

Defining Vulnerability

Nik Nicol, Barrister, 1 Pump Court

 Keywords to Follow

Under Pt 7 of the Housing Act 1996, those with no or inadequate housing can look to get themselves a new home if the local council is satisfied that they pass a number of tests, namely if they are homeless, eligible for assistance in accordance with their immigration status, in priority need and not intentionally homeless.¹ Priority need is defined as being in one or more of a number of specified categories. Some of those categories require that the homeless applicant should be “vulnerable”:

- (1) a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason²;
- (2) a person (other than a relevant student) who has reached the age of 21 and who is vulnerable as a result of having been looked after, accommodated or fostered³;
- (3) a person who is vulnerable as a result of having been a member of the regular naval, military or air forces⁴;
- (4) a person who is vulnerable as a result of having served a custodial sentence, been committed for contempt of court or been remanded in custody⁵;
- (5) 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.⁶

There is no statutory definition of “vulnerable” but the courts have made many attempts to define it and then refine that definition. In *Aman v LB Camden*⁷

¹ Housing Act 1996 s.193(1).

² Housing Act 1996 s.189(1)(c).

³ Homelessness (Priority Need for Accommodation) (England) Order 2002 (SI 2002/2051), para.5(1).

⁴ *ibid.*, para.5(2).

⁵ *ibid.*, para.5(3).

⁶ *ibid.*, para.6.

⁷ [2005] EWCA Civ 1632 at [5].

Mummery L.J. said he found it difficult to understand a challenge being made to the local authority’s decision on vulnerability and then said:

“It may be my fault; it may be the fault of the legislation; it may be the result of the courts in seeking, in cases such as *Pereira*, to give more precise definitions to words that have no precise definition, in particular the word ‘vulnerable’ ... I suspect that the problem is that tests are being propounded by courts, local authorities and practitioners which are difficult to fit with the statutory words of the relevant provisions of the 1996 Act. When attempts are made to impose tests on words that are in the Act, questions do arise that are difficult for courts and people who have to apply the law to adjudicate upon.”

Any definition of vulnerability must start with the statutory purpose for including this category of applicants within priority need. Lord Hoffmann explained the purpose when he said in *O’Rourke v Camden LBC*⁸ that the

“Act is a scheme of social welfare, intended to confer benefits at the public expense on grounds of public policy. Public money is spent on housing the homeless not merely for the private benefit of people who find themselves homeless but on grounds of general public interest: because, for example, proper housing means that people will be less likely to suffer illness, turn to crime or require the attention of other social services”.

The courts’ first attempt to define “vulnerable” in this context was set out in *R. v Waveney DC Ex p. Bowers*⁹: “vulnerable in the context of this legislation means less able to fend for oneself so that injury or

⁸ [1998] A.C. 188 at 193.

⁹ [1983] Q.B. 238.

detriment will result when a less vulnerable man will be able to cope without harmful effects.”¹⁰

In cases that followed, the courts sought to refine the test, including:

- “The vulnerability to be considered is vulnerability loosely in housing terms or in the context of housing.”¹¹
- Vulnerability is to be assessed by comparison with an average homeless applicant.¹²

In *R. v Camden LBC Ex p. Pereira*¹³ and, seven years later, *Osmani v Camden LBC*¹⁴ the Court of Appeal felt the need to review the case law to date and reconfirm the correct test. In particular, *Pereira* disposed of the argument that “vulnerable” in this context necessarily equated to an inability to find or maintain accommodation. In *Osmani*, the Court of Appeal stated¹⁵:

“It is section 189(1)(c) in its broad and immediate statutory context that a local housing authority has to apply, not the *Pereira* test as if it were a statutory formulation. The *Pereira* test is simply a judicial guide—albeit and to the extent that it is sufficiently precise, an important one—to interpretation and application of the statutory provision.”

Following a flurry of cases about vulnerability, of which *Osmani* was the most notable, Jonathan Parker L.J. in *Bellouti v Wandsworth LBC*¹⁶ felt able to say:

“In my judgment if, after the decisions of this court in *Bowers* and *Pereira*, there remained any room for genuine doubt as to the test to be applied in deciding whether an applicant is ‘vulnerable’ within the meaning of section 189(1)(c), Auld LJ’s judgment in *Osmani* has removed it. It seems to me, if I may respectfully say so, that in his judgment in *Osmani* Auld LJ has said all that (at least for present purposes) need be said or can be said on the matter: so much so that any attempt on my part to provide

¹⁰ *ibid.*, per Waller L.J. at 244–245.

