IN THE UPPER TRIBUNAL **Appeal Numbers** CPIP/3062/2016
ADMINISTRATIVE APPEALS CHAMBER CPIP/2660/2017

Before: Upper Tribunal Judge Perez

Mr Matthew Fraser of counsel for the claimants
Mr Andrew Deakin of counsel for the Secretary of State

A. Decision

1. The claimants' appeals are allowed.

2. I set aside the part of KT's First-tier Tribunal decision dated 7 June 2016 (heard under reference SC227/16/00444) that relates to washing and bathing. I also set aside the part of SH's First-tier Tribunal decision dated 28 April 2017 (heard under reference SC241/16/00592) that relates to washing and bathing.

3. I substitute my own decision awarding each claimant two points for washing and bathing. Those two points, when added to the six daily living points that the First-tier Tribunal gave in each case, bring the daily living activities total to eight points for each claimant. That means that each is entitled to an award of the standard rate of the daily living component of the personal independence payment ("PIP"). The rest of each First-tier Tribunal decision remains undisturbed.

4. I thank both counsel for their very helpful submissions. I also thank and commend – for their thorough work – those instructing each counsel: Ms Sajal Siddiqui of The National Deaf Children's Society, and Ms Tessa Hocking of the Government Legal Department.

B. The Grenfell Tower fire

5. Submissions were made about the Grenfell Tower fire. It is discussed in statistical terms in this decision. But I do not for a moment lose sight of the tragedy that it was and continues to be. I do not want readers, especially anyone closely affected by it, to feel that it has become merely a number. It has not.

C. Background

6. KT's date of birth is 3 August 1998. He was 17 when, on 30 November 2015, he claimed PIP. That was also the effective date of his claim. SH's date of birth is 30 September 1998. She too was 17 when, on 25 May 2016, she claimed PIP. The effective date in her case was 7 September 2016. Both KT and SH have a significant hearing impairment. They each remove their hearing aids to take a

shower and to take a bath (and I find later in this decision that this is because they have to do so).

7. The six daily living points given by the First-tier Tribunal to KT comprised: two points under descriptor 1c for being unable to cook a simple meal using a conventional cooker but able to do so using a microwave, two points under descriptor 7b for needing to use an aid or appliance to be able to speak or hear, and two points under descriptor 9b for needing prompting to be able to engage with other people. The six daily living points given by the First-tier Tribunal to SH were made up slightly differently from KT's six points. SH's six points comprised: four points under descriptor 7c for needing communication support to be able to express or understand complex verbal information, and two points under descriptor 9b for needing prompting to be able to engage with other people.

8. In each case, the First-tier Tribunal gave no points for daily living activity 4, washing and bathing.

9. The claimants each separately appealed to the Upper Tribunal, with my permission. Their appeals were then linked with each other, at my direction. I so directed because each appeal was broadly about whether the First-tier Tribunal had erred in law in relation to washing and bathing in light of the decision of a three-judge panel of the Upper Tribunal in *RJ, GMcL and CS* [2017] UKUT 0105 (AAC).

10. The Secretary of State, in written submissions to the Upper Tribunal, asserted errors of law beyond those on which I had granted permission to the claimants to appeal to the Upper Tribunal. The Secretary of State abandoned that position however. So there was no application before me to make a cross-appeal, and no cross-appeal was before me.

D. Legislation

11. PIP is governed by the Welfare Reform Act 2012 and the Social Security (Personal Independence Payment) Regulations 2013[1] ("the PIP regulations"). The legislative detail is at **Annex 1** to this decision.

12. Broadly, Part 2 of Schedule 1 to the PIP regulations contains in column 1 a list of daily living activities. For each daily living activity, there is in column 2 a list of descriptors. The descriptors for a daily living activity specify needs or impaired functioning, or both, in relation to that activity. Column 3 says how many points are merited for each of those descriptors. A score of at least eight daily living points is needed to qualify for the standard rate of the daily living component (regulation 5(3)(a) of the PIP regulations). A score of at least 12 daily living points is needed to qualify for the enhanced rate of the daily living component (regulation 5(3)(b)). The mobility component is not considered in these two Upper Tribunal appeals.

13. Having scored six daily living points each, the claimants each needed only two more daily living points to be entitled to an award of the daily living component at the standard rate.

