



# Online Meeting: Adult Social Care in the Current Health Crisis

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# Adult Social Care in the Current Health Crisis – AN OVERVIEW

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# Adult social care in the health crisis – funding, policy, guidance

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- £1.6 billion allocated to local government to meet additional costs from Covid-19
- 16.3.2020 CQC stops routine inspections in response to Covid-19
- 19.3.2020 publication of the Covid-19 - Hospital Discharge Requirements (- unless required to be in hospital patients must not remain in an NHS bed)
- 19.3.2020 Updated Covid-19 Guidance on residential care provision (visits from friends and family stopped)

# Adult social care in the health crisis – funding, policy, guidance

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- 19.3.2020 Guidance - *Responding to Covid-19: The ethical framework for adult social care*
- 31.3.2020 Coronavirus Act 2020 Sch 12 Pt 1 (relevant to England) in force and guidance on the changes – *Care Act easements: guidance for local authorities*
- 1.4.2020 Coronavirus Act 2020 Sch 12 Pt 2 (relevant to Wales) in force
- To come - guidance on the operation of DoLS during the health crisis.

# Coronavirus Act 2020 (CVA 2020) s 15 and Sch 12

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*“This is a health and social care obliteration Bill by a different name.”*

Baroness Grey-Thompson, Hansard, 24 March 2020

*“The overriding purpose of these easements is to ensure the best possible provision of care to vulnerable people in these exceptional circumstances.”*

*“They are time-limited and are there to be used as narrowly as possible.”*

Care Act easements: guidance for local authorities, 31 March 2020 GOV.UK

## CVA 2020 Sch 12

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- CVA 2020 Sch 12, Pt 1 came into force on 31 March 2020 (SI No. 388/2020)
- Sch 12 Part 1 applies to England; Sch 12 Part 2 to Wales (amending the Social services and Well-being Wales Act 2014 with effect from )
- What is the effect of CVA 2020 Sch 12 Pt 1?
  - it makes far-reaching amendments to the Care Act 2014 (CA 2014) but its impact will depend on how it is implemented. It must be read with the guidance – *Care Act easements: guidance for local authorities*.

### **The main change to CA 2014 duties under CVA 2020 Sch 12 Pt 1**

Duties to assess needs for care and support and to meet those needs are replaced with a duty on Local Authorities (LAs) to meet needs for care and support where not to do so would be a breach of an individual's human rights, and a power to meet needs in other cases.



## **Suspension of pre-amendment duties to assess needs for care and support**

Paragraph 2 removes a list of CA 2014 duties to assess needs for care and/or support and to make a determination on whether a person meets eligibility criteria but preserves a power to do these things.

Sched 12, para 2 (1)-(3): A local authority does not have to comply with its duty under

- S 9 (assessment of an adult's needs for care and support)
- S 10 (assessment of a carer's needs for support)
- Regulations made under s 12(1) or (2) about carrying out assessments or s 12(3) and (4) (duties to give written records of assessments)
- S 13 (determination of whether needs meet the eligibility criteria) or any regulations made under that section
- Ss 58 and 59 (assessment of a child's needs for care and support, where it is likely to have such needs after becoming 18)
- Ss 60 and 61 (assessment of a child's carer's needs for support where the child is likely to have such needs after becoming 18)
- Ss 63 and 64 (assessment of a young carer's needs for support where he/she is likely to have needs for support after becoming 18))
- Any regulations made under s 65(1) (further provisions about assessments under ss 58-64).

The LA can carry out any assessment or determination it considers appropriate for the purpose of the modified duties (Sch 12 para 2(4)).

### **Suspension of CA 2014 duty to carry out financial assessments**

- A LA does not have to comply with the duty under s 17 CA 2014 to carry out a financial assessment.
- However a LA may not make a charge for meeting needs during the period when the Schedule has effect without making a financial assessment.
- There is power to conduct a financial assessment at a later date and to charge for meeting needs that were met before the financial assessment was conducted.
- This is so long as the LA informs the person that there may be a charge at the time when the service is carried out, or before the service is carried out (see Care Act easements: guidance for local authorities, 31.3.2020, Annex B).

### **Suspension of pre-amendment CA 2014 duties to prepare and review care and support plans**

A local authority does not have to comply with duties under ss 24, 25 or s 27(1), (4), (4A) and (5) Care Act 2014 :

the duties to prepare a care and support plan and to review plans, to conduct a re-assessment where circumstances have changed, the duty where it is proposed to change how needs are met to take reasonable steps to reach agreement with the adult about how to meet needs.

### **Duty to meet eligible needs under s 18 CA 2014 is replaced by a duty to meet needs in order to avoid a breach of ECHR**

The pre-amendment 18 CA 2014 - the duty to meet needs for care and support which meet the eligibility criteria – is replaced by a different version of s 18 CA 2014:

- (1) A local authority must meet an adult's needs for care and support if -*
  - (a) The adult is ordinarily resident in the authority's area or is present in its area but of no settled residence,*
  - (b) the authority considers that it is necessary to meet those needs for the purpose of avoiding a breach of the adult's Convention rights, and***
  - (c) there is no charge under section 14 for meeting the needs or, in so far as there is, condition 1, 2 or 3 is met.*



## CVA 2020 Sch 12 paras 5 & 6

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### **Amendments to the power to meet needs for care and support**

Sch 12 para 5 amends s 19 CA 2014 including to allow for the power to be used without carrying out a needs assessment or a financial assessment .

