IN THE CENTRAL LONDON COURT

IN THE MATTER OF AN APPEAL UNDER SECTION 204 HOUSING ACT 1996

BETWEEN

SHANICE KHAYAT

Appellant

- and –

WESTMINSTER CITY COUNCIL

Respondent

JUDGMENT

Introduction

1. This is an appeal by Shanice Khayat ("the Appellant") brought under section 204 of Housing Act1996 ("the Act") against a review decision by Westminster City Council "(the Respondent") set out in a letter dated 9th June 2020. The Respondent upheld it's decision pursuant to section 184 of the Act (set out in a letter dated 20th March 2020 [C38]) that the Appellant was homeless, eligible for assistance but that she did not have a priority need for housing.

2. Throughout this Judgment numbers appearing in square brackets identify documents appearing in the agreed Appeal Bundle.

3. An appeal pursuant to section 204 of the Act arises on a point of law. Having been given permission on 01 July 2020 by His Honour Judge Saunders so to do, the Appellants formulated five main Amended Grounds of Appeal [A23] namely that the Respondents decision [A27] was deficient as :-

   (1) it was in breach of the Review Regulations 2018/natural justice.
   (2) it was deficient on the grounds that the Respondent failed to take relevant matters into account.
   (3) the Respondent failed to make adequate inquiry and
   (4) the Respondent failed to provide adequate reasons for its decision; and,
   (5) the decision was irrational.

Those substantive Grounds are subdivided and there is a measure of overlap in the substantive issues that are raised under each Ground.

The Relevant Statutory Provisions

The relevant parts of the statutory provisions applicable to this appeal are

184.— Inquiry into cases of homelessness or threatened homelessness.
(1) If the local housing authority have reason to believe that an applicant may be homeless or threatened with homelessness, they shall make such inquiries as are necessary to satisfy themselves—
(a) whether he is eligible for assistance, and
(b) if so, whether any duty, and if so what duty, is owed to him under the following provisions of this Part.
….
(3) On completing their inquiries, the authority shall notify the applicant of their decision and, so far as any issue is decided against his interests, inform him of the reasons for their decision.

189.— Priority need for accommodation.
(1) The following have a priority need for accommodation—
…
(c) a person who is vulnerable because 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 …

203 Procedure on Review

(1) The Secretary of State may make provision by regulations as to the procedure to be followed in connection with a review under section 202. Nothing in the following provisions affects the generality of this power.
(2) Provision may be made by regulations—
(a) requiring the decision on review to be made by a person of appropriate seniority who was not involved in the original decision, and
(b) as to the circumstances in which the applicant is entitled to an oral hearing, and whether and by whom he may be represented at such a hearing.
(3) The authority, or as the case may be either of the authorities, concerned shall notify the applicant of the decision on the review.
(4) If the decision is—
(a) to confirm the original decision on any issue against the interests of the applicant, or
(b) to confirm a previous decision—
(i) to notify another authority under section 198 (referral of cases), or
(ii) that the conditions are met for the referral of his case,
they shall also notify him of the reasons for the decision.
(5) In any case they shall inform the applicant of his right to appeal to [the county court]1 on a point of law, and of the period within which such an appeal must be made (see section 204).
…

204.— Right of appeal to county court on point of law.

(1) If an applicant who has requested a review under section 202—
(a) is dissatisfied with the decision on the review, or
(b) is not notified of the decision on the review within the time prescribed under section 203,
he may appeal to the county court on any point of law arising from the decision or, as the case may be, the original decision.
…
(3) On appeal the court may make such order confirming, quashing, or varying the decision as it thinks fit.

Reg 7(2) Homelessness (Review Procedure) Regulations 2018

2. If a reviewer considers that there is a deficiency or irregularity in the original decision, or in the manner in which it was made, but is minded nonetheless to make a decision which is against the interests of A on one or more issues, the reviewer must notify A

That the reviewer is so minded and the reasons why;
That A, or someone acting on A's behalf, may make presentations to the reviewer orally or in writing or both orally and in writing.

Equality Act 2010
4 The protected characteristics

The following characteristics are protected characteristics—
age;
disability;
…..

6 Disability

(1) A person (P) has a disability if—
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Schedule 1 to Equality Act 2010

5 Effect of medical treatment

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
(a) measures are being taken to treat or correct it, and
(b) but for that, it would be likely to have that effect.
(2) *"Measures"* includes, in particular, medical treatment and the use of a prosthesis or other aid.

Vulnerability

4. By virtue of section 189(1)(c) above, a person that is vulnerable because of mental illness, physical disability or for some other special reason, is deemed to be in priority need for housing. It is for the housing authority to determine whether an applicant to it is in priority.

5. The test applicable for determining vulnerability is formulated in the leading case of *Hotak & Others v LB Southwark & Others [2016] AC 811.* Vulnerability within the meaning of section 189(1)(c) means an applicant must be significantly more vulnerable when rendered homeless than ordinarily vulnerable. The appropriate comparator against which to assess vulnerability is an ordinary person when rendered homeless. The assessment of vulnerability is a contextual and practical assessment of the applicants physical and mental ability if he were rendered homeless compared to the ability of an ordinary person if he were made homeless.

6. An issue arose in argument before me as to whether, when assessing vulnerability under section 189(1)(c), the appropriate comparator was as Mr Nabi submitted, an "ordinary robust and healthy person". This designation forms part of Mr Nabi's formulation of Grounds 3.9 and 4.14(4) in this appeal. Considering what I have said above, the designation is not correct and cannot be sustained. I accept Mr Peacock submission that the correct comparator is, as is clear from *Hotak* "the ordinary person if made homeless". In *Hotak* at paragraph 71, Lord Neuberger, in considering the significance of the support being provided to a vulnerable person, referred to Pitchford LJ judgment in the Court of Appeal. The reference contains the description "robust and healthy homeless person". In my view, Lord Neuberger was not there endorsing a test of vulnerability in which the specific quality of the appropriate comparator was that of a robust healthy person. I treat the use of that description as no more than an illustration used to emphasise a point that Lord Neuberger was then considering namely, where, despite an applicant being the recipient of very good support when homeless (as though the person were housed) that still did not prevent the person from being vulnerable. The words used by Pitchford LJ were merely apt to demonstrate the point. However, the description did not supplant or equate to the formulation for the correct comparator that Lord Neuberger had given detailed and full consideration throughout his judgment.

7. In *Panayiotou v London Borough of Waltham Forest [2017] HLR 48* the court examined, amongst other things the meaning to be attributed to "significantly" when a decision was being made as to whether an applicant for housing was vulnerable within the meaning of section 189(1)(c) of the Act. The test of vulnerability required "significantly" greater vulnerability in the applicant than the ordinary person made homeless, and this connoted that the applicant would suffer or be at risk of suffering harm or detriment that would result in a difference in his ability to deal with the consequences of homelessness.

8. The Homelessness Code of Guidance provides in paragraph 8 additional guidance on the approach to be adopted when an authority is considering whether an applicant is vulnerable. Amongst other things, the Code provides that vulnerability may arise due to factors not expressly referred to within the stature. Assessment of the applicant must take place having regard to the persons circumstances. A person may be vulnerable for some other special reason that does not arise because of the persons mental or physical characteristics.

