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COURT OF PROTECTION & HOUSING OFFICERS

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Mental capacity and housing officers

Mental Capacity and Housing Officers



- A housing officer may have to undertake a capacity assessment in relation to, for example:
 - granting or terminating a tenancy;
 - taking a homelessness application;
 - abiding by the terms of a tenancy agreement:
 - Keeping the home habitable and e.g. hoarding disorder;
 - ASB and (e.g.) paranoid schizophrenia or personality disorder;
 - Paying the rent and e.g. dementia
- Cf CoP 3 capacity assessment must be filled by e.g. a medical practitioner, social worker, OT nurse, psychologist.

General Points



- Capacity is **issue specific**
 - What are you trying to achieve?
 - Compliance with an injunction or term of the tenancy?
 - Terminate a tenancy?
 - Make a homelessness application?
- Capacity is **time specific**
 - Tenant may gain and lose capacity
 - e.g. schizophrenia, substance abuse, progressive dementia.
 - The effect of treatment/medication.
- Capacity is **decision specific**
 - Tenant may have capacity for one decision but not another
 - e.g. capacity to give access for inspection, but not to refrain from noise nuisance

The Principles



1. Starting point = **presumption of capacity**

“A person must be assumed to have capacity unless it is established that he lacks capacity.”

s. 1(2) Mental Capacity Act 2005

2. Must first **try to help** a person to reach a decision:

“A person is not to be treated as unable to make a decision unless all practicable steps to help him have been taken without success.”

s. 1(3) Mental Capacity Act 2005

3. Ability to decide **at all**, **not** ability to decide **well**:

“A person is not to be treated as unable to make a decision merely because he makes an unwise decision.”

s. 1(4) Mental Capacity Act 2005

Providing help and support



- Referrals to GP / CAMHS / LA / SALT/other support services
 - Follow-ups and practical help in taking advantage of those referrals
- Use of communication aids (pictures, notebooks, large text)
- Attending at the right time for the person
- Use of personal visits to reinforce correspondence
- Staff training in communication skills
- Use/consideration of lesser steps e.g. warning letters
- Good practice in all cases – reinforces proportionality

The Diagnostic Test



Section 2(1) Mental Capacity Act 2005

“For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time—

- 1. he is unable to make a decision for himself in relation to the matter*
 - 2. because of an impairment of, or a disturbance in the functioning of, the mind or brain.”*
- There must be a causative relationship between the decision and the impairment.

The Diagnostic Test



- It does not matter if the impairment/disturbance is permanent or temporary (section 2(2) MCA).
- It may be temporary as a result of failing to take medication, substance misuse, intoxication or the effects of medication.
- Drink & drugs addiction/hoarding disorder: does the tenant have capacity to decide (not) to drink/do drugs in the first place?
- Paragraph 4.21-4.22 of the MCA Code of Practice, '*...sometimes people can understand information but an impairment or disturbance stops them using it...for example a person with the eating disorder anorexia nervosa may understand about the consequences of not eating. But their compulsion not to eat may be too strong for them to ignore.*'

The Diagnostic Test



- The party that wishes to rely on a lack of capacity must prove it on the balance of probabilities (section 2(4) MCA).
 - Often necessary for the housing officer to have a view on capacity so that their approach can be tailored to the situation.
- A lack of capacity cannot be established merely by reference to age, appearance, condition (section 2(3) MCA).

The Functional Test



- A person is unable to make a decision if he is unable to (section 3(1) MCA):
 - Understand the relevant information
 - Retain the information
 - Use or weigh it
 - Communicate the decision
- An explanation must be given to him appropriate to his circumstances using *simple language, visual aids or any other means* (section (2) MCA).
 - Draft questions in advance
 - Use IT – keyboards/screens

The Functional Test



- The ability to retain the information only for a short period does not deprive P of capacity. (section 3(3) MCA).
- The relevant information includes reasonably foreseeable consequences of deciding one way or another or failing to make a decision (section 3(4) MCA).

Effect of a Lack of Capacity



- Where a person lacks specific capacity, the ASB is a symptom of their mental health issues, such that the person cannot fairly be held to be responsible for his/her actions.

