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EXPLORING ISSUES WITH CAPACITY AND HOW TO ADDRESS THEM IN EDUCATION PROCEEDINGS



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Speakers:

Asma Nizami

Louise Price

Oliver Lewis





WHAT WE WILL COVER

1. What is a lack of capacity? An overview of the COP & education issues in COP – Asma Nizami
2. How to manage capacity before the FtT – Louise Price
3. Deprivation of liberty and restraint– Oliver Lewis

[Questions were taken at the point of registration]

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Capacity, the COP and education issues



Asma Nizami
Doughty Street Chambers



SPOTTING INCAPACITY

- Section 20, Children and Families Act 2024
- Existing diagnosis may be relevant to capacity
- But: formal diagnosis not required for the court to find that P lacks capacity to make a particular decision (*An NHS Trust v ST & Anor* [2023] EWCOP 40 at [97]).
- A diagnosis does not always mean a lack of capacity (e.g. *Re Z* [2016] EWCOP 4)
- Mental Capacity Act 2005 ('MCA 2005') & *The MCA Code of Practice* (issued by the Lord Chancellor under s.42 of the MCA 2005)



CHILDREN & YOUNG PEOPLE IN COP

- COP applies to 16 + if P lacks capacity within the meaning of the MCA 2005
- 16 + professionals will presume capacity unless the presumption is rebutted



THE MENTAL CAPACITY ACT 2005

- Mental Capacity Act 2005 ('MCA 2005'), Explanatory Notes:
- 4. *[The MCA 2005] [...] aims to clarify a number of legal uncertainties and to reform and update the current law where decisions need to be made on behalf of others. The Act will govern decision-making on behalf of adults, both where they lose mental capacity at some point in their lives, for example as a result of dementia or brain injury, and where the incapacitating condition has been present since birth. It covers a wide range of decisions, on personal welfare as well as financial matters and substitute decision-making by attorneys or court-appointed “deputies”, and clarifies the position where no such formal process has been adopted [...]*
- <https://www.legislation.gov.uk/ukpga/2005/9/notes/division/2>



PRINCIPLES – MCA 2005

- Section 1 sets out general principles:

- 1 The principles

[...]

- (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.*



CORRECT APPROACH TO CAPACITY

- *A Local Authority v JB* [\[2021\] UKSC 35](#) [65-79]
 - Is P unable to make a decision for himself in relation to the matter? If not,
 - Is the inability because of an impairment of, or a disturbance in the functioning of, the mind or brain?



WHO LACKS CAPACITY?

- ‘Core determinative provision’ (see *A Local Authority v JB* [2021] UKSC 52 at [65])
- s.2(1):
 - “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”
- E.g. psychiatric illness, learning disability, dementia, brain damage, coma, confusion, shock, drugs, fatigue
- Because of = causative nexus



- Capacity is time specific and decision specific (*JB* at [82])
- NB:
 - it does not matter if the impairment is temporary or permanent (s2(2))
 - 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 (s2(3))
 - s2(4) – questions about lack of capacity - standard of proof is balance of probabilities



INABILITY TO MAKE A DECISION

- ‘Functional test’
- 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.*



RELEVANT INFORMATION

- Will vary depending on the particular decision e.g. contact, residence, care, education, marriage
- Will include the reasonably foreseeable consequences of the decision or the failure to make the decision (s3(4))



- **A Local Authority v GP (Capacity – care, support and education)** [2020] EWCOP 56
- Capacity to request an assessment of need
- The relevant information was (§25):
 - An EHC Plan is a document that says what support a child or young person who has special educational needs should have”;
 - “Other people will be consulted during the assessment process including parents, teachers and other professionals”;
 - “If assessed as requiring an EHC (sic) the young person has enforceable right to the education set out within their Plan;
 - “An EHC Plan is only available up to the age of 25 years.”



- Capacity to make decisions about education
- The relevant information was (§34):
 - The type of provision
 - The type of qualifications if any, on offer
 - The cohort of pupils and whether P would match the profile of other pupils at the provision
 - That P has additional rights up to the age of 25 because of his SEN



BEST INTERESTS (S4)

- all steps and decisions taken for someone who lacks capacity must be taken in the person's best interests.
- Consider whether P will at some time have capacity in the future, when that will be **(s4(3))**
- As far as reasonably practicable, permit and encourage P to participate/improve his ability to participate in any act done for him and any decision affecting him **(s4(4))**
- **S4(6)** Consider so far as is reasonably ascertainable—
 - (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
 - (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
 - (c) the other factors that he would be likely to consider if he were able to do so.
- **S4(7):** You must take into account, if it is practicable and appropriate to consult them, the views of—
 - (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
 - (b) anyone engaged in caring for the person or interested in his welfare,
 - (c) any donee of a lasting power of attorney granted by the person, and
 - (d) any deputy appointed for the person by COP,
- as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6)



CAPACITY TO CONDUCT PROCEEDINGS

- ***Masterman-Lister v Brutton & Co (Nos 1 and 2), Masterman-Lister v Jewell and another*** [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511
- Pre MCA 2005
- Useful guidance:
 - *“the test [for litigation capacity) [...], is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law whether substantive or procedural should require the interposition of a next friend”* (§75).



