IN THE UPPER TRIBUNAL **Appeal No.** HS/1782/2020
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Health, Education and Social Care Chamber)

Between:

TC and BW

Appellants

- v –

LB Islington

Respondent

Before: Upper Tribunal Judge Ward

Hearing date: 4 May 2021

Representation:
Appellants: Joseph Thomas, instructed by Ropes and Gray
Respondent: Alexander Line, instructed by Head of Legal Services

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

Introduction

1. The appellants are the parents of B, a boy who at the time of the decision by the First-tier Tribunal ("FtT") was entering year 6. They had appealed to the FtT against the respondent's decision dated 10 February 2020 not to issue an Education, Health and Care plan ("EHC plan") following an assessment. Their appeal did not succeed.

2. Their appeal, like all or virtually all in the SEND jurisdiction in the circumstances of the Covid-19 pandemic, had been conducted remotely. The appellants' case is that the hearing was conducted unfairly in the light of the fact that TC, B's mother and the first appellant, is deaf, as also is KC (no relation), the Inclusion Lead at the school B was attending, who performed a mixed function of witness and representative in the proceedings. TC is a teacher at the same school.

3. The appellants appeal with permission given by a FtT judge on 17 November 2020, who noted that

> "the panel's decision does not make any indication of how it adjusted its conduct of the hearing to accommodate [TC's special needs arising from her hearing impairment]. Nor does the decision comply with the Senior President of Tribunals' instruction that the parties [*sic* – this must be an error for "the judge"] must record that the parties were asked whether they had been able to participate effectively in the hearing. These points have the potential of supporting the allegations [that the fairness of the hearing was undermined]."

4. I held an oral hearing on 4 May 2021. Both parties were represented as set out above. Steps were taken to verify with TC that she had an adequate sight line to enable her to lipread and a short break was given when she needed to change the battery in her hearing aid.

5. At the hearing before me, the appellants sought to introduce further evidence, the admission of which was opposed by Mr Line. The items concerned were a hospital letter dated 11 April 2014 in relation to B; a letter dated 30.4.21 offering TC a medical appointment; a bundle of audiology reports and associated documents regarding KC and a copy of the EHC Needs Assessment of B which the respondent had carried out, annotated by TC. As will be seen, even were I to admit it, the appeal would fail, so a formal ruling on the admissibility and relevance of this evidence is not required. I was also provided with extracts from the Equal Treatment Bench Book, to the admission of which Mr Line had no objection.

The FtT hearing

6. At the heart of this case is the impact of such steps as were taken or not taken in the FtT hearing upon (in particular) TC. The Grounds of Appeal were accompanied by a witness statement by TC. There was no witness statement by KC, nor by BW, B's father and second appellant, who had attended the proceedings and fulfilled the function of a supporter, both of whom were sharing the same computer as TC in order to participate. The respondent provided statements by Mr Warley, its solicitor in the FtT proceedings, and by Dr Raman and Ms Sassienie, respectively Educational Psychologist and Principal Educational Psychologist of the respondent, who had taken part in proceedings as the respondent's witnesses. Statements were also invited (and received) from the judge and the panel member.

7. On the original appeal form to the FtT, TC had answered the question "Do you have any special needs?" by ticking the box for "Yes". The follow-up question "If Yes, please tell us about this in the box below" was answered "I am deaf. (I wear hearing aids and lip read)." The further question about whether a signer or interpreter was required was left unanswered. There is no suggestion that any further submission which might be thought to go to a potential need for adjustments was made before the hearing. Nor was any request made for the hearing to be conducted by alternative means, such as in person.

8. In relation to how the hearing was conducted, much was common ground or at least undisputed. I therefore set out my findings as to the events at the hearing, before moving to the relevant legal or quasi-legal framework and then to the parties' submissions as to what should follow.

