EU Settlement Scheme
People who lack mental capacity

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Objectives of this Session

This session aims to give you an introduction to:

1. Particular challenges faced by people who lack mental capacity to make an EU Settlement Scheme Application
2. Basic principles under the Mental Capacity Act 2005
3. The test for whether someone lacks mental capacity
4. Making best interests decisions
5. When it's permissible to make an EUSS application on behalf of someone who lacks mental capacity
6. Who is responsible for making applications on behalf of people who lack mental capacity?
7. Practical aspects of making an application on behalf of someone who lacks mental capacity to do so

Very Brief Overview of the EUSS

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What is the EU Settlement Scheme?

- Enables EEA citizens and their family members to apply for an immigration status (settled status or pre-settled status) that will allow them to live lawfully in the UK after "Brexit"
- Deadline for applications is 30 June 2021 (**with exceptions**)
- But we strongly recommend applying as soon as possible
- Eligibility is governed by Appendix EU to the Immigration Rules.

What is settled status?

- Indefinite leave to enter/remain in the UK
- Holders of settled status:
  - Have an indefinite right to enter/ live in the UK
  - Can spend up to 5 consecutive years outside the UK without losing this right (or 4 if they are Swiss citizens)
  - Have the same rights to live, work, and access health and social assistance benefits as UK nationals
  - Nationality, Immigration and Asylum Act 2002 has now been amended – people with settled status not excluded from community care

What is pre-settled status?

- Limited leave to enter/remain in the UK
- Holders of pre-settled status:
  - Are granted the right to live in the UK for up to 5 years
  - Can apply for settled status after 5 years' continuous residence – must make their application **before their pre-settled status expires**
  - Have the same rights to live, work and access healthcare as UK nationals
  - Nationality, Immigration and Asylum Act 2002 has been amended – people with PSS not excluded from community care.
  - However:
    - Can't access means-tested benefits unless they have another qualifying right to reside (subject to outcome of a Court of Appeal case called Fratila & Tanase)

Overview of who needs to apply

- “Relevant EEA citizens” – i.e. EEA citizens who were residing in the UK by 11pm on 31 December 2020:
- Their family members of any nationality (including those who have retained a right to reside)
- Some primary carers of EEA citizens/ British citizens/ children in education
- Family members of some British citizens

Requirements for settled status (1)

- Three main conditions:
  - Fall into a relevant category entitled to settled status
  - No supervening event
  - Pass a suitability assessment

Requirements for settled status (2)

- Main "relevant category" entitled to settled status is people with **5 years' continuous residence in the UK**
  - Usually has to start before 11pm on 31 December 2020 (with some exceptions – e.g. for close family members arriving after that date)
  - "Continuous" means without absences of more than 6 months in any 12-month period, apart from:
    - Single absence of no more than 12 months for an important reason (e.g. pregnancy, child birth, serious illness, study, vocational training, or an overseas posting)
    - Period of absence on compulsory military service, on Crown Service, or working in the UK marine area
  - Serving a prison sentence of any length in the UK will break continuity of residence
  - However, if they already had a right of PR or built up 5 years' continuous residence before the prison sentence, they can rely on that to get settled status
  - Residence is enough - there is **no need** to exercise EU free movement rights

Requirements for settled status (3)

- Some EEA citizens/family members can get settled status before 5 years, including:
  - Child (of any nationality) aged under 21 of an EEA citizen who has or (if apply before 1 July 2021) is getting settled status
  - Family member of a deceased EEA citizen if:
    - They were living with the EEA citizen at the time of their death; and
    - The EEA citizen was working or self-employed in the UK at the time of their death; and
    - The EEA citizen had been living in the UK for at least two years before their death, or their death was the result of an accident at work/ an occupational illness

Supervening events

- Supervening event:
  - There will be a supervening event which will prevent a person from getting settled/pre-settled status if:
    - They have been absent from the UK for more than five consecutive years at the date of the application; or
    - They are subject to an exclusion, removal or deportation order (justified under EU law)

Suitability Assessment

- Suitability criteria:
  - Applicants also need to pass a suitability assessment
  - Looks at various factors, including criminal record, and whether the applicant is subject to a deportation/exclusion order or decision
  - Applicants aged 18+ are required to disclose any convictions in the UK or elsewhere, and say if they are awaiting a charging decision/trial
  - Applicants will be refused if they are subject to a deportation order, decision to make a deportation order, exclusion order or exclusion decision
  - Applicants with a serious record may be referred to immigration enforcement for a decision on whether to make a deportation order
  - However, having a criminal record and/or making false representations will not automatically lead to an application being refused. Each case must be considered on its own merits. For criminal offending, different rules apply depending on when the offence was committed.

Requirements for pre-settled status

- Relevant EEA citizens and their family members who are ineligible for settled status merely because they have less than 5 years' continuous residence in the UK should be eligible for pre-settled status
- Just like for settled status, eligibility is subject to:
  - No supervening event
  - Passing "suitability criteria"

Consequences of Failing to Apply by deadline

- EEA nationals who do not apply by the deadline risk being:
  - In the UK unlawfully
  - Subject to removal proceedings, including indefinite immigration detention
  - Excluded from mainstream benefits (s. 115 Immigration & Asylum Act 1999)
  - Banned from working
  - Unable to have a bank account
  - Charged for many secondary NHS services
  - Prevented from renting private residential accommodation
  - May be excluded from community care – unless they have some other lawful basis for being in the UK/it would breach their human rights

