migrants organise

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Without Capacity

Mental Capacity as a Barrier to Justice in the Immigration System

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About Migrants Organise

Migrants Organise is an award winning, grass roots platform where migrants and refugees and our allies organise for dignity and justice.

Migrants Organise was established in 1993 by migrant and refugee leaders in North Kensington, London to provide capacity building and assistance to new arrivals. In response to the changing needs of our members and the deteriorating national context for immigration, we have grown into a national organisation combining community organising and movement building with our Community Programme, a project which offers direct ongoing advice and casework support for vulnerable migrants and asylum seekers in London.

Take action with us. Join us in our call for humane immigration reform - sign our Fair Immigration Reform Charter (https://firmcharter.org.uk/) and be part of a growing movement for migrant justice.

Migrants Mental Capacity Advocacy (MMCA) Pilot

In October 2017 we established the Migrants Mental Capacity Advocacy (MMCA) pilot – a small strategic sub-project within our Community Programme - due to growing concerns that the hostile immigration system does not adequately protect and safeguard the interests of individuals with mental health disabilities, who might not have the mental capacity to engage with the immigration process. To our knowledge this is the first of its kind in our sector.

Preface

The impetus for the MMCA project stemmed from our experience working with a particularly vulnerable victim of sexual trafficking, who had suffered from repeated abuse since a young age. Her immigration solicitor had obtained and presented to the Home Office various strong medical evidence for her asylum and trafficking claim. The evidence highlighted specifically her deep-rooted fear of authority figures as a result of the past trauma. Despite this, the Home Office continued to insist that she went to report at a Home Office reporting centre regularly.

We worked with her immigration solicitor and tried our best to challenge the inappropriate and unlawful bail condition. However, in the meantime, our member still had to comply with her reporting condition as it would be a criminal offence otherwise. During one of her reporting events, she was called for, what we believe, was a redocumentation interview. She became agitated, suffered a panic attack and dissociated. She was not able to answer any questions and yet the Home Office still tried to interview her for a few hours. At one point, she was allowed to call us as she did not know what was happening. She had been asked to sign a paper which she could not even read back to us on the phone, as she was too distressed (she speaks English). She ended up signing the document despite our advice, and not knowing what exactly what she was signing. After the interview, she walked aimlessly on the street and became suicidal. Fortunately, she was still able to go to the A&E to seek help.

We had to immediately send a letter to the Home Office explaining that whatever she had signed was not valid as she clearly did not have the requisite mental capacity to make that decision. She was not able to understand the information given to her and, until today, cannot even remember what had happened exactly. We are still not sure what it was that the Home Office had asked her to sign. We did not hear back from our letter, and in the end, after a threat of a judicial review proceeding, the Home Office agreed to stop requiring her to report. We suspect that she had been asked to sign a voluntary return form which would have been detrimental to her asylum claim. She is now a refugee.

40 months into the project, and 50 cases later, what our experience has shown most clearly is that issues with mental capacity appear in every step of the immigration process, not just in relation to bail condition, and that there is a much bigger gap in the current system than we initially suspected. Individuals with mental health disabilities and conditions face multiple, intersecting barriers to accessing the immigration system effectively, from the very start of the process of seeking legal help, until when they have "won the battle", and have received their immigration status. At the moment, some of these barriers are quite simply insurmountable. We have worked on cases (some of which will be elaborated in this report) that were referred to us as a last resort as no one else has been able to make progress. Unfortunately, we too have struggled.

The lack of Home Office policy guidance on this issue is telling. As far as we know, there is currently no published substantive Home Office guidance which mentions specifically the issue of mental capacity in relation to making an immigration application, apart from the current EUSS guidance [1]. The only time the issue is mentioned by the Home Office is in the Detention Service Order 03/2017 relating to the care and management of detainees who are refusing food and/or fluid (September 2019).

What is most concerning, however, is that these issues are often missed, not just by the Home Office, but by judges, lawyers, advisers, caseworkers and support workers on the ground. Cases in which a migrant lacks capacity as the result of a serious mental health condition are often characterised as "one-off", "unique", or "especially challenging", even though anyone who works in the field can attest to the disconcerting amount of trauma that our clients often go through, whether back in their country of origin, in their journey coming into the UK, or in the UK itself as a result of the Government's ongoing hostile environment policy; and an obvious corollary is that a lot of human rights migrants and asylum seekers are more likely than not to suffer from mental health problems.

The main purpose of this report therefore is to shed light on these issues. We have learnt much, but we are still scratching at the surface. There are still a lot of questions and problems that needs to be analysed and potential answers and solutions to be tested. We hope that this will be a good first step towards improving the immigration system.

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[1] In September 2020 - May 2021 , Migrants Organise, represented by the Public Law Project and Garden Court Chambers sought to judicially review the Home Office's lack of adequate guidance to ensure that EU migrants who lack mental capacity can still access the EU settlement scheme. After a series of pre-action correspondence, the Home Office's caseworker guidance for EUSS now specifically covers the issue of mental capacity.

Thank You

We would like to extend our deepest gratitude to our pro bono advisory panel. The MMCA project was a small pilot ran without any clear funding, and so without their unwavering dedication, knowledge and expertise, this pilot would not have existed:

Francesca Valerio, Community Programme Director, Migrants Organise
Heike Langbein, Advice Manager, Migrants Organise
Jennifer Blair, Modern Slavery Lead at Migrants Organise and Barrister at No5 Chambers
Dr Johanna Herrod, Consultant Neuropsychiatrist
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Bijan Hoshi, Lead Lawyer at the Public Law project and Barrister at Garen Court Chambers
Eleanor Sibley, Legal Project Manager at AIRE Centre and Barrister at Field Court Chambers

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Oliver Persey

What is Mental Capacity?

Mental capacity can generally be understood as a person's ability to make a particular decision. A straightforward example of someone who lacks mental capacity would be someone who is in a coma. Mental capacity however can be difficult to assess. Someone who suffers from dementia, for example, might experience lucid moments where all normal faculties return.

The Mental Capacity Act 2005 (MCA) was intended to create a comprehensive system to assist individuals who lack mental capacity to make decisions, whatever the context. Before the MCA was created, there was a lot of confusion and difficulties in relation to the assessment of capacity. The common law developed a number of different tests of capacity depending on the context, including the creation of wills, litigation, marriage, etc. The MCA consolidated all of these different tests.

The MCA is a primary legislation covering English and Wales. It was enacted by the Parliament and is directed towards people over the age of 16 who lack capacity to make particular decisions for themselves – or for those who still have capacity but want to make preparations for a time when they may lack capacity in making decisions in the future.

The main thinking behind the MCA is the idea that people have the right to live as they choose. Just as people with capacity are able to make their own decisions about their lives, the MCA's purpose is to support and enable, as much as possible, those without capacity to do the same. This is of course rooted in our commitment to human rights, such as the right to private life (such as under article 8 ECHR) and non-discrimination (article 14 ECHR). Put simply, the idea is that individuals should be able to become the author of their own lives.

The MCA defines mental capacity as the ability to make specific decisions at a specific point in time. This provides the MCA with a far-reaching impact. For example, those who are under the influence of drugs and alcohol may temporarily lose capacity to make certain urgent decisions. The MCA therefore is a crucial piece of legislation which provides a systematic framework in order to safeguard a person's right to make their own decisions about their own life in various different situations.

There are 5 main principles which underpin the MCA, as per section 1 of MCA:

1 .A person must be assumed to have capacity unless it is established that they lack capacity. In other words, a person cannot simply assume that another person lacks capacity, even if he suffers from conditions associated with lack of capacity such as dementia.

2. A person is not to be treated as being unable to make decision unless all practicable steps have been taken without success to help him to do so. This ensures that priority is given to help people make their own decisions about their lives.

3. A person is not to be treated as unable to make decision merely because he makes unwise decisions. The ability to make decisions which might be imprudent is equally protected.

4. An act done, or decision made, under this act on behalf of a person who lacks capacity must be done, or made, in his best interests

5. Before an act is done or decision is made, regard must be had as 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.

As can be seen, the 5 principles of MCA encapsulate the legislation's supportive nature – the provisions are there to help people who lack capacity to be able to make their own decisions as much as possible.

Mental Capacity and the Immigration System

When working with such a marginalised group of individuals as asylum seekers and human rights migrants, there is often a tendency to presume that the immigration process is simply a legal barrier to accessing basic rights and entitlements, such as the right to reside, to work, or to access welfare benefits. Different immigration routes therefore are seen as equal options to reach the same goal.

What is often underappreciated however, is that the process of migration, and of going through the immigration system, can also be an intensely personal choice and experience. Declaring that you have been a victim of exploitation and trafficking, particularly from people you have known (friends or even family members) can be very destabilising and even traumatising. Likewise, admitting and accepting that you cannot go back to your own home country because the situation is so terrible – even more terrible than the small shared room you are currently forced to live in, and £37 a week subsistence payment that you somehow has to manage to live on for years – is in itself, a very difficult choice.

On the most fundamental level, this is where the ideas behind the MCA starts to intersect with the immigration system: it is important to respect the rights of migrants to make their own decisions and become authors of their own lives, in connection to their migration journey.

The concept of mental capacity is also highly relevant from an access to justice perspective. Immigration law and the immigration process are extremely technical and complex, even for those who do not suffer from any mental health conditions.

An incapacitous individual, might not be able to understand what the role of a lawyer is or understand any advice that is given. They might not be able to understand the concept of an appeal or an independent tribunal. In such a circumstance the big question is then how do we ensure that the immigration system remains accessible to those who might not even know that they need to access it in the first place? Equally how do we make sure that their cases are still given the same due process and consideration, when they might not even be able to articulate to their lawyers what their cases are? As can be seen in the case studies provided in this report, many individuals whom we assist in our project face numerous barriers in obtaining their status, often as a direct result of the issue with their mental capacity.

MMCA Project

Under the MMCA project, we created a referral system to assist migrants who might have issues with their capacity to make immigration-related decisions. For each referral, we create a bespoke support plan, overseen by our pro bono advisory panel. Everyone who is referred to us will also be supported fully through our Community Programme – meaning we will also look beyond issues with immigration including housing, benefits and healthcare.

