

CAPACITY AND LITIGATION FRIENDS IN THE IMMIGRATION TRIBUNAL

Asma Nizami, Ben Bundock and Eleri Griffiths
September 2021



LEGAL FRAMEWORK



Mental Capacity – the law

Mental Capacity Act 2005,

Explanatory Notes:

4. [The MCA 2005] [...] aims to clarify a number of legal uncertainties and to reform and update the current law where decisions need to be made on behalf of others. The Act will govern decision-making on behalf of adults, both where they lose mental capacity at some point in their lives, for example as a result of dementia or brain injury, and where the incapacitating condition has been present since birth. It covers a wide range of decisions, on personal welfare as well as financial matters and substitute decision-making by attorneys or court-appointed “deputies”, and clarifies the position where no such formal process has been adopted [...]

<https://www.legislation.gov.uk/ukpga/2005/9/notes/division/2>



Key Principles (s1)

Section 1 sets out key principles:

1 The principles

- (1) *The following principles apply for the purposes of this Act.*
- (2) *A person must be assumed to have capacity unless it is established that he lacks capacity.*
- (3) *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.*
- (4) *A person is not to be treated as unable to make a decision merely because he makes an unwise decision.*
- (5) *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.*
- (6) *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.*



People who lack capacity (s2)

- section 2(1): 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”
- Capacity is time specific and decision specific
- S2(1) - “diagnostic test”. E.g. psychiatric illness, learning disability, dementia, brain damage, coma, confusion, shock, drugs, fatigue
- NB it does not matter if the impairment is temporary or permanent (s2(2))
- A lack of capacity cannot be established merely by reference to—
 - (a) a person's age or appearance, or
 - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity (s2(3))
- S2(4) – standard of proof is balance of probabilities



Inability to make a decision (s3)

- 'Functional test'

3 Inability to make decisions

(1) *For the purposes of section 2, a person is unable to make a decision for himself if he is unable—*

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) *A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).*

(3) *The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.*

(4) *The information relevant to a decision includes information about the reasonably foreseeable consequences of—*

(a) deciding one way or another, or

(b) failing to make the decision.



Best interests (s4)

- all steps and decisions taken for someone who lacks capacity must be taken in the person's best interests.
- Consider whether P will at some time have capacity in the future, when that will be **(s4(3))**
- As far as reasonably practicable, permit and encourage P to participate/improve his ability to participate in any act done for him and any decision affecting **him (s4(4))**
- **S4(6)** Consider so far as is reasonably ascertainable—
 - (a)the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
 - (b)the beliefs and values that would be likely to influence his decision if he had capacity, and
 - (c)the other factors that he would be likely to consider if he were able to do so.
- **S4(7)**: You must take into account, if it is practicable and appropriate to consult them, the views of—
 - (a)anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
 - (b)anyone engaged in caring for the person or interested in his welfare,
 - (c)any donee of a lasting power of attorney granted by the person, and
 - (d)any deputy appointed for the person by COP,as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6)



Litigation Capacity

- ***Masterman-Lister v Brutton & Co (Nos 1 and 2), Masterman-Lister v Jewell and another*** [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511
- Pre MCA 2005
- Useful guidance:
- *“the test [for litigation capacity) [...], is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law whether substantive or procedural should require the interposition of a next friend”* (§75).
- Ability to understand the the effects of decisions made within the litigation (§83):
“I accept that capacity to pursue a claim requires capacity to take a decision to compromise that claim; and that capacity to compromise requires an understanding of what the effects of a compromise will be in particular, an understanding that it will be necessary to deal with the compensation moneys in a way which will provide for the future”
- NB (§17), *“it has to be recognised that when a person is treated as a patient, whether or not as a result of an order of the court, he is thereby deprived of civil rights, in particular his right to sue or defend in his own name, and his right to compromise in litigation without the approval of the court. They are important rights [...]”*.



