Joint Presidential Guidance No. 1 of 2024: Appointment of litigation friends in the Upper Tribunal (Immigration and Asylum Chamber) and First-tier Tribunal (Immigration and Asylum Chamber)

1. This practice guidance applies to all proceedings in the Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC") and First-tier Tribunal (Immigration and Asylum Chamber) ("FtTIAC"). It comes into force on 2 December 2024 and applies to all cases governed by the law of England and Wales.

2. Paragraph 1(p) of the *Practice Statement authorising legally qualified members of staff in the Upper Tribunal (Immigration and Asylum Chamber) to carry out functions of a judicial nature* dated 6 April 2020 authorises a UTIAC Lawyer, as there defined, to appoint a litigation friend where the appointment is not opposed by a party. This guidance applies to a UTIAC Lawyer acting under delegated powers in those circumstances.

Vulnerable parties and litigants

3. This guidance must be read alongside the guidance contained in the Equal Treatment Bench Book and the Joint Presidential Guidance Note No. 2 of 2010 *Child, vulnerable adult and sensitive appellant guidance.*

4. An assessment of capacity is distinct from making reasonable adjustments to accommodate a party or witness's vulnerabilities or particular needs.

5. While, for the reasons set out below, the appointment of a litigation friend is a rare step, many litigants in the UTIAC and FtTIAC are highly vulnerable, and will require case-specific reasonable adjustments in order fully to be able to participate in the proceedings. In many cases, taking steps to accommodate the vulnerabilities of a party or witness are essential, and a failure to do so may render the proceedings unfair or otherwise involve the making of an error of law.

6. It is important to note that a finding that a party does have capacity to conduct litigation should not be confused with a finding that no such reasonable adjustments will be necessary. A party who is unfit to give evidence (even with reasonable adjustments) may still have the capacity to conduct proceedings, and vice versa.

Introduction

7. There are currently no rules of procedure governing the appointment and role of litigation friends in the tribunals. However, in *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123, the then Senior President of Tribunals, Sir Ernest Ryder, held that the general case management powers enjoyed by the First-tier Tribunal and the Upper Tribunal under their respective rules of procedure provide "ample flexibility" to appoint a litigation friend "in the rare circumstance that the child or incapacitated adult would not be able to represent him/herself and obtain effective access to justice without such a step being taken." The overriding objective in the context of natural justice required the same conclusion. See para. 44.

8. Pending the adoption of rules concerning the appointment of litigation friends by the Tribunal Procedure Committee, this practice guidance is intended to provide practical guidance to litigants, legal representatives, litigation friends, tribunal staff and judges concerning the appointment and role of litigation friends in the UTIAC and FtTIAC.

9. This practice guidance addresses:

    a. When a litigation friend is required;

    b. The role and duties of a litigation friend;

    c. Selecting and appointing a litigation friend.

A When is a litigation friend required?

10. A litigation friend may only be appointed where the party does not have the capacity to conduct litigation. As Sir Ernest Ryder observed in *AM (Afghanistan)* at para. 44, a litigation friend will only be required "in the rare circumstance that the child or incapacitated adult would not be able to represent him/herself and obtain effective access to justice without such a step being taken."

11. In practice, a litigation friend will be required where:

    a. a party to the proceedings is a child and is not capable of conducting or giving instructions in relation to the proceedings; or

    b. a party to the proceedings who is an adult lacks the mental capacity required to conduct proceedings.

Children

12. In contrast to the position in the courts under the Civil Procedure Rules, there is no rule in the tribunals that a child must have a litigation friend unless the court (or tribunal) orders otherwise. A child applicant by no means automatically requires a litigation friend. At para. 44 of *AM (Afghanistan)*, the Court held that the appointment of a litigation friend:

> "…will not be necessary in many cases because a child who is an asylum seeker in the UK will have a public authority who may exercise responsibility for him or her and who can give instructions and assistance in the provision of legal representation of the child."

13. Further guidance relating to the appointment of litigation friends in cases involving children may be found in *R (JS and Others) v Secretary of State for the Home Department (litigation friend - child)* [2019] UKUT 64 (IAC). The headnote to the decision provides:

> "(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.

(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."

14. These principles also apply to age assessment judicial review applications. In practice, since all age assessment judicial review proceedings in the UTIAC are initially brought in the High Court and later transferred to the UTIAC, the appointment of a litigation friend may already have been considered by that Court, under the Civil Procedure Rules. If a litigation friend has already been appointed by the High Court, the order appointing the litigation friend will continue to have effect once the matter is transferred to the Upper Tribunal as though the order had been made in the Upper Tribunal (see section 31A(3)(c) of the Senior Courts Act 1981). If the High Court has not considered the issue, the UTIAC is likely to consider whether a litigation friend is required in accordance with the principles in *JS*.

15. Where a child is a party to proceedings in the UTIAC and FtTIAC as a dependent of their parent or guardian, it is unlikely to be necessary additionally to appoint a litigation friend in respect of the child. In such cases, the parent(s) or guardian(s) are the lead litigant(s), and the question of the child(ren) having to give instructions or conduct litigation in their own capacity is unlikely to arise.

Adults without capacity

16. There is a presumption that adults have the capacity to conduct litigation.

17. In *JS*, the Upper Tribunal drew on the approach of the Mental Capacity Act 2005 to in relation to those who lack capacity: see para. 79. Section 2 of that Act provides, where relevant:

> "**2. People who lack capacity**
>
> (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."

