Appellants in the First Tier Tribunal, Special Educational Needs & Disability Tribunal and Witnesses with Disabilities

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Introduction

Very recently, two cases involving disabled appellants have arisen, both dealt with by Judge Ward of the Upper Tribunal involving the Health Education & Social Care Chamber (Sendist) and the Social Entitlement Chamber. There is another UT case pending.

The issues that arose was how to deal with disabled adults or disabled young persons who give evidence either as Appellants or where the young person is giving evidence in their own case, although the parent is conducting the appeal on their behalf, or the parent is the Appellant.

It has been overlooked that the Practice Direction for the First Tier and Upper Tribunal on child, vulnerable adult and sensitive witnesses given by Lord Carnwarth, 30th October 2008, applies particularly in the Special Educational Needs & Disability Tribunal. The Practice Direction applies to a person who has not attained the age of 18, or to a vulnerable adult, which has the same meaning as in the Safeguarding Vulnerable Groups Act 2006, which in essences means an adult with a disability, although that is a technical definition. The guidance applies also to a sensitive witness which means an adult witness where the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with giving evidence in the case.

The Practice Direction essentially points out the 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 in doing so. The Tribunal is required to have regard to all relevant information. A vulnerable adult is a person who falls within subsection 9 of the 2006 Acts. Subsection 9 defines a vulnerable adult effectively as any person with a disability.

In practical terms, this affects Appellants to the Tribunal first of all who are visually impaired. The recent case of AA and BA v A Local Authority HS/16692020, now as I understand on the Upper Tribunal website, involved two parents, one of whom was effectively completely blind and one of whom was severely sight impaired. However, the Upper Tribunal also has a case pending where the parents are hearing impaired, and in that case allege that the online hearing did not allow them to access the hearing properly because they were hearing impaired. In the case, Appellants AA and BA stated that they could not follow the hearing and therefore it was unfair.

However, plainly, if a young person has either visual impairment or hearing impairment, and whether or not they are the Appellant or are wanted to give evidence in the case, they would fall into the category of vulnerable adults. While I take the view that even severe dyslexia is unlikely to qualify, but for example, most certainly somebody with an Autistic Spectrum Disorder who cannot access for example an online hearing or would find it difficult to attend a live hearing because of the presence of other people, would fall within this category. Current experience shows that a number of persons with Autism may not be able to access online hearings for varying reasons. Obviously others with Autism cannot access normal live hearings because of their Autism. There plainly will be other disabilities which are rare and not so easy to list which affect somebody who can give evidence and has the capacity to do so, whether as an Appellant or as a witness in the Sendist.

The line of cases are recent. They commence with the Court of Appeal judgment in the case of AM (Afghanistan) Appellant and the Secretary of State for the Home Department, Respondent & Others [2017] EMCA Civ. 1123 lending judgment Sir Ernest Ryder, Senior President.

The case concerned a young man from Afghanistan seeking asylum. He had mental health and psychological difficulties and moderate learning difficulties. There was expert evidence before the First Tier Tribunal to support his claim for disability, a psychological report that indicated that in the psychologist's professional view, AM should not give evidence, but if it he did there was a variety of special arrangements needed to be made. AM was represented in the proceedings, although it is not clear what the representation actually constituted. The Tribunal made little reference to the Psychologist's report and appeared not to have implemented any special arrangements for him to give evidence.

The Tribunal concluded that he was a willing witness and able to answer questions without apparent difficulty and found against him. The Upper Tribunal dismissed the appeal without addressing the Psychologist's report.

The Court of Appeal unanimously drew attention to the Practice Direction, and in relation to the Immigration Tribunal rules which are effectively for this purpose, the same as the practice rules for the Special Educational Needs & Disability Tribunal, see regulation 2 in particular, cited the rule which required the Tribunal *and the parties are required as far as practical to ensure that the Appellant is able to participate fully in the proceedings.* The Court of Appeal applied the Practice Direction and allowed the appeal. In the judgment, the Court of Appeal at paragraph 37 did sound a note of caution. That is because other jurisdictions had developed what they termed as *"more sophisticated protections for incapacitated of vulnerable persons, for example, the Court of Protection, in crime and in the Family Courts. For example, the Judges of the Family Division and the Family Court have discouraged the use of experts to provide a veracity assessment (i.e. as to the reliability and credibility) on the grounds that the ultimate issue is one for the Judge and in practice, assessments add little if any value*…" The Court of Appeal's reasoning, particularly paragraphs 21 to 23 was in essence that, "*That said, the principles were not applied properly or at all in determination of this Appellant's claim for asylum either by the FTT or the UT*".