9. A complimentary duty arose under section 149 Equality Act 2010. This Equality Act duty should feature at every stage of the decision-making process when an authority is called upon to determine whether a person was vulnerable within section 189(1)(c) of the Act. Compliance with that duty was a substantive and rigorous process that the authority was required to approach with an open mind. There had to be a sharp focus, when a review of a housing officers decision was being taken, upon whether the applicant was under a disability, the extent of the disability, the likely effect of the disability on the applicant if and when homeless, and whether the applicant was as a result vulnerable. The issue of whether a person was vulnerable should be decided by taking all the applicants' characteristics together and examining these in the round when he is homeless. There should not be an overtechnical examination of the wording of a review decision with a benevolent approach adopted disregard minor and immaterial errors.

The Background Facts

10. The Appellant is 28 years old having been born on 11 October 1991. She resides with her mother in a one-bedroom flat at premises at 10 Gloucester Street, London SW. The Appellant has a history of mental and physical health complaints. A letter dated 04 May 2016 [C54] written by Joanna Burbury, a CBT Therapist, records that the Appellant suffered from depression and anxiety from as long ago as about 2015.

11. The Appellant is her mother's carer. Her mother suffers from multiple sclerosis, is partially blind and has developed high blood pressure.

12. The Appellant became unemployed on or about 01 October 2019. The upshot was that the Appellant now had no respite from her responsibilities of caring for her mother. This placed an intense strain on the Appellant and caused a significant deterioration in their relationship. By her undated letter [C1-2] the Appellants mother reported a worsening in their respective mental health. As a result, the Appellant was asked by her mother to leave the accommodation.

The Application to the Respondent

13. On 27 January 2020 the Appellant presented to the Respondent seeking housing assistance as homeless. The Appellant reported to the Respondent's Housing Solutions Caseworker that there had been a deterioration in her mental state. Details of the Appellants background and personal circumstances were recorded and the Caseworker prepared an Initial Risk Assessment [C21 at 24] and noted a history that included suicidal ideation, severe depression for a period of six years and that the Appellant used cannabis daily. It was further noted that the Appellant had received ongoing counselling sessions over a period of six years but that these had not helped.

14. On 28 January 2020 the Appellant, made a formal application to the Respondent as a homeless person. A Personalised Housing Plan was prepared for the Appellant and, on the same day, the Respondents Caseworker informed the Appellant, in a letter sent by email, that it had decided that the Appellant was homeless, eligible for assistance and that she had a local

connection with the Respondent and accordingly duties arose on the Respondent under section 189(A) of the Act [C30].

15. Further information about her circumstances was provided by the Appellant in answers set out in a Medical Assessment Form which she completed and submitted to the Respondent on 05 February 2020 [C69]. This identified details of the various physical and mental health conditions from which the Appellant suffered and the medication she had been prescribed [71 at section 3]. It did not include any reference to medication for treatment of the Appellants anxiety and depression.

16. The Appellant provided details of the array of mental and physical health conditions from which she suffered which she listed as depression, insomnia, legions on her kidneys, cysts on her ovaries and uterus, endometriosis a dermatological compliant and hyperhidrosis [C71]. The Appellant also stated that she suffered from insomnia and that she wanted to kill herself. The Appellant highlighted that her mother's circumstances (her medical conditions and need for constant care) was having a detrimental effect on the Appellants own mental health [C73, C75].

17. Having self-referred on 30 January 2020 [C53] to the Talking Therapies service operated by Central and North West London NHS Trust, the Appellant was assessed by Sofie Manetta, a Psychological Wellbeing Practitioner, who noted that on 06 February 2020 the Appellant had presented with

> *"…severe symptoms of both anxiety and low mood maintained by her current living condition…She is constantly distressed and anxious over her mother's well-being; however she has no respite from her care duties and therefore can not look after her own mental and emotional well-being"*

The letter ended with an invitation that the writer could be contacted to provide further information.

18. Another assessment, carried out on 31 January 2020 [C3] by the Residential Management Group, noted that the Appellant was distraught during the assessment and

> *"…reported that she had been diagnosed with depression over 6 years ago and has been struggling with mental health since… has been linked in with several services in the last few years most recently 2018she says she has undergone a number of counselling session s but never results in any change in her mood*
>
> *…She tends to feel suicidal very frequently…"*

19. Having seen the Appellant for an initial assessment, on 04 February 2020 [C32], the Respondents Caseworker sent an email to the Central and West London NHS Trust enquiring if there was any information that indicated the need for a "JAS assessment" and stated

> *"…She [the Appellant] reports being diagnosed with severe depression and that she has been seen by different counsellors over the last 6-7 years …she has not been*

referred to secondary mental health services but did say that her GP was looking into having her referred."

"Please let me know if there is any information on her file or whether there is enough there to suggest whether or not she will benefit from an assessment"

20. Dr Rankine, the Appellant's GP at the Victoria Medical Centre, wrote the first of three letters to the Respondent on 04 February 2020 [C35]. In it she stated that because of the Appellants circumstances, living conditions and her loss of employment, she suffered from depression and anxiety and those factors were having a big impact on her mental health. Attached to the letter was a list detailing the Appellants active medical problems and the medication which she had been prescribed. The list did not refer to medication prescribed for the Appellants mixed anxiety and depressive disorder.

21. On 06 March 2020 [C37] Dr Rankine wrote again in similar terms as her letter of 04 February but on this occasion importantly highlighted that despite receiving counselling, the Appellants depressive condition was ongoing and intractable in nature, and stated

"Shanice has had multiple health issues, including some recent pregnancies which have not turned out well. She is attending counselling which has not been made easier by the fact that she has been involved in a recent relationship breakup.

"…She has tried very hard to try and resolve problems using counselling service in Westminster Talking Therapies, her Employees Assistance Program, and Turning Point but nobody seems to get to the root of the problem."

22. On the same date the Respondents Caseworker recorded that, in response to the request made on 04 February, she had consulted with the JAS team and the outcome was that the Appellant was not believed to be in priority need for housing [C4]. At that point it was also recorded that the JAS team was suggesting that the services provided through a hostel project called the Marylebone Project was the "best fit" for the Appellant. However, it appears that it was soon recognised that the Appellants anxiety condition meant this project was not at all suitable .

23. The Appellant had written to her local councillor on 13 March 2020 [C34] setting out, amongst other things, her disabled mothers' circumstances particularly that she was aged 64, suffered from multiple sclerosis and was partially blind. The letter emphasised as other communications also had, the severity of the Appellants mental health problem that had been caused by her having to care for her mother. The Appellant self-assessment stated :-

"My mental health and wellbeing are also deteriorating because of this and has been for the longest while and I cannot cope. Its all gotten on top [sic] and is too overwhelming.

"…I am vulnerable, and my mum is vulnerable"

24. On 19 March 2020 further information of what is described as the Appellants Active Major Problems had been provided to the Respondent by the Appellants surgery [C89]. This document contained the first reference to the anti-depressant, sertraline, that had been prescribed to treat the Appellants anxiety and depressive disorder.