Late applications – People who Lack Mental Capacity

- People who have reasonable grounds for missing the deadline should be given a further reasonable period of time to apply
- EUSS Home Office Caseworker Guidance now contains detailed guidance on situations when there may be reasonable grounds for missing the deadline
  - Applies indefinitely – but should make application asap
  - Home Office should take a flexible approach
  - Home Office should look for reasons to grant status
  - If encountered by immigration enforcement, should be given written notice, giving them an opportunity to make a valid application within 28 days
  - Physical or mental capacity and/or care or support needs are a reasonable ground
- However, although they are likely to be granted further time to apply, they will still, as things stand, face the "hostile environment" in the meantime

Late applications – People who Lack Mental Capacity

- Guidance says,
- *"Where a person lacks the physical or mental capacity to apply to the EU Settlement Scheme (or for example did so in the months before the deadline applicable to them), that will normally constitute reasonable grounds for the person to make a late application to the scheme or for an appropriate third party to apply to the scheme on their behalf."*
- *"Where a person has care or support needs (or for example did so in the months before the deadline applicable to them), that will also normally constitute reasonable grounds for the person to make a late application to the scheme or for an appropriate third party to apply to the scheme on their behalf. This may include many adults with physical or mental capacity issues, but will also include adults with broader care or support needs, such as those who may be residing in a residential care home, or receiving care and support services in their own home, with long-term physical or mental health needs or a disability"*

Late applications – People who Lack Mental Capacity

- Guidance says that evidence that may satisfy the Home Office that a person lacks the physical or mental capacity to apply to the EU Settlement Scheme (or did so), or has relevant care or support needs, may include:
  - evidence that a formal arrangement, such as a Power of Attorney, is or was in place in respect of the person
  - a letter from a doctor, health professional, social services department or solicitor confirming the circumstances
  - a letter from the applicant themselves explaining the circumstances and authorising an appropriate third party to act on their behalf
  - evidence of a carer relationship where an appropriate third party is providing for the person's care needs, for example a Department for Work and Pensions letter confirming the eligibility of the third party for Carer's Allowance

Consequences of Failing to Apply by deadline

- As things stand, even those who are likely to be granted further time to apply to make a late application face the "hostile environment" until they are **granted** status under the EUSS.
- The Citizens' Rights (Application and Temporary Protection) (EU Exit) Regulations 2020:
  - Protect status of people who were exercising a right to reside immediately before 11pm on 31 December 2020 but who do not yet have settled or pre-settled status until:
    - The deadline of 30 June 2020; or
    - (If later) a valid, **in-time application** has been determined
  - For these people, the Immigration (European Economic) Area Regulations will continue to apply during this period, and they will continue to be lawfully present and eligible to claim benefits so long as they are exercising a right to reside
- This protection does not extend to those **who do not apply to the EUSS by 30.6.21 (**Reg 4 of the Temporary Protection Regs only applies if make a valid application to EUSS **on or before 30.6.21**)
- The UK government has repeatedly stated that although their right to obtain leave (ie their lawful right to remain in the UK) is provided for through allowing later applications to the EUSS, their right to claim benefits will not continue beyond 30 June 2021. This right will recommence from the date they are granted status under the EUSS.
- The response offered by the government so far, is that such people should apply to the EUSS before the deadline.

Challenges for people who lack mental capacity

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Challenges

- Lack of knowledge that they need to apply
- Potential barriers to giving instructions about, and providing evidence of their nationality, identity, and residence in the UK
- Lack of knowledge about criminal record in the UK or details of any prior offences
- Lack of authority to make an application on their behalf
- Lack of resources to apply to the Court of Protection for authority to make an application on their behalf

Home Office Guidance on Applications for people who Lack Mental Capacity

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Home Office Guidance (1)

- Home Office EUSS Caseworker Guidance contains guidance on making an application for someone who lacks mental capacity
  - Applications can be made on behalf of adults with mental capacity issues by (amongst others)
    - Person with power of attorney
    - Deputy appointed by the CoP
    - Another appropriate third party, for example, a friend, relative, carer, social worker, support worker or legal representative
  - If the person has capacity to consent to the application being made on their behalf, this must be sought
  - If capacity fluctuates, their consent must be sought when they have capacity
  - In all cases where a person lacks capacity must be satisfied that the person acting on behalf of the individual either or both:
    - Has the authority (in the general sense of permission or consent) to do so
    - Is acting in the best interests of the individual

Home Office Guidance (2)

- Comment on guidance:
  - Caution - if the third party that makes the application is acting in a professional capacity (whether paid or not), they are likely to need to be regulated to provide immigration advice and services in order to make an application on the person's behalf.
    - Could be a criminal offence to make immigration representations on their behalf
    - Likely to apply to:
      - Social workers
      - Perhaps even professional deputies
      - CHECK WTH OFFICE OF THE IMMIGRATION SERVICES COMMISIONER BEFORE ACTING
  - Guidance suggests that "authority" and "best interests" are either/or:
    - However, arguably need **both**

Home Office Guidance (3)

"Power of Attorney": *A Power of Attorney is a document that grants the holder (the attorney) power to make certain decisions on behalf of the person named in the document. Someone who holds Power of Attorney for an individual may make any necessary application for immigration status (including under the EU Settlement Scheme) on their behalf as a result of the Power of Attorney or as a result of their general duty to act in the best interests of the individual. In any given case, you must be satisfied that the person is acting within the scope of their decision-making powers by checking the terms of the Power of Attorney, which must be provided to support the application. For example, the Power of Attorney may grant the holder general authority to take possession and control of the affairs of the person named in the document.*

