



# CAPACITY

## Mental Capacity Act 2005

### CHAPTER 9

### CONTENTS

#### PART 1

#### PERSONS WHO LACK CAPACITY

#### *The principles*



# Persons unable to apply

- **Dependent children** (*R v Oldham MBC ex p Garlick* [1993] AC 509). But no exclusion on minors *per se*.
- **Repeat application** – ‘exactly the same facts’ as when previous application disposed of if LA/applicant previously refused assistance (*R v Harrow LBC ex p Fahia* [1998] 1 WLR 1396, HL; *Rikha Begum v Tower Hamlets LBC* [2005] EWCA Civ 340).
- **Unlawfully in UK** – i.e. offender under Immigration Act 1971, s.14 (*R v Westminster CC ex p Castelli and Tristran-Garcia* (1996) 28 HLR 617; *R v Secretary of State for the Environment ex p Tower Hamlets LBC* [1993] QB 632, 25 HLR 524, CA; *R v Hillingdon LBC ex p Streeting* (No 2) [1980] 1 WLR 1425, CA).
- **Lack mental capacity** – to understand offer & undertake responsibilities (*R v Tower Hamlets LBC ex p Begum* [1993] AC 509, reported under *Garlick*).

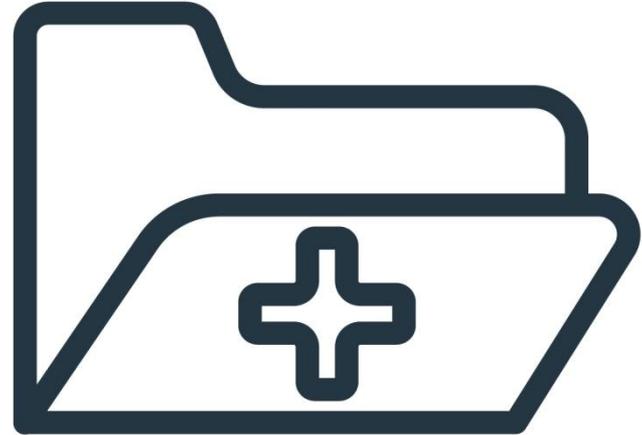
# Capacity

- Should inquire into capacity if evidence raises real possibility that disability might affect capacity.
- Capacity defined:
  - Assumed to have capacity unless established otherwise.
  - Issue specific – whether capacity to make particular decision.
  - Impairment or disturbance in the functioning of the mind or brain, which leads to the person being incapable of making a decision.
  - May be temporary or permanent (Mental Capacity Act 2005, ss.1-3).
- Questions:
  - Real possibility that applicant disabled?
  - Effect of disability on capacity?



# Evidential issue

- Decision must have factual basis.
- Housing options are not clinicians or mental health specialists.
- Commonly need specialist opinion.



# Recent case: *WB v W District Council & Anor* [2018] EWCA Civ 928

- June 2015 – Court of Protection declared Ms W did not have capacity to make decisions:
  - About where she should live, or
  - To enter into tenancy agreement.
- Ms W unsuccessfully argued before Court of Appeal that:
  - Exclusion of persons lacking mental capacity was an obsolete statutory provision.
  - S.189(1) must be interpreted using s.3, Human Rights Act 1988, s.3 “in a manner which puts applicants for priority housing with mental disability...on the same footing as those by persons with no such disability” [16].
  - Effect of *ex p Ferdous Begum* is simply to prevent person signing a tenancy agreement whilst allowing a Part 7 application.

# *WB v W District Council & Anor* [2018] EWCA Civ 928 (2)

- Court of Appeal:
  - Rejected these arguments.
  - Held that the ratio of *ex p Ferdous Begum* remains binding.
  - Because Court of Protection had declared WB lacked capacity, she could not apply as homeless.
- However:
  - Court noted that Court of Protection could appoint a deputy for such a person.
  - Powers vested in deputy could include decision-making about where disabled person should live: “the deputy may be given power to make the various choices that an applicant may be required to make” [34].
  - But no deputy had been appointed in WB’s case.

