Coronavirus, social care, law and Occupational Therapists: a briefing note

Forward

As we are all well aware, we unfortunately find ourselves living in a time of change and uncertainty resulting from the Coronavirus Pandemic. As an Occupational Therapist working within the multi-verse of Local Authorities, I have personally found it particularly challenging to keep abreast of, and internalise, how the continual changes that this new world creates will affect our professional scope of practice and impact the work we conduct within social care on a daily basis. As always, I believe most of the answers stem from 2 core foundations, an understanding of the legislation and guidance that instructs us and directs our thinking, balanced alongside the continual need for robust, appropriate assessments of need and sound clinical reasoning. There have been various legislative changes and guidance notices released over the past few weeks and I believe it is essential our OTs, and the profession as a whole, understand the impacts these will have on us all whilst keeping alert to their ever evolving nature. With this in mind, we have commissioned this easily digestible, expert briefing note by Michael Mandelstam to help summarise some of the key changes and how they are already being applied. Please feel free to share it across your teams and with anyone whom you feel it will benefit; we hope it informs your practice and supports all OTs to think creatively, and participate fully, in assisting with the development of our profession and service delivery throughout the months ahead.

Matthew Box

Occupational Therapist/Founder & Director of inclusion.me

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Summary

This briefing note considers the pressures on local authorities, and on occupational therapists in particular, in the light of coronavirus. It should be noted that legal changes have for obvious reasons been fast moving and may continue to be so; this note was to up-to-date, to the best of the writer's knowledge, to 30th April 2020.

- ***Existing Care Act flexibilities***. The note points out the significant legal flexibilities within the normal rules of the Care Act 2014, in particular proportionate and appropriate assessment, prioritisation and provision of cost-effective care and support packages. Both of which occupational therapists are well used to considering. And all of which are directly relevant to coping with the pressures.

- ***Coronavirus Act 2020: Care Act easements***. It then goes on to consider the operation of what are called Care Act "easements." This term is used to refer to a

local authority's taking advantage of the Coronavirus Act 2020 which diminishes a local authority's duties under the Care Act. Guidance states that local authorities must take a formal decision before adopting these easements and reduced duties. So occupational therapists should be clearly informed by a local authority as to whether they are operating under the Care Act rules as normal – or the revised rules.

In particular, the Coronavirus Act removes the duty (in sections 9 and 10 of the Act) to assess adults in need and their carers. And removes the duty to meet a person's eligible needs – replacing it with a duty to meet care and support needs but only if a failure to do so would result in a breach of human rights. Likewise, in respect of providing support to meet a carer's needs.

- ***Human rights***. Therefore, if the revised rules are in place, the question of human rights comes to the fore. Some sort of assessment is still required because otherwise a decision about human rights would be uninformed. So, this briefing note considers also human rights and gives case examples relevant to occupational therapists. It points out that, for various reasons, including but not limited to the effect of the coronavirus, successful human rights challenges to adult social care decisions under the Care Act 2014 are difficult.

- ***Children.*** The Children Act 1989 (section 17, children in need) and Chronically Sick and Disabled Children Act 1970 are not directly affected by the Coronavirus Act 2020; there are no "easements" as there are for adult social care.

- ***NHS continuing healthcare.*** The Coronavirus Act 2020 relieves the NHS (clinical commissioning groups and NHS Trusts in relation to hospital discharge) of their duty to carry out NHS continuing healthcare assessments for adults.

- ***Disabled facilities grants***. The Coronavirus Act 2020 has nothing to say about disabled facilities grants (DFGs), so the normal rules are unaffected. A recent legal case is summarised in which the court's judgement in effect did not support a *blanket* cessation or delay in the processing of DFGs.

There is perhaps one over-arching point to make. That is, whatever the decision being made, under whatever legislation – for example, the normal rules of the Care Act 2014, its amended rules, Housing Grant, Construction and Regeneration Act 1996 (DFGs) – it is crucial for local authorities and their officers such as occupational therapists to explain themselves. So that in particular, if there have been real, practical limits on what could be done in terms of assessment or of meeting people's needs, the evidence, professional judgement and reasoning are clearly recorded and explained.

As the Local Government and Social Care Ombudsman has put it, in the light of coronavirus:" *If you use new or revised policies and processes this*

should not lead to arbitrary decisions and actions. Ensure you have a clear framework for fair and consistent decision making and operational delivery".[1]

1. Pressures on adult social care

The causes of the current pressures on adult social care can be broken down into at least the following.

- Adult social care was in any case under severe pressure before coronavirus.
- Adults in need in the community with symptoms (suspected or confirmed) may have greater needs.
- Adults recovering from coronavirus-related severe illness and hospitalisation, particularly intensive care, may have new and ongoing needs when discharged, including substantial rehabilitation and reablement needs, as well as additional care in the interim.
- Tens of thousands of other NHS hospital inpatients were discharged into the community abruptly (and sometimes prematurely), with therefore potentially greater needs than they might otherwise have had.
- The duty on the NHS to do continuing healthcare assessments has been suspended. This is likely to have a knock-on effect on adult social care.
- Social distancing measures, including isolation for those with symptoms, shielding of the vulnerable and protection of staff, all introduce practical obstacles for local authorities, including maintaining effective assessment of the person, the home environment and provision of care and equipment.

