IN THE UPPER TRIBUNAL **Appeal No. HS/1669/2020**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (HESC Chamber)

Between:

AA and BA

Applicants

- v –

A Local Authority

Respondent

Before: Upper Tribunal Judge Ward

Hearing date: 22 February 2021

Representation:
Applicants: Mr John Friel
Respondent: Mr Jack Anderson

NOTICE OF DETERMINATION OF GROUNDS 1 AND 2 OF APPLICATION FOR PERMISSION TO APPEAL

Of its own motion, the Upper Tribunal orders, pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, that it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the child who is the subject of these proceedings. This order does not apply to: (a) the child's parents; (b) any person to whom the child's parents discloses such a matter or who learns of it through publication by the parents, for reasons bona fide aimed at promoting the child's best interests; or (c) any person exercising statutory (including judicial) functions in relation to the child where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

The case is to be cited as AA and BA v A local authority.

I refuse permission to appeal on Grounds 1 and 2.

I direct that because of its wider importance, a copy of this ruling on permission to appeal, which has been anonymised, is to be placed on the Chamber's website. The remaining Grounds, which have no importance beyond the parties, will be dealt with in a separate ruling, which will not be on the website.

An additional copy of this ruling is to be provided to the applicants, in 18 point font. Some reformatting has been required.

REASONS FOR DECISION

1. AA is severely sight impaired; BA is sight impaired. Along with other grounds, they submit that the proceedings of the First-tier Tribunal ("FtT") hearing their appeal in respect of their son's Education Health and Care plan, which because of the Covid-19 pandemic were conducted using the Kinly online platform, were unfair in view of their visual difficulties.[1] Intending no disrespect, but in the interests of anonymisation, I refer to their son as "C". He, too, has a visual impairment.

2. With the growth in online hearings, the case is thus potentially of some topical and practical importance. It is not the only case before the Upper Tribunal where people with various forms of sensory impairment assert they had difficulty with an online hearing in the FtT. For that reason and because the Senior President's Practice Direction (see below) is not something which is encountered very often in the proceedings of the FtT (Health, Education and Social Care Chamber) in its special educational needs jurisdiction and perhaps requires a higher profile, I have drafted this as a stand-alone ruling and, though it is only a ruling on permission to appeal, am directing that it be placed on this Chamber's website.

3. In view of its significance, I directed an oral hearing of the application. Mr Friel appeared for the applicants and Mr Anderson for the respondents, as they had done below. The hearing was held in person at Field House, London EC4 on 22 February 2021.

4. As it had not previously figured in the proceedings at any stage, I raised with counsel shortly before the hearing the possible applicability of the Practice Direction dated 30 October 2008 by the Senior President of Tribunals entitled "*First tier and Upper Tribunal- Child, Vulnerable Adult and Sensitive Witnesses"* and referred them to a number of authorities concerning its implications, namely *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123, *RT v Secretary of State for Work and Pensions (PIP)* [2019] UKUT 207 (AAC); [2020] AACR 4 and *JE v SSWP (PIP)* [2020] UKUT 17 (AAC).

5. In view of the ground challenging the fairness of the proceedings and the evidence filed on behalf of the applicants, I had invited the comments of the FtT judge and requested his notes; both were provided.

6. The status of the Practice Direction, approach to interpreting it and the basis for determining who falls within its scope are examined with a degree of detail in *RT v SSWP* which need not be repeated here. While Mr Anderson had not had the opportunity in the short time after I had raised the Practice Direction to take instructions, he agreed that for the purposes of the hearing it should be assumed that the applicants fall within its scope as being "vulnerable adults", most probably via

[1] Among their other grounds was a claim that the FTT had failed to comply with the public sector equality duty under s.149 of the Equality Act 2010. That was struck out, without opposition from the applicants' lawyers, for lack of jurisdiction: see *TS and EK v SSWP* [2020] UKUT 284(AAC).

s.59(1)(h) of the Safeguarding Vulnerable Groups Act 2006, as originally enacted, as each being an adult who "receives any service or participates in any activity provided specifically for persons who fall within subsection (9)". A person falls within subsection (9) inter alia if "he has any form of disability".

7. The relevant paragraph of the Practice Direction states:

> "6. The Tribunal must consider how to facilitate the giving of any evidence by a …vulnerable adult… ."

