

ACCOMMODATION OUTSIDE THE HOUSING ACTS

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HLPAs

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FOUR ROUTES...

- 1) CARE ACT 2014
- 2) LOCALISM ACT 2011
- 3) S117 MENTAL HEALTH ACT
- 4) CHILDREN ACT 1989 (LOU CRISFIELD)

The Care Act 2014

a) Part 1 the Act, (b) regulations made thereunder and (c) statutory guidance

Care and Support Statutory Guidance has been modified eight times, current version: 9 July 2018 ("act under" – s78)

Part 1 came into force on 1 April 2015 but there are only a handful of cases

3

THE CARE ACT IN THREE ACTS

1. KEY PRINCIPLES/OBJECTIVES OF THE ACT
2. FIVE STAGE DECISION MAKING UNDER THE ACT
3. ACCOMMODATION UNDER THE ACT

1. KEY PRINCIPLES/OBJECTIVES OF THE ACT

- consolidation and simplification of the existing legal framework
- *reforming the cost of care to individuals* [NOT IN FORCE]
- extending the provision of support services to carers
- implementing policy aims of:
 - early intervention/prevention,
 - wellbeing, and
 - personalisation/choice.

5

WELLBEING PRINCIPLE

- Law Com thought there should be a set of statutory principles which gave expression to the underlying purpose of the statute.
- Settled on a single one: "**wellbeing**"
- Guidance:
 - "Local authorities must promote wellbeing when carrying out any of their care and support functions in respect of a person. ... it is a guiding principle that puts wellbeing at the heart of care and support."
 - "The core purpose of adult care and support is to help people to achieve the outcomes that matter to them in their life."

6

PROMOTE WELLBEING

S1(1) the general duty when **exercising a f(n) in case of individual** is to **promote** wellbeing

S1(2) wellbeing **includes**

- (a) personal dignity (including treatment of the individual with respect);
- (b) physical and mental health and emotional well-being;
- (c) protection from abuse and neglect;
- (d) control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided);
- (e) participation in work, education, training or recreation;
- (f) **social and economic well-being**;
- (g) domestic, family and personal relationships;
- (h) **suitability of living accommodation**;
- (i) the individual's contribution to society.

“HAVE REGARD”

(3) In exercising a function under this Part in the case of an individual, a local authority must have regard to the following matters in particular—

- (a) the importance of beginning with the assumption that the individual is best-placed to judge the individual's well-being;
- (b) the individual's views, wishes, feelings and beliefs;
- (c) the importance of preventing or delaying the development of needs for care and support or needs for support and the importance of reducing needs of either kind that already exist;
- (d) the need to ensure that decisions about the individual are made having regard to all the individual's circumstances (and are not based only on the individual's age or appearance or any condition of the individual's or aspect of the individual's behaviour which might lead others to make unjustified assumptions about the individual's well-being);

“HAVE REGARD”/contd

- (e) the importance of the individual participating as fully as possible in decisions relating to the exercise of the function concerned and being provided with the information and support necessary to enable the individual to participate;
- (f) the importance of achieving a balance between the individual's wellbeing and that of any friends or relatives who are involved in caring for the individual;
- (g) the need to protect people from abuse and neglect;
- (h) the need to ensure that any restriction on the individual's rights or freedom of action that is involved in the exercise of the function is kept to the minimum necessary for achieving the purpose for which the function is being exercised.

FREESTANDING DUTY?

- Plain that s.1(1)(2) not a target or even general duty like s.17 Children Act 1989 or s.1-2 NHS Act 2006 (see Morris J in *R (Davey) v. OCC* [2017] EWHC 354 at [19]).
- But w/being principle and s.1(3) ‘have regard’ duty apply when exercising a f(n) in relation to an individual and so only in that context breach may occur
- All factors in s.1(3) “relevant considerations” (ibid [19])

2. FIVE STAGE DECISION MAKING UNDER THE ACT

11

1. ASSESSMENT OF NEEDS

- Assess and identify the adults “**needs for care and support**” pursuant to s.9(1)
- **And** the matters set out in s.9(4):
 - (i) the impact those needs have on well-being
 - (ii) the outcomes the adult wants to achieve
 - (iii) whether and is so to what extent the provision of care and support could contribute to the achievement of those outcomes.
- Failure to assess all of these will vitiate assessment (*R (JF) v. Merton LBC* [2017] EWHC 1519)

12

What is a “need”?