There are different types of Power of Attorney according to the jurisdiction:

- *in England and Wales, an attorney will be appointed under either a Lasting Power of Attorney (LPA) or an Enduring Power of Attorney (the forerunner of the LPA) – a person must be aged 18 or over to be able to make a Power of Attorney and have capacity to understand what they are doing when granting this*
- *in Scotland, there are three types of Power of Attorney, either Continuing, Welfare or Combined, which can be made by a person aged 16 or over with capacity*
- *in Northern Ireland, there is the Enduring Power of Attorney, which can be made by a person aged 18 or over with capacity*

You must check with the relevant office in the UK (the Office of the Public Guardian in England and Wales, the Office of the Public Guardian in Scotland or the Office of Care and Protection in Northern Ireland) or the relevant issuing office abroad if you have doubts about the document, including its validity.

Home Office Guidance (4)

England and Wales: Deputy appointed by the Court of Protection

A deputy is authorised by the Court of Protection to make decisions on behalf of a person who lacks the mental capacity to make decisions for themselves and where there is no Power of Attorney already in place.

A deputy is usually a close relative or friend of the person who needs help making decisions. In other instances, a person can be engaged professionally to act as a deputy, for example, an accountant, solicitor or representative of the local authority.

Appointed deputies may make any necessary application for immigration status (including under the EU Settlement Scheme) on behalf of an individual as a result of a legal duty in their court order (e.g. property and financial affairs), or as a result of their general duty to act in the best interests of the individual. In either case, you must be satisfied that a deputy is acting within the scope of their decision-making powers by checking the terms of their court order, which must be provided to support the application. For example, the deputy order may grant the holder general authority to take possession and control of the affairs of the person lacking capacity.

Home Office Guidance (5)

Applications made by another appropriate third party

An application can be made on behalf of an adult applicant with mental capacity issues and/or care or support needs by another appropriate third party, for example a friend, relative, carer, social worker, support worker or legal representative. In each case, you must be satisfied that the person acting on behalf of the individual is authorised to do so and/or that they are acting in the best interests of the individual.

Evidence that may satisfy you of this may include:

- *a letter from a doctor, health professional, social services department or solicitor confirming the circumstances*
- *a letter from the applicant themselves, authorising someone to act on their behalf*
- *evidence of a carer relationship where the third party is providing for the individual's care needs, for example a Department for Work and Pensions letter confirming receipt of carer's allowance*

The third party must provide their contact details when prompted at the end of the online application process or in the relevant section of the appropriate paper application form. The third party must upload a letter in the evidence section of the online application form (or provide this with the appropriate paper application form) to inform the caseworker of the individual's circumstances, including the reasons why the application is being made by a third party and their relationship to that individual…

The third party must also ensure they are acting appropriately according to the requirements of the Office of the Immigration Services Commissioner (OISC). OISC is the regulatory body for the provision of immigration advice.

Where advice or assistance is provided to an applicant by a friend or relative, who is not acting in a professional capacity, such advice and assistance does not require OISC regulation. Professionals such as carers, social workers or support workers can also provide technical assistance in completing the application without the need to be regulated by OISC, but they should ensure that they are not providing immigration advice. For example, they may provide assistance in completing and submitting the application form, by explaining what the form is asking for and entering the applicant's responses.

Further information about assistance that can be provided without the requirement for regulation can be found in OISC's Immigration Assistance Document.

Mental Capacity Act 2005
(applies to people aged 16+)

Mental Capacity Act 2005 – Core Principles

- P must be assumed to have capacity unless it is established that he lacks it (s. 1(2))
- P is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success (s. 1(3))
- P is not to be treated as unable to make a decision merely because he makes an unwise decision (s. 1(4))
- An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests (s. 1(5)); and
- Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action (s. 1(6))

Capacity is decision-specific

- Capacity is decision-specific
- Need to identify the relevant decision – for example:
  - Does P have capacity to decide whether or not to make an EUSS application?
  - Does P have capacity to decide whether or not to instruct someone else to make an EUSS application on their behalf?
  - Does P have capacity to make the various decisions needed in order to make an EUSS application?
- Remember: P may lack capacity to make one decision (e.g. whether to undergo a programme of treatment for drug addiction) but have capacity to make another (e.g. whether or not to make an EUSS application)

Summary

- Need authority
- Must be in person's best interests
- Need to provide a letter/evidence, showing that:
  - The person lacks mental capacity in relevant respects:
    - Social worker assessment?
    - GP assessment?
    - Psychiatrist/psychologist assessment?
    - S. 49 report?
  - It is in their best interests to make the EUSS application
  - The third party has authority to make the application (e.g. LPA, Order appointing them as deputy, order of CoP granting permission, or evidence that requirements of S. 5 MCA 2005 are met)

The test for lacking mental capacity

The test for lacking capacity - Section 2 MCA (1)

- *"…a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of or a disturbance in the functioning of the mind or the brain"* (s. 2(1))
- Three parts to the test:
  - Is the person unable to make the decision in question?
  - If so, do they have an impairment or disturbance in the functioning of their mind or brain?
  - If so, is the inability to make the decision *caused by* the impairment/disturbance in the functioning of the mind or brain?

The test for lacking capacity - Section 2 MCA (2)

- Does not matter whether impairment/disturbance is permanent or temporary
- Lack of capacity cannot be established merely by reference to:
  - Age or appearance (s. 2(3)(a)MCA)
  - A condition of P's, or an aspect of P's behaviour that might lead people to make unjustified assumptions about P's capacity (s. 2(3)(b))

Is P unable to make the decision?