# STATUS OF S.213B REFERRALS



# Is receipt a homeless application?

- Guidance suggests not:
  - “A referral...will not in itself constitute an application for assistance under Part 7, but...should always respond to any referral received.” (Code, 4.19)
- But will courts agree with this interpretation?



# If cannot establish contact...



- Send 'minded to find' letter.
- Warning application will be treated as withdrawn unless contact.
- Template:  
<https://markprichard.co.uk/documents/warning-case-will-close-after-s213-referral-from-public-authority>

## PLEASE CONTACT US SO WE CAN HELP WITH YOUR HOUSING PROBLEM

Dear

**Please contact us by [date]**

**Your case will be closed if you don't contact us**

We received a referral from [name of public authority] on [date]. They said you wanted help because you were homeless or may become homeless.

We wrote to you on [date] asking you to contact us, but we have not heard from you.

**What happens if I don't contact the Council?**

If you don't contact us by [date] we will close your case. This means we won't be able to help you.

**How can I contact the Council?**

You can contact us by:

# Giving the applicant an opportunity to comment

## Key principle

- If fairness requires it, the applicant must be informed of a matter which is adverse to his interests and be given the opportunity to comment, before a decision is reached on the issue (*Board of Education v Rice* [1911] AC 179).
- Public law provides that an individual adversely affected by a decision of a public authority has, in certain circumstances, a 'right to be heard'.



# Right to be heard – two elements

- Right occurs when *fairness requires* that applicant:
  - Is informed of what is being said.
  - Is given an opportunity to answer what is being said.

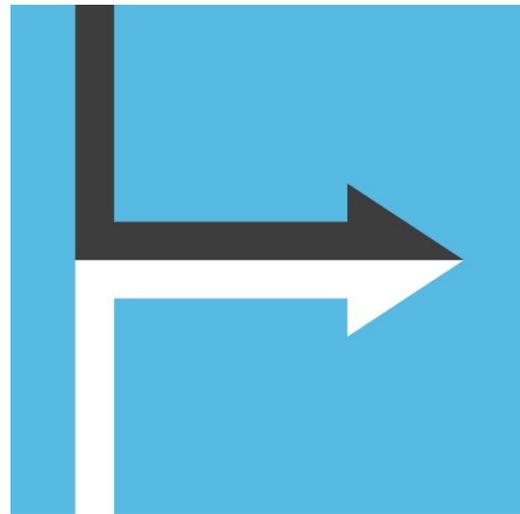


# SOLE AND 'JOINT' APPLICATIONS



# Law

- Part 7 talks in singular: “applicant”, “the person”, “making the application”.
- Application is made by an individual, not “a family unit” (*MacLeod (aka Hynds) v Midlothian DC* (1986) SLT 54.
- **However**, two persons may request assistance at same time.