For each referral our aim is to:

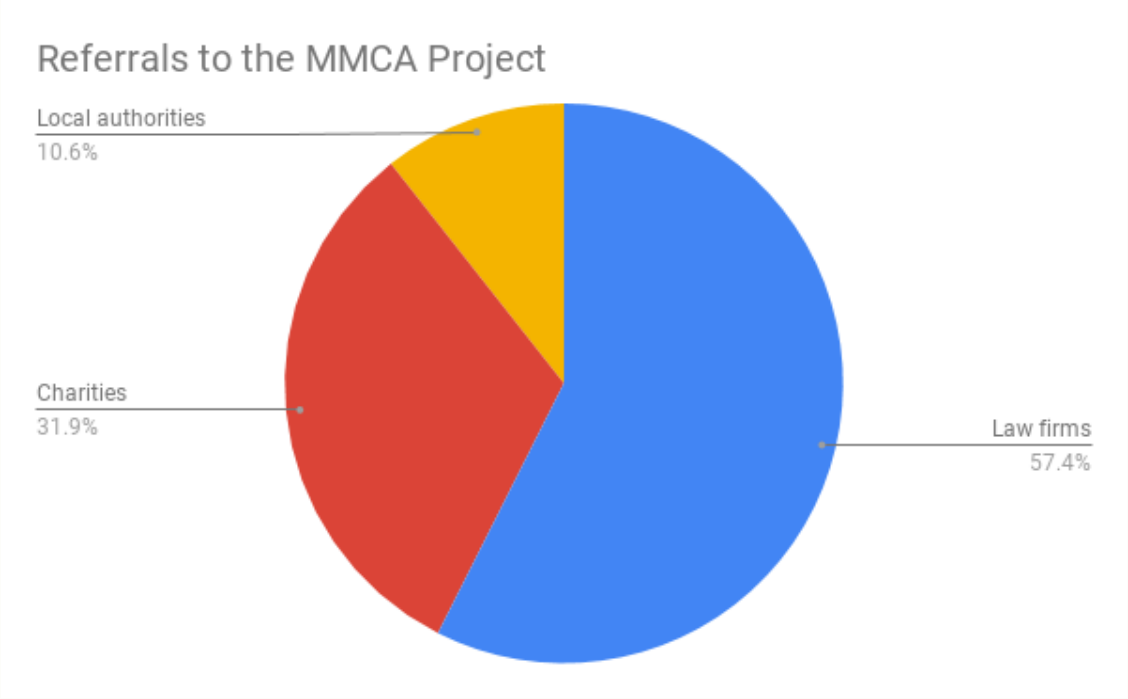
1. Gather an evidence-base as to the issues faced by adults who lack mental capacity both in the immigration and social care system (i.e. accessing welfare benefits, community care support, health care, etc.).
2. Provide short-term, practical solutions to these issues for adults who lack mental capacity currently in the system.
3. Push for changes to be made to provide long term solution to the issues identified through strategic litigation and/or policy campaigning.

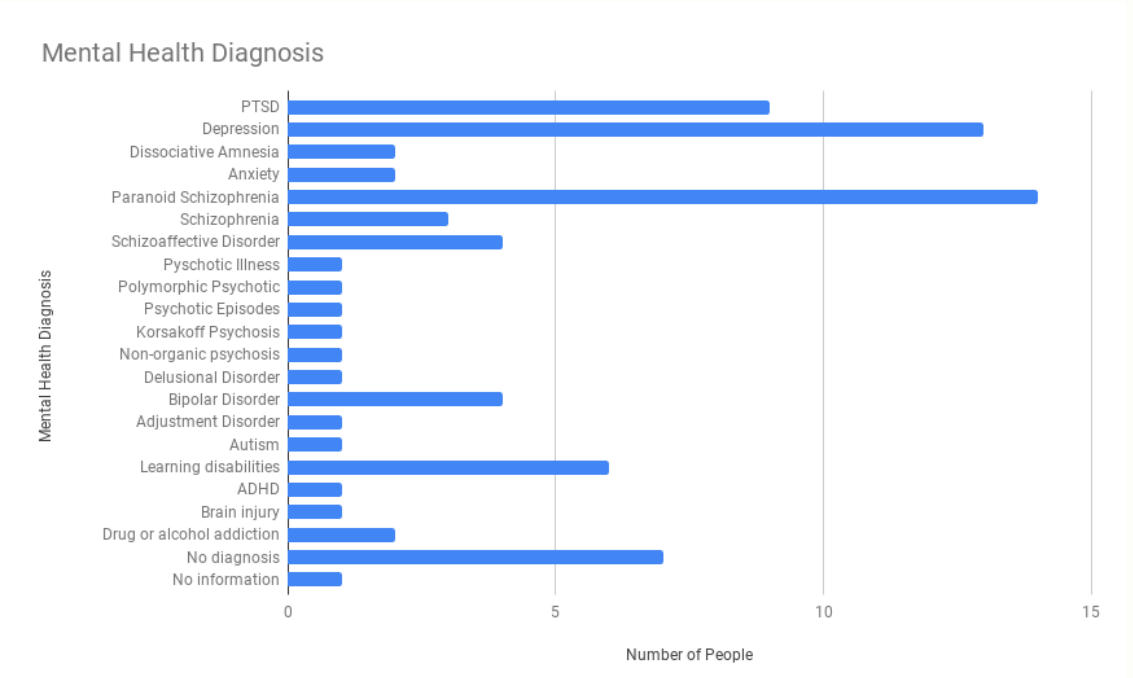
We've also recruited a small group of immigration and welfare professionals who can act as independent advocates or litigation friends. In essence, their role is to make decisions on behalf of the incapacitous clients following the principles of the Mental Capacity Act 2005.

We work with both cases in the appeal stage and also pre / post appeal stages (i.e. where there is no litigation). Over the past 41 months, we have worked on 51 cases with background as follows:

- 36 men, 14 women, 1 male to female transgender person
- 22 from Africa; 11 from the Middle East; 8 from Europe; 6 from Asia; 1 from the Caribbean; and 3 for whom we have no information
- 35% of MMCA Project members were asylum seekers; 24% were refused asylum seekers; 20% were overstayers; and 14% were EEA nationals when referred.
- 18% of MMCA Project members have been diagnosed with Paranoid Schizophrenia; 17% with depression; and 12% with PTSD.
- 47% of MMCA Project members have been sectioned under the Mental Health Act (1983) at least once, that the Project knows of.
- 25% of MMCA Project members were under a deportation or removal order when referred to the Project

- 77% of MMCA Project members were accessing some kind of care from the government when referred, whether subsistence support under statutory authority, housing support under statutory authority, or mental health support under statutory authority.
- See Appendices 1-4 for further data on MMCA Project members' backgrounds and statistics





Achievements and Impact

1. We've had 51 cases: 24 litigation friend cases and 27 pre-appeal cases.

2. 11 of them have been “resolved”, in the sense that the client has been granted immigration status and/or no outstanding work needs to be carried out. 34 of them are still ongoing.

3. We have recruited 22 immigration professionals including social workers, immigration / welfare advisers, solicitors and barristers to act as litigation friends as last resort or an appointed advocate to provide instruction.

4. We have arranged a number of different trainings including for our litigation friends and to charity advisers and solicitors from various firms, such as Praxis, Connections at St Martin, Haringey Migrant Support Centre, The British Red Cross, Wilsons LLP, Islington Law Centre, etc.

5. We have successfully established an informal system for payments of professional litigation friends through ex-gratia funding. Since August 2019 we have matched 9 of our litigation friends with vulnerable clients whose cases are unable to progress due to lack of litigation friend of last resort (it is our policy than the Official Solicitor be approached first before we step in). We have obtained confirmation of funding from the HMCTS for all 9 cases and obtained payment for one of them.

6 Our last request to the Upper Tribunal at Field House for ex-gratia funding was approved within 1 day, which shows increased awareness of this request.

7 We are a part of the Ministry of Justice's working group on the issue of litigation friends of last resort headed the access to justice lead at the MOJ.

Testimonial I

From the minute I engaged with the MMCA, I was well supported to understand all of the steps which were required. Despite being incredibly withdrawn, both Brian and Jennifer made [my client] feel at ease and comfortable, something which I had not seen successfully done before on other occasions. Brian supported us to identify a doctor who could conduct the capacity assessment, he also advised the solicitor on how to get the costs covered under legal aid. The Doctor visited my client within the British Red Cross offices and went to great lengths to ensure that he felt comfortable and had the support he required when undergoing the assessment - I believe this is a true testament to the support the Doctor also received from the MMCA.

The support did not stop there, the MMCA also helped us to find and instruct a Court of Protection solicitor, and, when more evidence was required, helped us to navigate who might be best placed to provide more detail on the mental health conditions affecting my client's capacity. The MMCA went above and beyond again in supporting the client to make a complaint against his [immigration] solicitor who was not following the guidelines of working with someone who lacks capacity (not having an informal litigation friend present, not actually trying different ways to ensure the client understood the information etc) and found us a new solicitor who has represented the client since this time.

The client received a positive conclusive grounds decision (recognising him formally as a survivor of trafficking) despite the statements regarding his experiences being limited - I believe this is truly on the basis that the capacity assessment and advocacy that went around this allowed the Single Competent Authority to understand that he was not currently in a place to disclose safely, nor could he appropriately weight up the risks or benefits of doing so.

The Home Office have also agreed to reopen his withdrawn asylum claim on this basis - again I believe because of the amazing relationships between the solicitors and the MMCA demonstrating successfully the client's vulnerabilities and lack of capacity. I would finally just like to add that the MMCA have also provided extensive advice and support on other cases of mine. They consistently go above and beyond in ensuring that we know where to reach out for support and that we will receive this quickly and in-depth. I think this is genuinely one of the best projects around.

Testimonial II

The big issue we had was that our adult social care department did not have a facility to progress a vulnerable person's immigration status because she lacked mental capacity. Her visa had long expired but the immigration & borders agency had no interest in pursuing her claim which actually made it difficult to finalise her status. She has significant care needs and couldn't possibly be accommodated in her country of origin and the local authority have been paying significantly high costs because she was not eligible for assistance from national government. We sought legal advice from counsel and consulted with other local authorities who did not seem to have a solution. This project helped us get some movement in sorting this issue at a point when we had reached a standstill.

Testimonial III

Without this project I would have been completely lost on how to approach the advocacy and logistics required to support someone who has a potential lack of capacity. It was clear from my experience with the above-mentioned client, and the other clients I currently support who lack capacity, that without an expert project providing advice and support, there is little true understanding of capacity and how big of an impact this could have on the support an individual can receive through their immigration proceedings.

