

MENTAL CAPACITY IN IMMIGRATION: EFFECTIVE ACCESS TO JUSTICE

Author: The Rt. Honourable Lord Justice Bernard McCloskey, Judge of the Court of Appeal in Northern Ireland

Introduction

In the world of litigation, in its multifarious forms, issues of mental capacity almost invariably raise questions of effective access to justice and procedural fairness. While international human rights instruments such as the European Convention on Human Rights and Fundamental Freedoms¹ and the United Nations Convention on the Rights of the Child² can sometimes wield some influence in resolving questions of this kind resort to the riches of the common law frequently provides the best solution. This is so because one of the greatest strengths and successes of the common law is the contribution that it has made to the development and protection of fair hearing (or due process) rights. It may be said that such rights are of elevated importance in every context where the litigant or, indeed, a witness, suffers from some form of mental incapacity. And every such case places the spotlight firmly on the presiding judge.

The Common Law and Rights of Access to Court

Access to the Court has been described as a right of constitutional stature.³ Thus it is possible, for example, to challenge by judicial review measures such as excessive Court fees, invoking this constitutional right. Notably, it has also been possible to bring challenges of this nature without any reliance on the common law. In *R (Unison) v Lord Chancellor*⁴ the challenge to the instrument of subordinate legislation whereby fees were introduced in Employment Tribunals for the first time⁵ was based substantially on principles of EU law. In particular, the challenge invoked the established principle of EU law, now enshrined in Article 47 of the Charter of Fundamental Rights of the EU,⁶ that persons who claim that their rights under EU law have been infringed must have access to an effective remedy for the breach.

The foregoing may be considered a paradigm illustration of the valuable contribution to the UK legal system, which is now under threat in the Brexit process. Though the common law was not expressly invoked, its influence in the development of this principle of EU law is readily ascertainable. Thus, in *Johnston v Chief Constable of Royal Ulster Constabulary*⁷ the ECJ

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Part of Domestic Law via the Human Rights Act 1998.

² Convention on the Rights of the Child (adopted 20 November 1989, entered into force 02 September 1990) 1577 UNTS

³ UNHRC: barely visible in the domestic law of the United Kingdom. And see Section 55 of the Borders, Citizenship and Immigration Act 2009.

⁴ *R v Lord Chancellor, ex parte Witham* [1998] QB 575.

⁵ [2015] EWCA Civ 935.

⁶ By the Employment Appeal Tribunal Fees Order 2013 (SI2013/1893).

⁷ Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

⁸ Case 222/84, [1987] QB 129, [17] (page 147).

described the so-called ‘effectiveness principle’ as something common to the legal systems of all Member States.

While immigration proceedings are a main focus of today’s event, it is instructive to cast one’s eye towards a broader panorama. A brief review of the leading cases in both the United Kingdom and the Commonwealth shows that a person’s right of access to the Court is not absolute. Thus, for example, both reasonable time limits and reasonable court fees have been upheld.⁸ Equally legislative measures of acute political contention have been affirmed, one of the clearest illustrations being the statutory amnesty from suit granted to those who made full disclosure to the Truth and Reconciliation Commission in South Africa, upheld by the Constitutional Court of that country.⁹

It is helpful to formulate the overarching principle; *Given that everyone is bound by, and entitled to the protection of, the law, resort to the Court is essential for the purpose of determining legal rights and resolving legal disputes.* This is nothing less than a fundamental requirement of the rule of law. It is no coincidence that the ultimate judicial arbiters on disputes relating to restrictions on access to the courts are Constitutional Courts and Supreme Courts, reflecting the importance of the right in play. Such cases not infrequently entail judicial review of public policy. In this context one is at once reminded that *capacity* to bring or defend legal proceedings is a long entrenched requirement of our legal system. Equally there is no right of access to the Court for the purpose of pursuing a frivolous or vexatious claim or otherwise misusing the process of the Court. Considerations of balance and proportionality are invariably to the fore.

