
GARDEN COURT
CHAMBERS

Re T, The National Deprivation of Liberty Court v The Court of Protection

Amanda Weston KC, Amanda Meusz

and James Holmes

Re T (A Child) [2021] UKSC 35

- - The Supreme Court has revisited the use of the inherent jurisdiction to authorise deprivation of liberty of young persons

- - This was against the background of a shortage of provision of secure children's homes in England and Wales.

The National Deprivation of Liberty Courts

- The court was created on 22 June 2022 following the decision of McFarlane LJ
- It heard its first case on 4 July 2023
- In the first twelve months
  - Applications were made by 151 different Local Authorities and 21 hospital or mental Trusts
  - The majority of children (59.4%) involved in applications were aged 15 and above, with a small minority relating to children under the age of 13 (9.2%).
  - 1,1309 application July 2022 – April 2023
  - Almost equal applications involving girls and boys

Why was the National Deprivation of Liberty Court Created

- To seek to improve the process for the consideration of applications for children to be deprived of their liberty under the Inherent Jurisdiction of the High Court.
- Due to the increasing numbers of applications being made for such orders
- Greater transparency

Different Mechanism authorising a Deprivation of Liberty

- Application to Court of Protection
  - Governed by the Mental Capacity Act 2005
  - Applies to those aged over 16 – young persons only
  - The person needs to lack mental capacity
  - Re X procedure – streamlined procedure

- Inherent Jurisdiction application to the National Deprivation of Liberty Court
  - Jurisdiction in relation to those under 18 years old – children and young persons.
  - Application of Article 5 Test – objective element and subjective element

- Secure Accommodation Order - Section 25 Children Act 1989
  - It needs to be established that;
  - (a) he has a history of absconding and is likely to abscond from any other description of accommodation; and if he absconds, he is likely to suffer significant harm; AND/OR
  - (b) if he is kept in any other description of accommodation, he is likely to injure himself or other persons.

- Mental Health Act 1983 –
  - relevant to children and young people who require a period of inpatient psychiatric care.
  - Individuals who are admitted for assessment of their mental health condition can be detained for up to 28 days (section 2). Those admitted for treatment of a mental health condition can be detained for up to 6 months, which can be renewed for another 6 months and thereafter every 12 months (sections 3 and 20)

Court of Protection or Family Court

- The Mental Capacity Act 2005 (Transfer of Proceedings) Order 2007

> (a) whether the proceedings should be heard together with other proceedings that are pending in a court having jurisdiction under the Children Act;
> (b) whether any order that may be made by a court having jurisdiction under that Act is likely to be a more appropriate way of dealing with the proceedings;
> (c) the need to meet any requirements that would apply if the proceedings had been started in a court having jurisdiction under the Children Act; and
> (d) any other matter that the court considers relevant.

- B (A Local Authority) RM, MM and AM [2010] EWHC 2802 (fam)

- A-F (Children) (No 2) [2018] EWHC 2129 (Fam)

- The Trend

Issues with the current processes

- **Transparency**
  - The MoJ do not publish data
  - Nuffield Family Justice Observatory has started collecting data
    - 1st April – 31 May 2023
      - 32 applications Court of Protection
      - 61 applications National Dol's court

- **Lack of suitable provision/placements**
  - Coventry City Case
  - Re X [2023] EWHC 129
  - NHS Trust v ST [2022] EWHC 719 (fam)
  - AB (A Child: human rights) [2021] EWFC

- **Regulation and oversight**
  - Revised Practice Guidance Issued

- **Lack of sufficiency framework / statutory responsibility**

Is there a solution?

- Change how provision is funded and secured – Care Reviews recommendations
- Public Law Challenges to Local Authority decision making
- Human Rights Claim against the Government
- Claims against CAMHS
- Changing the approach taken when applications are made for DoL's
- Expanding the scope of Section 25 Children Act 1989
- Liberty Protection Safeguards

Housing issues in the Court of Protection

Pt. 1 - tenancy issues and possession proceedings

Angharad Monk

8 November 2023

Why are possession proceedings relevant in the COP?

- Need to understand P's tenancy rights in order to conduct options analyses.
- P may be facing the loss of their home due to issues which require need COP input.
- P may be unable to prevent the loss of their home, but need COP input to source alternative accommodation options (subject of Tim's presentation).

Common tenancies

- Private sector assured shorthold tenancies under Housing Act 1988
  - Usually for a fixed term, then periodic ("rolling") after (section 8 HA 1988)
  - Landlord can use "no fault" eviction process under section 21 HA 1988
  - Market rent

- Secure social tenancies under Housing Act 1985
  - Usually local authority landlord (some older housing association tenancies)
  - Mostly lifetime periodic / rolling tenancies – some fixed term "introductory" tenancies
  - Social rent

- Assured social tenancies under under Housing Act 1988
  - Housing association landlords
  - Can be lifetime periodic / rolling tenancies. Sometimes fixed term, but more complex for social landlord to use section 21
  - Social rent

Less common …

- Private sector protected / regulated tenancies under Rent Act 1977
  - Any private sector tenancy that began before 15 January 1989
  - Lifetime tenancies with strong protections
  - Fair rent with controls
  - Succession rights

Grounds for Possession

- All the tenancies discussed have protection from eviction, meaning no eviction without a court order.

- Grounds for possession depend on the tenancy types, broadly two categories:

Discretionary, where the court has to be satisfied both that the ground is "made out" and that it is reasonable to make a possession order

Mandatory, where the court must make a possession order if satisfied the ground is made out

Finding the grounds for possession

- **Assured tenancies (both shorthold and non-shorthold)**: *Schedule 2 Housing Act 1988*
- **Assured shorthold tenancies**: *see above, but also section 21 Housing Act 1988*
- **Secure tenancies**: *schedule 2 Housing Act 1985 , section 84A Housing Act 1985*
- **Regulated / protected tenancies**: *schedule 15 Rent Act 1977*
- **Other scenarios**: where it is said that there is no security of tenure because either the tenant died, or the tenant has ceased to occupy the property as their only or principal home. No statutory grounds of possession required.

Common possession claims in matters with COP overlap

Rent arrears

- Can be discretionary or mandatory grounds.
- No mandatory grounds for secure (non-introductory) tenants, or regulated / protected tenants.
- Social landlords expected to comply with the Pre-Action Protocol for Possession Claims by Social Landlords which includes engagement with the tenant and attempts to resolve the arears without proceedings.
- Mandatory ground 8 available to private landlords and housing associations (assured tenancies) – where rent arrears over eight weeks (weekly or fortnightly tenancies) or two months (monthly tenancies) at date of notice and possession hearing.
- Protected parties may lack capacity to manage financial affairs resulting in arrears.

Common possession claims in matters with COP overlap

Anti-social behaviour

- Can be discretionary and / or mandatory grounds. Mandatory grounds based on certain other orders being obtained – specific criminal convictions, breach of anti-social behaviour injunctions, closure orders made in respect of the premises.

- Discretionary grounds relate to breach of specific tenancy terms and/or anti-social behaviour as statutorily defined (fairly broad definition).

- In many cases involving protected parties, there will be strong evidence that the grounds are made out, but the conduct may be related to incapacity / disability.

Common possession claims in matters with COP overlap

Hoarding

- Usually brought on basis of discretionary grounds relating to breach of tenancy, deterioration of the property, and sometimes anti-social behaviour where hoarding impacting others.

- Extremely complex cases which tend to be long-running.

- Frequently tenants will have mental health diagnoses and possession proceedings can raise a number of capacity issues. May lack capacity over their hoarding behaviours.

When the COP is needed, and how it can assist

- In rent arears, ASB and hoarding cases there is often a direct link between lack of capacity in relevant areas and the grounds for possession.

- Where P represented in possession proceedings, housing lawyers will usually try to defend the case on following bases:
  - Where discretionary grounds – arguments that it is not reasonable to make a possession order
  - Where mandatory grounds – defences alleging discrimination under Equality Act 2010 / public law arguments against social landlords

- Ultimately any defence unlikely to succeed unless a practical alternative can be presented to possession, whether that be reduction of arrears over time, abatement of anti-social behaviour, or reduction / abatement of hazards resulting from hoarding.