To give an example, one of my other clients who lacks capacity, while having an Medico-Legal Report which stated this, currently has never had support from a litigation friend nor the wrap around support that the MMCA provides. This made taking on his case much more challenging as there was not a clear description of what he lacks capacity with or a plan of how to engage with him to ensure he understands in the best possible way resulting in me having to start from scratch in trying to understand and plan how to provide support with someone who is already in the appeal stages of his claim.

Succesful Cases

Migrants who lack capacity as a result of mental health issues have difficulty navigating every stage of the immigration system and will continue to be at risk even after they receive temporary leave to remain in the UK. Nonetheless, with the proper support from independent advocates or litigation friends, some of our members under the MMCA project have managed to regularise their statuses. Here we use two anonymised case studies from the MMCA Project to illustrate how appropriate support based on the principles of the MCA (2005) can lead to successful outcomes at both the pre-appeal and appeal stages.

> *EM is an Albanian national who lived in Italy for 23 years and arrived in the UK on 15 October 2016. EM suffers from paranoid schizophrenia and was assessed to lack the mental capacity to understand her immigration situation or instruct her solicitor to regularise her immigration status. We matched EM with one of our trained independent advocates who is a qualified social worker from Italy. We then successfully obtained a welfare order from the Court of Protection to allow the independent advocate to make immigration decisions and instruct a solicitor on EM's behalf. Our independent advocate worked with EM and her solicitor to prepare an asylum and human rights claim on the grounds that EM fears persecution in Albania from organised crime networks. Although her asylum claim was refused, EM was granted Discretionary Leave due to her private life for 30 months. EM will be able to apply for a renewal of her DL and has right of appeal on her asylum claim. EM's independent advocate has instructed EM's solicitor to move forward with an appeal and also to request an discretionary indefinite leave to remain for EM as she will struggle to renew her leave.*

In EM's case, appointing an independent advocate to support EM and act on her behalf was crucial to clarifying a complex immigration case. When EM was referred to the MMCA Project, she had a series of decisions to make about what kind of immigration claim to make: should she pursue an asylum claim in the UK, despite having residency status in Italy, or return to Italy, where she might have a better chance of accessing state support? As a result of her mental health issues, EM struggled to explain her desire to stay in the UK or to provide clear information about her past. Because she was an overstayer, every month that passed without a decision meant that EM was at risk of removal and without access to public funds. Appointing an independent advocate who spoke Italian and could make decisions in EM's best interests enabled EM to successfully regularise her status.

EK is a Sierra Leonean national who first arrived in the UK in 2002. He was deported, re-entered the UK, and claimed asylum. His asylum claim was refused and he was served with a Notice of Removal in 2015. In 2018, EK was in prison, where he remained when he was referred to the MMCA Project by his solicitor. He suffers from paranoid schizophrenia and Korsakoff Psychosis and was assessed to lack capacity to engage with the immigration process. The judge hearing the appeal of EK's deportation order indicated that a litigation friend was merited and one of the MMCA Project's trained litigation friends was appointed to act on his behalf. The litigation friend visited EK all the way to HMP Lincoln and provided invaluable report, which allowed his solicitor to better prepare his appeal. EK's appeal was recently allowed on Article 3 grounds.

In EK's case, the appointment of a litigation friend also proved to be a crucial step in winning his appeal and regularising his status. Prior to the LF's appointment, EK's immigration representatives had struggled to take instructions from him due to his mental health issues. Additionally, EK's imprisonment had made it difficult for them to communicate with EK. As in EM's case, appointing a litigation friend who could take decisions in EK's best interests and instruct his solicitors enabled the appeal of his deportation order to move forward in a timely manner.

BARRIERS TO JUSTICE

EM and EK succeeded in regularising their status with support from their solicitors and the trained independent advocates and litigation friends of the MMCA Project. But, as their cases show, migrants with mental health issues and disabilities face a multitude of barriers in accessing the immigration system, particularly as a result of their lack of mental capacity to engage with that system. Without adequate support, incapacitous migrants may never make an immigration claim or have their claims refused, thus risking enforcement actions.

In this section, we explore in greater depth the difficulties which migrants who lack capacity may face in going through the immigration system. To do so, we follow the life-cycle of the immigration process, from the moment that an individual seeks help, through the application and appeal process, all the way to the planning stages for future applications. We use anonymised case studies from the MMCA project in order to illustrate the barriers incapacitous migrants face at each stage of the journey and the challenges of implementing the principles of the MCA within the immigration system as it currently stands.

I. Seeking Help

Unlike with the criminal justice system, it is the responsibility of a migrant to make an application for an immigration status, whether it is for a temporary visiting visa or for asylum. While the Secretary of State for the Home Department has a wide discretion in granting an immigration status, there is no automatic provision for this – it is up to the individual to show that they satisfy the requirements of immigration laws and regulations, or to persuade the Home Secretary to exercise her discretion.

This we believe forms the most fundamental barrier in accessing the immigration system for members of our project. Many of our cases involve individuals who are not even able to understand what an immigration status is or have any opinions as to whether they would like to stay in the UK. Some members suffer delusional beliefs that they do not need to engage with the immigration system at all or that they are able to return safely to a dangerous country of origin. In what follows, we highlight two cases which exemplify the difficulties which incapacitous migrants may face and the risks they may run when they harbour delusional beliefs about their immigration status.

Case Study 1 - HA

HA is a Nigerian who has lived in the UK for more than 14 years. She was brought into the UK by her sister, and was forced to do domestic work. She claimed asylum in 2014 and was referred to the National Referral Mechanism (NRM) as a possible victim of trafficking. Both applications failed. HA has previously been diagnosed with schizophrenia. HA has a delusional belief that she is a British citizen and, therefore, constantly insists to all of her support workers that she only requires assistance with obtaining benefits, accommodation, and a national insurance number so that she can work. Before referred to our project, HA went to various different charities in London but she refused assistance on her immigration matter.

HA currently lives with her sister again. The situation however is unclear as HA is often very reluctant to disclose information relating to her sister. She has mentioned repeatedly, however, that her sister is deeply unhappy that she is still staying with her without paying rent. HA has expressed that she would want to one day go back to Nigeria to visit her family

HA is not alone in insisting that she already has an immigration status which, in reality, she does not possess. Other MMCA members also suffer delusional beliefs that they do not need to engage with the immigration system at all. Like HA, often it is because they believe that they already have an immigration status. We have 3 other cases at the moment involving individuals who believe that they have indefinite leave to remain. We have one other person who believes that they have refugee status. All of these delusional beliefs limit individuals' capacity to understand and make decisions about their immigration status, putting them at risk of overstaying and forced removal or deportation.

Other kinds of delusions can also limit incapacitous migrants' ability to engage with the immigration system. Some individuals, like DL in the case below, believe that they will be able to return safely to their country of origin, again putting them at great risk of forced removal or deportation.

Case Study 2 - DL

DL came to the UK under family reunion provision to join his father and obtained a refugee status. He has a history of repeated criminal offending which led to the revocation of his refugee status, and a decision to deport him. He has a diagnosis of paranoid schizophrenia with intense delusion of possessing Godly power. DL tried numerous times to fire his immigration solicitor who was helping him in an appeal to revoke the deportation decision. He repeated several times that he would like to go back to the DRC as he had traumatic experience being detained in the mental health hospital. He told us that he has God on his side and that he would be able survive as a faith healer back in the DRC. At certain points, he made threats to his solicitor, mixed with inappropriate suggestions that he wanted to have sexual relationship and marry his immigration solicitor. We have worked with the solicitor to successfully challenge his deportation decision and he has a refugee status again now. Unfortunately, we have been notified that DL committed another offence and is now in prison again.

DL's case was particularly challenging firstly because of his threatening and erratic behaviour, but also because there were moments where DL became quite articulate. He insisted that he did not want to stay in the UK as he has had terrible experiences in the UK, whether in prison or in mental health hospital. He told us about his experience being "drugged" in the hospital and feeling like he was not himself. He asked "why would [he] stay after that [experience]?". He also told us that he would commit a criminal offence so that he would be imprisoned again and be deported back to his home country, which was a very surprising display of understanding of how the deportation system works. It was therefore difficult to know at what point we should have let DL make his own decisions about his own life, or whether it was important to step in, and make decisions which he might disagree with.

DL was lucky to have obtained an immigration solicitor who steadfastly advocated for him despite his behaviour. A formal capacity assessment was obtained and the immigration tribunal appointed one of our advocates as his litigation friend, which meant that his solicitor did not have to follow his instruction.

Encouraging individuals with mental health issues to engage with the immigration process can be tricky and it depends a lot on the individual's circumstances and presentation. What we have found to be key however, is to build a trusting relationship with the individual. This often means that assistance needs to be provided on other related issues. For example, in the case of HA, we provided destitution support for her and assisted her in obtaining NASS accommodation. It is only after we had worked with HA in this way that she started to agree to our advice for her to engage with the immigration process. This of course takes a significant amount of time and investment – something which not a lot of services working in the sector are able to provide.

II. Obtaining Help

Even when individuals can understand that they need to seek help, i.e. to engage with the immigration process, in one way or another, the process of seeking assistance itself can be difficult.

Immigration advice relies on instructions – an individual's immigration options depend a lot on the account of their circumstances which they give to their solicitors and support workers. For example, if a person states that they cannot go back to their country of origin as they fear that they would be falsely imprisoned because of their political affiliation, that person can probably apply for asylum. On the other hand, if the reason that they want to stay is because they have a close relationship with a child here in the UK, then it would be an application based on their right to family life.

When an individual has issues with their mental capacity, their ability to provide such instructions can be affected, which in turn makes it difficult for them to obtain help.

Case study 3 – XC

XC is a 43-year-old man from China who has been in the UK since 2001 and instructs that he has been homeless effectively, throughout. He has been living on the street for many years now. He presents with some form cognitive deficiency which affected his communication ability. When speaking, he mumbles a lot, and often does not answer the question posed to him. His English is also only conversational which exacerbates the problem, and he does not like to speak in Mandarin through an interpreter. XC insist that he does not have any problem back in his country of origin – he came to the UK to work and cannot go back as he has no one else there who can support him. At the same time, he says that he still has family members back in China and he does not have any issues with them. He has no diagnoses and has not been engaging with his GP. XC has been assisted by other charities in the past who did not believe that he is able to make any meritorious immigration application.