Capacity

- An assessment has to be made in relation to all aspects of the proceedings, as a whole, rather than individual decisions within the proceedings (***Dunhill v Burgin* [2012] EWCA Civ 397 §24; also *Dunhill v Burgin (Nos 1 and 2)* [2014] UKSC 18, [2014] 1 W.L.R. 933**)
- “*The proceedings themselves may take many twists and turns, they may develop and change as the evidence is gathered and the arguments refined [...] It would make no sense to apply a capacity test to each individual decision required in the course of the proceedings*” (§15)
- Capacity to conduct litigation involves capacity to understand the “*large variety of issues*” that may arise through the currency of proceedings (***Dunhill v Burgin* EWCA §25**).
- The assessment is not whether the person lacks capacity for the matters that have *in fact* arisen for decision in proceedings, **but whether they lack capacity for the decisions that may hypothetically arise** (***Dunhill v Burgin* UKSC §18; *Dunhill v Burgin* EWCA §1, §16, §24, §27-29**).



A word of warning

- Lacking capacity to conduct proceedings is not the same as inability to give evidence.
- Don't assume that because someone lacks capacity in one domain, they lack it in another domain too.
- *N.B. Sheffield City Council v E* [2004] EWHC 2808 (Fam); [2005] Fam. 326 §49



Litigation Friends

- The Civil Procedure Rules 1998 provide (CPR21.1): “(1) A *protected party must have a litigation friend to conduct proceedings on his behalf*”. A protected party is defined as “*a party, or an intended party, who lacks capacity to conduct the proceedings*” (CPR 21.1(d)).
- A litigation friend instructs lawyers on behalf of P and makes decisions about the conduct of the litigation. They should act in P’s best interests.
- They make all the decisions that P would have made if P had been able to.
- They do not become a litigant themselves (**Re E (mental health patient)**) [1984] 1 All ER 309 pp312-3
- They will ascertain P’s wishes and feelings.
- They should follow the principles in the MCA 2005 and also consider the MCA Code of Practice



Duties of a Litigation Friends

JS and Others) v Secretary of State for the Home Department (litigation friend – child) [2019] UKUT 00064 (IAC)

“ 92. The Lord Chancellor adopted the description of the role and duties of the litigation friend as framed, although not precisely defined, in The "White Book" 2018 at 21.2.1:

"The litigation friend is required to take all measures he or she sees fit for the benefit of the child or protected party, supplementing the want of capacity and judgement of the child or protected party, his or her function being to guard or safeguard the interests of the child or protected party for the purposes of the litigation. The discharge of that duty involves the assumption by the litigation friend of the obligation to acquaint him or herself of the nature of the action and, under proper legal advice, to take all due steps to further the interests of the child or protected party; see [Whittall \[1973\] 1 WLR 1027](#) , [Brightman J v SSHD \[2005\] EWCA Civ 629](#) at 1030, cited with approval in [OH v Craven \[2017\] 4 WLR 25](#) , [Norris J v SSHD \[2005\] EWCA Civ 629](#) ."



Litigation Friends

“93. This position is reflected in the observations in re [E \(Mental Health Patient\) \[1984\] 1 WLR 320](#) at 324 regarding the role of a litigation friend, who was to conduct litigation on behalf of a claimant who lacks competence, in his best interests. The duties 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](#)).

94. We consider that the description of these duties would apply equally in the Upper Tribunal.”

- §72, 101 guidance is relevant to statutory appeals



Litigation Friends

- Must consent to being appointed
 - Must be able to act competently and diligently; and
 - to act in the best interests of (and without conflict with) the party for P
 - may be liable for costs ordered against P (not so relevant in IAC)
 - NB confidentiality/data protection (see also §4.55 and 5.56-7, 16.27-9 of the Code of Practice)
-
- A litigation friend could be a volunteer, a friend, a deputy (if there is one), another professional etc
 - They are not P's legal representative
 - Official Solicitor is LF of last resort.
 - OS is frequently involved in COP/higher court matters



