



# Navigating Litigation Capacity Issues

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GARDEN COURT CHAMBERS



14 December 2021



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# Navigating Litigation Capacity Issues

## Key Principles

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14 December 2021



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# Introduction

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- A child/protected party may only conduct proceedings by a litigation friend
- Any step taken before a child/protected party has a litigation friend shall be of no effect unless the court orders otherwise [CPR 21.3(4)]
- The court has power to appoint a litigation friend [CPR 21.6(1)]
- The court can only order the appointment of a LF with evidence [CPR 21.6(4)]
- Evidence in standard form Certificate or medical report



# Principles

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- There is a presumption in favour of capacity. All practical support must be given to the protected party during an assessment.
- Burden of proof on the person who asserts there is a lack of capacity
- Not in the abstract. Always necessary to ask whether the protected party has the capacity to litigate in relation to the particular application before the court  
*Sheffield City Council v E and another* [2004] EWHC 2808 (Fam), *para 38*.
- *Masterman-Lister v Brutton & Co, Masterman-Lister v Jewell and another* [2002] EWCA Civ 1889, [2003]
- *Dunhill v Burgin (Nos 1 and 2)* [2014] UKSC 18



# The Test

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- “Whether the party to the 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 or guardian ad litem (now a litigation friend)”

*(Masterman-Lister v Brutton & Co, para 75)*



# The Test - Section 2 – people who lack capacity

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- (1) For the purposes of this Act, 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.***
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.*
- (3) 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.**
- (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.*
- (5) No power which a person (“D”) may exercise under this Act—
  - (a) in relation to a person who lacks capacity, or*
  - (b) where D reasonably thinks that a person lacks capacity,*is exercisable in relation to a person under 16.*
- (6) Subsection (5) is subject to section 18(3).*



# The Test - Section 3 – inability to make decisions

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- 3.—(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.*





# In Practice

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- Provision of relevant information about the case/proceedings

## **Understand**

- Do you have a solicitor
- What is his or her role
- What do you understand about the choice the court could make
- What are you asking the court to do
- What are the other people asking the court

## **Retain**

**Use and weigh** – twists and turns



# Litigation Friends

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- LF must act fairly and competently conduct the proceedings and have no interest adverse to the protected party
- Where conduct of LF is contrary to the interests of the protected party, an application can be made to terminate the appointment
- Where LF ceases to consent to being LF and wishes to be discharged
- Who can be LF? Family member or friend. LF of last resort OS – resources are limited so only accept an appointment where no other suitable and willing person can be identified to act as LF and she is given suitable security for costs



# Navigating Litigation Capacity Issues in Housing & Community Care: CPR 21 and

- (I) Medical evidence needed to establish a lack of litigation capacity
  - (2) Investigating litigation capacity
  - (3) Disputing that a person lacks litigation capacity

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# Introduction to navigating litigation capacity issues in community care & housing

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- Civil Procedure Rules 1998 Part 21 applies
- A range of issues can arise requiring careful navigation: e.g. is incapacity to litigate established, objection to assessment, disagreement with role of litigation friend, disputes raised by the other party.
- There is useful guidance in The Law Society’s “*Working with clients who may lack mental capacity*”, 5 June 2020 and The Bar Council Ethics Committee document “*Client Incapacity*” (last reviewed June 2021).
- In some community care cases a client may for reasons relating to their condition prefer to communicate with legal representatives through a relative or carer, but not lack litigation capacity. Direct contact with the client will nevertheless be necessary some of the time.
- In both areas, the person’s capacity in the litigation may rest on matters that overlap with substantive issues in the case, which can mean a dispute arises as to litigation capacity (although what ensues procedurally from that will vary depending on the type of case).
- This talk focuses on evidence needed to establish a lack of litigation capacity, investigating litigation capacity and disputes about whether a person lacks litigation capacity.



# Establishing that a person lacks litigation capacity – evidence requirements under CPR 21

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- **Where a person becomes a litigation friend without a court order** (CPR 21.5, PD 21.2)
  - proposed litigation friend must file a certificate of suitability (PD 21.2.2) stating the **grounds for his belief that the person lacks capacity**, and if medical opinion/opinion of another suitably qualified expert is relied on for their belief, attach the document containing that opinion to the certificate (PD 21.2.2 (c))
  - no requirement in the rules/PD to *serve* the document containing the expert's opinion (PD 21.2.4)
- **Where litigation friend appointed by court order** (CPR 21.6, PD 21.3)
  - the appointment is made on the basis of a Part 23 application to the court for an order
  - that application must be **supported by evidence** (CPR/PD do not state a requirement of medical evidence)
- Whether there will be a requirement to *serve* the application on the other party/parties (not being a person/s against who the order is sought) depends on the circumstances of the case (***Folks v Faizey*** [2006] EWCA Civ 381; [2006] C.P. Rep. 30 [30])