Turning to the sphere of immigration litigation, the enduring vigour and influence of the common law are evident in two of the most important decisions of the last twelve months. In *R (Kiarie and Byndloss) v Secretary of State for the Home Department*¹⁰ the United Kingdom Supreme Court decided unanimously that the making of a ministerial certificate the effect whereof was that the immigrant could pursue an appeal to an immigration tribunal only from abroad was unlawful. The essence of the illegality lay in the breach of the principle of effectiveness, in a context where the financial and logistical barriers to giving live evidence to the Tribunal from overseas were virtually insurmountable. Notably, the principle of effectiveness was considered to derive from the procedural dimension of Article 8 ECHR. The decision of the Supreme Court displays a welcome grasp of practical realities: the unavailability of legal aid; the improbability of securing legal representation; formidable difficulties in giving and receiving instructions where legal representatives were engaged; the availability of facilities for live evidence; securing the attendance of UK based witnesses at the Tribunal hearing; and the ability to navigate one’s way through bundles of documents.

While it might seem to many observers that the appeal could equally have succeeded on the basis of common law fair hearing principles, the decision is, once again, a signal illustration of the influence of international law in the United Kingdom legal system.

The principle of effectiveness featured prominently again in *AM (Afghanistan) v Secretary of State for the Home Department and Lord Chancellor*.¹¹ [Many of those associated with the MMCA project will have some familiarity with this case]. It confronted squarely the

⁸ See for example, *Mwelle v Ministry of Works* [1995] 4 LRC 184 and *Bahamas Entertainment v Koll* [1996] 2 LRC 45.

⁹ *Azanian People’s Organisation v President of the Republic of South Africa* [1997] 4 LRC 40.

¹⁰ [2017] UKSC 42.

¹¹ [2017] EWCA Civ 1123.

question of the effective right of access to immigration tribunals by incapacitated and vulnerable individuals. The factual matrix, in brief compass, involved the Secretary of State's refusal of an asylum claim by a citizen of Afghanistan aged 15 years. There ensued the dismissal of the Appellant's appeal by the First-tier Tribunal (FtT)¹² in circumstances where the evidence included the report of an expert in psychology drawing attention to the Appellant's moderate learning difficulties and impaired intellectual skills and recommending that a series of measures be adopted for the hearing: informality, restrictions on those attending, specially tailored questions *et al.* The FtT dismissed the appeal, as did Upper Tribunal (UTIA)¹³ on further appeal.

Neither Tribunal paid proper attention to the expert psychological evidence. In the language of the Court of Appeal, neither Tribunal took –

‘... sufficient steps to ensure that the appellant had obtained effective access to justice and in particular that his voice could be heard in proceedings that concerned him’.¹⁴

The legal infirmity thereby generated was the familiar one of common law procedural unfairness. The judgment continues:

‘The Appellant was a vulnerable party with needs that were not addressed’.¹⁵

The framework of legal principle rehearsed by the Court of Appeal is worthy of note:

- a. Given the gravity of the consequences of a decision on asylum and the accepted inherent difficulties in establishing the facts of the claim as well as future risks, there is a lower standard of proof, expressed as ‘a reasonable chance’, ‘substantial grounds for thinking’ or ‘a serious possibility’;
- b. While an assessment of personal credibility may be a critical aspect of some claims, particularly in the absence of independent supporting evidence, it is not an end in itself or a substitute for the application of the criteria for refugee status which must be holistically assessed;
- c. The findings of medical experts must be treated as part of the holistic assessment: they are not to be treated as an ‘add-on’ and rejected as a result of an adverse credibility assessment or finding made prior to and without regard to the medical evidence;
- d. Expert medical evidence can be critical in providing [an] explanation for difficulties in giving a coherent and consistent account of past events and for identifying any relevant safeguards required to meet vulnerabilities that can lead to disadvantage in the determination process, for example, in the ability to give oral testimony and under what conditions (see the Guidance Note below and JL (medical reports – credibility) (China) [2013] UKUT 00145 (IAC), at [26] to [27]);

¹² First-tier Tribunal (Immigration and Asylum Chamber).

¹³ Upper Tribunal (Immigration and Asylum Chamber).

¹⁴ [2017] EWCA Civ 1123, [16].