It is not in dispute that the applicants did gave evidence in the course of the FtT proceedings.

8. *AM* concerned a young man from Afghanistan seeking asylum. He was said to have mental health and psychological difficulties and moderate learning difficulties. The latter two were evidenced in the FtT by an expert's psychological report which indicated that on their account AM should not give oral evidence but that if he did, a variety of special arrangements were recommended. AM was represented in the FtT proceedings, though details of that representation are not stated. The FtT made scant reference to the psychologist's report, appears not to have implemented any special arrangements, and concluded that AM was a willing witness and able to answer questions without apparent difficulty. The FtT found against AM, noting a number of features of his evidence which counted against him. The Upper Tribunal, again without addressing the psychologist's report, dismissed the appeal.

9. The Senior President of Tribunals ("SPT"), with whom the other Lords Justices agreed on the issue, drew attention to the various Rules, Practice Directions and Guidance that were in existence, reference to which would in his view have forestalled the problem. In relation to the Rules, it is sufficient to note his reference to r.2(2)(c) which led him to observe (at [27]) that

> "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… ."

10. As regards the Practice Direction, he said:

> "To assist parties and tribunals a Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses', was issued by the Senior President, Sir Robert Carnwath, with the agreement of the Lord Chancellor on 30 October 2008. [He then referred to guidance specific to the immigration and asylum chamber]. The directions and guidance contained in them are to be followed and for the convenience of practitioners, they are annexed to this judgment. Failure to follow them will most likely be a material error of law."

11. He indicated (at [32]) that:

> "Appellant's representatives should draw the tribunal's attention to the PD and Guidance and should make submissions about the appropriate directions and measures to be considered… ."

12. In *RT v SSWP*, the representative of RT, who is autistic, had protested at the end of the hearing in the FtT about the manner in which questioning had been conducted and indicated that it might become a ground of appeal. Upper Tribunal Judge Poynter concluded (at [102]) that he was bound following *AM* to hold that a failure to follow the Practice Direction would amount to an error of law, but drew attention in the course of his analysis to how not every such failure would amount to a material error of law, particularly given the very wide breadth of those who fall within the definition of "vulnerable adult". It does appear that at [28] and again at [83] Judge Poynter omitted the word "material" when quoting from the SPT's words set out at [10] above. Nonetheless, the Court of Appeal, by including the words "most likely" in relation to whether a material error of law would arise, was clearly envisaging scrutiny in any individual case of whether any error was material.

13. In relation to proceedings in the Social Entitlement Chamber, where an extremely high proportion of appellants are a "vulnerable adult", Judge Poynter observed:

> "88. In circumstances where it can be said that considering in advance how to facilitate the giving of evidence by a vulnerable adult would have made no difference to the way in which the Tribunal in fact conducted the hearing, it is unlikely that the First-tier Tribunal will be held to have made a *material* error of law, even if it has erred by failing to follow the Practice Direction.
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> 89. However, whether or not a failure to follow the Practice Direction is material falls to be decided on the facts of each individual case. The First-tier Tribunal would therefore be well-advised to adopt the practice of considering—as part of the its preview of each appeal—whether special arrangements need to be adopted to facilitate the giving of evidence.
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> 90. Such arrangements might perhaps be no more than deciding that what would normally be regarded as an acceptable robust style of questioning was not appropriate in an individual case.
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> 91. In circumstances where special arrangements have been put in place—or where there might be doubt as to whether they should have been—it would be wise for the tribunal to record briefly in its record of proceedings that the Practice Direction had been considered. A single sentence should suffice. If a written statement of reasons is requested in such a case, the statement must then explain what the tribunal decided about the requirements of the Practice Direction and why. "

14. In the present case, there were two days of hearings, both conducted using the Kinly CVP platform, on 15 July and 13 August 2020. On 8 July the applicants' solicitors had emailed the FtT saying:

> "We would also be grateful if you could remind the Tribunal Panel that parents, Mr and Mrs …, are visually impaired. This means that they

> may not see everything and everyone on screen and will need a little more time and patience to participate in the hearing. Please can you ask the Panel to make reasonable adjustments."

