

MENTAL CAPACITY & LITIGATION FRIENDS IN ASYLUM & HUMAN RIGHTS APPEALS

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INTRODUCTION

This document provides guidance on the identification, appointment and role of litigation friends in the First-tier and Upper Tribunal Immigration and Asylum Chambers for asylum and human rights appeals in England and Wales. It is aimed at lawyers and presenting officers, hearing centres, Tribunal Judges and civil society organisations working with people impacted by this issue.

This guidance has been written by Jennifer Blair, a barrister and specialist in disability, immigration and asylum law, on behalf of Migrants Organise, a registered charity which runs a designated Migrants Mental Capacity Advocacy (MMCA) Project. This guidance has been prepared in consultation with and with thanks to the MMCA Project's Advisory Group members Brian Dikoff, Heike Langbein and Francesca Valerio from Migrants Organise, Beth McGovern from Southwark Law Centre, Bijan Hoshi from the Public Law Project, Eleanor Sibley from the AIRE Centre, Dr Johanna Herrod and Will Whitaker from Bindmans. This publication draws significantly on the writing, research and training of Alex Ruck-Keene, barrister at 39 Essex Chambers, although any errors are the writer's own.

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MENTAL CAPACITY

Under the Mental Capacity Act 2005, mental capacity is defined as an individual's ability to make a particular decision at a particular time. In certain circumstances, a person might not be able to engage sufficiently with an issue to make a decision. That person is said to lack mental capacity for that decision. The decision-specific nature of mental capacity is important to remember and it is essential to always ask the question with the specific context, i.e. "does this person lack capacity to make decision **about X?**", and not simply "does this person lack capacity"

The Mental Capacity Act 2005 is designed to provide an accessible framework to undertake a mental capacity assessment and to assist individuals who might lack mental capacity to make certain decisions. Whilst it is clear that the Act was enacted with the care context in mind, the Mental Capacity Act applies to all individuals above 16 years old of age in England and Wales in any circumstances. The Mental Capacity Act framework, therefore, is designed to be used widely not just by carers, clinicians and health care professionals.

Section 2(1) of the Mental Capacity Act sets out the test for assessing mental capacity: "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 brain"

Essentially the question that needs to be answered is whether, **with as much support as possible, the person can make the decision**. The Mental Capacity Act test can be considered in two parts:

Stage 1: Is there an impairment of or disturbance in the functioning of a person's mind or brain? If so,

Stage 2: (From section 3(1) of the Mental Capacity Act) Does this mean that (due to the impairment or disturbance), the person is unable to make a particular decision, because they cannot:

- understand information relevant to the decision
- retain that information long enough to be able to make the decision;
- use or weigh up the relevant information available to make the decision; or communicate their decision (whether by talking, using sign language or by any
- other means).

Both a positive answer to Stage 1 and to one or more of the criteria from Stage 2 are needed to find someone lacks mental capacity for that specific decision. The inability to make a decision, must be **because of**, the mental impairment or disturbance (there must be a causal nexus between the two).¹

The Mental Capacity Act sets out five key principles which underpin it. These are:

1. 'A person must be assumed to have capacity unless it is established that he lacks capacity' – this presumption of capacity means that it cannot be assumed a person lacks capacity because they, for example, have a disability;
2. 'A person 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' – Capacity should be maximised, so for example if it takes time for a person to understand well enough to make their own decision then they should be given that extra time.
3. 'A person is not to be treated as unable to make a decision merely because he makes an unwise decision'.
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**'.
5. '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' – the 'least restrictive option' means that even where a person lacks capacity their wishes will be considered.²

Mental capacity is not static and may fluctuate depending on a person's health or other factors, such as how the stress of a given situation impacts on them. Therefore mental capacity has to be assessed at that particular point in time.

1 PC and NC v City of York Council [2013] EWCA Civ 478 at [58]: "There is, however, a danger in structuring the decision by looking to s 2(1) primarily as requiring a finding of mental impairment and nothing more and in considering s 2(1) first before then going on to look at s 3(1) as requiring a finding of inability to make a decision. The danger is that the strength of the causative nexus between mental impairment and inability to decide is watered down. That sequence – 'mental impairment' and then 'inability to make a decision' – is the reverse of that in s 2(1) – 'unable to make a decision ... because of an impairment of, or a disturbance in the functioning of, the mind or brain' [emphasis added]."

2 The Mental Capacity Act 'Code of Practice' provides more detailed information: <https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>. A further introduction to the Mental Capacity Act test is set out on the Social Care Institute for Excellence website: <https://www.scie.org.uk/mca/introduction>

WHERE A DECISION NEEDS TO BE MADE FOR A PERSON WHO LACKS MENTAL CAPACITY

A person may lack mental capacity to decide what to spend their money on, for example, but a decision about this may still need to be made.

Section 5 of the Mental Capacity Act provides protection from liability for non-negligent acts and decisions taken by a third party on behalf of a person who lacks capacity to make decisions in connection to their “**care or treatment**”, as long as the decision taken in connection to their care and treatment follows a mental capacity assessment (meaning that the person ‘reasonably believes’ that the person lacks capacity) and is taken in the person’s best interests (as set out in section 4 of the Mental Capacity Act).

If a decision does not relate to care or treatment, if mental capacity is disputed or the person’s best interests are disputed then it may be necessary to apply to the Court of Protection. The Court of Protection oversees decision-making for people who lack capacity and also makes decisions about capacity. For example, a person’s family member may apply to the Court of Protection to

be appointed as a Deputy in respect of a person’s financial and/or welfare affairs or a local authority could apply to the court for permission to deprive a person of their liberty.³

A person who *has* mental capacity to make the relevant decision can authorise a third party to act on their behalf. It is possible for a person who has mental capacity to authorise a third party to continue to act for them even if they later lose mental capacity. This is through a process called a Lasting Power of Attorney. This can **only** be made by a capacitous person and has to be properly registered with the Office of the Public Guardian. This process is sometimes used by people with a deteriorating or fluctuating condition.⁴

The process of appointing a Litigation Friend exists separately from the above (although a person may have a Litigation Friend within proceedings in the Court of Protection to help them engage with those proceedings).

