

THE ASSESSMENT OF DOMESTIC VIOLENCE CASES UNDER THE HOMELESSNESS LEGISLATION

1. Whether or not a person is **statutorily homeless** is determined by an assessment under Part 7 of the Housing Act 1996, as amended. In practical terms this is best viewed as a series of **tests** that must be met. These are:

- Is the applicant **eligible** for housing assistance?
- Is the applicant **homeless**?
- Is the applicant in **priority need**?
- Is the applicant **unintentionally** homeless?
- Does the applicant have a **local connection**?

Note that the tests are **mandatory** apart from the local connection test which is a discretionary one (applied after an applicant has been accepted as homeless in order to decide if the applicant should be referred to another authority).

2. Homelessness is not just 'rooflessness'.

Under the legislation 'homelessness' has a meaning that extends well beyond simply lacking a roof. The Act recognises the importance of not having a 'home'. The extended meaning of homelessness in the Act includes:

- Having **no** home
- Having a home but **no right to occupy** it.
- Having a home that is **not reasonable or safe** to occupy due for example its fitness, overcrowding or through a threat of violence.
- Having no home that is **available** for the **whole household**.
- Having a home but being **unable to access** it or if a **mobile structure** unable to **place it on a lawful site**.

3. Housing officers are required to assess the circumstances of those who are homeless or potentially homeless as the result of domestic violence or a threat of violence likely to be carried out because it cannot be reasonable to continue in occupation of accommodation where violence is probable.

The homelessness decision-making process requires both an **investigation to ascertain the facts** of the case and then an assessment of those facts against the statutory criteria in order to make a reasoned decision supported by the evidence.

4. Context: Domestic Violence policy & Homelessness Code of Guidance

> A Council's policy on Domestic violence can be no more than a statement of intent and cannot be a blueprint for assessing cases of domestic violence under Part 7. This is because the housing authority is legally unable to 'fetter its discretion' on making such assessments. In other words the authority cannot adopt a pre-determined policy approach to the way it implements Part 7 of the Housing Act 1996 which would be unlawful in terms of public law.

> However the purpose of a policy can usually provide a starting point for good practice in adopting a '**survivor centred**' approach and empowering people by advising them of their options and giving guidance so that they can make their own informed decisions.

> The Code of Guidance, to which a Council must have regard, spells out good practice in relation to assessing cases of domestic violence.

5. The Application

> A person fleeing violence can approach any Council to present as homeless regardless of whether there is a local connection or not.

> Multiple applications to different Councils are lawful and although normally the first Council approached would take prime responsibility, all others are still obliged to reach a decision. However once accepted by one authority the other Councils could then conclude that the applicant was no longer homeless, since the accepting authority is under a duty to provide suitable accommodation.

6. Provision of accommodation

> The duty to provide s188 **interim** (or emergency) accommodation pending enquiries is easily triggered by the low evidential requirement of having "**reason to believe**" the applicant is (eligible), homeless and in priority need.

Reason to believe could be provided by a person claiming to be homeless on fleeing domestic violence and for priority need as the result of claimed pregnancy or dependant children - albeit this would be investigated in due course as part of the duty to make enquiries. For those without dependants there would have to be reason to believe there was priority need as the result of vulnerability.

> This could be as the result of ceasing to occupy accommodation by reason of violence from another person or threats of violence, which are likely to be carried out [see more on vulnerability as the result of fleeing violence below].

> Accommodation has to be suitable and so a person cannot be provided with accommodation in an area that they may be at risk of violence.

7. The Investigation

> Once a local authority has reason to believe an applicant is homeless or threatened with homelessness, section 184 of the 1996 Act provides that:

“...they shall make such **inquiries** as are necessary to satisfy themselves whether he is eligible for assistance and if so whether any duty, and if so what duty, is owed to him...”

> The burden and duty of making inquiries is on the authority and case law has clearly determined that it is for the authority to decide on the **scope, nature and scale** of its inquiries; in other words to decide what inquiries to make.

> In making a homelessness presentation an alleged victim of violence therefore triggers this duty to make inquiries. Taking a sympathetic approach to the victim does not mean that the person's account can be accepted on the basis of their unsubstantiated word or that the account is accepted uncritically.

> If domestic violence is alleged the circumstances of this have to be **investigated** so that this authority can establish and satisfy itself regarding the facts. The applicant is therefore generally under an obligation to provide the full circumstances appertaining to her/his homelessness.

> Occasionally there may be a lack of clear corroborating evidence in support of the applicant. This again does not mean the Council can accept the applicant's word at face value or ignore the possibility of any adverse evidence, which does not support the applicant's case.

> The investigating officer will always seek objective, third party **corroborative evidence** where “this is reasonable to do so in the circumstances”. Evidence from others simply repeating the applicant's account may not carry much weight. However evidence from any relevant source will be considered. Evidence from the Police or the applicant's GP would carry evidential weight but this is not to say that such sources are a requirement.

> If there is doubt after scrutinising the evidence then this generally favours the applicant who has the benefit of the doubt.

