

SOME PROBLEMS AFFECTING ACCESS TO JUSTICE FOR VULNERABLE
ADULTS WHO MAY LACK CAPACITY

Mental capacity and safeguarding culture

In this paper I look at how the developments in establishing essential safeguards for access to justice - particularly in the context of risks to liberty - ushered in by the Mental Capacity Act and parallel developments in safeguarding practice for vulnerable adults have failed to permeate in two particular contexts – vulnerable migrants and vulnerable defendants. The consequences in impeding – and in some cases effectively nullifying – the right of access to a court have been well documented in the case of vulnerable defendants by the Law Commission in its report no.364 on ‘Unfitness to Plead’. In the context of vulnerable migrants the rather extreme consequences of the apparent lack of practical reach of the Mental Capacity Act’s protective principles has been less publicised. Accordingly, although I make reference below in brief to the work of the Law Commission on ‘fitness to participate’ in a criminal trial – shifting the focus from ‘fitness to plead’ - and an effective NHS England project which embodies those principles, the emphasis in this paper is in bringing to light the failure to extend established legal principles to vulnerable adults in indefinite immigration detention¹.

Basic principles – access to justice

Fair and unimpeded access to justice is a bedrock principle of the common law²:

"access to a court; access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege" are rights that are "inherent and fundamental to democratic civilised society."

¹ For a fascinating and scholarly application of common law safeguards and the Rule of Law to indefinite immigration detention see The Bingham Centre’s https://www.biccl.org/files/6559_immigration_detention_and_the_rol_-_web_version.pdf

² *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 see Lord Cooke of Thorndon at paras [30]-[31].

This fundamental right is acute for those whose liberty is at stake as Lord Bingham of Cornhill explained in *Daly*:

"Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens. He cannot move freely and choose his associates as they are entitled to do. It is indeed an important objective of such an order to curtail such rights, whether to punish him or to protect other members of the public or both. But the order does not wholly deprive the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order. And it may well be that the importance of such surviving rights is enhanced by the loss or partial loss of other rights. Among the rights which, in part at least, survive are three important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege."

Mental Capacity, safeguarding and access to justice

In the civil law context, the courts have long recognised the need to make arrangements to ensure that access to justice is facilitated by those who lack litigation capacity, currently reflected in Civil Procedure Rule 21 which makes provision for the appointment of suitable litigation friends. As the Supreme Court explained in *Dunhill v Burgin*³

“the policy underlying the Civil Procedure Rules is clear: that children and protected parties require and deserve protection, not only from themselves but also from their legal advisers.”

Applying and explaining the effect of the key principles of the Mental Capacity Act in action, the accessible and clear MCA Code of Practice points out that:

“Assessing capacity correctly is vitally important to everyone affected by the Act. Someone who is assessed as lacking capacity may be denied their right to make a specific decision – particularly if others think that the decision would

³ [2014] UKSC 14

not be in their best interests or could cause harm. Also, if a person lacks capacity to make specific decisions, that person might make decisions they do not really understand. Again, this could cause harm or put the person at risk. So it is important to carry out an assessment when a person's capacity is in doubt.”⁴

The process of authorising a deprivation of liberty under the MCA has received criticism due to its complexity and bureaucracy, and the Law Commission has made recommendations for its replacement⁵. There are however a few key protective features which illustrate the central importance of supporting a vulnerable adults ability to engage in processes and decisions which affect them:

- (1) Firstly an application for authorisation for a deprivation of liberty must be accompanied by an assessment of whether the affected person has the mental capacity to consent to being accommodated at a particular;
- (2) Secondly, the application must include an assessment of whether the deprivation of liberty is in the person's best interests – a holistic assessment requiring consultation with and for the person, with support for them to engage in that assessment;
- (3) Thirdly, the appointment of an Independent Mental Capacity Advocate;
- (4) Fourthly notification to family, friends, carers and any advocate that a deprivation of liberty application has been made (3.15 Code of Practice) and of the outcome (5.7).

The emphasis that the MCA places on a vulnerable adult's participation as an essential plank of Article 5(4) safeguards (the right to a speedy review of the legality of a deprivation of liberty) can be seen in *AJ v Essex County Council* [2015] EWCOP 5 where the Court of Protection made clear the heavy burden on local authorities to ensure that where a vulnerable adult's liberty is in issue they must be supported to have access to judicial scrutiny of their detention.