When the COP is needed, and how it can assist (continued)

- P may lack litigation capacity in which case will require litigation friend in possession proceedings, often the Official Solicitor.

- May also lack capacity in other respects, for instance in respect of decisions as to place of residence, managing finances, and entering into / surrendering tenancies.

- Litigation friend cannot make decisions for P which go beyond the conduct of litigation, which can prevent resolution of underlying issues required for positive outcomes:
  - If unable to manage financial affairs, may require a deputy to resolve arrears
  - If unable to make decisions about place of residence, may require best interests decisions in this respect
  - If unable to enter into or surrender tenancies, may require COP authorizations to make the legal arrangements for a managed move

Practical points

- Possible to ask the court to list possession proceedings and COP proceedings before the same judge – some members of judiciary have both tickets.

- It will often be appropriate to stay possession proceedings behind COP proceedings where issues overlap, as COP can progress the underlying matters relevant to determination of the possession action.

- Important to identify if there may be tenancy issues / possession proceedings requiring defence in COP cases. P may require representation in this respect and it should not be assumed that loss of tenancy is inevitable, particularly where there is a social landlord.

So how can the Court of Protection help your housing case?

Tim Baldwin

8 November 2023

How can the Court of Protection help?

- Applications to the Court of Protection what can they achieve? Why is having a litigation friend not enough?
  - Possession proceedings
    - ❖ Rent – paying rent
    - ❖ Welfare benefits – appointees - DWP
    - ❖ ASB/hoarding – AC and GC (Capacity: Hoarding: Best Interests) [2022] EWCOP 39 (15 August 2022) (bailii.org)
    - ❖ Injunctions – enforcement/alternative accommodation
  - Homelessness and housing
    - ❖ Applications for accommodation Part 6 and 7 Housing Act 1996
    - ❖ Specialist forms of accommodation – supported living/residential care
    - ❖ Discharge from hospital or detention in psychiatric hospital
    - ❖ S 21A or s 16 Mental Capacity Act 2005?
- How can the Court of Protection help you and your client?
- Interaction with the Care Act 2014
- Sharing of evidence – County Court and COP what steps do you have to take.

Invoking the jurisdiction of the Court of Protection

- Section 48 of the MCA 2005 power to make interim orders – “some reason to believe” – making interim orders, evidence client may lack capacity on particular issue of decision making
- S 50(2) MCA 2005 permission to bring an application “personal welfare”
- Section 47 of the MCA 2005 powers of the High Court – injunctions
- S 15 of the MCA 2005 – power to make declarations – as to capacity and lawfulness of an Act
- S 16 of the MCA2005 – powers to appoint deputies for personal welfare or property and affairs. Powers of the court to make orders.
- S17 on 16 powers MCA 2005– personal welfare – (1)(a) where someone to live. Can also deal with care and contact.
- S 18 on 16 powers MCA 2005: property and affairs
- S 7 MCA 2005 payment for necessary goods and services
- S 20 MCA 2005 appointment of Lasting Powers of Attorney

Principles of MCA 2005

S 1 The principles
(1) The following principles apply for the purposes of this Act.

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Capacity

2 People who lack capacity

(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
(2) It does not matter whether the impairment or disturbance is permanent or temporary.
(3) A lack of capacity cannot be established merely by reference to—
(a) a person's age or appearance, or
(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
(5) No power which a person ("D") may exercise under this Act—
(a) in relation to a person who lacks capacity, or
(b) where D reasonably thinks that a person lacks capacity,
is exercisable in relation to a person under 16.
(6) Subsection (5) is subject to section 18(3).

Inability to make decisions

3 Inability to make decisions

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—

(a) deciding one way or another, or

(b) failing to make the decision.

Best interests

S 4 of the MCA 2005

- Encourage participation – do what is reasonably possible
- Identify all relevant circumstances – what P would take into account if able to make decision themselves
- Find out P's views – past and present wishes and feelings, beliefs of values or other factors
- Avoid discrimination – do not make assumptions
- Assess whether person might regain capacity
- Does it involve life sustaining treatment
- Consult others
- Take less restrictive approach
- Everything must be taken into account
- S 1(5) MCA 2005
- What is the burden of proof and how is this assessed
- Advance decisions
- Deputy or LPA? Do displacement proceedings need to be considered

Other sources

- Court of Protection Rules 2017 Practice Direction 14E and independent experts (rules 15.3 and 15.5)
- Code of Practice Mental-capacity-act-code-of-practice.pdf (publishing.service.gov.uk)
- Chapter 4 Capacity
- Chapter 5 Best interests
- S 49 visitors reports letter Section-49-Guidance-December-2022.pdf (mentalcapacitylawandpolicy.org.uk)
- Also, there is further guidance for example from NICE Recommendations | Decision-making and mental capacity | Guidance | NICE

How the COP can help: Mental Capacity: tenancy/licence

- If someone, notably a landlord, has evidence that a person lacks mental capacity when it comes to a tenancy, they cannot enter into a tenancy agreement, assign/vary a tenancy, or end the tenancy.
- Tenant may become lacking in capacity
- Ability to contract *Chitty* – common law ability to contract and tenancies in Equity – held on Trust?
- If lacks capacity – need someone to act on Tenants behalf
  - Court appointed deputy
  - Someone with lasting powers of attorney
  - An order of the Court which makes provision to enter, assign or vary, or end a tenancy.
- Voidable? Nullity? Knowledge of the Landlord.
- Applications for Welfare Benefits, s 7 MCA 2005: Appointees.
- ***Wychaven District Council v EM [2012] UKUT*** 12 (AAC). The tribunal held that a purported tenancy agreement was a nullity as the occupant was so severely disabled as not to be capable of indicating any assent thereto but went on to hold that she was entitled to housing benefit because the supply of the accommodation had been necessary.

What can finance deputies do?

- Part 21 of the Civil Procedure Rules govern what a litigation friend can do. This concerns issues of capacity to conduct litigation. Cannot make applications for benefits, cannot sign new tenancy agreements cannot agree to directly terminate tenancies may be able to make applications to the Court of Protection. Also, Part 21 includes compromise of litigation “protected parties” and “protected beneficiaries”.
- Orders of the Court of Protection:
  - Urgent interim applications – benefits and payment of rent
  - Appoint an interim deputy or a panel deputy or a deputy within a Local Authority to manage the tenant's property and affairs – Court of Protection can make orders where deputy powers limited in respect of consultation with the Litigation Friend e.g. to serve a notice to quit to end a tenancy.
- This would have to engage an assessments of tenant’s best interests
- Application for housing
  - Homelessness and allocation Part 7 and Part 8 – mainstream housing “light touch care needs”
  - Specialist housing – residential care or supported living
  - How does this work?

Capacity and homelessness applications

- Intentional homelessness s 191 HA 1996 (1) and (1A), (2) and (3).
- 9.17 (E) Code of Guidance

> (b) the housing authority has reason to believe the applicant is incapable of managing their affairs, for example, by reason of age, mental illness or disability;
>
> (c) the act or omission was the result of limited mental capacity; or a temporary aberration or aberrations caused by mental illness, frailty, or an assessed substance misuse problem;

All well and good but – how do you make the application?

Capacity and homelessness application

- An application for homelessness assistance cannot be accepted by a local authority from a person who lacks the mental capacity to make it ***R v Tower Hamlets LBC ex parte Ferdous Begum*** (1993) 25 HLR 3019 (Pre MCA 2005 Authority and pre- HA 1996 authority) also ***Re Garlick.***
- It is the responsibility of the local authority to decide whether the applicant has capacity to make the homeless application or not. A specific issue!
- Local Authority officers as professionals must have regard to MCA 2005 Code of Practice s 42 MCA 2005 in particular 42(4)(c). How do you challenge this? JR? or COP on capacity issue.
- Advocacy IMCA
- Cannot make a homelessness application even as likely to be in priority need s 189(1)(c) HA 1996 not event s 188(1).
- Is ***Ferdous Begum*** still good law after MCA 2005 and the Care Act 2014 as considered s 21 NAA 1948 as the route and was also in context of child in linked case?
- ***WB (by her litigation friend, the Official Solicitor) v W District Council*** [2018] EWCA Civ 928 confirmed ***Ferdous Begum*** good law. Also, in ***Re Garlick*** [519] expressly contemplated that a person could appoint an agent to make an application on their behalf but only where that she had capacity to make an application herself – could be done by LPA. Question in ***WB*** concerned compliance with HRA 1998.
- So how do you get around this apparent conundrum especially if care and support needs do not require specialist form of accommodation.