> Housing officers should not make decisions in fulfilment of their statutory duties in the absence of evidence unless satisfied that it is a situation where there is no corroboration available either way e.g. if a person is fleeing domestic violence from abroad and no reasonable enquiries can be made.

> In these cases it may be reasonable to suggest the applicant makes a **Statutory Declaration** witnessed by a Commissioner for Oaths or solicitor. This counts as a legal statement of truth (and applicants can perjure themselves by not doing so). But using a Statutory Declaration would be exceptional. It is seldom the case that there is no third party evidence to be investigated.

8. The assessment

The statutory background

> Section 175(1) of the Housing Act 1996 states that a person is homeless if s/he has no accommodation available to her/him which s/he has a right to occupy.

> Section 175(3) states that a person shall not be treated as having accommodation unless it is accommodation that it would be reasonable for her/him to **continue** to occupy.

The test is not therefore whether it is reasonable to leave (*R v Kensington & Chelsea RLBC ex p Bayani 1990*) but whether or not accommodation is reasonable to continue to occupy.

> Section 177 (1) applies a slightly different test of reasonableness [i.e. the **probability test**] in domestic violence cases from that which is applicable in other cases. It provides that: "It is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence against him or against... a person who normally resides with him as a member of his family...".

> Domestic violence means **violence** from a person with whom the applicant is **associated**, or **threats of violence** from such a person which are likely to be carried out. It is not reasonable to occupy accommodation if it is probable that this will lead to violence against the applicant or a member of her/his household. Violence means violence from any person, or threats of violence which are likely to be carried out. The violence could be likely to occur, or have been threatened, either inside or outside the home.

> **Accommodation** means a place that can be **fairly described as accommodation** and that it would be reasonable, having regard to the general circumstances in the local authority's district, for the person to continue to occupy. There is no **additional requirement** that it should be **settled** or **permanent**: *R v Brent LBC ex p Awua [1996]*

> The exception to this definition of accommodation is '**crisis**' accommodation. Therefore a women's refuge, or crisis night shelter does not constitute accommodation that a local authority could determine that an applicant wasn't homeless, or at least threatened with homelessness.

This was confirmed in **Moran v Manchester City Council [2009]** In *Moran*, it was held that although there may be circumstances in which it is reasonable to continue to occupy a place in a women's refuge indefinitely, in **most cases**, a woman who has left her home because of domestic (or other) violence within it **remains homeless** even if she has found a temporary haven in a refuge. She is homeless while she is in the refuge and remains homeless after she has left.

If she loses her place there because of her own conduct, **she does not become homeless intentionally** because it would **not have been reasonable** for her to continue to occupy the refuge indefinitely.

9. The Domestic violence 'probability test' contained in s177(1) of the Housing Act 1996.

> Where a local authority has to decide whether it is reasonable for a person alleging domestic violence to continue to occupy accommodation, the only question the authority may ask is whether it is **probable** that continued occupation of the accommodation will lead to domestic violence against that person or a threat of violence that is likely to be carried out. That is purely a question of **fact**, devoid of value judgments about what an applicant **should or should not** do: *Bond v Leicester CC [2001]* .

The question always to be addressed is not whether it was reasonable for the applicant to leave their last settled accommodation but whether it was reasonable to continue in occupation. It is not reasonable to continue to occupy accommodation if it is 'probable' that this will lead to domestic or other violence or to threats of violence which are likely to be carried out.

> '**Probable**' can be defined as 'more likely than not'. '**Likely**' in the context of 'threats of violence' includes a 'real or serious possibility'.

>The Supreme Court has ruled that 'violence' in the homelessness legislation in s177 should not be narrowly defined in terms of 'physical' violence but should have a **wider meaning** to include psychological abuse or other abuse where this may result in harm - *Yemshaw v LB Hounslow 2011*.

> An assessment must be carried out on the basis of the evidence as to whether violence is **probable by continuing in occupation** or the threat of violence likely to be carried out.

> It is not necessary to establish a history of violence. Past history is not a pre-requisite as evidence of probability and likelihood. So a threat likely to be carried out is sufficient.

> On considering this test the probability alone must be considered. It is not permissible to take into account the applicant's ability to seek **Family law or other remedies** to seek an injunction or occupation order to oust the perpetrator from the home **in reaching this decision** (in accordance with the decision in *Bond v Leicester CC* Court of Appeal 2001).

> Nevertheless if an applicant has already taken **preventative measures** the assessment of probability needs to consider if these have proven effective, as a matter of fact, in reducing the risk of violence below probability - but this is unlikely to be the case.

> The probability test does not require the probability of violence or threat likely to be carried out to be a 'high' probability. Any reasonable probability of violence/risk/harm meets the test.

> The violence need not be directed at the applicant. It can be against any person who usually **resides** with the applicant or might reasonably be expected to do so.

> The risk of domestic violence comes from **associated persons**. These include:

- Married, civil partners or separated/divorced persons
- cohabitants and former cohabitants including same sex couples
- persons who live or have lived in the same household
- relatives (defined in s178(3))
- persons associated because each is the parent of a child or has or had parental responsibility for that child.