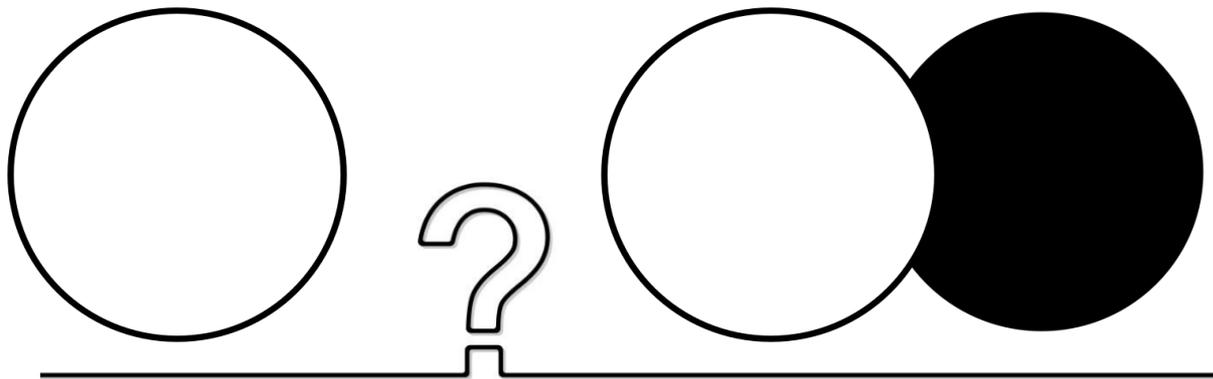
# Common scenarios

- Household example:
  - Mr Smith
  - Mrs Jones
  - Baby Smith-Jones
- Examples:
  - Mrs Jones phones LA and attends appointment alone.
  - Mr Smith submits online form and attends appointment alone.
  - Both Mrs Jones and Mr Smith rock up at housing options drop-in.



# How should LA administer case?

- Two applicants:
  - ‘two applications in a single document’ (*Hemans v Windsor and Maidenhead RBC* [2011] EWCA Civ 374).
  - Decisions notified to both.
  - “there may be an obligation to consider the separate circumstances of the individuals who are making the joint application” (*R v Wandsworth LBC ex p Lord*, 8 July 1985, QBD per Woolf J).



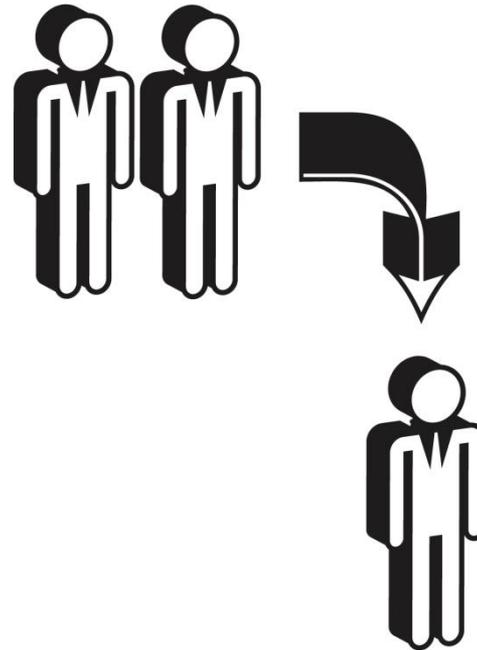
# Consecutive applications

- Common rationale for taking 'joint' (or concurrent) applications from partners:
  - Avoids subsequent application by other household member once application determined/duty ends.
- Potential disadvantage:
  - Household separates.
  - 2 households to whom duty owed.



# 'Convert' to sole application?

- Question of fact – who requested assistance?
- Rather than LA's choice.
- Informed consent surely required.
- Should be evidenced at outset.
- But many LAs prefer 'joint' applications instead, to prevent consecutive applications.



# MANAGING LOSS OF CONTACT



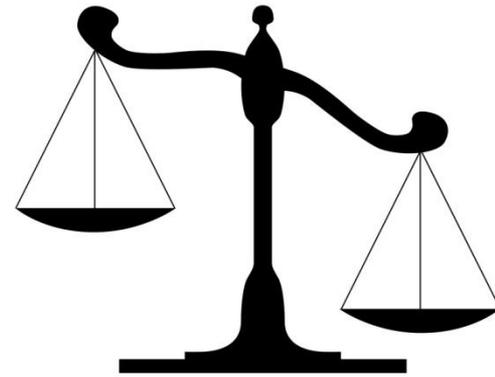
# What if people want *housing* not help?

- Ever deal with applicants who:
  - Want temporary accommodation.
  - But don't want/value other assistance on offer?
- If applicant not owed s.188 interim duty:
  - Reason to believe they don't want help?
  - Have you checked this?
  - If so, can application be 'shut down'?
- 'Reasonable steps' model assumes:
  - You're in regular contact.
  - Are you initiating contact every two weeks?
- 'Withdrawn application' available as statutory discharge ground for:
  - prevention duty (s.195(8)(g)); and
  - relief duty (s.189B(7)(f)).



# Balance between...

- Genuinely providing 'reasonable steps' help, and
- Effective case management – no point in carrying loads of 'dead' cases.



