



IMMIGRATION AND PUBLIC LAW

GOLDSMITH  
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# Mental health in immigration cases: The use of intermediaries and other issues to consider with vulnerable clients

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CHAMBERS

# WEBINAR OVERVIEW

- ▶ Identifying vulnerabilities / areas of concern
- ▶ The importance of our roles as advocates
- ▶ Assessing capacity – what to do
- ▶ Facilitating participation from vulnerable clients who have capacity – best practice, intermediaries
- ▶ Facilitating participation from vulnerable clients who lack capacity – appointing litigation friends
- ▶ Further issues to consider

# Identifying vulnerabilities / areas of concern

- ▶ Importance of acting early
- ▶ Vulnerability may significantly affect:
  - ▶ Quality of evidence a client provides
  - ▶ Their understanding of proceedings and their engagement
  - ▶ The factual matrix of the case you are preparing
- ▶ Nature/severity of issue can dictate how you conduct your case
- ▶ Need for ongoing vigilance as issues may arise during course of proceedings

# Identifying vulnerabilities

- ▶ Children -those under 12 will usually require a litigation friend [JS & Ors [2019] UKUT 00064 (IAC)]
- ▶ Those with pre-existing medical conditions
- ▶ Those with a history of trauma (eg domestic violence/trafficking/torture)
- ▶ Learning difficulties
- ▶ Mental illness
- ▶ Mental incapacitation (eg dementia/Alzheimer's)
- ▶ Those with addiction issues
- ▶ Those under the undue influence of others

# Identifying vulnerabilities

- ▶ Be mindful of:
  - ▶ Shame/embarrassment about disclosure
  - ▶ Existence of conditions which the client is unaware of
  - ▶ Difficulties being confused with interpretation issues
- ▶ Some signs to look out for include:
  - ▶ Difficulty in processing information / lack of eye contact / repeating questions put to them / overly eager to please / sudden change in demeanor etc
  - ▶ Rule 35 reports / GP referrals / victim of violence or exploitation / NRM referral
- ▶ Remember - not everyone with an illness or disability will be vulnerable
- ▶ Presumption of capacity

# Our roles as advocates

- ▶ **Solicitors:** SRA Practice Note 5<sup>th</sup> June 2020 (updated from 2015):  
“You must be satisfied that your client has capacity to give you instructions on the matter you are dealing with. If you have any doubt about this, you must do a capacity assessment before you act on any instructions. If you do not, you may be at risk of sanctions. See our [guidance on meeting the needs of vulnerable clients](#).”
- ▶ Duty confirmed in [AM \(Afghanistan\)](#) [2017] EWCA Civ 1123
- ▶ **Barristers:** BSB Vulnerability Good Practice Guidance for Immigration Clients (April 2018)  
*“If you entertain a reasonable doubt that a client lacks capacity to give proper instructions, it is your professional duty to satisfy yourself that the client either does or does not have capacity as quickly as possible” [Factsheet 6]*
- ▶ **Judges:** Equal Treatment Bench Book (ETBB) (March 2020)

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# Assessing capacity

- ▶ Mental Capacity Act 2005:

*“2(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.”*

- ▶ Five Core Principles set out at s. 1(1) MCA 2005

- ▶ Questions to ask:

- 1) Does the client understand information relevant to their decision?
- 2) Can the client retain that information?
- 3) Can they use / weigh up the information in the course of making decisions?
- 4) Can the client properly communicate their decision?