WHAT IS A LITIGATION FRIEND?

In order to commence most civil litigation a person needs to have mental capacity to conduct proceedings and make relevant decisions. This was formerly sometimes described as ‘litigation capacity’, but it is important to consider the specific legal proceedings in issue. In civil proceedings a person who lacks mental capacity to conduct proceedings may be described as a “protected party”.

3 More information about the Court of Protection is available online: <https://www.gov.uk/courts-tribunals/court-of-protection>.

4 More information on Lasting Powers of Attorney is available online: <https://www.gov.uk/power-of-attorney>.

Without a process for a third party to be appointed, adults who lack mental capacity to make relevant litigation decisions and many children would be barred from accessing important legal proceedings in a fair way.

A person who lacks capacity to litigate cannot just rely on a lawyer to do so for them, because a person has to have capacity to sign the contract (the retainer) with the lawyer and to give the lawyer instructions on what to do in the case.

The appointment of a 'Litigation Friend' is the official mechanism used to ensure that children and vulnerable adults are not excluded from most civil litigation.⁵

A litigation friend stands with the person who lacks capacity to conduct the proceedings, instructing any legal representative on their behalf and taking any necessary litigation decisions in their best interests. In order to be able to appropriately assess a person's best interests, the child or protected party's wishes and feelings should be ascertained and taken into account as part of this process (and the key principles from the Mental Capacity Act 2005, as above, should be followed).

WHO CAN BE A LITIGATION FRIEND?

To be a litigation friend a person must:

- 1) Consent to being appointed;
- 2) Be able to fairly, competently and diligently conduct proceedings on behalf of the child or protected party; and
- 3) Be able to act in the best interests of the child or protected party (having no interest adverse to that of the child or protected party).⁶

In a civil law context where the child or incapacitous adult/protected party has issued the proceedings a litigation friend may also have to confirm they are willing to be liable for any costs ordered against the child or adult.⁷

In general, so long as a person is willing, is 'fairly and competently' able to conduct proceedings and there is no conflict of interest, anyone can act as a litigation friend. It is common for any Court of Protection appointed deputy to act as a litigation friend, for relatives to act as a litigation friend, or for professionals to do so also.

⁵ See for example Part 21 of the Civil Procedure Rules - <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part21#21.4>; the Court of Protection has its own procedures.

⁶ E (Mental Health Patient) [1984] 1 WLR 320

⁷ In the civil courts Form N235 is the form of suitability to act as a litigation friend, for example: <https://www.gov.uk/government/publications/form-n235-certificate-of-suitability-of-litigation-friend>.

Whether a person can fairly and competently conduct the proceedings will depend on the nature of the proceedings and whether or not the person will be legally represented.⁸

When considering a potential conflict of interest it is important to look out for:

- Cases where the potential litigation friend has a personal conflict or there is a risk of such a conflict, such as where they have a financial interest in the outcome of proceedings, a business interest, they may have to defend their previous conduct or where they may come into conflict with their employer.
- Cases where the potential litigation friend has a professional or third party conflict, such as where their duty to another person or company may create a conflict of interest.

There is no reason why a professional, acting in a paid capacity, cannot be appointed as a litigation friend. The Official Solicitors' office is funded for its work, professional mental health or capacity advocates can act as litigation friends in the Court of Protection⁹ and, where a professional is appointed as a property and affairs deputy by the Court of Protection they are permitted to be appropriately remunerated for their time. However, it is important that the professional has no potentially conflicting interest in the outcome of the proceedings.

In general, it is not advisable for a local authority social worker or Director of Adult Social Services to be appointed as a litigation friend, because the local authority may not be able to pursue reliably any one person's best interests without balancing those with the other demands on their service and their budget. For example, in cases where there is an age dispute or potential dispute around entitlement to services (such as due to schedule 3 of the Nationality, Immigration and Asylum Act 2002) then the interests of the local authority and person in need of a litigation friend are at odds. The local authority may have a duty to address a person's needs as part of a care plan, which may include procuring or facilitating access to legal support in legal/immigration proceedings. If a local authority representative is proposed as a potential litigation friend, they should demonstrate that there are specific mechanisms in place to avoid a conflict of interest¹⁰ or alternatively the local authority could identify an independent person/advocate who could act as a litigation friend.

It is not advisable for a legal representative to act as a litigation friend (whether the same fee earner does so or someone else in the firm does). This does not allow for sufficient oversight of the legal representative's work or meaningful scrutiny/

8 Sir Robert Megarry V-C said in *Re E (mental health patient)* [1984] 1 All ER 309 at pages 312-3

"The main function of a [litigation] friend appears to be to carry on the litigation on behalf of the plaintiff and in his best interests. For this purpose the [litigation] friend must make all the decisions that the plaintiff would have made, had he been able... the [litigation] friend ... is responsible to the court for the propriety and the progress of the proceedings. The [litigation] friend does not, however, become a litigant himself".