Making the application and other accommodation

- An application by another member of the household but what if no family member
- Appointment of a deputy
- Court of Protection can identify this as an issue.
- Can appoint the deputy and authorise them to make an application, decide on the offer and sign a tenancy (see ***WB***)
- Is this ideal and can it be done urgently – can a tenancy in equity be granted pending a resolution?
- See order appended to ***WB*** WB v W District Council [2018] EWCA Civ 928 (26 April 2018) (bailii.org)**.**
- Is there an argument that s 19(3) of Care Act 2014 could be used to get around s 23 Care Act 2014 problem as often need a Care and Support Assessment under s 9 Care Act 2014.
- Application under Part 6 Housing Act 1996.
- Litigation Friend in s 204 HA 1996 Appeals.

- Role of the Court of Protection in respect of specialist accommodation supported living or residential care – best interest decision and care needs assessments.

Sharing evidence COP, County Court and High Court

- Will require orders from each jurisdiction to admit evidence into the court in the other jurisdictions.
- Within COP often covered by Transparency Order
- Within County Court and High Court receiving evidence from COP r 39.2(4) orders covering identify and access to documents in those jurisdictions.

THE END AND TIME FOR QUESTIONS AND DISCUSSION

Community Care Law for CoP Lawyers

Ollie Persey, Garden Court Chambers

9 November 2023

Contents

(1) Key points on meeting needs under

- Care Act 2014
- NHS Continuing Healthcare (NHS CHC)
- Children Act 1989 and other provisions concerning children and young people

(2) Transfers from children's to adult care

(3) Disability adaptations

Meeting needs under Care Act 2014 (CA 2014)

CA 2014 provides the main legal framework for adult social care in England. For Wales, see Social Services and Well-being (Wales) Act 2014.

Key points in decision-making under CA 2014:

- **Duty to assess needs for care and support** (s 9) Arises regardless of local authority's view of level of adult's resources (s 9(2)); duty to provide written record of the assessment (s 12(3))
- **Decision on eligibility** (s 13(1)), applying *Care and Support (Eligibility Criteria) Regs 2015*, reg 2 : 3 essential criteria - (a) the adult's needs arise from or are related to a physical or mental impairment/illness (b) as a result of the adult's needs s/he is unable to achieve 2 or more of the outcomes specified in para 2 and (c) as a consequence, there is, or is likely to be, a significant impact on the adult's well-being. Reg 2 (2) states the specified outcomes as 10 activities of daily living
- **Duty to meet eligible needs crystalises** where person is (i) ordinarily resident in the local authority area or present in its area but has no settled residence (ii) has been assessed as not liable to pay a charge or one of 3 conditions in s 18 (2)-(4) are met - (in sum) adult liable pay only part of the cost under the means test (i.e. not a self-funder); adult liable to pay whole of the cost (is a self-funder) *but* requests the local authority to meet their needs; *or* the adult lacks capacity to arrange the provision of their care and support and there is no person authorised to do so under MCA 2005 or otherwise in a position to do so on their behalf (s 18)
- **Duty to compile care and support plan** (ss 24-25 CA 2014)

Meeting needs under CA 2014 (continued)

Duty to assess needs for care and support (CA 2014 s9)

↓

Decision on whether needs meet the eligibility criteria

(CA 2014 s 13 and Care & Support (Eligibility Criteria) Regs 2015)

↓

Financial assessment (whether person liable to pay/amount of charge) (CA 2014 ss 14 and 17 and Care and Support (Charging and Assessment of Resources) Regs 2014 and Care and Support Statutory Guidance Ch 8 & Annexes B,C,E)

↓

Duty to meet eligible needs if criteria in s 18 (1)-(4) are met (CA 2014 s 18)

and

Duty to prepare a care and support plan, including stating the personal budget

(CA 2014ss 24, 25 and 26; for examples of ways of meeting needs see CA 2014 s 8)

Meeting needs under CA 2014 (continued)

Care and Support (Eligibility Criteria) Regs 2015, reg 2- outcomes/eligible needs

(a) managing and maintaining nutrition;

(b) maintaining personal hygiene;

(c) managing toilet needs;

(d) being appropriately clothed;

(e) being able to make use of the adult's home safely;

(f) maintaining a habitable home environment;

(g) developing and maintaining family or other personal relationships;

(h) accessing and engaging in work, training, education or volunteering;

(i) making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and

(j) carrying out any caring responsibilities the adult has for a child.

Meeting needs under CA 2014 (continued)

Needs can be met in a wide variety of ways (see s 8 CA 2014)

- No limit specified, but examples stated: accommodation in a care home/premises of some other type, care and support at home or in the community, counselling and other types of social work, goods and facilities, information, advice and advocacy
- local authority can arrange for others to provide the services, or provide a service itself
- direct payments (if service-user opts for them)

Well-being principle to be factored into decision-making

- General duty under s 1(1) on the local authority in exercising its functions to promote the individual's well-being, defined in s 1(2) and to have regard to the matters in s 1(3)(includes person's wishes, restriction on rights and freedom of action kept to minimum necessary)
- needs assessment must include assessment of impact of the adult's needs for care and support on matters specified in s 1(2), the outcomes the adult wishes to achieve, whether and extent care and support can contribute to achieving them (s 9(4));
- care plan must specify to which matters referred to in s 9(4) the provision of care and support could be relevant (s 25(1))

Reviews and re-assessments (s 27 CA 2014)

- Care and support plans must be kept under review generally;
- review on a reasonable request by/on behalf of the adult;

Meeting needs under CA 2014 (continued)

(**Reviews and re-assessments-** continued)

- where satisfied that circumstances have changed in a way that affects a care and support plan, to the extent it thinks appropriate, the local authority must carry out a needs assessment (s 27 (4) and Care and Support (C&S) statutory guidance Ch 13).

Other points on needs assessments

i. Right to **independent advocacy** (in relation to needs assessment and preparation/revising of a care and support plan) where criteria are met in s 67 (4) and (5) CA 2014; more detail on role of independent advocates in Care and Support (Independent) Advocacy Support (No. 2) Regs 2014 CHECK

ii. Where the individual's **needs fluctuate**, must take into account the individual's circumstances over such period as it considered necessary to establish accurately the individual's level of need (Care and Support (Assessment) Regs 2014, reg 3(3))

iii. Assessors may need to **consult others with relevant expertise** in relation to the condition or circumstances of the individual: statutory guidance 6.88 and Care and Support (Assessment) Regs, reg 5.

- Must **disregard care being provided** -the entirety of the adult's needs should be identified. The eligibility determination must be made without regard to whether the person's needs are currently being met or may be met by a carer (C&S statutory guidance 6.115).

Meeting Needs under CA 2014 (continued)

Other points on care and support plans

i. **Cost is only one factor amongst others** when deciding on how needs will be met. C&S statutory guidance, para 10.27:

> "*..the local authority* ***should not set arbitrary upper limits on the costs it is willing to pay to meet needs through certain routes*** *– doing so would not deliver an approach that is* ***person-centred*** *or compatible with public law principles. The authority may take decisions on a case-by-case basis which weigh up the total costs of different potential options for meeting needs, and include the cost as a relevant factor in deciding between suitable alternative options for meeting needs.* ***This does not mean choosing the cheapest option****; but the one which delivers the outcomes desired for the best value.*

Proposing to meet needs by a move away from home and/or living with family would interfere with Art 8 rights requiring justification (Art 8(2)) and see also the C&S statutory guidance paras 1.18-19: **well-being principle** intended to cover key components of independent living, as expressed in the UN Convention on the Rights of People with Disabilities (in particular, Article 19 of the Convention).

ii. **Need for transparency in setting the personal budget**
costs assumptions upon which the budget has been set should be shared (statutory guidance, 11.25)

iii. **Family member carers**: **only if the person caring is willing and able to continue caring** is the local authority *not* required to meet the needs the carer is meeting. See C&S statutory guidance para 10.40.