¹⁵ *ibid.*

e. An appellant's account of his or her fears and the assessment of an appellant's credibility must also be judged in the context of the known objective circumstances and practices of the state in question and a failure to do so can constitute an error of law; and

f. In making asylum decisions, the highest standards of procedural fairness are required.¹⁶

Predictably, the Court emphasised that this is not an exhaustive or immutable checklist.¹⁷

The Court of Appeal next turned to consider the extant Tribunal rules, practice directions and guidance. It observed that adherence to these measures would have served to avoid the procedural unfairness which had been permitted to permeate the proceedings at both levels. The judgment states:

Critically, the Appellant's age, vulnerability and learning disability could have been recognised and taken into account as factors relevant to the limitations in his oral testimony. Likewise, the Tribunal's procedures could have been designed to ensure that the Appellant's needs (including his wishes and feelings) as a component of his welfare were considered to ensure that he was able to effectively participate.¹⁸

Drawing attention to various provisions of the FtT Rules (rule 2, the overriding objective, rule 4, the Tribunal's power to regulate its own procedure and rule 14, the Tribunal's broad power to give directions)¹⁹ the Court concluded:

It is accordingly beyond argument that the Tribunal and the parties are required so far as is practicable to ensure that an appellant is able to participate fully in the proceedings and that there is a flexibility and a wide range of specialist expertise which the Tribunal can utilise to deal with a case fairly and justly. Within the Rules themselves this flexibility and lack of formality is made clear.²⁰

The Court of Appeal also placed some emphasis on the need for early alertness on the part of the Tribunal in cases of impaired capacity and the desirability of an early case management hearing and specially tailored case management directions.²¹ The judgment also draws attention to:

- (i) The Senior President of Tribunal's Practice Direction "First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses" [October 2008].

¹⁶ [2017] EWCA Civ 1123, [21].

¹⁷ *ibid*, [22].

¹⁸ *ibid*, [23].

¹⁹ 'The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014' (Tribunal Procedure Committee 2018)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701695/Consolidated_Tribunal_Procedure_FTT_Immigration_and_Asylum_Chamber_Rules_2014.pdf> accessed 28 August 2019.

²⁰ [2017] EWCA Civ 1123, [27].

²¹ *ibid*, [28] – [29].

(ii) The Joint Presidential Guidance Note No 2 of 2010.²²

The Court of Appeal cautioned that a failure to give effect to these instruments would normally constitute a material error of law.²³ These measures repay careful reading. They have the following central features:

- a. the early identification of issues of vulnerability is encouraged, if at all possible, before any substantive hearing through the use of a CMRH or pre-hearing review (Guidance [4] and [5]);
- b. 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’ (PD [2] and Guidance [8] and [9]);
- c. 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 (PD [6] and [7] and Guidance [10]);
- d. it is necessary to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence (Guidance [10.2] to [15]); and
- e. relevant additional sources of guidance are identified in the Guidance including from international bodies (Guidance Annex A [22] to [27]).²⁴

Next the judgment draws attention to the advent of section 55 of the 2009 Act²⁵ suggesting that the statutory duty to have regard to the best interests of any affected children in the discharge of immigration, asylum and nationality functions extends to Tribunals.²⁶ The Court also discourages excessively elaborate and literal interpretation of the Guidance Note.²⁷ Next, the Court decided that a direction for the involvement of an *intermediary* is possible.²⁸ Finally, the Court interpreted the relevant primary and secondary legislation as supportive of the conclusion that Tribunals are empowered to appoint a ‘litigation friend’.²⁹ The relevant passage is at [44]:

I have come to the conclusion that 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 not 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. It must be remembered that this step will not be necessary in many cases because a child who is an asylum seeker in the UK will have a public authority who

²² *ibid*, [30].

²³ *ibid*, [30].

²⁴ *ibid*, [31].

²⁵ See Note 2 *supra*.

²⁶ [2017] EWCA Civ 1123, [36].

²⁷ *ibid*, [37].

²⁸ *ibid*, [38].

²⁹ *ibid*, [38] - [42].

may exercise responsibility for him or her and who can give instructions and assistance in the provision of legal representation of the child.

