

Domestic Violence and Priority Need

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LT Domestic violence; Homelessness; Priority needs; Vulnerable adults

Introduction

The 2001 Priority Need Order widened the responsibilities of local authorities so as to extend the category of those in priority need to include those who are vulnerable as a result of having to flee their homes because of violence or threats of violence, whether or not the applicant has children or is pregnant.¹ While this was a very welcome extension to the categories of those deemed to be in priority need, there was a marked disparity with the Welsh provisions which allowed automatic "priority need" status to be awarded to applicants homeless due to domestic violence without requiring the additional criteria of "vulnerability" to be met.²

This article examines whether the more liberal provisions in place in Wales should be adopted in England to ensure that local authorities in England are properly assisting all applicants fleeing domestic violence to secure suitable accommodation.

Domestic violence: the facts

Homelessness research has found that domestic violence is the "single most quoted reason for becoming homeless". A study carried out by the charity Shelter in 2002 found that 40 per cent of all homeless women stated domestic violence as a contributing factor to their homelessness.³ However more recent research carried out by the homelessness charity Crisis, in December 2006, suggests that local authorities are failing to provide applicants fleeing domestic violence with the help that they urgently need.⁴ The Crisis research found that more than 20

per cent of all the homeless women surveyed were escaping domestic violence and in the age group 40-50, this figure rose to 40 per cent. However the majority of the respondents reported very negative experiences of approaching local authorities as homeless, stating that the lack of understanding of the needs of homeless women/survivors of domestic violence acted as a deterrent to them obtaining assistance that they needed. This would suggest that the additional hurdle that English applicants have to overcome, i.e. in establishing vulnerability as a result of fleeing domestic violence, may mean these applicants are not receiving the assistance that they need to secure accommodation under Pt 7 of the Housing Act 1996.

The legal framework: priority need

A housing authority will only be under a duty to assist an applicant fleeing domestic violence, pursuant to the Housing Act 1996, as amended by the Homelessness Act 2002, if satisfied that the applicant is homeless, eligible for assistance, in priority need and has not made herself intentionally homeless. A person will be deemed to be in "priority need" if they are vulnerable as a result one of a number of specific factors or a combination of these factors.

The Housing Act 1996 defined a person as having a priority need for accommodation if they are "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".⁵ However the legislation provides no statutory definition of vulnerability and therefore it has been left to the courts to give guidance on when an applicant will be deemed vulnerable and therefore eligible for assistance under the Act.

¹ The Homelessness (Priority Need for Accommodation) (England) Order 2001 (SI 2001/2050).

² The Homelessness Persons (Priority Need) (Wales) Order 2001 (SI 2001/607).

³ Shelter Scotland, *Repeat Homelessness and Domestic Abuse* (2002).

⁴ Crisis, *Homeless Women, Still being failed yet striving to survive* (December 2006).

⁵ Housing Act 1996 s.189(1)(c).

The leading case on vulnerability is *R. v Camden LBC Ex. p Pereira*⁶ where the Court of Appeal held that to be vulnerable, an applicant when homeless must 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". The Court of Appeal made it clear that the assessment of need must be a composite one and that there must be a risk of injury or detriment to the homelessness applicant. Without the risk of harm, the person would not be deemed vulnerable.

The Homeless Persons (Priority Need for Accommodation) (England) Order

Prior to 2002, an applicant fleeing domestic violence would only be deemed to be vulnerable if she satisfied the definition of priority need as set out in s.189(1)(c) and *Pereira*. However the Homeless Persons (Priority Need for Accommodation) (England) Order 2002 extended the categories of those deemed to be in priority need to another six categories which included those who had been in care, those who had been a member of the armed forces, those who had been in custody and⁷:

"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."

In contrast the Welsh order simply requires that a Welsh housing authority shall find "a person without dependent children who has been subject to domestic violence or is at risk of such violence, or if he or she returns home is at risk of domestic violence" to be in priority need.⁸ There is therefore no requirement, under the Welsh provisions, first for the applicant to have ceased to occupy accommodation as a result of the violence and secondly to establish that they are "vulnerable" so as to secure priority. It is accordingly a much lower test for the applicant to satisfy to secure accommodation under Pt 7 of the Housing Act 1996 in Wales.

⁶ *R. v Camden LBC Ex. p Pereira* (1998) 31 H.L.R. 317.

⁷ The Homelessness (Priority Need for Accommodation) (England) Order 2001 SI 2001/2050.

⁸ The Homelessness Persons (Priority Need) (Wales) Order 2001 SI 2001/607.