### **Duty to meet a carer's eligible needs replaced by duty to meet a carer's needs in order to avoid breach of ECHR**

Sch 12 para 6 amends the duty to meet a carer's needs for support under s 20 CA 2014, so that instead of the eligibility criteria, the threshold for the duty is now *“the authority considers that it is necessary to meet those needs for the purpose of avoiding a breach of the carer's Convention rights”*.

## CVA 2020 Sch 12 para 14

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### **Discharge of hospital patients with care and support needs**

Sch 12 para 14 amends CA 2014 Sch 3 as regards requirements for the LA to conduct a needs assessment where an NHS body considers that it is not likely to be safe to discharge the patient from hospital unless arrangements for meeting the patient's needs for care and support are in place. The NHS body serves on the local authority an assessment notice.

Instead of the LA being required to carry out a needs assessment and identify eligible needs it would meet, the Sch 3 is amended to require that the LA must inform the NHS body whether the patient has needs for care and support (or carer has needs for support), which of them it proposes to meet and how.

# CVA 2020 Sch 12 paras 8, 12, 15

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## **Other duties LAs do not have to comply with**

- By Sch 12 para 8, a LA does not have to comply with
  - regulations made under s 30 CA 2014 (the Choice of Accommodation Regulations 2014)
  - s 47(2) CA 2014 (the duty to prevent or mitigate loss or damage to property of adults being cared for away from home).
- By Sch 12 para 12, a LA does not have to comply with any duties imposed by s 37 (duties of notification, assessment etc. when a person moves) or s 38 CA 2014 (duty to meet needs where assessment not complete on day of the move).
- By Sch 12 para 15, a LA does not have to comply with any duties imposed by s 2A(2)-4 or (6) Chronically Sick and Disabled Persons Act 1970 or s 17ZH(2)-(4) or (6) Children Act 1989 (services during transition to adult care and support).

## CVA 2020 Sch 12 paras 16 & 17

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### **Duties that arose pre- and post- commencement of CVA 2020 are equally affected by the suspensions**

By Sch 12 para 16 CVA 2020 the suspensions and modifications brought in by Sch 12 Pt 1 are made applicable to duties arising before or after the commencement of CVA 2020.

(This applies to duties under CA 2014 Pt 1 and the transitional duties to over 18s under the Chronically Sick and Disabled Persons Act 1970 and s 17ZH Children Act 1989.)

### **After the suspensions are lifted – how long will local authorities have to deal with the backlog of assessments?**

By Sch 12 para 17, in determining for the purpose of any proceedings whether a local authority has complied with its duty to carry out a relevant assessment within a reasonable period, a court must take into account among other things (a) how long the suspension of the duty was in effect and (b) how many assessments the local authority has to carry out following the ending of the suspension of its duty.

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# CVA 2020 Sch 12 para 18

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## Power to issue guidance

By Sch 12 para 18:

- the Secretary of State may issue guidance about how a local authority must exercise its functions in consequence of Sch 12 Pt 1
- a LA must have regard to any guidance issued under paragraph
- a LA must comply with such guidance issued under this paragraph as the Secretary of State directs
- a LA may disregard any guidance under s 7 LASSA 1970 or s 78 CA 2014 so far as it is inconsistent with guidance issued under this paragraph.



# The Guidance - *Care Act easements: guidance for local authorities*

## 31.3.2020

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**The Guidance says LAs should comply with pre-amendment CA 2014 duties as long and as far as possible:**

*“The easements took legal effect on 31 March 2020 but should only be exercised by LAs where this is essential in order to maintain the highest possible level of services. **They should comply with the pre-amendment Care Act provision and related Care and Support Statutory guidance for as long and as far as possible.**”* (para 4 of the Guidance)

*“**Local authorities should only take a decision to begin exercising the Care Act easements when the workforce is significantly depleted, or demand on social care increased, to an extent that it is no longer reasonably practicable for it to comply with its Care Act duties (as they stand prior to amendment by the CVA) and where to continue to try to do so is likely to result in urgent or acute needs not being met, potentially risking life.**”* (para 6 of the Guidance)

Annex A of the Guidance adds that the above circumstances should be differentiated from “*decisions that need to be made in response to Government’s guidance about social distancing*” – such as closure of a service because it is not safe to keep people together in a building.

# The Guidance - *Care Act easements: guidance for local authorities*

## 31.3.2020

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### **LA decision-making to operate the Care Act easements**

The Guidance is clear that the decision to operate the easements should be taken locally by each LA.

See para 6 of the Guidance: **Steps Local Authorities should take before exercising the Care Act easements:**

- The decision is to be taken by the Director of Adult Social Services in conjunction with the Principal Social Worker, with lead member involved and briefed, and fully informed by discussion with local NHS CCG leadership;
- There should be a documented decision with evidence that was taken into account;
- Where possible the record should include a list of points among which are:  
the nature of changes to the workforce, steps which have been taken to mitigate against the need for this to happen, the expected impact of the measures taken, how the changes will help to avoid breaches of people's human rights at a population level and when this decision will be reviewed again.

# The Guidance – *Care Act easements: guidance for local authorities*

## 31.3.2020

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### LA decision-making before/after operating the easements

Annex A in the Guidance sets out recommended governance and decision-making:

- Stage 1 is “Business as usual” to continue “as long as feasible”;
- There is a possible “Stage 2: applying flexibilities under the pre-amendment Care Act” where due to Covid-19 related absence some types of service may be delayed or cancelled in the short-term;
- Stage 3 is a decision to operate the easements to streamline services and Stage 4 under the easements to prioritise between services.
- Any decisions taken when operating the easements to prioritise or reduce support should be reviewed every two weeks, and full service should be restored as soon as is reasonably possible;
- It is notable that the example given of where there is a need to consider prioritisation between services is when operating the easements is “*where a LA is faced with a decision about reducing personal care for one person so that another gets the help they need to eat*”.