15. The evidence of the judge is that he has no record that this email was forwarded to the panel. The hearing on 15 July proceeded, with counsel, the applicants' witnesses and the applicants all in different physical locations. There is no suggestion that any reference was made during that day by anyone to the applicants experiencing difficulties in participating in proceedings because of their visual impairment.

16. At some point thereafter, the applicants raised with one of their witnesses their difficulties in dealing with the video hearing, such as not being able to pick up on nuances and the "non-verbals". This was referred on to the solicitors, who on 6 August 2020 emailed the FtT again, in the following terms:

> "Both Mr and Mrs … are **visually impaired** and are politely requesting that the **reasonable adjustments** listed below be made if at all possible, for the Hearing on 13-08-2020, based upon their experiences at an earlier Hearing on 15-07-2020. I would be extremely grateful if you could ensure that the Tribunal Panel are fully briefed, as follows:
>
> Reasonable Adjustments:
>
> ●If necessary, for them to be provided with **extra time to find and access documents** referred to.
> ●For **people to state who they are, before speaking**.
> ●For **people to be clear when addressing them, asking them for comment**. Our clients can find it difficult to know when to come in, when they can't see the people on-screen."
>
> Thank you very much for your understanding."

The emboldened text is in the original.

17. The evidence of AA is that Mr Friel referred to the second email at the start of Day 2 and asked for those reasonable adjustments. There is no suggestion that Mr Friel made any submission that proceedings on the first day were vitiated by the difficulties the applicants claimed to have experienced. The evidence also asserts that either in the late morning or at lunch break Mr Friel again raised the need for reasonable adjustments, saying that there were times when the parents were unable to participate properly and follow. AA's evidence indicates that while one member of the panel did make the adjustments sought, the other two did not.

18. Written submissions were made after Day 2. In the course of a lengthy submission ranging over 43 pages, no reference was made to any consequences in relation to the evidence the FtT was being invited to consider of the difficulties now asserted to have been experienced by the applicants, nor is there any indication before me of what they would have said had their ability to participate and follow not been impaired as claimed.

19. The judge's notes are (he will not mind my saying) not the easiest to read. Neither counsel suggests that there is any record anywhere in the notes of any submission relating to reasonable adjustments nor of any expression of difficulty in participating on the part of the applicants, nor can I find any. A number of breaks in proceedings are recorded. There are a good number of places where one or other of the applicants is recorded as giving evidence or otherwise participating.

20. In his response to the Upper Tribunal's enquiry, the judge indicates, inter alia:

a. he has no record that the panel was aware of the email of 8.7.20;
b. the email of 6.8.20 was circulated on that day;
c. the panel were at all times aware of the parents' vision difficulties; Both provided evidence and comments and were "active participants";
d. he has no record nor recalls requests "for a pause or further time on the day";
e. he cannot recall unanswered questions addressed to the parents;
f. on the video platform, the party speaking comes to the fore of the screen;
g. the parties were represented and the representatives "were able to respond to their clients and to some extent control the pace of the hearing";
h. the applicants appeared to be in their own home, with familiar equipment;
i. he is not in a position to comment on arrangements and communication between the applicants, their solicitor and counsel;
j. while different modes of hearing may have different advantages and disadvantages, he "on completion had no reason to doubt that a full and fair hearing had taken place in which both parties were able to present evidence and make their points."

21. The FtT addressed the applicants' evidence at [31] and [32], noting that:

> "31. [AA and BA] are caring and supportive parents. [C] is clearly at the centre of their focus. They are however also parents with relevant professional experience. This has informed their conclusions about what they feel would be best for [C]. Their parental aspirations are difficult to separate from objective evidence of the alternatives proposed." [The FtT set out particulars of options explored by the parents and on the independent school which "has now become the focus of their appeal".] "Many of their submissions relate to the alternative VI approaches in the adjacent counties and the fact that [the respondent] maintains a VI resource. Mr Friel's closing submissions includes [the applicants'] refusal to accept an adverse determination by the Tribunal stating that [C] will not go to [the respondent's proposed school] and/or they will move home.
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> 32. This single-minded approach to the appeal gives rise to reservations about [the parents'] factual evidence including the severity and depth of [their son's] anxieties."

