

# Vulnerable appellants/witnesses and those lacking capacity in the Immigration Tribunal



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# Presenter

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Lucy is a human rights barrister who specialises in representing particularly vulnerable victims of human trafficking, domestic violence, torture, and sexual or other forms of exploitation at all levels in their immigration and asylum appeals and in judicial reviews.

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# Agenda

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## Welcome and Introduction

## Contents:

1. Who is vulnerable and on what basis?
2. What impact does this have on proceedings?
3. When should vulnerability be considered?
4. What measures should be considered?
5. What have higher courts said about vulnerability?
6. What about litigation friends?
7. What evidence is needed to establish vulnerability?
8. What impact has covid had on all of this?

# Who is Vulnerable?

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## **Joint Presidential Guidance Note No 2 of 2010 Child, vulnerable adult and sensitive appellant guidance**

- Some individuals vulnerable by definition (i.e. children);
- Vulnerable adult = definition as Safeguarding Vulnerable Groups Act 2006; &
- Sensitive witness = an adult witness where the quality of evidence given is likely to be diminished by reason of fear or distress.

# Who is Vulnerable (cont.)

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- Others are less easily identifiable and factors to consider include:
  - mental health problems
  - social or learning difficulties
  - Religious beliefs and practices, sexual orientation, ethnic social and cultural background
  - Domestic and employment circumstances
  - Physical disability or impairment

# What impact?

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Guidance says: “It is a matter for the tribunal to determine the extent of an identified vulnerability, the effect on the quality of the evidence and the weight to be placed on such vulnerability in assessing the evidence, taking into account the evidence as a whole.”

# When to Consider?

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## Guidance:

- In so far as possible potential issues and solutions should be identified at a CMRH/ PHR
- Where there has not been a CMRH/PHR or the parties were inadequately prepared these matters should in any event be considered at the commencement of the substantive hearing.

# Measures to consider

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Guidance proposes various measures to be considered at each stage:

- At commencement of hearing;
- During the hearing; &
- When assessing evidence.



# Measures: Giving of Evidence

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## **Practice Direction: First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses:**

“A child, vulnerable adult or sensitive witness will only be required to attend as a witness and give evidence at a hearing 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.”

# Measures: Giving of evidence (cont.)

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Practice Direction: “In determining whether it is necessary for a child, vulnerable adult or sensitive witness to give evidence to enable the fair hearing of a case the Tribunal should have regard to all the available evidence and any representations made by the parties.”

# Measures: Giving of evidence (cont.)

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Practice Direction: “The Tribunal must consider how to facilitate the giving of any evidence by a child, vulnerable adult or sensitive witness.”

“It may be appropriate for the Tribunal to direct that the evidence should be given by telephone, video link or other means.., or to direct that a person be appointed for the purpose of the hearing who has the appropriate skills or experience in facilitating...”

# Guidance of Higher Courts

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- Pivotal case of *AM (Afghanistan) v SSHD* [2017] EWCA Civ 1123 (27 July 2017)
- Senior President of Tribunals, Ryder LJ, addresses the fair determination of claims by vulnerable appellants:
  - (1) The need for the FTT and UT to alter their procedures.
  - (2) The ability of the FTT and UT to appoint a litigation friend.

# AM re sources of guidance

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Two key sources are the above-mentioned

- Practice Direction: First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses
- Joint Presidential Guidance Note, No 2 of 2010

*Note:* Ryder LJ states (at [30]): “Failure to follow them will most likely be a material error of law.”

# AM re key features

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- Early identification;
- Giving of oral evidence only where "the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so";
- Detailed provision is to be made to ensure welfare is protected before and during the hearing; &
- Special consideration to all of the circumstances of the person in assessing their evidence.

# AM re early identification

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- “Primary responsibility” w appellant’s representatives;
- Professional duty on a solicitor to satisfy him/herself about capacity;
- Should draw the tribunal's attention to the Practice Direction and Guidance; &
- Submissions made about appropriate directions/ measures to be considered e.g. whether can give oral evidence or special measures required.

