

# Shortages in Social Care

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Starting shortly....

# Difficulties in provision: defences and the significance of A5

**Fenella Morris QC**

# *R (K) v Camden and Islington HA*

# Court of Appeal

- s.117 MHA 1983 does not impose an absolute obligation to provide
- there is a duty to use reasonable endeavours to make provision, but a discretion as to its nature and extent, including an obligation to have regard to the other demands on the budget
- a failure to use reasonable endeavours, absent strong reasons, would be an unlawful exercise of discretion, but a failure to provide where it is not practical to do so is not a breach of duty
- although a patient may remain longer in hospital longer where MHRT discharge conditions cannot be fulfilled, it is not a breach of A5 ECHR (majority)
- if it were a breach, it is not the fault of the health authority since it is not authorising the detention, and any remedy must be against the State (majority)

# *Kolanis v UK*

# ECtHR

- Breach of A5(4) and (5)
- 6000 euros for 12 months delay

# Practice and procedure (1)

- the importance of a clear and detailed record of the steps taken – the “best endeavours”
  - in an individual case
  - with respect to the market as a whole?
- the importance of evidence of budgetary pressures and concomitant risks to others (*R (AB) v LB Brent and others* [2021] EWHC 2843 (Admin))

# Practice and procedure (2)

- the precise terms of relief – interim and final
- contempt of court

# Practice and procedure (3)

- the well-established limits on the powers of the CoP
- cf the practice of some CoP judges seeking to encourage provision in individual cases by asking responsible authorities to file evidence or attend court

# Who is liable? (1)

- For the unnecessarily prolonged detention?
  - Detainer and/or struggling provider?
  - What is the position of a local authority which knowingly maintains rates for care providers which do not generate sufficient services to enable individuals to leave a DoL placement?

# Who is liable? (2)

- For the lack of a satisfactory process for resolving the position – the State?

# Difficulties in provision: no easy answers

# Care planning and meeting needs in times of shortage: what is 'reasonable'?

**Arianna Kelly**

# Duties to meet needs

- Care Act framework revolves around ‘meeting needs’ rather than entitlement to any particular services
- Situations in which shortages are focused in a particular sector (eg, domiciliary care) but less prevalent in other sectors
- Hospital discharge/situations in which the person may be at significant risk -> particular time sensitivity

# Duties to meet needs

- Making an offer which fully meets needs but is not what the person wants
- *Khana v London Borough of Southwark* [2001] EWCA Civ 999
- ‘Needs’ vs ‘preferences’

# Duties to meet needs

Differences between a local authority attempting *‘to do the best it can...in an already existing situation where a person in need declines to accept an offer’* of residential care *‘that the local authority reasonably considers to be the only type of accommodation appropriate for that person’s needs’* and compelling an LA to enter into a care arrangement that doesn’t meet needs

# Duties to meet needs

- *Khana*: duties to the person may be discharged if the local authority if a person unreasonably rejects a reasonable offer to meet the person's needs

# Duties to meet needs

- If there are multiple ways of meeting a person's needs, a local authority is entitled to take account of its own resources (*McDonald*)
- However, failure to meet terms of care plan as written -> unlawful and potential breach of Article 8

# Reasonable steps to reach agreement

- Care Act 2014 ss.25(5)/27(5):
  - In preparing a care and support plan or proposing to change how it meets needs, duty is on the local authority to ‘take all reasonable steps to reach agreement with the adult concerns about how it should meet those needs’
  - What are all reasonable steps?

# Reasonable steps to reach agreement

- *Davey v Oxfordshire*
  - Not an obligation ‘to reach agreement at any cost’, but to take reasonable steps
  - Considerable attempts at engagement: ‘substantial amount of effort, over an extended period of time’
  - Claimant could not identify any particular step, short of agreeing with the Claimant, that LA ought to have taken

# Well-being

- S.1 – Well-being duties – duty to have regard to ‘the importance of beginning with the assumption that the individual is best-placed to judge the individual’s well-being’
- Restrictions ‘kept to the minimum necessary for achieving the purpose for which the function is being exercised’

# Person-centred care planning

*10.20 The local authority must take into consideration the individual's preferences. The authority should consider the person's goals in approaching the authority for support, and the level or nature of support desired. Where the person wishes to take more control over their own care and support, this should be reflected in the route taken.*

# Person-centred care planning

*10.27 In determining how to meet needs, the local authority may also take into reasonable consideration its own finances and budgetary position, and must comply with its related public law duties. This includes the importance of ensuring that the funding available to the local authority is sufficient to meet the needs of the entire local population. The local authority may reasonably consider how to balance that requirement with the duty to meet the eligible needs of an individual in determining how an individual's needs should be met (but not whether those needs are met).*

