Short changed

How can it be lawful for care home fees to be paid by the person deprived of their liberty? *Michael Kennedy* and *Bilkiss Bashir* consider whether the state should pick up the tab

Many people believe that a person in need of care from a nursing home should not have to pay for it: that should be the role of the state. However, there is a degree of acceptance that, owing to demographic changes and in view of the parlous state of UK plc, expecting the state to cover the majority of someone's fees is not realistic.

There is settled law in relation to charging for care home accommodation (see the National Assistance Act 1948 (NAA)). The general rule is that accommodation in care homes is free only if the person is eligible for NHS-funded care or has, in the past, been detained under one of the sections of the Mental Health Act 1983 (MHA), which triggers a right to aftercare under section 117 of that Act.

For all other people who are liable to pay for their care, there is a means test and we get into the territory of upper capital limits and property disregards.

New ground

However, a new category of care home resident was created by the deprivation of liberty safeguards (DOLs) (see box one), which came into force on 1 April 2009 under the Mental Capacity Act 2005 (the MCA). Arguably, the liability of these residents to pay their own care home fees has not yet been established, so there is a need for clarification. Moreover, it raises very real questions about the fairness and legality of the state charging the recipient for a social care service that is being imposed upon them. Can it be lawful to expect a person compelled to receive accommodation, together with related care services, to pay for it? And is that fair?

The issue was addressed in a recent case. DM and FM are an elderly couple who have been married for over 60 years. As a result of circumstances that arose in the family home, FM was removed and made subject to a standard authorisation under the DOLs scheme. DM felt so strongly that FM should be returned to the matrimonial home that she issued a section 21A MCA challenge against the standard authorisation. Throughout his detention at the care home, FM has stated that he wants to return home and views himself as a 'prisoner'.

Despite the ongoing challenge, DM was being sent invoices from the local authority charging for FM's care. DM and FM were of limited income and neither had worked for many years. Both had always lived moderately and had managed to accumulate life savings of just over £14,000.

However, by the end of the first 12 months of care, DM had paid to the local authority more than £8,000 on behalf of FM. As a result, the couple saw their life savings diminish. Furthermore, it later transpired that the local authority had made an error in the financial assessment and had been over-charging by just under £2,000 for the first 12 months of care. This raised further questions in respect of the assessment processes undertaken by local authorities and the transparency of the charging regime.

At this point DM took steps to challenge the local authority's decision to levy charges for FM's deprivation of liberty and care being received, by way of judicial review. An overarching legal argument was progressed in respect of the statutory construction of the NAA 1948 and the MCA 2005, that said it was not the intention of parliament that those deprived of their liberty should have to pay for it.

The Honourable Mr Justice Holman, granting permission on the papers on 25 July 2011, said: "In my view this case is eminently arguable and the detailed grounds raise important issues which require to be determined by the court." Mr Justice Holman further ordered and directed that no further charges should

Filling the gap

The deprivation of liberty safeguards

As a result of a European Court of Human Rights decision (*HL v UK*, 'the Bournewood decision'), the UK government introduced a new scheme that allowed for the authorisation of the deprivation of liberty of those who lacked capacity to consent to their deprivation and where it was in their best interests that they be so deprived. This scheme was created to fill what had become known as the 'Bournewood gap': people who were admitted to a psychiatric hospital or care home but who lacked the capacity to consent to that admission.

In many cases, such people were being deprived of their liberty in terms of article 5 of the European Convention on Human Rights (the Convention) and yet there was no "authorisation prescribed by law'"(per the Convention), nor was there a right of review by an independent court or tribunal (article 5.4 of the Convention).

Given the scheme was predicated on a finding of a lack of capacity to decide on residence, it was always likely that it would be predominantly used for service users with dementia, learning disabilities and brain injuries. The scheme operates by way of a managing authority (a hospital or care home) seeking an assessment from an assessor (in a similar role to an approved mental health professional under the Mental Health Act 1983) as to whether the assessor believes that the care provided to the person amounts to a deprivation of liberty and, if so, whether the person lacks the requisite capacity and whether such deprivation is in their best interests. If so, the deprivation of liberty can be authorised by the supervisory body (invariably a local authority).