22. The Practice Direction is specifically about the giving of evidence, not about participation in the proceedings more generally. There is certainly no record that the FtT "consider[ed] how to facilitate the giving of any evidence by a…vulnerable

adult…" as recommended by Judge Poynter. On the other hand, it would be odd if the FtT, having received the email of 6 August, had not considered the matter; it is said that Mr Friel reminded them of its contents and the evidence is that on Day 2, one of the panel members, though not the other two, made the requested changes in behaviour. The evidence, even if taken at its most favourable to the parents, suggests not that the email was not considered, but that two members of the panel were insufficiently assiduous, or insufficiently skilled, at implementing it. Whether or not there was a failure to follow the Practice Direction by not "considering" it, considering it but not adequately implementing what was needed would certainly be capable of going to whether there was a fair hearing and the requirements of the overriding objective and in particular rule 2(2)(c).

23. But however one gets there, it comes back to materiality. Mr Anderson is correct to say that it has never been suggested what difference to the evidence the submitted shortcomings may have made. I note that to the extent that the FtT attributed reduced weight to the parents' evidence it did so not on the basis of anything that was said to be lacking from it, nor on their manner when giving evidence, but on what flowed from undisputed facts and on their position as stated by Mr Friel in his post-hearing submission (see [21] above).

24. This is not a case where the solicitors failed in the duty highlighted in both *AM* and *RT* to draw relevant matters to the FtT's attention. Save that they might usefully have referred additionally to the Practice Direction, their emails were clear and in point. But though it is said that the parents had difficulty in Day 1, no attempt was made to submit that that day's hearing had been vitiated before Day 2 was commenced, so one can only conclude that the fairness of Day 1 was not considered to have been fundamentally impugned. Indeed, if it had been, I consider, notwithstanding the claimed difficulties in doing so asserted by AA in his evidence, which I find unconvincing on that aspect, the applicants would have contacted their solicitors during Day 1 at one of the breaks.

25. The position on Day 2 was at least better than that on Day 1 inasmuch as on AA's evidence, at any rate one member of the panel was doing what had been requested in the 6 August email.

26. I also consider that if the fairness of the hearing had been fundamentally impugned as a result of the manner in which the proceedings had been conducted, the point would have been raised in the course of the very careful 43 page review of the issues and evidence submitted by Mr Friel after the hearing.

27. Participation may very possibly have become somewhat more onerous for the applicants as a result of the failure adequately to implement the solicitors' requests. That would be not inconsistent with the response from the experienced judge, as summarised at [19]. Such a thing would of course be regrettable and something which a tribunal adequately mindful of the issue would seek to avoid. Merely because participation in the proceedings has become somewhat more onerous does not however, of itself, mean that the hearing was unfair so as to make it unlawful.

28. I therefore conclude that it is not arguable, with a realistic prospect of success, that the hearing was unfair. If there was any such unfairness, it made no material

difference. I do not accept Mr Friel's submission that, at permission stage, it is for the respondent to show that an error would have made no difference; the test of what is arguable with a realistic prospect of success, which is for the applicants to show, is sufficient to require them to show enough to get the case off the ground, including as to materiality. In this case there is nothing to enable me to conclude that the outcome might realistically have been any different, even if the extent of the FtT's shortcomings in dealing with the applicants' visual impairment was, contrary to my view, such as to render the proceedings unfair.

29. The same matters were relied upon by the applicants as constituting apparent bias. For the reasons above, I consider that an objective bystander would conclude that while the FtT's implementation of the requests made by the solicitors may have been less than optimum, the effect may have been to make participation somewhat more burdensome for the applicants but is not indicative of any real possibility that the panel unfairly viewed them with disfavour. Insofar as the Ground is also based on the FtT's view of the applicants' evidence, that view was open to it on the material the FtT had. The fact that it reached, in measured terms, a particular view of the applicants' approach to the appeal would not give rise to any real possibility of bias in the mind of an objective bystander.

30. It is of course possible to give permission to appeal even where there is not an error of law which is arguable with a realistic prospect of success if there is sufficient reason to do so. Promoting consideration of the needs of those with sensory impairments when online hearings are in contemplation and of awareness of the Practice Direction is important but is sufficiently achieved by the route adopted, without putting the parties to the worry and expense of an appeal where, so far as Grounds 1 and 2 are concerned, the outcome is in my view clear.

C.G.Ward
Judge of the Upper Tribunal
Authorised for issue on 2 March 2021