2. Dealing with adult social care pressures legally

There are two main ways legally of dealing with the above pressures.

First, to find ways of adhering to the normal rules of the Care Act 2014, despite the pressures. There is considerable flexibility within the existing rules, in terms of proportionate assessment, as well as finding cost-effective ways of meeting the needs of adults assessed as having eligible needs.

Second, is for a local authority to fall back from adherence to the normal rules of the Care Act 2014. And instead formally to adopt what guidance calls "easements" via the Coronavirus Act 2020; that is, relaxation of various duties and rules within the Care Act.

In particular, the Coronavirus Act 2020 states that local authorities no longer have a duty to carry out section 9 assessments of adults in need (or indeed of section 10 assessments of carers). And that there is no longer a duty

[1] Local Government and Social Care Ombudsman. *Good Administrative Practice during the response to Covid 19*, para 4, 30th April 2020. (In *Local Government Lawyer* magazine).

to meet assessed eligible needs of either adults in need or their carers (sections 18 and 20 of the Act). The duty now is only to meet a person's care and support needs, or a carer's support needs, in order to avoid a breach of human rights.

3. Ethical framework for local authority staff, including occupational therapists

Non-statutory guidance has been issued to local authorities in the form of an ethical framework to follow during the coronavirus outbreak.[2] *Non-statutory* guidance means guidance that should be generally had regard to by local authorities, although does wield as much clout as *statutory* guidance (see immediately below). Nonetheless, local authorities and occupational therapists would be well advised to refer to it. This guidance seems to apply both to operation of the Care Act as it stands, and to its operation if the easements are adopted. It sets out eight key values and principles:

1. Respect
2. Reasonableness
3. Minimising harm
4. Inclusiveness
5. Accountability
6. Flexibility
7. Proportionality
8. Community

A key point made within the guidance is that these values and principles will be particularly important in the case of prioritisation, rationing and, effectively, denial of care and assistance:

- "*Recognising increasing pressures and expected demand, it might become necessary to make challenging decisions on how to redirect resources where they are most needed and to prioritise individual care needs. This framework intends to serve as a guide for these types of decisions and reinforce that consideration of any potential harm that might be suffered, and the needs of all individuals, are always central to decision-making*".[3]

[2] Her Majesty's Government. *Responding to COVID-19: the ethical framework for adult social care*. 19th March 2020.
[3] Her Majesty's Government. *Responding to COVID-19: the ethical framework for adult social care*. 19th March 2020, p.3.

4. Care Act easements: adoption process

The Coronavirus Act 2020, schedule 12, states that the assessment duty under the Care Act 2014, for both adults and informal carers, is relaxed. The duty has been reduced to a power only. In addition, the duty, to meet a person's assessed eligible needs has been removed. The duty now is to meet person's care and support needs (or a carer's support needs) only to avoid a breach of human rights. However, statutory guidance states that despite what the legislation now clearly states, a local authority can implement these revised duties only if it does so formally and, effectively, as a last resort - when it is no longer reasonably practicable to comply with normal Care Act duties.

First, it should do so if it is being so overwhelmed that it is likely that urgent or acute needs will not be met, potentially risking life.

Second, the decision to do this must involve the principal social worker, director of adult social care, the lead member (councillor) and the Health and Wellbeing Board – as well as being discussed with the local CCG. Although this is a requirement only of guidance, it is what is called statutory guidance, to which local authorities must have regard – and must follow unless there is strong reason not to.[4]

Therefore, it seems that until such easements are formally adopted, local authorities – and occupational therapists as local authority officers - should continue to apply the Care Act as it stands, that is by applying the normal rules.

(**Note**. A number of other duties are also downgraded by Coronavirus Act and if the easements are adopted. These include not having to carry out financial assessments (although charging can be imposed retrospectively) and not having to review care and support plans. Similarly, the duties relating to care and support plan are reduced to powers; also, the duties relating to continuity of care when a person, in the community, moves from one local authority to another. However, if a local authority chooses to revise a care and support plan, it must still involve the service user and any informal carers in that process. In addition, the transition assessment duties, when children are approaching the age of 18, are also reduced to powers only.

Unaffected, for example, are the duties to promote well-being (section 1), of prevention (s.2), and to make safeguarding enquiries (s.42)).

5. Assessment under the normal Care Act rules: appropriateness and proportionality

[4] Department of Health and Social Care. *Care Act easements: guidance for local authorities*, 31st March 2020.

Entitlement to assessment under section 9 of the Care Act 2014 depends on an appearance of possible need, no matter how low, and also irrespective of the person's finances. So, this is a low threshold, which does not sound promising if local authorities are trying to manage pressures. However, the Care and Support (Assessment) Regulations 2014, secondary legislation made under the Care Act, state that an assessment must be appropriate and proportionate.