The scheme has now been in operation for long enough to note some trends in its usage (see box two).

People who are deprived of their liberty in this way do have a right to appeal to the Court of Protection. An application for removal of the authorisation to deprive can also be lodged by a close relative (MCA section 21A).

The great majority of authorisations are granted by local authorities. This then begs the question about who pays for the resultant care.

be levied or enforced against DM or FM until the conclusion of the substantive hearing.

Room for manoeuvre

The substantive hearing was listed and heard by the Honourable Mr Justice Langstaff on 12 and 13 December 2011.

The key arguments progressed on behalf of DM were:

1. The power to accommodate and charge those deprived of their liberty by virtue of a standard authorisation under the MCA, cannot be found in sections 21 and 22 of the NAA.
2. The effect of the standard authorisation, as under schedule A1 of the MCA, is to authorise and to require the provision of a package of accommodation and care, which requires him to be detained involuntarily. It is this element of an involuntary detention and compulsion, which squarely takes FM and others like him outside of the category of people, who are accommodated and required to pay for their care under part III of the NAA. There is a duty on local authorities to make arrangements for providing accommodation and care for anyone who meets certain criteria based on need, under section 21 of the NAA. However, section 21 imposes no power and no duty to compel someone to accept such accommodation. It does not authorise or require the local authority to detain people in accommodation to ensure they benefit from such provision.
3. The power to accommodate and provide those under a standard authorisation with a required package of care derives from schedule A1. As such, if it was intended that those deprived of their liberty by virtue of those provisions were to be charged, the MCA would have created a power to charge. The MCA does not provide an express power to charge; indeed it is altogether silent on the issue of charging. It is a fundamental principle of settled common law that if property is to be taken by the state, the intention must be expressed in unequivocal terms. The absence of any charging provision within the MCA must be interpreted in the favour of an individual's property rights and against the presumption to charge.

The secretary of state for health and the local authority took the counter position.

1. The power to accommodate and charge those deprived of their liberty under schedule A1 of the MCA is derived from section 21 and 22 of the NAA.
2. The local authority's legal power/duty to provide accommodation does not arise from schedule A1 of the MCA. The purpose of schedule A1 is to provide a mechanism by which the authorisation of a person's deprivation of liberty is said to be lawful, while care and attention is provided pursuant to the NAA. Schedule A1 does not create any new power to arrange accommodation, but simply ensures compliance with article 5 of the European Convention on Human Rights and to address the Bournewood gap.
3. The MCA does not have to provide an express power to charge, given that it does not create any power to accommodate. The power to accommodate remains with the NAA, and, as such, it flows that the power to charge remains with the NAA.

> **"The key word is 'need' and not 'desire': the test is objective"**

Judgment was delivered by Mr Justice Langstaff on 16 December. He found against DM and duly dismissed the application. After careful examination of the structure of the MCA 2005, he found it was clear that the purpose of the Act was not about accommodation, but that those who do detain under it are free from liability for doing so. The purpose of the MCA 2005 is to authorise detention, not require it; it is about providing safeguards, which is indicative in the very title: deprivation of liberty safeguards.

Langstaff J took the view that "the element of compulsion" does not take FM outside section 21 NAA. The key word in section 21 is 'need' and not desire: the test is objective. The wording of section 21 NAA is wide enough to encompass FM and this is supported by the directive LAC(93) 10.

The judgment delivered was very thorough and, for the time being, the court's decision is that it is lawful for this new class of recipient of care home provision to be charged for the care they receive by virtue of the NAA. Charging will be assessed per the charging for residential accommodation guidance (CRAG) in the usual way.

Human interest

From a human interest point, it delivers an unwelcome outcome and the question remains as to how it can be just that someone who is deprived of their liberty and removed from their home against their will should be charged for the privilege. An appeal is being very carefully considered. For now, there are some interesting questions, for example, as to whether for the purposes of the NAA, section 21 on a statutory construction

and plain reading does "inevitably cover those who do not consent, whether because they cannot or because they will not", as was held by Langstaff J.