Relying on XC's instruction alone, it is certainly difficult to see what application he could make. However, given his presentation we spent much longer than usual to understand his situation better. After a 2-hour appointment, we found out that XC was sent to the UK by a family friend whom he called his "cousin" colloquially. This alerted us to the possibility that XC might have been trafficked.

We tried to ask XC more about this "cousin" and the specific events that led him to come to the UK, but XC became very evasive and kept on insisting that the main point is that he wants to be able to live in the UK. We are therefore still investigating the situation such as by requesting his documents from different hospitals he may have attended, charities and the Home Office. At the same time, we work on building a more trusting relationship with XC in the hope that he will be more willing to disclose more information in the future.

We are able to such extensive investigative work as we are a charity with flexible funding. For many legal aid providers, this will be very difficult under the LASPO'2012 system.

Case study 4 – EO

EO is a referral from social services. She is a 59-year-old woman who has been under the care of social services for many years, and they have deputyship over her property affairs. She is an overstayer and does not have any immigration status. However, EO does not believe this and initially insisted that she does not need an immigration lawyer. EO is highly paranoid and social services have reported that she can open her door holding a knife in her hand.

She however receives letters from the Home Office which confuses and aggravates her. She usually would tear them immediately and throw them out so we are unsure what the letters say. Social services in the end, manage to persuade her to engage with our project and an immigration solicitor whom we work with, in order to stop the letters from the Home Office. However, they have assessed him as lacking mental capacity to actually provide immigration instruction, as she still believe that she has a status.

We and the solicitor have been working with EO for 4 months now to get to this stage where she at least somewhat agrees to engage. We also had to advise social services on the need for a capacity assessment, and provide an explanation as to what sort of information and understanding are needed in order for a person to be able to make an immigration decision (again, because mental capacity is decision specific). All this work has been carried out by the solicitor pro bono as she has not been able to open a legal aid file. Even now that a clear capacity assessment has been obtained, it is still unclear who would be able to sign the legal aid forms on her behalf.

III. Proving Needs

EO's case above illustrates another problem: immigration law is complex and statutory services often do not have adequate resources to understand them. The Mental Capacity Act 2005 empowers everyone to assess capacity when needed, particularly those who provide care and support such as social workers, mental health advocates, nurses, doctors and care workers.

Mental capacity however is also decision specific and always has to be presumed. This means that someone like EO who does not have capacity to manage her property (which is why social services has deputyship over it), might well still have capacity to provide immigration instruction. Assessing this inherently requires an understanding of what is actually entailed when one provides immigration instruction, and the type of information that the individual need to be able to understand, weigh, and retain.

Many such professionals, such as social workers or medical professionals whom we have worked with do not have such familiarity in the immigration process. Some do not understand themselves, for example, the unique definition of an asylum claim (i.e. risk of persecution) and how that differs, generally speaking, from an application on the basis of human rights. Many have no experience with the legal process themselves.

On the other hand, sometimes they do not fully understand the concept of mental capacity. We have seen independent assessments which conflate the issue of mental capacity, with the ability to give evidence or to be interviewed, and/or with medical diagnoses. Unfortunately, at the moment, there is no clear guidance on this issue.

In any case, funding is again an issue. In the case of EO above, if social services had not been involved, it is really difficult to see how a capacity assessment could have been obtained, since the solicitor could not even open a legal aid file. Likewise, obtaining an expert report to assess capacity at the legal help stage is very difficult as it requires solicitors to convince the Legal Aid Agency of the need, and not a lot of providers would be willing to do this. Some solicitors would insist on seeing a capacity assessment first before they would act in any way as shown below.

Case study 5 – JL

JL is a Chinese man who only speaks mandarin. He suffers from severe schizophrenia and has been living under s117 aftercare support in a supported accommodation in the past 2-3 years. We believe that he does not have capacity as he was only able to provide basic instruction, namely that he owed money from a gangster back home who is dangerous. However, he has been in the UK for more than a decade and he was not able to provide any other instruction. His health also recently deteriorated and he has been sectioned again.

We obtained pro bono counsel opinion from our advisory panel, who believes that he should have a claim based on his mental health. However, at the same time, it will be quite important for him to be represented by someone who is familiar with his cultural background, and will be able to thoroughly investigate what would happen to him if he were to return to China in terms of the actual availability of support and risk of persecution. We found a solicitor whom we believe is suitable and can take on the case. However, the solicitor wanted to see a capacity assessment first.

For the past 2 years we have been trying to obtain a capacity assessment for him. We tried liaising with the mental health team who was very slow to respond and was confused with our request to assess his immigration capacity. We finally had to find pro bono medical professional to assess his capacity, but this also took a long time to arrange.

The issue is again that there is a lack of clarity as to how solicitors are supposed to proceed in these situations, especially considering legal aid restrictions. The current Law Society's guidance on vulnerable clients states very clearly that solicitors will need to ensure that they are able to obtain capacitous instruction either from the client [3], or from someone whom they are satisfied has the authorisation to do so, such as someone with a power of attorney. This is also reiterated in the Mental Capacity Code of Practice [4] paragraph 4.41 :

> *For a legal transaction (for example, making a will), a solicitor or legal practitioner must assess the client's capacity to instruct them. They must assess whether the client has the capacity to satisfy any relevant legal test. In cases of doubt, they should get an opinion from a doctor or other professional expert.*

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[3] Law Society (5 June 2020), "Meeting the needs of vulnerable clients", https://www.lawsociety.org.uk/en/topics/client-care/meeting-the-needs-of-vulnerable-clients, last accessed: 22 February 2021

[4] Department of Constitutional Affairs (2007), "Mental Capacity Act 2005 Code of Practice", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921428/Mental-capacity-act-code-of-practice.pdf, last accessed: 22 February 2021

IV. Making an Application

Even after we obtained a capacity assessment for JL above, the next question would be: how do we obtain authorisation to make a decision on his behalf? Section 5 of the Mental Capacity Act 2005 allows "decision makers" to make decisions "relating to the care and treatment" of an individual who lacks mental capacity in relation to those decisions. As long as the decisions are made on a best interest basis (as formulated under section 4 of the Mental Capacity Act 2005), then section 5 provides protection from liability. It should be clear that section 5 was introduced primarily with the care context in mind. The Mental Capacity code of guidance gives an example of a patient with dementia and how section 5 allows his carer (his sister and nurse) to make decisions on his behalf. The code of guidance states that section 5 will most likely affect:

> *family carers and other kinds of carers · care workers · healthcare and social care staff, and · others who may occasionally be involved in the care or treatment of a person who lacks capacity to consent (for example, ambulance staff, housing workers, police officers and volunteer support workers).*

It is however unclear what kind of liability a person would need protection form when it comes to making an immigration application on behalf of someone else. Unlike with caring for someone, where assault for example can be easily foreseeable, making an immigration application usually only involves primarily disclosing information and there are other lawful bases under the GDPR to disclose information without consent. One potential scenario where protection from liability is needed is if a third party needs to search personal property (for example to obtain passport or ID documents) in order to be able to make an application.

In any case, we also do not believe that making an immigration decision would necessarily count as "relating to the care and treatment", and there does not seem to be much guidance from caselaw on this point.

The main issue however is that there is a lack of clear process and information on how a third party can make a valid application on behalf of someone else who lacks mental capacity to do so. It should be evident that the Home Office certainly should not accept just any application from a third party on behalf of someone else. However it is unclear in what circumstances such an application could be accepted and what necessary safeguards are in place to ensure that wider considerations under the MCA are respected. The case bellow is illustrative

Case study 6 – KDS

KDS is a 47-year-old woman from Gambia who came to the UK in 2005. She subsequently obtained a number of limited leave to remain covering the period from 2006 to 2016. KDS has an acquired brain injury, is HIV positive with HIV encephalopathy, end stage renal failure and epilepsy. She requires antiretroviral treatment and has dialysis three times per week for four hours. Not having this treatment would be fatal and even with a care package in place through social services, she is regularly admitted to hospital. Her last leave expired in 2016 and she became an overstayer, and has been supported by social services under the Care Act since then. It is the view of social services that there would considerable and life-threatening risks to KDS were she to return to Gambia, breaching her rights under article 3 of the ECHR. They also believe that she lacks mental capacity to make an immigration application to regularise her status.

Social services tried to help resolve her immigration status by obtaining a private immigration solicitor. They then wrote to the Home Office regarding the issue, but were advised that, because of her lack of capacity, she would not be able to submit an immigration application – no other reasonable adjustment was offered.

We raised this issue to the Home Office's Asylum Safeguarding Team. The Team's initial response was that because KDS did not have any pending asylum claim, her case was beyond their remit. We explained that that was precisely the issue: how could she apply for asylum when she lacked mental capacity? The Home Office's last response was below

Dear Brian,

Following our conversation last week regarding this case, I've discussed with colleagues what is within the realm of the possible for us to be able to assist, but unfortunately, as … previously indicated we are unable to assist unless there is an active Asylum claim in the system.

I appreciate what you have discussed with me as the barriers to this process, however the advice I have received from colleagues is that we are unable to provide immigration advice – this must come from an immigration lawyer.

The advice you received that a claim cannot be made on the basis on the medical condition is, as far as I understand, in relation to an Asylum claim. There are other routes which can be applied for which would allow for the consideration of this. It is possible for [client] to make an asylum claim based on other grounds.

As I discussed with you over the phone, the Safeguarding Team's remit is those who have an asylum claim; making referrals to the appropriate services etc.

Unfortunately the best information which I can give to you is to speak again with an immigration lawyer, and also to review the information on the Migrant Help website regarding Asylum: https://www.migranthelpuk.org/advice-and-guidance

Apologies that we are unable to assist with this any further.

Kind regards,

Given the Safeguarding Team's position, our approach in these cases is thus to go the Court of Protection to obtain the necessary authorisation for a third party whom we identified, to make the immigration decisions on behalf of the client, including instructing a solicitor. So far our approach has been to ask for a welfare order (under section 48 of the MCA for interim order and section 16 for final order) instead of a full welfare deputyship. We have successfully obtained 2 such orders so far.