Remote assessment: adequacy. Many local authorities in any case already conduct a significant proportion of assessments (including eligibility decisions) over the telephone.[5] In each individual case, the local authority would legally need to reassure itself, on the evidence, that it has sufficient, reasonably reliable material on which to assess and take a decision remotely. Nonetheless, the current crisis is an opportunity to look closely at how telephone assessments can be utilised, as well as other technology involving images as well as sound.

Social distancing. Appropriate and proportionate assessment can clearly serve more than one purpose, including adherence to social distancing rules - for the protection of adults in need, of their informal carers and of local authority staff. It can also serve to husband a local authority's scarce staff resources. In addition, with a person's consent, greater focus could for example be placed on obtaining relevant information from other professionals and individuals with knowledge of the person; this may also serve to avoid unnecessary physical proximity.

Professional judgement about adequacy of remote assessment. Occupational therapists may understandably ask about when a remote assessment is legally adequate. The answer is that it is a matter of professional judgement. In terms of defending a decision to assess remotely, in one way or another, the OT would need to explain why she or he is satisfied that, in all the circumstances, the assessment was appropriate and proportionate. The sort of thing obviously to avoid, as occurred in one ombudsman case, is assessment or review on the telephone of a person with learning disabilities who was also deaf.[6]

Supported self-assessment. Supported self-assessment is anyway something which local authorities have a duty to offer under the Care Act 2014; this could be another way of gathering, remotely, information about a person's needs and how they might be met.

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[5] Department of Health. *Care and support statutory guidance*, 2016, para 6.3.
[6] Local Government Ombudsman. *Birmingham City Council* (05/C/18474), 2008.

Reaction of the courts and the ombudsmen. In the light of the coronavirus and social distancing, the courts will recognise that a remote assessment, normally not appropriate, might be so in this time of emergency. For instance, in relation to mental capacity assessments, the Court of Protection stated recently in the *BP v Surrey* case:

Remote assessment: necessary but vigilant scrutiny required. "Over the last few weeks, I have had cause to issue a number of guidance documents to address a rapidly changing landscape. On 19th March 2020 I recognised the reality that capacity assessments would, of necessity, for the time being required to be undertaken remotely. There is simply no alternative to this, though its general undesirability is manifest. Assessments in these circumstances will require vigilant scrutiny".[7]

This same case returned to court a few weeks later, when the question of remote assessment came up again. The care home had refused access to a doctor to carry out a capacity assessment (because of the risk to the residents, in a coronavirus-free care home, even though the doctor offered to wear protective clothing). Conversely, the doctor was not prepared to conduct such an assessment remotely.

The judge's view of this was as follows, and surely helpful not just in relation to mental capacity, but also to other types of assessment including those conducted by occupational therapists. It is interesting to note that if one professional would not conduct a remote assessment, then another would have to be found:

Remote assessments of mental capacity not desirable but necessary; creative use of other options required. The judge stated: "In my Guidance, dated 19th March 2020, I addressed some of the concerns identified by the professions and observed the reality that for the time being many, perhaps most, capacity assessments would require to be undertaken remotely. I stated, "there is simply no alternative to this, though its general undesirability is manifest". I further emphasised that with "careful and sensitive expertise" it should be possible to provide sufficient information. I specifically contemplated that video conferencing platforms were likely to play a part in this process as they now do in so many other spheres of life and human interaction.

If BP had remained at the home, it would have been necessary to instruct a different assessor. I remain of the view that creative use of the limited options available can deliver the information required to determine questions of capacity. It may be that experienced carers well known to P and with whom P is comfortable can play a part in facilitating the assessment. Family members may also play a significant role in the process. I am aware that

[7] *BP v Surrey County Council* [2020] EWCOP 17, 25th March 2020.

in many areas of the country innovative and productive approaches of this kind are proving to be extremely effective".[8]

In other words, a lower standard or threshold of what constitutes an adequate assessment is likely to accepted by the courts or the local ombudsman – even within normal Care Act rules.

6. Screening and prioritisation under normal Care Act rules

The Care Act does not contain time scales for assessment. In the absence of a statutory timescale, the duty must be performed within a reasonable period of time, that is, without undue delay. What constitutes undue delay will depend on the urgency and nature of the case.

Over the years, the local ombudsman has investigated many complaints about occupational therapy waiting lists – and generally emphasised the importance of having a fair, reasonably sophisticated and well-informed system for making priorities. All of which rely, at the least, on having decent referral information about the person; without that, a fair decision can scarcely be made.

The ombudsman has in the past stated that, in general, assessment in adult social care should in any event be carried out within four to six weeks, whilst recognising that complex assessments may take longer.[9] Clearly, however, in the light of a public health emergency, both the ombudsman and the courts are going to be sympathetic to unavoidable delays, as long as local authorities can show they have made reasonable efforts in all the circumstances.