# The Guidance - *Care Act easements: guidance for local authorities*

## 31.3.2020

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### **When operating the Care Act easements, what is required of LAs as regards assessments and care planning?**

See ANNEX B of the Guidance:

- LAs should still assess people's social care and support needs and make a written assessment
- It may not be possible or necessary for assessments to be face-to-face
- The discretion to review care and support/support plans remains in force (s 27(2) and (3)), including the requirements to involve service users and carers
- Further guidance on direct payments is to be published.

See also para 5 of the Guidance:

- LAs expected to observe the Ethical Framework for Adult Social Care
- LAs expected to continue to respect the principles of personalization and co-production.

## **What is the status of the Guidance on the Care Act easements?**

The Guidance states that it, and the Ethical Framework for Adult Social Care, “*fall under Schedule 12*” and that “*Schedule 12 of the Act gives the Secretary of State a power to direct Local Authorities to comply with this guidance and the ethical Framework, and the Department will keep this under review.*”

Therefore, by virtue of CVA Sch 12, para 18(2):

- a local authority must have regard to the Guidance;
- the Secretary of State could at a future date use the power under Sch 12 para 18(3) to direct local authorities to comply with it.

## Other areas to consider

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Safeguarding duties under CA 2014

S 117 MHA 1983 after-care duty

Changes to NHS Continuing Health Care assessments



# Adult Social Care in the Current Health Crisis: *Human Rights Considerations in Accessing Care and Support*

Shu Shin Luh, Garden Court Chambers

3 April 2020



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# Human Rights Exception: Duty to Meet Care and Support

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## *Amended by CVA 2020 Sch 12 Para 4*

### **18 Duty to meet needs for care and support**

(1) A local authority, ~~having made a determination under section 13(1),~~ must meet the adult's needs for care and support which meet the eligibility criteria if—

(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence,

~~(b) the adult's accrued costs do not exceed the cap on care costs, and~~

**(b) the authority considers that it is necessary to meet those needs for the purpose of avoiding a breach of the adult's Convention rights, and**

(c) there is no charge under section 14 for meeting the needs or, in so far as there is, condition 1, 2 or 3 is met.

**In this subsection "Convention rights" has the same meaning as in the Human Rights Act 1998."**



# Human Rights Exception: Duty to Meet Carer's Support Needs

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*Amended by CVA 2020 Sch 12 Para 6*

## **20 Duty and power to meet a carer's needs for support**

(1) A local authority, ~~having made a determination under section 13(1),~~ must meet a carer's needs for support which meet the eligibility criteria if—

(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence,

**(aa) the authority considers that it is necessary to meet those needs for the purpose of avoiding a breach of the carer's Convention rights, and**

(b) in so far as meeting the carer's needs involves the provision of support to the carer, there is no charge under section 14 for meeting the needs....

(c) .... [charging provisio]

**In this subsection "Convention rights" has the same meaning as in the Human Rights Act 1998."**

# Human Rights Considerations: Article 2

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1. *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
  2. *Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.*
- Negative duty to refrain from intentional and unlawful taking of life, but also positive duty to take appropriate steps to safeguard lives of those: **L.C.B. v UK**, 9 June 1998, § 36)
  - Positive obligation (sometimes) to take preventive operational measures to protect an individual whose life is at risk: see **Osman v UK** (2000) 29 EHRR 245 at §§115 in respect of criminal acts of others or **Keenan v UK** (2001) 33 EHRR 913 to prevent mentally ill person from committing suicide where known risks and reasonable steps were not taken.
  - For a positive obligation to arise, must be established that authorities knew or ought to have known at the time of the existence of a real and immediate risk to life of individual and failure to take measures within scope of powers which, judged reasonably, might have been expected to avoid that risk: **Osman** §116.



# Human Rights Considerations: Article 3

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***No one shall be subjected to torture or to inhuman or degrading treatment or punishment.***

- Focus in CVA 2020 likely to be on “inhuman or degrading treatment”
- Prohibition is formulated in absolute, non-derogable terms
- Formulated in negative terms but construed as creating positive obligation on state to ensure that no one suffers from degrading treatment.
  - “Treatment” implies something more than passive from the state
- Threshold is high – not “real risk” threshold used in context of asylum / protection immigration claims: *R (Q) v SSHD* [2003] EWCA Civ 364 at §63
- Although no assessment duty (Para 2(1)(a) Sch 12 CVA 2020), must *at minimum* take steps to determine whether “necessary” to avoid “treatment” of an Article 3 threshold.



# Article 3: *Pretty v UK* (2002) 35 EHRR 1

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*"As regards the types of 'treatment' which fall within the scope of article 3 of the Convention, the court's case law refers to 'ill-treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment 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, it may be characterised as degrading and also fall within the prohibition of article 3. The suffering which flows from naturally occurring illness, physical or mental, **may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.**"*



# Article 3: *Price v UK* (2001) 34 EHRR 1285

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- §30: ... no evidence .. of any positive intention to humiliate or debase the applicant. However ... to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3.