- Existential question? Courts slow to define a need – mix of inability/thing required (*R (Macdonald) v. RBKC* – a need for night time care? Access to toilet facilities? Or incontinence pads?
- However, Act moves away from defining needs by reference to the service, facility or equipment required and towards identifying difficulties achieving specified ‘outcomes’
- *R(GS) v. Camden LBC* [2016] EWHC 1762 wrong to say **bare accommodation** can’t be a care need

2. ELIGIBILITY CRITERIA

- S.13(1) & (2) determine if needs meet criteria and provide **written reasons**
- 3 stage test** (eligibility regs 2015/313)
1. Needs arise from or relate to mental and physical impairment
 2. As a result unable to achieve two or more specified outcomes
 3. As a consequence significant impact on wellbeing

14

(1) Arise from or relate to mental and physical impairment

- Narrower than old law (s.21 NAA “or any other circumstances”)
- No formal diagnosis required – 6.105
- Include any mental disorder (s.1(2) MHA 1983)
- Appears to include substance/alcohol misuse (guidance at 6.104)
- ‘or related to’ much broader than ‘caused by’ and include needs indirectly caused by impairment

(2) As a result unable to achieve two or more specified outcomes

- (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.

“unable to achieve” **CARER BLIND**

- (a) is unable to achieve it **without assistance**;
- (b) is able to achieve it without assistance but doing so **causes the adult significant pain, distress or anxiety**;
- (c) is able to achieve it without assistance but doing so **endangers or is likely to endanger the health or safety of the adult**, or of others; or
- (d) is able to achieve it without assistance but takes **significantly longer** than would normally be expected.

(3) As a consequence significant impact on wellbeing

The Act does **not define** the term significant and the courts are likely to resist doing so too:

‘[i]n my view this court should avoid attempting to explain the word “significant”. It would be a gloss; attention might then turn to the meaning of the gloss and, albeit with the best of intentions, the courts might find in due course that they had travelled far from the word itself.’ Lord Wilson in *re B (A Child)* [2013] UKSC 33

This is where **s.1(3)** factors likely to be **very relevant**
Also no hierarchy of needs (Guidance 6.118)

3. DUTIES (AND POWERS)

Section 18 – meet **eligible** needs (unless being met by carer)

Section 19 – power to meet non-eligible and urgent needs

No duty to meet needs being met by carers – s18(7)

- need must **in fact be met** by carers, not ought to be met
- “The local authority is not required to meet any needs which are being met by a carer who is willing and able to do so, but it should record where that is the case.” 6.15

19

4. CARE PLANNING

Care and support plan –s.24/5

- **help the adult with deciding** how needs will be met
- Specify eligible needs **and** how they are going to be met
- Must **take all reasonable steps** to involve the adult and agree the plan
- The plan must be **proportionate** having regard to matters in s.9(4) – wellbeing and desired outcomes
- Set a **personal budget** sufficient to meet the needs **in the manner set out in the Plan** – budget must be transparent

20

What can be provided/done to meet needs?

- Non-exhaustive list in s.8: accommodation/care and support/counselling and other types of social work/goods/facilities/information & advice
- provide or arranging for someone to provide a service
- Direct payments

Extremely wide – basically **anything** to meet need (i.e overcome inability) save what is “**required to be provided**” by LA under Part VII Housing Act 1996 or NHS Act (s.22/23)

4. CARE PLANNING/contd

- G/10.27 – clear that **resources irrelevant** to stages 1-3, but relevant to stages 4/5 – care planning – i.e. *how* needs will be met
- But resources never determinative – arbitrary limits unlawful *R (Alloway) v. Bromley LBC* [(2005) 8 CCLR 61; *DM* [2012] NIQB 98; (2013) 16 CCLR 39

4. CARE PLANNING/contd

11.7 ... At all times, the wishes of the person must be considered and respected. For example, the personal budget should not assume that people are forced to accept specific care options, such as moving into care homes, against their will because this is perceived to be the cheapest option.