7. Meeting eligible need under the normal Care Act rules

Local authorities have considerable leeway in how they meet a person's needs, under section 18 of the Care Act 2014. Whilst there is a duty to meet eligible need, local authorities are legally required to do this only in the most cost-effective way. As long as the cost-effective option can be demonstrated to be capable of meeting the need.

Occupational therapists are well used to this sort of thing. For example, in some areas they have been heavily involved in implementing "single-handed

[8] *BP v Surrey County Council* [2020] EWCOP 22, 29th April 2020.
[9] Local Government Ombudsman. *Complaints about councils that conduct community care assessments*, September 2013.

care", better named "reduced carer handling".[10] In the following two cases, there was significant reduction in each of the care packages. The decisions breached neither adult social care law nor human rights:

Replacing night-time carer with incontinence pads. It was lawful in one case to replace a night-time carer with incontinence pads. The woman concerned had a stroke and poor mobility; she was not incontinent but had a small, neurogenic bladder. She needed help, in the form of assistive handling, to get safely on the commode a few times a night. The local authority redefined her need as being to urinate safely at night; the courts accepted as lawful the offer of incontinence pads.[11]

Replacing care workers with equipment. A double-handed care package, for a 55-year old woman with an incurable, degenerative disease (muscular dystrophy) – she was both bedbound and wheelchair-bound - was reduced to single-handed care, through the introduction of a hoist. In addition, a night-time carer, who turned her during the night for pain management, was removed and replaced with a profiling bed. A legal challenge failed; the court held that the local authority had acted lawfully.[12]

8. Providing equipment or care without having conducted an assessment or made an eligibility decision

Given the difficulties there may be in carrying out section 9 assessments, in timely or adequate fashion, section 19 of the Care Act contains important legal powers (though not duties). One of them is to meet a person's needs without having first carried out a section 9 assessment, in case of urgency. Obviously, a certain amount must be known about the person and their situation to be able to put anything in place. But it may be that use of the section 19 power could take on added importance and usefulness during the coronavirus crisis.

9. Coronavirus Act: effect on the Care Act assessment duty

In order to cope with the pressures, there is a fallback for local authorities. This is because the Coronavirus Act 2020 states that from 31st March 2020, a local authority in England no longer has a duty to carry out section 9 assessments (or section 10 assessments for informal carers). There is nothing to stop it still doing so – there is still a power but no obligation. In which case, the precise and arguably burdensome rules under the Care Act itself and the Care and Support (Assessment) Regulations 2014 would in principle fall away.

[10] Personal communication to the author by Frances Kent.
[11] *R(McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33. And: *McDonald v United Kingdom* (2015) 60 E.H.R.R. 1.
[12] *R(VI) v London Borough of Lewisham* [2018] EWHC 2180 (Admin).

Some form of assessment still required. However, whilst a section 9 assessment is no longer a requirement, nonetheless the implications of the amended section 18 of the Act, mean that some (form of) assessment is still going to be required. Albeit not necessarily according to section 9 and its detailed rules. This is because section 18 states broadly that, although there is no longer a duty to meet people's eligible needs, nonetheless there is a duty instead to meet a person's care and support needs to avoid a breach of human rights. Clearly, in order to make that judgement about human rights, some form of assessment is going to be needed.

And this is where the relevant statutory guidance gets a little bit confusing. Because if a local authority does invoke the easements, and removes the assessment duty, that guidance states that local authorities should still assess people's needs. But it is about, where possible, avoiding "detailed" assessment; about "streamlining" and proportionality – whilst at the same time recording evidence, professional judgements and their rationale, and applying the *Ethical Framework* guidance (noted above).[13]

In other words, the guidance is stating that even if the detailed rules about Care Act assessment are disapplied, the local authority should still attempt to follow their gist, even though, strictly speaking, there is no longer a duty to do so.

Therefore, much of what has already been covered above, about appropriateness, proportionality and priority, would broadly remain relevant. And a local authority would need to show how it had sought to adhere to the statutory guidance in this respect.

10. Coronavirus Act, effect on Care Act: duty to meet need to avoid breach of human rights

Section 18 of the Care Act 2014, from 31st March 2020, now reads differently than before. The duty to meet assessed, eligible needs has been replaced. Section 18, as amended, states only that a local authority must meet a person's care and support needs if the local authority considers this necessary to avoid a breach of the person's human rights. (In addition, the person must be ordinarily resident within the local authority, or physically present but of no settled residence).

The guidance about easements is arguably not as clear as it might be on the legal position. With or without formal adoption of the easements, the duty

[13]Department of Health and Social Care. *Care Act easements: guidance for local authorities*, 31st March 2020.

to meet eligible needs under the normal rules no longer exists – full stop. Therefore, if a local authority does not formally adopt the easements, but purports to continue following the normal rule of meeting eligible need, it could not be doing so under section 18 of the Care Act. It would, seemingly, instead be invoking a power in (the also amended) section 19 of the Act, namely, to meet care and support needs - even when there would be no breach of human rights and therefore no duty to do so.

As already noted above, if a local authority (having adopted the easements) is no longer carrying out section 9 assessments, it is still going to have to do some form of alternative assessment in order to come to a view about human rights.