# Establishing that a person lacks litigation capacity – evidence requirements under CPR 21 – format of medical evidence

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- There is no requirement that medical evidence filed in support of an application to appoint a litigation friend/with the certificate of suitability must be in a specific format
- It may conveniently be in the form of a completed **Certificate as to Capacity to Conduct Proceedings**, available on UK.GOV (contains useful notes of guidance)
- Otherwise, a clinician's (or other suitable expert's) report, or both
- A letter of instruction to the doctor will need to provide an explanation of the issues in the case as well as setting out the legal framework for litigation capacity
- There is guidance to experts on how to structure their expert reports on capacity in *AMDC v AG and CI* [2020] EWCOP 58 [28]
- How detailed the letter of instruction and the opinion itself need to be will depend on the circumstances of the case.



# Is medical evidence always required to establish that a lack of litigation capacity?

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Where medical evidence cannot be obtained:

*“The absence of medical evidence cannot be a bar to a finding of lack of capacity but where most unusually circumstances arise in which medical evidence cannot be obtained, the court should be most cautious before concluding that the probability is that there is a disturbance of the mind.”* Sir Raymond Jack, ***Baker Tilley (A Firm) v Makar*** [2013] EWHC 759 (QB); 3 Costs L.R. 444.

Medical evidence not always necessary – relevance of overriding objective:

In ***Hinduja v Hinduja*** [2020] EWHC 1533 (Ch), [2020] 4 W.L.R. 93 the daughter and carer of the proposed protected party filed a certificate of suitability stating her father lacked capacity to conduct the litigation because of “age-related disease”. The other parties opposed the appointment of a litigation friend.

Falk J held *“medical evidence is not required under the rules and I do not think that it is necessary, or that it would be in accordance with the overriding objective, to require it in this case. I am sufficiently satisfied by the evidence before me that SP lacks capacity to conduct these proceedings”*.



# Investigating suspected lack of capacity to conduct the proceedings

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- The need to investigate litigation capacity will most likely be identified by the person's solicitor, who will then seek medical opinion
- Where an opponent of a litigant in person suspects a lack of capacity on the part of the litigant in person it may be appropriate to bring the issue before the court (***Masterman-Lister v Brutton & Co.*** [30])
- The court itself may raise the issue:

*“courts should always, as a matter of practice, at the first convenient moment, investigate the question of capacity whenever there is any reason to suspect that it may be absent..That means that even where the issue does not seem contentious a district judge who is responsible for case management will almost certainly require assistance of a medical report before being able to be satisfied that incapacity exists”* (***Masterman-Lister v Brutton & Co.*** [17])





# Disputes about whether a party lacks litigation capacity

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When can one party contest the other party's incapacity to litigate?

***Folks v Faizey*** [2006] EWCA Civ 381, [2006] C.P. Rep 30

The Claimant claimed damages arising out of a road traffic accident. It was accepted that he was incapable of managing his affairs. An application was made supported by medical evidence for the appointment of a litigation friend. The Defendant opposed the application. The judge ordered a trial of the matter as a preliminary issue. The Claimant appealed.

Held:

- The Defendant had not put forward any good reason why he was opposing the appointment. The court suspected that it was because he thought the court would be more generous where a party had a litigation friend, but that was difficult to contemplate given it was already accepted that the Claimant was incapable of managing his own affairs
- The rules as to capacity are not designed to create additional litigation, the result of which will have minimal effect on the main action

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# Disputes about whether a party lacks litigation capacity

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## *(Folks v Faizey continued)*

- There is no entitlement for the other party to put in its own evidence to dispute the evidence filed in support of an application to appoint a litigation friend
- There may be cases where the proposed protected party disputes the need for a litigation friend and there could be cases where the other party to the litigation may have a legitimate interest
- However in a situation where the proposed protected party and the litigation friend both consent to the appointment, there is adequate evidence to support the appointment, and no evidence to suggest the application is not bona fides, the court should make the order sought.

**Comment:** Practitioners may have experience of cases in which the court *has* entertained the other party's challenge to asserted incapacity to litigate, because the court itself has doubts about the evidence relied on and/or the issue is so closely linked to substantive issues in the case.



# Disputes about whether a party lacks litigation capacity

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What if the person said to lack litigation capacity disputes that they lack capacity?

- There is no doubt that the appointment of a litigation friend is a serious step (taking away the party's right to conduct the litigation)
- Practitioners in housing and community care will be familiar with explaining to clients suspected to lack litigation capacity the reasons why an assessment of their capacity is needed and the role of the litigation friend
- The judgment in ***RP v UK***, *Application no 38245/08*, *ECHR (2013) 16 CCLR 135* includes a useful setting out of the factors that ensure Art 6 rights are not breached when a litigation friend is appointed

Facts: RP had a significant learning disability. In care proceedings she was represented by the Official Solicitor (OS). The court made a care order and placed her child with foster parents. Her appeal to the Court of Appeal alleging breach of Art 6 was rejected. She applied to the ECHR alleging violations of ECHR including Art. 6.