⁴ Mental Capacity Act 2005 Code of Practice, §4.34

⁵ http://www.lawcom.gov.uk/app/uploads/2017/03/lc372_mental_capacity.pdf

A host of procedural safeguards are required for detention and deprivation of liberty whether under the Mental Health Act or the Mental Capacity Act to ensure that the protections under Article 5 ECHR – and the right to liberty under the common law - are effective. The three regimes operate differently but three key principles can be drawn out:

- (1) the detained person must be able to bring a challenge against their detention.
- (2) The detained person must have a representative, whether a known person or a professional, who has a free-standing right to challenge the detention and that representative must be suitable to exercise that right.
- (3) There must be an independent review of the detention whether or not either of the above rights are exercised.

Safeguarding

Initially developed as a form of non-statutory guidance from the department of health entitled ‘No Secrets’ safeguarding policy is now on a statutory footing following the coming into force of the Care Act 2014. The statutory provisions are supplemented by extensive guidance issued under s 78 of the Care Act, “Care and support statutory guidance”. Chapter 14 of the Guidance deals with ‘safeguarding’ and it is clear designed with the Mental Capacity Act’s approach to ‘vulnerability’ in mind.

Paragraph 14.7 of the guidance sets out the meaning of safeguarding: - *“Safeguarding means protecting an adult’s right to live in safety, free from abuse and neglect. It is about people and organisations working together to prevent and stop both the risks and experience of abuse or neglect, while at the same time making sure that the adult’s wellbeing is promoted including, where appropriate, having regard to their views, wishes, feelings and beliefs in deciding on any action.”*

Paragraph 14.11 of the Guidance sets out the aims of safeguarding, which are to: -

- *“prevent harm and reduce the risk of abuse or neglect to adults with care and support needs*
- *stop abuse or neglect wherever possible*

- *safeguard adults in a way that supports them in making choices and having control about how they want to live*
- *promote an approach that concentrates on improving life for the adults concerned*
- *raise public awareness so that communities as a whole, alongside professionals, play their part in preventing, identifying and responding to abuse and neglect*
- *provide information and support in accessible ways to help people understand the different types of abuse, how to stay safe and what to do to raise a concern about the safety or well-being of an adult*
- *address what has caused the abuse or neglect”*

The Guidance also sets out at paragraph 14.13 the 6 key principles that underpin all adult safeguarding work, namely empowerment, prevention, proportionality, protection, partnership and accountability.

Under section 42 of the Care Act the local authority has a duty towards adults who have a need for care and support and are experiencing or at risk of abuse or neglect, and as a result of those needs are unable to protect themselves against abuse or neglect or the risk of it. The duty is to make whatever inquiries it thinks are necessary to enable it to decide what action should be taken in respect of the adult and by whom. The duty to make inquiries applies to adults with any level of care and support needs, even if they would not meet the eligibility criteria for the provision of services under Part 1 of the Care Act⁶.

Paragraph 14.17 of the Guidance includes non-exhaustive list of the sort of behaviour that could give rise to safeguarding concerns. Of particular relevance is:

“Psychological abuse including:

- *emotional abuse*
- *threats of harm or abandonment*
- *deprivation of contact*

⁶ Care Act 2014: Explanatory Notes para 274

- humiliation*
- blaming*
- controlling*
- intimidation*
- coercion*
- harassment*
- verbal abuse*
- cyber bullying*
- isolation**

•unreasonable and unjustified withdrawal of services or supportive networks

....

Organisational abuse”

Including neglect and poor care practice within an institution or specific care setting such as a hospital or care home, for example, or in relation to care provided in one’s own home. This may range from one off incidents to on-going ill-treatment. It can be through neglect or poor professional practice as a result of the structure, policies, processes and practices within an organisation.”

And

Neglect and acts of omission including:

- ignoring medical*
- emotional or physical care needs*
- failure to provide access to appropriate health, care and support or educational services*

The Guidance covers safeguarding procedures, and points out at paragraph 14.152 that “In any organisation, there should be adult safeguarding policies and

procedures” which should reflect the guidance and are to support the reduction or removal of safeguarding risks and to support and protect the adult and help them recover and develop resilience. Critically the Guidance states “Such policies and procedures should assist those working with adults how to develop swift and personalised safeguarding responses and how to involve adults in this decision making. This, in turn, should encourage proportionate responses and improve outcomes for the people concerned”.

