

## Factsheet 6

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# Issues with mental capacity

You may have a client about whom you are unsure whether they have the capacity to instruct you. This factsheet will help you in identifying a potential lack of capacity, provide practical advice on obtaining evidence of capacity and steps that can be taken if the client is found to lack capacity. It also directs you towards further sources of information.

## When might a person lack capacity?

The Mental Capacity Act (MCA) 2005 states that 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'*. This includes temporary and permanent impairments and disturbances.

A person may lack capacity due to health conditions such as dementia, learning disabilities, or mental ill-health due to, for example, the effects of trauma. Likewise, drug or alcohol use may mean that a person lacks capacity to instruct you and/or make informed decisions. These effects on a person's capacity can be temporary (time-specific), and specific to the decision to be taken. A person's capacity should therefore be continually monitored throughout the process.

The MCA established five core principles which must be taken into account when considering a client's capacity<sup>1</sup>:

- A person must be assumed to have capacity unless it is established that they lack capacity ("presumption of capacity")
- A person is not to be treated as unable to make a decision unless all practicable steps to help them do so have been taken without success
- A person is not to be treated as unable to make a decision merely because they make an unwise decision
- 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 their best interests
- Before an 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.

1. [Mental Capacity Act 2005](#), Part 1, s.1

You should be continually assessing your client's capacity throughout the process, due to the fluctuating and dynamic nature of vulnerability and the stress associated with accessing and receiving legal services. If you notice your client taking decisions or behaving in a manner which is inconsistent with previous decisions or behaviour, you may want to explore this further. For example, perhaps your client is easily influenced by others and a family member is exerting undue pressure on them, which has led to a series of seemingly inconsistent decisions.

## Identifying a possible lack of capacity

### Referral cases

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<sup>2</sup>. Where a solicitor is involved, discuss any questions of your client's capacity with them, since they will likely have had more contact with the client. However, given the difficulties in identifying a potential lack of capacity in some cases, particularly where the client's native language is not English, be aware that solicitors, advisers or others involved may not have picked up on this issue.

It is important to be alert to signs that a client may lack capacity for a number of reasons, including that it would not be proper to act on any instructions if the client's capacity is in doubt, and you may need to consider placing the issue before the court<sup>3</sup>.

When considering whether a person lacks capacity under the MCA 2005, ask yourself the following:

- Does the person understand the information which is relevant to their decision?
- Can the person retain this information?
- Can the person use or weigh up the information as part of the process of making the decision?
- Can the person properly communicate their decision?

If your client appears to struggle to understand what is being said, remember events and information or make and communicate decisions, you should consider the need for a mental capacity assessment. This assessment should be conducted by a professional. Do not assume your client lacks capacity, but ensure they are assessed prior to acting on instructions.

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2. Re P [2008] EWCA Civ 462

3. Bar Council (2014) [Client Incapacity](#)

If, after having considered the questions above and spoken to the solicitor, you remain concerned, inform your client of this in a tactful manner, taking their views and comments into account. It is highly advisable that both you and the solicitor keep records of actions taken and advice provided.

If you meet a client for the first time at court and suspect a possible lack of capacity that has not been previously identified, call the instructing solicitor to make them aware of this and ask for an adjournment so that evidence can be sought.

### **Public access cases**

If you are working on a public access basis, seek to meet the client or arrange a consultation as soon as possible to identify any potential issues regarding capacity. Again, keep a record of actions taken and advice provided. However, you may be unable to act – or continue to act – since concerns about your client’s capacity may lead you to believe the case is unsuitable for public access and/or the client’s best interests are served by different legal representation. If such a situation arises, explain to the client that you believe it is in their best interests to inform the court of your suspicion, and inform them of the procedures around this.

Where you believe you may need to return instructions you should bear in mind your duty to act in your client’s best interests, and carefully consider whether your withdrawal would adversely affect the client by, for example, placing them in a position where they do not have sufficient time to engage other adequate legal representation. If you refuse or return instructions, this does not prevent you from helping the client by assisting them to find alternative legal representation. Before you withdraw, consult the [BSB Public Access Guidance](#)<sup>4</sup> on withdrawing from a case.