Carers – assessment and care planning duties

- CA 2014 contains a separate duty to provide support services for carers in their caring role
- The duty arises when the carer is assessed as having eligible needs (ss 13 and 20 CA 2014); duty to assess: s 10 CA 2014
- There are duties to compile a care and support plan (ss 24 and 25) and to review the plan (s 27)
- The carer's eligibility for support does not depend on whether the adult whom they support has eligible needs (statutory guidance 6.118)
- The eligibility criteria for carers are in reg 3 Care and Support (Eligibility)Regs 2015
- Under s 8 CA 2014 there is a wide range of potential ways of meeting carers' support needs
- The statutory guidance steers LAs away from charging for services (8.49-8.55).

CA 2014 – final points

i. **Powers** to meet care and support needs: ss 19(1) and (3) CA 2014

ii. Other (mainly) general duties: s 2- preventing needs for care and support; s 3- promoting integration of care and support with health services etc; s 4- providing information and advice; s 5- promoting diversity and quality in provision of services; s 6- co-operation between relevant partners; s 7- co-operating in specific cases

iii. **Ordinary residence** rules: s 39 deals with ordinary residence and **out-of-area placements**. See also Care and Support (Ordinary Residence) (Specified Accommodation) Regs 2014 and C&S statutory guidance Ch 19

iv. **Safeguarding duties**: ss 42 – 45, apply in respect of adults "*in its area*"

v. S 75 NHS Act 2006 agreements – arrangements between NHS bodies and local authorities.

NHS Continuing Healthcare (NHS CHC)

What is it?

i. Defined as "***a package of care arranged and funded solely by the health service in England for a person aged 18 or over to meet physical or mental health needs which have arisen as a result of disability, accident or illness"*** (NHS Commissioning Board and CCGs (Responsibilities and Standing Rules) Regs 2012 (2012 Regs), reg 20)

ii. Free of charge

iii. Statutory underpinning: Care Act 2014 s 22; NHS Act 2006 s 3(1); 2012 Regs

iv. Duty to have regard to the National Framework (2012 Regs, reg 21(12)), for which see ***National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care***, July 2022 (Revised) ("**NF**")

v. Children are assessed against a children's national framework

vi. Integrated Care Boards (ICBs) are responsible for system leadership for NHS CHC (NF, para 22)

vii. NHS CHC can be provided in **any setting** (includes care home, hospice, person's own home)

viii. Applicable where the person has a "***primary health need***" (NF, paras 55-67)

NHS CHC (continued)

What does the assessment process consist of?

i. Assessment by **multi-disciplinary team** (National Framework (NF) para 139-143, reg 21(13) 2012 Regs)

ii. Initial screening under **NHS CHC Checklist** as to whether to undertake an assessment. If negative, ICB can be asked to reconsider (NF, para 132)

iii. Assessment is followed by application of the **Decision Support Tool** (DST) (NF, para 138, 2012 Regs, reg 21(5))

iv. DST groups needs into **12 domains**: breathing, nutrition, continence, skin integrity, mobility, communication, psychological and emotional, cognition, behaviour, drug therapies and medication, altered states of consciousness, other significant care needs (NF, para 156)

v. Indicative guidelines as to threshold are set out in the DST. "*The tool is to aid decision-making in terms of whether the **nature, complexity, intensity or unpredictability** of a person's needs are such that the individual has a primary health need*" (NF, para 161)

vi. Time-frame: "*in most cases*" should not exceed **28 days** from date ICB receives the positive Checklist/other notice of potential eligibility (NF, para 182)

vii. Fast-track Pathway available when access to NHS CHC needed quickly (by-passes DST) (NF, para 240-7).

NHS CHC (continued)

Appealing against refusal of NHS CHC

- First, ICB's published local resolution procedure (NF, paras 212-5)
- Independent review panel, convened by NHS England (NF, paras 216-227).

Care planning under NHS CHC

i. The package to be provided is what the ICB assesses is appropriate to meet all of the person's **assessed health and associated care and support needs** (NF, para 192)

ii. A "***suitable personalized care plan***"; "*The **starting point** for agreeing the package and the setting where NHS CHC services is to be provided should be the **individual's preferences***" (NF, paras 189, 197)

iii. Comparative cost and value for money can be taken into account but other factors must also be taken into account: **cost to be balanced against other factors** in the individual case, in particular where a person wants to be supported in their own home. Specific reference to Art 8 in the practice guidance (NF, para 197; practice guidance note 46)

iv. Reviews: after 3 months, and then at least annually (NF, para 201).

Other arrangements for NHS funded care in the community – *in brief*

- **Personal Health Budget** – alternative means of delivery of care under NHC CHC

  (NF, paras 320-24, 2012 Regs, reg 32B)

- **Joint packages** - where the person is ineligible or NHS CHC, but specific needs have been identified which are beyond the power of the local authority to meet, a package will be **jointly funded by NHS and local authority** (NF, para 287)

- **NHS- funded nursing care** – individuals who are not eligible for NHS CHC, who are in care homes with nursing may be eligible for this, a standard rate, paid directly to the care home (NF, paras 276-286).

Children's services

i. **Assessment of needs -** "*Where it appears to a local authority that a child within their area is in need the authority may assess his needs…*" : Children Act 1989 (CA 1989), Sch2, para 3

ii. "***Child in need***" defined in s 17(1) CA 1989, includes child who is disabled

iii. Statutory guidance on conducting needs assessments: *Working together to Safeguard Children, a guide to inter-agency working to safeguard and promote the welfare of children, July 2018*

iv. **Duties and powers to provide accommodation for under 18s:** CA 1989 s 20

v. Includes duty to provide accommodation for any child in need within their area who appears to them to require it as a result of (a) no person has parental responsibility (b) lost or abandoned (c) "*the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care*" (s 20(1) CA 1989)

vi. A "***looked after child***" (LAC) is a child in the care of the local authority either under a care order or being provided with accommodation under s 20 CA 1989 for more than 24 hours (ss 22(1)-(2) CA 1989)

vii. *CA 1989 guidance and regulations vol. 2: care planning, placement and case review, July 2021*: care plan must be regularly reviewed

viii. **Independent Reviewing Officer** (IRO) (s 25B CA 1989).

Children's services (continued)

Duties to provide care packages and other services for disabled children and their families

- A **specific duty to meet disabled child's assessed needs** under Chronically Sick and Disabled Person's Act 1970 (**CSDPA 1970**) s 2: where a local authority has functions under Part 3 CA 1989 in relation to a disabled child ordinarily resident in their area, they must make any arrangements of a type listed in that section that they are satisfied it is necessary for them to make in order to meet the needs of the child. Includes "*the provision of practical assistance for the child in the home*".

- A "general duty" under **s 17 CA 1989** to provide services for children in the local authority's area who are in need, includes provision of services to the *family* of a child in need

- **Carers** - duty to conduct **assessments of parent carer's needs for care and support** and consider whether to provide services under s 17 CA 1989 to meet them: ss 17ZD-F CA 1989.

Education, health and care plans (EHCPs)

- Under Children and Families Act 2014 s 37; EHCP specifies special educational needs, health and social care reasonably required by the learning difficulties/disabilities and may specify other health/social care needs; EHCP can be maintained to age 25 (end of academic year)(s 46).