Section 68 of the Care Act provides for the arrangement of an independent advocate to represent and support adults involvement in safeguarding inquiries under section 42(2) if certain conditions are met. These are that the local authority considers that without an advocate the adult would be in substantial difficulty in doing one or more of a) understanding relevant information, b) retaining that information, c) using or weighing that information as part of the process of being involved or d) communicating their views wishes or feelings. Unsurprisingly the Guidance stresses the need for professionals to work in line with the MCA . With respect to capacity the guidance points out that *“where the adult may lack capacity to make decisions about arrangements for enquiries or managing any abusive situation, then their capacity must always be assessed and any decision made in their best interests”* (paragraph 14.108) and that *“In order to make sound decisions, the adult’s emotional, physical, intellectual and mental capacity in relation to self-determination and consent and any intimidation, misuse of authority or undue influence will have to be assessed”* (paragraph 109).

What happens in Immigration detention?

The Home Office has a policy of detaining under the Immigration Acts persons who are mentally ill. The previous default policy of excluding from detention vulnerable persons such as those with mental health issues was abandoned. There is no automatic referral for independent review of immigration detention regardless of how long it continues. The onus is on the detained person to challenge their detention. There are no adjustments to Home Office immigration and detention procedures for those who may lack or lose capacity to instruct a representative or make decisions about their treatment, whose capacity fluctuates or who need support to engage in immigration or

legal procedures, and in a response dated 4 May 2017 to an FoI request seeking information about the numbers of people in immigration detention who lack capacity to instruct a legal representative and whether the Home Office provides any training on mental capacity to its detention decision-makers it confirmed that:

The Home Office does not hold the information which you have requested. The Home Office has established there is no specific training provided to IRC staff or case workers on safeguarding individuals lacking mental capacity. Furthermore, in relation to question 3 and 4, no statistics are recorded.

In his Review⁷ dated January 2016 of the detention of vulnerable persons in Immigration removal centres at §10.6, Stephen Shaw noted this lacuna and at §10.26 he stated:

“those who are most vulnerable should not languish in detention because they lack the capacity to make a bail application. “

Vulnerable migrants – barriers to justice and consequential risks

Migrants needing immigration advice and representation may be vulnerable for a number of reasons. They may have language problems, learning disability, mental illness or disorder or other attributes which affect access to representation. A person may be vulnerable owing to learning disability or mental disorder but may – with support – be able to make a decision or give instructions.

The potential consequences for a migrant who lacks capacity, or by reason of vulnerability falling short of lack of mental capacity, to deal with their immigration affairs are profoundly serious. All those who cannot evidence their lawful immigration status are liable to detention. Provisions of the Immigration Act 2016 (not yet in force) provide that all those who are liable to detention may have bail conditions imposed upon them as a condition of their liberty whether or not the power to detain could lawfully be exercised: s 61 and schedule 10 Immigration Act 2016. The schedule also provides for a power of arrest of those in breach of bail conditions: para 10 schedule 10 IA 2016:

⁷https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf

“(1) An immigration officer or a constable may arrest without warrant a person on immigration bail if the immigration officer or constable—

(a) has reasonable grounds for believing that the person is likely to fail to comply with a bail condition, or

(b) has reasonable grounds for suspecting that the person is failing, or has failed, to comply with a bail condition.”

It is clear that the need to regularise the immigration status of a person who may be liable to be detained BUT cannot consent to bail conditions is imperative.

Unlike detention under the Mental Health Act, deprivation of liberty under the Mental Capacity Act and imprisonment in the Criminal Justice System, there is no automatic referral for review of the lawfulness of a person’s detention under the Immigration Acts. Applications – even for a speedy review of the legality of a person’s detention as required by article 5(4) ECHR - are contingent on a person’s ability to make such an application, bring such challenge and instruct legal representatives.

Whether or not a person has an appeal against any immigration decision (save with some narrow exceptions such as EEA cases) is now entirely dependent on whether a human rights claim has been made by a person and refused by the Secretary of State: s 82(1) Nationality Immigration & Asylum Act 2002. Failure to respond to immigration documents within the timeframe provided may result in no appeal to the FtT (IAC) because no relevant human rights matters have been put to the Secretary of State.

Even if a migrant has access to an appeal in the FtT, they may be unable to access a fair hearing because their ability to communicate may be impeded for reasons of mental illness, disorder or learning disability. Currently there is no system of allocation, funding or costs protection for litigation friends and no system or onus of identifying migrants who may be unable to access a remedy or fair hearing by reason of vulnerability or lack of mental capacity (to make decisions, to instruct a legal representative) which means that:

- detainees may be unable to access the court;

- migrants may be removed or deported in breach of their rights to a place where they may be at risk or may be separated from their families
- they may spend long periods in detention
- they may be subject to undue pressure and influence to consent to voluntary departure and may waive their rights
- they may be unable to access lawful care and treatment planning
- their circumstances may trigger safeguarding duties under the Care Act 2014
- they may be suicidal or at risk of self-harm or death.