25. The Respondent rejected the Appellant's homelessness application. On 20 March 2020 [C38] pursuant to section184 Housing Act 1996, the Appellant was notified of the decision and that the Respondent had found that she was homeless, eligible for assistance but that she was not in priority need for housing. The decision letter made reference to the categories of individuals that, by virtue of section 189 of the Act and the operation of the Homeless (Priority Need for Accommodation) Order 2002, were deemed to have a priority need. After referring to the Supreme Court decision in the case of *Hotak* the decision-maker went on to deal with the test of vulnerability that had been applied in arriving at the decision. It stated

> "*We have decided that you are not someone who, if rendered homeless, would be significantly more vulnerable than an ordinary person who is homeless.*
>
> *I have also considered whether or not this authority has complied with section 149(7) of the Equality Act 2010. This authority has taken into account your circumstances in accordance with the characteristics defined by section 149(7)...in reaching that decision the Council has complied with the public sector equality duty under section 149…*
> *We are not satisfied that the effect of your disability would make you significantly more vulnerable when homeless."*

The Appellant was found not to be vulnerable whether by virtue of her physical or mental health conditions. The decision-maker further stated

> *"We are therefore of the opinion that you do not have severe and enduring mental health problems which warrant input from a secondary mental health services or admission to hospital. You are currently prescribed the standard dose of sertraline (anti-depressant) and although you state you are not currently receiving any counselling – we are confident that your mental health is being sufficiently managed by your GP. We are also confident that if you needed to be referred to secondary mental health services your GP would be in the best position to do so and is aware of the procedure.*
>
> *"…we have decided that you are not someone who, if rendered homeless, would be significantly more vulnerable than an ordinary person who is made homeless and that you would be able to receive appropriate treatment from services irrespective of your housing circumstances*
>
> *I have decided that you are not in priority need, nor do I believe that your circumstances constitute an "other special reason" within the meaning of s. 189(i)(c)…*

In dealing with determination under the Equalities Act 2010 the letter stated

> *"The Council does not consider you to have a disability or relevant characteristic. And despite your health issues … you are not vulnerable despite that health condition as (a) the effect of the health problem can be ameliorated with treatment; (b) that treatment would be able to continue if the applicant was homeless and (c) as a result if rendered homeless the applicant would not suffer any significantly greater injury or detriment than the ordinary person…"*

26. By a letter dated 23 March 2020 [C43], the Respondent notified the Appellant of its decision that it no longer owed her a duty pursuant to section 189(7) of the Act to take any reasonable steps to give assistance to the Appellant.

The Request for A Review

27. On 31 March 2020 by an email [C45/46] sent to the Respondents Caseworker, the Appellant stated that she wished to appeal (seek a review of) the decision that she was not in priority need. In her email the Appellant sets out more fully information about her medical circumstances covering both her mental and physical health. The gist of the complaint was that the significance and severity of her mental health had not been grasped by the Respondent and crucial relevant matters had not been considered.

28. The Appellant emphasised her contention that the Respondent had not had sufficient or adequate regard to her difficulty in engaging with counselling services and the impact on her mental state of enduring various failed pregnancies. The Appellant pointed to the worsening of her mental health condition the root of which had not been established and which, in effect, was not being controlled or managed.

29. The Appellant referred to the unsuitability for her of the Marylebone Project highlighting an aspect as the exposure of herself in the current pandemic and the fact that her mother was in the high-risk category. The Appellant made express reference to the issue of the outcome if she were rendered homeless and stated

> *"It is stated [*in the section 184 letter] *if rendered homeless treatment could continue but I am already struggling and have previously, to keep on top, attend appointments, I've had missed appointments due to mental state and staying in various different places…Me being homeless would only result in me becoming more vulnerable than I am now…"*

The Appellant concluded her letter seeking a review by stating

> *"I hope this is all taken into consideration as my situation is desperate, and needs to be revised and amended promptly. So I will be passing my case over to my sister to put*

forward because I am really struggling to cope an [sic] I'm caring for my mother even more so at a time like this with the coronavirus pandemic"

30. On 01 April 2020 the Respondents Review officer Nicki Adelaja [49], invited the Appellant to provide any additional information in support of the review.

31. The Respondent was sent a further letter dated 06 April 2020 written by Dr Rankine [C51]. That letter stated

> *"…Miss Khayat feels so anxious and entrapped that it has caused her severe health problems...*
>
> *"… She has always suffered from an element of stress and anxiety but has become more depressed and anxious citing the family situation as 'the big thing for me'. She also worries about her sister and her sister's son…*
> *She has accessed our counselling services as well as her employer assistance programs which have now stopped because she no longer has a job. She feels she is unable to get to the root of the problem and that she is breaking down…"*

32. The Appellant was described as in a desperate situation. The letter supported the Appellants self-assessment that her depressive condition was entrenched and enduring and, rather than reducing or altering with the access to counselling services was continuing and worsening in the circumstances in which the Appellant was. Moreover, the Appellant was not experiencing improvement but rather felt *"… that she was unable to get to the root of it".* The letter again had attached the list detailing her medical conditions and medication that had previously been sent to the Respondent.

33. Further details of the grounds for review on which the Appellant relied were formulated in a letter dated 27 April 2020 from Andy McCarthy, a caseworker with the organisation called Z2K [C55]. The letter stated that having regard to her various mental health conditions the Appellant would become significantly more vulnerable than an ordinary homeless person which was set out in the following terms -

> *"…becoming homeless will make her significantly more vulnerable than an ordinarily homeless person. She would suffer more harm by the exacerbation of that mental illness by reason of becoming homeless than an ordinary person would, and her ability to receive treatment would be compromised as it has in the past. Her cannabis use would also likely increase as this has in the past been used to cope with her depression and anxiety."*

34. The Appellants ability to cope with her circumstances, including dealing with her use of cannabis, was the subject of an undated letter from Turning Point [C7] a Drug & Alcohol Wellbeing Service, her connection with that organisation having been brought to the Respondents attention on 30 January 2020. Leon Nicolson (MSC MBACP) wrote that

"Although Ms Khayat can appear to manage, it is my professional option (sic) that Ms Khayat actually has extremely poor coping strategies which results in Ms Khayat not being able to move forward in her life"

35. On 07.05.2020 [C62] the reviewing officer sent a request to Esther Paul, the Respondents Medical Advisor, seeking comment about the Appellant in the following terms: -

"*medical information on the file she deems the client to be in priority need".*

36. On 19 May 2020, the Medical Advisor responded to the request [C64] devoting specific attention to three letters that were before her dated 20 September 2019 (dealing with the condition affecting the Appellants kidneys), that dated 06 April 2020 [C51] (from the Appellants GP) and finally one dated 04 May 2016 [C54]. The Medical Advisor highlighted from the latter that in 2016 the Appellant had reported depression in the mild range which she had developed coping strategies to deal with.

37. The Medical Advisor recorded that the Appellant was not "*on any GP prescribed medication".* This was erroneous. The Medical Advisor had referred to the GP letter of 06 April 2020 which itself had annexed to it a list of Appellants prescribed medication which included reference to sertraline. The Medical Advisor also noted that the Appellants self-referral to the CBT Talking Therapies.