[1] S.I. 2013/377, as amended.

14. Regulation 4(2A) and (4) of the PIP regulations provided, at all relevant times—

> "(2A) Where C's [the claimant's] ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so—
>
> (a) safely"
>
> "(4) In this regulation—
>
> (a) "safely" means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity".

E. *RJ, GMcL and CS* [2017] UKUT 0105 (AAC)

15. In *RJ, GMcL and CS* [2017] UKUT 0105 (AAC), a three-judge panel of the Upper Tribunal addressed how to determine whether washing and bathing can be carried out safely, as required by regulation 4(2A)(a) and as defined by regulation 4(4)(a). The three-judge panel said—

> "**Safety and supervision: overall conclusion**
>
> 56. In conclusion, the meaning of "safely" in regulation 4(2A) and as defined in regulation 4(4) is apparent when one considers the legislation as a whole and with the assistance of the approach by the House of Lords to the likelihood of harm in the context of protecting people against future harm. An assessment that an activity cannot be carried out safely does not require that the occurrence of harm is "more likely than not". In assessing whether a person can carry out an activity safely, a tribunal must consider whether there is a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case. It follows that both the likelihood of the harm occurring and the severity of the consequences are relevant. The same approach applies to the assessment of a need for supervision.
>
> […]
>
> CS
>
> 63. CS had to remove her cochlear implant processors in order to bathe. Without the implants she was profoundly deaf and, she said, would not have been aware of a fire, burglary or other unexpected emergency which would normally be detected by sound. Thus it was necessary for someone to be present in the house in order to alert her should such an event occur. On our analysis of regulation 4 and "supervision", these facts would indicate that she needed supervision to bathe.
>
> […]
>
> 68. It follows that CS's appeal succeeds on this ground. Despite our observation that, on the facts asserted by CS and summarised at [63] above, descriptor 4c would seem to apply, we do not re-make the decision. It is appropriate that a tribunal determines on the facts the nature and

> degree of risk to CS while bathing in accordance with the approach which we have set out. Moreover, as we conclude below, the appeal in relation to activity 10 must be determined by another tribunal in any event. It would over-complicate matters and possibly cause difficulties for the next First-tier Tribunal if this tribunal were to determine some aspects of the appeal and remit others.".

F. The questions in these two appeals

16. The questions in each of these two appeals are broadly—

(1) whether the First-tier Tribunal materially erred in law in its approach to determining whether points were merited under the legislation for needs relating to washing and bathing;

(2) what approach to take to the question of whether, and how many, such points are merited; and

(3) ultimately, whether each claimant merits points for washing and bathing and, if so, how many and whether that results in an award of the daily living component.

17. I take each of those questions in turn.

G. Question 1: Did the First-tier Tribunal materially err in law in its approach to washing and bathing?

18. Yes, the tribunal materially erred in law in both cases in its approach to washing and bathing.

19. The parties agreed that the part of the decision of the First-tier Tribunal relating to washing and bathing (daily living activity 4) should in each case be set aside for error of law, in light of *RJ, GMcL and CS* [2017] UKUT 0105 (AAC). The errors of law in each case were as follows.

1. Claimant KT

20. In KT's case, the First-tier Tribunal said (page 119)—

> "27. Washing and bathing – In respect of this activity, it was submitted that Mr [T] can wash and shower but his mother stays close to the bathroom because he is without his spectacles and hearing aids. Mention is made of an incident on New Year's Eve, this incident has been referred to on a number of occasions in the papers (including at page 81). On this occasion it is said that Mr [T]'s mother was cooking and one of her other children came in to tell her that water was leaking through in to the living room. Mr [T] was in the shower at the time and the door was locked. She said that she had to knock extremely loudly and repeatedly for several minutes to get Mr [T] to turn the shower off. It is further said that this took considerably longer than it would have done for a hearing person of the same age.

28. It was submitted that given he is unable to hear whilst showering, he is open to risks such as burglary and fire.

29. This was explored in detail with Mr [T] at the Oral Hearing. He explained that he does prefer to have someone in the house when he is showering. He showers on one to two occasions each week. He can dress and undress independently. He can run a shower for himself. He can wash himself whilst in the shower and there are no aids or adaptations in the shower and none are required. He can do all of the activities involved but noted that he likes the reassurance of there being somebody in the house.