CONDUCTING PROCEEDINGS 2

- *NB (§17), “it has to be recognised that when a person is treated as a patient, whether or not as a result of an order of the court, he is thereby deprived of civil rights, in particular his right to sue or defend in his own name, and his right to compromise in litigation without the approval of the court. They are important rights [...]”.*



CONDUCTING PROCEEDINGS 3

- An assessment has to be made in relation to all aspects of the proceedings, as a whole, rather than individual decisions within the proceedings (***Dunhill v Burgin* [2012] EWCA Civ 397 §24; also *Dunhill v Burgin (Nos 1 and 2)* [2014] UKSC 18, [2014] 1 W.L.R. 933**
 - Capacity to conduct litigation involves capacity to understand the “*large variety of issues*” that may arise through the currency of proceedings (***Dunhill v Burgin* EWCA §25**).
 - The assessment is not whether the person lacks capacity for the matters that have *in fact* arisen for decision in proceedings, **but whether they lack capacity for the decisions that may hypothetically arise** (***Dunhill v Burgin* UKSC §18; *Dunhill v Burgin* EWCA §1, §16, §24, §27-29**).



THINGS TO REMEMBER

- Capacity can fluctuate ***A Local Authority v PG*** [2023] EWCOP9
- If P lacks capacity to conduct proceedings, in COP litigation friend or ALR (r.2.1, COP Rules 2017).
 - Civil Procedure Rules 1998 provide (CPR21.1): *A protected party must have a litigation friend to conduct proceedings on his behalf*”.
 - A protected party is defined as “*a party, or an intended party, who lacks capacity to conduct the proceedings*” (CPR 21.1(d)).
- Lacking capacity to conduct proceedings is not the same as inability to give evidence.
- Cannot assume that because someone lacks capacity to make one type of decision, they lack it in relation to another decision.
- ***N.B. Sheffield City Council v E*** [2004] EWHC 2808 (Fam); [2005] Fam. 326 §49



JURSDICTION OF THE COP

- Created by MCA 2005
- Superior court of record (s.45, MCA 2005)
- Best interests decisions about those who do not have capacity (as defined in the MCA 2005)
- Some decisions are excluded (s27-29 MCA 2005)
- P must be over 16 (s2(5) MCA 2005)
- Parties – Local Authority, NHS Trust, family members, P
 - Tier 1 – DJ
 - Tier 2 – CJ
 - Tier 3 - High Court (all HCJ can deal with COP and some cases must be dealt with in the HC).



POWERS OF THE COP

- Declarations regarding capacity – s15
- Decisions/orders – s16
- Dealing with a challenge to a standard authorisation –s21A
- Powers re deputies – s16
- Powers re LPA – ss22-23
- Advance decisions to refuse treatment
- Powers re EPA – schedule 4
- Interim orders
- Other powers incl. getting further information - s49



THE ROLE OF COP IN EDUCATION MATTERS

- E.g.
 - EHCP relevant to care/residence in a DOLs case
 - DOLS in an education setting
 - Restraint issues
 - LA seeking enforcement of an EHCP as a best interest decision
 - COP has directed the SEN team to give evidence directly, and also ordered the SEN manager to attend court, to explain the efforts made to secure an education placement under the terms of the EHCP when none had been provided over time, in circumstances causing P to be subject to greater deprivation of liberty (s.16/s.21a)
 - Considering P's capacity to request an assessment of need
 - Considering P's capacity to make decisions about education

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How to manage capacity before the FtT



Louise Price
Doughty Street Chambers



RELEVANT LEGAL FRAMEWORK

- i) Section 3 Mental Capacity Act 2005
- ii) Section 80 Children and Families Act 2014
- iii) Regulation 64 SEND regulations 2014
- iv) SEND Code of Practice, Annex 1
- v) **London Borough of Hillingdon v WW** (Special educational needs : Other) [2016] UKUT 253 (AAC) (25 May 2016)
- vi) **Buckinghamshire County Council v SJ** (Special educational needs : Other) [2016] UKUT 254 (AAC) (25 May 2016).