38. The Medical Advisors Comments and Opinion [C64] did not support the conclusion that the Appellant was in priority need a view expressed in the following way

"…the clients [sic] being investigated for a kidney condition, she is receiving support for her mental health conditions, there is no reported medication prescribed by the GP and the client's age, which would assist in achieving the best outcome, I do not support the client is priority need."

39. The Medical Advisor did not address or draw attention to that part of the GP's report that assessed the Appellant as having become more depressed or that the Appellant felt as though she were breaking down. Nor did she address the issue of the severity of the Appellants mental health condition notwithstanding that this was how it had been characterised by the Talking Therapies Service report. The Medical Advisor did not refer to the Turning Point assessment which highlighted that the Appellants coping strategies were poor.

<u>The Review Decision</u>

40. By a letter dated 09 June 2020 the reviewing officer informed the Appellant that the original section 184 decision was being upheld. No deficiency or irregularity was found in the original decision and it had not failed to take account of any relevant matters. The reviewer determined that the public sector equality duty that arose under section 149 Equality Act 2010 had been complied with.

41. On the issue of vulnerability, the reviewing officer stated that the issue had been approached by applying the test laid down in *Hotak* by assessing whether or not if rendered homeless the Appellant would be significantly more vulnerable than an ordinary person who is made

homeless. Stating that she had relied on the information before her, the conclusion was that the reviewer was not satisfied that the Appellant was vulnerable whether on the ground of her physical or mental health conditions or because of use of drugs. Nor was the Appellant vulnerable for some other special reason.

42. As to the Appellants physical condition the reviewer indicated that the letter dated 06 April 2020 from Dr Rankine showed that

> "*The Appellant had been able to seek advice and treatment in relation to her health difficulties and that she appears to have a good insight into her conditions".*

43. So far as the Appellants mental health condition was concerned the reviewer referred to the letter from the CBT Talking Therapy dated 06 January 2020 and concluded that

> "*the client would receive support from this service to manage her mental health conditions as achieved previously, and that she also had support from her GP.*
>
> *"Additionally, there is nothing to suggest that any future treatment would be withdrawn in the event of homelessness. It is therefore reasonable to conclude that this would go some way in helping you to manage her health conditions thus reducing any risk"*

44. The reviewer stated that despite her drug misuse the Appellant was able to approach HSS for assistance and request a review decision. The reviewer concluded that the Appellant had a high degree of functionality that demonstrated that she would not be significantly vulnerable if homeless.

45. The reviewer next dealt with the Appellants circumstances and found that she was not vulnerable for some other special reason, stating

> *"...I am not satisfied that her circumstances are of an unusual degree of gravity to constitute a special reason which we would consider her as vulnerable. This is because despite her circumstances, she has shown that she is able to cope with being homeless just like any ordinary person. To start with she has been able to seek treatment for her health difficulties and despite her difficulties she appears to have a good insight into her conditions… She has previously been able to seek employment and apply for benefits independently.*
>
> *She has been able to develop coping mechanisms and I am satisfied that she will be able to continue to do so if she became homeless."*

46. Finally, the reviewer concluded that the Appellant's health problems did not render her disabled within the meaning of the Equality Act 2010. The Appellant was found not to be vulnerable because of the health problems that she faced. Those problems could be ameliorated by treatment, the treatment could continue if the Appellant were rendered homeless and if she were so rendered homeless, she would not suffer any significantly greater injury or detriment than an ordinary person.

The Criticism of the Section 184 Decision

General Matters

The Grounds of Appeal

47. As Mr Peacock submits, and following *Rother District Council v Freeman-Roach [2018] HLR 22,* in an appeal pursuant to section 204 of the Act, the appellant has the burden of establishing the flaw, deficiency, or error of law that the authority has made. On an appeal such as this the court can only intervene and impugn the decision of the authority where it is satisfied that there has been an error of law, that the authority has taken into account matters that were not relevant or not taken into account matters that were relevant.
48. The Appellant advances 5 main heads of appeal with several subsidiary grounds under each head. They are set out in sequential numbering under Section B of the Amended Grounds of Appeal [A23] and for ease of reference I shall denote, in this Judgment, a Ground commencing in the format 1.4(1) to include the relevant sub-part of the Ground.

49. The essence of Mr Nabi's submission is that the Respondents original decision and its review are each deficient in numerous material and fundamental aspects. As a result, the decision and review decision are rendered unlawful. Mr Peacock appearing for the Respondent in opposing the Appeal, rejects each Ground submitting, broadly, that each is misconceived and otherwise not sustainable.

Ground 1 and Ground 3.10

50. The central aspect of Ground 1 is perhaps formulated in paragraph 1.4.6 of the Amended Grounds. The original decision is deficient and non-compliant with the Review Regulations 7(2) because the Respondent did not invoke the additional safeguard provided for under the regulations "the minded to" process. Ground 3.10 raises issues in relation to the failure to conduct inquiries that are like those raised in Ground 1. Accordingly, that part of Ground 3 is dealt with here.

Ground Under Paragraph 1.4 (1) - *First limb*

That the original decision was deficient for the purposes of the Regulations "*the Respondent failed to make any or any adequate inquiry".*

"The Council unlawfully failed to make any inquiry of the Appellants care coordinator or GP as to her ability to comply with the medication regime or engage with counselling services if she was without accommodation"

51. Pursuant to section 184 of the Act if an applicant for housing assistance is believed to be homeless a duty arises upon a housing authority to carry out appropriate inquiries. The

inquiries required to be carried out are directed to enabling the authority to decide what housing duty, if any, it owes to an applicant.

52. The applicant does not have to prove his case. The inquisitorial process that the authority embarks upon must be carried out rigorously and proactively but fairly and the rules of nature justice observed. The applicant must be afforded an opportunity to put forward such matters as he wishes to authority to consider. Moreover, an applicant should be given the opportunity to respond to any adverse medical evidence that the authority is to hold against him. In determining the application for assistance, the authority must consider all relevant factors and disregard irrelevant matters.

53. The Act requires that a housing authority undertakes inquiries into the relevant circumstances of an applicant seeking housing assistance. Mr Nabi for the Appellant has taken my attention to *R v Newham LBC ex p Lumley (2001 33 HLR 11* and in particular the judgment of Brooke LJ (at 54) to effect that an authority's decision is susceptible to being struck down because there has been a failure on the part of the authority to proactively carry out adequate inquiries. In that case the applicants' medical condition was described as serious and was of such a level that it warranted further investigation by the authority. Brooke LJ stated

> *"…the councils original decision was even more seriously flawed because it did not pursue proactively any inquiries of its own into his medical condition after being told by Mr Lumley's GP that he suffered from a severe depressive reaction, and did not give him the opportunity of responding to such adverse medical evidence it did obtain..."*

54. Mr Peacock relied on the case of *Cramp v Hastings BC [2005] HLR 48* in support of his submission that it is for a housing authority to decide what enquires it makes and to evaluate the medical evidence. Moreover, Mr Peacock contends, it is for the applicant for housing assistance to put forward the matters that he wished to have considered. A court could not interfere with the authority's determination of the inquiries that it was to carry out, save where it can be said that any reasonable decision maker would have made further inquiries. Mr Peacock argued that as the reviewer had before her the letters from the Appellants GP, the psychological wellbeing practitioner and the older medical material together with the Medical Advisors report, no reasonable decision-maker would have made further inquiries.