30. He chooses to lock the bathroom door but likes his mother or father to be standing outside. He referred specifically to the New Year's Eve incident which is an isolated incident but indicative of difficulties that could arise. He described how his Mum really had to bang on the door to get him out of the shower. That said, he continues to lock the door. He noted that he was not frightened by this episode. He understandably prefers the peace and quiet and privacy from his brothers. It was also noted that the door has a key lock so in the event of an emergency his mother fully accepted that the door could be unlocked from the outside. It was also fully accepted that mother or father do not stand outside whilst he is showering, they just keep checking.

31. By way of completeness, it was confirmed that drying after a shower, dressing and subsequently undressing for bed are not things that present any difficulties for Mr [T].

32. The Tribunal found that the New Year' [sic] Eve incident was an isolated episode but indicative of difficulties that could arise. The Tribunal however found that subsequent to that incident the door is locked by choice and that importantly there is access to the bathroom by a lock in any event. There are no other additional aids or supports and the Tribunal concluded that Mr [T] is able to manage washing and bathing without an aid or appliance or supervision, prompting or assistance, safely and repeatedly and to an acceptable standard and within a reasonable timescale. Consequently he qualified for no points for this activity." (pages 119 and 120, KT bundle).

21. KT had relied on risks of fire and burglary while showering or bathing without his hearing aids. It was common ground, and I find, that the First-tier Tribunal erred in law in failing, contrary to *RJ*, to say why those risks did not give rise to a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm (see, in particular, paragraphs 56, 63 and 68 of *RJ*). As part of that overall failure, the First-tier Tribunal erred in law in how it dealt with the New Year's Eve incident. The tribunal said it was "an isolated episode but indicative of difficulties that could arise". But it did not go on to explain why those difficulties did not give rise to a real possibility, that cannot reasonably or sensibly be ignored, of harm occurring.

22. It is for these reasons that I am setting aside, in KT's case, the part of the First-tier Tribunal's decision relating to washing and bathing.

2. Claimant SH

23. In SH's case, the First-tier Tribunal said (page 174)—

> "77. …The claim form set out that she needs supervision *"because without my hearing aids on I can't hear anything eg smoke alarm, bang on the door or a warning shout in emergency due to the water running"* (page 21). The Tribunal relied on its findings about her intellectual capacity to conclude that she can reasonably and reliably prepare a bath or shower for herself. The Tribunal relied on its findings that she can dress and undress independently in finding that she can manage to clean her body independently. The Tribunal found that the tasks involved in washing and bathing can be completed by the Appellant without prompting.
>
> 78. The Tribunal found that supervision during a bath or shower was not reasonably required. There is a risk that the Appellant would not hear a smoke alarm or bang on a door during a shower, noting that the risk was posed as theoretical and not as something which had occurred. The Tribunal concluded that the risk of an occurrence was extremely remote, taking into account the time taken for a shower, the risk of such an event and the fact that the Appellant could use other senses to identify risk, including her sight." (pages 174 and 175, SH bundle).

24. It was common ground, and I find, that the First-tier Tribunal erred in law in the following two ways, in SH's case—

(1) First, having found that SH "could use other senses to identify risk, including her sight"[2], the tribunal failed then to consider how SH would use her sight to do that. If the fire is not in the bathroom, she will not see it. If the fire is not in the bathroom but would be within sight from the shower or bath through an open bathroom door, that was not, both counsel submitted, an acceptable scenario; they were agreed that having to leave the bathroom door open would not be washing and bathing to an acceptable standard (as required by regulation 4(2A)(b)). The obvious way for SH to use her sight to identify fire seems therefore to be by a visual aid of some kind. Yet the First-tier Tribunal failed to consider whether such an aid was needed, and failed to explain why one was not needed. (The tribunal also failed to say how SH could use the remaining "other senses" (taste, touch and smell) "to identify risk", and why that would suffice. But that was not the subject of submissions, and I need make no finding as to whether that was a material error of law. The Secretary of State did not suggest that touch, taste or smell would suffice to avoid the need for an aid or appliance or supervision.)

(2) Second, the First-tier Tribunal in SH's case considered the risk of an <u>event</u> occurring. I find that the tribunal erred in law, however, in failing also to consider and make findings as to the nature and gravity of the feared harm. The tribunal was required by *RJ* to do that (see, in particular, paragraphs 56, 63 and 68 of *RJ*).