- Section 3 MCA 2005:
  - P is unable to make a decision for himself if he is unable to:
    - understand the information relevant to the decision or
    - retain that information; or
    - use or weigh that information as part of the process of making the decision; or
    - communicate his decision (whether by using sign language or any other means)

Unable to **understand** relevant information? (1)

- Need to identify what the relevant information is (see next slide)
- Not necessary to understand every last detail – just need to understand the salient factors
- Must not regard P as unable to understand if they are able to understand an explanation that is given in a way that is appropriate to their circumstances - e.g. using simple language, visual aids or any other means (s. 3 (2) MCA)
- Section 3(4) MCA – "relevant information" includes the reasonably foreseeable consequences of:
  - (a) deciding one way or another; or
  - (b) failing to make the decision
- What information is relevant will depend on the decision in question

Unable to **understand** relevant information? (2)

- Information relevant to deciding whether or not to make an EU Settlement Scheme application includes:
  - What the EU Settlement scheme is
  - The need to apply even to maintain the status quo
  - Basics of what an application requires
  - Reasonably foreseeable consequences of deciding to apply (including salient advantages and disadvantages)
  - Reasonably foreseeable consequences of deciding not to apply, or of not making a decision either way (including salient advantages & disadvantages)

Unable to **retain** relevant information?

- Only needs to be able to retain the salient points for long enough to be able to make the decision
- S. 3(3) MCA 2005:
  - "The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision"

Unable to **use or weigh** relevant information? (1)

- This is about the decision-making process itself - using and weighing the relevant salient information to reach a decision.
- The Court of Protection has described it as:

  "…the capacity actually to engage in the decision-making process itself and to be able to see the various parts of the argument and to relate the one to another"

Unable to **use or weigh** relevant information? (2)

- Remember:
  - Only need to be able to use/weigh the salient relevant information (not every last piece of relevant information)
  - So it's important to be clear about what the salient relevant information is and why
  - Important not to equate an "unwise" decision with an inability to make the decision (or to work backwards from the consequences)
  - If P is able to use/weigh information, it's up to P what weight to give it – important not to impose own value system
  - Psychiatric expertise may be needed in tricky cases

Unable to **communicate** their decision?

- Presupposes that they have been able to make the decision (i.e. shouldn't conclude that they are unable to communicate their decision on the basis that they were unable to understand/ retain/ use or weigh relevant information)
- Only applies to people who are unable to communicate their decision in any way, even though all reasonably practicable steps have been taken to assist them to do so
- If conclude that they are unable to make a decision (e.g. because unable to retain relevant info) should still take into account anything that they communicate when making a best interests decision

Does P have an **impairment or disturbance** in the functioning of their mind or brain?

- In most cases, will be relying upon the opinion of a medical professional
- BUT does not need to have a condition that fits into one of the ICD-11 or DSM-5 diagnoses
- Impairment/disturbance in functioning of mind/brain can be temporary or permanent (s. 2(2) MCA)
  - If it's temporary, need to consider whether the decision can wait until the impairment/disturbance is no longer there

Is the inability to make the decision **caused** by the impairment/disturbance?

- Is P unable to make the decision **because of** the identified impairment or disturbance?
- Need to be satisfied (and be able to demonstrate why you are satisfied) that the inability to make the decision is caused by the impairment/disturbance in the functioning of the mind/brain
- May need expert opinion in difficult cases – e.g. if capacity fluctuates or is borderline

Fluctuating capacity

- Sometimes P's capacity will fluctuate because of the nature of the condition that they have
- If it's a one-off decision, consider whether it can wait until they regain capacity
- If they need to make a series of decisions/repeated decisions (e.g. making a series of decisions needed in order to make an EUSS application), may need to take a broad view and consider whether they have capacity for the "material time"

Capacity assessments

- Need to tell P the purpose of the assessment
- Need to provide P with the relevant information in a format that is appropriate for them
- Keep a good record of the assessment, including:
  - What capacity decision is being assessed
  - What the (salient) relevant information is that P needs to understand, retain, use/weigh
  - What steps were taken to assist P to be able to make the decision
  - What concrete information P was provided with about his/her options
  - What questions you asked P
  - What answers P gave
  - Conclusions on whether P could understand, retain, use/weigh, or communicate relevant information and, if not, why – needs to be supported by evidence
  - Whether P has an impairment/disturbance in the functioning of the mind/brain and, if so, what
  - Whether the impairment/disturbance is temporary or permanent – if temporary, could the decision wait?
  - How any inability to make the decision is ***caused by*** the impairment/disturbance (as opposed to any thing else)
  - If P is found to lack capacity:
    - Why you've decided that the decision is "incapacitous" rather than unwise
    - IS P' likely to retain capacity and/or does P's capacity fluctuate? If so, could the decision be postponed?

Capacity assessments – who should do it?