The issue of treatment of vulnerable witnesses then came before Upper Tribunal Judge Poynter, who in an extensive judgment which also considered the legislation in detail. That was in the case of RT v Secretary of State for Work & Pension [2019] UK UT 207 (AAC). Judge Poynter stated he was bound to follow the case of AM, but pointed out that not every failure to apply the Practice Direction would result in an unfair hearing and the matter being set aside. At paragraph 89 he stated, "*However, whether or not a failure to following the Practice Direction is material falls to be decided in the fact of each individual case. The First-Tier Tribunal would therefore be well-advised to adopt the practice in considering – as part of its preview of each appeal - whether special arrangements need to be adopted to facilitate the giving of evidence…Such arrangements might be no more than deciding what would be normally regarded as an acceptable, robust style of questioning was not appropriate in an individual case*".

Judge Poynter at paragraph pointed out at Paragraphs 92 to 94 that the Practice Direction had implications for representatives. Under the Procedure Rules for the Social Entitlement Chamber rules, the parties were under a duty as they are in the Sendist to help the First Tier

Tribunal further the overriding objective and to cooperate with the Tribunal generally. Judge Poynter advised in paragraph 94 that:-

Representatives who consider the Practice Direction applied should write to the Tribunal at the earliest opportunity and request the necessary directions.

Such a request should give details of the specific arrangements that are considered desirable.

They need to be realistic about the sort of arrangements that the Tribunal can make.

Judge Ward then followed that decision in JE v SSWP (PIP) [2020] UKUT 17 (AAC). In that case the appeal was supported by a Respondent on the basis the First Tier Tribunal erred in law by failing to consider whether the Appellant's impairments triggered the duties under the Practice Direction.

The Appellant's appeal was based on a mobility issue. The evidence pointed out that he had developed a recurrent colloid cyst which is a form of brain tumour which had been partly removed in 2005.

A 2007 neurological report indicated that he has suffered a severe cognitive impairment and brain damage and gave details of the brain damage. There were further operations and the cyst was finally removed in January 2017, but the operation was not expected to improve his memory problems or fatigue or cognitive issues.

In paragraph 11, Judge Ward points out that the Tribunal below seems to have accepted all the medical reports. The central issue in the appeal was there was no evidence to indicate that the Tribunal gave consideration how to support the Claimants giving evidence, and that particular failure constituted a material error of law and was unfair. Judge Ward set aside a decision as a result.

In AA and BA v A Local Authority, Appeal Number HS/1669/2020, the Appellants as already indicated were either severely sight impaired, a category that covers somebody who is effectively blind or is blind as well as with very inhibited vision. BA was basically effectively blind and A had severe sight impairment. The Tribunal was informed by letter before Day 1 of the hearing that they needed time to process information, time to see and time to understand who was talking or giving evidence. The letter was lost by the Tribunal. The

appeal to the Upper Tribunal was originally made on the basis that the whole chapter of maladministration, and failures amounted to apparent bias. Judge Ward drew attention to the recent cases outlined above and asked to be addressed on the issue of fairness and the practice direction. The apparent bias part of the Tribunal obviously raised the issue of procedural unfairness as well.

The facts in brief were that on the 8th July 2020, the Tribunal was informed by letter of the concessions sought for a video hearing. The Upper Tribunal asked the Judge who was Judge Bennett, for his view. The hearing proceeded on the 15th July, and what actually happened which doesn't emerge from the judgment, is that as everybody was in different places as it was a video hearing, the parent Appellants considered that the Tribunal knew about their request for support and concessions, and had ruled against or ignored it. The situation actually was that the Tribunal never for some reason due to an error had sight of the original letter, on 15/07/2020.

Before day two, an email was sent repeating the request. Judge Ward deals with those events at paragraph17, page 10 of the UTT decision. However, as he points out, the evidence (from the parents) was that the matter was raised before the Tribunal at the beginning and on Day 2 and during the day so that the parents stated that they were unable to properly participate and follow the evidence. One member did make adjustments, the other two did not.

The Judge's notes sent to Judge Ward raised no record of any issue raised on Day 2 or whether the Judge indicated that the second letter had been received to the parties. At paragraph 20, the Judge's account is set out in the judgement. Judge Ward obviously went quite near considering that the Tribunal did fail to follow the Practice Direction on day two but ultimately decided that it made no difference to the case and that they fully participated.

