

LEGAL BRIEFING

LEGAL CHALLENGE ON THE LACK OF LITIGATION FRIENDS OF LAST RESORT IN THE FIRST TIER AND UPPER TRIBUNALS (IACS)



NOVEMBER 2022

LEGAL BRIEFING – Legal Challenge on the Lack of Litigation Friends of Last Resort in the First Tier and Upper Tribunals (IACs)

November 2022

Migrants Organise can announce that the Ministry of Justice and the Official Solicitor have now confirmed that the Official Solicitor will act in the immigration tribunals, both First Tier and Upper Tribunals, so long as their standard criteria are satisfied.

The power of both the First Tier and Upper Tribunal (Immigration and Asylum Chambers) to appoint a litigation friend for litigants who lack litigation capacity has been clearly established since the case of R (C) v FTT and others [2016] EWHC 707 and of AM (Afghanistan) v SSHD [2017] EWCA Civ 1123.

While the power to appoint a litigation friend is clear, practitioners in the field are familiar with the challenges in identifying and securing litigation friends to act on behalf of vulnerable migrants and asylum seekers who lack litigation capacity. Many migrants and asylum seekers often do not have significant support network in the UK including friends or families who would be able to step into the role of a litigation friend.

The Official Solicitor is an arms-length body of the Ministry of Justice whose responsibilities include acting as a litigation friend of last resort. They regularly act in the High Court and the Court of Protection, for example, on behalf of litigants who lack litigation capacity. The Official Solicitor has three standard criteria that have to be fulfilled before they act as a litigation friend of last resort, namely:

1. That the person concerned lacks capacity to conduct the proceedings (she requires evidence of the lack of capacity) or is a child who does not have permission of the court to conduct proceedings without a litigation friend;
2. That the Official Solicitor as litigation friend of last resort; and
3. That there is security for the costs of legal representation for the person concerned.

Over the past 6 years, it has been Migrants Organise’s experience that the Official Solicitor has routinely been refusing to act in the tribunal system including the immigration tribunal, even when all of the criteria above have been satisfied. The Official Solicitor often stated that they would only act in the tribunals in “exceptional circumstances”. Below is an example of their refusal:

“The Official Solicitor will of course, consider acting as a litigation friend to assist litigants who lack capacity to conduct proceedings in matters before a tribunal in exceptional circumstances, and subject to her acceptance criteria being met. Having considered the details of this matter however, she does not consider this to be such a case and accordingly is unwilling to accept appointment as a litigation friend in this matter.”

It was unclear what constituted “exceptional circumstances” and why matters in front of the tribunals, including immigration tribunals, warranted an additional criterion which was not required in other jurisdictions. As a result, many appeals in the immigration tribunals have not been able to proceed.

Our Work

In response, under our Migrants Mental Capacity Advocacy (MMCA) Project, Migrants Organise has created a small pool of trained professionals to act as litigation friends of “last resort” to ensure that cases involving some of the most vulnerable appellants are able to proceed. We used our experience assisting litigants on the ground, as highlighted in our 2021 Report “Without Capacity: Mental Capacity as a Barrier to Justice in the Immigration System” to try to bring about a systemic change by trying to engage both with representatives of the Ministry of Justice and the Official Solicitor.

We have been clear from the beginning that our project cannot be a replacement to a sustainable, properly funded system for ensuring access to the immigration tribunals, and to justice, for litigants who lack requisite capacity.

Earlier this August, Migrants Organise, represented by Wilsons Solicitors LLP and Alasdair Mackenzie and Sophy Miles from Doughty Street Chambers, sent a pre-action protocol letter against the Ministry of Justice and the Official Solicitor in relation to

their ongoing failure to provide such a system.

The Ministry of Justice has now responded to our pre-action protocol letter and confirmed via a letter dated 13 October 2022 (Government Legal Department reference number: Z2208107) that the Official Solicitor will act in the immigration tribunal provided that all of their standard criteria apply. If you would like to see their full response, please contact brian@migrantsorganise.org.

This commitment from the Ministry of Justice and the Official Solicitor means that vulnerable litigants in the immigration tribunal will finally have access to litigation friends of last resort in the immigration tribunal.

How to Refer to the Official Solicitor

Referrals to the Official Solicitor can be made by emailing os_civil_litigation@ospt.gov.uk.

The Official Solicitor will provide a referral form which needs to be completed and returned, along with:

- The pleadings i.e. claim form, particulars of claim, order(s) and any key documents as separate attachments.
- Evidence as to lack of litigation capacity i.e. a certificate as to capacity or a medical report from an expert.
- Confirmation that there is nobody else willing or suitable to act as the person's litigation friend; and
- Documentation to show how this matter will be funded - copy of legal aid certificate, CFA and ATE certificate.

We also advise that when approaching the Official Solicitor, legal representatives provide a clear and workable timeline for the Official Solicitor to respond.

In many cases where the Official Solicitor's service is required, vulnerable migrants will be without any immigration status or access to public funds. They are often destitute and/or have difficulties accessing necessary statutory support and services due to

their lack of immigration status and due to the Hostile Environment policy. It is therefore important to notify the Official Solicitor of important deadlines to ensure that the case is not delayed any further than necessary.

It is also important to note that mental capacity is decision specific and therefore clear evidence of lack of litigation capacity should be produced, identifying clearly the litigation in question (for example, in cases where there are parallel proceedings involving the same client).

Migrants Organise has produced two guidance below to assist practitioners working with migrants who might lack mental capacity in relation to their immigration matters:

1. Supporting Migrants Lacking Mental Capacity In Relation to Immigration Matters, published November 2022 with the NRPF Network
2. Mental Capacity & Litigation Friends in Asylum & Human Rights Appeals, published May 2021

Following our pre-action correspondence, the Official Solicitor has also further confirmed to us through email correspondence that they intend to publish a practice note on this issue which will be available to all practitioners and interested stakeholders. This will be a very much welcome step.

Migrants Organise is dedicated to ensuring that the Ministry of Justice and the Official Solicitor remain steadfast in their commitment to ensure access to the immigration tribunals for migrants and asylum seekers lacking capacity to litigate. We also want to ensure that the service provided by the Official Solicitor is sufficiently tailored to appeals in the immigration tribunals and the specific challenges in this practice area.

Should practitioners encounter any issues in approaching the Official Solicitor to act as a litigation friend of last resort, or issues receiving instructions from them please contact brian@migrantsorganise.org.

Kind regards,



Brian Dikoff, Legal Organiser at Migrants Organise



Migrants Organise provides a platform for refugees and migrants to organise for power, dignity and justice to enable meaningful inclusion and integration. We combine advice and support for individuals affected by the hostile environment immigration policies with community organising, advocacy, research and campaigning to help dismantle structural racism.

Migrants Organise is a registered company limited by guarantee, (3673737) and a registered charity (1077116).
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