# Disputes about whether a party lacks litigation capacity (*RP v UK* continued)

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The court held that there was no breach of Art 6, taking into account:

- The appointment of the OS was based on a thorough assessment of her capacity by a clinician (a clinical psychologist)
- In order to safeguard her Art 6 rights it was essential that she could challenge the appointment of the OS
- She had been informed that, if she was concerned about the way her case was conducted, she could speak to her solicitor or the OS or contact a Complaints Officer
- She could at any time have applied to the court to have the OS discharged, or the OS would have been open to inviting her to undergo a further assessment had the OS been aware she was asserting her capacity
- The means of challenge are only effective if the implications of the appointment, the existence of a means of challenging the appointment and the procedure for exercising it are clearly explained to the protected person in language appropriate to their level of understanding .....



## Disputes about whether a party lacks litigation capacity (*RP v UK* continued)

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- Acting in RP's best interests did not require the OS to advance any argument RP wished. It would not have been in her best interests to advance an unarguable case. However it was imperative that RP's views about her child's future were made known to the court. This had occurred.
- There had been no breach of Article 6.

### **CPR 21 procedure for seeking to remove a litigation friend:**

- under CPR 21.7 the court may terminate a litigation friend's appointment on an application supported by evidence
- the court may also exercise its powers of its own initiative: CPR r 3.3(1).



# Navigating Litigation Capacity: Community Care and Housing

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14 December 2021



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## Topics of cases to consider

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- Protected Parties and Protected Beneficiaries
- Part 21 CPR what is the role of a Litigation Friend as contrasted to Court of Protection, if any?
- Litigation Friend and Risk of costs
- Disputes with Protected Party and what is their voice?
- Distinction between Adults and Children urgent cases.
- Anonymity Orders and compromise
- Assessment of capacity and continued review.



# What is the role of Litigation Friend:

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CPR 21.1(2)(d) defines a “protected party” as a party, or intended party who lacks capacity to conduct proceedings. A “protected beneficiary” is defined as a protected party who lacks capacity to manage and control any money recovered by on their behalf or for their benefit in the proceedings (r 21.1(2)(e)). These terms come from the Mental Capacity Act 2005.

The protected beneficiary features in r 21.11 which deals with the control money recovered for the protected party. There is an important distinction which will be returned to later on.

CPR r 21.1(2)(c ) adopts the meaning of “lacks capacity” within in the s 2(1) MCA 2005. It has to be noted that the mere inability to make a decision about the conduct of proceedings is not alone sufficient to make a person a protected party – must be linked to disturbance in mind or brain in adult. A protected party must have a litigation friend to conduct the proceedings on their behalf CPR r 21.2(1). A child (under age of 18 irrespective of disorder of mind or brain) must have a litigation friend unless the court makes an order under 21.2(3). r 21.2 is clear it LF is required in proceedings or against child or protected party.

What then is the precise role of the litigation friend in Community Care and Housing cases?

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# What does conduct proceedings mean

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This is undefined but must mean to include doing anything which in the ordinary conduct of proceedings is required or authorised under the CPR to be done by a party in the proceedings.

Duty no longer defined but must include a duty to fairly and competently conduct proceedings, and may include a duty to attend hearings.

The duty of the LF is to take all measures he or she deems fit for the benefit of the child or the protected party, supplementing the lack of capacity and judgment of the child or protected party, with the function being to guard or safeguard the interests of the child or protected party for the purposes of the litigation. To discharge that duty requires the LF to acquaint themselves with the nature of the action and under proper legal advice take all due steps to further the interests of the child or protected party (*Re Whitehall* [1973] 1 WLR 1027 [1030]; *OH v Craven* [2017] 1 WLR 25). Not a general power to act in best interests of protected party on all issues of capacity e.g. defending injunctions see *Wookey v Wookey* or decisions to terminate tenancy.

Expenses incurred by LF CPR r 21.12(1A) and CPR r 21.3 identifies when LF becomes necessary. No requirement for LF to be solicitor or Official Solicitor.

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# Risk of costs to Litigation Friend

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When considering a litigation friend without a court order the issues in CPR r 21.4 come into play and especially CPR 21.4(3):

- (1) This rule does not apply if the court has appointed a person to be a litigation friend.
- (2) A deputy appointed by the Court of Protection under the 2005 Act with power to conduct proceedings on the protected party's behalf is entitled to be the litigation friend of the protected party in any proceedings to which his power extends.
- (3) If nobody has been appointed by the court or, in the case of a protected party, has been appointed as a deputy as set out in paragraph (2), a person may act as a litigation friend if he –
  - (a) can fairly and competently conduct proceedings on behalf of the child or protected party;
  - (b) has no interest adverse to that of the child or protected party; and
  - (c) where the child or protected party is a claimant, undertakes to pay any costs which the child or protected party may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the child or protected party.**



## So what does CPR r 21.4(3)(c) do?

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This rule on its own only applies to a Claimant's litigation friend (rule does not state anything about part 20 Claimant).