# Withdrawn applications

- Issue of explicit vs. implicit withdrawals remains.
- Reasons why applicant wishes to withdrawn application?
- Code recommends:
  - Should have procedures in place to maintain / regain contact prior to ending of prevention/relief duties where contact ceased (Code, 14.33).
  - 56 days without contact or longer = recommended treat application as withdrawn (Code, 18.14).
  - Where contact within 56 days will need to consider any change of circumstances that affects application (Code, 18.14).
  - Efforts should take into account the applicant's circumstances and needs (Code, 14.33)
  - Should use different methods of communication, e.g. to prevent loss of mobile phone being fatal (Code, 14.33).

# Withdrawn applications (2)

- Notifications treated as given when copy held for collection by applicant or representative (s.195(9), s.189B(8)).



# CHILDREN IN NEED



# 16 & 17 year olds

- 16 and 17 year-olds have a priority need (SI 2002 No 2051, Art.3).
- Part 7 accommodation duty owed unless accommodation duty owed under Children Act 1989, s.20.
- Issue – which department owes a duty?



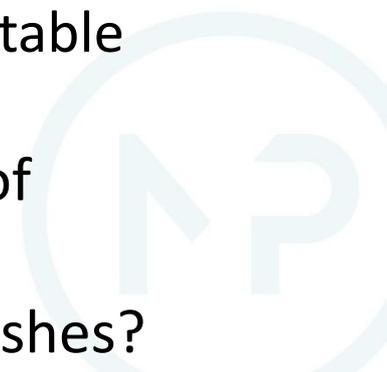
## 16 & 17 year olds (2)

- LA cannot lawfully rely on homelessness duty or referral to housing authority to negate or 'side step' s.20 duty (*R (G) v Southwark LBC* [2009] UKHL 26).
- s.20 is primary duty; if owed, homelessness application 'falls away'.
- Statutory guidance requires LHAs & SSAs to have joint working practices / joint assessment procedures / protocols.
- Guidance: *Prevention of homelessness and provision of accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation* (2018).



# Social services must decide...

- Series of questions social services must ask:
  - Is applicant a child?
  - Is applicant a child in need?
  - Is child within LA area?
  - Does child need accommodation?
  - Is this because of one of statutory reasons?
    - “There being no person who has parental responsibility for him”.
    - “His being lost or having been abandoned”
    - “The person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.”
  - Child’s wishes and feelings regarding provision of accommodation.
  - What consideration should be given to those wishes?



# Problems with social services?

- Identify barriers to joint / early assessment.
- Managerial/strategic input.
- Do applicants require specialist independent advice (if not unitary)?



# AFFORDABILITY



# Affordability & homelessness

- Mandatory issue – must be considered in every case.
- Relevant:
  - Whether **homeless** (reasonable to continue to occupy)  
(HA 1996, s.177(3); Homelessness (Suitability of Accommodation) Order 1996 SI No 3204).
  - **Intentional homelessness** (reasonable to continue to occupy) (s.191(1)).
  - **Suitability** of accommodation (if any) secured under Part 7 (s.206).



# “Reasonable to continue to occupy”

- Means reasonable to continue to occupy **indefinitely, or for as long as applicant will have to if LA do not secure accommodation** (*Birmingham CC v Ali & Aweys; Moran v Manchester CC* [2009] UKHL 36).
- Not necessary that not reasonable for one more day (*Ali & Aweys*).
- Not same as whether accommodation is suitable (when performing a duty).



# Affordability – factors

- Local Authorities must take account of:
  - a) the financial resources available to him or her;
  - b) the costs in respect of the accommodation;
  - c) maintenance payments (to spouse, former spouse, or in respect of a child); and
  - d) his or her other reasonable living expenses (The Homelessness (Suitability of Accommodation) Order 1996, SI No 3204).