- Psychiatrist/psychologist – in difficult cases
- GP?
- Social worker?
- (If apply to Court of Protection) – s. 49 report:
  - Court of Protection visitor
  - Court of Protection special visitor (medically qualified)
  - Local Authority
  - NHS body
- Cost of s. 49 report generally falls on the person who is ordered to produce it

Making best interests decisions

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Best interests decisions (1)

- "An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests" (s. 1(5) MCA 2005)
- Remember:
  - If P *has* capacity, you should not act on their behalf without their consent –there's no room for making a best interests decision
  - Even if P *lacks* capacity, you still need some form of authority to make a decision/carry out an act on their behalf
  - Any decision made/act done on behalf of P under the MCA 2005 must be done/made in P's best interests

Best interests decisions (2)

- S. 4 MCA 2005 sets out a framework:
  - Must not make decision merely on the basis of P's age/appearance or a condition/aspect of his behaviour (s. 4(1) MCA)
  - Must consider "all the relevant circumstances" (s. 4(2) MCA)
    - i.e. those of which the DM is aware, and which it would be reasonable to regard as relevant (s, 4(11))
  - Must consider whether it's likely that the person will have capacity to make the decision in future and, if so, when (s. 4(3) MCA)
  - Must so far as reasonably practicable, permit and encourage P to participate in the decision-making, and improve his ability to participate (S. 4(4) MCA)

Best interests decisions (3)

- S. 4(6) says that a decision-maker must, consider, so far as is reasonably ascertainable:
  - P's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity)
  - The beliefs and values that would be likely to influence his decision if he had capacity, and
  - The other factors that he would be likely to consider if he were able to do so
- S. 4(7) requires the decision maker to take into account (if it is practicable and appropriate to consult them) the views of:
  - Anyone named by the person as someone to be consulted on the matter in question or on matters of that kind
  - Anyone engaged in caring for the person or interested in his welfare
  - Any donee of a lasting power of attorney granted by the person, and
  - Any deputy appointed for the person by the court

  …as to what would be in the person's best interests and, in particular, the matters in s. 4(6).
- The Mental Capacity Act Code of Practice contains useful guidance on making best interests decisions

Best interests decisions (4)

- It won't necessarily be in an EEA citizen's best interests to make an application
- Consider (for example)
  - Their wishes and feelings
  - Views of those caring for P or with an interest in their welfare
  - What is important to them
  - Implications of making an application on any pending application for leave to remain
  - Implications of making an application where the applicant has a criminal record that they will need to disclose
- Given the consequences of *not* applying, it will, in most cases be in a person's best interests to apply, but there will be exceptions

When is it permissible to make a decision/act on P's behalf?

Making decisions/doing acts on P's behalf

- Normally need a person's consent in order to make a decision/carry out an act on their behalf
- If they lack capacity, need some form of authority
- Before making an EUSS application on P's behalf, consider what authority you have:
  - Do you have their consent given with capacity?
  - Can you rely on s. 5 MCA 2005?
  - Do you have the consent of a donee of a power of attorney or Court appointed Deputy who has authority to make the decision?

Section 5 MCA 2005 (1)

- S. 5 MCA 2005 – Acts in connection with care or treatment

"(1) If a person ("D") does an act in connection with the care or treatment of another person ("P"), the act is one to which this section applies if –

(a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and

(b) when doing the act, D reasonably believes –

(i) That P lacks capacity in relation to the matter, and

(ii) That it will be in P's best interests for the act to be done.

(2) D does not incur any liability in relation to the act that he would not have incurred if P –

(a) Had had capacity to consent in relation to the matter, and

(b) Had consented to D's doing the act

(3) Nothing in this section excludes a person's civil liability for loss or damage, or his criminal liability, resulting form his negligence in doing the act"

Section 5 MCA 2005 (2)

- S. 5 MCA 2005 provides protection from liability for non-negligent **acts in connection with the care or treatment** of P where the person doing the act reasonably believes that:
  - P lacks mental capacity in relation to the matter; and
  - It will be in P's best interests for the act to be done

Section 5 MCA 2005 (3)

- MCA Code of Practice gives examples of acts in connection with care and treatment:
  - Helping with washing, dressing, personal hygiene, eating or drinking
  - Helping with communication or mobility
  - Helping someone take part in education, social or leisure activities
  - Going into someone's home to drop off shopping or check that they are alright
  - Using their money to buy shopping for them
  - Arranging household services (e.g. arranging repairs/maintenance for gas or electricity supplies
  - Providing services that help around the home
  - Undertaking actions related to community care services (for example, day care, residential accommodation, or nursing care
  - Carrying out diagnostic examinations and tests
  - Providing professional medical, dental and similar treatment
  - Giving medication
  - Taking someone to hospital for assessment or treatment
  - Providing nursing care
  - Carrying out any other necessary medical procedures (for example, taking a blood sample) or therapies (for example, physiotherapy or chiropody)
  - Providing care in an emergency

Section 5 MCA 2005 (4)

- Does making an immigration application fall within "*acts in connection with…care or treatment*?"
  - No conclusive case law on this point
  - S. 5 generally taken to extend to a broad range of personal welfare decisions
  - However, the examples given in the MCA Code of Practice are much more closely related to the delivery of personal care and treatment
  - In ACC & Ors [2020] EWCOP 9, SJ Hilder suggested that s. 5 is not wide enough to cover acts taken in connection with property and affairs
  - Making an immigration application may be "legal affairs"

Section 5 MCA 2005 (5)

- On the other hand, arguable that deciding to make an EUSS application/instruct someone else to do so does fall within s. 5 if:
  - P needs settled or pre-settled status to access necessary care or treatment; and
  - Reasonably believe that P lacks relevant mental capacity; and
  - Reasonably believe that it's in P's best interests
- However, given the lack of clear case law, would urge caution in relying on s. 5 MCA 2005 if:
  - P objects to the immigration application being made; and/or
  - There is a dispute (or question) as to whether it's in P's best interests
  - If will incur costs (e.g. through instructing solicitor, or time as professional deputy) and will look to recover funds from P
  - There is someone with LPA or a deputy who objects
  - Capacity in doubt
- Instead, may want authority from the Court of Protection