Litigation Friends

- If there is no litigation – e.g. LTR application
- **COP** – ask COP for an order to make a welfare decision in P's best interests/a decision in relation to property and financial affairs
- **Or** consider s5 of MCA which protects a third party from liability where they act on behalf of a mentally incapacitous person, in relation to decisions about care/treatment and provided conditions are met (1) P is reasonably believed to lack mental capacity and 2) the decision is taken in P's BI



PRACTICAL ISSUES



PRACTICAL ISSUES

- Recognising incapacity
- Capacity assessments and instructing experts
- Navigating the Tribunal
- Litigation friends



RECOGNISING INCAPACITY



RECOGNISING POSSIBLE INCAPACITY

<p>Not recalling previous attendances or what was discussed.</p>	<p>Not being able to repeat back information provided immediately before.</p>	<p>Being unable to communicate e.g. mutism/trauma or distress manifestations.</p>
<p>Giving instructions which suggest a lack of understanding of the advice or consequences of certain actions.</p>	<p>THINGS TO LOOK FOR (Not exhaustive or determinative)</p>	<p>General behavior/demeanor which casts doubt over their capacity to instruct (for example, over-excitement/enthusiasm)</p>
<p>Hallucinations</p>	<p>Concerns raised by others (whether professionals or not)</p>	<p>GP or other medical records or past diagnoses which <i>indicate</i> lacking or fluctuating capacity*</p>

*specific diagnoses do not mean you should assume lacking capacity [MCA Code §4.48] but, by their nature they may indicate a need for further examination.



RECOGNISING POSSIBLE INCAPACITY

Responding inappropriately or inconsistently to what they are asked.	Unable to answer basic questions (time, where they have come from, where they live)	Being unable to elaborate when asked.
Lack of compliance with former orders/directions/ Instructions without explanation.	THINGS TO LOOK FOR (Not exhaustive or determinative)	Appearing not to understand the subject matter *
Intoxication	Short attention span/inability to focus.	Obsession or preoccupation with irrelevant matters



TIPS FOR INITIAL CONSIDERATION OF CAPACITY

- Establish the best environment to take client's instructions and try to take them in that environment (e.g. time of day, location)
- Discuss both specific and non-case specific issues e.g. ask them if they understand the purpose of the visit/appointment generally, how they got to the appoint, their role, rather than only about aspect of their case/account*
- Consider multiple appointments. Has their approach, presentation or instructions changed?
- Ask clients to explain their understanding of advice given or something recently explained.
- Ensure clients have all the information and documentation needed before being asked about making the decision.
- Test understanding/recall regularly.
- Try to avoid yes or no answer questions.
- Try different ways of communicating with client to see if it changes their engagement.
- Adapt interview style – short questions/sentences, easy language.
- Discuss between Counsel and solicitors
- Keep good records



TIPS FOR INITIAL CONSIDERATION OF CAPACITY

- All possible steps must be taken to help the person make the decision themselves before deciding a person does not have capacity to take a certain decision.
- Use appropriate language
- Check interpreter dialect
- Is the interpreter experienced in working with vulnerable people?
- Would a same sex interpreter make a difference?
- Use visual aids if needed.
- Change appointment venue/time?
- Multiple short appointments*
- Would an intermediary help?
- Use support workers, advocates.
- Intermediaries do not make litigation decision but generally help a client to understand and communicate them themselves.

* A person who can only retain information for a short period does not necessarily lack capacity to make the decision and should not be assumed to be lacking capacity [Code of Practice §4.20]. Much will depend on what is necessary to make the decision, including how quickly a decision needs to be made.



IS A FORMAL CAPACITY ASSESSMENT NEEDED?

- Decision on whether client has capacity to instruct and whether instructions can be accepted and acted upon rests with the adviser (The Law Society Practice Note *Working with clients who may lack mental capacity*).*
- However: “If you have reasonable doubt about your client's capacity to give proper instructions, it's your professional duty to satisfy yourself whether the client has the capacity to give instructions” : The Law Society Practice Note *Working with clients who may lack mental capacity*).
- Does not always require expert evidence but usually will.