Notably, the need for intervention by the Tribunal Procedure Committee, in the form of procedural rules, was expressly acknowledged.³⁰

The right of effective access to a Court must, I suggest, be the core element of every litigant's right to a fair hearing. It is this right which unlocks all of the other constituent ingredients of a fair hearing – the independence and impartiality of the tribunal, the right to be alerted to the case to be answered and so forth.³¹ It has been consistently recognised in various juridical contexts – European human rights, EU law and domestic law – that being a right which by its very nature invites regulation by the State limitations, including financial limitations, may be valid, *but provided only that* these –

‘... pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved’.³²

It is abundantly clear from all of the leading cases addressing this issue that *context* is of crucial importance. The common law had, of course, taught us this from long ago. Thus, in one case, the court fee in question – approximately €115 – for the enforcement of a judgment, did not, objectively, appear unreasonable. But it was held to constitute a disproportionate restriction on the right of access to the Court on the ground that the claimant's monthly income was a pension of just €19.³³ The same conclusion was made in another case where the fee in question equated to the average annual salary in the state concerned.³⁴

As the foregoing brief reflection demonstrates, the affordability of justice, the availability of legal representation and the provision of support measures such as a litigation friend are closely related subjects, all of them inextricably linked to the litigant's fundamental right to a fair hearing. For the migrant litigant the *context* will frequently include elements of family separation, vulnerability of all kinds, psychological trauma, emotional instability, an unfamiliar language and an alien country and culture. Sheer desperation is commonplace. Worry, perplexity, fear and uncertainty abound. Furthermore, the factor common to many migrant litigants is a lack of support - moral, psychological, material and financial.

Accordingly, an assessment in any given case that a migrant litigant is entitled to the support of a litigation friend is a matter of enormous importance to the person concerned. Its value must not be underestimated. But the typical migrant litigant will not have available a pool of candidate litigation friends to which to turn. This stands in marked contrast to the British national litigant who, typically, can call on a parent, parental figure, older sibling or other blood relative for this purpose. There is, therefore, an unmistakable disparity of treatment issue.

The need for a simple, accessible, expeditious and workable framework to give effect to the assessment that a migrant litigant should have the benefit of a litigation friend is

³⁰ *ibid*, [4] and [45].

³¹ *Podbielski and PPU Polpure v Poland* App no 39199/98 (ECHR, 30 November 2005), [2005] ECHR 543, para 61.

³² *ibid*, para 63.

³³ *Apostol v Georgia* App no 40765/02 (ECHR, 28 November 2006), [2006] ECHR 999.

³⁴ *Kreuz v Poland* App no 28249/95 (ECHR, 19 June 2001), [2001] 11 BHRC 456.

incontestable. In the absence of this – coupled with the necessary related public funding – the pioneering decision in *AM (Afghanistan)*³⁵ will be set to nought and our legal system will find itself paying mere lip service to the hallowed common law right to a fair hearing. Are we in the UK really prepared to sink to depths so low?

POST – *AM*: WHITHER?

At this point, one pauses – and, unfortunately, continues to do so. Clearly, a framework of procedural rules is required to give proper effect to the litigation friend mechanism. Whimsical and essentially unregulated and unsupervised judicial decision making in a matter of this importance simply will not work. Procedural regulation is required not merely in the interests of legal certainty and consistent, predictable judicial decision making but, fundamentally, in furtherance of the overarching right in play, namely the litigant's right to a fair hearing.

Funding will obviously be an issue, one of not less than vital importance, predictably the biggest issue of all. In the same breath one adds that the corollary of every judicial assessment that a person is of sufficiently impaired capacity to warrant the assistance of a litigation friend, or some other comparable support measure, must surely be that a failure to provide such facility will impact adversely on the person's right to a fair hearing – one of the fundamental, inalienable rights in the UK legal system. It is trite that rights of this kind must be practical and effective, not theoretical or illusory. This principle also was entrenched in the common law, before the (welcome) advent of international law influences. It has been said by the European Court of Human Rights (ECtHR):

‘This is particularly so of the right of access to the Courts in view of the prominent place held in a democratic society by the right to a fair trial ...’³⁶

In that case, which concerned the availability of legal aid, the test that the Strasbourg Court formulated was:

‘...whether Mrs Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily’.³⁷

The procedural framework that I have advocated above is nowhere to be seen. It would appear that The Tribunals Procedure Committee, with its many and under – resourced commitments, has not yet devised a model. Presumably the related issue of *judicial training and expertise* similarly lies dormant.

