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Immigration Newsletter: December 2024 Update

New guidance on the appointment of litigation friends in the Upper Tribunal (Immigration and Asylum Chamber) and First-tier Tribunal (Immigration and Asylum Chamber)

Joint presidential guidance on the appointment of litigation friends in the Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC") and First-tier Tribunal (Immigration and Asylum Chamber) ("FtTIAC") ("the Guidance") was issued on 2 December 2024.

The Guidance provides welcome clarification as to the reasoning and process for appointing a litigation friend in the FtTIAC and UTIAC. The Guidance is helpfully divided into three parts; Section A addresses the circumstances when a litigation friend is required; Section B covers the roles and duties of a litigation friend; Section C addresses the practicalities of selection and appointment. This article will outline the key points of the Guidance, but all practitioners are encouraged to read the Guidance in full for further details. Numbers in square brackets relate to paragraphs within the Guidance.

Section A: When is a litigation friend required?

Litigation friends are only appointed to conduct proceedings on behalf of parties who lacks capacity to do so themselves, i.e. where a child or incapacitated adult would not be able to represent themselves and obtain effective access to justice without such a step being taken (AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 at para 44) **[10]-[11].**

In practice, litigation friends will only rarely be appointed in the UTIAC or FtTIAC **[7]; [10]**.

It is important to bear in mind that capacity to conduct proceedings and fitness to give evidence are distinct, and a litigant may fall into either, both, or neither category. Vulnerable litigants, including those with capacity to conduct litigation, may nevertheless require reasonable adjustments in order to fully participate in proceedings: **[6]**.

Appointment of Litigation Friends: Children **[12]-[15]**

Children do not automatically require the appointment of a litigation friend **[12]**.

A child will often not require a litigation friend where responsibility for them is exercised by a public authority which can give instructions and assistance in the provision of legal representation for the child (AM (Afghanistan) para 44) **[12]**.

Following the guidance given in R (JS and Others) v Secretary of State for the Home Depart-

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ment (litigation friend - child) [2019] UKUT 64 (IAC), whether a litigation friend should be appointed will depend to a significant extent on the applicant's age. Depending on the circumstances a litigation friend will not generally be appointed for 16-17 year olds; the need for a litigation friend will be assessed on a case-by-case basis for 12-15 year olds; and applicants under 12 will normally require a litigation friend **[13]** (see JS for further detailed guidance of the relevant considerations).

If a litigation friend is to be appointed, the principles which should guide the Tribunal in determining who that person should be are also found in paragraphs 3 and 4 of the headnote of JS **[13]**.

The JS principles apply equally to age assessment judicial review applications. Litigation friends appointed in the High Court will continue to be able to act as litigation friends should the matter be transferred to the UTIAC **[14]**.

Where a child is a party to proceedings as a dependant of their parent or guardian it is unlikely that the appointment of a litigation friend will be required **[15]**.

Appointment of Litigation Friends: Adults Without Capacity **[16]-[24]**

Adults are (rebuttably) presumed to have capacity to conduct litigation **[16]**.

In JS, the UTIAC drew upon the test for capacity is set out at s.2 Mental Capacity Act 2005. Under that Act, for a person to be found to lack capacity, it must be established (1) that there is an impairment of, or disturbance in, the functioning of the person's mind or brain, and (2) that the impairment or disturbance is sufficient to render the person incapable of making the decision for which they may be said to lack capacity. A lack of capacity cannot be established merely by reference to a person's age, appearance, or a condition or aspect of their behaviour which might lead others to make unjustified assumptions about their capacity **[17]-[18]**.

The Guidance at **[19]** highlights the test for capacity set out in Masterman-Lister v Brutton & Co (Nos 1 and 2) [2003] 1 WLR 1511 at para. 75, as endorsed in JS (emphasis added):

> "…the test to be applied, as it seems to me, 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 or guardian ad litem (or, as such a person is now described in the CPR, a litigation friend)."

The Guidance emphasises that capacity is highly fact-specific: it must be assessed with refer-

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ence to a particular activity (bearing in mind that capacity can fluctuate / be present for some purposes but not others) **[20]**, and the question of capacity is a question of fact to be determined by the Judge on the balance of probabilities, who will almost certainly require the assistance of a medical expert report **[21].**

A party's representatives are usually best placed to identify in the first instance that their client may lack capacity. Where a lack of capacity is identified, legal representatives should raise this with the Tribunal as soon as possible. The Tribunal may alternatively raise the issue of its own motion **[22].**

Short adjournments may be required to allow appropriate steps to be taken where there is a realistic prospect that the appointment of a litigation friend may be required. The need for such adjournments should be rare, particularly in the case of late adjournments sought by represented parties **[23]**.