9. TC's witness statement contains much that is subjective. I cannot and do not gainsay her unhappiness with the process or the genuineness of her concerns for her son. She gives evidence that there are additional points she would have wished to make but did not do so. A schedule of these was provided as part of Mr Thomas's skeleton argument and he also seeks to rely on the annotated EHC Needs Assessment (as to which see [5] above). What is apparent is that

> a. substantial parts of her unhappiness arose from matters unconnected with her hearing impairment but rather from a litigant in person's lack of familiarity

with how such proceedings are conducted and from the natural feelings of a parent about important and emotive matters; and

b. if she (and/or KC) were having difficulties to any material extent, their extent was not communicated to the FtT panel.

10. As to a., TC was "expecting the tribunal hearing to be much more like a round table meeting/discussion" but when the hearing began "it became clear that the LA was doing everything in its power to argue that [B] did not need an EHC plan". She states that she was "completely unfamiliar with many of the issues that we have faced during this very lengthy legal process". She records her concern for her son and her determination to fight for him to ensure his education is protected.

11. As to b., her only evidence is that KC told the FtT that she and TC are both deaf, wear hearing aids and that TC heavily relies on lip-reading and that they were doing their best. Those were matters of which the FtT was already aware and were addressed as set out below.

12. As to what objectively occurred at the hearing, I accept the evidence of the respondent's witnesses and that of the judge and panel member, which is all broadly consistent (and for the reasons above in many respects is not contradicted by TC's own evidence). The professional backgrounds of the respondent's witnesses will have trained them to be objective and Mr Warley as a solicitor has a duty to the court. I am particularly assisted by the measured evidence of the judge, in which he acknowledges that in the light of TC's account of her experience it would have been preferable to have double-checked that she was following, albeit there was no indication, explicit or implicit, that she was not.

13. I find the following facts:

a. The FtT was aware from the material in [7] that TC has a hearing impairment and lip reads. It did not ask questions about the extent of that impairment. There was (as noted in [7]) nothing indicating that special arrangements were required to facilitate TC's participation.

b. At the beginning of the hearing, the judge addressed KC's and TC's hearing difficulties to ensure they could participate effectively in the hearing. Both confirmed that if they had any difficulty hearing what was being said they would seek help from BW, seated beside them.

c. Near the beginning of the hearing, an issue arose with Mr Warley's participation by video link and his participation was then changed to being via audio link. No objection was made by any party to that mode of his participation and once he transferred, everyone confirmed they could hear him.

d. Subsequently the specialist member also had difficulties with her internet connectivity and briefly re-joined the hearing by telephone before re-establishing connectivity during the mid-morning break.

e. As well as that 15 minute break, there were other natural pauses which would have afforded an opportunity for the appellants or KC to say that their ability to participate was impaired but they did not.

f. Both TC and in particular KC were able to give evidence and/or make submissions, summarised by the FtT at paras 15 and 16 of its decision. In particular, KC "spoke at some length and with considerable passion", while TC became upset as she recounted her fears for the future concerning her son.

g. Beyond occasional instances of asking for a question to be repeated, at no point did either TC or KC say they had not heard what any other participant (including, without limitation, those participating by audio link only) had said or that there was any difficulty with their arrangement for BW to assist them.

h. Participants did not, in general, talk over one another. Once or twice a member of the FtT panel interrupted KC when she was failing to answer the question put to her.

i. The proceedings were not conducted in an adversarial manner. The tribunal panel asked questions in the usual way and were not reliant on adversarial interaction between the parties.

j. After the hearing had started, the FtT took no steps while it was under way to check that TC or and/or KC were able adequately to participate in proceedings. However there was nothing in the manner of KC's or TC's participation to suggest that their ability to do so was restricted by their hearing impairments.

k. At the end of the hearing the judge asked whether either party had anything further they wanted to contribute. None of TC, BW or KC indicated that they had anything more they wished to say.

l. The judge did not include a description of the hearing directly corresponding to what is set out in the Senior President of Tribunals' *Judges' and Members' Administrative Instruction No.2* (as to which, see [18] below.)

m. TC and KC did not dispute a statement made by the judge at the end of the hearing that despite the failure of Mr Warley's video link the parties had been able to follow proceedings.

n. There is no evidence that any complaint about TC's and KC's ability to participate in the hearing was made until after the FtT's decision was issued.

