



Mental capacity and immigration **Leonie Hirst and Zoe Harper**

Capacity and immigration

- **Where and how might issues arise?**



Case study 1: identifying immigration issues; assessing mental capacity

Immigration status and applications

The statutory framework: Mental Capacity Act 2005 and the Court of Protection

Capacity: principles and assessment

Case study 2: regularising status

Overstayers, EUSS, settlement/citizenship

How is the issue recognised?

Role of 'corporate parent'

Involving the Court of Protection

Case study 3: Decisions related to immigration: marriage/spousal applications

Outside the MCA: Inherent jurisdiction

Subject matter capacity

Potential conflicts of interest

- **Further steps, questions and perspectives**



- Case study 1 -

Identifying immigration issues
Assessing mental capacity

Case study 1: assessing capacity



Mr Saleh is a failed asylum-seeker from Afghanistan. His asylum claim was refused by the Home Office and his appeal dismissed three years ago. He presents with acute symptoms of psychosis and has spent periods of homelessness in the UK. Following attendance at Accident & Emergency, he was detained under section 3 of the Mental Health Act 1983 ('sectioned').

Whilst in hospital, Mr Saleh said he was tired of being homeless and he should just go back to Afghanistan. In hospital, a capacity assessment was undertaken. The health and social care teams considered that Mr Saleh had no entitlements in the UK, would be released to street homelessness, and that in the circumstances he had capacity to make the decision to return to his country. Through the local authority, they contact the voluntary returns team at the Home Office.

Issues:

- Entitlements
- Regularisation of stay, changes in circumstances
- Information relied upon to make an assessment

Immigration: leave to enter/remain

- Requirement for leave (permission) to enter / remain in the UK unless:
 - British Citizen
 - 'right of abode' (granted to some when countries became independent of the UK)
- Types of leave to enter / remain :
 - Indefinite Leave to Enter / Remain
 - live in the UK permanently with no time limits or restrictions
 - can be lost eg if deportation order made as a result of criminal offending
 - can be lost if outside the UK for more than 2 years.
 - Leave to Enter / Remain for time-limited period
 - May be 12 months, 30 months, 5 years
 - May be subject to conditions e.g. no recourse to public funds in some but not all cases
 - Need to apply to extend leave before leave expires, application fees and waivers
- EEA nationals and family members used to have rights through parallel EU law regime applied directly in UK, now require leave to enter/remain (settled / pre-settled status) under domestic scheme (EUSS).
- Immigration bail – temporary admission whilst status being determined (eg asylum seekers)

Immigration: consequences

Consequences of no leave to remain / overstaying:

- Liable to removal
- Immigration Detention
- Breach of immigration laws may affect other immigration applications that may make
- Disrupt or delay route to settlement
- Subject to hostile environment
 - Restricted access to free secondary health care, including community mental health care
 - No access to mainstream welfare benefits
 - Restriction on opening / operating bank account

Necessary to make application for leave to enter / remain

Or if have leave to enter / remain, necessary to apply to extend or vary that leave to remain

Immigration: types of application

Protection-based claims

- Refugee status, humanitarian protection
- Article 3 European Convention on Human Rights (prohibiting inhuman / degrading treatment / punishment, including arising from deterioration in health / risk of suicide and lack of healthcare treatment if removed)
- Fresh asylum claims based on the above

Private/family life applications

- Immigration rules / Article 8 European Convention on Human Rights
- Private life: ties to the UK, length of residence, very significant obstacles to integration
- Family life: family applications, dependency on family members
- Exceptional circumstances

Applications related to EU Citizenship

- EEA nationals
- Family members of EEA nationals

Citizenship

- Ancestry / childhood / historic entitlements to nationality

Mental capacity: statutory framework

- Mental Capacity Act 2005 and statutory Code of Practice
- Fundamental statutory principles (s1 Mental Capacity Act 2005)
 - **Presumption of capacity** unless it is established that P lacks capacity
 - Must take **all practicable steps to help P make a decision** before concluding P lacks capacity
 - **'Unwise' decisions** do not equate to lack of capacity
 - Acts done on behalf of someone lacking capacity must be done in his/her **best interests**
 - **Least restrictive** principle s1(6): duty to have regard to whether an act or decision achieves the purpose in the way least restrictive of P's rights and freedom of action