# Person-centred care planning

*However, the local authority should not set arbitrary upper limits on the costs it is willing to pay to meet needs through certain routes – doing so would not deliver an approach that is person-centred or compatible with public law principles. The authority may take decisions on a case-by-case basis which weigh up the total costs of different potential options for meeting needs, and include the cost as a relevant factor in deciding between suitable alternative options for meeting needs. This does not mean choosing the cheapest option; but the one which delivers the outcomes desired for the best value.*

# What is reasonable?

- Service-wide:
  - are rates sufficient if there are persistent shortages?
  - What steps are being taken to address shortages in particular areas?
- Individual cases
  - Incurring some additional costs?
  - Flexibility re: providers
  - Flexibility re: direct payments

# Market shaping, provider failure & social care changes

**Sian Davies**

# Resources

## The Command Paper

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1015736/Build\\_Back\\_Better- Our Plan for Health and Social Care.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1015736/Build_Back_Better-Our_Plan_for_Health_and_Social_Care.pdf)

## Care Act 2014

<https://www.legislation.gov.uk/ukpga/2014/23/contents/enacted>

## Care and support statutory guidance

<https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance#using-the-care-act-guidance>

Chapter 4 <https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance#chapter-4>

Chapter 5 <https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance#chapter-5>

# Market shaping – overview of statutory provisions

- CA 2014 s.5 – strategic thinking about the market
- Core duty s.5(1) to promote the efficient and effective operation of a market in services for meeting care and support needs
- 5(2) – (3) - “must have regard”
- 5(4) – relationship to well-being principle

# Commissioning

- Guidance:

*“Promoting diversity and quality”*

*“Vibrant responsive market”*

By understanding the market, commissioning and facilitating interventions

# Joint Strategic Needs Assessment/ Joint health and wellbeing strategies

- Not new concepts -
- Pre- CA 2014 DoH Guidance

<https://www.gov.uk/government/publications/joint-strategic-needs-assessment-and-joint-health-and-wellbeing-strategies-explained>

# JSNA (cont'd)

- C&S Guidance 4.52: an assessment of local needs  
Should look at current and future health and care needs of local populations to inform and guide the planning and commissioning of health, well-being and social care services within LA area

*The anticipating needs part of the market analysis*

# Market Position Statement

- Guidance 4.34 - a way of showing that the s.5 duty is being met, by needs and supply analysis and consideration of future needs and trends
- Planning for anticipated needs (which should be identified within JSNA/ JH&WS)

# Market Position statement (cont'd)

- What support and care services people need and how they need them to be provided.
- The support and services available at the moment, and *what is not available but needs to be*.
- What support and care services the council thinks people will need in the future.
- What the future of care and support *will be like locally, how it will be funded and purchased*.
- How commissioners want to shape the opportunities that will be available.

# The reality?



<https://www.itv.com/news/2021-10-13/care-homes-are-in-crisis-pm-told-urgent-action-to-prevent-more-closures>

# Command Paper

40. We will also tackle persistent unfairness in the social care system. Under the current system, people who fund their own care often pay more than people who are funded through their Local Authority for equivalent care. For the first time, using legislation included in the 2014 Care Act, we will ensure that self-funders are able to ask their Local Authority to arrange their care for them so that they can find better value care.

# Factors affecting the care market

- Increase in minimum wage
- rise in NI
- Brexit impact/ staff shortages
- Other cost increases (petrol, energy costs)
- vaccine requirement for care staff (11 Nov 21): see <https://www.gov.uk/government/publications/vaccination-of-people-working-or-deployed-in-care-homes-operational-guidance/coronavirus-covid-19-vaccination-of-people-working-or-deployed-in-care-homes-operational-guidance#timeline-for-implementation>

# Compliance with s.5

- LAs will need to factor these impacts into their JSNA & market position statement
- Risks of provider failure to be identified - see CA 2014 sections 48 – 57 and Care and Support (Business Failure) Regulations 2014 which aim to ensure care and support needs of service user are met in event of business failure

# Risks/ vulnerabilities

- Care home closures/ provider failures
- LA unable to meet eligible needs because inadequate supply care staff
- Restriction in registered and community settings greater because of insufficient staff – ability to comply with least restrictive principle MCA 2005 and necessary and proportionate test under LPS

# Example

- SL is in a care home and subject to DOLS authorisation
- SL has her own home where her son lives and assessment is that she could reside there on a trial basis with 24/7 live in care
- No care agency can be identified able to provide live in care – SL is on a waiting list for assessment, two agencies have agreed to assess but don't have staff to do this
- In the interim, SL is identified as needing 1:1 support in the care home to lessen her distress at being there.
- Funding authority says no 1:1 care is available
- SL is reporting daily high levels of distress, wants to go home and does not participate in group activities at care home, remaining alone in bedroom



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