*“If by reason of mental incapacity an offender is **incapable of complying** with an order, then an order is incapable of protecting the public and cannot therefore be said to be necessary to protect the public.”*

Cooke v DPP [2008] EWHC 2703 (Admin) per Dyson LJ at [10]

- This means: no ABC, no ASB injunction, no SPO...
 - No ‘contempt of court’ in breaching the injunction
 - Impact on proportionality of remedy sought
 - Therapeutic approach instead? Vulnerable / disabled?

Effect of a Lack of Capacity



- But still need to protect neighbours' rights.
- Can still get outright possession against a tenant that lacks specific capacity: the fact that a breach of tenancy arises from mental illness is not a bar to possession as it may not be unreasonable to take action against a breach of tenancy that is beyond the control of the tenant where the breach impacts on other people.
- Likely to need to provide assistance for the outgoing tenant – refer to ASC/transfer to supported accommodation.

Case study



- *Accent Peerless v Kingsdon* [2007] EWCA Civ 1314
- Tenants (mother & daughter) suffer from a mental illness:
 - hypersensitive to noise, propensity to exaggerate effects of noise, agoraphobia, tendency to misunderstand, chronic complaining...
- Tenants made repeated unjustified complaints to police & environmental health = ASB to neighbours
- Psychiatrist: tenants' conduct is a result of mental illness
- Judge: effect on neighbours untenable = outright possession
- Appeal: likelihood of recurrence important (not determinative)
 - Tenants refused to accept treatment for their illness
 - (& were presumed to have capacity to decide whether to do so)
 - No prospect of abatement therefore outright possession justified

Practical considerations



- The assessment record should:
 - State the decision being assessed.
 - Ask P the relevant question.
 - Record the information the tenant requires to make a decision
 - Set out the relevant principles and test.
 - Set out the ways in which the principles were abided by e.g. what time the visits were, how many were there, how long did they last, was there any effect of medication, who attended, how was P made comfortable?
 - What information was sought/obtained from friends/family/care workers?

Practical considerations



- The assessment record should:
 - Record exactly what the person said.
 - Evidence each element of the diagnostic and functional test.
 - Illustrate the analytical process by which the decision was arrived at and given reasons.
 - Explain if necessary why it is an incapacitated decision and not an unwise one.
 - Give the date the decision was arrived at especially if there are a number of meetings.



**Lack of capacity & tenancy
agreements**

Tenancy Agreements



- The Mental Capacity Act 2005 does not enable a person to sign a legal document on P's behalf (where he is not deputy of property and affairs, does not have a relevant lasting power of attorney or has not been authorised by the CoP)
 - i.e. don't get family member to sign a tenancy agreement if P lacks capacity!

Does P have capacity?



- Does P have capacity to accept an offer to a tenancy?
- There is no set test for capacity to accept a tenancy.
- In relation to a supported living tenancy the court in *LB Islington v QR* [2014] EWCOP 26 found that the relevant information was:
 - Her obligations as tenant to pay rent, occupy and maintain the flat
 - The landlord's obligations to her under the contract
 - The risk of eviction if she does not comply with her obligations
 - The purpose of and terms of the tenancy to provide her with 24 hour support.

Application to the CoP



- Make an application to the CoP for an order authorizing the signing of the tenancy.
- http://www.mentalhealthlaw.co.uk/media/COP_guidance_on_tenancy_agreements_February_2012.pdf



Deprivation of liberty and housing officers

Deprivation of Liberty



- Identifying a possible deprivation of liberty in the home – is this anything to do with your housing officer?
- Very likely yes:
 - the local authority has a duty to investigate, support and refer to the Court of Protection where there is a possible DoL.
 - A social housing provider should co-operate to help identify possible DoLs.



- Article 1 of the European Convention of Human Rights (“ECHR”) provides, *‘The States shall secure to everyone within their jurisdiction rights and freedoms defined in Section 1 of the Convention’*
- This includes Article 5.

Legal Framework



- Article 5 of the ECHR provides, so far as is material,
‘1. Everyone has to right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law....
(e) the lawful detention...of persons of unsound mind...
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.