9 See for example *AB v LCC and The Care Manager of BCH* [2011] EW COP 3151 at [43].

10 See 8.60 of the Mental Capacity Act Code of Practice

instructions, since the litigation friend will have a financial and professional interest in the profitability of the case for the legal representative and in protecting the reputation of the firm. Migrants Organise has heard of arrangements between firms where (due to the lack of any other option) solicitors at different firms have agreed to act as litigation friends for each others' cases. There is again nothing inherently wrong with this, but in our view, in such a case, the Tribunal should take steps to ascertain the independence of the litigation friend. Solicitors should be aware of their own professional obligations around conflicts of interests.¹¹

LITIGATION FRIENDS IN THE TRIBUNAL IMMIGRATION AND ASYLUM CHAMBERS

The civil courts may appoint a litigation friend or one may be in place when a claim is first issued. However, the Tribunal Immigration and Asylum Chambers have different procedure rules from the courts and until recently it was not known whether it was even possible for them to appoint a litigation friend.

In the case *AM (Afghanistan)* [2017] EWCA Civ 1123 the Court of Appeal accepted that the common law duty of fairness and natural justice required this, finding *"there is ample flexibility in the tribunal rules to permit a tribunal to appoint a litigation friend in the rare circumstance that the child or incapacitated adult would not be able to represent him/herself and obtain effective access to justice without such a step being taken. In the alternative, even if the tribunal rules are not broad enough to confer that power, the overriding objective in the context of natural justice requires the same conclusion to be reached."*¹²

11 See for example the guidance [on the SRA website](#).

12 <https://www.bailii.org/ew/cases/EWCA/Civ/2017/1123.html>; the Court of Appeal judgment followed and reaffirmed the case of *R (C) v First-tier Tribunal and Others* [2016] EWHC 707 (Admin) where Picken J found that principles of fairness required the appointment of a litigation friend. Subsequent to *AM (Afghanistan)* the Upper Tribunal considered in *R (JS) and others v Secretary of State for the Home Department* [2019] UKUT 64 (IAC) (<https://www.bailii.org/uk/cases/UKUT/IAC/2019/64.html>) when a child would generally be required to have a litigation friend for judicial review cases (a kind of civil case that can specially be transferred from the High Court to the Upper Tribunal under a specific protocol) and found that 16–17 year olds will in general be presumed to have litigation capacity, in respect of 12–15 year olds this would be on a case by case basis and children under the age of 12 would usually require a litigation friend. However, this case does not apply to appeals and the way a hierarchy of children's rights is taken is controversial and has not yet been tested in a higher court.

LITIGATION FRIENDS OF LAST RESORT

There are cases where a person does not have a family member or professional person available who is willing and able to act as a litigation friend. In such cases there is a real risk that there will not be a fair hearing: cases may grind to a halt or otherwise proceed unfairly creating a substantial risk of injustice. In asylum and human rights cases, the risk of injustice can be linked with the most serious forms of harm.

The Official Solicitor is a publicly funded appointment designed to assist those who are vulnerable, because of their mental capacity, to access the justice system. Where a person has no one else to act as a litigation friend then the Official Solicitor often does so in the Court of Protection or civil proceedings in the higher courts. However, the Official Solicitor's office has limited funding, its focus is on acting in higher courts and in general, unless an exception is made or the case is of wider public importance, then the Official Solicitor will not act as the litigation friend of last resort in immigration and asylum appeals.¹³

The result is that **there is currently no mechanism for identifying a litigation friend of last resort where a protected party requires one in an immigration and asylum appeal**. This can result in long delays in cases involving vulnerable people while requests are made to different organisations to try and find someone who will volunteer to undertake the role of litigation friend.

The Migrants Mental Capacity Advocacy Project at Migrants Organise was partly set up as a small-scale project to try and bridge this gap for some urgent cases in the interim while a more sustainable option was developed for the longer term (ideally increased funding for the Official Solicitor's office, given the existing expertise they have in this field). However, a considerable period of time has now passed and no appropriate mechanism has been identified to respond to this protection gap in a sustainable, national way.

In a case where a litigation friend of last resort is required, but cannot be identified, the remaining options are to seek assistance from the person's local authority (who could for example, exceptionally, fund an independent

disability advocate to undertake this role) or, if that is not successful, to consider ancillary legal proceedings to challenge the failure to make appropriate provision necessary for a fair hearing.

¹³ The general criteria for the Official Solicitor to act are set out in the family courts practice note [‘The official solicitor to the senior courts: appointment in family proceedings and proceedings under the inherent jurisdiction in relation to adults’](#).

WHAT A LITIGATION FRIEND IS NOT

A litigation friend conducts litigation ‘on behalf’ of a person, but they are not that person’s legal representative (an unrepresented person conducting proceedings through a litigation friend would still be unrepresented).

Litigation friends are obliged to take decisions on a best interest basis, but their role is not explicitly to present the wishes and feelings of the person. Sometimes they may even be taking decisions contrary to the direct expressed wishes of the person involved (for example in the case of a person who wishes to terminate their retainer with their legal representative for reasons linked to a delusional disorder and the litigation friend takes the overall decision this would not be in their best interests). It can therefore be very important that a proper mechanism is in place for the person’s wishes and feelings to be presented as part of litigation (to allow that person to play an effective part in the litigation, even when they have a litigation friend). It is recommended that this is explored by judges dealing with such cases at case management stage.¹⁴

In different legal jurisdictions and official processes there are a number of different professional roles that exist to support disabled people to engage with processes in a fair way. These are not the same as litigation friends and the roles should not be elided or confused. Examples of professional roles that are not the same as that of a litigation friend are:

- **Support worker** (a professional working to assist a person to apply for or access the facilities they need or would benefit from);
- **Appropriate adult** (a third party whose role is to actively try and promote/ensure understanding and wellbeing of a vulnerable person or child in an official interview or appeal process¹⁵);
- **Intermediary** (an independent person appointed in litigation as a special measure due to vulnerability such as age or disability – for example when a person seems unlikely to be able to recognise a problematic question or, even if able to do so, may be reluctant to say so to a questioner in a position of authority¹⁶);
- **Interpreter** (a person who translates from one language to another);
- **Independent Mental Capacity Advocate (IMCA)** (an independent professional who can support and represent a person lacking mental capacity in the decision making process – usually linked with NHS treatment or NHS or social services accommodation);
- **Independent Mental Health Advocate (IMHA)** (a statutory right for people detained under most sections of the Mental Health Act to promote engagement in decision making);

14 See ‘[Litigation friends or foes? Representation of ‘P’ before the Court of Protection](#)’, Ruck Keene and others, *Medical Law Review*, Volume 24, Issue 3, August 2016, Pages 333–359.