IS A FORMAL CAPACITY ASSESSMENT NEEDED?

- Bar Council Guidance *Client Incapacity* [Reviewed June 2021]:

4. *The general rule is that once a legal adviser entertains a reasonable doubt about their client's capacity to give proper instructions, it is that adviser's professional duty to satisfy themselves that the client either has or does not have the capacity to give instructions; see Re P [2008] EWCA Civ 462, at paragraph 47.*



WHY IS A CAPACITY ASSESSMENT NEEDED?

- *RP v Nottingham City Council and Official Solicitor* [2008] EWCA Civ 462:

“47. There is, however, a further point which needs to be understood and emphasised. Both the relevant rules of court and the leading case of Masterman-Lister make it clear that once either counsel or SC had formed the view that [the client] might not be able to give them proper instructions, and might be a person under a disability, it was their professional duty to have the question resolved as quickly as possible. This point will become more apparent when I consider the case of Masterman-Lister later in this judgment (see in particular paragraphs 111 to 127 below). For present purposes, it is sufficient to state that in my judgment it would have been a serious breach of her professional and ethical code were SC to have continued to take instructions from a person whom she had reason to believe did not have the capacity to instruct her. She was, accordingly, duty bound to seek a professional opinion on [the Client’s] capacity to do so.”



COMMON MISCONCEPTIONS ABOUT LITIGATION CAPACITY

- A person who is unable to make one decision is unable to make any decision
FALSE – Capacity is issue specific.
- Making a bad decision is the same as being unable to make one.
FALSE - Capacity is about understanding not wisdom.
- Once a person loses capacity they cannot regain it
FALSE – loss of capacity can be permanent or temporary



EXPERT EVIDENCE ON CAPACITY



IDENTIFYING THE APPROPRIATE CAPACITY EXPERT

- Type of expert will depend on the suspected impairment
- Examples:
 - Psychiatrist
 - Psychologist
 - Educational psychologist
 - Speech and language therapist
 - Occupational therapist
 - Client's GP
 - Social worker
 - Mental health nurse
- Does the client have a treating practitioner?



INSTRUCTING THE EXPERT

- Usual rules on instructing experts should be followed:
- [Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal](#) §PD 10.
- Ensure **ALL** relevant information and documents are given.
- Consider also using helpful civil forms: [Guidance Notes for Certificate as to Capacity to Conduct proceedings](#)

CERTIFICATE AS TO CAPACITY TO CONDUCT PROCEEDINGS

To the assessor:

The attached certificate of capacity to conduct proceedings is a standard form of report for recording the assessment of the mental capacity of an adult to conduct their own proceedings ('litigation capacity') where that adult is a party or intended party to proceedings in the Family Court, the High Court, a county court or the Court of Appeal. 'Conducting one's own proceedings' includes both conducting the proceedings through solicitors and conducting them as a litigant in person ('LIP').

This assessment of capacity is being requested because there is concern that the party or intended party to the proceedings lacks litigation capacity (within the meaning of the Mental Capacity Act 2005) and is therefore a 'protected party'.

Part 15 of the Family Procedure Rules 2010 and Part 21 of the Civil Procedure Rules 1998 provide that a protected party must have a litigation friend to conduct the proceedings on that party's behalf. The litigation friend, rather than the protected party, is responsible for making the decisions about the conduct of the proceedings.

The certificate is not intended for any purpose other than the assessment of whether the person lacks litigation capacity in relevant proceedings.

Before you carry out your assessment and complete the certificate you should:

- (1) Read the **guidance notes** attached.
- (2) Read the **description of the proceedings** provided at part 3 of the certificate and/or in the accompanying letter of instruction.
- (3) Consider chapter 3 of the Mental Capacity Act 2005, **Code of Practice**, issued by the Lord Chancellor in accordance with sections 42 and 43 of the Act.