Conclusion

One recalls the scholarly argument of Dr EJ Cohn:³⁸

³⁵ [2017] EWCA Civ 1123.

³⁶ *Airey v Ireland* (1979) 2 EHRR 305, para 57.

³⁷ *ibid.*

³⁸ An academic writer and author of an article published in the Law Quarterly Review 1943.

Our law makes access to the Courts dependent on the payment of fees and renders assistance by skilled lawyers in many cases indispensable. Under such a legal system the question of legal aid to those who cannot pay must not be allowed to play a Cinderella part. Its solution decides nothing less than the extent to which the State in which that system is in force is willing to grant legal protection to its subjects. Where there is no legal protection, there is in effect no law. Insofar as citizens are precluded from access to the Courts, the rules of the law which they would like to invoke are for them as good as non-existent.³⁹

In a later passage the author refers to the plight of those citizens who are too weak to protect themselves and reasons:

Just as the modern State tries to protect the poorer classes against the common dangers of life such as unemployment, disease, old age, social oppression etc., so it should protect them when legal difficulties arise. Indeed, the case for such protection is stronger than the case for any other form of protection. The State is not responsible for the outbreak of epidemics, for old age or economic crises. But the State is responsible for the law. That law again is made for the protection of all citizens, poor and rich alike. It is therefore the duty of the State to make its machinery work alike for the rich and the poor.⁴⁰

It seems remarkable that these wise words were written fully 75 years ago. Today they would appear to resonate as strongly as ever. One might justifiably ask whether access to justice – a cornerstone of the rule of law – has in truth been moving in a progressively backwards direction.

It is also instructive to recall that the supposedly enlightened UK legal system has been legislating for free legal advice and representation for some five centuries (since 1494) following the example of a Scottish Act of 1424.

These admittedly gloomy reflections prompt the recollection that philanthropy and human solidarity have for long been established features of the UK legal system. The so-called ‘dock brief’ gained currency in the 18th century when the practice whereby the trial judge in a criminal case asked the barristers who had speculatively attended the court room to represent the accused without any fee developed. And one looks back with unvarnished admiration at the altruism of those involved in the Bentham Committee (established in 1929) and the Poor Man’s Lawyer at Toynbee Hall (from 1884). By 1928, there were 27 such centres operating in London, spreading to the main provincial towns and cities. The momentum towards a proper legislative vehicle gradually became irresistible, culminating in the Legal Aid and Advice Act 1949.

The noble work of the Bar Pro Bono Unit dates formally from 1972. It involved a commitment by participants to offer at least three days advice and assistance annually without charge. Solicitors established an equivalent agency. In 1996, the Bar Pro Bono Unit provided free advice and representation to 1615 individuals. The suggestion that as of now

³⁹ EJ Cohn, ‘Legal Aid for the Poor – a study in comparative law and legal reform’ (1943) 59(3) *Law Quarterly Review* 250, 251.

⁴⁰ *ibid*, 256.

there is a more compelling need than ever for this service seems incontestable. My personal experience has been that the law departments of universities are increasingly alert to this and examples of impressive free legal advice and representation schemes are multiplying. These almost invariably require voluntary input and assistance from practicing professionals. It has been my pleasure to make a modest contribution to some such worthy ventures.

The principles which inspired the development of the Toynbee Hall Poor Man's Lawyer over a century ago continue to resonate: that the laws of our country exist for the benefit of the poor as well as the rich; that equality before the law is a mere pretence if some citizens can assert and protect their rights while others cannot; and that the rule of law will be empty of meaning if justice is not available to every citizen, irrespective of means. The underlying precept was expressed memorably by Colonel Rinborough during the Putney Debates of 1648:

‘The poorest he that is in England has a life to live as the greatest he’.

The case for a keen sense of civic duty, an altruistic disposition and solidarity with the weakest and most vulnerable of our fellow citizens seems more powerful than ever before. If Government will not act, conscientious and responsible lawyers and other professionals must attempt to at least partly fill the void. I have witnessed with admiration approaching awe how some of the worst paid immigration and asylum cases have been conducted by legal and other professionals to the highest standards imaginable. This has served to rekindle my innate belief in the rule of law. To all young aspiring lawyers especially I say ‘seize the day’. *Carpe diem!*