## Concurring opinion of Judge Greve:

*It is obvious that restraining any non-disabled person to the applicant's level of ability to move and assist herself, for even a limited period of time, would amount to inhuman and degrading treatment – possibly torture. In a civilised country like the United Kingdom, society considers it not only appropriate but a basic humane concern to try to improve and compensate for the disabilities faced by a person in the applicant's situation. In my opinion, these compensatory measures come to form part of the disabled person's physical integrity.*

*The applicant's disabilities are not hidden or easily overlooked. **It requires no special qualification, only a minimum of ordinary human empathy, to appreciate her situation and to understand that to avoid unnecessary hardship** – that is, hardship not implicit in the imprisonment of an able-bodied person – she has to be treated differently from other people because her situation is significantly different.*



# Article 3: *R (Limbuela) v SSHD* [2005] UKHL 66

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**Issue:** when does deprivation becomes so grave that state is obliged to intervene and provide support in respect of an asylum seeker who is homeless?

- §7: ... the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life.
- §8: 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.
- §9: not ... possible to formulate any simple test applicable in all cases. But if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed.



# Article 3: *MSS v Belgium and Greece* (2011) 53 EHRR 2

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No general obligation to house the homeless but:

§§249-264:

*The Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. **The Court ... considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.***





# Article 3: Other Case Law

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## Positive duty also found in:

- Power to protect from abuse:
  - ***A v UK (1998) 27 EHRR 611*** - child applicant caned by stepfather
  - ***Z and Ors v United Kingdom (2002) 34 EHRR 97*** – severe physical abuse and neglect
- Obligation to protect health of persons deprived of liberty:
  - ***Keenan v UK (App No 27229/95, 3 April 2001)*** – concerning lack of effective medical care for mentally ill prisoner who committed suicide. High duty to protect health of those deprived of liberty.
  - ***Kudla v Poland, App no 30210/96***



# Human Rights Considerations: Article 5

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***1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:***

***(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants***

- ***Cheshire West and Chester Council v P [2014] UKSC 19:*** acid test for DOLS: where P is under continuous / constant supervision and control and not free to leave his or her residence
- MCA 2005 s1(6) – “least restriction option”
  - before a best interests decision is made or act done, “regard must be had” to whether the purpose sought can be achieved in a way that is “less restrictive of the person’s rights and freedom of action.”
- In order to avoid disabled person experiencing DOLs that is unnecessary – care and support need to be provided



# Human Rights Considerations: Article 8

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1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
  2. *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.*
- ‘Respect for’ – positive obligation to take steps to secure private life, rather than obliging ‘not to interfere’ : **Markcx v Belgium (1979) 2 EHRR 330**
  - ‘Family life’ / ‘home’ / ‘correspondence’ – given everyday meaning
  - ‘Private life’ – more expansive to include a “*person's physical and psychological integrity*” for which respect is due in order “*to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings* : **Botta v Italy (1998) 26 EHRR 241**
  - Qualified right - interference permitted but only where ‘lawful’ and done in proportionate way in pursuant to legitimate aim



# Human Rights Considerations: Article 8

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- CVA 2020 alters duty to review under s27 CA 2014 (para 11 Sch 12) BUT not power to carry out a review
- If power to review exercised, requirements under s. 27(2) (adult's C&S) and 27(3) (carer's support) continue to apply:
  - (a) must have regard in particular to the matters referred to in section 9(4) (and specified in the plan under section 25(1)(d)), and
  - (b) must involve— (i) the adult to whom the plan relates, (ii) any carer that the adult has, and (iii) any person whom the adult asks the authority to involve or, where the adult lacks capacity to ask the authority to do that, any person who appears to the authority to be interested in the adult's welfare.

*(similar provision for carer)*
- **Right to participate in decision a procedural guarantee under A8:** *W v UK* (1998) 10 EHRR 29 at §64 – “involved in the decision-making .... to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of Article 8.”

**Duty to involve adult / carer not changed – cannot change C&S by stealth**

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# Article 8: R (Bernard) v Enfield [2002] EWHC 2282 (Admin)

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**Facts:** Severely disabled applicant, incontinent, who through LA failure to assess her community care needs properly, and then provide necessary services, had been forced to live with family in conditions where confined to lounge, defecates / urinates in clothing because cannot get to toilet. Left in situation for more than 20 months.

## **Held:**

- No breach of Article 3: conditions were “*deplorable*” and “*manifestly unsuitable*” but “*not deliberately inflicted upon her by the defendant*” and “*no intention to humiliate or debase the claimants is a most important consideration.*”: §§28-31
- Breach of Article 8: Those entitled to residential care are “*particularly vulnerable group. Positive measures have to be taken (by way of community care facilities) to enable them to enjoy, so far as possible, a normal private and family life.*”
  - Following LA assessments, “*under obligation not merely to refrain from unwarranted interference in the claimants' family life, but also to take positive steps, including the provision of suitably adapted accommodation, to enable the claimants and their children to lead as normal a family life as possible, bearing in mind the second claimant's severe disabilities.*”



# Article 8: Anufrijeva v LB of Southwark [2003] EWCA Civ 1406

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**Facts:** 3 asylum-seekers: C1 complain of LA failure to provide accommodation to meet special needs, C2 complain of maladministration & delay in the handling of their asylum applications, receiving inadequate financial support, causing psychiatric injury; C3 complain of maladministration arising from delay.

## **Held:**

- §33 – notes possibility of duty to provide positive welfare support, such as housing, in special circumstances, but no requirement to do so.
- §43 – distinction drawn between ‘family life’ and ‘private life’
  - hard to conceive of a situation in which predicament of an individual will be such that Article 8 requires him to be provided with welfare support where not sufficiently severe to engage Article 3.
  - may more readily be engaged where a family unit is involved. Where the welfare of children is at stake, Article 8 may require the provision of welfare support in a manner which enables family life to continue.



# Article 8: McDonald v RBKC [2011] UKSC 33 and (2015) 60 EHRR 1

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**Facts:** Disabled ballerina w limited mobility and bladder problems. Not incontinent, receiving carer help to use commode. LA withdraws care and provides incontinence pads.