¹¹ *R. v Bath CC Ex p. Sangermano* (1984) 17 H.L.R. 94, Hodgson J. at 97.

¹² *Wilson v Nithsdale DC* 1992 S.L.T. 1131.

¹³ (1998) 31 H.L.R. 317.

¹⁴ [2005] H.L.R. 22.

¹⁵ *ibid.*, [38(1)] of the judgment.

¹⁶ [2005] H.L.R. 46 at [57].

further judicial guidance or to undertake further analysis would in all probability serve no purpose other than to increase the scope for the kind of dissective, semantic arguments that [counsel for the appellant] has addressed to us on this appeal.”

Further definition

The thesis of this article is that Jonathan Parker L.J. is wrong in that further Court of Appeal comment is needed on the subject. It is the experience of this author that, whether owing to resource pressures or for other reasons, local authorities are continuing their attempts to narrow their duties to homeless persons by adopting more restrictive definitions of the relevant legal provisions, particularly in respect of vulnerability. Arguably, they often go too far.

An example arises from the case of *Griffin v City of Westminster*.¹⁷ There, the Court of Appeal held that the Code of Guidance in force at that time was wrong to state that the test for vulnerability was whether the applicant was “likely” to suffer injury or detriment (this error has now been fixed in the Code of Guidance in force since September 2006¹⁸). Some local authority officers appear to have misunderstood this and to think that this has required a standard of proof of certainty. While the *Bowers/Pereira* test does not involve likelihood, in determining whether it has been fulfilled an officer will still need to apply a suitable standard of proof. That standard cannot be more than the balance of probabilities and certainly not as high as certainty.

Medical issues

Of more significance is the role of medical advisers in helping local authorities determine the issue of vulnerability. Most cases of vulnerability involve a medical opinion on the homeless applicant’s problems. In *R. v Lambeth LBC Ex p. Carroll*¹⁹ Webster J. said:

“Where the applicant claims to be vulnerable for medical reasons or where on making proper inquiries it is apparent to the authorities that such is his claim, it is both proper and necessary as part of the inquiries which the authorities are under a duty to make to take and consider a

¹⁷ [2004] H.L.R. 32.

¹⁸ See para.10.13 of Homelessness Code of Guidance for Local Authorities.

¹⁹ (1988) 20 H.L.R. 142.

medical opinion, unless the applicant's condition renders him so obviously vulnerable that that is not necessary. It may quite often be the case, I suspect, that the medical opinion is in practice more or less conclusive in the sense that the authority will be able from it to satisfy themselves whether or not the applicant is vulnerable and, if so, whether he is vulnerable for one of the particular reasons specified in [s.189](1)(c). This could particularly be so where the doctor concerned expressly addresses and gives opinions about three separate questions: first, whether the homeless person is in his opinion vulnerable in that he is less able to fend for himself when homeless or in finding and keeping accommodation; secondly, whether or not he is of that opinion, whether the person is suffering from any of the conditions specified in section [s.189](1)(c); and, thirdly, if in his opinion the homeless person is vulnerable, whether that vulnerability is caused by such condition or by any other reason."

Webster J.'s separation of the elements of s.189(1)(c) into three parts does not fit with the Court of Appeal's judgment that it is a composite question.²⁰ However, the principle is that if a suitable medical adviser applies the correct test, then their opinion is likely to be, for all intents and purposes, conclusive, even if the final decision is technically for the local authority alone. A problem arises, though, if the adviser does not apply the correct test.

Local authorities often use external medical advisers. There is one organisation in particular that many local authorities are using, called NowMedical. According to their website,²¹ they will provide reports for local authorities on vulnerability and general housing need which will stand up to examination in court. However, in the experience of this author, in their reports they do not purport to apply the *Bowers/Pereira* test set out above but instead whether the applicant's condition is not "such as to significantly impede his/her reasonable function".

NowMedical reports have been involved in a number of reported cases:

- In *Bellouti v Wandsworth LBC*²² the appellant suffered from chronic backache, arthritis and depression. As part of an exchange

²⁰ See *Osmani*, above fn.14, [38(6)].

²¹ <http://www.nowmedical.co.uk>.

²² Above fn.16.

of medical opinions between the parties, Dr Keen of NowMedical stated that the appellant's depression was not such as to materially impede reasonable function²³ and that none of his medical issues, either singly or as a whole, were considered such as to significantly impede reasonable function.²⁴ In rejecting the appeal against the local authority's subsequent finding that the appellant was not vulnerable, the county court judge said that the authority's reviews manager "was clearly entitled to take into account Dr Keen's assessment of Mr Bellouti's mental and physical condition, whatever the actual question which drew his answers".²⁵ The Court of Appeal did not comment directly on the test applied by Dr Keen but, in rejecting the appeal, stated that the authority's reviews manager had applied the correct *Pereira* test.