Transitions from children's social services to adult social services

"*As a judge of the Family Division and as a judge of the Court of Protection I have seen from both perspectives the **acute distress caused by inadequate transition planning**.*" (Hayden J, [2019] EWCOP 22)

i. **Transitional assessments** under CA 2014 ss 58-9: a "**child's needs assessment**", to be conducted where child likely to have needs for care and support after becoming 18 and of significant benefit to the child to carry out the assessment

ii. "*The purpose of the transitional assessment is to provide young people and their families with information **so that they know what to expect in the future and can prepare for adulthood"*** (C&S statutory guidance, para 16.4)

iii. Right to **independent advocacy** where criteria met (CA 2014 s 67(4) and (5))

iv. Children's **services may continue after 18**, under CA 1989 ss 17ZG-I and CSDPA 1970 s 2A
" *..if, having carried out a transition assessment, it is agreed that the best decision for the young person is to continue to receive children's services, the local authority may choose to do so.*" (Care Act 2014 statutory guidance para 16.72)

vii. Transitional **carers' assessments**: whether carer likely to have needs for support after child turns 18 (ss 60 –61 Care Act 2014).

Disability adaptations in the home

i. **Disabled Facilities Grants** (DFGs) under Housing Grants, Construction and Regeneration Act 1996
- maximum amount in England - £30,000; Wales - £36,000;
- duty is on the local housing authority
- applications may be made by owner-occupiers, tenant or licensees
- paid for specified purposes set out in ss 23 of the Act, including making the dwelling safe (which means as safe as reasonably practicable : *R (B) v Calderdale MBC [2004] EWCA Civ 134*

ii. The **"RRO"** - local housing authorities have **a power** to provide assistance with adaptations under *Regulatory Reform (Housing Assistance) (England and Wales) Order 2002*, for which they must have a policy

iii. **Care Act 2014**: an adaptation may be the identified means of meeting the assessed eligible need; may take the form of ensuring access to a DFG, but the need is not met until the adaptation is secured. See C&S statutory guidance para 10.25 on this point. The adaption could be outside the scope of a DFG or not available fast enough by DFG if there is urgency

iv. **Minor aids and adaptations** (costing £1,000 or less), provided as care and support free of charge under the Care and Support (Charging and Assessment of Resources) Regs 2014, Pt 2

v. **Guidance:** *DFG delivery: Guidance for Local Authorities in England,* ***March 2022***: promotes person-centred approach; covers assistive technology, taking account of future needs.

Overview

- Capacity issues in Immigration Detention
- Impact of mental capacity on the immigration claim
- When and how should capacity be assessed?
- Applications to the CoP, declarations and deputies
- Practical considerations for practitioners

1. Capacity issues in immigration detention

Immigration detention – an outline

- Statutory power to detain is intended for the purpose of examining immigration status; in order to facilitate removal and in order to facilitate deportation. There is a strong 'public protection' element.

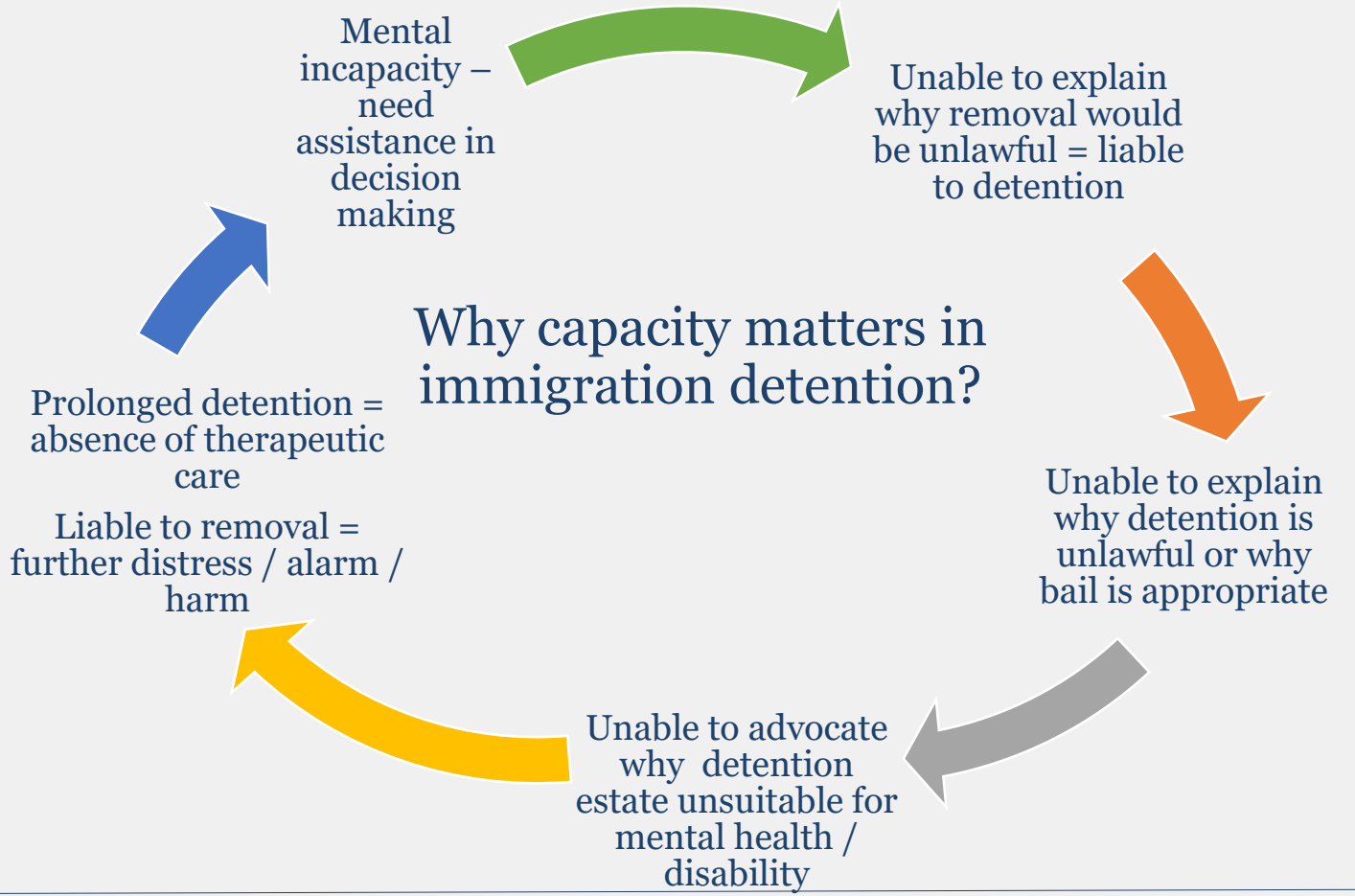
- Power is limited by:
  - Articles 5, 3 ECHR, read together with Article 14 ECHR
  - Adults at Risk Policy Framework pursuant to s 59 of the Immigration Act 2016
  - *Hardial Singh* common law principles
    - NB – new changes brought into force since 28 September 2023 to reflect commencement of s 12 Illegal Migration Act 2023.
  - Detention General Instruction published policy.

Immigration detention – a vulnerable client cohort

- Client cohort – likely to encounter a number of vulnerabilities:
  - Unaccompanied and looked after children
  - SEND/learning difficulties/neurodivergence (may not be diagnosed)
  - Mental health diagnoses (may not be diagnosed)
  - Experiences of persecution, including torture, ill-treatment, trafficking and exploitation, and traumatic journeys to the UK
  - Untreated underlying medical conditions eg HIV, infections

- Early identification key to ensuring access to justice and fairness.

Why capacity matters in immigration detention?