Legal and other material

14. The overriding objective, as set out in r.2 of the Rules of the HESC Chamber of the FtT, is as follows:

> "2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
> (b) co-operate with the Tribunal generally."

15. On 30 October 2008 the then Senior President of Tribunals issued a Practice Direction under the powers conferred by Tribunals, Courts and Enforcement Act 2007, s.23, entitled *First-tier and Upper Tribunal – Child, Vulnerable Adult and Sensitive Witnesses*. Para.6 provides that "the Tribunal must consider how to facilitate the giving of any evidence by a …vulnerable adult… ." Who is a "vulnerable adult" for this purpose is far from straightforward and was examined with care in *RT v Secretary of State for Work and Pensions (PIP)* [2019] UKUT 207 (AAC). For present purposes, it is sufficient to assume (without deciding) that, insofar as they were giving evidence, it applied to both KC and TC by reason of their hearing impairments.

16. Mr Thomas referred me to the passages from the *Equal Treatment Bench Book* set out below. (As I do not have a breakdown of chapters I have included pagination from the February 2021 edition, which it is not suggested has changed in material respects from the edition in force at the time of the FtT hearing).

> Page 5 para 2:
>
> "Although the Bench Book does not express the law, judges are encouraged to take its guidance into account wherever applicable. It is increasingly cited in judgments and by practitioners as to the approach to be adopted."
>
> Page 6, paras 8-11:

> "8. Effective communication underlies the entire legal process: ensuring that everyone involved understands and is understood. Otherwise the legal process will be impeded or derailed.
>
> 9. This is a particular challenge in the context of remote hearings and judges will need to be sensitive to the many barriers that can reduce effective engagement in a hearing.
>
> 10. Understanding means understanding the evidence, the materials, the process, the meaning of questions and the answers to them.
>
> 11. If someone remains silent it does not necessarily mean that they understand. It may equally well mean that they do not understand, that they are unable to understand, that they feel intimidated or inadequate, that they are too inarticulate to speak up, or that they are otherwise unable to communicate properly."
>
> Page 8 para 32:
>
> "It is for judges to ensure that all these[1] can participate fully in the proceedings."
>
> Page 96 para 9:
>
> "Each person with a disability must be assessed and treated by the judge or tribunal panel as an individual so that his or her specific needs can be considered and appropriate action taken."
>
> Page 413 (paragraph numbers not used):
>
> "Lipreading by the deaf person is very tiring and much of it is guesswork. As many words look similar on the lips, context is an important clue.
>
> Do not assume the person is following what is being said because they smile and nod. They may be being polite. Check understanding by asking the person to repeat back what has been said."

17. Mr Thomas also seeks to rely on *Coronavirus (COVID-19): Message from the Lord Chief Justice to judges in the Civil and Family Courts* (19 March 2020). The message notes that:

> "Unrepresented parties may have difficulty with telephone hearings. .. It is very unlikely that a telephone hearing would work if a litigant in person …has other needs or disabilities which would militate against telephone hearings… ."

18. Finally, it is necessary to mention the *"Judges' and Members' Administrative Instruction No.2*" issued by the Senior President of Tribunals. The document is undated but was published around the same time as the Lord Chief Justice's message (above). In a section headed "Remote Hearings" the then Senior President explains the need to evaluate the use of remote hearings during the period of the Covid pandemic, sets out a code system for recording which of the various methods of remote hearing was used and then continues:

> "In every determination or decision (no matter how short) every judge must include a description of the hearing in a form similar to this:
>
> > "This has been a remote/paper hearing on the papers which has been consented to/not objected to by the parties. The form of remote hearing was [insert the code and

[1] "These" refers back to "those at a particular disadvantage" (para 31) who "may "include "individuals with disabilities (physical, mental or sensory)".