V. Application to the Court of Protection

The next issue is then to identify a person whom the Court of Protection can appoint in order to provide the instruction. Many vulnerable migrants and asylum seekers do not have the necessary support network to allow them to identify people that would be suitable to make immigration decisions on their behalf. When a migrant does not have any status yet, it is often very difficult to obtain statutory assistance such as from social services. Various legislations and policies enacted to create the hostile environment mean that there is often a conflict of interest for social workers which prevents them from acting on a vulnerable migrant's behalf.

Case study 7 – EM

EM, whose case was discussed in a previous section, is an elderly lady from Albania who has residency status in Italy. She has a daughter in Italy, though their relationship is difficult and they have minimal contact. EM says that she had a lot of issues in Italy and that is why she came to the UK. However, EM has never been able to provide clear information about her past and why she would prefer staying in the UK. EM suffers from paranoid schizophrenia and moderate-to-severe depressive disorder. She has a number of cognitive limitations including with her memory and concentration. An independent psychiatrist assessed her as lacking mental capacity to provide instruction to her immigration solicitor.

EM however had no one who would be suitable to give instruction on her behalf. She is very isolated and has no friends or family member. She is supported by social services as part of her s117 Mental Health Act 1983 after-care support. She is provided accommodation and a small weekly stipend as she is unable to obtain housing support or welfare benefits as she lacks immigration status and recourse to public funds.

From an immigration perspective, someone like EM has a number of options which are not very clear-cut. The fact that she has residency status in Italy makes pursuing an application to stay in the UK on the basis of future persecution or significant obstacles when returned more difficult. On the other hand, if the circumstances in Italy can be clarified, it might well have been in her best interest to return to Italy where she could have access to state support (unlike in the UK where, as she was an overstayer, she did not have recourse to public fund).

Unfortunately, EM did not have anyone who could potentially be appointed by the Court of Protection to provide instruction on her behalf. We believe that there is a strong conflict of interest with social services and local authorities making these decisions, given that migrants without status like EM are explicitly excluded from the provision of services under Schedule 3 of the Nationality, Immigration, and Asylum Act 2002. This includes the provision of care and support under the Care Act 2014. Local authorities are still under a duty to provide these services if there would be a breach of the person's human rights, such as if the person is unable to leave the UK to obtain care.

The provision of aftercare support under s117 of the Mental Health Act 1983 is not excluded by schedule 3 of the Nationality, Immigration and Asylum Act 2002. However, in our experience, there is often a lot of misunderstanding around this issue, with care coordinators believing that a person without status or recourse to public fund is unable to access after care support. In any case there is also an obvious financial conflict of interest – if someone like EM were to leave the country, then support will no longer be needed.

As an interim solution to this issue, our project has recruited and trained 22 immigration and welfare professionals (solicitors, barristers, caseworkers and social workers) whom we can match with people who lack mental capacity and can provide immigration instruction on their behalf independently. EM was matched with a qualified social worker from Italy and an application was made to the Court of Protection for a welfare order to authorise her to provide instruction on behalf of EM. This was successful. There is currently no clear name for a person with this role. The role is similar to that of a litigation friend but of course in this case, there is no litigation to speak of, and thus we have called the role as "independent advocate".

At the moment, EM has been granted a limited leave to remain by the Home Office with access to public funds. They however have refused her claim for asylum. After investigating her circumstances further, her independent advocate believes that it would be in her best interest to appeal the Home Office's refusal to grant her asylum. This continues to be pursued.

We are currently trying to replicate our success with EM's case. However, this has proven difficult. Our experience indicates that the order we obtained for EM is not something that has often been made. EM's case was not our first attempt to obtain such an order from the Court of Protection. We had at least 3 other cases before that, but there were a lot of delays in implementing this case strategy.

Firstly, as mentioned above, obtaining the required capacity assessment itself is often difficult. While technically a capacity assessment can be done by anyone, we are unsure whether a capacity assessment done not someone who was not a medical or accredited welfare professional (such as a social worker, mental health coordinator, etc.) would be sufficient.

Secondly, we did not have much success referring these cases to a court of protection solicitor. There are often issues with opening a legal aid file, again because only specific cases are covered by LASPO.

Thirdly, there also does not seem to be a lot of awareness of this issue amongst court of protection practitioners. In one our cases, the solicitor confused the application for a welfare order authorising an independent advocate to provide instruction on the client's behalf with a request to obtain reasonable adjustments from the Home Office due to the client's disability. We are not aware of any practitioners' best practice guidance on making this type of application.

With EM, the case was delayed about 6 months until in the end we decided to submit the application ourselves, acting as EM's litigation friend in the Court of Protection application as well. This is of course often beyond the ambit and expertise of most immigration advice charities.

VI. Home Office Decision Making

Migrants who struggle to provide instruction on their immigration cases as a result of a serious mental health condition may also have trouble providing detailed witness statements or answers to asylum interview questions. Vulnerable migrants without a court-appointed independent advocate or a solicitor who understands the issue of mental capacity may make statements to the Home Office while they lack the capacity to engage with the immigration process.

Because the Home Office has no clear guidance on how to treat vulnerable migrants who lack capacity, the Home Secretary can rely on these statements in order to reach a decision about a migrant's immigration claim. MAN's case illustrates how the Home Office may not consider mental capacity when assessing a migrant's claims and reaching a decision.

Case study 8 – MAN

MAN is a 33 years old asylum seeker from Iran. He suffers from Major Depressive Disorder, and Dissociative Amnesia (without dissociative fugue). He has been suspected to suffer from PTSD as well, however as he cannot remember many of his past trauma, a full diagnosis of PTSD is not justified. Due to his condition, MAN could not be interviewed during his initial asylum claim. His then representative sent in a short, unsigned witness statement from MAN which provides only a very general reasons of his fear of persecution in his country of origin. His representative was not able to obtain a fuller / more detailed instruction.

In her refusal decision, the Secretary of State acknowledged that the claim has been decided "on the basis of the unsigned, undated witness statement". The decision also confirms that MAN could not be interviewed because of his medical conditions. Despite this, reliance then continued to be placed on his unsigned and undated witness statement, and MAN was found not to be credible.

The case above again illustrates how a lack of understanding and the absence of a safeguarding system to deal with issues with mental capacity can affect substantive decision making. The Home Secretary based her decision on a witness statement which the client was not able to capacitously adopt. It should come as no surprise that his account was found to be inconsistent and therefore his credibility was questioned.

VII. Appeal Stage - Litigation Friend

Issues of capacity can often only arise during the appeal stage. A person might lose capacity due to deteriorating mental health, their mental capacity might fluctuate, or the issue might simply have been missed previously by their advocates and/or representatives.

In the case of AM(Afghanistan) [2017] EWCA Civ 1123 the court of appeal confirms the immigration tribunal's power to appoint a litigation friend. However as with making an immigration application, the main issue is to identify the appropriate litigation friend of last resort. Many vulnerable migrants and asylum seekers would not have the necessary support system to allow them to easily identify someone who can act as their litigation friend. At times, clients might have family members in the UK but they might have a conflict of interest.

At the moment the Official Solicitor will consider an application to be a litigation friend of last resort in the tribunal system. However, we have met with representatives of the Official Solicitor who informed us that they do not have enough capacity to regularly act in the tribunal system, including the immigration tribunal.

We have 24 cases which require litigation friends and, in all of them, the legal representatives have approached the Official Solicitor first but the request has been refused. In some of these cases, there is also a parallel ongoing judicial review proceeding (for example, to challenge social services), whereby the official solicitor is already acting. However, she is still unable to act in the immigration tribunal.

As a result, immigration proceedings often cannot move forward without substantially breaching the client's right to a fair trial. Even more pressing, a lack of resolution to the immigration case means that a client might continue to bear the full brunt of the hostile environment policy, which can be devastating as the case below illustrates:

Case study 9 – EA

EA is a dependant of an EEA national who has lived in the UK for 5 years in 2015. He made an application for permanent residency, which was refused and the matter went to appeal in the immigration tribunal. The first hearing was listed in September 2016. Following an accident, EA's physical and mental health however deteriorated, and eventually he was assessed as lacking the capacity to provide instructions and to litigate. His solicitor and counsel therefore asked for an adjournment and tried vigorously to find a suitable litigation friend for him. His cousin (the EEA national) was deemed to have conflict of interest and he does not have any other close friends or family. EA's representatives tried the local authority, the Official Solicitor's Office, the immigration tribunal itself and various charities, all of which were unable to help. The tribunal judge acknowledged that they can appoint a litigation friend, but was unable to help identify one. As a result, the hearing was adjourned three times, and the case was at a standstill until November 2018 when the case was referred to the MMCA project. In the meantime, EA's housing benefit claim and other benefits were stopped. He accrued more than £10,000 of rent arrears and was served with an eviction notice.

As previously discussed, our project has recruited and trained 22 immigration and welfare professionals to assist as litigation friends when there is no other alternative and the Official Solicitor is unable to act.

We ask for ex-gratia payment from the HMCTS in order to cover the reasonable cost and time for our litigation friends (we match the LF's costs with the hourly rate of legal aid immigration work). Our litigation friends are all professionals, and it is only right that their time and valuable service should be adequately compensated. Our first few requests were met with a lot of confusion. Tribunal managers often asked us to approach the legal aid agency instead, but the provision of litigation friend simply does not come under LASPO. This created a lot of delays as we were sent back and forth between the tribunal and the Legal Aid Agency.

After a few successful cases however, the requests for payments have been approved more efficiently. We currently have 8 ongoing cases where funding has been approved by the tribunal. It typically costs around £400-£500 for a litigation friend to act until a a decision is made by the tribunal.

It is not our aim, however, to replace what should be a public mechanism to safeguard the interest and rights of very vulnerable individuals. We believe that the best solution to the issue is to expand the capacity of the Official Solicitor's office, given their proven experience and expertise. In the meantime, however, we want there to be a solution for someone like EA above.

We also want to use our project to gather more expertise and experience on the use of litigation friends in immigration proceedings. At the moment, there is very little guidance on the use of litigation friends. We have a case where the immigration judge asked the representing solicitor whether one of their colleagues, from the same firm, would be able to act as a litigation friend for the appellant who had been found to lack mental capacity. Such a course of action would constitute a serious conflict of interest.

We also have encountered a case where a request for adjournment was refused even though the appellant had been found to lack mental capacity to litigate and no litigation friend was appointed. The representative was asked to proceed on submissions only basis. It was only after the case was reconsidered that adjournment was granted.