The Code of Guidance and domestic violence

In exercising their functions under Pt 7 of the Housing Act 1996, authorities must have regard to the Code of Guidance.⁹ In considering whether applicants are vulnerable as a result of leaving accommodation because of violence or threats of violence, the Code of Guidance states that a housing authority may wish to take into account the following factors:

- i) The nature of the violence or threats of violence (there may have been a single significant incident or a number of incidents over an extended period of time which have had a cumulative effect);
- ii) The impact and likely effects of the violence or threats of violence on the applicant's physical and mental health and well being;
- iii) Whether the applicant has any existing support networks, particularly by way of family or friends.¹⁰

It is worth spending a little time looking at this paragraph of the Code of Guidance in more detail. First, the housing authority needs to consider the exact nature of the violence that the applicant has suffered, e.g. was it a one-off incident or was she subject to violence over an extended period of time? Was the violence physical, financial, psychological or emotional abuse? The Code of Guidance makes it clear that the term "violence" should not be given a restrictive meaning but that "domestic violence" should be understood to include threatening behaviour or abuse which could be psychological, physical, sexual, financial or emotional.¹¹

Secondly, what effect has the violence, or threats of violence, had on the applicant's physical and mental state of health and most importantly on her "well-being"? It is submitted that "well-being" has a much wider definition than just an applicant's physical or mental state of health and should encompass factors such as whether the applicant fears going out alone, whether she has difficulty in forming relations and trusting people or if she has suffered loss of self-esteem as a result of the violence she has suffered or been threatened with. Thirdly, the housing authority needs to consider the support network of the applicant—does she have friends

⁹ Housing Act 1996 s.182.

¹⁰ Code of Guidance for Local Authorities, para.10.29.

¹¹ Code of Guidance, para.8.21.

and family that she can turn to or is she isolated from her community?

In theory the Code of Guidance suggests that local authorities should take a subjective, sympathetic and holistic approach to applicants who have had to leave accommodation because of violence or threats of violence likely to be carried out. However, in the experience of the writer, many local authorities take a very objective and restrictive approach, in some circumstances completely failing to consider the Code of Guidance at all. In other cases, they will only consider an applicant vulnerable if the domestic violence suffered has been physical as opposed to emotional or financial.

While this may result in challenge to the County Court, pursuant to s.204 of the Housing Act 1996, on a point of law, it will only serve to delay the time, and increase the anxiety, that the applicant faces in trying to secure suitable accommodation.

Fitting domestic violence into priority need

However, not only can a housing authority fail to consider at all the provisions of para.10.29 of the Code of Guidance, but often, in the writer's experience, will fail to apply the correct legal test in domestic violence cases. Instead of considering the factors listed in the Code of Guidance, review officers will seek to apply a "medical" model of the *Pereira* test, arguing that an applicant fleeing domestic violence cannot be deemed to be at risk of detriment or harm unless she is taking long-term anti-depressant medication/is under psychiatric supervision or showing signs of self-harm/suicidal ideations. Clearly medical evidence may be important in domestic violence cases, in showing that the applicant may be at risk of injury or detriment where a less vulnerable person would be able to cope without harmful effect, but this should not be conclusive. This is backed up by the Code of Guidance which states that the housing authority must also consider the applicant's "well-being" as well as her physical and mental state of health.

A woman fleeing domestic violence will often present with a complicated range of physical and psychological issues which will not fit neatly into "physical" or "mental" health categories. According to Women's Aid, the national charity assisting victims of domestic violence, those fleeing violence may experience any or all of the following:

"Loss of opportunity, isolation from friends/family, loss of income or work, homelessness,

emotional/psychological effects such as lowered self-worth, poor health, physical injury or ongoing impairment."¹²

Anecdotal evidence suggests that applicants fleeing from domestic violence may also suffer from post-traumatic distress syndrome and disturbed patterns of eating and sleeping. In the experience of the writer, often housing authorities will make a finding that the applicant cannot be deemed vulnerable because she is not taking anti-depressant medication or receiving psychiatric treatment. However many applicants may be concerned about the long-term effects of taking anti-depressant medication, especially if young, or prefer to deal with their problems with the assistance of a local counselling service rather than psychiatric assistance.

In a recent article in this journal, Nik Nicol also highlighted the fact that many local authorities were increasingly using external medical assessors to assess the vulnerability of applicants.¹³ The medical assessment would take place without the applicant attending. In particular, many local authorities were using an organisation called NowMedical whose assessments had recently come under scrutiny by the Court of Appeal in several cases, notably *Shala v Birmingham CC*.¹⁴ Nik Nicol argues that although NowMedical staff were aware of the *Pereira* test, many were applying a "reasonable function" test instead. This meant that the applicant would only be deemed vulnerable if the applicant's condition was such as to "significantly impede his reasonable function".

The difficulty in applying this test in the domestic violence context is that an applicant could plainly still be vulnerable under the *Pereira* test without having a physical or mental illness such that they were unable to function in carrying out ordinary everyday tasks or activities.