It is important to note also that under section 19, the power to meet need more widely, in case of urgency, remains (already discussed above).

11. Human rights

There are at least four relevant articles of the European Convention on Human Rights to consider:

- the right to life (Article 2).
- the right not to be subjected, amongst other things, to inhuman or degrading treatment (Article 3).
- the right not to be deprived, unlawfully, of one's liberty when mentally incapacitated (Article 5: this is better considered under the Mental Capacity Act 2005 which remains unchanged by the Coronavirus Act 2020).
- right to respect for private life, family life, home and correspondence (Article 8).

These rights were incorporated into United Kingdom law by the Human Rights Act 1998. (They do not derive from the European Union, so are unaffected by Brexit).

12. Human rights: Article 3, inhuman or degrading treatment

Article 3 is what is called an absolute right; it is not qualified. The courts have set a high threshold for it, meaning that it cannot be breached willy-nilly.

The European Court of Human Rights has stated that inhuman or degrading treatment means that the ill-treatment in question must reach a minimum level of severity and involve actual bodily injury or intense physical or mental suffering. Degrading treatment could occur if it "*humiliates or debases an individual showing a lack of respect for, or diminishing,*

his or her human dignity or arouses feelings of fear, anguish, or inferiority capable of breaking an individual's moral and physical resistance".[14]

In the context of asylum seekers, the courts considered, in the key *Limbuela* case, that Article 3 would be engaged:

- "*when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation*".[15]

The following case was more directly related to the sort of work that occupational therapists do in local authorities. It highlights that the threshold for breaching Article 3 is a high one, and likely to be higher still if any alleged breach is associated with a public health emergency.

In the *Bernard* case, a local authority, both its social services and housing departments, had failed to meet the needs for nearly two years of a woman who had suffered a stroke. She lived during this time in dire circumstances, but this was not a breach of Article 3 of the Convention (although it was a breach of Article 8: see below). It is worth summarising at a little length, since the sort of detail involved is bread and butter for occupational therapists:

Failure to provide equipment and adaptations or alternative accommodation: 'corporate neglect'. A local authority failed for some 20 months to meet the assessed community care needs of a woman, seriously disabled following a stroke.

Background. She had hemi-paralysis and almost no use of her right arm and leg. She had very limited mobility and was dependent on an electrically operated wheelchair, but the property was too small for this to be used. Likewise, too small for any substantial equipment or adaptations. She was doubly incontinent and had diabetes. She was cared for by her husband; he also looked after their six children, aged between 3 and 20.

Daily life. The husband's evidence was as follows. His wife was doubly incontinent and, with frequently less than one minute's warning of the need to use the toilet, commonly defecated or urinated before he could help her reach the toilet. He had to persistently clean the carpets, clothes and bedclothes. This happened several times each day. He had to go to the laundrette often twice a day, and buy incontinence pads, together with disposal pants and wipes. However, the family had had only State benefits to live on, so the cost of all this,

[14] *Pretty v United Kingdom* [2002] 2 FCR 97, European Court of Human Rights.
[15] *R v Secretary of State for the Home Department, ex p Adam, Limbuela, Tesema* [2005] UKHL 66, House of Lords.

and floor cleaner and carpet cleaner in addition, meant they were impoverished. This left them in rent arrears, unable to bridge the gap between housing benefit and the rent owing.

His wife could not access the upper part of the house at all and it was a real struggle for her to leave her bedroom, which was in fact, the family's living room accessed directly from the front door. With six children, there was no privacy. His wife found this situation depressing, demeaning and humiliating.

Local authority inaction. The local authority, for a number of reasons, including the rent arrears and a threat to evict the family, failed either to ameliorate the wife's situation through adaptations and equipment, or to move the family to more suitable accommodation. This failure stretched over a period of 20 months. A key cause of the inaction was the failure of the local authority's housing and social services departments to liaise effectively: it had been an "administrative void".

Article 3 human right: inhuman or degrading treatment: not breached, though finely balanced. Though the family had arguably been living in degrading conditions in the ordinary sense of the word, the court found that the "minimum level of the severity threshold" had not been crossed so as to breach Article 3. The living conditions had not been deliberately inflicted by the local authority; the suffering experienced was due to the local authority's "corporate neglect" and not to a positive decision by the defendant that they should be subjected to such conditions. Therefore, though a "finely balanced" matter, Article 3 was not breached.

Article 8: right to respect for private and family life. The court found, however, that for Article 8, the matter was not delicately balanced; it had clearly been breached. (See below).[16]

Thus, it can be seen that a breach of Article 3 is not easily made out. In the recent *MB* case, in the context of the coronavirus, it was argued that sudden discharge from hospital of a patient with serious mental health needs would amount to inhuman or degrading treatment. Her bed was needed in the light of a decision about clinical priority and limited public resources. The court rejected this argument:

Hospital discharge in the time of coronavirus; risk of distress, self-harm, suicide: no breach of Article 3. A woman had been in hospital for about a year. She had a diagnosis of functional neurological disorder, manifesting as variable upper and lower limb weakness, variable and intermittent upper limb tremor and speech disturbance. She had chronic migraine, fatigue and generalised pain. She had long-standing, complex psychological conditions, including post-traumatic stress disorder, disrupted attachment, obsessive compulsive disorder, possible borderline personality disorder and Asperger's syndrome. She needed help with personal care, including washing, dressing and toileting.

