

National Homelessness Advice Service

# Vulnerability and priority need: advising clients

**A Guide for frontline advisers supporting single people making a homeless application where there may be an issue about priority need**

This guidance has been developed following the Supreme Court decision [in Hotak v Southwark LBC, Kanu v Southwark LBC; Johnson v Solihull MBC](#) (15 May 2015)

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## 1. What is Priority Need?

Priority need is one of the tests which a homeless person needs to pass for the Council to decide what help with housing that they might be entitled to. The other tests are whether the person is eligible for homeless assistance, actually homeless, homeless through no fault of their own or intentionally homeless, and has a local connection with the local authority where they are making their application.

For example, a homeless person with children will automatically be in priority need.

A single, homeless person aged 16 or 17 (or under 21 and have been looked after at any time when between the ages of 16 and 18) will automatically be in priority need.

But in every other situation a single person will have to persuade the local authority that they are 'vulnerable' in order to be in priority need.

A homeless person may be 'vulnerable', in the words of s189 Housing Act 1996, as a result of:

- Old age
- Mental illness
- Mental handicap
- Physical disability
- Having been in care (and now 21 or over)
- Having been in the armed forces
- Having been in custody
- Having fled actual or threatened violence or
- Other special reason

The words " other special reason" ...show that vulnerability arising from other causes (e.g. being a refugee) must be considered by the Local Authority Homeless Service.

## 2. Why is priority need important?

If a homeless person is in priority need then the local authority may have the following duties:

- (1) **to provide interim or temporary accommodation when the person applies for homeless assistance.** The local authority must simply have 'reason to believe' that they are homeless, eligible for homelessness assistance and in priority need for this duty to arise. This duty continues while the Council makes enquiries and then a decision about their homeless application. (s188 (1) Housing Act 1996)
- (2) **to secure longer term accommodation for someone who is unintentionally homeless and in priority need.** This duty arises when the local authority accepts a full housing duty towards them. (s193 Housing Act 1996)
- (3) **to provide short term accommodation for a homeless person who is intentionally homeless but is eligible for assistance and in priority need.** Under this duty the local authority is obliged to provide accommodation to give the homeless person a reasonable amount of time to find accommodation for themselves. (s190 (2) Housing Act 1996)

If a homeless person is **not** in priority need then the local authority has a **duty** to provide advice and assistance, but only a **power** – which they rarely use in practice– to provide accommodation.

**3. The initial Interview:** when advising and assisting your client they may need help to show the local authority how they might meet the 'vulnerability' priority need criteria for homeless assistance. Key pointers:

- **Awareness** of the new approach to vulnerability, as set out by the Supreme Court is key to advising your client. See the main points from their judgment listed in Appendix 1.
- **Aim** is to encourage the client to draw out and present all the relevant information about their lives and circumstances to Homeless Service who will assess whether or not they are vulnerable.
- **Focus** on the impact of homelessness on the client when compared to 'a robust and healthy' ordinary person if rendered homeless i.e. how they are more at risk.

Being old, for example, by itself does not mean someone is vulnerable without describing how their age will affect the risk they face when homeless.

Being an ex-offender or a victim of domestic violence, by itself does not mean that someone is vulnerable, without explaining how that experience of prison or violence will add to the risks they face when homeless.

- **Emphasis** is on the facts and evidence relating to the particular applicant. Use examples from their everyday life, to show how homelessness affects them.
- **Attention** is on the client's problems 'in the round' when homeless i.e. taking them all together

### **3a) Aspects of your client's life to consider:**

- Health issues
  - physical and mental health medical conditions,
  - current and future treatment,
  - particular requirements to help manage the condition (medication, need for medical equipment, attending appointments, diet, rest, quiet, warmth etc.)
- Activities of daily living
  - personal care
  - managing household affairs (dealing with correspondence, appointments, language issues, communication, literacy)
  - getting around
  - keeping safe (at home or out and about)
  - usual work/leisure/social activities

### **3b) Questions to keep in mind when interviewing and advising your client**

- (1) How the client is or will be affected by homelessness in relation to the above aspects of life? Encourage the client to describe their situation, their feelings and fears.
- (2) How might any difficulties be linked to the client's age/having been in care or prison/having fled actual or threatened violence/ or other special circumstance such as being a refugee etc.?

- (3) Who, if anyone, provides support – family, friends, voluntary agencies, health or social services? What kind of support do they give?