WHO DOES THIS APPLY TO?

- Young people or parents.
- A young person is someone who is over compulsory school age but under the age of 25: section 83(2) of the 2014 Act.
- Section 51 confers a right of appeal on the young person.
- Section 80 deals with young persons who lack capacity. It adopts the meaning of lacking capacity that applies in the 2005 Act: section 80(5).
- It provides for references to a young person to be read as referring to the young person's representative or parent: section 80(2)(b).
- That is give a specific meaning, defined by section 80 (6).



SECTION 80 REPRESENTATIVE

(6)“Representative”, in relation to a parent or young person, means—

(a) a deputy appointed by the Court of Protection under section 16(2)(b) of the Mental Capacity Act 2005 to make decisions on the parent's or young person's behalf in relation to matters within this Part;

(b)the donee of a lasting power of attorney (within the meaning of section 9 of that Act) appointed by the parent or young person to make decisions on his or her behalf in relation to matters within this Part;

(c)an attorney in whom an enduring power of attorney (within the meaning of Schedule 4 to that Act) created by the parent or young person is vested, where the power of attorney is registered in accordance with paragraphs 4 and 13 of that Schedule or an application for registration of the power of attorney has been made.



PRESUMPTION OF CAPACITY

- Unless and until it is determined that a person does not have capacity to litigate, by reference to the principles in the MCA 2005, it is to be presumed that they do have capacity: s 1(2) of that Act.
- Where there is ‘good cause for concern’ about a person’s capacity to litigate, the Tribunal should order an assessment of that person’s capacity.
- Assessment should be conducted by reference to the principles in the Mental Capacity Act 2005 (MCA 2005).



WHEN CAPACITY IS IN DOUBT

- It is for the Tribunal to determine whether a person has capacity to conduct the particular litigation, applying s 1-4 MCA 2005 and Chapter 4 of the Code of Practice.
- It is a question of fact for the FtT, **Buckinghamshire County Council v SJ (SEN): [2016] UKUT 254 (AAC)** §11.
- Suggests, ‘the most efficient way to resolve it may be as a preliminary issue that the tribunal will have to decide before it identifies the correct parties: rule 5(3)(e) of rules of procedure for both the First-tier Tribunal and the Upper Tribunal’ § 19.



CONSIDERATION FOR ALL PARTIES

- The overriding objective for both the First- tier Tribunal and the Upper Tribunal requires parties to co-operate with the tribunal.
- See rule 2(4) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699).
- See rule 2 (4) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698).
- That may involve drawing an issue to the tribunal's attention and, providing the tribunal with any evidence it needs to resolve the issue.



UNREPRESENTED LITIGANTS

- In **Masterman-Lister v Brutton and Co [2002] EWCA Civ 1889** Kennedy LJ went on to say that: “Sometimes the doubts may arise in relation to an opponent acting in person, and then it may be appropriate to bring the issue of capacity before the court” §17.
- Equal Treatment Bench Book (ETBB) suggests ‘Where a party is not represented, it is for the judge to investigate or consider if that person has capacity to conduct that litigation, as a matter of priority. Concerns as to capacity to litigate may have arisen from material in the court papers or from that party’s behaviour. However, embarking upon such investigation requires caution and sensitivity as there could be many reasons for unusual behaviour in court. It might be worthwhile asking if the party has a friend or family member that they would wish to bring to court with them to the next hearing. Information may be able to be obtained in this way as to that party’s involvement with any professionals such as a social worker, community psychiatric nurse or a treating clinician. This is if the party is unable or unwilling to offer information themselves’.



EVIDENCE- WHAT WILL FTT NEED?

- In some cases, the judge will have to decide on capacity without the benefit of any external expertise, although the courts have emphasised that judges should be slow to do so because of the serious consequences for the person concerned.
- In **Baker Tilly v Makar [2013] EWHC 759 (QB)** Sir Raymond Jack J observed § 8:

“In most cases where a question of capacity has arisen the person whose capacity is in question has co-operated with the court and the court has been provided with the assistance of appropriate medical experts as the court has to be satisfied that the lack of capacity involves an impairment of the mind to compass the definition. It is but commonsense that this should be so. But I refer to the judgment of Kennedy L.J. and **Masterman-Lister v. Brutton & Co. [2003] 1 WLR at 1511** and to the dictum of Rimer L.J. in **Carmarthenshire County Court v. Lewis [2010] EWCA Civ.1567** where he said:

"I cannot think that the court can ordinarily, by its own impression of the litigant, safely form its own view of that."



EVIDENCE – WHAT WILL THE FTT NEED?