- The Human Rights Act 1998 provides at section 6(1) that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

Legal Framework



- The Mental Capacity Act (“MCA”) provides at section 4A,
‘(1) This Act does not authorise any person (“D”) to deprive any other person (“P”) of his liberty.
(2) But that is subject to (a) the following provisions of this section, and (b) section 4B.
(3) D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.
(4) A relevant decision of the court is a decision made by an order under section 16(2)(a) in relation to a matter concerning P’s personal welfare.
(5) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home residents: deprivation of liberty).’



- The MCA provides at section 64(5),
‘In this Act references to deprivation of a person’s liberty have the same meaning as in Article 5(1) of the Human Rights Convention’ and Section 64(6),
‘For the purposes of such references, it does not matter whether a person is deprived of his liberty by a public authority or not.’

When is there a Deprivation of Liberty?



- There are three conditions must be satisfied for there to be a deprivation of liberty (*Cheshire West v P* [2014] UKSC 19):
 - an objective element of a person's confinement to a certain limited place for a not negligible length of time;
 - a subjective element i.e. that the person has not validly consented to the confinement in questions; and
 - the attribution of responsibility to the state.

Attribution of Responsibility to the State



- There will be an attribution of responsibility to the state (as relevant here):
 - if there is direct involvement e.g. the DoL occurs in a care home or hospital run by a public body or where the state is involved in some way e.g. through undertaking a needs assessment, preparing a care and support plan, providing services or a personal budget under the Care Act 2014.

Attribution of Responsibility to the State



- Where the state has violated its positive obligation to protect the applicant against interferences with her liberty carried out by private persons (*Storck v Germany* (2006) 43 EHRR 6).
 - The state is obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty which the authorities have or ought to have knowledge.

What does state attribution require?



- If the authorities, have or ought to have had knowledge, then the Article 5(1) positive obligation requires the state to:
 - investigate to determine whether there is in fact a derivation of liberty;
 - take reasonable and proportionate steps to bring it to an end e.g. by providing support services under the Care Act 2014; and
 - if there are no reasonable measures or if they are objected to then seek the assistance of the court in determining whether there is in fact a DoL and, if there is, obtaining authorisation for it (*A v A LA* [2010] EWHC 978 (Fam)).

What does state attribution require?



- The Court of Appeal in *SSJ v SRK* [2016] EWCA Civ 1317 made clear that an authority has a duty to make an application to the Court of Protection to seek an order authorising the deprivation of liberty in a purely private care regime.

When does the state 'ought to have knowledge'?



- It will depend on the facts of the case.
- In *SSJ v SRK* the state had the requisite knowledge through the civil court that awarded the personal injury damages, the CoP by appointing a deputy for property and financial affairs to manage his funds, the deputy/trustees/attorney who make decision in the person's best interests and who ought to have informed the local authority.

When does the state 'ought to have knowledge'?



- As regards housing officers the legal context will include:
 - The court in SSJ emphasised the need for protection of P's on account of their extreme vulnerability.

When does the state 'ought to have knowledge'?



- Local authorities have a duty to make or undertake to be made safeguarding enquires where they have reasonable cause to suspect that an adult in its area (whether or not ordinarily resident there)—
 - (a) has needs for care and support (whether or not the authority is meeting any of those needs),
 - (b) is experiencing, or is at risk of, abuse or neglect, and
 - (c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it (section 42 Care Act 2014).

When does the state 'ought to have knowledge'?



- A local authority must make provision for ensuring co-operation with housing (section 6(4) CA).
- A local authority must co-operate with private registered providers of social housing where it considers it appropriate (section 6(2) and 6(3)(d) CA).

When does the state 'ought to have knowledge'?



- In practice the role for a housing officer may include:
 - Identifying occupants whose living arrangements may amount to a deprivation of liberty e.g.:
 - where elderly relative may be locked in home/room for 'own safety' as dementia progresses and family member is sole care giver
 - Young person as grown and become an adult become more difficult for mother to care for.
 - Making a safeguarding alert/referral to adult social care.
 - Working with partner agencies to develop the least restrictive living arrangements.

What may amount to a deprivation of liberty at home?



It is case specific but may include:

- Use of medication to control behaviour
- Support with the majority of aspects of daily living on timetable set by others.
- Use of restraint e.g. locking in bedroom
- Use of real time monitoring with assistive technology e.g. door sensors, pendant alarm, GPS tracking
- Locked door to the property
- P is rarely left alone in and/or out of the property
- Restrictions on contact



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