- In *Brown v Wandsworth LBC*²⁶ the appellant had a range of medical problems including sciatica, asthma, psoriasis, high blood pressure, obesity, liver dysfunction, narcolepsy and rhinitis. Dr Keen of NowMedical stated that none of these issues, "either taken singularly or as whole, are such as significantly to impede his reasonable function".²⁷ The local authority's reviews manager (the same one as in *Bellouti*) decided that the appellant was not vulnerable but the county court judge held that this was irrational and varied the decision to say he was vulnerable. The Court of Appeal refused the authority permission to appeal. Both the county court judge and the Court of Appeal based their judgments on the authority's errors, not on what Dr Keen had said.
- In *Richardson v Birmingham CC*²⁸ the appellant's own medical advisers said he needed to use a particular machine as a result of his diabetic condition. The authority obtained a NowMedical report which said it was not necessary and refused to provide accommodation pending an

²³ *ibid.*, [18].

²⁴ *ibid.*, [30].

²⁵ *ibid.*, [37], [20].

²⁶ [2005] EWCA Civ 907.

²⁷ *ibid.*, [6(ii)] of the Court of Appeal's judgment.

²⁸ *Legal Action*, November 2005, p.38 (the report contains some good advice on how to deal with medical reports for vulnerability cases).

appeal against their finding that the appellant was not vulnerable. The county court judge said that the NowMedical report should be treated with caution and ordered the authority to provide accommodation pending the substantive appeal.

- In *Khelassi v Brent LBC*²⁹ the appellant's medical adviser, Dr Steadman, said there was a current serious risk or a real and substantial risk of the appellant committing suicide.³⁰ Dr Keen said: "his condition is not substantial, nor such as to impede reasonable function and activity, and being mindful of Pereira as always, I make no recommendation for housing on this basis", and "In summary, I do not believe that any depression is such as to significantly impede the applicant's normal and reasonable function, nor will materially hinder his ability to cope as a homeless person, and I do not consider that there is a significant risk to his health by homelessness".³¹ Relying on Dr Keen's opinion, the local authority found the appellant to be not vulnerable. The county court judge quashed this decision. In refusing the authority permission to appeal, the Court of Appeal commented that Dr Keen was of the view that Dr Steadman's reports broadly supported his own view but that they found it difficult to see how that could have been said.³² Arden L.J. stated: "There was ... a chasm between the two reports and while I have every sympathy for [the authority] in using a phraseology which they found in Dr Keen's own report, in my judgment they should have read the reports and realised that there was a difference of opinion and that it was not possible for them to make their decisions as a matter of law without engaging and grappling, as the judge said, with that particular difference of view."³³
- In *Shala v Birmingham City Council*³⁴ Dr Keen stated, in respect of a Kosovan refugee with depression and post-traumatic stress disorder: "her condition is currently

being treated ... and there remains nothing to suggest her condition [is] of particular severity, nor that it has been in the past and nor that impairs her ability to function or significantly impedes her daily activities."³⁵ It is ironic that the authority's review officer claimed in his decision letter that the appellant's medical advisers had not applied the correct test, even though they used the words of the *Bowers/Pereira* test, but did not purport to apply the same analysis to Dr Keen's report.³⁶ In any event, the Court of Appeal merely commented: "Dr Keen did not attempt to formulate his advice in the language of the Act or the cases decided under it."³⁷

NowMedical's doctors are clearly aware of the *Bowers/Pereira* test and would appear to apply the "reasonable function" test because they regard the two tests as synonymous. However, this was specifically put to the test in *Khelassi* and the reasonable function test was found wanting. A close reading of the excerpts from Dr Keen's reports in that case suggest that when he said he and the appellant's medical adviser were of the same view, he was talking not about the *Pereira* test or the risk of suicide but of whether the reasonable function test was satisfied.³⁸ He may well have been right on that issue but the whole point of the case was that this was not a sufficient analysis of whether the appellant was vulnerable within the meaning of the Act, i.e. the *Pereira* test and the reasonable function test diverged.