There is no general presumption LF will have to pay the costs of the child or protected party would have to pay.

It will be typically be just to order a Claimant's LF to pay the costs if such an order would have been made against themselves if they were not a child or protected party but the court in exercising their discretion will take account of all the circumstances. *Glover v Barker* [2020] EWCA Civ 1112, [64] [Glover v Barker & Ors \[2020\] EWCA Civ 1112 \(21 August 2020\) \(bailii.org\)](#) and in particular at 64(iv)

There is no presumption that a defendant's litigation friend should bear costs which the defendant would have been ordered to pay if not a child or protected party. That the litigation friend controlled the defence of a claim which succeeded will not of itself generally make it just to make an adverse costs order against the litigation friend. **Factors that might, depending on the specific facts, be thought to justify such an order include bad faith, improper or unreasonable behaviour and prospect of personal benefit. If a director causes his company to litigate "solely or substantially for his own benefit" (to quote Lord Brown in *Dymocks*), that may point towards a costs order against him. The fact that a litigation friend stands to gain a substantial personal benefit must also, I think, be capable of weighing in favour of a costs order against him.**

Issues of wasted costs? Legal aid and costs in the Court of Appeal.

# Disputes with Protected Party and where can voice of protected party be found

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It is clear that the issue of lack of capacity is a legal issue for the court to determine and accept. A LF can be appointed without a court order and a LF can be appointed

CPR r 21.6 concerns how a person becomes a LF by Court order and this is by application and a court may not appoint unless it satisfies the conditions in r 21.4(3) apply and now must apply to Defendants and Part 20 Counter claim etc. Court also has separate power to revoke, vary or discharge power.

Application supported by evidence and may include Claimant.

*Folks v Faizey* [2006] EWCA Civ 381 consent of proposed protected party and litigation friend.

If consent what happens? If no consent of protected party or there is a dispute? Can the court make an interim declaration as to incapacity under part 23?

If appointed where how is the “voice” of the protected party heard if at all?



# Urgent proceedings children v adults

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It is clear that from CPR r 21.2 that in all circumstances an adult must have a LF but the court has the power under 21.2(3) to permit a child to conduct proceedings without a LF (or even if they have a LF) on application subject to later desirability of a LF to be appointed (21.2(5))

Thus if there was an urgent application for a claim for urgent judicial review on behalf of a child who gave some instruction to issue a claim or it became apparent for it to the solicitor it be issued by the child's best interests or the litigation friend was incapacitated or not contactable this application could be made as part of the JR claim.

The question is what if you had an adult, for example, about to be made street homeless or actually street homeless but lacking capacity but without a litigation friend or appearing to lack capacity to conduct proceedings in a really urgent situation can a claim be issued if it is in the best interests of the solicitors client who has capacity to sign a legal aid form?



# Compromise

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- CPR 21.10 requires that where a claim is made by or against a protected party or child no settlement, compromise or payment and not accepted of money may be made without approval of the court. Similarly if no claim is issued a settlement is proposed this must be approved by the court under Part 8 proceeding to compromise.
- In respect of CPR r 21.11 money recovered will be dealt with in accordance with directions by the court and how it is dealt with. Under (3) if money is paid into court or recovered by or on behalf of the protected party before giving directions, the court will consider whether the protected party is a protected beneficiary.
- A protected beneficiary means a protected party who lacks capacity to manage and control any money recovered on their behalf. But there may be protected parties who are not protected beneficiaries and reflects the issue specific nature of capacity in MCA 2005.
- Children are likely to be deemed to be protected beneficiaries and funds administered by the court.
- This will be different for adults depending on the issue of incapacity and whether it is a personal injury claim PD21 5.1 – 5.6, 6.1 – 6.5, 8.1- 8.5, and 10.1 – 10.6



# Anonymity

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This is governed by CPR r 39.2 and the application of the criteria in 39.2(3) and an order made under (4) which may include witnesses with a copy of said order published on Judiciary website under (5) to allow applications to be made by a third party to attend and make submissions to set aside or vary. The proceedings may also be protected by an order under the Contempt of Court Act 1981, s 11 and reference to the Practice Guidance: Publication of Privacy and Anonymity Orders, 16 April 2019

Children, generally with children anonymity granted on application as minors but with adults applications needs to be made with evidence to meet the criteria under 39.2(3):

- (3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice –
- (a) publicity would defeat the object of the hearing;
  - (b) it involves matters relating to national security;
  - (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
  - (d) a private hearing is necessary to protect the interests of any child or protected party;
  - (e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;
  - (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or
  - (g) the court for any other reason considers this to be necessary to secure the proper administration of justice.