The BMA/Law Society Legal Handbook, *Assessment of Mental Capacity - A Practical Guide for Doctors and Lawyers*, 4th edition, chapter 8 also contains useful guidance.

Your opinion:

- (4) If it is your opinion that the person does lack litigation capacity please complete all 8 parts of the certificate; in such cases the certificate must identify what the impairment of, or disturbance in the functioning of the person's mind or brain is *and* why it causes the person to be unable to make the decisions necessary to conduct of those proceedings:
 - (a) please note that the assessment is by reference to the proceedings as a whole not by reference to each step in the conduct of the proceedings
 - (b) please consider if there are practicable steps which could be taken to enable the person to acquire capacity to conduct the proceedings.
- (5) If it is your opinion that the person does have litigation capacity, there is no need for you to, and you should not, give grounds for that opinion.

Completing the certificate



INSTRUCTING THE EXPERT

SUGGESTED INFORMATION TO GIVE

1. What the case is about.

- Identify the key issues and history (including medical information)
- Outline if there is any information missing.
- Provide all relevant documents (PD10) (e.g. including RFRL and interviews, medical notes)

2. What has prompted the concern over the client's capacity?

- Previous contemporaneous notes may help the expert but be careful about privileged information.



INSTRUCTING THE EXPERT

3. What types of decisions will the client need to make?

- **Understanding the purpose of the appeal.**
- **Whether to pursue or withdraw the appeal (Some clients may purport to instruct you not to pursue this appeal).**
 - Requires understanding of the consequences of not doing so including procedure and law around fresh claims.
- **Which claims/grounds to pursue and the difference between them.**
 - Requires some basic understanding of difference between them, the advantages of certain status, different kinds of leave.
- **What evidence to rely on and disclosure.**
 - Especially important where some evidence is both helpful in one respect but also damaging.
 - Risks and benefits of instructing expert evidence and what that involves (for example forensic psychiatric reports)

- **Oral evidence:**
 - who to call
 - what is involved
 - If client also lacks capacity to give evidence then they *may* also lack opportunity to correct adverse points which they can explain.
- **Case management decisions**
 - Applications to adjourn.
 - Waiting behind significant cases
 - Seeking specific disclosure (E.g. of HMRC records)
- **How to discharge obligations to the Tribunal.**
- **Decisions on format of proceedings.**
- **In private cases in particular, the chances of not succeeding and costs risks.**



INSTRUCTING THE EXPERT

SUGGESTED QUESTIONS TO ASK

- Equal Treatment Bench Book (Feb 2021), Ch 5
“Medical evidence is admissible and usually important, but it must be considered whether the opinion of a medical witness as to capacity has been formed on sufficient information and on the basis of the correct legal test.” [13]
- Ask expert to specifically address the MCA 2005 and explain:
 - i. Does the client understand the information which is relevant to their decision?*
 - ii. Can the client retain this information?*
 - iii. Can the client use or weigh up the information as part of the process of making the decision?*
 - iv. Can the client properly communicate their decision?*



INSTRUCTING THE EXPERT

SUGGESTED QUESTIONS TO ASK

- What is the impairment of, or a disturbance in the functioning of, the mind or brain?
- Causation - is that the reason the client cannot make the decision?
- Has capacity been lost entirely, can it be regained or is it fluctuating?
- If capacity fluctuates, are there any recommendations for maximising capacity?
- In what circumstances may the client regain capacity?
- How long will it likely take for capacity to be regained?