Court Appointed Deputy

- When making decisions, must apply MCA s. 1 (general principles) and s. 4 (best interests)
- Two kinds of deputyship:
  - Health & welfare
  - Property & affairs
- Source of authority is order appointing the deputy and any subsequent orders varying it
- Questions to consider:
  - Is there any express provision granting or excluding authority to (e.g.) make an immigration application, instruct someone else to make an immigration application, or obtain legal advice, on behalf of P?
  - If not, is there any "general authority" in the order that confers this authority on the deputy?
- If it's not clear, the deputy can apply to the Court of Protection under ss. 15 or 16 MCA 2005 for a declaration of their scope of powers and/or specific authorisation to act
- General point: if the deputy is a professional deputy, acting in the course of a business (whether voluntary or not) it is likely to be an offence for them to provide immigration advice/services unless they are regulated to do so by a designated regulatory body (e.g. OISC, BSB, SRA) – so will need to instruct someone else to advise on/make the application

Property & Affairs Deputies (1)

- Template order contains "general authority" and specific provisions, conferring/excluding liability for various matters
- None of the specific provisions in the template order expressly mentions immigration applications/obtaining legal advice
- The General authority says:

  "(a) the court confers general authority on the deputy to take possession or control of the property and affairs of [P] and to exercise the same powers of management and investment, including [selling and] letting property, as he has as beneficial owner, subject to the terms and conditions set out in this order"

Property & Affairs Deputies (2)

- Is it covered by the "general authority"?
  - ACC & Ors [2020] EWCOP 9 (SJ Hilder):
    - Suggests scope of "general authority" may be somewhat narrower than at first it appears
    - General authority is designed to cover the myriad day-to-day property and affairs transactions that it would not be conceivable to make specific provision for – "the essence of its scope is the 'ordinariness' of the task contemplated"
    - To fall within the scope of the general authority the matter in question will need to be a "property & affairs" matter **and** sufficiently "common"/ "widespread"/ everyday (e.g. contentious litigation is probably outside scope)
    - Whether or not obtaining legal advice falls within scope of authority depends on whether the subject matter of the advice does – ask yourself: would I have authority to act on the advice?
    - Not all legal affairs fall within the scope of the general authority – e.g. making a "welfare" application to the Court of Protection (e.g. to authorize a deprivation of liberty) does not fall within the scope of the general authority
    - However, applying to the CoP for initial directions (Even for a welfare matter) probably does

Property & Affairs Deputies (3)

- Is it a "property & affairs" matter?
  - "Property & affairs" not defined in MCA
  - S. 18 (court's property & affairs powers) gives some indication – includes carrying out contract entered into by P & conduct of legal proceedings
  - Re F [1989] 2 FLR 376 – Lord Brandon considered the meaning of "property & affairs" in similar provisions in the Mental Health Act 1983 – concluded it meant "busines matters, legal transactions, and other dealings of a similar kind"
- Arguable that "legal affairs", including making an immigration application to ensure compliance with the law (or instructing someone else to do so) would fall within scope

Property & Affairs Deputies (4)

- Is it "everyday" enough to fall within the "general authority"?
  - Examples from ACC & Ors:
    - Within scope:
      - Tax return
      - If estate is extensive, obtaining advice from a tax expert
      - Making arrangements for funding care, and preparing employment contracts for carers
      - Obtaining legal advice on non-contentious matters – but only if the subject matter of the advice falls within the scope of the "general authority" – ask: could I act on the advice?
      - Applying to Court of Protection for authority to make property and affairs decisions that don't fall within the general authority
    - Outside scope:
      - Buying or selling freehold/leasehold property
      - Entering into/terminating a tenancy agreement
      - Making an application to the Court of Protection for a welfare order (although can apply for initial directions – and may have a duty to do so if necessary to avoid an unlawful situation)
- Conclusion?
  - Not clear
  - May be advisable to seek specific authority from the Court of Protection if:
    - P objects
    - Capacity in doubt
    - Best interests are in doubt (e.g. because P objects and/or risks being referred to immigration enforcement
    - Necessary to incur costs (will be personally liable for any costs incurred when acting outside scope of authority)

Welfare Deputies

- Need to check order appointing deputy and any subsequent orders varying or augmenting that order.
- The standard (or 'template') order does not contain a 'general authority'
- Instead, it sets out specific decisions which the deputy has authority to make on P's behalf (and some decisions which he or she is *not* entitled to make).
- The 'template' order in Court of Protection Practice provides that the deputy
  - Has authority to make decisions relating to making arrangements for the provision of care services
  - May, in order to give effect to any decisions that he has authority to make, execute or sign any necessary deeds or documents
- Query how far this power extends – does it confer power on the deputy to take steps to make an immigration application where obtaining a status is necessary for P to access care/support?
- At best questionable – advisable to seek specific authority
- If professional deputy, acting in course of business (even if voluntary) prohibited from providing immigration advice/services unless regulated by designated regulatory body (e.g. OISC, SRA, BSB)

Lasting Power of Attorney
(or its predecessor, the Enduring Power of Attorney)

- Formal document granting power to the attorney to make decisions covered by the document, even after the grantor loses mental capacity to make those decisions themselves
- Must have been made when the grantor had capacity
- Must be registered with the Office of the Public Guardian before use

Lasting Power of Attorney (2)

- S. 9 MCA defines "lasting power of attorney":

"A lasting power of attorney is a power of attorney under which the donor ("P") confers on the donee (or donees) authority to make decisions about all or any of the following:

