

Guidance from the Upper Tribunal about vulnerable witness participation (AA and BA v A Local Authority)

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Local Government analysis: The Upper Tribunal (UT) highlighted the importance, in First-tier Tribunal (FTT) (Health, Education and Social Care Chamber (HESCC)) cases, of applying the Practice Direction (PD) (dated 30 October 2008) by the senior president of Tribunals, entitled 'First tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses'. A failure to follow such guidance would, however, have to make a material difference to the fairness of the proceedings to amount to an error of law. Written by Hannah Lynch, barrister, at St Pauls Chambers.

AA and BA v A Local Authority (SEN) [\[2021\] UKUT 54 \(AAC\)](#) (2 March 2021)

What are the practical implications of this case?

Tribunals should take care to follow the PD, which relates to the giving of evidence by (among others) vulnerable adult and sensitive witnesses. This is likely to impact on the case management arrangements for FTT cases, although UT Judge Ward made clear that the necessary steps to comply with the PD would not, in many cases, be particularly onerous. Representatives, parties and tribunals will need to consider whether any of the proposed witnesses in a particular case falls under the ambit of the PD (for example, where a parent is a vulnerable witness by virtue of his/her own disability) and make directions to facilitate the witness giving his/her evidence, such as to ensure that the hearing is fair.

At a time when the majority of FTT HESCC cases are dealt with via video hearing, due to the pandemic, it is perhaps particularly important for tribunal panels, solicitors and advocates to be mindful of the PD and of making arrangements, in advance of the day of the hearing where necessary, to avoid unfairness to vulnerable witnesses when giving evidence.

What was the background?

AA and BA, who both had visual impairments (of differing degrees of severity), appealed to the FTT in respect of the Education, Health and Care Plan prepared for their son, the claimant, by the respondent local authority. AA and BA appealed against the FTT's decision on various grounds. Two of those grounds related to alleged unfairness/apparent bias in the manner the tribunal managed the hearing. The allegation was that the panel had failed to follow guidance provided by the applicant's solicitors, as to the measures necessary to ensure that AA and BA were able to fully participate in the remote video hearing, despite their respective visual impairments. It was argued, on behalf of AA and BA, that failure to follow the PD/requested steps provided by the parents' instructing solicitor, amounted to a material error of law, such that permission to appeal should be granted. UT Ward J drew the advocates' attention, at the beginning of the oral permission hearing, to the PD; and considered how it should be applied to FTT HESCC proceedings, applying the authorities concerning its implications.

What did the court decide?

The court held that:

- the relevant sentence of the PD states that ‘the Tribunal must consider how to facilitate the giving of any evidence by a[...]vulnerable adult[...]’ (para [7])
- failure to follow the guidance in the PD was likely to amount to a material error of law. 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. *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123 applied (paras [10] and [11])
- however, per *RT v Secretary of State for Work and Pensions* [2019] UKUT 207 (AAC), not every failure to follow the guidance will amount to a material error of law. Scrutiny would be required, in every case, as to whether any error was material (para [12]). In this case, the applicants’ representative had not raised issues of apparent unfairness with the FTT panel during the hearing (although the applicants’ representative had drawn the tribunal’s attention, at the beginning of day two) to guidance provided by the applicants’ solicitors), nor in applicants’ representative written closing submissions (para [26])
- the fact that participation in the proceedings has become somewhat more onerous does not, of itself, mean that the hearing was so unfair as to make it unlawful. The applicants had never suggested what difference to the evidence the submitted shortcomings by the panel might have made. It was not arguable, with a realistic prospect of success, that the hearing was unfair. If there was any such unfairness, it made no material difference (paras [23], [27] and [28])

Case details:

- Court: UT (Administrative Appeals Chamber)
- Judge: UT Ward J
- Date of judgment: 2 March 2021

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