# Affordability – meaning

- Accommodation is unaffordable if the cost of paying for it (rent, but also essential costs, eg fuel) would deprive the applicant of the **necessities of life** (*R v Brent LBC ex p Baruwa* (1997) 29 HLR 915, CA).
- LAs must also take ‘**other reasonable living expenses**’ into account (The Homelessness (Suitability of Accommodation) Order 1996, Art. 2(d)).
- Assessment of *reasonable* living expenses requires an **objective assessment**; it cannot depend simply on the subjective view of the case officer (*Samuels v Birmingham CC* [2019] UKSC 28 at [34]).
- Correct test – what are/were applicant’s reasonable living expenses, having regard to applicant’s and children’s needs, including promotion of their welfare (*Samuels* at [36]).



# Samuels ratio often overstated?

- Arguably, essential ratio is:
  - ‘Sufficient flexibility to cope with shortfall’ is wrong test.
  - Decision-maker failed to consider in any detail what reasonable living expenses were.
  - Objective starting point required to determine reasonable living expenses.
- ‘not a general review of the law and policy in this field’ [32].
- No longer recommendation that accommodation treated as unaffordable if residual income lower than non-housing benefits. Rather, “may be guided by universal credit standard allowances” [40].
- On the other hand, Supreme Court accepted that social security rates at subsistence levels. Applicants will understandably argue that paying rent out of subsistence benefit will deprive them of essential item.

# Issues left unresolved by *Samuels*

- LAs will wish, indeed have no option, to take restrictive approach.
- Court of Appeal will in due course have to grapple with:
  - In absence of amended guidance, can LAs use their own guidance/schedule of typical amounts?
  - Can such guidelines be local (or does this defeat objectivity requirement)?
  - Permissibility of (and if so, limits of) subjective approach (following objective starting point)?
- LAs will argue:
  - Notwithstanding need for objective starting point, each case is by its very nature fact sensitive.
  - Can rely on own guidance, e.g. Association of Housing Advice Services (AHAS) affordability guidelines (permission to appeal in *R(B) v Redbridge LBC* [2019] EWHC 1197 (Admin) refused).

# Take care out there!

- Fertile ground for applicant's advocates, e.g. where:
  - Over-reliance on averages instead of making factual findings of *actual* expenses.
  - Fail to identify/deal with issues, e.g.
    - Extra expenses for particular household.
    - No sum allowed for non-essential/entertainment.
  - Reasons poorly formulated, e.g. applicant can argue:
    - Decision dictated by own guidance/schedule.
  - LA's chosen guidance/schedule is not sufficiently evidence-based or based on a flawed methodology. LAs should keep reasons for preferring different sums to benefit allowances, JRF figures etc.



# Affordability – meaning (2)

- Guidance:

*“Housing costs should not be regarded as affordable if the applicant would be left with a residual income that is insufficient to meet these essential needs. Housing authorities may be guided by the Universal Credit standard allowances when assessing the income that an applicant will require to meet essential needs aside from housing costs...”* (17.46).

- Affordability must be judged on basis that accommodation available indefinitely, applying *Ali (Samuels at [34])*.
- Detailed financial statement – part of homelessness assessment

Budget Worksheet

Fixed Expenses	monthly	Debt payments	monthly
Mortgage	\$	Regular payment on credit card(s)	\$
Rent / condo fees	\$	Payment on line(s) of credit	\$
Property taxes (monthly)	\$	Other debt payments	\$
Hydro	\$	Car loan(s) / lease(s)	\$
Water	\$	<b>Total debt payments (B)</b>	<b>\$</b>
Heat (gas, oil)	\$		
Home telephone	\$	<b>Savings</b>	<b>monthly</b>
Cable / satellite TV	\$	RRSP contributions	\$
Home - lawn care, house cleaning etc.	\$	RESP contributions	\$
Internet	\$	Emergency fund	\$
Alimony / support payments	\$	Savings for goals	\$
School tuition	\$	Other savings	\$
Child care	\$	<b>Total savings (C)</b>	<b>\$</b>



# Reasons on affordability – detail required

- If no facts suggest may be unaffordable (uncontentious):
  - Mandatory – so still address.
  - But brief – amenable to standard form of wording.