Section B: Role and duties of a litigation friend [25]-[26]

A litigation friend is not a party to proceedings **[25].** As set out in (JS at para 93) a litigation friend must:

- fairly and competently conduct the proceedings on behalf of the party without capacity; and
- act in the best interests of, and to have no interest adverse to the interests of, the party without capacity **[26]**.

Section C: Selecting and Appointing Litigation Friends [27]-[33]

Litigation friends may be appointed under the general case management powers of the UTIAC and FtTIAC **[7]**.

Litigation friends may only be appointed if they consent to being so appointed **[27]**.

The Tribunal may refuse to appoint a litigation friend even where the parties have agreed that one should be appointed **[24]**.

Applications for the appointment of litigation friends may be dealt with on the papers or at an oral hearing, depending on the complexity and sensitivity of the issues involved. Where a hearing is held, the prospective litigation friend must attend and be prepared to answer questions **[29]**.

Where no willing prospective litigation friend may be found, the Official Solicitor has a power, but not a duty, to act as a litigation friend in the Tribunal (s.90(3A) Senior Courts Act 1981) **[30]**.

If judicial review proceedings have commenced, parties must apply for the appointment of a

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litigation friend as follows:

> If applying at the time the claim is brought, at parts 6.5 and 8 of form UTIAC1.
> If applying at any other time, by way of a formal application using form UTIAC6 or UTIAC7 **[31].**

In respect of statutory appeals, while there is no prescribed application form such applications must be made in writing and should certain details as set out at **[32]**, including the litigation friend's name, relationship to the appellant, and confirmation of the litigation friend's understanding of the role required.

Applications must include the evidence pursuant to which the Tribunal is being asked to find (or endorse the agreement) that the party in question lacks capacity, usually in the form of a medical report prepared specifically for the purpose of the proceedings. This also applies to judicial review proceedings **[33]**.

COMMENT

The Guidance provides a helpful summary of the relevant principles and considerations regarding the appointment of litigation friends, and in particular, emphasises the importance of avoiding the conflation of capacity with vulnerability. Key tips for practitioners are as follows:

- Raise any concerns regarding capacity as early as possible.
- Ensure that an expert report is obtained to specifically address the question of capacity.
- Ensure that the litigation friend fully understands what the role requires and is content to act accordingly (and is prepared to answer questions from a Judge).

The Guidance hints at the adoption of rules by the Tribunal Procedure Committee to follow in due course **[8]**. Whether or not formal rules are adopted, the Guidance demonstrates a further step (following the recent Practice Direction of 1 November 2024) towards greater formality and focus on procedural rigour in the FtTIAC and UTIAC.

Josh Stamp-Simon (2018)

Jennifer Lanigan (2018)

Immigration Protestors Acquitted at Stratford Magistrates' Court

In the first week of May 2024, the Home Office commenced a week of increased surveillance and detention of those applying for immigration status with the aim of increasing the number of individuals returned to their country of origin. Some individuals on immigration

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bail were detained at Home Office centres while attending to report as per their conditions, meaning they had no belongings with them, and no means to obtain legal advice regarding the revocation of their bail.

Local communities rallied around those at risk of being detained, with volunteers maintaining a near 24/7 presence at Lunar House in Croydon and Eaton House in Hounslow in order to hand out pamphlets containing advice and solicitors' telephone numbers to those attending to report. These leaflets were translated by volunteers into multiple languages. Most significantly, communities rallied around those subjected to immigration raids, with a number of activists preventing the transfer of several asylum seekers housed in Peckham, including a 17-year-old student, to Bibby Stockholm on 2 May 2024 this year. The abhorrent conditions inside Bibby Stockholm are well-documented, and activists remained at the scene from 7am to 3pm to ensure their neighbours would not be removed. The coach which had attended that morning left empty.

Numerous community members were arrested at the scene, but five were acquitted at Stratford Magistrates' Court on 30 October 2024 after the Crown Prosecution Service offered no evidence. More recently, on 27 November 2024, four people were acquitted after a District Judge found that a conviction would not be a proportionate interference with their Article 10 & 11 rights to free speech and to protest.

The acquittals are a reminder for those of us working in the often overwhelming immigration tribunals that we can rely on our communities to support us in the work we do. Those who spent the night outside immigration centres to ensure anyone attending would have the phone number of a solicitor to call did so because they had real faith in our ability to make a difference.

Ciara Moran (2021)

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