VC v SSHD [2018] EWCA Civ 57

- Issue: whether procedures/safeguards in place for mentally ill detainees to challenge detention?
- Conclusion by CoA? – No.
- VC was a foreign national offender, subject to deportation, suffering from bipolar disorder and psychotic symptoms; history of being sectioned under MHA 1983.
- SSHD had not made 'reasonable adjustments' to enable VC to challenge his detention as a vulnerable, mentally ill person
- Argued by Appellant that SSHD needed to put in place a system of mental health advocates to assist detainees who may need them
- SSHD argued that duty had been discharged and not able to introduce such a system – rejected by the CoA

- Adults at Risk policy is to be construed as a protective, preventative measure, and must be capable of being applied so to protect an adult at risk from being detained at all, before the risk of harm materialises - §52-§53

- Although individuals not involved in the decisions to detain/remove/segregate them, and there is no formal process for representations, detainees can make informal representations in respect of decisions made - §151

- The SSHD's policies do put mentally disabled detainees at substantial disadvantage compared to other detainees. Even if they wanted to make informal representations about detention, not able to do so because of their ill mental health. Court agreed there is a 'lacuna,' in system; in other contexts, bail will prompt a review of detention - §154

- Reasonable adjustments duty is anticipatory - §157

- Great care is needed to ensure that decisions to detain mentally ill persons are procedurally fair - §189

ASK & MDA v SSHD [2019] EWCA Civ 1239

- ASK and MDA were both foreign national offenders in detention, subject to deportation action
- Both were disabled by reason of their mental health needs and lack of capacity:
  - MDA – previously admitted to hospital under MHA 1983; previously granted LTR on Art 3 ECHR due to mental health; psychiatric evidence 'seriously psychotically unwell'
  - ASK – previously detained under MHA 1983; schizoaffective disorder and psychotic symptoms
- Crux of the case:
  - Persons with mental disabilities are not in a position to make representations to the SSHD on suitability for detention
  - Nothing in Adults at Risk/Rule 35/DSOs deals with lack of mental capacity
  - Failure by SSHD to undertake any inquiries
  - Breach of common law fairness, PSED and failure to discharge duty to make reasonable adjustments

Approach to capacity in detention

Per Lord Justice Hickinbottom at §244:

"In my view, in this regard, ASK's case is not materially different from the cases of VC or MDA. Because of his illness, ASK suffered from a disability. It seems likely that, from time-to-time, he lacked the capacity properly to engage with the detention authorities in relation to important decisions that related to him, e**.g. with regard to his continuing detention, segregation and non-transfer to hospital. In those respects, he was treated differently from those detainees who were not disabled. In breach of the PSED, the Secretary of State failed to have due regard to eliminate discrimination. Further, the duty on the Secretary of State to make reasonable adjustments having arisen, no adjustments were made and obvious adjustments (e.g. in the form of IMCA-type representation) could have been made**. The burden was therefore on the Secretary of State to show he had complied with the duty to make such adjustments; and he adduced no evidence that he had even considered such adjustments and certainly no evidence that he had complied with the duty."

Detention services order 04/2020

"22. In cases in which the individual may lack capacity in respect of a particular decision, the member of staff who has identified the possible lack of capacity should take any necessary steps to ensure that the individual has access to legal representation and that any necessary reasonable adjustments are made to accommodate this or to facilitate any daily living issues experienced by the individuals. Where appropriate, this consideration should be carried out with the support of healthcare and other members of staff.

23. DET staff must take all reasonable steps to ensure that the individual understands all papers that they serve, through personal engagement. They must signpost the individual to the provision of legal representation. Anyone who does not speak English as their first language must be offered the use of interpretation services."

https://www.gov.uk/government/publications/mental-vulnerability-and-immigration-detention/detention-services-order-042020-mental-vulnerability-and-immigration-detention-accessible-version

Detention Services Order 08/2016

Management of Adults at Risk in Immigration Detention

- DSO does not apply to those detained under immigration powers in prisons. For those being held in the Prison estate under Immigration Powers, Prison. Service Orders (PSOs), Prison Service Instructions (PSIs) and Policy Frameworks will apply.
- Identification of vulnerabilities in detention is the responsibility of anyone who has contact with the case or the detained individual, including the caseworkers, the Detention Gatekeeper, Detention and Escorting Services (DES) staff, DETs, contracted suppliers for the detention facility, contracted escorting suppliers, IRC Healthcare staff, the Detained Medical Reports Team, or Arresting Officers.

ASK v United Kingdom App No 43556/20

- Alleged violations of the right to liberty protected by Article 5(1) ECHR, and Article 5(1) ECHR read with Article 14 ECHR in relation to mentally ill people in immigration detention who lack capacity.
- S48/49 MHA transfer to hospital under section, 'grace periods', delays and JR

2. Impact of mental capacity on immigration claims

Procedural issues

- Capacity to instruct and capacity to litigate their claim?
  - Arises in both detained and non-detained context – NO right to an appeal on the merits of a deportation decision UNLESS a human rights claim has been made and refused
  - What happens when proximity of 'removal' cited as justification for ongoing detention but no capacitous response to immigration documents – is that legal service?

- Capacity to give evidence to the Tribunal?
  - Bear in mind possibility of special measures available under the Joint Presidential Guidance Note 2 of 2010
  - Bear in mind the Practice Direction and impact of welfare considerations

Position in the application stage versus at appeal

- No system at the application stage – may apply to CoP for an order to appoint a deputy or litigation friend? See also the Migrants Organise Project, but not without challenge. See also SRA conduct 'outcomes', is there a retainer? Is there legal aid for the CoP application to appoint a deputy? Welfare or property and affairs? Cutting through the welfare standard directions.

- LFs available at Tribunal stage: *R (C) v First-tier Tribunal* [2016] EWHC 707 (Admin):
  - Tribunal has power to appoint a litigation friend for a party lacking capacity, relying on overriding objective and broad case management powers in the Tribunal Procedure Rules (cf. position in CPR Part 21 for example)
  - Failure to appoint a litigation friend for a party lacking capacity breaches the principle of procedural fairness

Has there been a lawful disposal of appeal rights?

- Important judgment on effective right of access to the Tribunal by incapacitated and vulnerable individuals, including children and young people, and how such a person can be heard. *AM (Afghanistan) v SSHD* [2017] EWCA Civ 1123

- "*There is ample flexibility in the tribunal rules to permit a tribunal to appoint a litigation friend in the rare circumstance that the child or incapacitated adult would not be able to represent him/herself and obtain effective access to justice without such a step being taken. In the alternative, even if the tribunal rules are not broad enough to confer that power, the overriding objective in the context of natural justice requires the same conclusion to be reached.*"

- Failure to follow the Joint Presidential Guidance and PD will most likely be a material error of law

Mental health and disability in asylum claims

- Mental health / disability can inform whether a person has well-founded fear of persecution on return to their country of nationality

- *DH (Particular social group: mental health) Afghanistan* [2020] UKUT 223 (IAC) - Mentally illness / disability may amount to membership of Particular Social Group under the Refugee Convention.

- Risks on return, including state protection/relocation assessment?
    - Persecution on grounds of mental illness/disability
    - Persecutory discrimination on grounds of mental illness/disability
    - Exploitation and trafficking due to vulnerabilities
    - Children's access to education – particularly if SEND

Mental health and disability in human rights claim

- Article 3 ECHR/Article 8 ECHR / Article 14 ECHR:

  - Torture/ill-treatment e.g. non-human rights compliant ‘treatment’
  - *AM (Zimbabwe)* [2020] UKSC 17 health claims
  - Discriminatory denial of treatment

When and how should a capacity assessment be made?

- Contact through NGOs – Gatwick Detainees Welfare Group (GDWG) Detention Action, Medical Justice, IMB
- Refer to principles and practice in DSO 4/2020
- In case of lack of co-operation/access to detainee – refer to Brook House Inquiry findings and case law VC etc. – threaten JR
- Litigation friend to authorize access to medical records
- Who is case managing detention? Who is making day to day 'management' decisions re vulnerability?
- Has there been a rule 34? What happened? Rule 35? Part C reports?
- Applications for declaration of litigation capacity in the Admin ct.
- Is there a best interests dispute? Judges with 'two hats'
- Is an application to the CoP the correct route?
- Local safeguarding boards – MHA/Care Act assessments

Practical issues in statutory appeals and JR in the Tribunal

- Application to the Tribunal
- For appeals, no prescribed form but application in writing, supported by evidence
- For JR, application notice supported by evidence
- Evidence must address whether the Appellant has the mental capacity to conduct proceedings – bear in mind the LF could exercise considerable power over a person's rights, so the Tribunal needs to properly informed.
- Usually dealt with as a preliminary issue at CMRH stage
- Be prepared re: suitability and assessment of the LF, including via evidence
- Certificate of Suitability (N235) - but CPR does not apply to the FtT/UT – good practice to complete.

