Incapacious respondents to closure order proceedings: *Ealing LBC v M*

The Anti-Social Behaviour, Crime, and Policing Act 2014 replaced and streamlined a range of powers to deal with various types of ASB into a single regime designed to 'create a fast, flexible power that can be used to protect victims and communities from premises which are causing nuisance and disorder'.[1] This regime, set out in ss. 76 – 93 of the 2014 Act, allows a police force or local authority to apply to the Magistrates Court for a 'Closure Order'. Such applications fall within the civil jurisdiction of the Magistrates Court,[2] and are thus governed by the Magistrates Court Act 1980 and the Magistrates Court Rules 1981. Both the 1980 Act and the 1981 Rules are silent as to arrangements for protected parties and in particular make no provision for the appointment of a litigation friend. This article considers the principles to be applied by the Magistrates' Court when faced with a respondent to a closure order application who lacks capacity to litigate the proceedings, and outlines the approach adopted by the court in a recent case in which Siân McGibbon and Joshua Hitchens acted for the respondent.

There is neither consensus nor clear authority on this point. One of the leading textbooks on anti-social behaviour law states that in respect of vulnerable respondents to closure order applications:

> *'In deciding whether to adjourn, the court will need to weigh the respective interests of the persons or community affected by the anti-social behaviour and the need to provide them with some respite from the behaviour, against the*

[1] Revised *Statutory Guidance for Frontline Professionals,* p. 58.
[2] *Commissioner of the Police for the Metropolis v Hooper* [2005] EWHC 340 (Admin), para. 16.

need to ensure that the respondent has a fair hearing [...] Equality Act 2010 considerations may be engaged if the respondent has a disability within the meaning of that Act. Such a respondent may wish to secure the attendance of their key worker or support worker at an adjourned hearing (in addition to seeking legal advice). The courts are likely to look more favourably on applications to adjourn in these circumstances'[3].

This analysis is not incorrect in as far as it goes, but (consistently with other texts) the issue of litigation capacity is conspicuous by absence.

There is, however, helpful guidance in authorities which consider the issue in the context of other tribunals whose procedural rules make no express provision for the appointment of a litigation friend to assist a party who would be treated as 'protected' for the purposes Part 21 of the CPR. In *AM (Afghanistan) v Secretary of State for the Home Department)* [2018] 4 WLR 78 the Court of Appeal considered the issue in respect of the Immigration Tribunals[4] and held that 'there is ample flexibility in the tribunal rules to permit a tribunal to appoint a litigation friend in the rare circumstance that the […] incapacitated adult would not be able to represent him/herself and obtain effective access to justice without such a step being taken' and that '[i]n the alternative, even if the tribunal rules are not broad enough to confer that power, the overriding objective [of the tribunal rules] in the context of natural justice requires the same conclusion to be reached'[5]. In doing so the Court of Appeal followed R *(C) v First Tier Tribunal* [2016] EWHC 707 (Admin), which it summarised: '[…] the Lord Chancellor

[3] Cornerstone on Anti-Social Behaviour, 2019, para. 8.27.
[4] Neither the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 nor the Tribunal Procedure (Upper Tribunal) Rules 2008 make express provision for the appointment of a litigation friend.
[5]Per Ryder LJ at [44].

was joined to a claim that the decision of an FTT (IAC) refusing to appoint a litigation friend for a national who lacked capacity was unlawful. The Lord Chancellor supported the granting of permission to judicially review the tribunal on the basis that the FTT had the power to appoint a litigation friend and that it had been unlawful not to do so. Picken J agreed and held that were that not to be the case, the claimant would not be able to make representations, put forward evidence, test the evidence against his case or instruct a solicitor: a situation which would breach the common law duty of fairness'[6].

More recently in *R (on the application of EG) v Parole Board* [2020] EWHC 1457 the High Court held that having a litigation friend was so fundamental to ensuring a fair hearing who lacked mental capacity that it would require words which clearly excluded such an appointment before a court could find that it was not provided for, there was no such clear exclusion in the language of the Parole Board Rules 2019.

The circumstances considered by the Court in *AM* and *EG* are clearly analogous with the position in civil proceedings in the Magistrates' Court. A respondent to an application for a closure order faces the potential loss of their home and in many cases findings of fact which will cause any authority to which they subsequently apply for homelessness assistance under Part VII of the Housing Act 1996 to find that they are 'intentionally homeless' (severely curtailing their entitlement to assistance).

This issue arose before the Ealing Magistrates Court in a recent application made by the London Borough of Ealing for a closure order under s.80 of the Anti-Social Behaviour, Crime, and Policing Act 2014, relying on allegations of anti-social behaviour made against (amongst others) the tenant of the Property, 'M'. M had a

[6] Per Ryder LJ at [39].

number of mental health issues and his legal team took the view that he lacked litigation capacity (concurrent criminal proceedings against M having been adjourned days earlier for a report on his fitness to stand trial). The first hearing was adjourned for fourteen days under s.81(3) of the 2014 Act to allow M to obtain legal representation. At the return hearing counsel for M sought a further adjournment beyond the 14 days permitted under s.81(3), on the basis that M lacked capacity to give instructions to his legal representatives and was thus unable to participate meaningfully in the hearing. The court granted an adjournment to the next available date, accepting that it must be the case that lack of capacity constitutes 'exceptional circumstances' so as to justify an adjournment beyond 14 days[7], notwithstanding the fact there is no power to extend the closure notice over the adjournment period.

At the second adjourned hearing, Ealing argued that the 1981 rules made no provision for protected parties and as such the court ought not to concern itself with the issue of M's litigation capacity but should proceed with the hearing, and that in any event an adjournment for evidence on a respondent's litigation capacity could not be justified in light of the clear statutory purpose of the 2014 Act was that an application for a closure order be resolved with urgency. Counsel for M argued that a power to appoint a litigation friend in circumstances where such a step was required to achieve a fair hearing could be read in to the 1981 Rules, applying *EG*, as there was no wording which was sufficiently clear to exclude this; further, that following *AM* the court had a positive obligation, arising out of the common law principle of natural justice and Article 6 and 15 ECHR, to take such steps as might be necessary to ensure the fair participation of an incapacious or disabled respondent. The court accepted the submissions on behalf of M and adjourned the application pending an expert opinion

[7] *Hooper*, ibid at n.2.

on the question of M's capacity to litigate and (subject to that opinion) the appointment of a litigation friend.

Whilst this must be the correct approach, the lack of any provision for protected parties in the 1981 Rules remains unsatisfactory as a matter of principle. As Underhill LJ commented in *AM*:

> *"[…] a litigation friend has wide authority to dispose of a party's legal rights, either directly by bringing and / or compromising proceedings, or indirectly by the way in which he or she conducts those proceedings. Those powers ought to be clearly defined and regulated, as they are by rule 21 in cases that come under the Civil Procedure Rules. It is very unsatisfactory that they should be exercised simply on the basis of general case management powers*"[8].

This criticism applies with equal, if not greater, force in the context of closure order proceedings. Given the severe implications for respondent parties and the fact that the urgency which is part of the underlying purpose of the closure order procedure deters adjournment, a revision to the 1981 Rules to clarify the position and ensure consistency of approach would be welcome.

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[8] At [49].