4. CARE PLANNING/contd

- And duty mandatory and must be met **fully**
- Therefore, although needs focus on outcomes not services, as some services will be essential if outcomes are to be achieved they must be provided (semantically this is of course a need for the service)
- Courts will be impatient if a failure to provide is because of resources – *R v. Islington LBC ex parte Rixon* (1997-1998) 1 CCLR 119/ *R (Tammadge) v. Wigan MBC* (1997-8) 1 CCLR 581
- Must make a “sincere and determined” effort to find an appropriate service (*R .v Lambeth CC ex parts A1 & A2* (1997) 1 CCLR 336)

5. REVIEWS

- S.27 Keep under review **generally**
- Review on a **reasonable request**
- LA **may** 'revise it'
- **Must** go through the care planning process **again** – proportionate etc
"This process is central to the provision of person-centred care and support that provides people with choice and control over how to meet their needs."

25

3. ACCOMMODATION UNDER THE ACT

- Section 8 – very wide power to provide anything to meets needs – including ordinary accommodation – must come up with a proportionate plan
- The power becomes a duty where it is necessary to provide a service, good or facility to meet an eligible need as otherwise in breach of s.18
- And possibly in order to meet an ineligible need if necessary to avoid an ECHR right

When is it available?

- "Bare accommodation?"
R(GS) v. Camden LBC [2016] EWHC 1762 wrong to say **bare accommodation** can't be a care need – example: mental disorder means cannot access own accommodation – may have no other need but alternative accommodation
 Very close to facts- GS could not return to her home in Switzerland as feared persecution

Accommodation related?

- Otherwise "accommodation related needs" may mean accommodation has to be provided – concept taken from s.21 NAA 1948 case law (*R (SL) v. Westminster* [2013] UKSC 27) at [46]:
"The need has to be for care and attention which is not available otherwise than through the provision of such accommodation. As any guidance given on this point in this judgment is strictly obiter, it would be unwise to elaborate, but the care and attention obviously has to be accommodation-related. This means that it has at least to be care and attention of a sort which is normally provided in the home (whether ordinary or specialised) or will be effectively useless if the claimant has no home."

Only specialist?

- The court in *R (SG) v. Haringey LBC* [2015] EWHC 2579 (Admin) [2017] EWCA Civ 322 accepted the *SL* test applied under the Care Act.
- Haringey argued in the CA that in fact the test was much more restrictive and *only specialist (i.e care home and disability adapted) accommodation can ever be provided under the Care Act 2014*. This is not the law.

Restrictions?

23 Exception for provision of housing etc.

- (1) A local authority may not meet needs under sections 18 to 20 by doing anything which it or **another local authority is required to do** under—
- (a) the Housing Act 1996, or
 - (b) any other enactment specified in regulations.

So no overlapping duties....

Homeless people?

- Generally a homeless person will not be entitled to receive accommodation from the local authority under the Care Act because either (a) s/he will be entitled to it under the Housing Act 1996 or (b) through mainstream services (i.e. state benefits).

Issues?

1. Specialist accommodation -
2. Homeless Prevention – initial and relief duties for 56 days
3. Priority need and “accommodation related need for care and support”?
4. Intentionally homeless?
5. Part VI Accommodation? *R (Mooney) v Southwark LBC* [2006] EWHC 1912 Admin, at paragraphs 55 – 66.

Mainstream support

10.24. There may be other services to which a person is entitled under other legislation (but which could also be provided as part of the provision of care and support), which a local authority is not specifically prohibited from providing under the Act. **Where there is a risk of overlapping entitlements (i.e. where two different organisations may be under a duty to provide a service in relation to the same needs), local authorities should take steps to support the individual to access the support to which they are entitled under other legislation.**

10.25. **The duty to meet eligible needs is not discharged just because a person has another entitlement to a different service which could meet those needs, but which they are not availing themselves of. The needs remain ‘unmet’ (and so the local authority under a duty to meet them) until those needs are actually met by the relevant service being provided or arranged.**