Some limited guidance as to the duty and responsibilities of a litigation friend can now be found in the case of JS & Ors [2019] UKUT 64 (IAC). The Upper Tribunal confirms that the duties of a litigation friend are i) to act competently and diligently and (ii) to act in the best interests of (and without conflict with) the party for whom he is conducting proceedings (RP v UK [2013] 1 FLR 744).

In terms of who should be a suitable litigation friend, the tribunal confirms that the two main requirements is whether the litigation friend can fairly and competently conduct proceedings on behalf of P (i.e. the appellant who lacks mental capacity to litigate), and whether the litigation friend has an interest adverse to P.

While these comments provide a useful starting point and confirmation of the basic principles of the MCA 2005, we believe that more thorough guidance is needed for the tribunal, the presiding judge, the appellant's representatives, and the Home Office's representatives. For example, we believe that in order to act competently, a litigation friend will need to follow closely principles and duties set out under the Mental Capacity Act 2005. At the moment, no guidance exists as to what that entails in practice.

VIII. Future Applications

It is always imperative to think ahead when it comes to immigration application. When a client receives a limited leave to remain, considerations need to be made as to how the client will be able to renew their leave in the future or apply for settlement.

Those with 30 months leave to remain after a human rights application, for example, will be under a 10 years route to settlement. This means that the client will have to extend their leave 3 more times, before then applying for settlement. For each extension application, an application fee is entailed which can only be waived with a separate application detailing why payment of the fee would make the client destitute. If an application is made after their leave has expired, the client will automatically become an overstayer and lose important rights, such as the right to free secondary care at the NHS and the right to welfare benefits. The settlement clock will then also restart (meaning another 10 years need to be accrued).

Many of the cases referred to us involve individuals with ongoing mental health issues, often with very poor prognosis, which are likely to have an ongoing impact on their mental capacity to provide immigration instruction. Our concern is that many of them will be unable to follow the difficult settlement process, and simply become overstayers again.

Case study 10 – MH

MH is a 33-year-old woman from Nigeria. She was a victim of trafficking since childhood. She was brought to the UK by her trafficker and continued to be exploited here before she finally managed to escape. She is a single mother of a young child and she made an application for a leave to remain as a parent of a child. She suffers from PTSD as a result of trafficking and the constant abuse she endured during childhood. She also has mild depression and possibly a learning disability. She has problems with communication and memory, and as a result, she was assessed by an independent psychiatrist as lacking mental capacity to provide immigration instruction. The psychiatrist believes that her prognosis would be good only if she was able to engage in suitable treatment and maintain a stable enough social environment to engage in therapy.

We matched MH with a litigation friend to appeal the Home Office's refusal to grant her leave, which was successful. However, MH might not regain her capacity in time to extend her leave to remain when needed, and so will risk losing her status again.

IX. Engaging with Help

The discussion so far has focused largely on the immigration process – from obtaining legal representatives to making an application and navigating the appeals process. As can be seen, there are already a lot of issues and challenges when an individual lacks the necessary mental capacity to engage with the immigration process.

In all of our cases, however, there are also various additional challenges that need to be overcome. A lot of the clients we work with do not receive proper support that would make the process of regularising their status easier. We have cases where the client is destitute and street homeless, or is not even registered with a GP. Some are still required to report to the Home Office regularly, even though they have no understanding of the risk that they would face upon returning to their country of origin. The case below is illustrative.

Case study 11 – XC

As discussed above, XC is a 43-year-old man from China who has been in the UK since 2001. He has been homeless for many years, and a number of different charities have attempted to help him, but weren't able to obtain clear instruction from him. He said that he came here to work but has been homeless throughout. He has trouble with his communication, quite apart from the language barrier. He mumbles a lot and often talks to himself. He told us that a few years back he was hit in the head by someone and he had to go to the hospital for this. He was unable to disclose much else in terms of his immigration history. A prominent homelessness charity which specialises in assisting homeless migrant tried to assist him a few years back. They referred him for a medical assessment and tried their best to obtain useful instructions, to no avail. XC's main concern is about his homelessness and ongoing destitution, and would often say that everything is "okay" apart from the fact that he has nowhere to sleep and no money to buy food.

It is often difficult to know where to start with someone like XC. With ongoing homelessness and destitution, it is hard to expect XC to be able to focus on his other issues, particularly when taking into account mental health issues, language barrier and differences in socio-cultural background particularly in relation to mental health. At the same time, without clear evidence of his vulnerabilities, it is extremely difficult in practice to obtain any assistance for someone like XC. Local authority should in theory be able to carry out a needs assessment under the Care Act to offer assistance. However, in practice, local authority's assessments can be poor, particularly when it comes to migrants with no recourse to public fund who are excluded from support under the NIAA 2002. In our experience, they can also be very poorly done, and tend to be confusing, if not retraumatising, for the client. Challenging these assessments is also difficult as there is no appeal process. Decisions from social services under the Care Act can only be challenged via a judicial review proceeding and the standard is very high.

X. Homelessness

The government's new rough sleeping immigration rule— which was enacted on 1 December 2020— illustrates the way in which the immigration system devolves, slowly but surely, to create more and more disadvantages for individuals who lack mental capacity.

The new rules provide discretionary grounds of refusal or cancellation of leave for individuals who have slept rough (according to the Home Office's definition). At the moment, fortunately the rules do not apply to asylum seekers and individuals applying on the basis of their article 8 rights (for example, private or family life). However, applications outside the immigration rules will be affected and it seems that historic rough sleeping will also be taken into account.

This can cause a lot of issues for individuals who have issues with their mental capacity to engage with the immigration process. As explained above, those who lack mental capacity are usually very vulnerable due to their underlying conditions. Their inability to engage with the immigration process, in turn, means that they will continue to be subjected to the full brunt of the hostile environment policy, which often leads to homelessness.

In its written answers to MPs about the new rough sleepers' rule, the government has stressed that the new rule will be used sparingly. Removal will only be considered in cases where individuals have refused repeated support offers, such as accommodation, or are engaged in persistent anti-social behaviour. In our experience, the individuals thus targeted are highly likely to have serious mental health problems and to lack capacity. The following case illustrates this point.

Case study 13 - JT

JT is a Congolese national who entered the UK in 1999. He is a failed asylum-seeker with a history of severe mental health issues, including delusions and psychosis. He has been street homeless in London for a number of years. He frequently stands in public parks, chanting and praying in a language of his own for hours at a time. JT has previously been sectioned under the Mental Health Act 1983 and, more recently, the Joint Homelessness Team has made multiple attempts to undertake a mental health assessment with a view to detaining him. However, JT becomes agitated when mental health is mentioned and is very reluctant to engage with mental health services.

Someone like JT might be able to apply outside of the immigration rules relying on his medical conditions. However, such application will likely be caught by the new rules given that JT has been sleeping rough, repeatedly refused support offers, and engaged in behaviour which might be considered anti-social, Yet JT's behaviour—particularly his suspicion of support offers from mental health services—is a result of his mental illness and he lacks capacity to engage with the immigration and welfare process.

Conclusion

The work of our project underlines most clearly the interconnectedness of issues faced by vulnerable migrants. Given the pervasiveness of the hostile environment policy, there are a number of different intersecting issues which, combined together, create an almost insurmountable barrier to accessing the immigration system for a lot of our clients. The issues discussed above should not be seen in isolation, but as parts of a larger systemic failure to accommodate the needs of mentally disabled individuals.

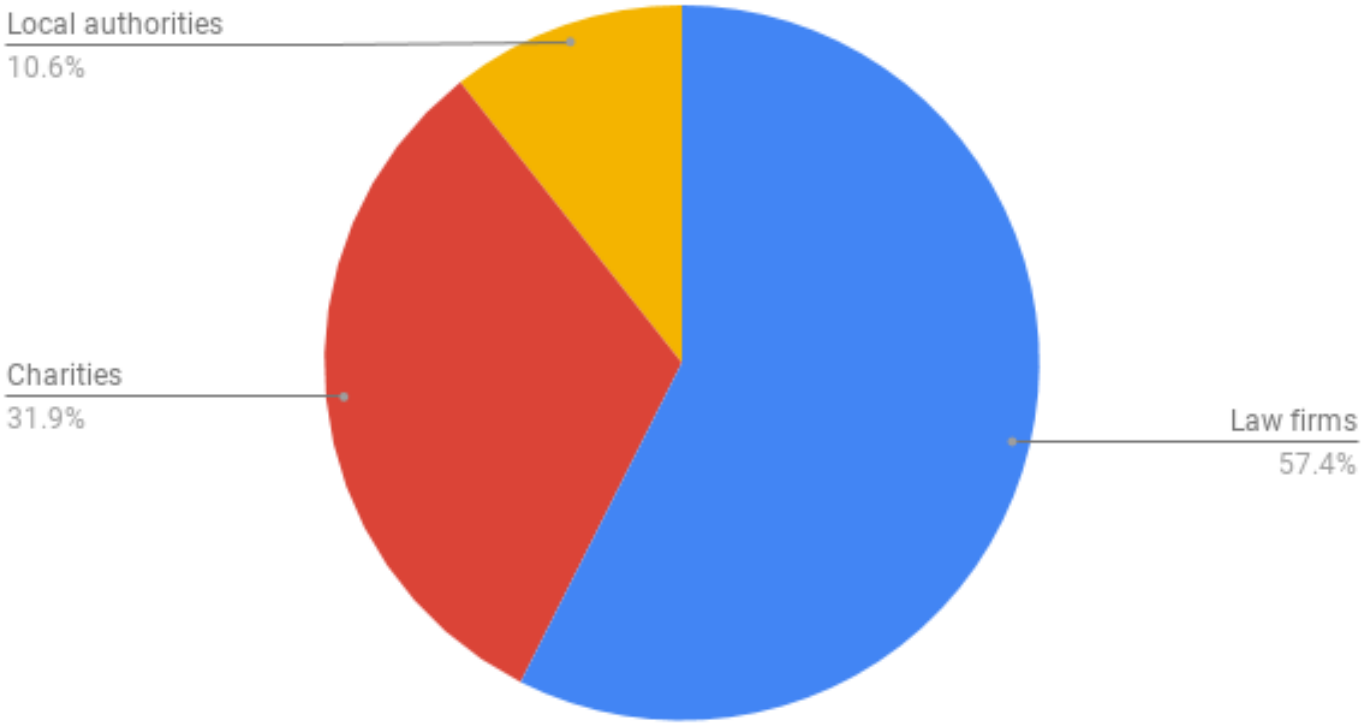
This report aims to capture the difficulties that we have uncovered over the past 40 months of the MMCA project pilot. As can be seen above, however, we have yet to uncover the solutions to a lot of these issues and further work is needed.