> description from the list above]. A face to face hearing was not held because [insert e.g. it was not practicable and no-one requested the same or it was not practicable and all issues could be determined in a remote hearing/on paper]. The documents that I was referred to are in a bundle of [x] pages, the contents of which I have recorded. The order made is described at the end of these reasons. (The parties said this about the process: [add])"."

The appellants' submissions

19. Mr Thomas submits that there was unfairness in a number of ways:

a. Rule 2(2)(c) required the FtT to manage proceedings to ensure TC's full participation as far as practicable. (He goes on to refer to a requirement that her participation be "fully facilitated" but that is not the same and not what the rule says).

b. The hearing was effectively a telephone hearing as Mr Warley had to "dial in". TC could not effectively "hear" the respondent's representative; participants spoke over one another and left TC upset and frustrated. As such it exemplified the sort of problem to which the Lord Chief Justice's message had referred.

c. The FtT had not complied with the Senior President's instruction, as summarised by the FtT judge who had given permission to appeal: see [3] above.

d. The FtT judge accepts that he did not ask TC about the extent of her hearing impairment and that he should have played a more active role in ensuring that TC could participate. These failures, when set against the passages from the Equal Treatment Bench Book recorded above, indicate that the judge should have done more.

e. The FtT failed to consider whether TC's impairments triggered duties under the Practice Direction or, if it did consider the point, to say what it made of it. Mr Thomas relies on *AM (Afghanistan) v SSHD* [2017] EWCA Civ1123, where the Court of Appeal held (at [30]) that a failure to follow the Practice Direction "will most likely be a material error of law". He also relies on *RT*, where Judge Poynter indicated it was "good practice" to note how the tribunal facilitated the giving of evidence and on *JE v SSWP (PIP)* [2020] UKUT 16 (AAC), where it was held (at [17]) that the applicant's disabilities went to the heart of giving evidence and the failure to consider the Practice Direction was especially important.

f. TC was unable to challenge "key findings and submissions asserted by the local authority" as she did not hear them and that "moreover, the experience was so stressful and difficult for [TC] she was not in the "right frame of mind" to properly comprehend and respond to the submissions."

g. It is no answer that TC could have informed the FtT about the difficulties she was having. The compound effect of her disability and her inexperience

of such hearings meant that the duty fell on the FtT and the respondent to ensure she was fully participating, comprehending and responding.

h. A fair hearing would have made the following allowances/adjustments to enable TC to participate fully:

i.it would not have proceeded if TC could not lipread a key participant's mouth when they were speaking

ii. If the technological issues could not be addressed, the hearing would be adjourned

iii. The FtT would have gone out of its way to ensure TC was following, was able to understand and whether she had any questions by frequently checking in with her as the hearing progressed

iv. regular breaks would have been taken

v. A round-table format would have been adopted rather than an adversarial format

vi. Participants would have been advised not to speak over one another and to slow down

vii. Reasonable adjustments would have been made to facilitate TC's participation and would have been recorded, thereby complying with the Practice Direction and "focusing the FtT's mind as to whether reasonable adjustments had been made."

20. He submits that the unfairness was material for the following reasons.

a. Just because TC was able to make her key points forcefully did not mean that she had a fair opportunity to participate. Her disability and the "high stress environment" mean that "she did not appreciate the considerations foremost in the tribunal's consideration as well as the LA's case".

b. In particular, she would have disputed the FtT's conclusion that B was operating at an acceptable academic standard. When replying, Mr Thomas explained that Dr Raman's assessment had been carried out when B was in Year 4. Had she had the chance, TC would have adduced further evidence.

c. TC failed to understand that she could bring to the FtT's attention that a record of B's behaviour (the "CPOM") was not in evidence and struggled to know which points being raised by the LA were in contradiction of the CPOMs. It was not necessarily an answer to say, as did the FtT, that B's behaviour was sufficiently reflected in other evidence, without seeing the CPOMs themselves.

d. There was an issue as to whether B required 1:1 adult support. KC wanted to refer to evidence supporting such a need, but could not find it. (In replying, Mr Thomas explained that this was not in order to counter the assertion that it could lead to dependency, but to propose it as a way for addressing B's emotional breakdowns). There was then a break in the hearing. On resumption KC, who had meanwhile found the evidence, was not given an opportunity to refer to it and did not know how to do so.

e. There were various further points TC would have wished to make, as set out on the annotated EHC needs assessment.

f. All the above were relevant to whether B requires an EHC Plan.

g. The Upper Tribunal should be very cautious about second-guessing the merits of the decision if the additional points had been made: see *MM (unfairness: E and R) Sudan* [2014] UKUT 00105 (IAC) per McCloskey J at [15] and [16].