## **Held:**

- *Bernard* considered at §17 but contrast drawn between impact on ‘family life’ and ‘private life’, whether incontinent, interference with ability to be involved in children’s care.
- No breach of A8 (§19). LA went to “*great lengths*” to involve M and carer in care planning. Took account of her feelings, desires, safety and independence. Respected her dignity and autonomy by allowing her to choose her package.
- Whilst understanding M’s “*deep antipathy*” toward notion of using incontinence pads, “*cannot establish an interference*” and even if so, “*clearly justified*” as “*necessary for the economic well-being of the respondents and the interests of their other service-users and is a proportionate response to the appellant’s needs because it affords her the maximum protection from injury, greater privacy and independence, and results in a substantial costs saving.*”

**ECtHR** found A8 breached but only in relation to period where LA failed to properly assess.

Technical breach. **What if assessment duty removed under CVA 2020?**



## Article 8: MV v Newham LBC [2018] EWHC 3298 (Admin)

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**Facts:** 5 year old disabled child (epilepsy and seizures). Family are NRPF. Placed by LA in single room in shared house. Later offered suitable 2-bed.

**Held:**

- §91 - Follows *Anufrijeva* – no A8 breach if not sufficient to breach A3 in private life context
- §§92-93 – no different positive obligation to support where particularly vulnerable by reason of disability even if not sufficiently severe to engage A3. Vulnerability “important factor” in considering whether engages A3.
- Breach of A8 only arises where (§95):
  - (1) There has been failure to provide C with some benefit / advantage to which C was entitled as a matter of public law
  - (2) There are grounds for criticising failure to act such as element of culpability and
  - (3) Impact on private / family life of PL failure is serious and has caused substantial prejudice

**But CVA taking almost all of those duties away unless breach of ECHR – circular.  
Court will need to modify (1) or else it will be hard for C to or hard to show that**





# Human Rights Consideration: Article 14

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*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

- **Ambit:** engages a Convention Right
- **Status:** based on particular status / characteristic of person. Not limited to innate characteristics such as gender, sexual orientation, congenital disabilities.
  - *Mathieson v SSWP* [2015] UKSC 47: includes disabled child in need of lengthy hospitalisation
  - *Hurley v SSWP* [2015] EWHC 3382: disabled person being cared for by family member.
- **Justification** for discrimination

**Equality Act duties not curtailed by CVA 2020**, so 'due regard' under s. 149 EA 2010 applies as well as reasonable adjustments (s. 20) and other safeguards.



# Relevance of International Law Obligations?: UN Convention on the Rights of Disabled Persons

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- **Article 4:** ensure and promote full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination on the basis of disability
- **Article 5(3):** in order to promote equality and eliminate discrimination, take all appropriate steps to ensure that reasonable accommodation is provided.
- **Article 17:** Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.
- **Article 19:** recognises *"equal right of all persons with disabilities to live in the community, with choices equal to others"* and require *"effective and appropriate measures to facilitate"* full enjoyment and *"full inclusion and participation"* in community, including by ensuring that: (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement; (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community; (c) Community services and facilities are available on an equal basis to persons with disabilities and are responsive to their needs."

***Burnip v BCC* [2012] EWCA Civ 629:** "potential to illuminate" domestic law approach. See *Davey v Oxfordshire CC* [2017] EWHC 354 (Admin) at §§44-46, upheld by CoA ([2017] EWCA Civ 1308).

# Relevance of International Law Obligations?: UN Convention on Right of the Child

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## Features affecting children

- No duty to assess regarding transition to adulthood under ss. 58 and 59 CA 2014: para 2(3)(a) Sch 12
- No duty to assess carer's need for support (s. 60 CA 2014): para 2(3)(b) Sch 12
- BUT wider power to meet carer's needs for support under s. 62 CA 2014: para 2(4) Sch 12
- No duty to assess young carer's needs for support under ss. 63 and 64 CA 2014: para 2(3)(c) Sch 12

## Problems?

- Cliff edge for disabled children? – may have care and support needs which will not be identified. Will LA withdraw support already provided to disabled child under CSDP 1970 or CA 1989 s. 17?
- No residual power to provide for young carer's needs for support as compared to child's carer

## Relevant UNCRC Articles?

- **Article 3:** Best Interests
- **Article 24:** Right to enjoyment of “highest attainable standard of health”
- **Article 26:** Right to “benefit from social security, including social insurance ... to achieve full realization of this right in accordance with national law.”
- **Article 27:** Right to “standard of living adequate for the child's physical, mental, spiritual, moral and social development.

# Contact

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# The Coronavirus Act 2020

*Discussion of some of the (non-human rights based) legal considerations arising from Schedule 12, Local Authority Care and Support*

Connor Johnston, Garden Court Chambers

April 2020



GARDEN COURT CHAMBERS



@gardencourtlaw

# Context (1) – the purpose of the new regime in Sch 12

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- *Care Act easements: guidance for local authorities* (DHSC 1 April 2020) section 2 –

‘Local Authorities and care providers are already facing rapidly growing pressures as more people need support because unpaid carers are unwell or unable to reach them, and as care workers are having to self-isolate or unable to work for other reasons. The Government has put in place a range of measures to help the care system manage these pressures. Local Authorities should do everything they can to continue meeting their existing duties prior to the Coronavirus Act provisions coming into force. In the event that they are unable to do so, it is essential that they are able to streamline present assessment arrangements and prioritise care so that the most urgent and acute needs are met. The powers in the Act enable them to prioritise more effectively where necessary than would be possible under the Care Act 2014 prior to its amendment... They are time-limited and are there to be used as narrowly as possible.’