55. In *NJ v Wandsworth London Borough Council [2014]* HLR 6 in dealing with the requirements of the Review Regulation 7(2), Lewison LJ at paragraph 70 identifies the mandatory duties imposed on the reviewer. The Review Regulation 7(2) "minded to" provisions are triggered if the reviewer considers that there is (a) a deficiency or irregularity in the original decision or (b) in the manner in which the original decision was made. Where either arises, the reviewer must notify the applicant and that he is minded in upholding the decision. The applicant must be given the opportunity to respond. A challenge to the reviewers' decision can be made on public law grounds.

56. The reviewing officer must therefore give due consideration to whether either of those conditions are satisfied. If, having done so, the reviewing officer concludes that there was no such deficiency or irregularity, the obligation to notify that a decision is to be made against

the interest of an appellant does not arise. The irregularity or deficiency in an original decision is one that might arise because of subsequent changes that renders the original decision deficient. Thus, Lewison LJ observed in *Banks v Kingston Royal Borough Council [2009] HLR 9* that a purposive approach must be adopted when considering the operation of the Review Regulations. Where new facts emerge that relate to an important issue in the case, the reviewing officer must consider whether those new facts expose a deficiency in the original decision and that will occur if, in light of the facts, the issue was either not addressed or not adequately addressed.

57. Mr Peacock submits that the reviewer considered and concluded as she was entitled to that there was no deficiency or irregularity in the original decision. The mandatory obligations imposed by the Review Regulation 7(2) were complied with and the reviewer was entitled to uphold the original decision on the grounds given. Those submissions are applicable to each of the individual parts raised under Ground 1. Moreover, Mr Peacock submits, notwithstanding the criticism raised under that Ground, it was open to the reviewer to conclude that those matters, whether individually or cumulatively, did not warrant invocation of the additional safeguard of the minded.

58. I do not accept Mr Peacock submissions on this point. It seems to me that there was a relevant flaw or deficiency the consequence of which is that the decision is unsustainable. This is because, upon the review, the reviewer had three new and key pieces of additional evidence relating to the Appellants medical conditions. First, the undated assessment prepared by Sofie Manetta [53] which characterised the Appellants mental health condition as "*severe symptoms of both anxiety and low mood".* Secondly, the reviewer also had the additional evidence from the Appellants GP. Thirdly, the Respondents Medical Advisor had also examined the Appellants records and provided the opinion upon the issue of priority need. In addition, the emergence of the Covid-19 virus with its grave implications for the population constituted a matter that had not been previously at the original decision stage.

59. There had been no consultation between the Respondents Medical Advisor and the Appellants GP or other mental or physical health practitioner. Nor had the Appellant been examined by the Medical Advisor. The Appellant had not been given an opportunity to address the matters set out in the Medical Advisors opinion that went to the core of the issue on priority need and therefore vulnerability. It seems to me that considering those matters no reasonable authority would have concluded that the Review Regulations had not been engaged and or that these matters were not of such importance that the additional safeguard was not required for the minded-to process invoked. In my view the failure to afford the Appellant the opportunity to respond and to make any representations by invocation of the minded-to provisions amounts to a fatal deficiency in the decision-making process. There was in short, a breach of the Review Regulations as well as breach of the rules of natural justice. For those reasons I accept Mr Nabi's submissions that there was unfairness in the decision-making process. and the Appeal is allowed under Ground.

60. It also seems to me that Mr Nabi makes a sound point in respect of Ground 3. 10. The Respondent, obliged to carry out adequate and proactive inquiries to enable assessment of whether the Appellant would suffer significantly more harm if rendered homeless, failed to pursue such inquiry. The reviewer concluded the Appellant would have access to counselling services to deal with her mental health issues if she were without accommodation. That

decision was made without any inquiry of the practitioners that had greatest experience of dealing with and treating the Appellant, including her GP and care coordinator. Contrary to Mr Peacock's submission it seems to me that any reasonable decision-maker would have considered that it was reasonable to make further inquiries regarding the Appellants ability to comply with the treatment regime and to engage with counselling services. This is so because of the seriousness of Appellants mental health condition. In addition, the Appellants r physical health condition and drug abuse were relevant consideration. These were coupled with the fact that the Appellant had missed counselling sessions and that she did not have access to employers counselling since being unemployed. Furthermore, there was evidence the Appellant's coping strategies, a key matter relied in the review decision, had been assessed as poor. For those reasons, the decision-making process was seriously flawed in the sense described by Brooke LJ in *Lumley* and I would allow the Appeal on Ground 3.10 also.

Ground 1.4 (1) – *Second limb*

That the original decision was deficient for the purposes of the Regulations
"*the Respondent introduced their own medical input int the decision making-process"*

61. I also conclude that the decision-making process was flawed as the decision-maker as part of the decision that the Appellant was not a person in priority need, introduced their own medical input into the process. The decision-maker accurately stated that the Appellant had been prescribed sertraline the antidepressant. However, none of the relevant medical documents gave any appraisal as to the significance of the dosage prescribed to the Appellant. The dosage had a material bearing on the decision-maker's conclusion that the Appellants mental health was being sufficiently managed. The view about the management of the Appellants mental health informed the decision-makers conclusion that the Appellant was not in priority. The decision-maker did not make any inquiry of the Appellants GP as to the meaning or significance of the dosage. There was therefore no medical foundation for the conclusion that the dosage was a standard dose or about any significance attached to the level of that dosage. It is an assessment made by the decision-maker without reference to the Appellant's GP or any other medical practitioner medical assessment.

62. Mr Peacock in dealing with the point contended that notwithstanding the absence of a medical consideration of the significance of the dosage, the decision-maker could properly bring her own experience to bear on the issue as part of the evaluative assessment that was undertaken. However, the context of the consideration of that issue was of an Appellant, described as suffering from a severe or major active mental health condition and the who was receiving treatment. The nature and level of that treatment was an important and relevant matter for the decision maker. No reasonable authority in those circumstances would have concluded that reliance could be placed solely on the experience of a non-medical decision-maker to assess the relevance meaning or significance of the dosage of medication. It seems to me that no reasonable reviewer, intending to decide the matter against an applicant's interest, would have concluded that there was no deficiency in the decision or the way the decision was made. Likewise, no reasonable reviewer would have concluded that the dosage forming an important part of the decision, was not of sufficient importance to justify the

invocation of the minded-to procedural safeguard. The Appellant has made out this Ground and the Appeal succeeds on it.