(4) The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness



## Continued review of capacity

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- With a child when they turn 18 then are treated as adults if they are also not a protected party (CPR r 21.9(1)) and a close eye have to be kept on (1) their birthday and (2) whether irrespective of their age they still lack capacity to conduct proceedings if they were not already a protected party. Thus there needs to be a precise definition as to whether a child is also a protected party.
- Regular review of capacity to conduct proceedings and whether other issues arise which require separate capacity assessments on other issues and satellite litigation.
- It is also the case that the lack of capacity to continue to conduct proceedings may arise at a particular point or in respect of particular issue in proceedings requiring the appointment of a litigation friend
- If a person regains capacity the appointment of the litigation friend may end (r 21.9(3)).
- The procedure is set out CPR r 21.9.





# Litigation capacity in the SEND Tribunal

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14 December 2021



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## Key resources

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- i) Section 3 Mental Capacity Act 2005
- ii) Section 80 Children and Families Act 2014
- iii) Regulation 64 SEND regulations
- iv) SEND Code of Practice, Annex 1
- v) *London Borough of Hillingdon v WW* (Special educational needs : Other) [2016] UKUT 253 (AAC) (25 May 2016)
- vi) *Buckinghamshire County Council v SJ (Special educational needs : Other)* [2016] UKUT 254 (AAC) (25 May 2016)
- vii) *A Local Authority v GP (Capacity - Care, Support and Education)* [2020] EWCOP 56



# Regulation 64

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64.—(1) *In a case where a young person lacks capacity at the relevant time—*

*(a) references to a young person in the provisions of Part 3 of the Act listed in Part 1 of Schedule 3 are to be read as references to both the young person and the alternative person;*

*(b) references to a young person or a detained person who is a young person in the provisions of Part 3 of the Act listed in Part 2 of Schedule 3 are to be read as references to the alternative person instead of the young person; and*

*(c) references to a young person in these regulations listed in Part 3 of Schedule 3 are to be read as references to both the young person and the alternative person; and*

*(d) references to a young person in these regulations listed in Part 4 of Schedule 3 are to be read as references to the alternative person instead of the young person.*

(2) *For the purposes of this regulation, “the alternative person” means—*

*(a) a representative of the young person;*

*(b) the young person’s parent, where the young person does not have a representative;*

*(c) a representative of the young person’s parent, where the young person’s parent also lacks capacity at the relevant time and the young person does not have a representative.*



# Alternative person (AP)

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## 1) Definition of AP

- Overriding objective
- Article 6/14; s3 Human Rights Act 1998

## 2) “Statutory substitution” of YP for AP as party- consequences of this

- Change of party per regulation 18 legal aid merits regulations
- Notify Tribunal- see rule 9(1)(b) Tribunal Procedure rules.



# Responsibilities of AP

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- *SEND Code of Practice Annex 1*
- *Similar to a litigation friend- references to Mental Capacity Act 2005*
- *“they are acting in respect of the young person, but not on behalf of the young person in the way an advocate would.”- Buckinghamshire para. 14*
- *“..the decision is not taken by the parent on the young person’s behalf. Rather, it is taken by the parent in their capacity as the alternative person and in the young person’s best interests.”- Buckinghamshire para. 16*



## Views of the YP and the representative

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*Annex 1 SEND Code of Practice “There are some occasions when a local authority must take account of the views of the young person as well as any representative.*

*These are when the local authority is [inter alia]*

*- having regard to the views and wishes of a child, the child’s parent or a young person when carrying out its functions under Part III of the Act (Section 19 CAFA”*



# Overriding objective

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*“...may involve drawing an issue to the tribunal’s attention and, perhaps, providing the tribunal with any evidence it needs to resolve the issue.”- Buckinghamshire at para. 11*

*“... This analysis is concerned with the capacity to bring an appeal. If that issue arises, the most efficient way to resolve it may be as a preliminary issue that the tribunal will have to decide before it identifies the correct parties: rule 5(3)(e) of rules of procedure for both the First-tier Tribunal and the Upper Tribunal.” – Buckinghamshire para. 19*

*“The Court of Appeal has emphasised that in cases concerning the education of children or young people “speed must be of the essence”, see *H v. East Sussex County Council* [2009] EWCA Civ 249; [2009] ELR 161 per Waller LJ at para. 13. *Scott Baker LJ* stated that “[c]ases that involve issues about the education of a child are par excellence cases that need to be heard and determined expeditiously” (at para. 51).”*



# Subject matter capacity: *A Local Authority v GP and RP (capacity – care, support and education)* [2020] EWCOP 56

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## Relevant:

- a. An EHC plan is a document that says what support a child or young person who has special educational needs should have;
- b. Other people will be consulted during the assessment process including parents, teachers and other professionals;
- c. If P were assessed as requiring an EHC they would have an enforceable right to the education set out within their plan;
- d. An EHC plan is only available up to the age of 25 years.