# AM re special measures

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- Determine “ground rules”, at CMR/PHR, or beginning of the appeal hearing ([28]), having regard to any expert evidence, which had included the following for AM:
  - Informal court dress; informal venue for hearing; informal seating; exclusion of members of public; open-ended, simple questions; points to be raised in cross examination identified by judge (*note: correspond with ch. 5 Equal Treatment Benchbook*)



## AM re effect on evidence

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“The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind”

## AM re impact on credibility

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*Ryder LJ agrees with JL (medical reports – credibility) (China) [2013] UKUT 00145 (IAC):*“Applying this guidance would have entailed the judge asking herself whether any of the inconsistencies in the appellant's account (as given in her asylum interview) identified by the respondent in the reasons for refusal – and described by the judge as being "cogent" – could be explained by her being a vulnerable person. This the judge did not do.”

## AM re other relevant sources

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- UNHCR Guidelines' on International Protection: Child Asylum Claims (liberal application of benefit of doubt)
- Article 4(3) of Directive 2004/83/EC
- Every Child Matters – Change for Children
- Paragraphs 350 to 395 of the Immigration Rules and the Secretary of State's Asylum Policy Guidance
- Equal Treatment Benchbook, Ch. 5

## AM re litigation friends

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“...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...” (AM, 44)

# Evidence of vulnerability

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- No prescribed evidence but should be from relevant expert, depending upon the particular vulnerability/sensitivity: GP, psychiatrist/ psychologist, social worker, country expert (on impact of religious/cultural/ sexuality etc); &
- Evidence should consider the impact of the specific vulnerability/ sensitivity on giving instructions/ evidence and specific measures to mitigate.

# Lacking capacity

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- Ensure expert properly understands and addresses mind to whether vulnerable Appellant has capacity
- Capacity as defined under the Mental Capacity Act 2005 ('MCA 2005') must be approached on an issue-specific basis. Section 2(1) of the Act provides that:
  - "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" (emphasis added).
  - Under section 3(1)(b) MCA 2005 Act, a person is to be deemed unable to make a decision on a particular matter if he is unable to retain information relevant to the decision.
- What is it that the Appellant is said to lack capacity to do?

# Evidence of vulnerability

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# Impact of covid

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## **1. The impact of COVID-19 measures on the civil justice system:**

<https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f-1.pdf>



# Key findings

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- Technical difficulties;
- Remote appropriate for non-contested hearings;
- Court users feel remote hearings are worse/tiring;
- Remote hearings may not be cheaper;
- Remote hearings present challenges for lay parties/litigants in persons; **those problems would be amplified for more vulnerable parties**

# Impact of covid (cont.)

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## 2. Good practice for remote hearings from Judicial College:

<https://www.judiciary.uk/wp-content/uploads/2020/05/Good-Practice-for-Remote-Hearings-May-2020-17.09.20.pdf>

# Key findings

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- “Effective communication underlies the entire legal process: ensuring that everyone involved understands and is understood...The ETBB is concerned with enabling participation...by identifying and making adjustments for disabilities or other disadvantage.”
- “We found that opportunities to identify impairments and make adjustments are lost or reduced when a defendant appears ...by video-link...”
- List of issues for judges to consider and to address

## Impact of covid (cont.)

**3. The Courts, Tribunals and the Covid-19 Public Health Crisis; Interim recommendations on safeguarding vulnerable people in the context of remote international protection and human trafficking/modern slavery legal casework (HBF):**

<http://www.helenbamber.org/wp-content/uploads/2020/05/Tribunals-courts-and-COVID-recommendations-Final.pdf>

# Key findings

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- The spirit of existing guidance, which helps promote access to justice for vulnerable people, should be followed, but may require adaptation;
- Deteriorating mental health for vulnerable clients;
- Particular risks to welfare and to access to justice where international protection and modern slavery/human trafficking casework is undertaken by remote means rather than face-to-face;

## Key findings (cont.)

- When decisions get to the Tribunal or the Court, the first question should be, was the decision procedurally fair?;
- Requests for extensions of time should be allowed; and
- Careful consideration should be given as to whether statutory appeals can *fairly* proceed.

# And finally: amendment to the CPR

PD 1A Participation of Vulnerable Parties or Witnesses  
(comes into force on 6 April 2021)

<https://www.justice.gov.uk/courts/procedure-rules/civil/127-cpr-update.pdf>

\*First time vulnerability mentioned in the CPR!\*

## Amendment to the CPR (cont.)

Amends the CPR's Overriding Objective, following the recommendation in the report by the Civil Justice Council on Vulnerable Witnesses (published in February 2020) in civil proceedings. The amendment makes it clear that dealing with a case justly includes ensuring that the parties can participate fully, and that parties and witnesses can give their best evidence.



# Any Questions?

# Thanks for watching!

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