NAVIGATING THE TRIBUNAL, LITIGATION FRIENDS



TRIBUNAL'S POWER AND DUTY TO APPOINT LF

- The Tribunal has the power to appoint a Litigation Friend: *R(C) v FTT; AM (Afghanistan) v SSHD* [2018] 4 WLR 78, [2017] EWCA Civ 1123 §44; *R (JS and Ors) v SSHD (litigation friend – child)* [2019] UKUT 00064 (IAC) §70, 72.
- Without a LF, a person without capacity to litigate *"will not be able to make representations, nor will he be able to put forward evidence, nor will he be able to test the evidence against his case, and nor will he be able to instruct a solicitor for the purposes of any appeal"*: *R (C)* §11. This proposition was supported by the Lord Chancellor.
- So where an appellant lacks capacity, *"the common law concept of procedural fairness demands that [...] a litigation friend should be appointed"*: *R(C)* §10. Put another way, there will be a breach of the Tribunal's common law duty if a LF is not appointed.



PROCEDURE: OVERVIEW

- The FTT and UT Rules do not include any provisions regulating the power to appoint a LF, nor any procedure.
- In 2017, Underhill LJ said this was "*very unsatisfactory*" and hoped that the Tribunals Procedure Committee would consider this "*as a matter of urgency*": AM §49.
- The Upper Tribunal has given guidance on procedure in JR in the UT: JS §102-104. No guidance has been given on procedure in statutory appeals.
- The CPRs do not apply in the Tribunal: JS §73-74.



BEFORE THE EXPERT REPORT

- It's likely you will have to engage the Tribunal before you have confirmation of whether your client lacks capacity. You may need adjournment or variation of directions in order to have time to confirm the position.
- Bar Council Guidance ('Client Incapacity') says if you reasonably suspect your client may lack capacity, "*you need to proceed with great care*", in particular because:

"6.1 If you doubt the client's capacity to give instructions, it follows that you cannot be certain that it is proper to act on any instructions which the client may purport to give you (although, even where a client definitely lacks the capacity to give instructions, you should still seek the client's views and take them into account);

6.2 You may need to consider placing the issue before the court [...];

6.3 Where the client is funding litigation privately, the propriety of your instructing solicitor accepting funds from the client may be in doubt; and

6.4 Revealing to your client your suspicion that he/she lacks capacity may well be perceived as offensive, and revealing the suspicion to the court and any other party may well be unauthorised and/or highly prejudicial.



BEFORE THE EXPERT REPORT

- On one hand, if your client authorises you to disclose your concerns to the Tribunal, it is possible that those instructions are not capacitous. On the other hand, if your client refuses to authorise disclosure, that refusal may not be capacitous, and may be strongly against their best interests.
- Bar Council Guidance now states that:

“8.5 If the client rejects the advice to obtain further evidence but your instructing solicitor nonetheless has concerns about the client’s capacity to litigate, in the Bar Council’s view, the court should be informed of these concerns (which, in the absence of any special application, will normally mean informing any other party to the proceedings), even if the client purports to forbid this, so that the issue can be investigated without delay. This might include making an application for expert evidence concerning the client’s litigation capacity, even if instructed not to do so.

9. In the Bar Council's view, this is a situation where your duty to the court at that time overrides the client's purported instructions, even if the client subsequently turns out to have capacity. Disclosure of the client's suspected lack of capacity is necessary for the protection of the client (in case the client lacks capacity), and may be necessary for the protection of you and your instructing solicitor, since, if the client lacks capacity to give instructions and/or to authorise private funding, neither you nor your instructing solicitor can properly act on the basis of the client's instructions and/or any such funding. It will also better enable the court to achieve the 'overriding objective', having regard to the difficulty which has arisen.”