## Irrelevant:

- a. If assessed as requiring an EHC plan, social care and health needs may be included on the plan and this may be advantageous to the person in having their needs (this adds nothing to (a) above);
- b. If an EHC plan is lapsed it may be difficult to seek one.
- c. The possibility (of uncertain extent) that “it may be difficult to seek an EHC plan” if the local authority lapsed it.





# Practical issues

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- 1) Legal aid eligibility
- 2) Who should undertake the capacity assessment?
- 3) Obtaining views of YP
- 4) How often should there be capacity assessments?
- 5) What if litigation capacity and subject matter capacity diverge?



# Capacity issues in Immigration and Asylum

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14 December 2021



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# Structure

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- Capacity issues in immigration and asylum cases
- Capacity issues in immigration detention
- Practical considerations for practitioners
- Impact of mental health/SEND on substantive issues in the claim



# Capacity issues in immigration and asylum cases



# Asylum and immigration – a vulnerable client cohort

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- Client cohort – likely to encounter a number of vulnerabilities:
  - Unaccompanied and looked after children
  - SEND/learning difficulties
  - Mental health diagnoses
  - Experiences of persecution, including torture, ill-treatment, trafficking and exploitation, and traumatic journeys to the UK
- Early identification key to ensuring access to justice and fairness.



# Resources for practitioners

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- Joint Presidential Guidance Note 2 of 2010 on Child, Vulnerable Adult and Sensitive Witnesses
- Practice Direction, First-tier and Upper Tribunal, Child, Vulnerable and Sensitive Witnesses
- Equal Treatment Bench Book
- Law Society Guidance Note, 'Working with clients who may lack mental capacity,' (5 June 2020)
- BSB, 'Issues with Mental Capacity' Factsheet (April 2018) and Bar Council Ethics Committee 'Client Incapacity,' (June 2021)
- Migrants Organise, 'Mental Capacity & Litigation Friends in Asylum and Human Rights Appeals,' (May 2021)



# Issues thrown up in an asylum or immigration case when faced with a vulnerable or incapacitated person

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- Capacity to instruct and capacity to litigate their claim?
  - Arises in both detained and non-detained context
- Capacity to give evidence to the Tribunal?
  - Bear in mind possibility of special measures available under the Joint Presidential Guidance Note 2 of 2010
  - Bear in mind the Practice Direction and impact of welfare considerations



# Position in the application stage versus at appeal

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- No system at the application stage – may apply to CoP for an order. See also the Migrants Organise Project, but not without challenge.
- LFs available at Tribunal stage: *R (C) v First-tier Tribunal* [2016] EWHC 707 (Admin):
  - Tribunal has power to appoint a litigation friend for a party lacking capacity, relying on overriding objective and broad case management powers in the Tribunal Procedure Rules (cf. position in CPR Part 21 for example)
  - Failure to appoint a litigation friend for a party lacking capacity breaches the principle of procedural fairness





## *AM (Afghanistan) v SSHD* [2017] EWCA Civ 1123

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- Important judgment on effective right of access to the Tribunal by incapacitated and vulnerable individuals, including children and young people, and how such a person can be heard.
- *“There is ample flexibility in the tribunal rules to permit a tribunal to appoint a litigation friend in the rare circumstance that the child or incapacitated adult would no be able to represent him/herself and obtain effective access to justice without such a step being taken. In the alternative, even if the tribunal rules are not broad enough to confer that power, the overriding objective in the context of natural justice requires the same conclusion to be reached.”*
- Failure to follow the Joint Presidential Guidance and PD will most likely be a material error of law



## *AM (Afghanistan) v SSHD* [2017] EWCA Civ 1123

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- Acknowledgement at para 49 that it is not satisfactory to rely on broad case management powers:
  - *“...a litigation friend has wide authority to dispose of a party's legal rights, either directly by bringing and/or compromising proceedings, or indirectly by the way in which he or she conducts those proceedings. **Those powers ought to be clearly defined and regulated, as they are by rule 21 in cases that come under the Civil Procedure Rules. It is very unsatisfactory that they should be exercised simply on the basis of the general case-management powers in rule 4 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (or its equivalent in other chambers).** The Senior President says at para. 4 of his judgment that he will ask that this decision be considered by the Tribunals Procedure Committee. I hope that the Committee will consider this aspect in particular, and as a matter of urgency.”*



# *R (JS) v SSHD (litigation friend – child) [2019] UKUT 0064 (IAC)*

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*(1) Although all cases are fact-specific, the following general guidance represents the approach the Upper Tribunal is likely to adopt in deciding whether a child applicant in immigration judicial review proceedings requires a litigation friend to conduct proceedings on the child's behalf:*