The problem is similar to the one identified in *Pereira*. In that case one possible aspect of "vulnerable", namely the ability to find and maintain accommodation, became erroneously elevated to a conclusive test. There can be no doubt that most, if not all, of those who satisfy the reasonable function test will be found to be vulnerable. However, the reverse is not true, namely that all those who are vulnerable within the meaning of the Act satisfy the reasonable function test. For example, the appellants in *Pereira*, *Khelassi* and *Crossley v Westminster CC*³⁹ suffered from mental illness or addiction but those problems did not, for the most part, prevent their functioning in ordinary daily life, which is what the reasonable function test would appear

²⁹ [2006] EWCA Civ 1825.

³⁰ See *ibid.*, [7].

³¹ *ibid.*, [10]; also see [16].

³² *ibid.*, [17].

³³ *ibid.*, [38].

³⁴ [2007] EWCA Civ 624.

³⁵ *ibid.*, [10] of the judgment.

³⁶ See *ibid.*, [14] of the judgment.

³⁷ *ibid.*, [20].

³⁸ Above fn.29, [16] of the Court of Appeal judgment.

³⁹ [2006] H.L.R. 26.

to be addressing. However, the Court of Appeal was satisfied that the appellants in each case were capable of being regarded as vulnerable within the meaning of the Act.

Moreover, it is worth noting that:

- (1) Being vulnerable as a result of having been in foster care, the armed forces or custody or subjected to domestic violence⁴⁰ would not appear necessarily to be a factor of one's ability to function in carrying out ordinary daily activities.
- (2) Limiting vulnerability to those who only satisfy the reasonable function test would appear to limit severely the purpose of the Act as expressed by Lord Hoffmann above.

The only case to have reached the Court of Appeal in which the "reasonable function" test was challenged was in *Aman v Camden LBC*,⁴¹ although NowMedical were not involved. The Court of Appeal refused permission to appeal on the basis that, on the facts, the local authority had not applied the functional test but the full *Pereira* test. Similarly, in *Bellouti*, although the authority had relied on NowMedical's report containing the reasonable function test, the Court of Appeal was satisfied that they had applied the correct *Pereira* test in their final decision letter.

In *Shala* (see above)⁴² Sedley L.J. emphasised the importance of these issues⁴³:

"this is an area of law which impinges directly on two important and in part conflicting interests. One is the need of local housing authorities to husband their resources and to ensure that only those genuinely entitled are treated as in priority need. The other is the catastrophic consequences of a failure to house someone whose vulnerability will make them unable to cope with homelessness—a legal test which itself makes the dubious assumption that homelessness is something fit people can always cope with. Only a properly approached and fair-minded decision can hold these interests in balance."

Although the Court of Appeal did not consider Dr Keen's use of the wrong test, they did provide

⁴⁰ See Homelessness (Priority Need for Accommodation) (England) Order 2002 as discussed above.

⁴¹ [2006] EWCA Civ 750.

⁴² Above fn.34.

⁴³ *ibid.*, [24] of his judgment.

some useful guidance which should severely limit the opportunity for the misleading use of medical evidence and over-reliance on Dr Keen. Specifically in relation to Dr Keen himself, Sedley L.J. stated: "those who rely on [Dr Keen's] opinions need to bear in mind that, notwithstanding [his] wide experience in general practice, he is not a qualified psychiatrist",⁴⁴ and

"[T]he limited extent and character of [Dr Keen's] expertise has to be borne in mind by those using his services . . . a local authority weighing his comments against the report of a qualified psychiatrist must not fall into the trap of thinking that it is comparing like with like".⁴⁵

The Court of Appeal suggested that "there is no harm and some good in medical advisers directly addressing" the *Bowers/Pereira* test,⁴⁶ thereby supporting the comments of Webster J. in *Ex p. Carroll* quoted above. They then gave some guidance on the limits of using advisers who have not had an opportunity to examine the homeless applicant themselves:

"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 . . . The caveat we would enter, because of misunderstandings which can easily arise, is that any such discussion should be informal and only an agreed minute of it, if one results, become part of the case materials."⁴⁷

Conclusion

It is a common failing in homelessness cases involving vulnerability that medical advisers do not have their attention directed to the *Bowers/Pereira* test when

⁴⁴ *ibid.*, [18].

⁴⁵ *ibid.*, [22].

⁴⁶ *ibid.*, [21].

⁴⁷ *ibid.*, [23].

giving their opinions, which results in their applying a different test. Some medical advisers to local authorities now appear to have gone further and are systematically applying the wrong test, even where they are aware of the correct one. As can be seen, this does not necessarily invalidate the authority's

final decision but it substantially increases the risk that the wrong decision will be made. It also appears that this will continue unless and until the Court of Appeal authoritatively states that the reasonable function test does not comply with the statute.