BEFORE THE EXPERT REPORT

- Each case will depend on its facts, and we would suggest seeking advice and using your ethics helpline. But the Bar Council Guidance suggests a way forward, §8-9:
- First, discuss the issue with the client, advise, and seek their instructions to obtain evidence and disclose concerns to the Tribunal, pursuant to any application that is necessary. See §8 of the Bar Council Guidance for useful step-by-step guidance.
- Then, if the client consents, you may notify the Tribunal, and explain that adjournment or variation of directions is necessary. If the client refuses, the Bar Council guidance suggests you are entitled to notify the Tribunal and invite these steps in any event.
- At all stages, keep detailed records of the steps taken, advice given, input and advice obtained, reasoning



BEFORE THE EXPERT REPORT

- In notifying the Tribunal, you will need to consider the need to satisfy it that there is legitimate concern about the client's capacity.
- There is a balance to be struck between disclosure of confidential material, potentially without instructions, and the need to secure the outcome that is in the client's best interests.
- Consider: detailed WS from representative; WSs from family or support workers; existing medical records; written communication from your client; attendance notes; etc.
- Experience suggests you should also make full submissions regarding law, procedure and professional obligations. Tribunal caseworkers and Judges may not be familiar with the issues. See the authorities noted above (particularly *R(C)*), the Law Society and Bar Council Guidance, and the Equal Treatment Bench Book §42-44, 64.



BEFORE THE EXPERT REPORT

- If the Tribunal refuses to adjourn, it is likely to be necessary to renew the representations and perhaps seek a CMRH.
- If the Tribunal still refuses to adjourn, counsel “*may have to withdraw from the case, making clear to the court that [they] cannot act in the absence of proper instructions*”: Bar Council, ‘*Client Incapacity*’ §10.4.
- It may also be appropriate to explore an application for Judicial Review of the Tribunal’s decision, involving the Official Solicitor if necessary.
- Again, at all stages, keep detailed records.



AFTER THE EXPERT REPORT, OR IF SATISFIED

- Once you are satisfied the client lacks capacity, generally you cannot continue to act unless a Litigation Friend is appointed.
- This is because generally the retainer terminates by operation of law, when the client loses the capacity to give or confirm instructions: Law Society, *Working with clients who may lack mental capacity; R(C) v FTT and ors* [2016] EWHC 707 (Admin) §11).
- However "*you should as far as practicable, take action to protect your client's interests*": Law Society, *op cit*.
- If incapacity is confirmed, you should notify the Tribunal and provide the evidence, as necessary in order to secure adjournment / variation of directions, etc. Again, it would be advisable to make full submissions on law, procedure and professional obligations.



IDENTIFYING A LITIGATION FRIEND

- You will need to identify a litigation friend.
- The “guiding principles” as to who may be suitable are derived from CPR r 21.4 (see *JS* §96, 101):
 - Can they fairly and competently conduct proceedings on behalf of the person?
 - Do they have an interest adverse to that of the person?



IDENTIFYING A LITIGATION FRIEND

- If the client has family, friends, carers, or support workers, they may well be suitable and willing.
- Sadly, many of our clients do not have anyone to take this role.
- Another option would be a suitable, volunteer professional.
- The Official Solicitor, which acts as the LF of last resort in many proceedings, has a power but not a duty to act as a LF in the Tribunal: s 90(3A) *Senior Courts Act 1981*.
- The OS's policy in relation to the Tribunal is that it will only assist in "exceptional circumstances" (in a context where their routine cases are on behalf of people who lack mental capacity). As such it is likely that in many cases the OS will refuse to assist.



IDENTIFYING A LITIGATION FRIEND

- In those circumstances, you might seek assistance from Migrants Organise's 'Mental Capacity Advocacy Project', via brian@migrantsorganise.org.
- However, in MO's own words, "this is a small-scale project with limited capacity": Migrants Organise, *'Mental Capacity & Litigation Friends in asylum & human rights appeals'* (May 2021).
- That Guide makes a further useful suggestion about seeking the assistance of the relevant local authority – see p16.
- Regrettably, in many Tribunal cases this is a cause of significant delay and difficulty. See further: Migrants Organise, *'Without Capacity, Mental Capacity as a Barrier to Justice in the Immigration System'* (May 2021).



APPLYING TO APPOINT THE LITIGATION FRIEND

- As noted, there are no procedure rules, and the CPRs do not apply in the Tribunal.
- Certainly, a detailed and full written application should usually be made to the Tribunal, supported by all relevant evidence.
- It may be sensible to suggest a CMR to deal with the appointment; and to ensure that the proposed LF can attend.