Suitable LFs

- A litigation friend a person must:
  - Be willing to undertake the role;
  - Be able to fairly, competently and diligently conduct proceedings on behalf of the child or protected party; and
  - Have no interest adverse to that of the child or protected party.

- No suitable LF? – Official Solicitor but only if 'last resort.'
- No system for providing a LF in the Tribunal system – Migrants Organise Mental Capacity Advocates Project
  - Contact: brian@migrantsorganise.org

Resources for practitioners

- Joint Presidential Guidance Note 2 of 2010 on Child, Vulnerable Adult and Sensitive Witnesses
- Practice Direction, First-tier and Upper Tribunal, Child, Vulnerable and Sensitive Witnesses
- Equal Treatment Bench Book
- Law Society Guidance Note, 'Working with clients who may lack mental capacity,' (5 June 2020)
- BSB, 'Issues with Mental Capacity' Factsheet (April 2018) and Bar Council Ethics Committee 'Client Incapacity,' (June 2021)
- Migrants Organise, 'Mental Capacity & Litigation Friends in Asylum and Human Rights Appeals,' (May 2021)

CASE STUDY 1

ZZ was detained at HMP Bleak as a Foreign National Offender initially pursuant to a sentence of 5 years for the index offence of arson and thereafter under the Immigration Acts. He arrived in the UK in 2003 from Iraq and applied for asylum but was refused and granted 'discretionary leave to remain' for a period of 3 years. His leave expired in 2008. He has a strong of public order offences accelerating in risk to the public until his arson offence. He sacked his solicitor and represented himself. The judge recorded in his sentencing remarks that ZZ's questioning and evidence was 'bizarre and frequently off on a tangent'. He is currently detained in Gatwick detention centre where his behaviours have deteriorated and he is on segregation. A fellow detainee has informed the DAS rota immigration lawyer that ZZ is obviously very unwell, does not understand why he is in detention but denies that he has any mental illness and needs specialist representation. The Home Office have asserted in response to the immigration solicitor that –

- The sols are a third party and not instructed by ZZ and so they have no authority to act
- There is a presumption of capacity and the detained clinical team say there is no problem with ZZ's capacity
- Detention is maintained.

ZZ has a sister in the UK who has been contacted by the immigration solicitor and wants to help? What can you do to help ZZ to get out of detention safely? Where do you start?

CASE STUDY 2

XX is Romanian and has been granted immigration bail ‘in principle’ having been detained after he was picked up sleeping rough but has no release accommodation. His immigration solicitor informs you that they are putting together an out of time EUSS application for him pending collection of sufficient information but suspect that he lacks capacity to litigate and to instruct them and may not have access to the documentation he needs owing to his ‘chaotic lifestyle’. XX has diabetes, mobility problems and serious health issues which he believes can be cured by drinking his own urine. He denies that he is ill and refuses to have his capacity assessed.

How would you go about accessing support and accommodation?

A relative has arrived in the UK and wishes to take XX back to Romania before his EUSS application has been resolved but XX has expressed a wish to stay in the UK to be near his friends. XX has described abuse at the hands of his relatives and gave an account of being trafficked to the UK for exploitation. How is this dispute over where XX’s best interests lie to be resolved?

Court of Protection
Mental Health Act & Aftercare

Roger Pezzani and Helen Curtis

8 November 2023

Introduction

- Mental Health Act 1983 and Mental Capacity Act 2005
- Two different statutory frameworks impact on a person's liberty
- MHA – patients including forensic patients seek discharge from detention in hospital or from liability to detention
- MCA – protected party ('P') lacks capacity to decide where to live and receive care and may have been previously detained
- Discharge pathway, appropriate treatment, risk management

Mental Health Act patient in the Court of Protection

- *MC v Cygnet Behavioural Health Ltd and Secretary of State for Justice* [2020] UKUT 230 (AAC)

- MC long term s.17(3) leave in nursing home; still needs medication but no longer needed to be in hospital; applied for conditional discharge, adjourned to obtain standard authorisation; FtT – regretted – could not conditionally discharge with conditions which amounted to a deprivation of liberty and refused to discharge her.

- UT Judge Jacobs found there is no impediment to developing a co-ordinated approach. It would be a 'proper use of the tribunal's powers to adjourn, to make a provisional decision or to defer discharge in order to allow the necessary authorisation to be arranged' [para 32]

Interface with care and treatment

- *ML v (1) Priory Healthcare Limited and (2) SSJ* [2023] UKUT 237 (AAC)
- *SF v Avon and Wiltshire Mental Health Partnership NHS Trust and RB* [2023] UKUT 205 (AAC)
- *Manchester University Hospital NHS Foundation Trust v JS* [2023] EWCOP 12
- *Rooman v Belgium* [2019] ECHR 105

Interface

- Deprivation of Liberty Safeguards (DoLS) - Care Quality Commission (cqc.org.uk)

- ‘Variable understanding of the interface between the MCA, which DoLS are part of, and the MHA. Where both frameworks could be used, it is not always clear how staff decided that using the DoLS framework would be most appropriate for a particular patient’

- Uncertainty around the future of DoLS and the implementation of Liberty Protection Safeguards appears to have resulted in inadequate training on DoLS and a lack of understanding among staff

Case Study – forensic patient

- P - forensic patient, conditionally discharged from a psychiatric hospital in 2017 to a specific care home. P consistently expressed a wish to leave the placement and live in the community/with family and sought an absolute discharge from the First-tier Tribunal. P went into town daily, unescorted and returned to the care home.

- ***Capacity****:* P initially found to have capacity to decide where to live and receive care. Subsequently found to lack capacity to make these decisions and the care manager applied for a standard authorisation which was then challenged in the Court of Protection, given P's wish to live in the community/with family. Judge queries whether acid test met – it was as P was not 'free to leave' although not subject to continuous supervision and control.

MHA patient and the CoP

- *DN v Northumberland, Tyne & Wear NHS Foundation Trust* [2011] UKUT 327 (AAC)
- *London Borough of Tower Hamlets v PB* [2020] EWCOP 34
- Deprivation of liberty as authorised by Schedule A1 of the Mental Capacity Act 2005 in care homes and hospitals
- Responsible Clinician's decision on discharge must happen before the Court of Protection considers whether to authorise a deprivation of P's liberty

Section 117 MHA aftercare

- *R (on the application of H) v Secretary of State for the Home Department* [2003] UKHL 59 “no power to require any psychiatrist to act in a way which conflicted with the conscientious professional judgement of that psychiatrist” (Lord Bingham para 29)

- *R (Worcestershire County Council) v SSHSC* [2023] UKSC 31 – patient detained under s.3 MHA in Area 1 becomes resident in Area 2 and subsequently detained again under s.3. The new duty on the second discharge falls on Area 2

- Funding splits between local authorities and ICBs

1. ***The crossover between the MHA and the MCA may be more significant than we think***

The MCA represents a potential alternative to detention under the MHA. Obviously, that is only in cases where the P meets the criteria in ss2 and 3 MCA

But whether a P detained in hospital does meet those criteria may not be an easy question

> See paras 77-83 of A NHS Trust v ST [2023] EWCOP 40 (25 August 2023) on the question of a P's *belief* in the information behind a decision to treat, approving Local Authority X v MM [2007] EWHC 2003 (Fam) [3] para 81:
>
> > "If one does not 'believe' a particular piece of information then one does not, in truth, 'comprehend' or 'understand' it, nor can it be said that one is able to 'use' or 'weigh' it. *In other words, the specific requirement of belief is subsumed in the more general requirements of understanding and of ability to use and weigh information*."

How might that work when (as is common) a P detained under the MHA lacks insight into (a) the fact they have a mental disorder, and/or (b) the fact that they need treatment for mental disorder?

If they could be caught by the MCA, then that would mean the crossover between MHA and MCA would be very considerable.