Has or will this support change as a result of the client's homelessness?  
Will the support continue to be available on a regular basis?

What will happen for example if the family/friends are not available or go away?

- (4) How might these changes mean the client is more at risk than the 'robust and healthy' ordinary person if rendered homeless?

- (5) Who might be able to provide evidence in support? (GP, medical consultants, social workers, specialist support agencies, family members, friends)

Consider whether it would be best to obtain letters from them at this stage.

A medical report may be particularly useful where the client has mental health issues or suffers from medical conditions which may not obviously appear to have an impact on their ability to cope when homeless.

If requesting a report ask the GP etc. to consider (a) whether or not his/heryour client's health would get worse if s/hes/he was (street) homeless and (b) their opinion as to whether they would suffer more than the ordinary person in the same position giving reasons why they think this.

**It may help to go through the activities of a normal day or week with some clients to get to the level of detail which might assist the assessment of vulnerability.**

**3c) Does the client have a 'protected characteristic' so that the Equality Act 2010 applies? (see Appendix 2 for details about definitions of disability)**

If, in your assessment, the client comes within the protection of the Equality Act then it is an option to inform the Council that you believe this to be the case. Any letter to the local authority would then need to include a brief description of the nature of the impairment and how it has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

It is up to the local authority to give rigorous consideration to the homeless disabled person's circumstances and whether they are vulnerable as a consequence.

NB. If someone had ADHD (a protected disability) which showed up in exhibitionism or a tendency to violence (excluded conditions) they would **not** be entitled to the protection of the Act, but if the person also had other symptoms such as hyperactivity or impulsiveness which led them to act without thinking or without any heed of the danger, then they would have a protected characteristic (notwithstanding the other excluded condition).

For example a person who has a drug/alcohol addiction (excluded condition) may be disabled if they have hepatitis C or alcohol related memory loss or drug induced mental health problem.

#### 4. Guidance for clients who are making a homeless application

- **We recommend** you and your client make a list to help them tell the interviewing officer about:
  - all their problems relating to their health and all aspects of daily living;
  - how those problems have got worse since they lost their accommodation or are likely to get worse when they become homeless;
  - who helps them with these problems while they had somewhere to live;
  - how their support has changed or might change when they are homeless.
- **Emphasise** to your client that they cannot assume that if they just tell the interviewing officer that they suffer from a particular physical or mental health condition, the officer will understand how it impacts on them now or when they become homeless.
- **Prepare** a list of the names of people it would be helpful for the interviewing officer to contact for more information (GP, Hospital consultants, social services, community agencies etc.)
- **Suggest** that they take someone with them to the interview if they feel that they cannot explain things clearly to the interviewing officer (possibly in addition to a referral letter).

#### 5. What to do if your client is turned away by the local authority Homeless Service or interim accommodation is refused because they say the client is 'not in priority need'.

If you think that your client is in priority need it may be possible to seek judicial review of that refusal in the High Court.

- **Send a letter immediately to Homeless Services and** : -
  - (1) confirm that your client made a homeless application when they approached Homeless Services,
  - (2) explain why in your view Homeless Services should have 'reason to believe' that they are eligible, homeless and in priority need
  - (3) ask them to provide interim accommodation straight away.
  - (4) also ask for a written decision and say that you will refer the client for legal advice if interim accommodation is not provided.
- **Refer your client to housing solicitor as soon as possible**

A solicitor can apply to the High Court for judicial review of that decision and an order for interim accommodation to be provided.

Legal Aid is available if the client is on a low income and there is sufficient merit in the case.

## 6. What to do if the local authority makes a decision that the homeless person is not in priority need

- (1) If you think that the local authority has made the wrong decision your client can seek a review. The review should be requested within 21 days of receiving the decision.
- (2) At the same time ask for a copy of the client's housing file.
- (3) **Refer to a housing solicitor?** Consider whether your client should be referred to a housing solicitor because the review raises difficult questions of fact or law. If the client is on a low income s/he may be eligible for legal aid.

### Things to consider when making representations on vulnerability

**NB** Advice from Lord Neuberger in the Supreme Court: challenges to local authority decisions should not take a 'too technical approach' or 'search for inconsistencies' and 'immaterial errors'. Nevertheless one must carefully go through the decision letter to identify any mistakes of fact and law.