The respondent's submissions

21. In addition to objecting to the fresh evidence, Mr Line makes a number of other preliminary or overarching points.

a. He cautions against simply allowing litigants a "second bite of the cherry", observing that it is common for parties to wish that they had put their case differently.

b. There is no disagreement that proceedings have to be conducted in a fair way or that, where necessary and practicable, tribunals should make accommodations for disabled litigants.

c. However, the evidence suggests TC's claimed difficulties arose more from stress than from a reduced ability to participate in consequence of her disability.

d. The appellants' arguments about procedural unfairness do not reflect the reality of the proceedings, based on the weight of evidence about what occurred.

e. Evidence of the materiality of any breach there may be found to have been is limited and, if there was some "imperfection of approach", it had no impact on the overall outcome and was not material.

22. In my consideration of what the law requires, Mr Line refers me to the decision in *Rackham v NHS Professionals Ltd* UKEAT/0010/15/LA. At [50], giving the judgment of the tribunal, Longstaff J observed:

> "[W]e would emphasise the importance for those who have disabilities that they be given proper respect for their autonomy as human beings. In many cases, if not most, a person suffering from a disability will be the person best able to describe to a court or to others the effects of that disability on them and what might be done in a particular situation to alleviate it. This may not apply, of course, to those who are challenged in such a way that they may lack capacity or perhaps be very close to lacking it. However, there is no reason to think that the Claimant here was in that category at all. …We would comment that his autonomy and integrity as a human being would require his views to be properly respected. If therefore, as happened here, the Claimant were to agree, as he did, to adjustments proposed by the Respondent, when the Claimant had earlier made a request for very similar adjustments, we consider the Judge was entitled to regard his agreement as evidence that those adjustments were appropriate."

23. With regard the points at [19h] i-vii above, he submits that no adjournment was ever requested, although there were opportunities to do so. While the judge did not

check on TC's understanding throughout the hearing, he was monitoring and observing throughout, nothing occurred so as to cause alarm bells to ring and he correctly probed the matter at the beginning and afforded an opportunity to raise missed points at the end. A 15 minute break was allowed (and it is not suggested what having more breaks might have achieved). A round table format was at least as likely to hinder as to help in that it would have provided more opportunities for participants to speak over one another. The FtT would have advised participants not to speak over one another had it been a problem but to the limited extent that this occurred it was because the panel member needed to speak over KC to ask her to refocus her answer. Whilst the decision ought to have recorded the parties being asked about their participation in compliance with the Senior President's Administrative Instruction (and it would have made matters clearer if it had done so), sufficient was done to ensure the parties' participation.

24. As to the Practice Direction, even if it applies, a non-compliance has to be material for it to have any legal consequences. The FtT complied in substance with the key paragraph 6 and it is the substance that matters, not whether the FtT was aware of the Practice Direction. In most cases, applying the overriding objective will result in compliance. The judge asked the relevant question at the beginning concerning TC's and KC's hearing impairments, receiving the answer that BW was there to provide assistance. That was sufficient. In relation to where there is a failure to comply with the Practice Direction, the context of *AM v SSHD* was very different. The appellant was a child asylum seeker who hade experienced significant traumas growing up and was understood to experience some learning difficulties. Conclusions in the FtT had been reached based, at least in part, on his (poor) credibility. *RT v SSWP* indicates that many errors will not be material. The suggestion in that case that the tribunal's consideration of the issue be noted in the decision is one of good practice and accordingly not an absolute requirement. *AA and BA v A Local Authority* (SEN) [2021] UKUT 54 (AAC) indicates that the correct approach is to look at materiality and the Upper Tribunal is invited to follow a similar approach in the present case.