PEOPLE SUBJECT TO IMMIGRATION CONTROL

- A person to whom section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits) applies includes those who are not a national of an EEA State (i) with no leave to enter or remain but require it, (ii) a no recourse to public funds condition and (iii) whose leave is subject to a maintenance undertaking.
- Destitute plus test: cannot meet needs that arise solely because of destitution or its physical effects (but see EC test (1) – “physical/mental impairment” therefore s.21 only relevant to s.19)
- Otherwise destitute asylum seekers will still be accommodated under the Care Act 2014 if they have accommodation related needs for care and support - *R (SG) v. Haringey LBC* [2015] EWHC 2579

PEOPLE SUBJECT TO IMMIGRATION CONTROL/CONTD

- Schedule 3 NIAA 2002 prohibits the provision of care and support “save to the extent necessary for the purpose of avoiding a breach of the person’s human rights’
- Threshold for A8/3 breaches in context of non-provision of care and support very high (*Anufrijeva v Southwark LBC* [2004] QB 1124)
- But what of A14? Must not treat all those excluded by schedule 3 the same – *Thlimmenos* discrimination

CHARGING

- Sections 14 to 17 and 69 to 70 of the Care Act 2014, the Care and Support (Charging and Assessment) Regulations 2014, and the Care and Support (Choice of Accommodation) Regulations 2014
- Much the same as before as significant reforms around care cost cap etc not in force (and may never be)

SOCIAL WORKER JUDGEMENTS

- JR not de novo (despite consultation)
- Courts will not micro-manage: *R (Ireneschild) v. Lambeth LBC* [2007] EWCA Civ 234
- Need is a “relative concept, which trained and experienced social workers are much better equipped to assess than are lawyers and courts” (Hale LJ in *R (Wahid) v. Tower Hamlets LBC* [2001] EWHC 641).
- Even where for example an independent occupational therapist states that a particular piece of equipment is “necessary” to meet a child’s needs, the local social or health authority will not be bound by that opinion (*R (Rodriquez –bannister) v. Somerset NHS* [2003] EWHC 2184 Admin)

BUT...

- The courts should now apply high intensity review of the decision (*R (KM) v. Cambridgeshire CC* [2012] UKSC 23 at [36]).
- Must have regard to up to date evidence and have good reasons for rejecting *R (Killigrew) Birmingham CC* (2000) 3 CCLR 109
- Act introduces useful formality and transparency – reasons required, all needs must be assessed, including those being met by a carer, and an explicit proportionality test
- And s.1(3)! Heavily subjective (not patronising) steer

The Localism Act 2011

- *R (GS) v. Camden LBC* [2016] EWHC 1762 (Admin)
- Although a need for bare accommodation could not be a need for care and support under the Care Act 2014 (but see above) a duty may nevertheless arise under s.1 Localism Act 2011 insofar as it is necessary to provide it in order to avoid Art 3 breach
- This is because Care Act post dates 2011 Act and no express limitation on s.1 is imposed by it and therefore s.2 not engaged.

S.117 MENTAL HEALTH ACT 1983

- Section 3 discharge cases
- Duty to provide or arrange to be provided “after care services” until such time as no longer in need
- After care services (6): means services which have both of the following purposes—
 - (a) meeting a need arising from or related to the person’s mental disorder; and
 - (b) reducing the risk of a deterioration of the person’s mental condition (and, accordingly, reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder).

Accommodation under s.117?

- Clear that can include accommodation
- But the provision of “basic” or ordinary” does not fall within – *R (Mwanza) v Greenwich LBC* [2010] EWHC 1462 Admin, (2010) 13 CCLR 454
- *R (Aferwork) v. Camden LBC* [2013] EWHC 1637
- “There were no circumstances in which a mere roof over the head would, on the facts of a particular case, be necessary to meet a need arising from a person’s mental disorder.”

Accommodation under s.117?

- Therefore limited to enhanced or specialist accommodation and the ex-patient was being placed there on an involuntary as in incapacitated basis
- I.e supported accommodation
- Cannot charge
- Duty owed by local CCG (or local health board) and social services

FINISH

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(Please feel free to email any queries/problems
-I'll do my best to answer them)