15 E.g. see ‘Guidance for Appropriate Adults’, Home Office 2003 <https://www.gov.uk/government/publications/guidance-for-appropriate-adults>

16 See for example the CPS guidance – <https://www.cps.gov.uk/legal-guidance/special-measures#:~:text=What%20is%20an%20Intermediary%3F,duty%20is%20to%20the%20court.>

- **Independent Child Trafficking Guardians** (a developing system to allow an independent guardian to coordinate and explain support to and for trafficked children);
- **Social worker** (usually an employee of the person's local authority who can assess a person and if relevant develop a support plan in line with specific statutory obligations);
- **A Child Advocate** (an independent person who can help looked after children to make representations about their care or complaints about their care).

LITIGATION FRIENDS AND LEGAL AID

Legal aid is the mechanism by which those who cannot afford to pay a lawyer can access one free of charge. There is legal aid available automatically in asylum, Article 3 ECHR cases, where a person has received a positive reasonable grounds decision as a victim of trafficking, for unaccompanied children in care and for some immigration detention/bail work. For other kinds of immigration and asylum appeal (e.g. many other deportation, human rights and/or EU law cases) legal aid is only available if Exceptional Case Funding is granted.¹⁷ Exceptional Case Funding can be applied for by a lawyer (for immigration law usually a lawyer with a relevant legal aid contract) or by the person affected directly (helped by another person if needed). Applying for Exceptional Case Funding is not itself immigration legal advice, but where possible we recommend people receive legal advice before applying to ensure it is suitable for them.

Legal aid in immigration and asylum appeals will usually only be granted where a person meets a set financial eligibility test to prove they cannot pay for a lawyer and also where the case meets a merits test, to justify the funding.

In a case where a person lacks mental capacity to apply for legal aid/conduct proceedings/instruct a legal representative (as relevant), the litigation friend or proposed litigation friend can sign the legal aid form, or if there is a good reason why a litigation friend or proposed litigation friend cannot do so then a different third party can.¹⁸ Even where a litigation friend is appointed it is the person's means who are assessed, not those of the litigation friend, for the purposes of legal aid.

17 <https://www.gov.uk/guidance/legal-aid-apply-for-exceptional-case-funding>

18 R.22(4) of the Civil Legal Aid (Procedure) Regulations 2012.

STEPS TO APPOINT A LITIGATION FRIEND IN AN ASYLUM OR HUMAN RIGHTS APPEAL

STEP 1: confirm if the party has ‘capacity to conduct proceedings’

Although there is a presumption in favour of assuming a person capacity, there will be cases when there is a serious concern about a person’s mental capacity, in terms of the Mental Capacity Act 2005, and an assessment of capacity will be needed.

There are a number of ‘micro’ decisions that feed into the wider and overall decision of whether a person has capacity to conduct proceedings in general.¹⁹ Capacity assessments are decision-specific, so will depend on what the person will actually need to decide in the specific proceedings, and lack of capacity cannot be assumed because a person is disabled. It is also important to note that immigration law can be exceptionally complex, to the extent that even those with mental capacity can struggle to fully understand it. The assessment of mental capacity therefore needs to be realistic and holistic.

Decisions that form part asylum and human rights appeal proceedings will include issues like whether a person can:

- understand the different kinds of leave to remain they might receive and decide between which of these they want to pursue;
- understand the purpose of the appeal and possible outcomes so that they are able to give sufficiently clear instructions;
- make decisions about case management issues, such as any need for an adjournment or withdrawal of proceedings or on whether proceedings should take place in person or remotely (or on the papers);
- give instructions to a legal representative to obtain expert evidence and understand to a sufficient degree what this is for and involves;
- choose to instruct a lawyer, understanding the benefits of doing so and what legal aid is.

Mental capacity should be maximised, so this can require additional time or appointments to allow a person the space to make a capacitous decision and it may involve adjustments to the process of explaining issues involved, such as the use of images to help a person to follow an explanation. It is only if, despite steps being taken to maximise capacity and engagement, the person still cannot make a capacitous decision that they would be assessed as lacking mental capacity to conduct proceedings.

¹⁹ See [Greenwich v CDM \(by her litigation friend the Official Solicitor\) \[2019\] EW COP 32](#) where although there “may be occasions” when a diabetic woman would have capacity to make micro-decisions about her treatment it was found that in terms of the “global decision” which involved interdependent different issues she lacked capacity “to take the macro-decision”.