25. The Lord Chief Justice's message is of uncertain status but in any event has no binding effect in the tribunal jurisdictions. It is phrased in general terms and at best no more than persuasive.

26. In relation to the submission that the claimed breach(es) were material, he submits:

> a. the FtT's conclusion that B was operating at an acceptable academic level is a challenge to the FtT's conclusions of fact, which was firmly rooted in the evidence of the head teacher of B's school. Evidence to the contrary, even now, is scant.
>
> b. The FtT was aware that there were other reasons why TC wanted an EHC plan for B – see e.g. para 15 of the FtT's decision, referring to her fears that he might be excluded and that his needs would "simply not be a priority".

c. As to B's behaviour and the risk of exclusion, paras 8, 9, 15 and 16 of the FtT's decision record the evidence given and the submissions made: the point is a challenge to the FtT's conclusions of fact.

d. Although the mid-morning break had provided the opportunity to locate evidence to counter the proposition that 1:1 provision was not favoured by academic research, none was ever produced.

e. The decision not to adjourn to allow the CPOM documents, which had not been before the FtT, to be produced, was a legitimate case management decision. As it noted, the FtT was aware that there were behavioural issues for B from other evidence.

Analysis and conclusions

27. I accept – and it is not disputed – that the FtT was under a duty to conduct proceedings in a fair way, which in appropriate cases may extend to a duty to make accommodation for disabled litigants. As to when that duty may arise, and its scope, it is helpful to look at the materials set out above. Mr Thomas, however, goes too far in also submitting that the respondent was under a duty to ensure TC's full participation.

28. The duties under the overriding objective are to "ensure, so far as practicable, that the parties are able to participate fully in the proceedings". The "so far as practicable" qualification is important. What is "practicable" will often be specific to the circumstances of a particular case. What the tribunal can glean from parties about their ability to participate will often be very important. I respectfully agree with Longstaff J's remarks in *Rackham* regarding the need to respect individual autonomy. In the present case, TC says that "I always try to not let my deafness affect me…I don't like asking for help or to be treated differently from someone with perfect hearing." For the FtT to have gone against TC's indication that she would manage with help from BW, or that she had no objection to Mr Warley participating by telephone, would have been a considerable intrusion on her personal autonomy. This is not a case where there was any doubt about the capacity of TC to give such an indication: as noted, she works as a teacher in a London primary school.

29. Of course, any tribunal hearing is likely to be an unfamiliar experience for an individual taking part in it. A remote hearing may pose additional issues, such as those of connectivity which arose in the present case. It may be that a person who thinks at the outset that they can manage the hearing finds as it goes along that in fact they cannot. In those circumstances it is not generally unreasonable to expect those who find themselves in difficulty to say so at the time. That is particularly so in a case such as the present where the party clearly has capacity and was plainly able to address the FtT on matters of importance to her. If for some reason a person is unable to raise the issue at the time, their concern is liable to carry more weight if they raise it with the tribunal before the decision is issued rather than (as in the present case) only afterwards, when a negative decision has been received.

30. Was, nonetheless, the FtT required to do more than it did, in order to ensure a fair hearing? If – without deciding - one assumes, as seems likely, that TC and KC

are "vulnerable adults" for the purposes of the Practice Direction, the requirement was to consider how to facilitate the giving of evidence by them. The FtT did so, by raising the matter with them at the outset (see [13b]), obtaining an apparently satisfactory answer. It complied with the Practice Direction in substance, even if it failed to refer to it in terms. However, referring to it expressly is purely a matter of good practice (*RT)* and there is no suggestion in the authorities that a failure to do so in circumstances where the substance is complied with would amount to a material error of law. In *JE*, also relied upon by Mr Thomas, the nature of the appellant's difficulties was significantly different and in any event para. 17 of that decision is merely recording why I considered I could properly accept a concession by the respondent in the case.