[Emphasis added.]



# Context (1) – the purpose of the new regime in Sch 12

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- *Explanatory notes* para 36 –

‘The immediate operationalisation of these provisions... is intended to reduce operational burden so Local Authorities can prioritise the service they offer in order to ensure the most urgent and serious care needs are met.’

<https://publications.parliament.uk/pa/bills/lbill/58-01/110/5801110en.pdf>



## Context (2) – use of new regime not mandatory

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- Contraction in duty under s18(1) Care Act 2014 coupled with implicit expansion of power under s19(1). Because local authorities (subject to ordinary residence rules) can meet needs in any case where there is no duty to do so.
- *Guidance* section 4 – ‘The easements took legal effect on 31 March 2020, but should only be exercised by Local Authorities where this is essential in order to maintain the highest possible level of services.’
- *Guidance* section 3 – ‘The duties on Local Authorities to meet eligible... needs... are replaced with a power to meet needs. Local Authorities will still be expected to take all reasonable steps to continue to meet needs as now.’
- *Guidance* section 6 – ‘A Local Authority should only take a decision to begin exercising the Care Act easements when the workforce is significantly depleted, or demand on social care increased, to an extent that it is no longer reasonably practicable for it to comply with its Care Act duties... and where to continue to try to do so is likely to result in urgent or acute needs not being met, potentially risking life. Any change resulting from such a decision should be proportionate to the circumstances in a particular Local Authority.’





# Safeguard (1) – constraints on decision to implement powers

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## Substantive considerations

- *Guidance* section 6 & Annex A –
  - whether it is ‘reasonably practicable’ to maintain existing regime or whether doing so ‘likely to result in urgent or acute needs not being met, potentially risking life’;
  - whether implementation of new regime is ‘proportionate’;
  - the nature of the changes to demand or the workforce;
  - the steps that have been taken to mitigate against the need for this to happen;
  - the expected impact of the measures taken;
  - how the changes will help to avoid breaches of people’s human rights at a population level;
  - the points at which the decision will be reviewed again.



# Safeguard (1) – constraints on decision to implement powers

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## Substantive considerations

- Section 2 Care Act 2014 –
  - ‘A local authority must provide or arrange for the provision of services, facilities or resources, or take other steps, which it considers will— (a) contribute towards preventing or delaying the development by adults in its area of needs for care and support;... (c) reduce the needs for care and support of adults in its area’.

## Procedural requirements

- *Guidance* section 6 & Annex A –
  - Decision should be agreed by the Director of Adult Social Services in conjunction with Principal Social Worker.
  - Lead member, Health and Wellbeing Board and Local NHS CCG leadership must be involved.
  - Decision should be communicated to providers, service users, carers and DHSC.



## Safeguard (2) – decisions must be assessment based

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- Notwithstanding suspension of s9 CA 2014 duty, LAs should still carry out assessment before refusing, reducing or ceasing provision of services. Para 2(4) Sch 12 CVA 2020 – ‘Nothing in this paragraph prevents a local authority from carrying out any assessment, or making any determination, it considers appropriate for the purposes of exercising its functions under section 18, 19, 20 or 62 of CA 2014.’
- Human rights assessment necessary adjunct to s18(1) Care Act 2014 duty. Both as matter of common-sense and to ensure compliance with s3 Human Rights Act 1998. Without assessment decision maker cannot evaluate whether duty to provide services to avoid breach of ECHR has arisen. Assessment therefore also necessary to decide whether s19(1) power is available. Because power only arises where s18(1) duty not owed.
- *Guidance* section 3 and Annex B - LAs ‘will still be expected to respond as soon as possible... and make an assessment of what care needs to be provided’ and ‘should still assess people’s social care and support needs throughout this period and should make a written record of this assessment.’
- See also *R v Gloucestershire CC ex p Barry* (1997-98) 1 CCLR 7. Reducing services without reassessment unlawful.



# Safeguard (3) – functions should be exercised in line with the well-being duty

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- Section 1 Care Act 2014 – (1) The general duty of a local authority, in exercising a function under this Part in the case of an individual, is to promote that individual's well-being. (2) “Well-being” , in relation to an individual, means... — (a) personal dignity...; (b) physical and mental health and emotional well-being; (c) protection from abuse and neglect... (3) In exercising a function under this Part in the case of an individual, a local authority must have regard to the following matters in particular—...(b) the individual's views, wishes, feelings and beliefs; (c) the importance of preventing or delaying the development of needs for care and support...
- This duty still applies, to discharge of any ‘function’, notwithstanding suspension of s9(4)(a) Care Act 2014. Arguable, at least, that decision whether or not to exercise s19(1) power is a ‘function’ for these purposes.
- Thus far, courts have effectively treated this as a ‘have regard’ duty. See *R (Davey) v Oxfordshire CC* [2017] EWHC 354 (Admin) at para 21 and [2017] EWCA Civ 1308 at para 52; *R (MG) v Brent LBC* [2018] EWHC 1777 (Admin) at para 66; *R (VI) v Lewisham LBC* [2018] EWHC 2180 (Admin) paras 45-52 & 84-89.
- But does s1 Care Act 2014 require more than this? The duty is to ‘promote’ not simply to ‘have regard’...