The Mental Capacity Act 2005 is designed to be accessible and usable in practice, so that professionals working with a person can themselves judge capacity. In the first instance therefore a lawyer – who would be a person acting in a professional capacity for, or in relation to, a person who lacks capacity²⁰ may assess capacity. This will involve considering whether the person has a disturbance of the mind or brain (which is likely to be based on medical/welfare evidence or information²¹) and then considering whether – due to that impairment or disturbance – the person can or cannot understand, retain, weigh up and communicate information sufficiently to make a decision. The lawyer should document their conclusion and the reasons for this. By comparison, the Mental Capacity Act 2005 gives this example about professionals assessing capacity in the context of care and treatment:

“Mary is 16 and has Down’s syndrome. Her mother wants Mary to have dental treatment that will improve her appearance but is not otherwise necessary. To be protected under section 5 of the Act, the dentist must consider whether Mary has capacity to agree to the treatment and what would be in her best interests. He decides that she is unable to understand what is involved or the possible consequences of the proposed treatment and so lacks capacity to make the decision. But Mary seems to want the treatment, so he takes her views into account in deciding whether the treatment is in her best interests. He also consults with both her parents and with her teacher and GP to see if there are other relevant factors to take into account. He decides that the treatment is likely to improve Mary’s confidence and self-esteem and is in her best interests.” (p.222)

When a litigation friend is to be appointed²², the Tribunal will expect to be provided with evidence that a person lacks mental capacity to conduct the proceedings. This is because a litigation friend can potentially exercise considerable power over a person’s rights, with potentially significant welfare consequences.

In cases where there is not yet a full mental capacity assessment, concerns from the legal representative or other professionals working with the person should be treated seriously by the Tribunal, in line with the Mental Capacity Act 2005 Code of Practice, because the legal representative or other professional may be the person who has best (or only) direct experience of the person who is suspected

20 And so be caught by the Mental Capacity Act 2005 Code of Practice: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf.

21 Assessing mental illness, mental impairment and cognitive function are outside of the scope of most legal practitioners’ competence (unless they have specific training, expertise or research experience to allow them to make such an assessment reliably) and so, in a crisis where a person has no relevant medical or welfare history, a working assessment from a lawyer may still need to be undertaken, but where a specialist opinion is needed to assess the nature and symptoms/impact of the suspected impairment or disturbance in the functioning of the person’s mind or brain then this should be obtained as a priority, in order to permit a better informed professional mental capacity assessment.

22 Unless the litigation friend already has authority to act through the Court of Protection.

to lack capacity's presentation and the relevant context. In some cases a legal representative, as an immigration legal professional, may be better placed than a clinician to explain why in the context of the particular proceedings the person has or does not have mental capacity. If there is a dispute about mental capacity it may be helpful to consider commissioning medical or welfare reports or, in a case with significant welfare implications, making an ancillary application to the Court of Protection.

In terms of obtaining an assessment from a clinician or welfare professional there can be misunderstandings that such evidence must come from a specific clinician such as a consultant psychiatrist, but this is incorrect. For example, the Court of Protection standard form for assessment of mental capacity expressly states that this kind of assessment for legal proceedings may come from a medical practitioner, such as the person's GP, a psychiatrist, an approved mental health professional, a social worker, a psychologist, a nurse; or an occupational therapist.²³ If a person's legal representative (or in the case of an unrepresented person then the person – the protected party – themselves) is struggling to obtain clinical or healthcare evidence regarding mental capacity then in some cases it may be helpful for the Tribunal to write to the relevant GP and/or local authority and make a direction for them to provide this evidence. Unfortunately, in the immigration and asylum tribunals there is no way to force compliance with such a direction and no equivalent to the Court of Protection's mechanism for commissioning a report from an external provider such as an NHS Trust or from a Court of Protection visitor. Due to time and cost pressures on GPs and social workers it can be very difficult for appellants or their legal representatives to obtain a specialist clinical or welfare assessment of mental capacity, so it is strongly recommended that as collaborative and pragmatic an approach as possible is taken towards this between the parties and the Tribunal. In a particularly difficult case, ancillary proceedings in the Court of Protection could be required.

In some cases a clinician or welfare professional may be instructed privately to provide a medico-legal report on this issue, which is often only possible for appellants where legal aid is in place. Where there seems to be no other option, it would be open to the Tribunal, where justice required it, to direct that the Respondent commission such a report from an agreed or directed expert or the Tribunal judge could potentially themselves, or via the Respondent, raise a request that HMCTS itself fund this as an exceptional payment via the Tribunal manager.

It is critical that litigation does not proceed unfairly, because of administrative difficulties and the current gaps in provision in this jurisdiction for mentally disabled litigants. Where there are safeguarding concerns, including because a child or protected party is not legally represented, then the Tribunal judge or the

23 COP3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/900101/cop3-eng.pdf

Home Office should consider a direct referral to social services or a third sector organisation.²⁴

The Tribunal has issued important guidance on vulnerable witnesses (Joint Presidential Guidance Note No.2 of 2010 – Child, vulnerable adult and sensitive appellant guidance²⁵) which emphasises the Tribunal’s own responsibility for considering an adjournment or active case management to ensure special measures and appropriate medical reports are in place and this guidance notes, for example, that civil society organisations, such as the Refugee Council can assist appellants (in that case minors) in finding legal representation. This guidance needs to be considered alongside the Tribunal and Home Office’s obligations under the Equality Act 2010 and the Human Rights Act 1998.

STEP 2: identify a suitable litigation friend

As set out above, to be a litigation friend a person must:

- 1) Be willing to undertake the role;
- 2) Be able to fairly, competently and diligently conduct proceedings on behalf of the child or protected party; and
- 3) Have no interest adverse to that of the child or protected party.

It is common for family members to act as litigation friends, but professionals may also. Virtually anyone can act but they must be able to ‘fairly and competently’ conduct the proceedings and there must not be a conflict of interest (as discussed above).

If no suitable litigation friend can be identified then it is possible to approach the Official Solicitor’s Office and ask them to provide a litigation friend of last resort.²⁶ However the Official Solicitor is not funded to act in human rights and asylum appeals in the Tribunal and so is likely to decline. There is then no system to provide a litigation friend (as set out in more detail above).