Ground Under Paragraph 1.4 (3)

That the original decision was deficient for the purposes of the Regulations because the decision-maker *took into account an irrelevant consideration in requiring the Appellant to have a severe and enduring mental health problem which warranted input from secondary mental health services or require admission to hospital…"*

63. It seems to me too that on this Ground the Appellant succeeds. The issue of whether the Appellant had a need to engage with secondary mental health services was central to determination whether the Appellant did or did not exhibit a severe and enduring mental health problem or require admission to hospital. It seems to me that the decision-maker expounded a proposition that the existence of a severe and enduring mental health problem was precedent to the engagement of secondary mental health services. That engagement was itself clearly and directly tied to the decision whether the Appellant was found to be vulnerable for the purposes of the Act.

64. Contrary to the submission of Mr Peacock, the decision-maker was not merely considering whether the Appellant had an enduring mental health problem as part of a contextual evaluation. Rather the existence of such a condition was treated as a prerequisite to a finding of vulnerability. The decision-maker assessed that the Appellant did not have such an enduring mental health problem as to necessitate secondary treatment. The decision that the Appellant was not vulnerable was founded on the absence of such a severe and enduring mental health problem as the decision-maker had referred to. By having regard to the absence of a condition which had to be a severe and enduring mental health problem, the decision-maker had misdirected himself and had considered an irrelevant matter. I am satisfied that this represented a serious flaw in the Respondents decision-making process. In those circumstances I would also allow the appeal on this Ground.

Grounds Under Paragraphs 1.4(2), 1.5, 2.8(1), 3.11, 4.14(1)

By these Grounds the Appellant asserts that the original decision either failed to have regard to the Covid-19 emergency and was defective for the purposes of the Regulation, failed to take relevant matters into account alternatively, that the Respondent failed to make any inquiry about the impact of the Covid-19 emergency on the Appellant constituted a new matter required to be considered on review and failed to give any or any adequate reasons

65. As these respective Grounds are inextricably linked because each raises an issue arising from and connected with whether or not the emergence of Covid-19 emergency was or was not appropriately dealt with as a part of the decision process, it is convenient to deal with them together.

66. The review decision did not address or make any refence at all to the Covid-19 emergency pandemic or any impact upon the Appellant. There was therefore no consideration of any impact or risk or detriment upon the Appellant, if she were rendered homeless, caused by the Covid-19 virus and the emergency.

67. This, Mr Nabi contends, is a fatal flaw and deficiency in the decision-making process. The thrust of Mr Nabi's submission can be taken to be that, given the Appellants array of medical conditions, no reasonable authority would have considered that no inquiry was necessary about the effect of the Covid-19 emergency upon her. The failure to carry out that inquiry meant that the Respondent deprived itself of consideration of relevant information and in consequence the decision-making process was deficient. At the review stage, the "minded to" safeguard under Review Regulation 7(2) was engaged. By reason of the failure to have regard to the effect of Covid-19 on the issue of whether the Appellant would suffer or was at risk of suffering any greater detriment if rendered hopeless than an ordinary person rendered homeless, was fatal to the fairness of the decision making process.

68. Mr Peacock addressed the issue on the basis that the Appellants GP did not give any indication that the Appellant fell into a high risk category for the purposes of the Covid-19 emergency and therefore the matter, not having been raised, was not one that the Respondent was required to have regard to.

69. I am unable to accept Mr Peacock submissions. It seems to me that the decision-making process is flawed as Mr Nabi advances under this Ground. Mr Peacock himself took my attention to *R v Brent ex p. Bariise [31 HLR 57],* a case that underscored the proposition that there may be cases in which it is not sufficient for the decision-maker merely to state that he has considered all the material put before him. *Bariise* was a case in which the authority had found the applicant in priority need but intentionally homeless for having prematurely left accommodation where she alleged other residents had, amongst other things, regularly stolen food which she needed to feed her two children. Numerous letters were sent to the authority on behalf of the applicant seeking a favourable review of that decision. *Bariise* makes clear that a permissible inference may be drawn, against an authority's decision that a matter has been inadequately considered or not considered at all, if the absence of consideration or mention of it could be described as startling.

70. The emergence of the Covid-19 virus and emergency that followed it relating to the risk of infection posed to all sections of the population and the government's unprecedented and comprehensive response for dealing with it, coincided with the Appellants request for a review on the issue of vulnerability. The impact of the Covid-19 emergency was widespread as it generated profound and serious concern for the risks to health and the response affected every sphere of daily life. The emergency gave rise to concerns about the exceptional risks posed but especially to those that were susceptible to contracting the virus because of pre-existing medical complaints.

71. It is correct, as Mr Peacock points out, that the Appellants GP had provided a letter adverting to her various medical complaints but had not mentioned that the Appellant was at a higher risk of contracting the virus than an ordinary person when homeless by virtue of the effect of the Covid-19 virus. That alone did not mean that there were no other matters or sources of information, relating to or impacting the Appellants medical condition of which the reviewer

should reasonably have regard. A health emergency on a pandemic scale is, in my view, one such matter. It is noteworthy that in her email sent to the Respondents Caseworker on 31 March 2020 [C46 & 47] the Appellant expressly raised as part of her circumstances the issue of her exposure to the Covid-19 virus pandemic. Whilst the Appellant was not formally assessed as being in high risk category for contacting Covid-19, the Appellant informed the Respondent that her mother was in that category and that she was fearful of being exposed herself as she would still remain the carer for her mother.

72. In adjudging vulnerability, the existence of the emergency provided one other relevant contextual feature referable to the Appellants circumstances if she were rendered homeless. The question in my view is whether the Respondent was reasonably required to give appropriate consideration in light of the Covid-19 emergency of whether, if the Appellant was exposed to any harm or detriment or risk of harm or detriment, if she were rendered homeless, by exposure to Covid-19 virus, that would make her less able to cope with homelessness. Leaving aside the Appellants mother circumstances, the Appellants array of medical conditions were such that the impact of the Covid-19 virus was a relevant consideration when determining whether the Appellant would suffer or be at risk any detriment if rendered homeless. It is a matter upon which any reasonable reviewer, when faced with the array of major active medical complaints as the Appellant, would have made further inquiries. In the context of the Appellants circumstances it is, in my view, both startling and remarkable that the reviewer remained entirely silent not dealing with the issue at all.

73. I therefore conclude that there was an unreasonable failure to give any consideration at all to the impact upon the Appellant of the Covid-19 emergency. The decision-making process was flawed for that reason. Alternatively, the decision-making process is flawed because the reviewer was faced with additional new information, including that from the Appellant detailing her personal circumstances with regard to the exposure to Covid-19, that was directly relevant to the assessment of whether there was a risk or detriment that would render her less able to deal with homelessness were she rendered homeless when compared to an ordinary person made homeless.

74. In my view the Covid-19 emergency represented a matter that was relevant to the contextual and evaluative assessment that the reviewer was required to carry out. The reviewer failed to take account of that relevant matter at all. The reviewer failed to make any proactive inquiry of the appellants medical practitioners about the impact upon the Appellant of the Covid-19 emergency. Consequently, I would therefore allow the Appeal on Grounds 1.4(2), 1.5, 2.8(1), 3.11, 4.14(1).

Ground 1.5 and 1.6

New matters comprising new medical evidence from the Appellants GP, the Central and Northwest London NHS Trust and its medical adviser and the fact of Covid-19.