- **Go through** the s184 decision letter with the client and check the facts as stated in the letter are correct
- **Identify** the key points in dispute
- **Decide** whether you need additional fresh evidence to put to the local authority
- **Ask** the local authority for more time if it will be needed to consider the housing file or gather evidence

### Questions to keep in mind when considering a s202 review:

- (1) Has the right comparator been used?
- (2) Have 'dangerous' or misleading terms been used such as
  - i. "*street homeless*": too difficult an expression to define and not referred to within the statute - to be avoided
  - ii. "*fend for oneself*": not referred to in statute and could lead to misleading test, e.g. would suggest that support of family members should not be taken into account.
- (3) Has there been non-permissible reference to statistics or the council's resources?
- (4) Has the assessment of 'risk of harm' been set at too high a level i.e. 'significant' has been interpreted as 'substantial' or 'very serious' as opposed to 'not insignificant' or 'more than minor'?
- (5) Has too much weight been given to the role of third party support to the client if homeless?
- (6) Have sufficient enquiries been made?
- (7) Have the relevant facts and evidence been properly taken into account?
- (8) Have any relevant facts or evidence been ignored or played down?
- (9) Has there been a 'rigorous consideration' of the Equality Act duty i.e. proper and conscientious focus on the statutory criteria and not just lip service (there does not have to be a specific reference to the Equality Act, but there should be evidence of consideration of the issues)?

## **7. What to do if the local authority review upholds the decision that your client is not in priority need.**

If you think that the local authority has still got it wrong it may be possible to appeal to the County Court under s204 Housing Act 1996 against the negative s202 review.

- **Consider referring your client to a housing solicitor or seek specialist advice as soon as possible.**
- Legal Aid is available if the client is on a low income and there is sufficient merit in the case.
- An appeal has to be lodged within 21 days.
- An appeal can only be brought on a point of law.
- Points of law can arise from any decision where – for instance:
  - the wrong legal ‘test’ has been applied.
  - inadequate enquiries have been made into your client’s situation
  - there is no or insufficient evidence to support the factual findings
  - the relevant factors have not been taken properly into account
  - the reasons for the decision are inadequate.

## Appendix 1: Changes to the assessment of vulnerability: some key points

### A. The old approach

'Vulnerability' is not defined in s189 (c) Housing Act 1996 nor in any regulations

In the absence of a statutory definition local authorities adopted and applied an interpretation from the judgment of the Court of Appeal in *R v Camden London Borough Council, ex p Pereira* (1998).

In order to pass the *Pereira* test a homeless applicant who did not fit into other priority need categories had to prove vulnerability by persuading the local authority that they:

*“when homeless [ will be] less able to fend for himself than an ordinary homeless person so that injury or detriment to him will result when a less vulnerable man would be able to cope without harmful effects”.*

It became a common practice for local authorities to compare the homeless applicant with the 'ordinary homeless person' who was street homeless and more likely than most to suffer from mental and physical health problems.

### B. The new approach outlined by the Supreme Court (References to specific paragraphs in the judgment in brackets)

#### Defining Vulnerability

'Vulnerable' is a word which invites a comparison so **who** should the homeless applicant be compared with and **how** should the comparison be made:

- The comparison must be with the ordinary person who is in need of accommodation and **not** the ordinary homeless person or street homeless person. (93),(57) - (59)
- Further the comparison is with 'ordinary people generally, not ordinary people in the locality' (93)
- The ordinary person is robust and healthy (71)
- "Vulnerable" in section 189(1)(c) means being "significantly more vulnerable than the ordinarily vulnerable as a result of being rendered homeless (Lord Neuberger para 53). All people are at risk of harm from homelessness but the Act did not intend all homeless persons to qualify as vulnerable.

*The person who is old ...(etc)... must as a result be **more at risk of harm** from being without accommodation than an ordinary person would be."* (Lady Hale at (93)).

The applicant must have something significant (i.e. something more than insignificant) that makes her/him vulnerable when compared to ordinary people generally. (cf 'substantial' in the Equality Act in relation to disability is defined as 'more than minor or trivial')

- The assessment of vulnerability is... 'a contextual and practical assessment of his physical and mental ability if he is rendered homeless (which, as just explained, must be compared with the ability of an ordinary person if rendered homeless)'. (62)

- Close attention must be given to the particular circumstances of the applicant in the round i.e. not so much by reference to each of the applicant's problems but by reference to them when taken together. (38)
- No account can be taken of the demands on the Council or its resources when making a decision on a homeless application (39)
- No statistics can be used as a comparator to measure vulnerability: 'The use of statistics to determine whether someone is vulnerable is a very dangerous exercise' (43)