18. Section 2(1) establishes a two stage test. First, it must be established that there is an impairment of, or disturbance in the functioning of, the person's mind or brain. Secondly, the impairment or disturbance must be sufficient to render the person incapable of making that particular decision.

19. At para. 81 of *JS,* the Upper Tribunal also endorsed for application in the tribunals the test for capacity as summarised in *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2003] 1 WLR 1511. At para. 75, Chadwick LJ said, in relation to Part 21 CPR:

> "…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)."

20. Capacity is to be judged by reference to the activity or litigation in question, and not globally: see *Dunhill v Burgin (Nos 1 and 2)* [2014] 1 WLR 933 at para. 13. A person may have capacity for some purposes but not for others. Capacity may also fluctuate from time to time.

21. Whether an adult lacks capacity to conduct litigation is a question of fact to be determined by the tribunal to the balance of probabilities standard. In *Masterman-Lister*, Chadwick LJ said at para. 17 that a judge, "will almost certainly require the

assistance of a medical report before being able to be satisfied that incapacity exists." It is legitimate for a judge to inform the tribunal's assessment of capacity by seeing the person alleged to lack capacity, but the individual concerned cannot be compelled to attend, "but", as Chadwick LJ continued, "the judge can always make his view clear, and in most cases that indication, together with a reminder as to the burden of proof, should suffice."

22. Where a party is represented, the party's representatives are likely to be best placed initially to identify that the party may lack capacity, in order to seek the appointment of a litigation friend by the Tribunal. In those circumstances, the legal representatives should raise the matter with the - Tribunal as soon as possible, and the - Tribunal should address it at the first convenient opportunity. However, the - Tribunal may raise the issue of its own motion where there are cogent grounds for doing so.

23. Where there is a realistic prospect that a litigation friend may be needed, it may be necessary in the interests of justice and consistent with the overriding objective for the proceedings to be adjourned for a short period in order to allow the appropriate steps to be taken by (or on behalf of) the party in relation to whom the litigation friend may be required. The need for an adjournment to be granted on this basis is likely to be rare. For example, the need to adjourn may arise where the party appears unrepresented before the Tribunal and the tribunal identifies of its own motion that capacity issues may need to be explored. Late adjournments on this basis should be unlikely in the case of represented parties. This is because the representatives should identify the need for capacity issues to be explored at an early stage and approach the Tribunal for bespoke case management directions in order to allow judicial assessment of the issue at an early stage.

24. Even when the parties agree to the appointment of a litigation friend, it will still be necessary for the Tribunal to be satisfied that the party in question lacks capacity or, if the party is a child, that the criteria in *JS* militate in favour of the appointment of a litigation friend.

B Role and duties of a litigation friend

25. A litigation friend is not a party to the proceedings but is appointed in order to conduct proceedings on behalf of a party who lacks the capacity to do so themselves.

26. A litigation friend must:

    a. fairly and competently conduct the proceedings on behalf of the party without capacity; and

    b. act in the best interests of, and to have no interest adverse to the interests of, the party without capacity.

    See *JS* at para. 93.

C Selecting and appointing a litigation friend

27. A prospective litigation friend must consent to being appointed as a litigation friend.

28. In relation to a child, a parent will often be the obvious choice, but not the only option. As summarised in *JS*, the guiding principles when selecting a litigation friend are whether he or she can fairly and competently conduct proceedings on

behalf of the appellant or applicant, and whether the proposed litigation friend has an interest adverse to that of the child.

29. Many applications for litigation friends may be dealt with on the papers. However, there will be some applications which will need to be decided by a judge at a hearing due to the complexity and sensitivity of the issues involved. Where a hearing has been directed, the prospective litigation friend must attend and be prepared to answer questions from the judge about their proposed role.

30. In the event that there is no one willing to be a litigation friend, the Official Solicitor has a power, but not a duty to act as a litigation friend in the Tribunal: see section 90(3A) of the Senior Courts Act 1981. The Lord Chancellor is empowered to direct the Official Solicitor to act in Tribunal proceedings generally but not in specific cases: see section 90(3)(b).

31. In judicial review proceedings commenced in the UTIAC, a party seeking the appointment of a litigation friend must make the application at parts 6.5 and 8 of form UTIAC1, if making the application when the claim is brought. If the application is being made at a time other than when proceedings are commenced, a formal application using form UTIAC6 or UTIAC7 (without consent and with consent respectively) must be made.

32. In statutory appeal proceedings there is no prescribed form. An application must be made in writing. The application should include the following details:

- name of the proposed litigation friend;
- relationship to the appellant;
- how long the proposed litigation friend has known the appellant;
- confirmation that the proposed litigation friend understands what the role of being a litigation friend is, and what their duties will be;
- explanation of why the proposed litigation friend considers that they can fairly and competently conduct proceedings on behalf of the appellant;
- confirmation that there is no conflict of interest or other reason why the proposed litigation friend would not be suitable.

33. In both judicial review and statutory appeal proceedings, an application for a litigation friend must contain the evidence pursuant to which the Tribunal is being invited to make a finding (or endorse the parties' agreement) that the party lacks capacity. This is most likely to be in the form of a medical report prepared specifically for the purposes of the proceedings.

This guidance is issued under paragraph 7 of Schedule 4 to the Tribunals, Courts and Enforcement Act 2007.

Mr Justice Dove
President, Upper Tribunal (Immigration and Asylum Chamber)

Judge Plimmer
President, First-tier Tribunal (Immigration and Asylum Chamber)

2 December 2024