*[The following paragraph assumes that no factors suggested the accommodation was unaffordable. If affordability was an issue you will need to summarise the facts and give reasons why you nonetheless concluded the accommodation was affordable. There is a separate 'affordability insert' which can help with this]*

We are satisfied the accommodation was affordable. Paying your housing costs would not have prevented you from paying for essential items. Nor would paying your housing costs have meant that you did not have the sums necessary to meet reasonable living expenses. When deciding that the accommodation was affordable I have considered a schedule the Council uses to help staff objectively assess likely living expenses for different types and sizes of household. I have also considered your income and the form you completed that summarised your typical expenditure.

When we interviewed you and made inquiries nothing else suggested the accommodation may not have been reasonable to continue to occupy in the context of homelessness.



## Reasons on affordability – detail required (2)

- Whether accommodation reasonable to continue to occupy / applicant can afford housing costs and necessities of life (*Bernard v Enfield LBC* [2001] EWCA Civ 1831)
  - Mr Bernard had to pay £29 shortfall for accommodation.
  - Evicted and found intentionally homeless.
  - Decision letter did not need to contain detailed assessment of applicant's resources.
  - Providing reasons given adequate, as per *Ermakov*.
  - Not required to set out arithmetical calculations or itemised quantifications of Mr Bernard's various expenses.



## Reasons on affordability – detail required (3)

- Defined negatively.
- “It is not for the reviewing officer to demonstrate positively that he has correctly understood the law. It is for the applicant to show that he has not. The reviewing officer is not writing an examination paper in housing law. Nor is he required to expound on the finer points of a decision of the Supreme Court.” (*Freeman-Roach v Rother DC* [2018] EWCA Civ 368 at [52]).
- “It is not for the decision letter to “demonstrate” anything; it is for the applicant to demonstrate an error of law, not the other way round.” (*Freeman-Roach v Rother DC* [2018] EWCA Civ 368 at [52]).



## Reasons on affordability – detail required (4)

- But, must engage with issues and provide sufficient reasons
- See for example *Farah v Hillingdon LBC* [2014] EWCA Civ 359)
  - Ms Farah evicted from private rental because of rent arrears.
  - Found intentional.
  - Central issue – could she afford rent.
  - Reviewing officer failed to engage with representations.
  - No reasons given as to why certain items of expenditure were not essential or excessive when applicant's case was that all expenditure was essential.
  - Decision quashed because of failure to give reasons.



# 'HOMELESS AT HOME'



## ***R (Edwards) v Birmingham CC [2016] EWCA Civ 173***

- Not every complaint about accommodation necessitates s.184 inquiries.
- LA entitled to ask questions to clarify:
  - Housing status if claims without accommodation.
  - Whether reason to believe accommodation may not be reasonable to continue to occupy [42].
- Act does not require inquiries to take any particular course.
- Birmingham CC's practice of making interview appointment at later date for applicant who does not require interim accommodation straight away is lawful [108].
- Where complaint about property condition LA may often consider condition (as described by applicant) is repairable, and that it's not unreasonable for household to remain until remedial works completed [42].

## ***R (Edwards) v Birmingham CC [2016] EWCA Civ 173 (2)***

- However, LA cannot defer consideration and decision whilst it conduct (non-statutory) inquiries, designed for defeating purpose of s.184(1) inquiries [43].
- In most cases ‘reason to believe’ tests must be considered on basis of what applicant says, together with any past history known to LA [45].



# Performing s.188 duty – “Homeless at home”

- No obligation to provide alternative accommodation if:
  - Applicant informed LA that willing to remain in current accommodation.
  - Which is not reasonable to continue to occupy indefinitely.
  - Providing applicant knows :
    - Right to accommodation.
    - Can request later (*Birmingham v Ali & Aweys* [2009] UKHL 36; *R (Edwards and others) v Birmingham CC* [2016] EWHC 173 (Admin)).
- LA entitled to rely on applicant’s ‘self-certification’ on suitability of homeless-at-home accommodation (*Edwards*).



# Exercise



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