*(a) As a general matter, applicants aged 16 or 17 years, without any attendant vulnerability or special educational need or other characteristic denoting difficulty, will be presumed to have capacity and so be able to conduct proceedings in their own right. They will generally not require a litigation friend. This is the position even if they are not legally represented.*

*(b) The appointment of litigation friends for applicants between the **ages of 12 years and 15 years inclusive (i.e. 12 and over but younger than 16)** needs to be considered on a case-by-case basis and the circumstances which should be considered, but which are not exhaustive, are:*

- (i) whether the applicant is legally represented;*
- (ii) whether there is an assisting parent;*
- (iii) whether there is a local authority involved; and*
- (iv) whether the applicant has any type of vulnerability.*



## *R (JS) v SSHD (litigation friend – child) [2019] UKUT 0064 (IAC)*

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*(c) If an applicant in this age group is legally represented, the Tribunal will expect the representative specifically to address in writing the issue of whether, in the representative's view, a litigation friend is necessary, having regard to capacity and the position of any parent.*

***(d) Applicants under the age of 12 will normally require a litigation friend.***

*(2) The above approach is one that, as a general matter, should also be followed in appeal proceedings, whether in the First-tier Tribunal or the Upper Tribunal.*

*(3) In deciding who is to be a litigation friend in a particular case, the guiding principles, derived from the Civil Procedure Rules, are:*

*(a) can he or she fairly and competently conduct proceedings on behalf of the child?*

*(b) does he or she have an interest adverse to that of the child?*

*(4) For practical purposes, only one person should normally be nominated as a litigation friend. A parent of a child will often be the obvious choice but not the only option.*



# Capacity issues in immigration detention



## *VC v SSHD* [2018] EWCA Civ 57

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- Issue: whether procedures/safeguards in place for mentally ill detainees to challenge detention?
- Conclusion by CoA? – No.
- VC was a foreign national offender, subject to deportation, suffering from bipolar disorder and psychotic symptoms; history of being sectioned under MHA 1983.
- SSHD had not made ‘reasonable adjustments’ to enable VC to challenge his detention as a vulnerable, mentally ill person
- Argued by Appellant that SSHD needed to put in place a system of mental health advocates to assist detainees who may need them
- SSHD argued that duty had been discharged and not able to introduce such a system – rejected by the CoA



## *VC v SSHD* [2018] EWCA Civ 57

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- Adults at Risk policy is to be construed as a protective, preventative measure, and must be capable of being applied so to protect an adult at risk from being detained at all, before the risk of harm materialises - §52-§53
- Although individuals not involved in the decisions to detain/remove/segregate them, and there is no formal process for representations, detainees can make informal representations in respect of decisions made - §151
- The SSHD's policies do put mentally disabled detainees at substantial disadvantage compared to other detainees. Even if they wanted to make informal representations about detention, not able to do so because of their ill mental health. Court agreed there is a 'lacuna,' in system; in other contexts, bail will prompt a review of detention - §154
- Reasonable adjustments duty is anticipatory - §157
- Great care is needed to ensure that decisions to detain mentally ill persons are procedurally fair - §189



## *ASK & MDA v SSHD* [2019] EWCA Civ 1239

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- ASK and MDA were both foreign national offenders in detention, subject to deportation action
- Both were disabled by reason of their mental health needs and lack of capacity:
  - MDA – previously admitted to hospital under MHA 1983; previously granted LTR on Art 3 ECHR due to mental health; psychiatric evidence ‘seriously psychotically unwell’
  - ASK – previously detained under MHA 1983; schizoaffective disorder and psychotic symptoms
- Crux of the case:
  - Persons with mental disabilities are not in a position to make representations to the SSHD on suitability for detention
  - Nothing in Adults at Risk/Rule 35/DSOs deals with lack of mental capacity
  - Failure by SSHD to undertake any inquiries
  - Breach of common law fairness, PSED and failure to discharge duty to make reasonable adjustments





# Approach to capacity in detention

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Per Lord Justice Hickinbottom at §244:

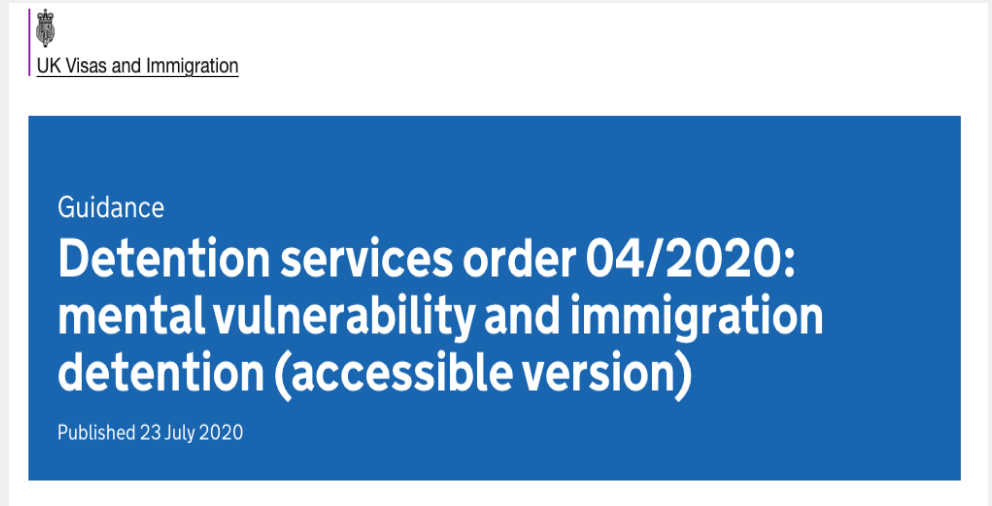
“In my view, in this regard, ASK’s case is not materially different from the cases of VC or MDA. Because of his illness, ASK suffered from a disability. It seems likely that, from time-to-time, he lacked the capacity properly to engage with the detention authorities in relation to important decisions that related to him, **e.g. with regard to his continuing detention, segregation and non-transfer to hospital. In those respects, he was treated differently from those detainees who were not disabled. In breach of the PSED, the Secretary of State failed to have due regard to eliminate discrimination. Further, the duty on the Secretary of State to make reasonable adjustments having arisen, no adjustments were made and obvious adjustments (e.g. in the form of IMCA-type representation) could have been made.** The burden was therefore on the Secretary of State to show he had complied with the duty to make such adjustments; and he adduced no evidence that he had even considered such adjustments and certainly no evidence that he had complied with the duty.”



# Detention services order 04/2020

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<https://www.gov.uk/government/publications/mental-vulnerability-and-immigration-detention/detention-services-order-042020-mental-vulnerability-and-immigration-detention-accessible-version>



## Detention services order 04/2020

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*22. In cases in which the individual may lack capacity in respect of a particular decision, the member of staff who has identified the possible lack of capacity should take any necessary steps to ensure that the individual has access to legal representation and that any necessary reasonable adjustments are made to accommodate this or to facilitate any daily living issues experienced by the individuals. Where appropriate, this consideration should be carried out with the support of healthcare and other members of staff.*

*23. DET staff must take all reasonable steps to ensure that the individual understands all papers that they serve, through personal engagement. They must signpost the individual to the provision of legal representation. Anyone who does not speak English as their first language must be offered the use of interpretation services.*



# Practical issues for practitioners



# Practical issues in statutory appeals and JR in the Tribunal

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- Application to the Tribunal, unless already appointed by CoP (rare)
- Early identification = early case management
- For appeals, no prescribed form but application in writing, supported by expert evidence
- For JR, application notice supported by expert evidence
- Evidence must address whether the Appellant has the mental capacity to conduct proceedings – bear in mind the LF could exercise considerable power over a person’s rights, so the Tribunal needs to be properly informed.
- Early instruction of counsel – advise on expert evidence, conference, draft application to the Tribunal etc
- Usually dealt with as a preliminary issue at CMRH stage
- Be prepared re: suitability and assessment of the LF, including via evidence
- Certificate of Suitability (N235) - but CPR does not apply to the FtT/UT



# Practical issues when issuing a JR in the Admin Court

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- Remember some claims need to be issued in the Admin Court – see Lord Chief Justice Transfer Direction
- Common areas include nationality and trafficking decisions
- Procedure is codified in Part 21 of the CPR
- Children – approach different to UT – presumed all children under 18 should have LF
- Application made early, when issuing, supported by evidence
- LF needs to sign certificate of suitability (N235)



# Suitable LFs

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- A litigation friend a person must:
  - Be willing to undertake the role;
  - Be able to fairly, competently and diligently conduct proceedings on behalf of the child or protected party; and
  - Have no interest adverse to that of the child or protected party.
- No suitable LF? – Official Solicitor but only if ‘last resort.’
- No system for providing a LF in the Tribunal system – Migrants Organise Mental Capacity Advocates Project
  - Contact: [brian@migrantsorganise.org](mailto:brian@migrantsorganise.org)



# Impact of mental health/SEND on substantive issues in the claim





## Issues to be alive to in the substantive case

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- Giving evidence? Reasonable adjustments?
- Particular social group? - *DH (Particular social group: mental health) Afghanistan* [2020] UKUT 223 (IAC)
- Risks on return, including state protection/relocation assessment?
  - Persecution on grounds of mental illness/disability
  - Persecutory discrimination on grounds of mental illness/disability
  - Exploitation and trafficking due to vulnerabilities
  - Children's access to education – particularly if SEND
- Article 3 ECHR/Article 8 ECHR/Article 14 ECHR:
  - Torture/ill-treatment e.g. non-human rights compliant 'treatment'
  - *AM (Zimbabwe)* [2020] UKSC 17 health claims
  - Discriminatory denial of treatment



# Thank you

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