# Safeguard (4) – involvement of adult in revisions to plan

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- Para 11(c) Sch 12 CVA 2020 – suspends those parts of s27 Care Act 2014 which deal with the obligation to review care and support plans (when asked to do so, or at regular intervals) but preserves duty under s27(2).
- Section 27(2) Care Act 2014 – requires LA to (a) have regard to well-being factors when revising care and support plans and (b) involve the adult, his or her carer and anyone else whom the adult asks the LA to involve.
- Given the duty to prepare a care and support plan under ss24-25 Care Act 2015 has been suspended (para 11(a) Sch 12 CVA 2020) could an LA legitimately say that they can cut care and support without revising the plan? After all, if the plan is optional then surely revising it must be optional too?
- Probably not. It would be odd to keep s27(2) in effect if revisions were not needed. And involving the adult in the revision of the plan is not an onerous duty, and promotes a number of the core principles of the Care Act 2014.
- In addition, the *Guidance* still envisions that *some* kind of care and support plan will be necessary, albeit the requirements of a lawful plan will be less rigid. See para 3(3) and Annex B: LAs will ‘still be expected to carry out proportionate, person-centred care planning which provides sufficient information to all concerned, particularly those providing care and support, often at short notice’.



# Safeguard (5) – powers must be exercised to promote purpose of statute

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- Decisions to reduce or cease support are exercises of the discretion under s19(1) Care Act 2014 and so should be exercised in line with purpose of statute. *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.
- But which statute? The Care Act 2014 or the CVA 2020?
- Both arguably, because the two statutes have to be read side by side: the CVA 2020 does not amend the Care Act 2014, in the classical sense of omitting, substituting or inserting text. Rather it requires the relevant provisions of the Care Act 2014 to ‘ha[ve] effect as if there were omitted [words X, Y, Z]’ etc.
- Purpose of Care Act 2014 encapsulated in the well-being and prevention duties under ss1-2 which we have already dealt with. So considering purpose of Care Act 2014 separately may not add much to decision-making. But consideration of the purpose of the CVA 2014 may add an additional protection.
- Purpose of CVA 2014 (as described at outset) is to deal with the pressures of the Covid-19 crisis by allowing social services to streamline their processes and prioritise cases according to need.



# Safeguard (5) – powers must be exercised to promote purpose of statute

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- Therefore, for example, a refusal of services to an individual or a group of persons based on immigration status (e.g. those with NRPF condition attached to their leave) likely to frustrate this purpose.
- A general refusal to exercise powers at all may also be unlawful. E.g. ‘owing to the crisis we will only be providing the care and support necessary to avoid a breach of human rights’. That’s tantamount to saying we will comply with s18(1) Care Act 2014 duty but will never exercise s19(1) power. And statutory powers must be exercised in *some* cases. See *De Smith's Judicial Review 8th Ed.* 9-002 – ‘A decision-making body exercising public functions which is entrusted with discretion must not disable itself from exercising its discretion in individual cases.’
- A refusal to exercise powers in an individual case because this will not result in a breach of his/her human rights may also be unlawful. The absence of a human rights breach means no s18(1) duty is owed. That is a precedent condition for existence of the s19(1) power. The precedent condition for existence of a power cannot be used a justification for refusing to exercise the power. This would be like saying ‘I have a power therefore I will not use it’. That would frustrate purpose of having the power.



# Summary

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- Consider systemic issues. If an LA is implementing the new regime, have they gone through the right decision making process? This may be clear from the notification your client has received. Or it may be information you need to request.
- In any case involving refusal, reduction or cessation of support LA should carry out an assessment.
- Your client will need to be involved in any revision to his/her care and support plan.
- When making representations in support of your client's case that he/she should be provided with care and support invite the LA to provide support pursuant to the s18(1) Care Act 2014 duty (if appropriate) and in the alternative, in exercise of the s19(1) power.
- Shu Shin's presentation has covered the issues/evidence relevant to the existence of the s18(1) duty.
- These same factors (even if they are not sufficient to establish duty exists) will be relevant to exercise of the s19(1) power. In addition make further representations focused on the well-being duty and the statutory purpose of the CVA 2020, and how these apply to your client's case.





# CVA 2020: Community Care, Localism Act 2011 and affected groups

Tim Baldwin, Garden Court Chambers

3 April 2020



GARDEN COURT CHAMBERS



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# Introduction

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The aim of this part of the meeting is to examine the following issues:

- Is the Localism Act 2011 (England), s 2 Local Government Act 2000 (Wales) of practical use?
- Duty of Public bodies to act in accordance with the law and reasonably
- What statutory duties in delivering care are unaffected
  - No derogation (at present) from Human Rights; Equality Act 2010, s 15, 19 and 149 untouched
  - Public Health Acts 1936 and 1984 (which deals with infection).
- Civil Contingencies Act 2004 not invoked
- How are specific specific groups affected if at all



# S 1 Localism Act 2011 (s 2 LGA 2000)

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## Localism Act 2011

- S 1 Local authority's general power of competence
  - (1) A local authority has power to do anything that individuals generally may do.
  - (2) Subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise—
    - (a) unlike anything the authority may do apart from subsection (1), or
    - (b) unlike anything that other public bodies may do.



# Localism Act 2011 (LGA 2000)

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- S 2 Boundaries of the general power

- (1) If exercise of a pre-commencement power of a local authority is subject to restrictions, those restrictions apply also to exercise of the general power so far as it is overlapped by the pre-commencement power.

- (2) The general power does not enable a local authority to do—

- (a) anything which the authority is unable to do by virtue of a precommencement limitation, or

- (b) anything which the authority is unable to do by virtue of a postcommencement limitation which is expressed to apply—

- (i) to the general power,

- (ii) to all of the authority's powers, or

- (iii) to all of the authority's powers but with exceptions that do not include the general power.

- ....