If such a situation should arise it would be contrary to principles of natural justice or the overriding objective for an asylum or human rights appeal to either be stayed indefinitely or for it to proceed without a capacitous appellant who can effectively participate in the proceedings. There are limited options available.

If the Official Solicitor declines to act, one option could be to try and make a referral to Migrants Organise’s Mental Capacity Advocacy Project (which can be done by emailing brian@migrantsorganise.org). This project can match people with a litigation friend if it can invoice the Tribunal centre manager for an ex gratia payment from HMCTS to cover

24 For example the Home Office does have a policy covering their response to Asylum Seekers with Care Needs: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/731907/Asylum-Seekers-With-Care-Needs-v2.0ext.pdf

25 <https://www.judiciary.uk/wp-content/uploads/2014/07/ChildWitnessGuidance.pdf>

26 <https://www.gov.uk/government/organisations/official-solicitor-and-public-trustee>

the litigation friend's costs. However, this is a small-scale project with limited capacity.

Another option would be for the Tribunal or Respondent to make a written request to seek the assistance of the relevant local authority²⁷ in order for them to identify an independent professional (likely a lawyer independent of the parties or a mental health advocate) to act in the role of litigation friend. Such a request should be made under the Localism Act and the Care Act 2014 in line with the local authority's obligations to take preventative steps to prevent care needs arising (section 2), to provide information and advice (section 4), to assess and adult's needs for care and support (section 9), the duty to meet eligible assessed care needs (section 18), the power to meet other needs (section 19, which would be equivalent to a duty where required to prevent a breach of human rights/EU law) and to safeguard at risk adults (section 42). Where the case involves a family with a minor child in need, the case involved a looked after child or care leaver then the relevant provisions of the Children Act 1989 would also be engaged.

In terms of funding the cost of the time and travel expenses of a professional litigation friend of last resort, the relevant local authority could undertake to cover this expense or if there is no other source of funding an ex gratia payment can be sought from HMCTS through the Tribunal manager. There is generally no funding available to cover the time spent on a case by more usual litigation friends (such as family members).

STEP 3: ensure litigation friend is properly appointed

Once a suitable litigation friend is identified then there is no established procedure in the Immigration and Asylum Tribunals to appoint them. The Tribunal Procedure Rules have not yet been updated to cover litigation friends and there is no established form. We recommend that the application be made in writing, to mirror the approach taken under the Civil Procedure Rules, and that either the application is made by letter and/or by using the form which is used in the civil courts²⁸ (although noting that the Tribunals is not a costs jurisdiction in general).

A claim can be issued with a litigation friend or an application can be made to appoint a litigation friend during proceedings. Whichever route is taken, the immigration judge dealing with the case will need to be satisfied that the person involved does lack capacity to conduct proceedings (whether because of their age or due to a lack of mental capacity) and the proposed person is a suitable litigation friend. Where the proposed litigation friend has authority to act in these proceedings through the Court of Protection then that should generally be sufficient.

²⁷ Bearing in mind that Schedule 3 of the Nationality, Immigration and Asylum Act 2002 restricts support to adults without leave to remain/who are EU nationals under the Care Act, Localism Act and Children Act unless this support is necessary to prevent a breach of human rights or EU law rights, so if that is plainly the case it is likely to assist the local authority to have this outlined.

²⁸ Form N235 is the form of suitability to act as a litigation friend: <https://www.gov.uk/government/publications/form-n235-certificate-of-suitability-of-litigation-friend>

If an application is made to appoint a litigation friend then we recommend that this be dealt with promptly/as a priority at a preliminary Case Management

Review Hearing. It is not generally appropriate to wait until a final hearing to resolve this issue, because it is unlikely a legal representative will be able to adequately prepare a person's case until the litigation friend is appointed.

STEP 4: litigation friend discharges their responsibilities

Once in post a litigation friend should discharge their responsibilities to conduct proceedings fairly and competently.

If a lawyer is instructed (and we recommend that one is), then the litigation friend will instruct the legal representative to act in the appellant's best interests as per section 4 of the Mental Capacity Act. It is important that any assessment of best interests places the wishes and feelings of the person concerned at its heart as part of the duty to promote the person's engagement with the proceedings.²⁹ All reasonable attempts should be taken to support people to understand and engage with the proceedings to the extent that it is safe and possible for them to do so and it should not be assumed that just because a person is disabled that decisions should be taken without consulting them. It can also be important to consult the people involved with the care and support of the person and any family members, if possible and appropriate. The litigation friend's conduct should be underpinned by the principles of the Mental Capacity Act 2005, including the need to take the least restrictive option in making a decision on behalf of another person.

In terms of practical tools that litigation friends, legal representatives (from both sides) and judges can draw on in cases involving very vulnerable and disabled appellants and witnesses, we strongly recommend the tools and materials set out on the Advocate's Gateway.³⁰

Lack of capacity to conduct proceedings is not the same as deciding on whether or not a person should be called to give evidence. A person may be able to answer some factual questions to the extent they are able to or express their wishes and feelings as they see them, but may lack insight, impacts on recall and memory or be unable to cope with cross-examination. In the adversarial context of an immigration and asylum case it is possible to present a vulnerable person's evidence by means of professional evidence and/or a witness statement (signed or even unsigned) rather than oral evidence in a court setting. It is therefore important for a litigation friend to consider the issue of competence to give evidence, the appropriateness of a child or protected party giving evidence and what reasonable adjustments/special measures may be needed to optimise a person's ability to engage with the proceedings (if it is safe and

29 Although there is technically no hierarchy amongst the section 4 Mental Capacity Act best interests criteria, *Re M, ITW, v Z* [2009] EWHC 2525 (Fam), there are other obligations around procedural fairness to promote a person's engagement with their case.