# Assessing capacity

- ▶ Test for the Tribunals set out in Masterman-Lister v Brutton & Co (nos 1 and 2) (CA) [2003] 1 WLR
- ▶ Instruct expert to assess and provide MLR. Psychiatrist preferably, or psychologist/social worker/speech and language therapist
- ▶ Ask for clear guidance/comment from the expert
- ▶ Consult friends/family members
- ▶ Obtain other medical notes
- ▶ Do this as early as possible – SB (vulnerable adult: credibility) Ghana [2019] UKUT 00398 (IAC)



# Facilitating participation - those with capacity

## Preparing for court

- ▶ Taking instructions in a suitable environment (quiet, private)
- ▶ Taking time, and arranging appointments at optimum time of day

## In court

- ▶ Joint Presidential Guidance Note 2 of 2010 on Child, Vulnerable Adult and Sensitive Appellants
- ▶ Senior President's Practice Direction on Child, Vulnerable Adult and Sensitive Witnesses
- ▶ Taking breaks, seating arrangements, lines of questioning.
- ▶ Failure to follow the Guidance Note is likely to amount to an error of law
- ▶ Prepare in advance, and where possible raise at CMRH

# Facilitating participation - Intermediaries

‘Intermediaries are impartial, neutral officers of the court. They are not expert witnesses. Their job is to facilitate communication between all parties and to ensure the vulnerable person’s understanding and participation in the proceedings. This includes making an assessment and reporting, orally or in writing, to the court about the communication needs of the vulnerable person and the steps that should be taken to meet those needs.’

(ETBB, 2-21, para 82)

➤ Often speech / language therapists

# Facilitating participation - Intermediaries

- ▶ A has capacity but struggles to understand/process information and/or communicate
- ▶ Most common in criminal cases, sometimes in Family. Can also assist IAC.
- ▶ Advocates Gateway Toolkit 16 on Intermediaries

## **How to instruct?**

- ▶ Inform the Tribunal ASAP (in writing or at CMRH)
- ▶ Contact Communicourt to request preliminary assessment
- ▶ Tribunal can issue directions
- ▶ Funding: Tribunal disbursement. No LAA funding available.

# Facilitating participation - Intermediaries

- ▶ Ground Rules Hearing (advocates, judge, intermediary) Client need not attend.
- ▶ Send through list of all questions to be put to witnesses. Confidential.
- ▶ Intermediary will attend hearing and can intervene or re-phase questions put to client, including regarding evidence taken from other witnesses
- ▶ Intermediary should do a read back of client's witness statement prior to hearing
- ▶ Intermediary report is not expert evidence

# Facilitating participation – those without capacity

- ▶ Remember that being unfit to give evidence is not the same as lacking capacity
- ▶ AM (Afghanistan) confirmed case of C [2016] EWHC 707 (Admin):
  - ▶ Broad power and flexibility in Tribunal to appoint a litigation friend
  - ▶ Power to be exercised with caution
  - ▶ Family member / friend / social worker / solicitor (rare) / independent appointee through eg migrantsorganise.co.uk

# Facilitating participation: Litigation friends

## **Role of LF:**

- ▶ 'direct proceedings'
- ▶ make decisions in A's best interests
- ▶ ask their wishes and feelings
- ▶ talk to solicitor on their behalf
- ▶ pay costs if ordered

## **Are they suitable?**

- ▶ No conflicting interests
- ▶ Able to make decisions in fair and competent way

# Facilitating participation: Litigation friends

- ▶ JS [2019] UKUT 00064 (IAC) looks at when LFs are needed for children
- ▶ Use caution when considering whether Social Worker can act
- ▶ Confirmed that part 21 CPR is not directly relevant but is a helpful guide in the FTT
- ▶ The forms required in the civil courts are not needed for the Tribunal
- ▶ Tribunal to direct appointment
- ▶ Statement of Truth
- ▶ Remains a grey area – Underhill LJ in AM(Afghanistan) indicated a need for guidance from Tribunal Procedures Committee – watch this space!

# Further Issues

- ▶ If your client is vulnerable, whether lacking capacity or struggling to communicate clearly, find evidence to support their case in other ways:
  - ▶ Take witness statements from other witnesses
  - ▶ Gather evidence of mental health vulnerability if relevant (GP records / MLR)
- ▶ UNHCR Handbook on Determining Refugee Status is helpful in asylum cases (paragraphs 206-212)
  - “Lighten the burden of proof normally incumbent on the applicant”



# Contact Details

► Any Questions?

► THANK YOU

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