# Localism Act 2011 (LGA 2000)

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- S 3 Limits on charging in exercise of general power
  - (1) Subsection (2) applies where—
    - (a) a local authority provides a service to a person otherwise than for a commercial purpose, and
    - (b) its providing the service to the person is done, or could be done, in exercise of the general power.
  - (2) The general power confers power to charge the person for providing the service to the person only if—
    - (a) the service is not one that a statutory provision requires the authority to provide to the person,
    - (b) the person has agreed to its being provided, and
    - (c) ignoring this section and section 93 of the Local Government Act 2003, the authority does not have power to charge for providing the service.
  - (3) The general power is subject to a duty to secure that, taking one financial year with another, the income from charges allowed by subsection (2) does not exceed the costs of provision.
  - (4) The duty under subsection (3) applies separately in relation to each kind of service.



## S 2 LGA 2000

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(1) Every local authority [ in Wales] are to have power to do anything which they consider is likely to achieve any one or more of the following objects–

- (a) the promotion or improvement of the economic well-being of their area,
- (b) the promotion or improvement of the social well-being of their area, and
- (c) the promotion or improvement of the environmental well-being of their area.

(2) The power under subsection (1) may be exercised in relation to or for the benefit of–

- (a) the whole or any part of a local authority's area, or
- (b) all or any persons resident or present in a local authority's area.

[...]

(3B) In determining whether or how to exercise the power under subsection (1), a local authority in Wales must have regard to the [local well-being plan for its area published under section 39 or 44(5) of the Well-being of Future Generations (Wales) Act 2015

]3[



# S 3 LGA 2000

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Limits on power to promote well-being.

- (1) The power under section 2(1) does not enable a local authority to do anything which they are unable to do by virtue of any prohibition, restriction or limitation on their powers which is contained in any enactment (whenever passed or made).
- (2) The power under section 2(1) does not enable a local authority to raise money (whether by precepts, borrowing or otherwise).
- (3) The [Welsh Ministers] may by order make provision preventing local authorities from doing, by virtue of section 2(1), anything which is specified, or is of a description specified, in the order.



# Case law

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*R. (on the application of AR) v Hammersmith and Fulham LBC* [2018] EWHC 3453 (Admin)

- A local authority could not exercise its general power under the Localism Act 2011 s.1 to provide an EU national with accommodation where he was ineligible for housing assistance by virtue of the Housing Act 1996 s.185. Section 3 of the 2011 Act prevented s.1 from being used to do something which was prohibited by another statute. Query ability to return to Lithuania and engagement of Human Rights? Would it be different now

*R. (on the application of GS) v Camden LBC* [2016] EWHC 1762 (Admin)

- A local authority was not obliged under the Care Act 2014 to provide a homeless Swiss national who was wheelchair dependent with accommodation where that was her sole requirement; a need for accommodation did not amount to a "need for care and support". However, it had a duty to provide her with accommodation by exercising its power under the Localism Act 2011 s.1, as the seriousness of her physical disabilities and mental disorder were such that homelessness would breach her rights under ECHR art.3.

*R. (on the application of Aburas) v Southwark LBC* [2019] EWHC 2754 (Admin)

- A local authority had not breached the ECHR art.3 rights of a homeless failed asylum seeker by refusing to provide him with accommodation that he claimed was necessary under the Care Act 2014 for the effective delivery of support from a social worker. The evidence did not establish such a need and, applying the standards from human rights case law to his case, he faced no imminent prospect of serious suffering caused or materially aggravated by the local authority's refusal to provide supported accommodation. Query would that be the same in present circumstances and with movement restrictions.

Consideration of Article 2, 3, 4, 8 and 14





# Particular groups and statutory powers

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- Those discharged from detention under the s 3, 37, 47 and 48 MHA 1983 and CTOs and s 17 leave— section 117 Aftercare duties unaffected. This can include people detained subsequently under DOLS MCA 2005 s 21A or DOLS under s 16.
  - However, limits on s 117 duties some patient may receive Continuing Health Care (s 14 CVA 2020) and elements of social care under Care Act 2014
- Those discharged from detention under s 2 MHA 1983 and informal patients – Care Act 2014 assessment
- S 76 Care Act 2014 (prisoners)- also early release and release of pregnant prisoners.
- MCA 2005 unaffected save for the assessment of need linked to best interests. Capacity assessments not affected – link to assessment of need, special group guidance
- S 4/95 IAA 1999 – however some asylum seekers additional care needs of Local Authority under Care Act 2014, special group guidance – also no real prospect of return, now heightened s 4. Release of persons from immigration detention – needs being assessed? Dispersal?.
- Schedule 3 IAA 1999, Human Rights now the limit for assessment rather than just provision.
- S 17 and s 20 Children Act 1989 not affected, save on the transition provisions of children to adult care. Particularly problematic with CAMHs. Care leaving provisions untouched.
- No recourse to public funds (High Court on 3.4.2020)



# Particular groups continued

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- Those discharged from hospital during CV – 19 pandemic, needs not linked to CV-19
- Disabilities resulting from ventilation and discharge from hospital as a result of CV -19
- Issues concerning those in care placements, care plans when family support absent – how if at all are care plans being revised?
- DOLS and care planning and meeting existing care plans
- Issues concerning those receiving care at home – refusal of care/ safeguarding issue.
- Safeguarding touched on by SSL
- Is NRM working and how will needs be assessed
- Already seen a successful challenge to NICE Covid -19 critical care guidelines (autism, learning disability and mental disorder) <https://www.hja.net/press-releases/nice-amends-covid-19-critical-care-guideline-after-judicial-review-challenge/>
- Continuing Health Care provisions (s 14 in force): Restrictions.



# Thank you

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