In the light of the coronavirus outbreak, she was told she would have to leave the hospital forthwith. She refused, arguing that the result would be likely to precipitate

[16] *R(Bernard) v London Borough of Enfield* [2002] EWHC 2282 Admin.

extreme distress, and possibly self-harm or suicide. And that this would amount to a breach of Article 3 in terms of inhuman or degrading treatment.

The court disagreed. It stated that the primary duty on the State under Article 3 is not to inflict suffering. Whereas the duty to take positive steps to avoid suffering is more limited and is a duty to take reasonable steps only. And, if the hospital discharge decision is being taken in the light of scarce public resources and on the basis of clinical priority, such that one patient needs a bed more than another, the court would be highly unlikely to interfere and find a breach of Article 3.[17]

13. Human rights: Article 8, right to respect for private life, family life, home

Unlike Article 3, Article 8 is a qualified right, although far more wide ranging. Article 8.1 states that: "*Everyone has the right to respect for his private and family life, his home and his correspondence. Private life includes a person's physical and psychological integrity*". Article 8.2, all importantly, provides for interference with the right, but it must be justified closely against the wording which is:

- "*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*".

This means that for a local authority to justify an interference it has in effect three hurdles to get over; first, was it acting lawfully under other, relevant legislation (such as the Care Act 2014); second, was it "necessary" in the sense of proportionate; third, was this necessary or proportionate interference for at least one of the listed purposes?

In the *Bernard* case, outlined immediately above, the local authority was unable, even at the first hurdle, to justify the undoubted interference with the woman's private life, because it had not acted in accordance with the law, namely the relevant community care legislation at the time. The court did find a breach of Article 8, although it should be borne in mind that, whilst no subsequent judicial ruling has held the *Bernard* case to have been wrongly decided, *this case is not to be viewed as evidence that the courts will lightly find a breach of Article 8 in adult social care*. The court stated:

[17] *University College London Hospitals NHS Foundation Trust v MB* [2020] EWHC 882 (QB).

Breach of Article 8 in Bernard case (background described above). The conditions made it virtually impossible for husband and wife to have any meaningful private or family life. Private life included physical and psychological integrity. And in this case, the local authority should have taken the positive steps of providing suitably adapted accommodation, which would have enabled the wife to move around and play some part at least in looking after the children. She would no longer have been housebound and confined to a shower chair for most of the day; and would have been able to operate as part of the family as a person in her own right. In short, her dignity as a human being would have been restored.

Although interference with the Article 8.1 right can be justified, the local authority fell in this case at the first hurdle in Article 8.2, since it was in breach of its statutory duty to meet the wife's needs under the community care legislation. Financial compensation of £10,000 was awarded.[18]

However, in another case shortly after, the Court of Appeal stated that for a breach of Article 8 to occur in adult social care, in terms of a local authority having a *positive* obligation to provide support, the predicament of the individual would also have to be sufficiently severe to engage Article 3 (which we have already seen sets a high threshold). The Court of Appeal did qualify this by noting that Article 8 may be more readily engaged if a family unit is involved, the welfare of children is at stake and family life needs to be maintained. The case was as follows:

No breach of human rights; disability and suitability of housing. A woman had serious health problems and cancer of the stomach. There were six family members in all, including her husband and children. The local authority was providing them with temporary accommodation. The accommodation was a maisonette, two floors, with steep stairs. Three bedrooms, the bathroom and lavatory were upstairs, the kitchen and living room were downstairs.

Within two weeks she had fallen down the stairs and become frightened to use them. One of her daughters also did so and broke her arm. The need to use the stairs seriously impaired the woman's ability to participate in family life in the kitchen, although the evidence was that she continued to come down to the lower floor, with assistance, for the next two years. The local authority installed a handrail. Her health deteriorated, she was admitted to hospital, she was discharged back to the maisonette. The family was offered alternative accommodation some ten months later which it rejected; the local authority then asked it to leave the temporary accommodation.

The Court of Appeal found no breach of Article 8 for the failure to provide suitable accommodation over the course of about a year.[19]

[18] *R(Bernard) v London Borough of Enfield* [2002] EWHC 2282 Admin.
[19] *R(Anufrijeva) v London Borough of Southwark* [2003] EWCA Civ 1406.