Mental capacity – MCA definition

- Sections 2 and 3 MCA 2005; statutory Code of Practice
- S2(1): “...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.**”
- Requires two elements: diagnostic **and** functional
- Functional test: s3 MCA 2005
 - understand ‘the information relevant to the decision’: includes consequences of decision or of not deciding
 - retain that information
 - use or weigh that information as part of the process of making the decision
 - communicate decision (whether by talking, using sign language or any other means)
- Diagnostic: wide range of conditions, including mental illness, learning disability, brain damage, dementia, loss of consciousness. Can also cover drug/alcohol use, pain, shock or exhaustion, or extreme fear
- Decision-specific
- May fluctuate or be borderline

Assessing capacity

- When to assess?
 - Triggers for concern: unwise decisions, difficulty in communicating with client, assessments in other areas
- Who should assess?
 - Nature of the decision to be made: complexity, subject matter, gravity of consequences
 - Legal transactions: should be the legal practitioner (cf Code of Practice at 4.41)
 - May require clinical input on diagnostic element
- Taking practicable steps to help P make a decision
 - ‘Information relevant to the decision’ - not a ‘blank canvas’ (*STCC v KK* [2012] EWHC 2136 (COP)) but who decides/knows what is relevant?
 - Practicalities: communication, time of day, surroundings, people
- Risk of conflating best interests with capacity: avoiding the protection imperative (*PH* [2011] EWHC 1704 and *KK*)

Case study 1: assessing capacity



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Issues:

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- Information relied upon to make an assessment

- Case study 2 -

**Regularising immigration status and
particular problems for EEA nationals
Applications to the Court of Protection**

Case study 2: regularising status



S is a 57-year-old EEA national who has been living in a care home for several years. He has no family in the UK, but his friend and ex-colleague C, who has known him for many years, visits him regularly. S often tells C that he does not want to leave the UK because his government have been tracking him and will try to kill him if he leaves. C asks the care home manager whether S can be made to leave the UK. The care home manager contacts the local authority for advice.

Issues:

- Capacity to make decisions about immigration status: application under EUSS
- Litigation capacity: who can/should act?
- What other applications/referrals may need to be made for S?

The Court of Protection

- Power to make decisions on behalf of P or to appoint a deputy to do so:
s16 MCA 2005
 - Jurisdiction: “welfare” and “property and affairs”: definitions in ss17 and 18
 - Where does immigration status sit?
- Can only make decisions which P could make for him/herself if capacitous: the ‘available options’ (*N v ACCG* [2017] UKSC 22)
- Power to make declarations: s15
 - Whether P has or lacks capacity to make a specific decision
 - The lawfulness of an act/decision on behalf of P
- Lasting Powers of Attorney (LPAs)

Deputyship

- ss16-18 MCA 2005
 - Is one needed? Welfare deputy only in ‘the most difficult cases’: Code of Practice 8.38, but see also *SBC v PBA* [2011] EWHC 2580 (Fam)
- Decision by the court under s16 to be preferred to the appointment of deputy
- Powers of deputy:
 - Must be as limited in time and scope as reasonably practicable
 - Court may confer such powers/duties as it thinks necessary for giving effect to the order/appointment – can do so without a specific application
 - Important to ensure that deputy’s powers extend to immigration applications/litigation
- Who can/should be appointed?
 - Spouse/partner; relative; close friend; professional adviser; local authority; panel deputy
 - Must act in P’s best interests – court may revoke or vary powers
 - Duty to consult P and permit/encourage P to participate as fully as possible

Litigation capacity

- Separate issue to whether P has subject matter capacity
- Whether able to litigate in the particular proceedings in question: may have litigation capacity for simple/straightforward claim but not more complex proceedings
- Test in *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889 (approved by UKSC in *Dunhill v Bergin* [2014] UKSC 18): whether capable of (i) understanding the issues in the proceedings, (ii) giving instructions to enable advice/representation, and (iii) understanding advice and making decisions based on it

Litigation friends

- Where P lacks litigation capacity, requires a litigation friend to conduct proceedings
 - Able to fairly and competently conduct proceedings in P's best interests
 - No interest adverse to P
- Civil proceedings: Part 21 Civil Procedure Rules
- Court of Protection: Part 17 Court of Protection Rules 2007
- Without a court order:
 - Deputy with power to conduct legal proceedings on behalf of P: CPR 21.4, COP Rule 142(2)
 - Official Solicitor
- With a court order: certificate of suitability and procedure in CPR 21.5, COP22 form and PD17
- The Official Solicitor: litigation friend of 'last resort'

EU Settlement Scheme

Status of EEA nationals and family members in the UK was derived directly from EU law, but UK ceased to be subject to EU law at 11pm GMT on 31 December 2020.