75. Mr Nabi also submits that, quite apart from the Covid-19 emergency, the reviewer had three further pieces of new information in the form of its own Medical Advisors assessment, the

letters from the Appellants GP and the Central and Northwest London NHS Trust. That, he submits, constituted evidence that would have led a reasonable authority to invoke the safety measure provided under Regulation 7(2). Mr Peacock resists this on the basis that it is inescapable that a review decision will encompass more information than was available at the section 184 decision stage. That, he submits is insufficient to trigger the provisions of the Regulation 7(2) obligations.

76. A purposive approach must be adopted when considering the operation of Regulation 7(2) *Banks v Royal Borough of Kingston Upon Thames [2008] EWCA Civ 1443*. For that reason, the point is not merely whether there is more information available at the review stage. Regard must be had to the nature and relevance of that information and whether considering it the procedural safeguard should be brought into operation.

77. In my view the material that was before the reviewer included that from the Respondents own Medical Advisor upon which the Appellant had not had the opportunity to respond to. That evidence was critical and went to the very question of the assessment of the Appellant's vulnerability. In the circumstances I am satisfied that any reasonable reviewer would have considered that there was some deficiency in the decision or the way it was arrived at and that accordingly that the Review Regulation be invoked. I would therefore allow the Appeal on these Grounds also.

Ground 1.4(7)

78. On the main part of the Appeal under this Ground Mr Nabi submits that the Respondent did not afford the Appellant an opportunity to respond to the evidence that had been obtained from its Medical Advisor [C64]. An aspect of that was that the Appellant was deprived of the opportunity of correcting the Medical Advisors conclusion that the Appellant had not been prescribed any medication. In arriving at her decision, the reviewer drew throughout on the information provided by the Medical Advisor.

79. Guidance regarding the role and use of Medical Advisors has been provided by the Court of Appeal in *Shala v Birmingham City Council [2008] HLR.* Medical Advisors are helpful to an authority " *only to the* extent *that they furnish material within their professional competence which addresses issues which the local authority has to decide".* Where an authority relies on the opinion of a Medical Advisor who has not examined the applicant account must be taken of that by the decision-maker.

80. Mr Peacock for the purposes of his submission, focusing on the second limb, frames this Ground somewhat differently as a contention by the Appellant that she should have been given an opportunity to comment on the views of the medical advisers. I was taken to the case of *Bellouti v Wandsworth LBC [2005] HLR 46* a case regarding priority need in which months of extensive communication ensued between the applicant's advisers and the authority. The authority relied ultimately upon a medical adviser's report and, on review, upheld the decision that the applicant was not in priority need.

81. The Court of Appeal held that it was for an applicant for housing assistance to put forward material on which he relied in support of the claim to be in priority need. It is not in every

case that natural justice requires that the applicant be given the last word and whether unfairness arises would depend on the circumstances in each case. An authority is not obliged to enable an applicant to have the last word. Jonathan Parker LJ stated that

> *"As to procedural unfairness, I first of all reject the submission that there is some absolute rule of natural justice that an applicant must have the last word. In every case whether or not it is unfair not to give the applicant the last word must depend on the facts of the particular case. In the instant case I respectfully agree with the judge that the to-ing and fro-ing between doctor Dr Sultan and Dr Keen doctor Keane at stop somewhere (see para. [24] of his judgement, quoted at [37] above). The instant case is distinguishable from Begum in in that in the instant case the council did not take into account factual material obtained from a third party : it is merely referred the material on which Mr blue tee relied to its independent medical adviser for his comments. I therefore reject the suggestion of procedural unfairness."*

82. Mr Nabi contends that there was a crucial deficiency in the Medical Advisors assessment. The Medical Advisor provided an assessment that was erroneous as it incorrectly stated that the Appellant was not receiving prescribed GP medication when the Appellant had in fact been receiving medication for her physical and mental health conditions. Mr Peacock rightly contends that correction of that error was unnecessary as the reviewer was aware of the true position.

83. I am satisfied, however, that the main limb of this Ground of Appeal is made out. In the circumstances of this case there has been a failure to allow the Appellant the opportunity to respond to the evidence that had been obtained from the Medical Advisor. There was consequently a breach of natural justice there being unfairness in the decision-making process.

84. I have arrived at that conclusion because first I note that, until receipt of the review decision the Appellant and her advisers would not have known that the Respondent, whether upon its own volition or as had been alluded to on her behalf on 27 April 2020 by the organisation Z2K [C56], had in fact consulted a clinician on the issue of whether the Appellant was vulnerable within the meaning of the Act. Secondly, the Medical Advisor, whose professional credentials are unknown, arrived at her conclusions in respect of three areas: the Appellants physical and mental health and her use of cannabis. The Medical Advisor did so without personally examining the Appellant or reviewing her medical records, nor did she consult with the Appellants own medical practitioners. Although there was mention of the Appellants self-referral to CBT service in January 2020, there was no reference to the assessment undertaken by Sofie Manetas on 06 February 2020 [C53] or the severe symptoms of both anxiety and low mood the Appellant was found to be suffering.

85. As the need for a clinician's assessment had been raised on her behalf, the Appellant had been unfairly deprived of the opportunity to respond to the assessment contained in the Medical Advisors opinion. That opinion, going as it did to the heart of the issue that had to be decided, namely, whether the Appellant was in priority need within the meaning of section 189(1)(c), amounted to new evidence. It was evidence that was held against the interest of

the Appellant in its conclusion that the Appellant was not deemed to be in priority need. It was material in respect of which no reasonable reviewer would have concluded that it did not engage the Review Regulation 7(2). Although the reviewer would have known that the Medical Advisor had not examined the Appellant there is no indication what account was taken of that in assessing the issues raised by the Medical Advisor. I do not accept Mr Peacock submission that the reviewer was here entitled to disregard the deficiency as not being of such an order that it called for the additional procedural safeguard of the service of a minded to notice under Review Regulation 7(2). In the circumstances where the Medical Advisors opinion was central to the reviewer's decision and to its reasoning, any reasonable authority would have concluded that the safeguard was required. Therefore Ground 1.4.7 is made out for the reasons set out above and the Appeal allowed on that Ground.

86. I should say that I treat *Bellouti* as a different case in which, as was noted in the case, the authority had not had regard to material from any third party without first putting its content before the applicant. In the Appellants case there had not been any lengthy communication between her advisers and the Respondents reviewer. Mr Nabi is right it seems to me in his contention that it could not be said that this was not a case involving protracted communication. Such communication barely got under way. The respondents did not engage in any responsive communication with the Appellants GP or treating physicians.

87. Before leaving Ground 1, I should for completeness deal with a matter raised by Mr Nabi in his Skeleton Argument [3] at paragraph 18] and orally before me, but which does not form a part of the Amended Ground of Appeal. Mr Nabi made further criticism of the section 184 decision, amongst other things, for lacking coherence. This is so he contends because the decision found that the Appellant did, and then (contradictorily) did not have a disability within the meaning of the Equality Act 2010. Broadly, Mr Nabi's point appears to be that this is indicative of illogicality that undermines the decision. It amounts to a deficiency or flaw in that decision that on review should have resulted in the decision not being upheld by the reviewing officer. This was not, as I have mentioned, formulated as a Ground of Appeal and I do not therefore need to determine it for the purposes of this Appeal.