The Homelessness Act 2002 extended s177 to include 'other violence' i.e. from someone not associated with the victim e.g. those suffering racial harassment. This is significant because previously violence from non-associated persons was only relevant to general reasonableness to occupy. In assessing such reasonableness therefore the position now is that alternative remedies are covered by the Bond v Leicester CC decision referred to above.

10. Reasonable to continue to occupy - the test in section 175(3)

> If physical domestic violence is alleged and discounted there is also an obligation on the authority to consider if the home was reasonable to continue to occupy on grounds other than domestic violence.

> However In this respect in relation to s175 (3), Section 177(2) of the Housing Act 1996 also entitles the Council to consider the **general housing** circumstances prevailing in its district in considering whether or not accommodation is reasonable to continue to occupy.

> The Council is not in a position to provide housing simply as the result of relationship breakdown unless this is evidenced by violence or other abuse. To do so would be entirely impractical given the frequency with which relationships end (as evidenced by the divorce rate). In *R v Kensington & Chelsea RLB ex p Monaco* QBD 1996 for example the court held it was reasonable for a divorced couple to continue to occupy the matrimonial home due to the shortage of accommodation in the area.

However account cannot be taken of local housing conditions in relation to domestic or other violence.

After acceptance as statutorily homeless a person cannot be referred back, under the **local connection** provisions, to an area where they may be at risk.

11. Priority need test: Vulnerability as the result of (domestic) violence

> Section 5 of the 'Homelessness (Priority Need for Accommodation) (England) Order 2002 states a person can be **vulnerable** as the result of ceasing to occupy accommodation by reason of violence from another person or threats of violence which are likely to be carried out. The vulnerability must be a result of having to cease accommodation because of violence or threats likely to be carried out.

> The '**Pereira**' test of vulnerability is still to be applied to those vulnerable due to ceasing occupation due to violence.

Pereira test

This composite test, formulated by the courts, requires that in order to determine vulnerability the Council must consider whether the applicant is less able to fend for his/herself when homeless so that injury or detriment will result when compared to a (hypothetical) less vulnerable person who would be able to cope without harmful effect.

The impact and likely effects of violence or threats on the applicant's physical and mental health and well being must be considered along with any support networks available by way of family or friends.

12. Place of safety approach adopted by Oxford City Council

> This applies to **secure tenants** of the Council and **assured** tenants of Housing Associations (operating in partnership with the Council) who are fleeing violence. Tenants requiring a place of safety due to violence or harassment must contact their local housing manager to discuss their circumstances (not least to establish if with agreement, any action can be taken against the perpetrator *) who will then advise the tenant s/he must present as homeless so that an assessment can take place under Part 7 of the Housing Act 1996. Interim accommodation will be provided under s188 if the Options officer considers a duty arises under this section as **a place of safety**. Alternatively the tenant could make their own arrangements such as staying with relatives pending the enquiries.

> Should the tenant look likely to be subsequently accepted as statutorily homeless, after investigation, the tenant's case will be referred to the Exceptional Circumstances Panel which will ratify an award of an 'urgent' rehousing status on the **Transfer register** subject to the tenant relinquishing their secure tenancy.

This approach is in the tenant's interest because it precludes existing permanent tenants from having to go back through the temporary accommodation route in order to obtain another permanent tenancy via the General housing register which could take several years.

> If the tenant is not accepted as statutorily homeless and the assessment is that their tenancy is reasonable to continue to occupy then they will be expected to return to their property (subject of course to the s202 right to a review).

*** Taking action against the perpetrator**

If a secure tenant chooses to remain in their accommodation rather than being rehoused various solutions are available ranging from Family law remedies to 'target hardening' of the property by providing greater physical security. The Council as a landlord can also assist in the case of a joint tenancy by agreeing a sole tenancy :

> It is established law that one joint tenant can terminate a joint tenancy without the agreement of the other joint tenant, with proper notice of 4 weeks in writing (sometimes called the **McGrady** judgement although this case has

been superseded by other court decisions confirming this). In the circumstances of DV if the victim wishes to retain the tenancy and not be rehoused elsewhere the Council can agree to offer the tenancy to the victim as a **sole** tenant. After notice has expired the Council can take legal action to evict the perpetrator of DV who becomes an unauthorised occupier after the tenancy has ended.

> The Council can also seek to evict the perpetrator of violence. It is a ground for the Council to seek possession of a secure tenancy using **Ground 2a: Tenant or tenant's partner has left due to violence or threats of violence** Housing Act 1985, as amended.

The landlord can apply for possession where partners (opposite or same-sex) were living together and either or both is the tenant and:-

- one partner has left the property because of violence or threats of violence from the other partner or a member of the partner's family;
and
- the court is satisfied that the partner who has left is unlikely to return.

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This contains my interpretation of the legislation; others may hold a different opinion. Only a court can provide a definitive interpretation of the law.