Litigation friends for vulnerable migrants

Recent judgments have begun to make rulings around the fringes of the position of vulnerable migrants and access to a court. Following the ruling of the Administrative Court in C and of the Court of Appeal in AM (Afghanistan) it is clear that the First tier Tribunal has a power (and indeed a duty) to appoint a litigation friend in circumstances where instructions cannot be given by an appellant who lacks capacity. But this does not solve the issue of who is to be a litigation friend, if there is no ‘suitable’ person available nor what form of litigation support is to be made available in the steps before any appeal.

Persons who lack capacity may not attend ‘surgeries’ or be able to be pro-active in seeking advice or representation. They may appear able to seek representation but may have delusional beliefs which impeded their ability to make decisions. They may not accept that they are unwell or understand the immigration process as it is being applied to them. They may act erratically and present with behaviours which, because they are not seen in a mental health context, are simply treated pejoratively.

Unfortunately there is evidence that social workers, health workers, clinicians, GPs, teachers, befrienders, mental health lawyers and advocates and the range of professionals with whom a mentally disordered or disabled person may come into contact with have little or no knowledge or understanding about immigration law and especially remedies against deportation decisions. Home Office decision-makers

typically do not have any understanding of complex mental health diagnoses and terms.

Access to a remedy (for the reasons set out above) is often complex and abstruse. The need for qualified, accredited immigration representatives with an understanding of mental capacity practice and procedure is axiomatic. As things currently stand there is no clear route - and certainly no enthusiasm in the Home Office - to ensuring that safeguarding law and practice is reflected in policy.

Vulnerable defendants in the criminal justice system

The law on unfitness to plead sets out what should happen when a vulnerable defendant is unable to play a meaningful part in their criminal trial because they have serious mental health or communication problems. At present, the ‘*Pritchard*’ test for unfitness to plead, which was formulated in 1836, focuses on a defendant’s intellectual abilities and their ability to understand the processes of a criminal trial. But disorders of mood and other aspects of mental impairment – such as a delusional belief - can also interfere with a defendant’s ability to engage with the proceedings and there is provision for enhancing participation. For example, the existing test for unfitness does not consider whether a vulnerable defendant could be fit for trial if they were supported to understand and engage with the trial process.

In its consultation exercise⁸ the Law Commission identified shortfalls in the current approach and the consequences for access to justice of a failure to extend modern capacity principles to the criminal justice context. The resulting report published in early 2016⁹ highlighted the need for accurate and efficient identification of defendants who, even considering available adjustments, cannot participate effectively in their trial. The Commission concluded that the current *Pritchard* test used to assess unfitness to plead requires is not consistently understood or applied by clinicians, legal practitioners and the courts, does not reflect progress in psychiatry and psychology, and denies defendants an opportunity to be supported to participate.

⁸http://www.lawcom.gov.uk/app/uploads/2016/01/lc364_unfitness_summary_English.pdf

⁹<https://www.gov.uk/government/publications/unfitness-to-plead>

Example of successful wider application of safeguarding principles – “Liaison and Diversion” in the CJS

NHS England’s ‘Liaison and Diversion’¹⁰ scheme is aimed at providing targeted services to improve both health and access to justice for adults and children who come into contact with the youth and criminal justice systems where a range of complex needs are identified as factors in their offending behaviour. The scheme provides a process to identify and assess those with mental health problems, a learning disability, substance misuse problems or other vulnerabilities as early as possible when they come into contact with youth and criminal justice systems. The entry point to the service is whenever an individual comes into contact with the police (or other criminal investigating authority) under suspicion of having committed a criminal offence. The service is holistic – assessing health and social care needs with referral to other relevant agencies. A great example of inter-agency working, the scheme draws on the expertise of the ‘Offender Health Collaborative (OHC)’ which is a working collaboration between six specialist organisations: Nacro, Revolving Doors Agency, Centre for Mental Health, Institute for Mental Health, NHS Confederation and the Cass Business School and provides services in order to avoid prosecution and imprisonment of children, young people and vulnerable adults.

The Liaison and Diversion scheme is a practical example of the application of safeguarding practice and support for vulnerable adults in contact with the CJS with a view to reducing the prison population and keeping out of prison the mentally ill who should not be there. A scheme which identified and supported vulnerable migrants to regularise their status or make capacitous decisions regarding their immigration affairs and to access representation would reduce the exponentially growing detention population.

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¹⁰ <https://www.england.nhs.uk/wp-content/uploads/2014/04/ld-op-mod-1314.pdf>

Garden Court Chambers

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