<u>Ground 2.8(2)</u>

There was a failure to consider relevant matters in that the reviewer did not disregard the positive effect of treatment for the purposes of S.5 Equality Act 2010

88. As formulated this contention is to effect that the reviewer ought to have taken into account when determining whether the Appellant was vulnerable for the purposes of section 189(c) of the Act, that the beneficial remedial effect of any medication or treatment was to be disregarded. On that basis the reviewer misdirected herself in failing to disregard the benefits of the treatment.

89. The test set out in *Hotak* for assessing vulnerability does not require the artificiality of consideration of those remedial effects when assessing vulnerability and thereafter exclusion of them for the purposes of the Equality Act disability assessment. This much is clear from

the judgment of Lewison LJ in *McMahon v Watford Borough Council [2020] EWCA Civ 97* to which I was taken by Mr Peacock. The approach advanced by Mr Nabi on this ground is, as described in *McMahon*, impractical and not one that I consider to be correct. This Ground cannot therefore be sustained.

Ground 2.8 (4)

Mr Nabi submitted that the decision and review can be impugned because no account was taken of the fact that the Appellant had not previously been without housing. It sems to me that Mr Peacock is correct in his submission when resisting that assertion. Although there was no express mention by the reviewer that the Appellant was not previously homeless, this fact would have been plain and obvious not least of all upon consideration of the housing file, which was described as substantial in nature. Not mentioning this does not in my view indicate that the matter was not taken into account nor does it amount to a material deficiency. Accordingly, I reject this Ground of Appeal.

Ground 3

90. The gist of the this Ground is that the Respondent failed to make relevant inquiries on a range of issues including about the Appellants prognosis, risks to her health if she were homeless (3.9); to the Appellants care coordinator in respect of her ability to comply and engage with counselling services (3.10); inquiries to be able reject the evidence from the Appellants medical practitioners assessments (3.12); and inquiries to be able to conclude that the Appellant did not have a protected characteristic once the positive remedial effect of treatment had been ignored (3.13).

91. These Grounds are linked to the issue of inquiries raised in Ground 1.4(2) above. I have concluded that the Respondent failed to make any adequate inquiries about the impact of the Covid-19 emergency upon the Appellant and that Ground 3.11 succeeds. I have also concluded, as set out above, that the Appeal should be allowed under Ground 3.10.

92. In view of my conclusions above that the correct formulation for the comparator that the Respondent was required to use in the test for determining vulnerability was "the ordinary person if rendered homeless", I do not consider that either Ground 3.9 or 4.14.(4) constitute sustainable Grounds of Appeal. This is so because each Ground is founded on the premise that the comparator is "*an ordinary robust and healthy person"*. The assertion is that the Respondent failed to make enquires to enable an incorrect comparison to be made. Formulated as such those Grounds cannot succeed.

93. It seems to me also that the same conclusion applies in respect of Grounds 3.12 and 3.13. Ground 3.12 appears to posit a scenario in which the Respondent is required to conduct inquiries with the purpose or outcome of enabling it to reject evidence from the treating physicians. Ground 3.13 appears to be an extension of the artificial reasoning to which I have referred above relating to the consideration of the beneficial remedial effect of treatment that the Appellant had been prescribed. I see no merit in either Ground.

Ground 1.4(4), 4.14(2), 4.14(3), 4.14(4), 4.14(5).

This Ground is concerned with the reasons given for the Respondents decision. The Appellant asserts that the original decision and the review decision contained inadequate reasons and gave any adequate explanation of the reasons for the decisions made.

94. I have concluded that the review decision is flawed because the reviewer fell into error in failing to take account of the impact of the Covid-19 emergency which was a new matter that was relevant to the Appellants circumstances. The review decision letter runs over 6 pages Clearly it did not deal with this in any way.

95. I have dealt above with Ground 4.14(4).

96. Whilst the decision expresses briefly the reasons for concluding that the Appellant was not vulnerable based on some other special reason, that brevity by itself does not in my view reveal a deficiency or flaw.

97. It seems to me that there is no substance in Mr Nabi's submission that the review decision was deficient because it did not expressly or explicit state it was accepted that the Appellant had a severe mental health condition.

98. Whilst I am satisfied that the reviewer, fell into error by not initiating the Review Regulation provisions on the basis I have stated previously, I do not consider that an error arose because there was no express mention of whether there was acceptance of the severity of her mental condition. The reviewer is not required in my view to set out in a pedantic forensic analysis every single matter that is accepted or is not accepted.

99. I am not satisfied that on this point, the absence of a statement indicating acceptance or rejection of the description of the Appellants condition as severe itself gives rise to or is an indicator of an error in law. Mr Peacock in my judgment is correct in his submissions. I therefore do not find that this Ground of Appeal is made out.

Ground 5.15, 5.16

Under these grounds the Appellant contends that the council's decision was affected by irrationality.

100. It seems to me that I must be mindful, as is restated in the authorities that, when considering reasons in a decision not to approach it in any over technical way or look for inconsistencies or treat decision as a legal treatise. Rather I should adopt a benevolent approach. Looking at the decision in the round, I do not consider any deficient or flaw or irrationality arises under either Ground 5.15 or 5.16.

101. I do not accept Mr Nabi's contentions that irrationality arises merely because of the use of the words extracted from the review decision in Ground 5.15 The words were used in the context of demonstrating that, despite her circumstances, the Appellants had shown an ability to cope. That the Appellant had not been without accommodation was clearly known to the reviewer. That fact does mean that a determination that the Appellant would be able to cope with being homeless like an ordinary person involves any irrationality in the reviewer's decision.

102. I additionally reject Ground 5.16. The foundation for the Appellants contention of irrationality is the use by the reviewers of the phrase "she has a high degree of functionality" when addressing the Appellants drug use. Mr Nabi submits that this is evidence of the introduction of a functionality test in place of the *Hotak* test of vulnerability. It is correct that the court in *Guiste v London Borough of Lambeth [2019] EWCA Civ 1758* firmly rejected the introduction of functionality as part of the test for vulnerability. However, I do not consider that a test of functionality was here being used. Whilst the word functionality appears in one passage of the review decision it had been preceded by a correct statement of the test that was required to be applied [A28]. The reviewer had reminded herself of the appropriate test and it seems to me that use of those word " functionality" did not indicate that she had at that point imported a different test or supplanted the test in *Hotak.*.

I therefore do not uphold Ground 5 of the Appeal.

Summary

103. In summary, on the bases set out above I allow the Appeal under Grounds 1, 2, 3 and 4. Ground 5 fails.

104. In view of my conclusions I quash the decision and remit the matter back to the Respondent for re-determination.

105. At the conclusion of the hearing the parties indicated that any outstanding matters that arose likely could resolved between the parties without the need for a further hearing. I am grateful to the parties for that indication. With that in mind I direct that in relation to any matters that remain unresolved, the parties do within 14 days of this Judgment, set those out (including any relating to costs) in short supplemental Skeleton Arguments.

Recorder Karl King