therefore prefer to leave it open.

Rose LJ:

74. I agree.

Theis J:

75. I also agree.