30 <https://www.theadvocatesgateway.org/>

appropriate for them to do so and whether or not they are giving evidence).

It is important for the Tribunal to be conscious of an incapacitous appellant's greater vulnerability and to raise safeguarding concerns if they should arise, including raising these to or about a litigation friend. An immigration judge can also expect the Home Office to act in a collaborative way around safeguarding concerns given their own responsibilities in this area and the overriding duty to assist the Tribunal. This may be particularly important in the case of an unrepresented party if there are any concerns about the litigation friend. Even in the case of a represented party, a person's legal representative is obliged to follow their instructions and conversations with the litigation friend are subject to legal professional privilege and confidentiality restrictions (so, for example, there may be situations where an immigration judge believes the interests of justice would require an adjournment, even if the appellant's litigation friend or legal representative do not seek one).

Whilst a litigation friend is expected to fairly, competently and diligently exercise their role, there is not precisely any particular 'standard of care' required by litigation friends: people's friends and family members who are lay people and not trained or professionals often act as litigation friends. However, lawyers or other professionals who are also acting as litigation friends will still be obliged to follow any relevant professional code of conduct and it is deemed not to be in a person's best interests to advance an unarguable point during litigation (even if the child or protected party wants the litigation friend or the legal representative to do so).³¹

STEP 5: litigation friend ceases to act/end of the process

If a litigation friend turns out to be unsuitable for their role then the Tribunal can remove them from acting as a litigation friend. An application for this can be made by either party or of the Tribunal's own volition.

A litigation friend can also choose to cease acting as a litigation friend. The litigation friend should request in writing that the Tribunal remove them from acting and we recommend that notice of this is served on the other party/parties, particularly if this is likely to interfere with the litigation timetable.

Otherwise, once litigation in these proceedings (including any onward appeal) has come to a close, the litigation friend's role will also come to an end. In cases where the appellant does not have capacity to instruct their lawyer, it is helpful for the litigation friend to remain available to instruct the legal representative/oversee matters until the proceedings have been implemented (for example through confirmation of a positive grant of leave to remain and issue of a BRP) in case there is a problem which requires a return to the Tribunal (such as through an application for a further hearing) or for new proceedings to be undertaken.

The litigation friend is appointed in a particular set of proceedings so if other proceedings commence, such as judicial review proceedings, then the litigation friend would need to be separately appointed in those proceedings (if needed).

31 RP v United Kingdom, 9 October 2012 ([Application no. 38245/08](#))

The role of a litigation friend will also come to an end if the protected party regains capacity. It is therefore important to keep capacity under consideration. In cases where capacity fluctuates, a clear plan should be in place to allow capacity to be ascertained and, if needed, the litigation friend to step in at the times the person does lack capacity to conduct the proceedings. This should be fully documented and details of each capacity assessment set out.

WHAT HAPPENS ‘PRE-LITIGATION’ WHERE A PERSON LACKS CAPACITY TO MAKE RELEVANT IMMIGRATION AND ASYLUM DECISIONS

Looking at this issue in detail goes beyond the scope of this document. However, a short outline is set out here to provide context to those working in this sector.

In pre-litigation work (where litigation is envisaged), a ‘proposed litigation friend’ can become involved. Where litigation is envisaged this allows the proposed litigation friend, as required and appropriate, to sign the legal aid forms and instruct a legal representative to issue proceedings.

Where no litigation is envisaged, so for example in the case of many first applications for leave to remain, there is no litigation even envisaged and so a litigation friend cannot be appointed. There are then two options.

As set out above, where a decision is connected with a mentally incapacitous person’s **care or treatment** section 5 of the Mental Capacity Act 2005 protects a third party from liability where they act on behalf of a mentally incapacitous person so long as:

- 1) that person is reasonably believed to lack mental capacity for the decision, in line with the principles of the Mental Capacity Act – i.e. before doing the act the third party must take reasonable steps to establish whether the person lacks capacity in relation to the matter in question, usually through a capacity assessment, and
- 2) the decision is taken in the person’s best interests (applying the principles of the Mental Capacity Act 2005 and its Code of Practice).

This provision does not provide a blanket immunity – it is there to provide immunity where critical decisions are taken in response to an imminent risk. For example if a dog walker collapsed in front of you then you might call an ambulance, share information with paramedics and take decisions about pet care until the person regains consciousness. This immunity provision is a defence, not a recommendation to take extensive actions without oversight.

There will also be many kinds of decision in relation to immigration and asylum matters which are not directly connected to a person’s care or treatment. However, there may be some decisions that are, such as some medical claims or cases made in response to an urgent safeguarding/welfare need – for example where someone risks being separated from a carer or where an NRM referral is considered to be

relevant to a person gaining access to much needed treatment to promote their recovery from exploitation. In some cases an initial decision may be taken connected with care and treatment (such as an urgent safeguarding measure), but at a certain point the process may no longer be directly connected to care and treatment and section 5 would no longer apply.

Where litigation is not envisaged and the decision is not an act connected with care and treatment then an application would need to be made to the Court of Protection before decisions can be taken on behalf of someone who lacks mental capacity to make a relevant decision.³² There is some legal aid for Court of Protection proceedings, but this is usually for more complex matters and it is common for statutory services such as local authorities and the NHS to initiate Court of Protection proceedings. Where the person's immigration status has serious consequences for their welfare (which can arise quite often in the context of hostile environment measures) then an application could be made to the Court of Protection for a personal welfare order. Where legal processes are not connected with a person's welfare then the application would be made under property and affairs instead. In some cases an appropriate person (usually a family member) may apply to be appointed as someone's deputy for property and affairs or welfare (welfare deputies are fairly uncommon). A Court of Protection appointed deputy should always consider whether a decision they are going to take is covered by their deputyship: for example an ordinary property and affairs deputyship does not usually allow a deputy to initiate civil legal proceedings without the permission of the Court of Protection.³³

MISCARRIAGES OF JUSTICE

The Tribunal Immigration and Asylum Chambers and the Home Office are bound by principles of natural justice and procedural fairness, the Human Rights Act 1998 and the Refugee Convention (as implemented in the immigration rules). The Tribunal and the Home Office are also bound by the provisions of the Equality Act 2010, including the obligation not to discriminate, the public sector equality duty and the duty to make reasonable adjustments. In most cases a person who lacks mental capacity to conduct proceedings will also be disabled in terms of the Equality Act 2010.

