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Legal Literacy Change Project

Using case law and local government & social care ombudsman reports

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Case law and **Local Government & Social Care Ombudsman decisions** offer instructive guidance for how practitioners, supervisors and managers should approach decision-making lawfully. Lawfulness refers both to standards in **administrative law** and to the **powers** and **duties** in primary legislation and associated regulations and statutory guidance. This resource:

- gives examples of case law judgments and ombudsman decisions
- identifies what might be drawn from each to inform practice
- provides guidance on analysing practitioners' own practice, drawing on the principles of administrative law.

Readers may find it helpful to:

- read the explanations given in sections one, two and three in advance of a supervision discussion/ team development session at which the content is discussed
- conduct a review or audit of current practice situations, using the guidance in section four.

1. The status of case law and ombudsman's decisions

Other than situations that involve matters of life and death, where decisions about the lawfulness of action have to be taken urgently, cases only progress to judicial review or to the ombudsman once the local authority's own complaints procedures have been exhausted by the complainant. This is because local authority complaints procedures are more informal mechanisms of complaint resolution, cheaper and quicker (*R (S) v Hampshire CC* [2009] EWHC 2537 (Admin); R *(Bhatti) v Bury MBC* [2013] EWHC 3093 (Admin)). Supervisors and managers will have had an opportunity to review their decision-making, which should include taking legal advice. However, there is evidence that often complaints are poorly investigated, with delay, defensive attitudes, incomplete responses and failure to follow published procedures (Preston-Shoot, 2019).

Key questions:

- What is your response when you receive a complaint?
- How familiar are you with the legislation and regulations that should shape it?

The *Health and Social Care (Community Health and Standards) Act 2003* and the *Local Authority Social Services and NHS Complaints (England) Regulations 2009* are relevant here.

Case law reports follow a standard format:

- case name
- court and judges hearing the case
- decision date
- brief overview of key legal issue
- summary of key facts and claim against the authority
- summary of the court's decision
- list of legislation and guidance referred to in the hearing and judgment
- full judgment.

Research in Practice produce monthly Case Law and Legal Summaries which look at the most recent legal judgments and translate these into key messages for adult social care practice. Further reports can also be found on the following sites:

- www.bailii.org (the database can be searched using a number of different search terms, including the name of the case, the full citation, the date and the topic)
- www.39essex.com
- www.mentalhealthlaw.co.uk

The convention for referencing case law requires:

- The name(s) of the parties
- The date of the judgment
- The law report series, volume and number in which the case is reported, or a neutral citation denoting the court and case number.

For example:

> *R (W) v Birmingham CC* [2011] 14 CCLR 516 (an example using a law report citation):

- The court action was initiated by the Crown (R = Regina), acting on the application of the individual named W, against Birmingham City Council. The use of the R in the case name is an historical formality to denote the fact that some cases, such as judicial review, are technically brought by the Crown. The judgment was made in 2011. It is reported in volume 14 of the *Community Care Law Reports*, page 516. In more recent cases, using a law report citation is uncommon.

> *R (McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33 (an example using a neutral citation, i.e. the initials of the court that heard the case and delivered the judgment):

- The court action was initiated by the Queen (R = Regina), acting on the application of the individual named McDonald, against the Royal Borough of Kensington & Chelsea. The judgment was made in 2011 and was case no.33 in the UK Supreme Court. In more recent cases it is usual to only see them referred to using their neutral citation. A list of the most common neutral citations can be found below.

EWHC = England and Wales High Court

EWCOP = England and Wales Court of Protection

EWCA = England and Wales Court of Appeal

UKSC = United Kingdom Supreme Court

Local Government & Social Care Ombudsman decision reports also follow a standard format. The report:

> sets out the complaint and the relevant law

> summarises what took place between the complainant and the local authority

> identifies whether and how the local authority was / was not at fault

> concludes with any necessary action by the local authority to resolve the complaint.

The Local Government & Social Care Ombudsman website hosts a search facility of adult and children's social care ombudsman decisions: www.lgo.org.uk/decisions. The adult social care section is divided into eight sub-sections:

1. domiciliary care
2. residential care
3. assessment and care plan
4. charging, direct payments
5. safeguarding
6. transition from children's services
7. transport.

Each sub-section can be searched by local authority and/or by year.

Decisions in judicial review are binding on the local authority unless successfully appealed in a higher court. Ombudsman reports conclude with recommendations for how the local authority should resolve the issue. Although not binding on the local authority, it would be highly unusual for the local authority to ignore these recommendations or to depart significantly from them in their response.

2. Examples

Below is an example of case law and one ombudsman report. Both raised questions related to core tasks mandated by the *Care Act 2014*, namely assessment of care and support needs, care and support planning and review, and the promotion of wellbeing.