(a) P's personal welfare or specified matters concerning P's personal welfare, and

(b) P's property and affairs or specified matters concerning P's property & affairs,

and which includes authority to make such decisions in circumstances where P no longer has capacity"

Lasting Power of Attorney (3)

- Two kinds:
  - Property & affairs – can be used before & after lose capacity
  - Health & welfare – can only be used if lack capacity
- OPG has a standard form for each:
  - The Property & affairs standard form grants authority to make decisions about property and *financial* affairs (not "affairs") – does this extend to legal matters like immigration applications?
  - The health & welfare standard form grants authority "to make decisions about my health & welfare" – examples on the form (and in the MCA Code of Practice [7.21-7.23] mostly relate to personal care and healthcare – does this extend to immigration applications?
- LPA who is unsure about scope of authority can make an application to the Court of Protection under ss. 15 and/or 23 MCA 2005 for a declaration as to the scope of its powers (s. 15) or authority to carry out acts beyond the scope of the authority conferred by the LPA (s. 23)

Decision by the Court of Protection

S. 16 MCA 2005 decision:

- If P lacks capacity to make relevant decisions, the court has the power, under s. 16 MCA, to grant authority to someone to:
  - Make an EUSS application for P (subject to being regulated to provide immigration advice/services if required to be)
  - Instruct someone else to make the application
  - Incur costs on P's behalf and recover them from P (e.g. for immigration advice)
- Court, when making decision, must apply s. 1 MCA (general principles) and s. 4 (best interests)

Who (if anyone) is responsible for ensuring that adults who lack mental capacity (are able to) apply?

Home Office Guidance?

- Home Office document, *EU Settlement Scheme: introduction for local authorities* contains some recommendations for local authorities:
  - Part of a "toolkit" for local authorities
  - Not guidance
  - Recommendations are skeletal

H.O. introduction for local authorities (1)

"4.1 Assisting adults with care and support needs

Adults with care and support needs includes adults in various care settings with a range of vulnerabilities.

To support adults with care and support needs the Home Office is directly engaging with a range of stakeholders, including the Local Government Association, the Association of Directors of Adult Social Services, the Office of the Public Guardian as well as representatives from private care providers, voluntary and community sector organisations.

***We recommend that you engage with your relevant service leads, cabinet members, local charities and community groups or representatives to explore opportunities to work together and assist adults with care and support needs in applying to the EU Settlement Scheme**.*

You can also signpost to the information the government is providing on gov.uk/eu-settled-status"

H.O Introduction for Local authorities (2)

- Home Office (2020) *EU Settlement Scheme: introduction for local authorities*:

  *"**Where someone who lacks mental capacity has appointed a legal representative with Lasting Power of Attorney, or has a Deputy appointed by the Court of Protection, their legal representative should make an application on their behalf.***

  If someone's mental capacity fluctuates then their consent should be sought, when they are able to vie it, for an appropriate third party to make an application on their behalf if they are unable to apply themselves

  In each case, the person acting on behalf of the individual will need to be satisfied:
  - *That they have the authority (in the general sense of permission or consent) to do so*
  - *That they are acting in the best interests of the individual in accordance with the Mental Capacity Act 2005*

  ***Those signing the declaration on behalf of someone without mental capacity should upload a letter in the evidence section of the application form to inform caseworkers of the individual's circumstances**"*

What steps can/should LAs take? (1)

- Providing general information & promoting the EUSS (using the “toolkit”)
- Identifying vulnerable adults who need to apply (including adults for whom fund care, or who are deprived of their liberty)
- Flagging up the need for applications (e.g. with the individual, any deputy/LPA, family members, support workers)
- Signposting and/or making referrals to organisations that can support:
  - Some are funded to help with complex applications – AIRE Centre can provide free advice/support
- Practical help and support:- e.g.
  - Helping find documents needed for application
  - Driving to appointments and/or helping set up virtual appointments
  - Providing practical/technical assistance with form-filling
  - Helping read/understand documents
  - Helping communicate with legal advisers etc.

What steps can/should LAs take? (2)

- More substantial support?
  - Ensure that EUSS application is made? (prohibition on non-regulated immigration advice/services)
  - If hold deputyship– obtaining legal advice/instructing someone to make application? (see later slides)
  - If no other organisation can assist - applying to Court of Protection for authority for someone to make the application?
  - Assisting with such an application in other ways – e.g.
    - Carrying out capacity assessments
    - Investigating P's wishes and feelings
  - Funding legal advice/the making of an application?

Sources of power or duty to provide support

- May include:
  - Care Act 2014 - subject to:
    - ”Care Act Easements” (Coronavirus Act 2020); and
    - Nationality Immigration and Asylum Act 2002, Schd. 3
  - Localism Act 2011 (subject to NIAA 2002, Schd. 3)
  - Human rights obligations?