31. The Lord Chief Justice's message is not addressed to judges in the FtT, its status is uncertain and its unsurprising note of caution in relation to telephone hearings is, as Mr Line submits, expressed in very general terms. However, the appellants agreed to go ahead with Mr Warley participating by audio link only, indicated they could hear him and did not subsequently indicate otherwise. As it would have appeared to the FtT, they were managing as they had said they would, and the acknowledged hearing impairment of TC was not such as to militate against (something akin to) a telephone hearing.

32. As to the Senior President's Administrative Instruction (slightly misquoted by the judge giving permission to appeal), on the face of it it is about assembling data to permit an evaluation of new working practices adopted at the start of the pandemic. It is, as it says, an "Administrative Instruction"; it is not statute, nor a practice direction. I have no doubt that it would have been useful expressly to have asked the parties about their perception of the process and to have recorded their answer. In the absence of such a record, it has become necessary to obtain further evidence about what occurred. Having obtained it, I am satisfied that the FtT (a) having asked about TC's and KC's ability to participate both generally and in relation to Mr Warley's participation by sound alone, obtaining satisfactory answers; (b) having failed to detect any indication that they were in any difficulty during the hearing and (c) having asked at the end if anyone had anything further to contribute, had done enough.

33. The Equal Treatment Bench Book provides valuable guidance across a wide range of topics. As it notes though, it does not express the law. The present case is not one where no account was taken of TC's disability. It is probably always possible to do more and, with the benefit of TC's evidence in this appeal about her subjective experience, the FtT judge acknowledges that he might have taken steps during the hearing to double-check that TC was following what was being said. I do not regard that as indicating an error of law on the part of the FtT. Soft skills are important in contributing to giving litigants as positive an experience as possible of the tribunal process, despite its relatively formal and sometimes stressful character and it is to the judge's credit that he is prepared to contemplate what he might additionally have done in that regard.

34. In the present case, there is very little objective evidence to suggest that the presentation of the appellants' case was materially impeded by TC's hearing impairment. Much of the evidence was already foreshadowed in documents. Mr Thomas's submission acknowledges that stress played a part in the difficulties TC

experienced. In a number of instances where things arguably went wrong from the appellant's point of view, it was for reasons which cannot be linked to TC's hearing impairment. If, during the mid-morning break, KC had found the evidence about 1:1 placements to which the appellants wished the FtT to refer, all they had to do was to speak up to say that the FtT had asked for it, it had now been found and to provide a reference. If they had considered it vital that the FtT saw the CPOMs, as the appellants would doubtless have received the bundle in advance they could have asked for them to be included. If the appellants wanted to make the points annotated on the EHC Needs Assessment (which had been annotated before the hearing) they could have submitted the document – or a typed-up version of the comments – in evidence, or could have made the points orally, if not before, then at the end of the hearing when the judge asked if they had anything to add. That they chose to focus on certain, strongly-held, key points to the exclusion of others was a decision in the admittedly difficult context for litigants in person of a tribunal hearing. That, having received the FtT's reasons for its decision, they wished they had argued it differently is an experience that will be shared by many litigants, whether or not they have a hearing impairment.

35. In conclusion therefore, I am satisfied that the FtT took steps that were sufficient in law with a view to ensuring a fair hearing. To the extent that TC and/or KC did experience difficulties during the hearing such as to contradict earlier indications given to the FtT that they would be able to manage, they were not communicated. To the extent that the appellants have concerns about specific aspects of the outcome, none have been demonstrated to arise from TC's hearing impairment and a significant element of their dissatisfaction is occasioned by their understandable and proper concern for their son's well-being and the lack of familiarity with the process as litigants in person. No material unfairness occurred and accordingly the appeal fails.

36. I take the opportunity to express my regret that it has not been possible to issue this decision any sooner and to apologise to the parties for any inconvenience which that may have caused.

C.G.Ward
Judge of the Upper Tribunal
Signed on the original 9 August 2021