Similarly, in a more recent case, involving occupational therapists among others, the court found no breach of the Care Act 2014, the Housing Act 1996 or human rights, even though the disabled person concerned remained confined to his bedroom for a long period of time, with severe impact on him:

Unable to leave bedroom, even to use bathroom, for 20 months: flat unsuitable for wheelchair: severe impact of delay, no breach of human rights. A man had been living with his wife and young daughter in an eighth-floor council flat when he suffered a medical emergency resulting in the sudden loss of the use of his legs. He spent an entire period of 20 months without being able to leave his bedroom. He could not use the bathroom and had to rely on others for all his most basic hygiene needs. He could not use a wheelchair because the doorways and corridors of the flat were too narrow. He challenged the delay.

The court found that the local authority had followed the rules under both the Housing Act 1996 and the Care Act 2014; delay did not necessarily mean unlawfulness in all the circumstances. As far as Article 8 of the Convention went, the court stated there was no breach even though it accepted that the effect on the man was severe. This was because, there would be no compensatable breach of Article 8 on grounds of delay, unless the local authority had breached a legal duty, and an element of culpability and lack of respect could be demonstrated.[20]

In the *McDonald* case, involving assistive handling and incontinence pads for a woman who had suffered a stroke, the European Court of Human Rights held that there had been a breach of her Article 8 right but that it was justified for the economic well-being of the country.

Stroke, night-time carer, assistive handling, incontinence pads, dignity: no breach of human rights. A former ballet dancer suffered a stroke, aged 56, followed by a number of falls, leaving her with compromised mobility. She had a small and neurogenic bladder but was not clinically incontinent. She had a night-time carer to help her on to the commode several times a night; the need had been assessed as assistance on to the commode.

The local authority then told her she would have to use incontinence pads, instead of having the night-time carer. However, it had not initially carried out a formal review or reassessment to underpin this decision - so was at that stage in breach of its duty to meet the assessed need. Finally, after a years, it formally reassessed her need more broadly as safe urination at night – thereby creating, legally, more options through which to meet the need.

The European Court held that during that period of a yaer, her private life had been interfered with in terms of dignity – and could not be justified because the interference was not in accordance with the law (clearly providing incontinence pads was not the same as helping her to the commode).

[20] *R(Idolo) v London Borough of Bromley* [2020] EWHC 860 (Admin)

However, once her need had been reviewed and recalibrated, as it were, to safe urination at night, the provision of incontinence pads was now in line with the assessed need. And, at this point, the European Court held that the continuing interference with her private life/dignity had fallen into line, and been in accordance, with the law. The interference also pursued a legitimate aim, namely the economic well-being of the country and the interests of other service users. In terms of whether it was a necessary and proportionate decision, the Court held that her personal interests had been adequately balanced against the more general interest of the local authority in carrying out its social responsibility of provision of care to the community at large.[21]

Occupational therapists will immediately see that as long as they work in accordance with the Care Act 2014, in its original or amended form, the courts are highly likely in any case – let alone in a period of public health emergency – to be sympathetic to the limitations imposed upon local authorities.

(It should also be noted that, in any case, the judges at the House of Lords stage of the above *McDonald* case, before it went to the European Court, did not hold that the Article 8 right had even been interfered with in the first place, far less that interference had been unjustified).

Therefore, as far as pressures and resources go, the economic well-being of the country remains an important justification for interfering with Article 8 rights. Additionally, under the terms of Article 8.2, such interference can be justified in the interests of the protection of health, or the rights of other people. For instance:

Interference with Article 8 on health grounds and the rights of other people. A man was deprived of his liberty under the Mental Capacity Act 2005 in a care home; because of the coronavirus, a ban on family visits was put in place. The court found this undoubtedly interfered with his private life but was a proportionate measure for the protection of health, in the light of government guidance about care homes and the coronavirus.

(The court even seemed to suggest, that even if there was a breach of Article 8, that under Article 15 of the European Convention, "derogation" from Article 8 in an emergency is provided for - although such derogation would have to be implemented at central government level).[22]

In the *MB* case, already summarised above, the decision to discharge a woman with serious mental health problems, because her bed was needed by others at a time of public health emergency, was held to be an interference with the right to respect for private and family life. But was justified as necessary to protect the rights of other patients in need of inpatient treatment.[23]

[21] *McDonald v United Kingdom* (2015) 60 E.H.R.R. 1.
[22] *BP v Surrey County Council* [2020] EWCOP 17.
[23] *University College London Hospitals NHS Foundation Trust v MB* [2020] EWHC 882 (QB).

14. NHS continuing healthcare

Section 14 of the Coronavirus Act 2020 relieves the NHS of its duty to carry out NHS continuing healthcare assessments. Whether in the context of hospital discharge or otherwise.

As far as hospital discharge goes, guidance states that CCGs will "*fully fund the cost of new or extended out-of-hospital health and social care support packages, referred to in this guidance, for people being discharged from hospital or would otherwise be admitted into it for a limited time, to enable quick and safe discharge and more generally reduce pressure on acute services*". [24]

This, on its face anyway, has the potential to be a somewhat vague commitment; especially given the background of the chaotic functioning of even the normal continuing care rules.[25] Furthermore, the guidance also does not appear to be statutory guidance, so it would seem that it is guidance of the weaker variety. In any event, these arrangements could result in an extra burden falling on local authorities to arrange care.