EU Settlement Scheme ('EUSS') set up to enable EEA nationals and their family members to apply for lawful status in the UK

Grace Period allows EEA nationals and non-EEA family members who were continuously resident in the UK before 31 December 2020 to **apply under EUSS by 30 June 2021**

Family members widely defined and include:

- Spouse, civil partner or durable partner (relationship akin to marriage)
- Child, grandchild or great-grandchild (including of spouse / civil partner)
- Dependent parent, grandparent or great-grandparent (including of spouse / civil partner)
- Dependent relative (including, in some cases, of spouse / civil partner).
- Primary carer of British citizen child, EEA child in school, self-sufficient EEA child ('derivative' rights)

Existing family members of EEA nationals not resident in the UK before 31 December 2020 have right to join them in the UK also and apply to stay



EU Settlement Scheme: applications

Must apply under EUSS by 30 June 2021

Simplified application process

- Smartphone app to photograph passport / ID document and own photograph
- Simple online application form

Non-EEA nationals without biometric passport need to send by post / attend appointment to show
Some non-EEA nationals (carers and family members of some British Citizens) need to send application by post

Indefinite Leave to Remain or Limited Leave to Remain granted depending on length of residence

Lack of provision and guidance to overcome barriers faced by people lacking mental capacity

Research by Age UK suggests that 7% of the population in the UK aged 65 and over have dementia, which means that an estimated 7,700 EU citizens over the age of 65 will have difficulties accessing the scheme. The numbers of older/disabled people with difficulties accessing the scheme are likely to make this figure even higher. (Source: Migrants Organise)



Case study 2: regularising status



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- Case study 3 -

**Marriage and immigration applications
Outside the MCA: inherent jurisdiction**

Case study 3: marriage & sexual relations



Ana is a British citizen with a learning disability and limited ability to communicate verbally. She is in receipt of local authority support and has a social worker. Ana lives at home with her parents, who have arranged for her to marry Boris, a national of country Alyria. Ana has met Boris on a visit to Alyria and is reported to be happy and excited about the marriage. Ana and her parents visit an immigration solicitor seeking advice about Boris's visa application.

Issues:

- Does Ana have capacity to instruct an immigration solicitor? If not, can Ana's parents act on her behalf?
- Does Ana have capacity to consent to marriage/sexual relations? If not, what are the implications?
- What is the relevance of Ana's wishes and feelings?
- Does it make a difference if the marriage is going to take place in Alyria rather than in the UK? What about if the marriage has already taken place in Alyria?
- What if any steps should be taken, and by whom?

Marriage and sexual relations

- Capacity to consent to marriage: principles summarised in *LB Southwark v KA* [2016] EWCOP 20
 - Issue specific, not person specific: wisdom of the particular marriage irrelevant
 - P must understand the broad nature of the marriage contract, the duties and responsibilities attached to marriage and the particular status of spouses with regard to each other
 - P must have capacity to consent to sexual relations
 - Not relevant: potential immigration issues or financial consequences of divorce
- Capacity to consent to sexual relations: *JB (Capacity: Sexual Relations)* [2020] EWCA Civ 735. The information relevant to the decision:
 - The sexual nature and character of sexual intercourse and the mechanics of the act
 - The fact that consent of the other person is required
 - The fact that P can give or withhold consent to sexual relations
 - That pregnancy is a foreseeable consequence of sexual intercourse between a man and woman (but not the risks/difficulties of parenthood)
 - That there are health risks, particularly the risk of sexually transmitted infections, and the fact that the risk of those can be reduced by precautions such as a condom
- Forced marriage protection orders: available where party lacks capacity to consent to marriage



Outside the MCA – the inherent jurisdiction

- Adults lacking capacity not because of the diagnostic element, e.g. through duress/undue influence
 - *DL v A Local Authority* [2012] WLR(D) 101 (controlling/violent behaviour by son)
- Seeking a remedy not available under MCA 2005
 - *An NHS Trust v Dr A* [2014] 2 WLR 607 (forcible feeding of man detained under MHA)
- Other vulnerable adults (whether or not lacking capacity): “...is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation... or who is substantially handicapped by illness, injury or congenital deformity” (*Southend on Sea v Meyers* [2019] EWHC 399 (Fam))

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Further steps
Questions and perspectives

Referral networks

- Importance of developing referral networks
 - Both Immigration and Mental Capacity / Court of Protection areas complex
 - Immigration advice also highly regulated:
 - Criminal offence under s.84 Immigration and Asylum Act 1999 to give immigration advice / representation if not within the regulated categories under the Act.
 - Refers to individual advice, not providing information leaflets etc.
- DSC clerks can support by putting in touch with other solicitors in each area – *see contact details at end of slides*

QUESTIONS? PERSPECTIVES?

Contact Us



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