APPLYING TO APPOINT THE LITIGATION FRIEND

- While the CPRs do not apply in the Tribunal, they "*offer a valuable source of assistance with regard to some of the basic tenets relating to the appointment of a litigation friend*": JS §77; see also Equal Treatment Bench Book §64.
- The use of form N235, the 'Certificate of suitability of litigation friend' used in civil proceedings, may be appropriate.*
- If used, consider removing the undertaking in relation to costs, at least as a starting point. Unlike under the CPRs, it is not a requirement that a LF must give an undertaking on costs before appointment: JS §99.**

* In JS the UT emphasised that form N235 ('Certificate of suitability of litigation friend') should not be used in JR in the UT: JS §102. But this aspect of the UT's decision expressly does not apply in statutory appeals: §101.

** The Tribunal is not precluded from doing so, although given the discussion in JS at §99 it would seem only a very extreme case in a statutory appeal where this would be appropriate or indeed lawful, if it restricted the client's access to justice. NB it appears *possible*, in theory, that a LF might be ordered to pay costs in any event, under the *Tribunal Procedure (FTT) (IAC) Rules 2014*, if their conduct was "improper", "unreasonable" or "negligent".



APPLYING TO APPOINT THE LITIGATION FRIEND

- Again, experience suggests that some Tribunal Judges may be more resistant to appointing a LF than others, and some may expect detailed argument while others may appoint the LF without difficulty.
- If the Tribunal refuses to determine the issue or decides to proceed without appointing a LF, you will need to consider your professional position carefully, bearing in mind that you cannot formally act without proper instructions, and the retainer may well have terminated by operation of law. In this situation, consider JR with involvement of OS.
- Each case will depend on the facts. Again would advise you to seek advice, including from your ethics helpline, and keep detailed notes of the steps you take and why.



RESOURCES



RESOURCES

Law Society, *Working with clients who may lack mental capacity*

<https://www.lawsociety.org.uk/en/topics/client-care/working-with-clients-who-may-lack-mental-capacity>

Law Society, *Meeting the needs of vulnerable clients*

<https://www.lawsociety.org.uk/en/topics/client-care/meeting-the-needs-of-vulnerable-clients>

Bar Council, *Client Incapacity* (updated June 2021)

<https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Client-incapacity-June-2021.pdf>

BSB, *Vulnerability Good Practice Guide, Immigration Clients*

<https://www.barstandardsboard.org.uk/uploads/assets/196ca72c-464d-4b59-9d3f95ef4569b233/immigrationvulnerabilityguidance2018.pdf>

BSB, *Vulnerability Good Practice Guide, Immigration Clients - Factsheet 6: Issues with mental capacity*

<https://www.barstandardsboard.org.uk/uploads/assets/63747d36-dd2e-48bd-9a7da82df0471afa/factsheet6.pdf>



RESOURCES

Mental Capacity Act Code of Practice

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921428/Mental-capacity-act-code-of-practice.pdf

The Advocate's Gateway

<https://www.theadvocatesgateway.org>

Joint Presidential Guidance Note No.2 of 2010 – Child, vulnerable adult and sensitive appellant guidance

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

Migrants Organise, *Mental Capacity & Litigation Friends in asylum & human rights appeals*

<https://drive.google.com/file/d/1MobVoHzLJiJ9pq5lpxRVErImof4altoy/view>

Migrants Organise, *Without Capacity, Mental Capacity as a Barrier to Justice in the Immigration System*

<https://drive.google.com/file/d/1MBaOqVcmgN5OIZ1oiVNnYmQXOPi44-Uy/view>



RESOURCES

CPR, Part 21

<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part21>

Equal Treatment Bench Book, p145 onwards

<https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021-1.pdf>

N235 Form

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/688543/n235-eng.pdf



THANK YOU FOR
ATTENDING!