15. Children: Children Act and Chronically Sick and Disabled Person Act 1970.

The Coronavirus Act 2020 does not amend either of these two pieces of legislation, except in relation to the transition duties of assessment when a child is approaching the age of 18. However, as already noted above, if local authorities are restricted in assessment and provision by the emergency situation, the courts and ombudsmen are likely to be at least sympathetic – as long as the local authority can evidence the efforts it has made.

16. Special education: Children and Families Act 2014

The Coronavirus Act 2020 (schedule 17) contains a power for the Secretary of State, by means of a notice, to disapply or modify legal requirements within the Children and Families Act 2014. In particular, local authorities and CCGs could be relieved of their duty to meet a child's educational and health needs, having first made reasonable endeavours to do so. A notice was issued to this effect on 30th April 2020.[26]

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[24] Her Majesty's Government. *COVID-19 Hospital Discharge Service Requirements*, 19th March 2020.
[25] Mandelstam, M. *NHS continuing healthcare: A-Z of law and practice*. London: JKP, February 2020.
[26] Coronavirus Act 2020: Modification of section 42 of the Children and Families Act 2014 (England) Notice 2020, 30th April 2020. (Secretary of State for Education).

Regulations have been passed, relaxing timescales within which certain duties must be performed. For instance, one of the amendments is as follows. If a local education authority seeks advice and information from certain other bodies in relation to assessing education, health and care (EHC) needs, those bodies have a duty under section 31 of the Children and Families Act 2014 to cooperate - and under regulations to do so within six weeks. The advice and information can be sought from, amongst others, NHS bodies (about health) or social services (about social care needs). Clearly, in either case, occupational therapists might be involved. The amendment to the regulations now allows for a modified timescale - for a reason related to the coronavirus.[27]

In addition, guidance has been issued specifically about risk assessment of children and young people with education, health and care plans. To decide whether or not they could have their needs met at home and be safer there than continuing to attend their educational setting. One of the considerations should be whether moving either equipment or services into a child or young person's home would enable them to be supported there rather than staying at school or college. Occupational therapists could well be involved with such considerations and decisions.[28]

17. Disabled facilities grants

The Coronavirus Act 2020 is silent about the Housing Grants, Construction and Regeneration Act 1996. Therefore, in principle, the rules about disabled facilities grants (DFGs) apply as normal. Clearly, however, public health considerations and social distancing will be relevant to issues such as assessment of need and the drawing up of proposals and plans.

Nonetheless, the courts, in a recent case, have indicated that a decision about what can and cannot be done about a DFGs in the context of coronavirus needs to be considered in the individual circumstances. The implications of this case seem to be that a local authority should not simply, as a blanket policy, suspend the processing of DFGs. Since some things can be done without requiring access to the home:

Processing a DFG application at the time of the coronavirus. Following a leg amputation, a woman had become wheelchair dependent. She was a council tenant. She required an

[27] See: Children and Families Act 2014, s.31. Special Educational Needs and Disability Regulations 2014, rr.6 and 8. And: Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020, r.8.
[28] Department for Education. *Coronavirus (COVID-19): SEND risk assessment guidance*. Published 19 April 2020

external platform lift, so she could access the street from her front garden, without calling on her sons to carry her up and the steps.

The court found overall that a DFG application had been rejected on the basis of what the court considered to be a fundamental misunderstanding of several of the DFG rules. The local authority therefore needed to reconsider its decision and the judge considered how quickly this should be done.

The woman could not exit her home, and her need was urgent. The judge acknowledged that the coronavirus and associated restrictions complicated matters – "but there is a significant difference between carrying out a reassessment of … general care needs which in my judgment is not required for a DFG (given that there is already a Care Act Assessment) but would have required access to the Claimant's home - and any assessment of the necessary building works or resolving a planning issue which, it is not suggested would require access to the Claimant's home".

The judge noted that the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 permitted movement for the purposes of work. And it was not being suggested that "most aspects of consideration of grant applications other than necessary visits are not capable of being carried out remotely". In normal circumstances, six weeks would have been more than adequate; the judge accepted it might be a little longer due to present circumstances.[29]

The court went on to note how the relatively recent coronavirus-related restrictions on the general population contrasted with the much greater restriction to which the woman had anyway been subject for the past year, because of her inability to leave her home for want of adapted access:

- "*The real lesson of the movement restrictions for corona virus for this case is in my judgment to place in stark relief the degree of deprivation of freedom for the Claimant which is involved in continued delay over the lawful consideration of a DFG. The UK population has been prevented from leaving their homes subject to a significant list of reasonable excuses for just over one week at the time of this judgment. In contrast the Claimant has been almost entirely prevented by her disability from leaving her home for at least one year. In those circumstances and on the basis of the facts as known to me today, in my judgment the reconsideration should not exceed a period of ten weeks*".[30]

[29] *R(McKeown) v London Borough of Islington* [2020] EWHC 779 (Admin).
[30] *R(McKeown) v London Borough of Islington* [2020] EWHC 779 (Admin).

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