(a) *R (VI) v Lewisham LBC* [2018] EWHC 2180 (Admin)

This case was brought by a 55-year-old woman with muscular dystrophy who used a wheelchair and required support for all her personal care. It revolved around whether a care package was lawful. R claimed that the assessment process and decisions regarding the care plan had failed to adequately consider the *Care Act 2014* requirements relating to the promotion of wellbeing (section 1), assessment (section 9) and eligibility criteria (section 13 and the *Care and Support (Eligibility Criteria) Regulations 2014*). R also alleged that the local authority had failed to cooperate during the assessment with NHS services (section 3) and had reached an irrational conclusion about her care and support needs.

On all counts, the local authority's approach was held to have been lawful. The judge held that the local authority's approach had not been irrational. Assessment had considered the factors prescribed in the *Care Act 2014* relating to wellbeing and R's eligible needs had also been assessed against the required specified outcomes relevant to her circumstances. The question of the pain R experienced had been considered and would need to be kept under review. However, health care professionals had given advice and the pain management proposals were not unreasonable. The adequacy of the care package to meet her needs, for example for social interaction and support, would also need to be kept under review but her needs had been considered and addressed lawfully.

(b) *Local Government and Social Care Ombudsman and North Tyneside MBC* (2019) Complaint Number 18 011 515

This complaint was about a man with disabilities and health conditions that affected his mobility and ability to complete activities associated with daily living. The complaint centred on delay in the local authority authorising extra support following an assessment and the rationality of a subsequent assessment decision to reduce the hours of care and support. The person bringing the complaint claimed that delays in authorising a budget increase that had been assessed as required, and the handling of his subsequent complaint, had a devastating impact. He could not, for example, afford to pay his personal assistant for the required extra hours.

The report of the decision sets out current law, namely sections 9 and 10, *Care Act 2014*, on assessment, the threshold for eligibility (*Care and Support (Eligibility Criteria) Regulations 2014*), and the legal rules on direct payments. The decision report does not explicitly name administrative law standards but does refer to assessment and decision-making being conducted within a suitable and reasonable timescale, with the person kept informed and being given a copy of the final outcome.

The local authority was found to have been at fault and the judgment concludes with the action required of the local authority to rectify **maladministration**. It was found:

- The local authority's response to the complaint was inadequate.
- The delay covered a two-year period and the local authority had failed to provide the support required without good reason.
- The authority had caused significant and avoidable distress.
- The personal assistant had experienced financial loss. The personal assistant had, in fact, provided the extra hours unpaid; had they not done so, the impact would have been much greater.

The local authority agreed to backdate the budget, reassess the person's needs, compensate them and their personal assistant and review its handling of complaints.

(c) Messages for practice

What do supervisors, managers and practitioners, need to consider in order to defend their practice approach in the event of a potential challenge? The key messages from these two examples are:

- Local procedures may not be an accurate interpretation of the legal rules. Even if local procedures do accurately interpret what the legal rules require, it is always best practice to refer to the original source documents, the legal rules themselves.
- In the event of a complaint to the Local Government & Social Care Ombudsman or an application for a judicial review, record keeping will come under scrutiny.
- **Administrative law standards** set out clear requirements for decision-making that involves the use of statutory authority. Unsurprisingly, therefore, case law judgments and ombudsman decisions begin with statute law. Administrative law standards are explored further in the ***Show your workings: Making good decisions*** tool.

Key questions

- Where does your supervision or management oversight begin – with the local authority's own requirements or the content of the legal rules themselves?
- How clearly do records state:
  - what was discussed in supervision?
  - when and between whom?
  - the reasons why some options were excluded?
  - for what reasons the final decision was reached?
- Is it clear from the records:
  - what legal rules were considered and which were considered relevant to the person and their circumstances and why?
  - how the person's requirements were implemented?

As the two examples illustrate, the ***Care Act 2014*** as primary legislation, amplified in regulations and statutory guidance, spells out the requirements for assessment and decision-making in relation to individuals' care and support needs and how any services are to be arranged. At the Act's heart is the promotion of wellbeing.

Key question

- How prominent in your discussions and decisions are these requirements?

However, the focus of supervision and/or management decision-making might revolve around other complex issues that also engage legal rules. Mental capacity and deprivation of liberty provide an example. In ***Essex CC v RF and Others* [2015] EWCOP 1**, a 91-year-old man was removed from home and deprived of his liberty unlawfully, breaching his rights to liberty and to private and family life (***Human Rights Act 1998*; *European Convention on Human Rights*** (ECHR) Articles 5 and 8). The judgment found:

- Practice was inadequate.
- There was no record of his wishes and feelings.
- RF lacked capacity to make decisions regarding his care and residence, but did not lack capacity in relation to contact with others. While a number of the local authority's capacity assessments had concluded that RF lacked capacity about these decisions, others had found that he did not lack it. The local authority had not paid enough attention to the capacity assessments that concluded he did not lack capacity.
- There had been delay in instituting a standard authorisation for deprivation of liberty, which had then not been renewed.
- There were no insurmountable barriers to his return home with a package of care and support.

Until April 2022, under the current Deprivation of Liberty Safeguards (DoLS), practitioners need to abide by the **DoLS code of practice 2008**. Following this, DoLS will be phased out and the **Liberty Protection Safeguards** will govern deprivation of liberty processes.