It is not acceptable for the Tribunal to permit a procedurally unfair appeal to proceed, which is what may happen if a person who lacks mental capacity to engage sufficiently with the proceedings themselves does not have a litigation friend.

In a case where there appears to have been a miscarriage of justice (which sometimes may only be identified substantially later on), it is possible to appeal (if necessary applying for permission to extend time to do so). It is also possible to consider an interlocutory judicial review challenge to a decision/failure to take a

32 <https://www.gov.uk/courts-tribunals/court-of-protection>

33 See for example ACC and Others [2020] EWCOP 9.

decision: sometimes waiting for the outcome and pursuing a statutory appeal will constitute a sufficient alternative remedy, but sometimes it will not (for example if damage may be done to a person in the meantime or if the problem is with a policy or practice, which is just likely to be repeated, rather than to an individual decision).

If, after the event, it is believed that a litigation friend has acted inappropriately in the way they have pursued or disposed of proceedings, this may also be a basis to request that a case be re-opened due to a procedural irregularity. We recommend if this situation should arise specialist legal advice should be sought.

CONFIDENTIALITY

In some immigration and asylum proceedings an anonymity direction is made to prevent the identity of the appellant from being revealed.³⁴ Where this is made a litigation friend must abide by it.

The obligation for a litigation friend to discharge their function fairly and competently, includes data protection and privacy obligations. A person lacking mental capacity still has a right to respect for their private life and information.

There are complex issues of confidentiality in this field. Lawyers, social workers and clinicians must follow their own codes of conduct and professional duties. A deputy appointed by the Court of Protection or an attorney appointed under a lasting power of attorney has an obligation to keep the person's affairs private unless an exception applies.³⁵ We recommend that litigation friends follow a similar approach. In a dispute the Court of Protection can make a decision about the right to access or share a person's information. In addition, the Mental Capacity Act 2005 Code of Practice states:

“4.55 People involved in assessing capacity will need to share information about a person's circumstances. But there are ethical codes and laws that require professionals to keep personal information confidential. As a general rule, professionals must ask their patients or clients if they can reveal information to somebody else – even close relatives. But sometimes information may be disclosed without the consent of the person who the information concerns (for example, to protect the person or prevent harm to other people).

[...]

5.56 Decision-makers must balance the duty to consult other people with the right to confidentiality of the person who lacks capacity. So if confidential information is to be discussed, they should only seek the views of people who it is appropriate to consult, where their views are relevant to the decision to be made and the particular circumstances.

34 See for example First-tier Presidential Guidance Note No.2 of 2011: <https://www.judiciary.uk/wp-content/uploads/2014/07/guidance-2-2011-.pdf>.

35 Mental Capacity Act 2005 Code of Practice 7.64 and 8.64

5.57 There may be occasions where it is in the person's best interests for personal information (for example, about their medical condition, if the decision concerns the provision of medical treatment) to be revealed to the people consulted as part of the process of working out their best interests (further guidance on this is given in chapter 16). Healthcare and social care staff who are trying to determine a person's best interests must follow their professional guidance, as well as other relevant guidance, about confidentiality.

[...]

16.27 Whenever a carer gets information, they should treat the information in confidence, and they should not share it with anyone else (unless there is a lawful basis for doing so). In some circumstances, the information holder might ask the carer to give a formal confirmation that they will keep information confidential.

16.29 A carer should always start by trying to get consent from the person whose information they are trying to access. If the person lacks capacity to consent, the carer should ask the information holder for the relevant information and explain why they need it. They may need to remind the information holder that they have to make a decision in the person's best interests and cannot do so without the relevant information."

COSTS

In the First tier and Upper Tribunal Immigration and Asylum Chambers statutory immigration and asylum appeals are a 'no costs' jurisdiction, which means that the 'winning' party cannot recover their legal costs from the 'losing' party. There is therefore no costs risk in this jurisdiction in the way that there might be in some civil litigation.

If an appellant wins an appeal against the Home Office the judge can consider reimbursing any fee that was paid to the court for the issue of the appeal.


However, it is possible for an immigration judge to make a wasted costs order against a parties' legal representative or an unreasonable costs order against a party. These are ordered where expenses have been incurred due to the representative or party's negligence or unreasonable behaviour. There is no way to gain protection from this kind of order (except by not behaving negligently or unreasonably). If an argument is made that a litigation friend should be obliged to pay such a costs order they would be given the opportunity to respond and defend themselves.³⁶


In a case before the Court of Appeal or Supreme Court, or in other kinds of proceedings such as judicial review proceedings, costs can be ordered against an unsuccessful party. Where a party has legal aid this usually acts as protection against these costs being ordered against the party. This is why the Official Solicitor will usually only act as the litigation friend in cases where a party is legally aided. If costs is a concern in a relevant case, the litigation friend may wish to seek advice from a legal representative about the possibility of seeking a protective costs order to allow them to act.

36 See for example First-tier Tribunal Presidential Guidance Note No.2 of 2018: <https://www.judiciary.uk/wp-content/uploads/2018/07/costs-guidance-2018.pdf>

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