Redress in the county court

It can of course be argued that if the applicant is not deemed to be in priority need, on the basis that the violence which she has suffered is not sufficient to render her "vulnerable", then it is of course open to her to pursue a review and if not successful an appeal in the county court if there are grounds to do

¹² <http://www.womensaid.org.uk>.

¹³ N. Nicol, "Defining Vulnerability" [2007] J.H.L. 76.

¹⁴ *Shala v Birmingham CC* [2007] EWCA Civ 624.

so.¹⁵ However, it is submitted that the problem with this approach is twofold.

First, the applicant, having already fled domestic violence, will have the additional anxiety and uncertainty regarding her housing situation while waiting for her appeal to be listed in the local county court. If the case is to be heard in London, it may take several months. Moreover even if the applicant is successful on appeal, the most likely outcome is that the decision will be quashed and referred back by the court to the local authority.¹⁶ There will then be a further time lag before a new decision is made on her case by the local authority and there is no guarantee that the applicant will be successful on the second review.

Secondly, there is very limited case law in this area which means that it is difficult for advisers to be able to advise clients properly on their prospects of success if they do pursue their case in the county court. While there has been substantial case law generally on the question of vulnerability in recent years, interestingly there is almost no case law on vulnerability in the domestic violence context. This may partly be because it will only apply to applicants fleeing domestic violence without children as those who are pregnant or have children would automatically be deemed to be in priority need.¹⁷

Williams v Oxford City Council

However the unreported case of *Williams v Oxford CC*¹⁸ proves to be a useful illustration of some of the points raised above. In this case, Mrs Williams was a victim of violence and applied to Oxford City Council for accommodation as a homeless person pursuant to Pt 7 of the Housing Act 1996. An officer had initially decided that she had suffered violence but that it was not sufficient to render her "vulnerable" for the purposes of the Homelessness (Priority Need for Accommodation) (England) Order 2001. On a review, the reviewing officer received medical evidence which suggested that Mrs Williams may not have suffered violence to the extent that she had suggested and his decision included the phrase "if there is little or no supporting evidence of violence then it is arguable you cannot rely on this category". The reviewing officer upheld the original decision that the applicant was not vulnerable and

Mrs Williams appealed. In the county court, H.H. Judge Corrie dismissed the appeal.

Mrs Williams then sought permission to bring a second appeal on the basis that the evident doubt of the reviewing officer about the correctness of the original decision should have triggered off the "minded-to" obligations.¹⁹ Regulation 8(2) states that if the authority decides that there is a deficiency or irregularity in the original decision, but nonetheless proposes to reach a decision which is adverse to the applicant, the reviewer must inform the applicant that he is so minded and of the reasons why, and give the applicant the opportunity to make further representations orally or in writing.

In this particular case, the Court of Appeal refused a renewed application for permission to appeal on the basis that the reviewing officer had proceeded on the basis that there had been violence but that it had not caused her vulnerability. There had been no unfairness to the applicant because the reviewing officer had invited responses to questions raised in the review process but he had not received a specific reply from the applicant.

However, it is submitted that if Mrs Williams had applied to a Welsh housing authority, then she would automatically have been accepted as vulnerable on the basis that there had been violence and therefore the housing authority owed her a duty under Pt 7 of the Act. Moreover she would not have had the prolonged uncertainty and anxiety about her housing situation while waiting first for the county court appeal to be heard and then seeking permission to appeal.

Conclusion

There can be no justification for the disparity in the legislation between the English and Welsh system for applicants applying for housing on the basis of domestic violence. Clearly there are real problems for applicants fleeing domestic violence being accepted by housing authorities as vulnerable on the basis that many local authorities are either applying a higher test than *Pereira*, applying the wrong test and/or failing to properly consider the factors set out in para.10.29 of the Code of Guidance.

The concern is that if local authorities are turning away applicants fleeing domestic violence, or making

¹⁵ Housing Act 1996 s.202 and s.204.

¹⁶ See Housing Act 1996 s.204(3).

¹⁷ See Housing Act 1996 s.189(1).

¹⁸ *Williams v Oxford CC*: see *Legal Action*, July 2006, pp.26-27.

¹⁹ See Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 (SI 1999/71) reg.8(2).

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it very difficult for them to secure accommodation under Pt 7, then they may return to live with the perpetrators of the violence. This could ultimately lead to further acts of domestic violence. However, the forthcoming Housing Bill, as introduced in the House of Commons on November 15, 2007, could

give the opportunity to address this disparity if there is a sufficient lobby for change.²⁰

²⁰ The Housing and Regeneration Bill (as introduced in the House of Commons, November 15, 2007).

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