### **Obtaining evidence of capacity**

Where you have doubts about a client’s capacity, you should seek an opinion from a doctor or other professional expert<sup>5</sup>. Ideally, assessment should be sought from a psychiatrist. However, in cases of urgency, assessment by a mental health nurse or social worker may be sufficient in the first instance. Where you are instructed by an OISC-registered adviser, solicitor or other professional client, advise that evidence about the client’s capacity should be obtained. If you are seeking medical evidence, you may advise the client to cooperate with this but may not insist upon it. You could additionally consider seeking evidence from those who know the client (with the client’s consent), such as carers or the client’s GP.

If you have accepted instructions and the presumption of capacity applies, legal aid funding should be available for a capacity assessment. Where it is not possible to gather means information or get the legal aid forms signed, seek advice from the Legal Aid Agency.

4. BSB (2017) [The Public Access Scheme Guidance for Barristers](#)

5. [Mental Capacity Act 2005 Code of Practice](#), para. 4.41

Baker J in *KK v CC* [2012]<sup>6</sup> set out how capacity to make a particular decision should be assessed:

*“The person under evaluation must be presented with detailed options so that their capacity to weigh up those options can be fairly assessed...As the Code of Practice makes clear, each person whose capacity is under scrutiny must be given ‘relevant information’ including ‘what the likely consequences of a decision would be (the possible effects one way or the other)’. That requires a detailed analysis of the effects of the decision either way, which in turn necessitates identifying the best ways in which the option would be supported...”*

This makes clear that whilst a person may lack capacity to make a decision (e.g. to apply for immigration leave), they may still be supported to express their wishes which are relevant to the litigation in question. Bear in mind that a client’s capacity may be time-specific and/or decision-specific.

## Managing issues around mental capacity

If you are instructed by a client who lacks capacity you should refer to the [MCA Code of Practice](#)<sup>7</sup>, which provides guidance, information, and sets out responsibilities when acting on behalf of individuals who lack capacity.

Before taking a decision or acting on behalf of a person who lacks capacity, the least restrictive means – or that which would allow the person the greatest freedom – should be pursued, unless it is not in the person’s best interests<sup>8</sup>. 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.

How (or if) you can help your client to make a decision will depend on their individual circumstances and the decision to be made, as well as the length of time your client has to take the decision. The box on the following page provides tips on how best you can do this.

6. *KK v CC* [2012] EWCOP 2136, para. 68

7. Mental Capacity Act 2005, [Code of Practice](#)

8. *Ibid*

### How to help your client make a decision for themselves

- **Provide relevant information** – refrain from providing lengthy and tangential detail. Focus on key information the client needs to know in order to make the decision.
- **Communicate appropriately** – adapt your style, tone and language to suit the client. Avoid jargon, and use clear and simple language. Be aware of cross-cultural communication issues (see [Factsheet 5](#) for guidance on good client care and communication).
- **Make the person feel at ease** – adopt neutral body language, avoid formal or aggressive language and tone. Be aware of any signs that your client is anxious or distressed.
- **Be supportive** – ensure your client knows you are there to act in their best interests, and to provide them with the necessary information and support to enable them to make a decision for themselves.

A Presidential Direction<sup>9</sup> issued in 2008 and the Joint Presidential Guidance Note No 2 of 2010<sup>10</sup> provide detailed guidance on the approach the tribunal should adopt in cases involving incapacitated or vulnerable persons. The Senior President in AM (Afghanistan) v Secretary of State for the Home Department [2017]<sup>11</sup> identified five key features of these guidance documents:

- the early identification of issues of vulnerability is encouraged, if at all possible, before any substantive hearing, through the use of a case management review hearing (CMRH) or pre-hearing review;
- a person who is incapacitated or vulnerable will only need to attend as a witness to give oral evidence where the tribunal determines that “*the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so*”;
- where an incapacitated or vulnerable person does give oral evidence, detailed provision is to be made to ensure their welfare is protected before and during the hearing;
- it is necessary to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence; and

9. [Practice Direction ‘First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses’](#)

10. [Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance](#)

11. [AM \(Afghanistan\) v Secretary of State for the Home Department \[2017\] EWCA Civ 1123 \(paragraph 31\)](#)

- relevant additional sources of guidance are identified in the Guidance including from international bodies.