- In **Hinduja v Hinduja [2020] EWHC 1533 (Ch)** Falk J makes clear, the CPR (and, for that matter, the FPR and the Court of Protection Rules) have no requirement for medical evidence. It will – and should – be a matter for the judge to determine in the circumstances of the case before them whether there is a need for medical evidence to enable them to determine whether an individual is a protected party.
- The Equal Treatment Bench Book recognises that evidence as to capacity may equally come from a carer or social worker, (Ch5. 44)



STEPS IF THERE IS NO CAPACITY

- FtT to make a finding as such.
- Appoint an alternative person.
- Note any decisions made prior to the appointment of an alternative person, may be void, **Dunhill v Burgin [2014] UKSC 18, [2014] 1 WLR 933.**
- Regulation 64 of the 2014 Regulations is made under the authority of section 80(2)(b). Introduces the concept of an alternative person.
- Who can be the alternative person.
- The young person's representative (under section 80) is the alternative person: regulation 64(2)(a).
- Or if no representative, the young person's parent (regulation 64(2)(b)).



WHO IS THE CORRECT PARTY?

- Where there is an AP the appeal under section 51 is brought by the the AP, acting in that capacity, but in the best interests of the young person.
- Not acting on behalf of the YP in the sense that an advocate does.
- An alternative person who is a representative in the section 80 sense may also rely on the services of a representative in the advocacy sense, Buckinghamshire §15.
- For 16 and 17 year olds, parents still retain parental responsibility.
- Section 27(1)(g) of the 2005 Act preserves that responsibility.
- Regulation 65 of the 2014 Regulations provides that regulation 64 applies despite section 27, but that does not deprive the parents of their responsibility generally.



CAPACITY CAN FLUCTUATE

- In appropriate cases must keep under review.
- It may be that this arises as an issue during the course of litigation.
- If a young person's capacity changes during the course of proceedings, the tribunal may need to stop the usual course of proceedings to consider the issue.
- May need to substitute another party as appellant or respondent: rule 9 of both FtT and UT's rules of procedure.



ISSUE SPECIFIC

- Remember capacity is issue specific, it is the capacity to litigate that is being considered.
- Mr Justice Munby noted in **Sheffield CC v E & S [2005] Fam 236**, at para 34:

‘The capacity to litigate is not something to be determined in the abstract. One has to focus on a particular piece of litigation in relation to which the issue arises. The question is always whether the litigant has capacity to litigate in relation to particular proceedings in which he is involved ... Someone may have the capacity to litigate in a case where the nature of the dispute and the issues are simple, whilst at the same time lacking the capacity to litigate in a case where the nature of the dispute or the issues are more complex’.

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**Deprivations of
liberty**

**Restrictive
practices in
schools**



Oliver Lewis
Doughty Street Chambers



DEPRIVATIONS OF LIBERTY

The three “[Storck](#)” requirements:

1. P is confined (‘continuous supervision and control’ and ‘not free to leave’)
2. there is no consent to that confinement
 - a. P has sufficient info to make the decision
 - b. P gives consent voluntarily
 - c. P has capacity (16+) or competence (<16) to make the decision
3. the State is responsible for the confinement

Authorising a dol:

- s.25 Children Act – secure accommodation order
- Family Division (‘National DoL Court’) to authorise dol of a child under its inherent jurisdiction (irrespective of capacity)
- Court of Protection for P 16+ who lacks capacity
- ‘DoLS’ in a hospital or care home for 18+



RESTRICTIVE PRACTICES IN SCHOOLS

1. [s.93](#) Education and Inspections Act 2006 allows “reasonable force”.
 2. DfE [guidance](#) 2013 “Use of reasonable force in schools”. Purpose is “*to help school staff feel more confident about using this power when they feel it is necessary*”. Nothing on children with learning disabilities or autism.
 3. DfE [guidance](#) 2016 “Behaviour and discipline in schools: guidance for headteachers and staff”. Schools decide how long child spends in seclusion, must ensure “*that their time spent there is used as constructively as possible*”, allow child to eat and use the toilet.
 4. DHSC [guidance](#) 2019 “Reducing the Need for Restraint and Restrictive Intervention”, for those with learning disabilities, autism, mental health difficulties, 2019. Applies only to special education settings.
- Children being harmed
 - No requirement on schools to inform parents / local authority / Ofsted
 - No requirement on Ofsted to collect data or report



- Pre-action correspondence and advocacy (2022)
- ECHR [report](#), on recording and monitoring (May 2021)
- Government [consultation](#) (Feb-May 2023)
- DSC / Irwin Mitchell [seminar](#) (March 2023)
- Govt research [report](#) based on interviews with staff in 45 special and alternative provision schools (March 2024)

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