He noted that section 21 of the NAA is worded such that: "Accommodation is, according to the section, to be provided for those who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them." He went on to note that: "The word is need. This is needs and not desires. The test is objective." As such, the fact that there is an element of compulsion in accommodating FM does not take him outside the scope of section 21 of the NAA. This raises two interesting questions: can a local authority accommodate under the NAA if there is an element of compulsion? And is the test for establishing 'need' objective?

If the above is a natural reading of section 21, what then for an individual who objectively has a need, and has capacity to make decisions, but refuses to accept accommodation? Can a fully capacitated individual be compelled to move into residential care in accordance with section 21 of the NAA? The answer is no. And, if that is the case, then can it be said that the scope of section 21 is wide enough "to cover those who do not necessarily wish to be accommodated by the local authority"?

Does this then call for a distinction to be drawn between:

1. the duty and requirement placed on a local authority to assess and make arrangements to provide residential accommodation under section 21, which certainly encompasses those who cannot and will not comply or consent; and
2. a duty and requirement on a local authority to compel or impose acceptance of accommodation by the recipient?

Under section 21 of the NAA, there is no duty or requirement on a local authority to compel acceptance. Indeed, refusal to accept accommodation or other services discharges the duty owed by the local authority. For example, in *R v Kensington and Chelsea RLBC ex p Kujtim* [1999] 4 All ER 161, (1999) 2 CCLR 340, CA at 3541, Potter LJ held that the duty to provide accommodation under section 21 of the NAA can be treated as discharged if the applicant "either unreasonably refuses to accept the accommodation provided or if, following its provision, by his conduct he manifests a persistent and unequivocal refusal to observe the reasonable requirements of the local authority in relation to the occupation of such accommodation".

While the duty on a local authority to assess a need and make arrangements for accommodation cannot simply be discharged by a refusal to engage (thereby ensuring the assessment of needs and offer of accommodation and services to the wider class of people "who do not consent, whether because they cannot or because they will not"), the duty to actually deliver accommodation or other such assessed service can be discharged by the intended recipient's refusal to accept.

Double standards

Arguably, the fact of refusal has implications as to the applicability and operation of section 21 of the NAA, and no reading of the section allows for the local authority to compel or impose acceptance. If a capacitated adult cannot be compelled to accept accommodation under section 21 of the NAA, then how can an incapacitated adult be compelled so? Should an incapacitated adult be treated differently? Should their wishes and feelings be ignored?

This raises the second question as to whether the test for establishing 'need' for the purposes of the NAA is merely objective? Arguably not. In *R (A and B) v East Sussex CC (No 2)* [2003] EWHC 167 (Admin), Munby J held that "the assessment process must take account of the disabled person's wishes, feelings and preferences".

If there is no power or duty available to a local authority to accommodate a capacitated individual by compulsion under the NAA, then by extension there can be no power to accommodate by compulsion an incapacitated individual. If the power to accommodate those subject to a standard authorisation does not derive from the NAA and it does not derive from the MCA (given Munby J read the purpose of the MCA as being to authorise detention, and free from liability those who do), then where does the power to accommodate and resultant power to charge come from?

For now, the argument as to the legality and power for a local authority to charge someone deprived of their liberty and compelled to live in a care home remains open to lively debate. ■

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Number crunching

Deprivation of liberty safeguards: key facts

Between 1 April and 30 September 2011

- 5,472 authorisation requests were completed. 3,963 (72 per cent) were received by local authorities and 1,509 (28 per cent) were received by primary care trusts
- 3,079 (56 per cent) of the completed assessments resulted in an authorisation
- At the end of the reporting period, 1,697 people were subject to a current standard authorisation. 1,484 (87 per cent) followed a granted local authority authorisation and 213 (13 per cent) followed a granted primary care trust authorisation

Source: NHS Information Centre for Health and Social Care bi-annual report on the Mental Capacity Act Deprivation of Liberty Safeguards Assessments in England