Care Act 2014 (1)

- S. 1 – General duty to promote wellbeing:
  - Includes personal dignity, participation in work, social & economic wellbeing & suitability of living accommodation (s. 1(3))
  - Factors that LA must take into account when exercising a function under Part 1 includes the need to prevent/delay the development of needs for care and support/ needs for support
- S. 42 – safeguarding duty – may give rise to a duty to investigate/act:
  - Duty to make enquiries where LA has reasonable cause to suspect that an adult in its area:
    - Has needs for care and support
    - Is experiencing or at risk of abuse or neglect; and
    - As a result of those needs is unable to protect himself or herself against the abuse or risk of it
  - "Neglect" has expansive definition (Care and Support Statutory Guidance, para 14.7) – arguably might include person whose care & support needs prevent them from applying, and who risks losing access to necessary care and treatment if they do not apply
  - If eligibility criteria are met, must investigate, and if consider must act, then have a duty to act

Care Act 2014 (2)

- Local authorities' duties and powers to meet needs for care and support may also require it to take steps to support someone to apply under the EUSS:
  - Duty to meet eligible assessed needs for care and support (provided residence & charging criteria are met) (s. 9, s. 27, s. 13, s. 18)
  - Power to meet other assessed needs for care and support (s. 19)
- Care and Support (Eligibility Criteria) Regulations 2015, r. 2(1):
  - R. 2(1) – needs will be eligible if:
    - Needs arise from or are related to physical/ mental impairment/ illness
    - As a result of the adult's needs, the adult is unable to achieve 2+ specified outcomes
    - As a consequence, there is likely to be a significant impact on the adult's wellbeing
    - R 2 – specified outcomes – outcomes do not include ensuring compliance with immigration laws, but this might be implied into other outcomes, in the same as the duty to assist with property and affairs (especially in light of wellbeing duty,)

Other sources of a duty to take action?

- Human rights:
  - May be a positive obligation to take action under European Convention on Human Rights (only where statutory duty?):
    - Art 2 (right to life)
    - Art. 3 (right to freedom from inhuman or degrading treatment)
    - Art. 8 (right to private and family life)
    - May, in particular, arise if the vulnerable adult is deprived of his/her liberty
  - Localism Act 2011 (subject to NIAA 2002):
    - S.1 confers a general power to do anything that individuals generally may do
    - S. 2 imposes limitations on the general power:
      - Restrictions on use of any pre-existing statutory powers also apply to the s. 1 Localism Act power
      - Can't do anything that's prohibited by pre-existing legislation, or legislation brought in after s. 1 Localism Act 2011

Practicalities

Extra evidence to supply with application

- Need to provide evidence that:
  - Have authority to make the application on P's behalf – e.g.
    - Copy of lasting power of attorney that covers making immigration applications (& confirmation of registration)
    - Copy of Court order appointing as deputy (which covers making immigration applications)
    - Copy of court order granting authority to make the application
    - Consent from someone with authority to provide it
    - Evidence that covered by s. 5 MCA 2005?
  - Applying is in P's best interests
    - Normally straightforward
    - BUT not in every case (e.g. where P objects to the application being made)

Alternative evidence of identity (1)

- All applicants must supply evidence of their ID and nationality
- Normally, this should be:
  - For EEA citizens: valid passport or national ID card
  - For non-EEA citizens: valid passport or biometric residence card
- Home Office should accept alternative ID if cannot provide the above evidence owing to circumstances beyond the applicant's control, or where there are other compelling practical or compassionate reasons

Alternative evidence of Identity (2)

- Lacking mental capacity to obtain valid ID is one such reason – but Home Office will expect evidence of their lack of mental capacity and why it precludes them from obtaining the form of ID normally required:
- Home Office EUSS caseworker guidance says (pp. 37-38):

"If the applicant claims that it would be impossible or unreasonable for them to obtain or produce the required document due to a serious medical condition or due to their mental capacity, they or the person acting for them must be requested to provide confirmation of their condition or capacity, and why it prevents them from obtaining or producing the required document, from their GP or other appropriately qualified medical professional

…

If you are satisfied that it would be impossible or unreasonable for the applicant to obtain or produce the required document, for example because their mental capacity falls under the Mental Capacity Act 2005…and there is no one to do so on their behalf, then the applicant is to be asked to produce alternative evidence of their identity and nationality"

Alternative evidence of identity (3)

- Alternative forms of evidence accepted include:
  - documents previously issued by the Home Office (such as a document issued for emergency travel purposes) provided there is no evidence that this identity or nationality was confirmed in error, fraudulently, or has significantly changed
  - an expired passport or other required document, bearing the applicant's name and photograph
  - an official document issued by the authorities of the applicant's country of origin which confirms their identity and nationality, including birth certificate, marriage certificate, driving licence, tax / social security statement, national service document, or emergency travel document or similar – this is not an exhaustive list and other similar documents may be considered
  - an official document issued by the UK authorities which confirms the applicant's identity and, if possible, nationality – and this can include a UK driving licence, National Insurance number card, or tax or pension statement – this is not an exhaustive list and other similar documents may be considered
  - an official document issued by the authorities of an EEA Member State which confirms the applicant's identity and nationality, including a document confirming permanent residence in that state or registration as the family member of an EEA citizen exercising Treaty rights in that state
  - the applicant's biometrics (facial photograph and, in the case of a non-EEA citizen, fingerprints) which match an existing government record confirming their identity and nationality
- Where none of the above is available, Home Office may:
  - contact consulate (so long as satisfied that will not put the applicant or their family at risk
  - Invite the applicant to interview (by video-link, telephone or in person)

Taking instructions from P, and finding out P's wishes and feelings

- Consider:
  - What method of communication P is most familiar with:
    - Visual aids? Pointing board? Makaton?
  - Best time of day/location to discuss issues with P
  - Whether it would help to have someone who P is more familiar with present for the discussion
  - Whether P has asked for a particular person to be present
  - What help P needs to understand the relevant information
  - Whether it would help to have more than one meeting
- May need support of social worker/ carer/ family to obtain background information/documents
  - Consider whether P can consent to this
  - If not, is it covered by s. 5 MCA 2005?

Thank you

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