For there to be a truly accessible immigration system for migrants and asylum seekers with mental health issues, we believe that systemic changes will be necessary. It is our aim to continue with this project to push for those changes to happen.

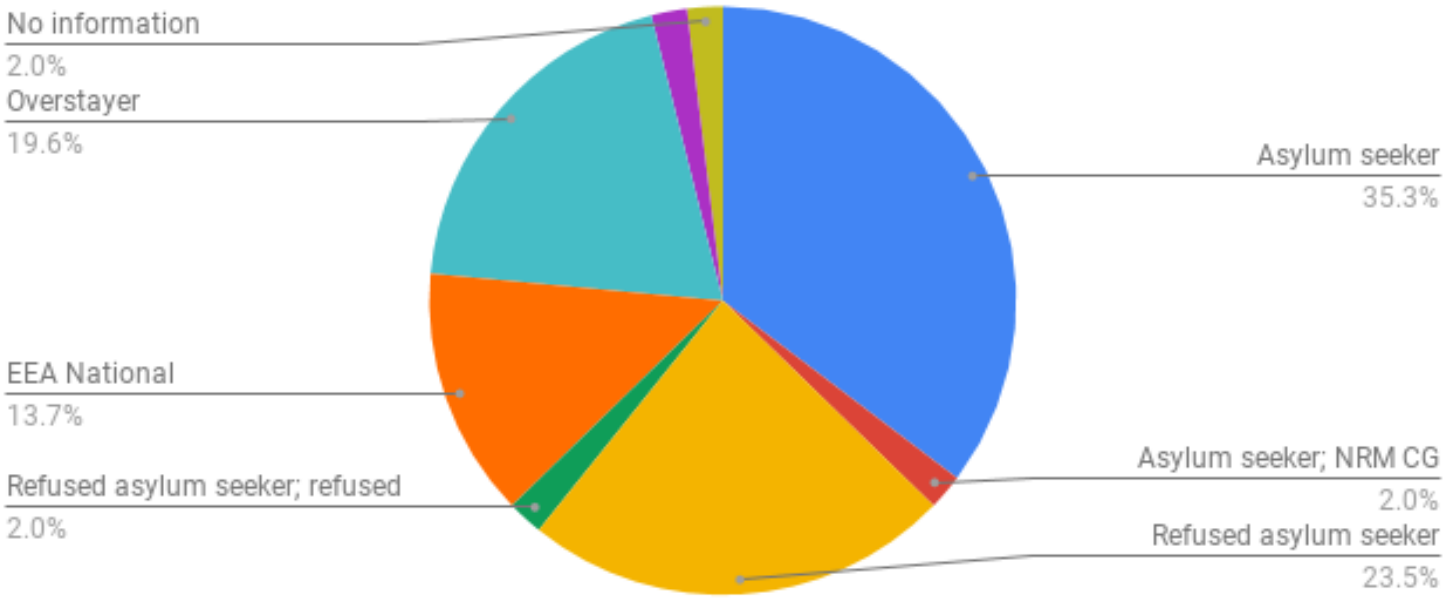
APPENDIX 1

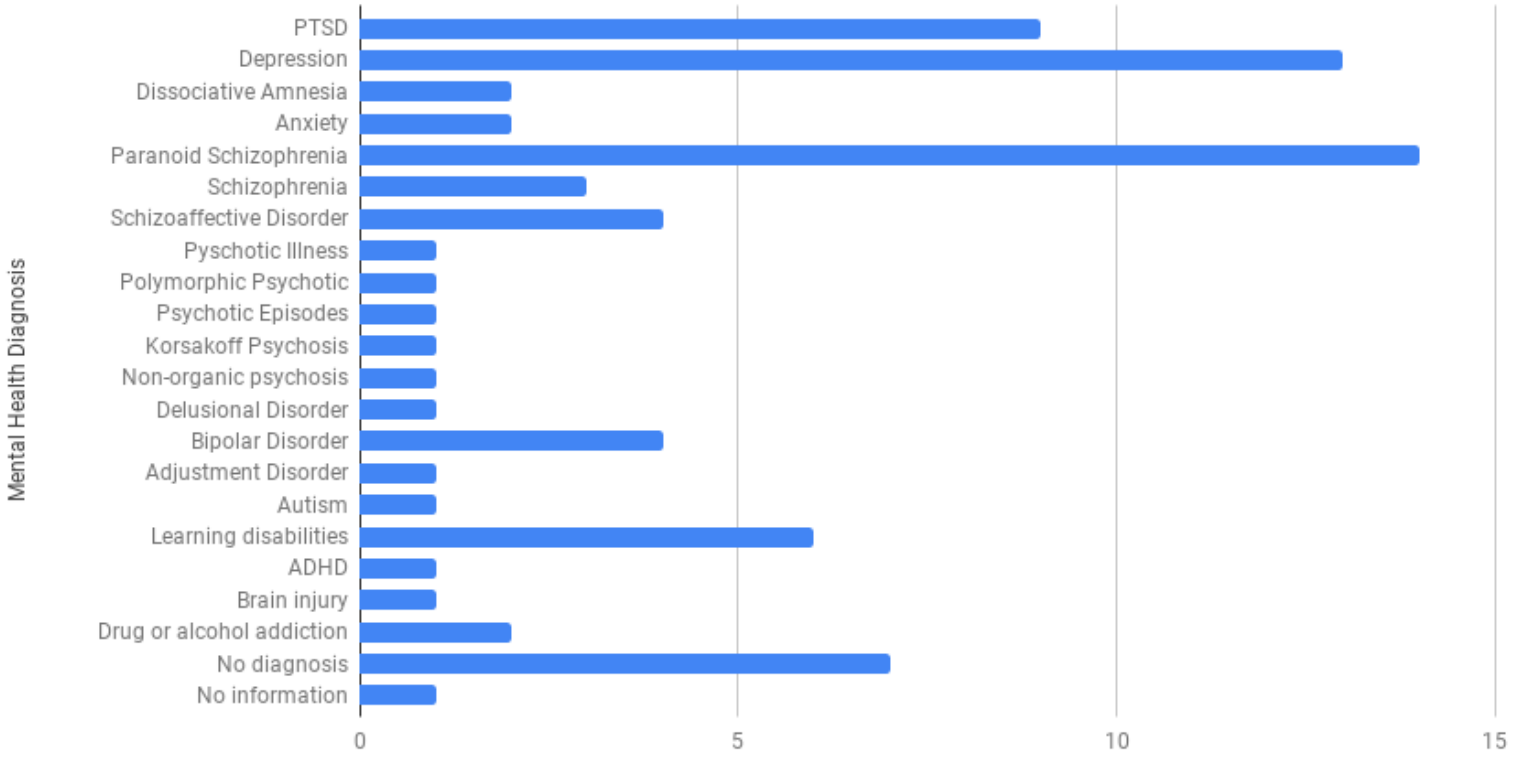
MMCA PROJECT MEMBERS BACKGROUND AND STATISTICS

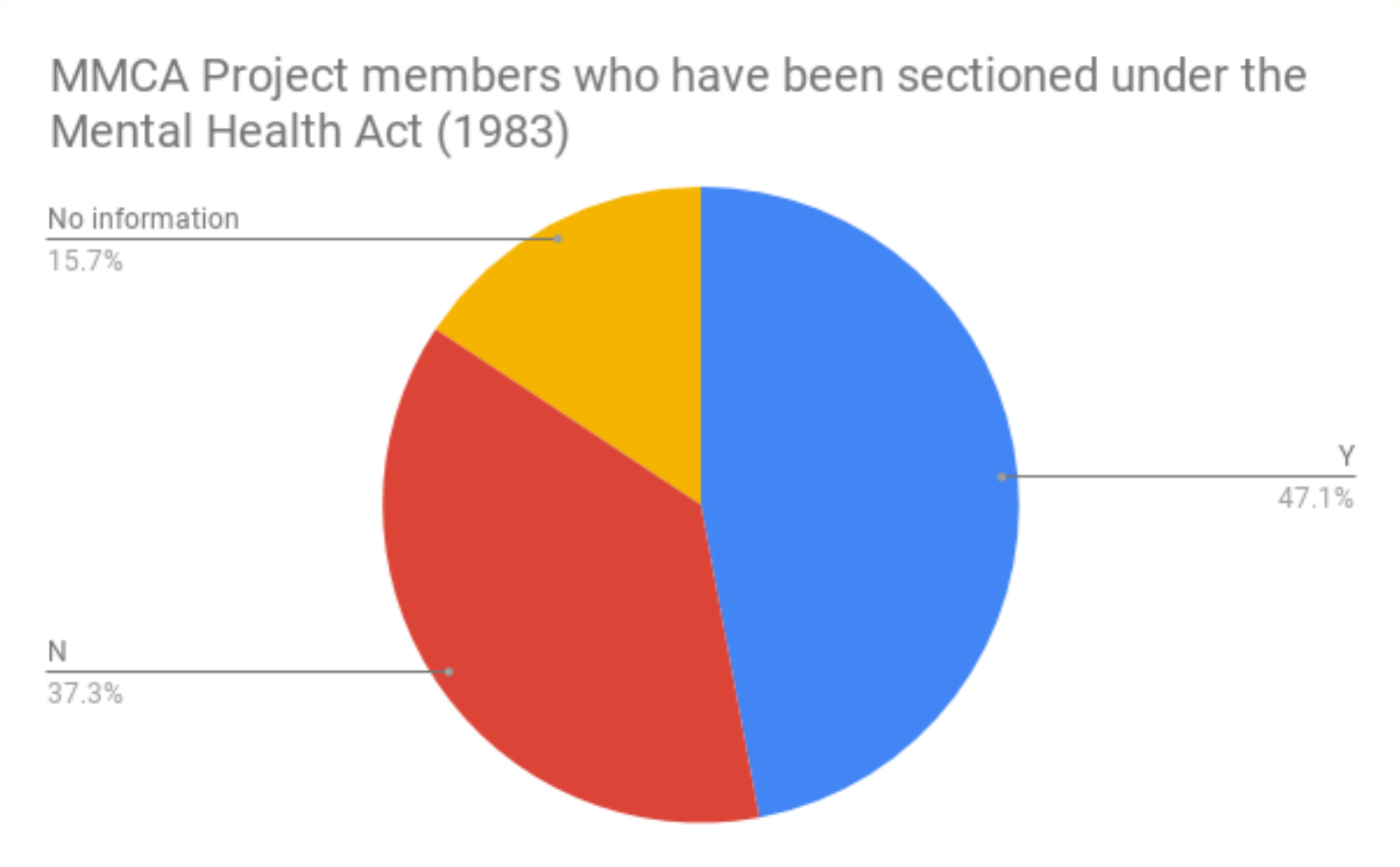
Referrals to the MMCA Project



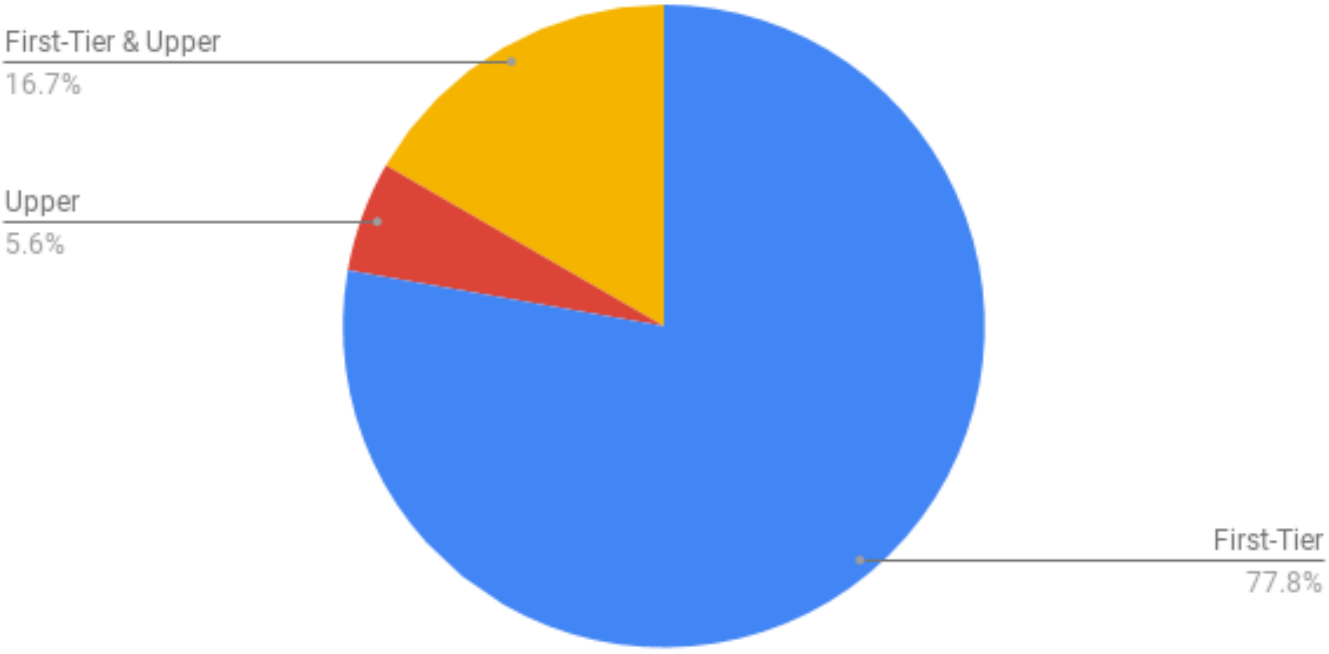
Immigration status when referred



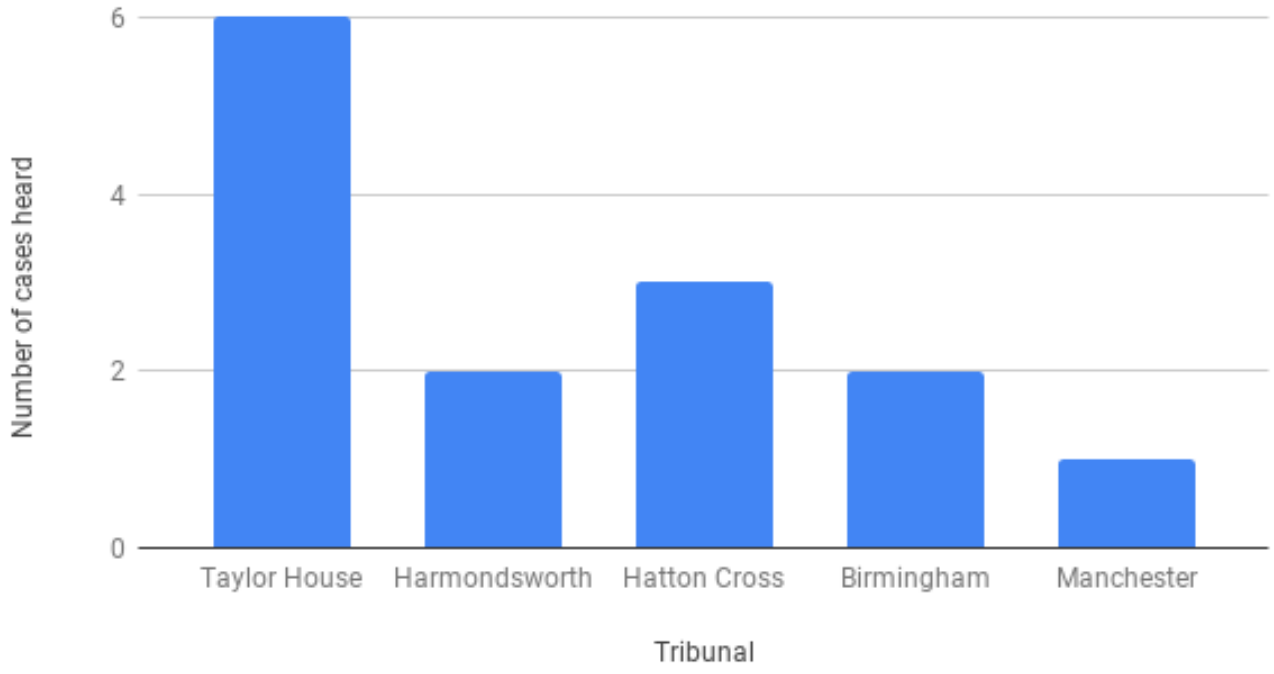

Mental Health Diagnosis
PTSD
Depression
Dissociative Amnesia
Anxiety
Paranoid Schizophrenia
Schizophrenia