The Appellants case was that having been raised at the hearing on day two twice, the failure was not raised in the final written submissions, although case law indicates that once it's raised, that is sufficient.

Judge Ward ultimately decided not to give permission on this issue as it did not materially affect the decision. It is worth pointing out firstly that on the second day, the evidence was on behalf of the parents different to Judge Bennett namely that the Tribunal Judge denied having received the letter sent for the second hearing. It was then brought to his attention. In his note to the Upper Tribunal, the Tribunal Judge stated he had received it. He also

stated he had no record of the issue being raised before him on the second day, although it is right that Judge Ward points out that his records are very poor indeed.

It is however clear from the decision of Judge Ward that some disabled Appellants who will inevitably as parents or the young person appellant give evidence, constitute vulnerable witnesses. It is also clear that in those circumstances where the Appellants are going to give evidence which they will as parents, that the Tribunal should be asked for adjustments. I would make the following suggestions:-

i. Having dealt with oddly enough a couple of VI cases during the current arrangements due to lockdown, my advice is that unless the client insists, a video hearing is completely inappropriate. This is despite the Tribunal contending it has grave problems with live hearings.

ii. In many cases which involve a major clash of evidence, video hearings are in any way inappropriate. A bad witness looks much better in a video hearing, a good witness looks good but not as effective, whereas a bad witness will often come out as absolutely awful live. Those are factors to be considered generally but apply very clearly in cases where clients have a disability.

iii. In visual impairment hearing impairment cases, very careful consideration should be given to whether a video hearing is appropriate. The screens are small and it is often difficult to follow and technology often breaks down.

iv. In the case of parents with ASD, a video hearing may not be at all appropriate because they can't access it, and accessing by telephone is one possibility but for a full hearing it does actually handicap the person giving evidence by telephone. Again I would strongly advise a live hearing is requested.

v. Some live hearings are now available, although the Tribunal obviously doesn't like doing it, it is now able to do it. At the first lockdown period it might be said that it couldn't, although now that we know about the guidance in vulnerable witnesses, it is highly likely that Judicial Review against the Tribunal if it refused any hearings other than online would be successful.

vi. Witnesses who are vulnerable such as ones with hearing impairment, Autism which affects their ability to give evidence or hearing impairment, or visual impairment cases or

other complex and rare disabilities, will normally be a young person who is able to give evidence whether over 16 or 18 or younger, that situation plainly calls for the implementation of a Practice Direction.

What this actually therefore means in such cases, is that the Tribunal needs to be informed, the Practice Direction quoted as well as Judge Ward's two decisions together with the decision of Judge Poynter and the Court of Appeal. Sensible suggestions for adjustments need to be made and discussion should take place with the client/clients if they are the Appellant, before the application.

The second visual impairment case I dealt with involved a mother who I have acted for before, and whose visual impairment was much milder. She had a daughter with vision impairment. The case was about the daughter who was visually impaired. We at a CMC raised with Judge Dow the issue of proper support for her giving evidence. Throughout what constituted two linked cases, the third case was settled, Judge Dow dealt with the case in my view quite brilliantly and ensured participation. However, in the case of AA and BA, even with Judge Dow hearing the case, I consider that from what I now know about AA means that a video hearing would never have been appropriate. It only became apparent in discussions before the UT hearing in front of Judge Ward that in fact AA could not actually see the screen at all. It was his wife who was able to at least see such a screen and try to follow. The lesson to be learnt there also is that very competent clients, and both of these Appellants held down very good jobs and were able, may not fully explain the extent to which their disability stands in their way, particularly if they have been able to make progress in life and do well despite their disability.

The current line of cases in my view therefore is something that all advocates need to be aware of in this jurisdiction. The situation is that the First Tier Tribunal needs to be informed and Directions sought well in advance of any hearing, or an adjournment may have to be sought and there is then the risks of facing an application for costs for not raising the matter early enough. As always, advance preparation and proper preparation is essential.

Possibly, one ought to point out that had one been able to meet both parents face to face, and not run a case on video consultations or telephone consultations, it may have been possible to understand the extent of their disability. This is not normally the practise to meet face to face in every case, only some cases. Normally because of the way in which cases work, one is dependent on the particular client or clients explaining the matter and the extent of their disability to their representatives. What I think we need to be aware of is that it

places a greater duty on the representatives to ask questions about how functional disabled clients would be within a hearing, whether it is online or live.

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