Where necessary, draw the tribunal's attention to these documents, and make submissions about the appropriate measures to be considered to protect your client's welfare and provide them with access to justice, and whether or not your client should provide oral evidence.

### **Litigation friends and the Court of Protection**

There is currently no express provision for the immigration tribunal to appoint a litigation friend. However, in *R (C) v First-tier Tribunal [2016]*<sup>12</sup> the Court of Appeal found that the First-tier Tribunal's decision not to appoint a litigation friend for a foreign national who lacked capacity was unlawful. Despite the lack of provision, Picken J ruled that the immigration tribunal can appoint a litigation friend to represent a person who lacks capacity, and further submitted that were this not the case it would breach the common law duty of fairness. This decision was later upheld in the case of *AM (Afghanistan)*<sup>13</sup>, making it clear that tribunals have not only the power but the duty to appoint a litigation friend where instructions cannot be given by someone who lacks capacity.

A litigation friend could be a family member, friend, solicitor, advocate or Court of Protection Deputy. Where a litigation friend is proposed, you will need to be satisfied that the person is someone who "can fairly and competently conduct proceedings" on the client's behalf, and that they have "no interests adverse to that of [the client]"<sup>14</sup>. If you suspect there is a risk of undue influence, this may suggest a person is not suitable to act as a litigation friend. An application to the court to appoint a litigation friend can be made at any time during the case. Guidance on who can act and how to apply for a litigation friend can be found on the [Government website](#). As a last resort, the Official Solicitor may be approached in the absence of a suitable litigation friend.

In cases of urgency, you may also wish to make an application to the Court of Protection, for example, to prevent a removal order or detention under compulsion. The Court has a number of responsibilities and powers, including granting permission for someone to take decisions on behalf of a person who lacks capacity, and handling emergency or urgent applications where a decision must be made on behalf of another person without delay. For more information on making applications to the Court of Protection, refer to the Legal Action Group's Court of Protection Handbook<sup>15</sup>.

12. *R (C) v First-tier Tribunal [2016] EWHC 707 (Admin)*

13. [AM \(Afghanistan\) v Secretary of State for the Home Department \[2017\] EWCA Civ 1123](#)

14. [Civil Procedure Rules 1998, rule 21.4\(3\)](#)

15. LAG (2017) Court of Protection Handbook: A user's guide (Second Edition)

## Key questions to ask yourself

- Does my client struggle to understand what is being said, remember events and information or make and communicate decisions?
- Before taking a decision as to whether my client lacks capacity, have I taken all practical steps to help them do so?
- Do I need to arrange for a capacity assessment?
- My client lacks capacity. What measures must be taken to protect their welfare and allow them to participate in proceedings as fully as possible?
- Have I considered the need for a litigation friend to be appointed, or should I apply to the Court of Protection?

## Further information

- ▶ [AM \(Afghanistan\) v Secretary of State for the Home Department \[2017\] EWCA Civ 1123](#)
- ▶ Bar Council (2014) [Client Incapacity](#)
- ▶ LAG (2017) Court of Protection Handbook: A user's guide (Second Edition)
- ▶ [Mind](#) (for information and advice on mental health and capacity issues)
- ▶ [Medical Justice](#) (writes medico-legal reports (MLRs) which can be used to support asylum claims and letters outlining significant medical concerns).
- ▶ [Mental Capacity Act 2005](#), [Code of Practice](#)
- ▶ R (C) v First-tier Tribunal [2016] EWHC 707 (Admin)