This highlights the importance of drawing on the legal rules contained in the ***Mental Capacity Act 2005***, and paying due regard to the **Code of Practice** that accompanies it, when assessing mental capacity and making best interest decisions. It shows that it may be necessary to lay the issues before a judge, in this case at the Court of Protection, in a timely and balanced way, as required by administrative law.

The process of assessment, care planning, decision-making and review must also be **reasonable** and **rational**. This requires that the tasks are approached with competence, judged by the standards of the day derived from research, guidance issued, feedback from the person with care and support needs or carer, and knowledge of the issues underpinning the problems or issues being presented.

All possible ways of understanding a situation and of intervening in it should be evaluated. The process should be characterised by fairness and thoroughness; it should be balanced and not biased. It is important to scrutinise whether all available evidence that it might be reasonable to consider has been included, with decisions clearly recorded on why greater weight has been given to some sources of evidence than others. Although it is unusual to see specific timeframes set out in primary legislation, that does not mean that time is irrelevant. Administrative law requires that decision-making is timely.

Whether the task revolves around assessment of care and support needs, including aids and adaptations, and/or mental capacity, the person should be involved in the process to the fullest extent possible. There may be family members and/or friends, as in the Essex case, with an interest in the person's life, whose views should be sought.

Ultimately supervisors and managers, as much as practitioners, are accountable for the conclusions that are drawn and the decisions that are reached. Administrative law requires that people with care and support needs and anyone reasonably associated with them, including family members, care-givers and advocates, are given copies of the decision and the reasoning that led to it. The reasons themselves must be reasonable, and capable of lawful and rational explanation.

Adult social care is concerned with promoting social justice. That includes a commitment to ensuring that human rights and equality of opportunity are promoted. The law provides support for this commitment in the shape of the ***Human Rights Act 1998*** and the ***Equality Act 2010***. Although not enshrined in UK legislation in the same way the European Convention on Human Rights is through the *Human Rights Act 1998*, case law decisions and government guidance also acknowledge the relevance of standards outlined in broader international human rights Conventions, such as *the* ***UN Convention on the Rights of Persons with Disabilities (2006).*** This human rights treaty, which the UK has signed and ratified, aims to promote and protect the basic fundamental human rights of all people with disabilities.

Key questions

- How do you judge whether a task has been approached with professional competence?
- What would you expect to see evidenced in what the practitioner talks about and includes in their written work?
- How do you ensure that, recognising the volume of demands on practitioners, the local authority's response has been timely with regard to assessment and intervention?
- Have all those with a legitimate interest in the person's life been consulted and involved, and their views taken into consideration?
- What oversight do you give to how decisions are formulated, recorded and communicated?
- How prominent in your discussions and decisions is law talk around human rights and equality?

3. Conducting a review of current practice

Underpinning the analysis of the examples above are concepts drawn from administrative law. The standards set out in administrative law are as important as adherence to the powers and duties in primary legislation and associated regulations and statutory guidance. They are concerned not with whether the right decision was made, but whether the right decision-making approach was taken. The process of decision-making must abide by key principles:

- **Lawfulness** (performing statutory duties, abiding by regulations and statutory guidance, and not exceeding the limits of statutory authority, respecting human rights).
- **Rationality and reasonableness** (avoiding a decision so outrageous in its defiance of logic or accepted standards that no sensible person could have reached it, and avoiding a decision so extreme that no reasonable authority could have reached it; decisions must also be fair).
- **Timeliness** (avoidance of delay).
- **Full examination of all relevant considerations** (making detailed enquiries, considering all the facts, avoiding bias, weighing up all relevant factors).
- **Not fettering discretion** (ensuring that blanket policies do not fetter how discretion is exercised in an individual person's circumstances, for example, by prohibiting exceptions to the rule).
- **Participation and information-giving** (providing sufficient information, support and advocacy where needed to ensure meaningful participation in decision-making).
- **Giving reasons for decisions** (ensuring reasons are explained and can be justified with reference to the evidence on which they are based).

  (Preston-Shoot, 2019)

For further detail on administrative law standards, see resource 3g ***Show your workings: Making good decisions*** and Preston-Shoot (2019).

In practice, such principles are not always explicit in how decisions are made. The purpose of this exercise is to practise making them more so.

You can use the table below to reflect on your decision-making process in a recent or current situation.

Administrative law principle	How was this met in decision-making processes?	Where is the evidence of this located?
Lawfulness.		
Rationality and reasonableness.		
Timeliness.		
Full examination of all relevant considerations.		
Avoidance of fettering discretion.		
Participation and information-giving.		
Provision of reasons for decisions.		

Discuss the outcome of your evaluation in supervision and make a commitment to any changes that might be necessary in your approach. This exercise can be repeated at intervals.

References

Preston-Shoot, M. (2019). *Making Good Decisions: Law for Social Work Practice, 2nd Edition*. London: Macmillan/Red Globe Press.

Research in Practice
The Granary Dartington Hall
Totnes Devon TQ9 6EE
tel 01803 869753
email ask@researchinpractice.org.uk

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