Schizoaffective Disorder
Pyschotic Illness
Polymorphic Psychotic
Psychotic Episodes
Korsakoff Psychosis
Non-organic psychosis
Delusional Disorder
Bipolar Disorder
Adjustment Disorder
Autism
Learning disabilities
ADHD
Brain injury
Drug or alcohol addiction
No diagnosis
No information
0
5
10
15


MMCA Project members who have been sectioned under the Mental Health Act (1983)
No information
15.7%
Y
47.1%
N
37.3%

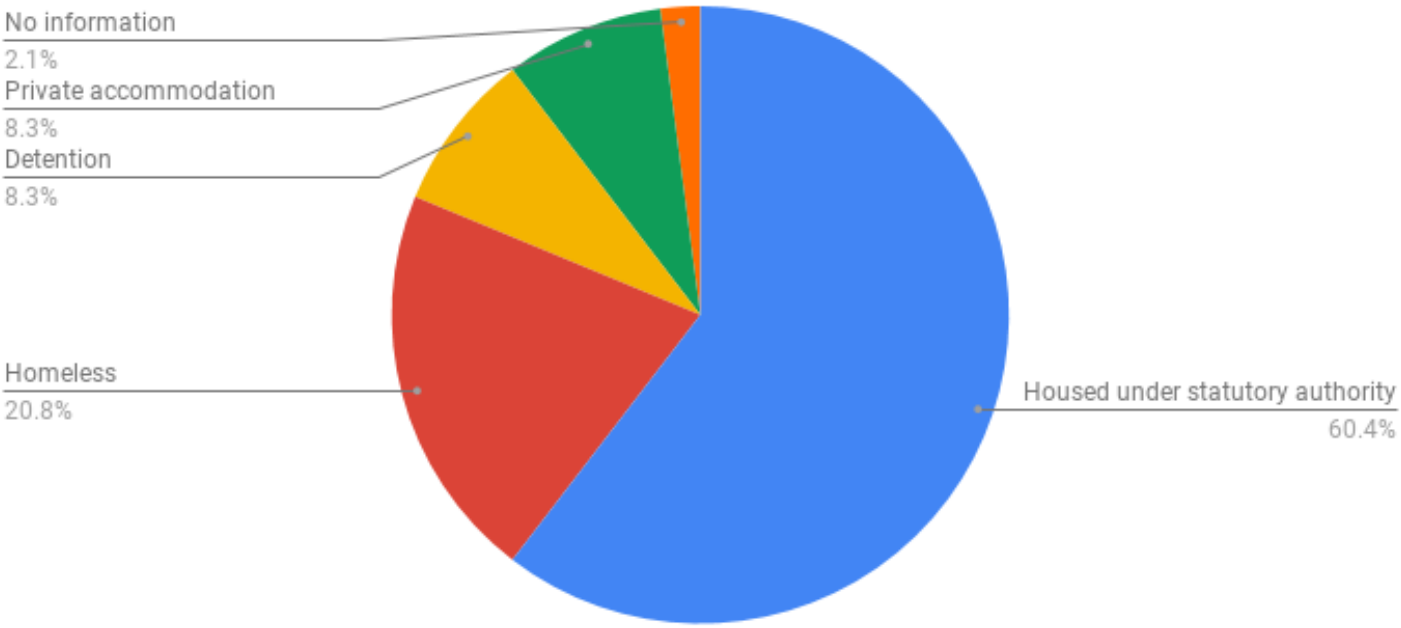
Litigation Friend cases heard in First-Tier, Upper, or First-Tier & Upper Immigration Tribunals



First-Tier Tribunals in which MMCA cases have been heard



Living situation when referred



Deportation/removal order when referred to MMCA