2. ***The MCA as an alternative to MHA detention***

Two ways the MCA alternative could be relevant:

1st, because a DOL in a community setting may well be less restrictive (or the minimum effective restriction) to the P compared to detention in a hospital, which has more of an institutional flavour – i.e. still a DOL, but less restrictive

2nd, because of s.72(1)(b)(ii) MHA – if an alternative legal framework would be available and would suffice, then cannot be said that detention in a hospital is "necessary" to provide treatment and risk management. But necessity (for treatment *in hospital*) is the statutory standard

Underpinning both is this proposition: both statutes may be apt to authorise the achievement of the same objective (i.e. treatment and risk management of a mental disorder), where authorisation is needed (e.g. a DoL)

3. ***There are symmetries between aftercare and a DOLS care plan***

The MCA is available where a person "*is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain*" (s.2(1) – the core determinative provision according to Lord Stephens in A Local Authority v JB [2021] UKSC 52

Aftercare is, according to para 33.3 of the Code to the MHA:

> "After-care services mean services which have the purposes of meeting a need arising from or related to the patient's mental disorder and reducing the risk of a deterioration of the patient's mental condition (and, accordingly, reducing the risk of the patient requiring admission to hospital again for treatment for mental disorder. Their ultimate aim is to maintain patients in the community, with as few restrictions as are necessary, wherever possible."

And at para 33.4:

> "For example, after-care can encompass healthcare, social care and employment services, supported accommodation and services to meet the person's wider social, cultural and spiritual needs, if these services meet a need that arises directly from or is related to the particular patient's mental disorder, and help to reduce the risk of a deterioration in the patient's mental condition."

Of course, an aftercare plan approved as being in the best interests of the P will not always precisely equate with care or treatment related to the impairment of or disturbance in the functioning of the mind or brain, but in many cases it will

In such cases, aftercare and the DOLS care plan may meet the same needs. Richard Jones lists grounds that do not justify discharge from aftercare in the notes to s.117(2) MHA – one of those grounds is that the P has been made the subject of a DOL authorisation under the MCA

Helen will talk about a COP case where the judge refused to consider an advance authorisation with a view to a discharge into a care plan authorised by the MCA. That jars with the approach endorsed in MC at para 29:

> "How can the necessary mental capacity arrangements be made? If the mental capacity issue has already been dealt with by an advance authorisation, the tribunal may be able to proceed to a conditional discharge without more ado."

This is another example of how the two jurisdictions *should* run in parallel but instead seem often to run off wildly in opposite directions

But the underlying duties are clear. The Code to the MHA at para 33.10 says this:

> "Although the duty to provide after-care begins when the patient leaves hospital, the planning of after-care needs to start as soon as the patient is admitted to hospital. CCGs and local authorities should take reasonable steps, in consultation with the care programme approach care co-ordinator and other members of the multi-disciplinary team to identify appropriate after-care services for patients in good time for their eventual discharge from hospital or prison."

This gels with the principles identified by the SSHSC in Manchester University Hospitals NHS Foundation Trust v JS [2023] EWCOP 33 at para 32 j and k:

> "j. A detention under ss. 2 or 3 MHA can be ended at any time by the person's responsible clinician if they consider that detention is no longer required to achieve the person's treatment. The appropriateness of continuing a detention under the MHA should be kept under continuous review by treating clinicians.
>
> k. The question of whether it is necessary to detain a person under the MHA for treatment is not determined by absolute descriptions or metrics, but will depend on whether there is a less restrictive means available to deliver the person's treatment. If treatment for the person's mental disorder is actually available without the person being detained in hospital, this is likely to be highly relevant in any consideration as to the use (or continuation) of ss.2 or 3 MHA."

This accords with the principles identified in MC and ML. as follows

4. How does this work in practice? Variably, and sometimes not at all

UTJ Jacobs in MC v Cygnet Behavioural Health Ltd and Secretary of State for Justice [2020] UKUT 230 (AAC) has done all the heavy lifting for us:

Useful review and endorsement of the authorities: paras 12-27

Leading to this statement at para 28:

> "Those factors combine to provide the imperative for the First-tier Tribunal to apply the 1983 Act in a way that allows a patient to be discharged if there are means by which the patient's case can be appropriately dealt with under other legislation. The 2005 Act is such legislation. If a patient's case is to be dealt with correctly under the 1983 Act and fairly and justly under the tribunal's rules of procedure, the tribunal is under a duty to find a way that allows both Acts to be applied in a co-ordinated manner."

'Imperative' – strong language

Note in particular how risk *to others* is addressed: para 22 (& para 41 of the quote from Birmingham City Council v SR and Lancashire County Council v JTA [2019] EWCOP 28) – it is "strongly" in the best interests of a P - who is a risk to others as a result of mental disorder - not to commit an offence

The UTJ gave broad guidance on how the imperative should be achieved: paras 29-32

But the FTT is still not comfortable with any of this, any more than the COP is comfortable with the MHA. In ML v Priory Group Ltd [2023] UKUT 237 (AAC) (20 September 2023) I represented the P at the FTT and the UT. The case for discharge was on a pure MC basis – every witness agreed the P lacked capacity to make decisions in multiple areas (e.g. medication, risk mitigation)

The FTT totally failed to engage with the point. The appeal was successful. Importantly, the SSJ was represented by counsel and made this important concession: "*were [ML] discharged from hospital, the [MCA] could be used to authorise a medication regime to the extent that he lacks capacity to make decisions relevant to that*"

UTJ Church said at para 33:

> "For the reasons Judge Jacobs gave in MC v Cygnet, there being uncertainty about whether the machinery of the 2005 Act will be available to authorise a deprivation of liberty does not obviate the need for a tribunal to consider alternatives to detention when determining whether the statutory criteria in section 72(1)(b) of the 1983 Act are satisfied."

He endorsed what UTJ Jacobs said in MC, and concluded with this at para 39:

> "It appears that the First-tier Tribunal was under the misapprehension that there was no way for it to co-ordinate the 1983 Act proceedings with a 2005 Act authorisation, and it made its decision on the section 72(1)(b) criteria without reference to the possibility that an alternative framework for managing the Appellant was available. That amounted to a material error of law."

5. Practicalities may obscure principle

The Manchester decision assumes there's always an alternative to detention (correct), and if an alternative will do instead of MHA detention, then it must be pursued (also correct). But it also says that if the alternative takes time, MHA detention remains lawful in the meantime.

I think the danger here is that the judgment might be seen as endorsing detention that achieves nothing more than stasis, as a kind of holding measure. Is that enough to satisfy the domestic law and Article 5, and if it is, for how long?

Manchester is a case about detention for medical treatment, so it's surprising there's no reference to Rooman v. Belgium [2019] ECHR 105 – one would've thought that paras 208-211 are directly on point. See also what was said about treatment in SF v Avon and Wiltshire Mental Health Partnership NHS Trust and RB [2023] UKUT 205 (AAC) (15 August 2023) at paras 37-39:

> "37. While the definition of 'medical treatment' in the MHA hinges on the purpose for which it is administered rather than its effect, as I commented in SLL v (1) Priory Health Care and (2) Secretary of State for Justice [2019] UKUT 323 (AAC) at [47]:
>
> > "it is difficult to see how a form of medical treatment which is not believed to have any realistic prospect of achieving any therapeutic benefit to a patient whatsoever could properly be considered "appropriate" for him even if it fell within the MHA definition of 'medical treatment'.
>
> 38. If the requirement for appropriate medical treatment could be satisfied simply by confining someone with mental disorder in a way that prevents them from engaging in risky behaviour arising from a symptom or manifestation of their mental disorder, this would mean that all manner of interventions would amount to treatment in and of themselves, such as confinement in a soft room, sedation, and mechanical restraint, and nothing else would be required.

39. If such 'treatment' satisfied section 72(1)(iia) then there is no reason why it shouldn't continue to do so for as long as the symptoms or manifestations persist. If such 'treatment' stands no real prospect of achieving any therapeutic purpose beyond preventing physical harm, then this could result in indefinite detention (subject to periodic review under sections 66, 68(2) and 68(6) MHA))." (emphasis added)

Thank you

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