### **Taking into account support from others**

- The care given by statutory bodies or by a carer, whether a family member or not can be taken into account. "An applicant might not be vulnerable if, when homeless, he would be provided with support and care by a third party (often no doubt a family member with whom he was living)" (61 - 65).
- This support can only be taken into account where the housing authority is 'satisfied that the third party will provide support on a consistent and predictable basis.' (65)
  - Further, 'The mere fact that such support would be available may not prevent the applicant from being vulnerable' (69).
  - "It is not unreasonable to expect members of the same family to support each other if they are living together, but:
    - (i) whether a particular applicant will *in fact* receive support and if so what support, must be a case-specific question, to which the answer must be based on evidence,
    - (ii) in a particular case, the level of support may have to be so high to obviate vulnerability that it goes beyond what can be expected on any view, and
    - (iii) as already explained, the fact that there may be very substantial support does not of itself necessarily mean that the applicant will not be vulnerable." (70)

### **Duty under the Equality Act**

- Where the EA 2010 is engaged, i.e. the person has a protected characteristic, the effect is to increase the level of scrutiny required by the housing authority.
  - This requires 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'. (78)
  - The duty must be 'exercised in substance, with rigour and with an open mind'. (78)

## Appendix 2: Relevant law in relation to vulnerability and priority need

### Housing Act 1996

Section 189(1)(c) of the Housing Act 1996, Part 7 (as amended) states that “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” has a priority need for accommodation.

Homelessness (Priority Need for Accommodation (England) Order 2002, SI 2002/2051 sets out a list of those who may be in priority need if they can show that they are vulnerable:

- (1) A person (other than a relevant student) who has reached the age of twenty-one and who is vulnerable as a result of having been looked after, accommodated or fostered.
- (2) A person who is vulnerable as a result of having been a member of Her Majesty's regular naval, military or air forces.
- (3) A person who is vulnerable as a result of:
  - (a) having served a custodial sentence (within the meaning of section 76 of the Powers of Criminal Courts (Sentencing) Act 2000)(1);
  - (b) having been committed for contempt of court or any other kindred offence;
  - (c) having been remanded in custody (within the meaning of paragraph (b), (c) or (d) of section 88(1) of that Act). (s5 of the above order)
- (4) A person who is 'vulnerable' as a result of ceasing to occupy accommodation by reason of violence from another person or threats of violence from another person which are likely to be carried out. (s6 of the above Order).

### Equality Act 2010

Section 4 of the Equality Act 2010 defines “protected characteristics” as age, disability (including mental or physical impairment), gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

Section 6 of the Equality Act 2010 states that a person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

In s 212(1) of the Equality Act 2010 'substantial' is defined as 'more than minor or trivial'.

In s2(1) of Schedule 1 of the Act the effect of an impairment is defined as 'long term' if it has:

- (a) it has lasted for at least 12 months,
- (b) it is likely to last for at least 12 months, or
- (c) it is likely to last for the rest of the life of the person affected.

If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur. (*para 2(2) Schedule 1*)

*If a person has certain specified medical conditions they will as a matter of law be deemed to have a disability:*

- (1) A person with cancer
- (2) multiple sclerosis
- (3) or HIV infection if it is infection by a virus capable of causing the Acquired Immune Deficiency Syndrome. (*para 6 Schedule 1*)

- (4) where that person is certified as blind, severely sight impaired, sight impaired or partially sighted by a consultant ophthalmologist. (reg 7 Part 2 *Equality Act 2010 (Disability) Regulations 2010* SI 2010 /2128).

On the other hand there are certain exclusions from the definition of disability because they do not amount to a physical or mental impairment. These are set out in the *Equality Act 2010 (Disability) Regulations 2010*.

*The exclusions are:*

- (1) addiction to alcohol, nicotine or any other substance is not to amount to an impairment unless the addiction was originally the result of administration of medically prescribed drugs or other medical treatment. (reg 3 Part 2)
- (2) (a) a tendency to set fires,  
(b) a tendency to steal,  
(c) a tendency to physical or sexual abuse of other persons,  
(d) exhibitionism, and  
(e) voyeurism. (s4 Part 2)
- (3) Seasonal allergic rhinitis but this can be taken into account where it aggravates the effect of any other condition.

See also [Equality Act Guidance](#)