[2] Paragraph 78, pages 174 and 175, SH bundle.

25. It is for these reasons that I am setting aside, in SH's case, the part of the First-tier Tribunal's decision relating to washing and bathing.

H. Question 2: What approach to take to the question of whether, and how many, washing and bathing points are merited?

26. The second of the three broad questions on these two appeals was what approach to take to the question of whether, and how many, washing and bathing points are merited.

1. Introduction

27. Having agreed as to the errors of law, the parties differed as to disposal. The Secretary of State invited me to remit for further findings to be made in relation to washing and bathing. The claimants invited me to substitute my own decision awarding two points for washing and bathing. They preferred that this should be for needing supervision, because supervision is what happens in practice for each claimant. But in the alternative, they asked for two points for needing an aid or appliance. (Two points are available whether for supervision or for an aid or appliance, but under different descriptors.) The claimants said that the First-tier Tribunal had made sufficient findings for me to award those two additional points, alternatively that there was sufficient evidence in the papers for me to make my own findings, alternatively that I could take further evidence to make my own findings. The broad question in each case for whether points are merited is whether washing and bathing can be carried out safely as required by regulation 4(2A)(a) of the PIP regulations. Do the claimants each need, when showering and/or when taking a bath, an aid or appliance (for example, a visual alarm such as a flashing light) or supervision, to alert each of them to an emergency such as fire or burglary? (I have said "and/or when taking a bath" because no point was taken that a claimant who could safely do one but not the other did not merit points.)

28. I held two oral hearings. The first was about (a) whether I should remit washing and bathing or substitute my own decision on that activity, (b) whether, if I substituted my own decision on that activity, I needed to make my own findings rather than using those of the First-tier Tribunal, and (c) whether, if I needed to make my own findings, I needed further evidence to do so.

2. The first oral hearing

29. I am setting out here some of the submissions that were made at the first oral hearing, when the question of whether to remit was still open. The more detailed submissions about the nature of the test, and whether to consider statistics, I am setting out later in the decision, although some of them were also made at the first oral hearing.

(1) Submissions for the Secretary of State as to remittal

30. At the first oral hearing, having agreed that there was an error of law in each case, Mr Deakin, counsel for the Secretary of State, invited me to remit. This was so

that each First-tier Tribunal panel could – as required by *RJ* – (a) assess the risk of harm occurring for each claimant, and (b) assess the nature and gravity of the feared harm.

31. Mr Deakin submitted that, in considering *RJ*, Upper Tribunal Judge Hemingway had made clear in *CPIP/3100/2017,* in referring to the effect of having to remove cochlear implant processors to bathe, that—

> "16. … it is apparent from what [*RJ*] also said at paragraph 68 (at least on my reading) that the Upper Tribunal [in *RJ*] was not seeking to lay down a general rule that, for example, daily living descriptor 4c would always be satisfied in circumstances where a person had to remove cochlear implant processors or hearing aids or other similar devices in order to bathe. There will be issues as to remoteness of risk in the context of both supervision and safety. It may also be, on the facts of any particular case, that it is possible to bathe whilst not removing the relevant aids. I do not know. But this issue is one which the previous tribunal did not explore but which the tribunal rehearing the appeal ought to".

32. Mr Deakin submitted that further evidence was required in each of these two cases: (i) evidence from an audiologist, (ii) evidence from the Fire Service as to what the Fire Service would recommend in such a case, given that the London Fire Brigade document[3] in the bundle said the London Fire Brigade would make "free home fire safety visits" to vulnerable persons to assess needs, (iii) evidence from the government including the statistics I mention later in this decision, and (iv) evidence about how fires start and are resolved. Mr Deakin accepted that, given that the claimants live in different regions of the United Kingdom, the fresh hearing on remittal would probably be by two different First-tier Tribunal panels.

33. Mr Deakin cited paragraphs 109 to 111 of the Court of Appeal's decision in *Commissioners of Her Majesty's Revenue and Customs v Newey* [2018] EWCA Civ 791. He pointed to the Court of Appeal's statement that—

> "111. … The principal role of this court is appellate and supervisory. Save in exceptional circumstances, it does not find facts itself, and we have not heard evidence from the witnesses. Nor have we been supplied with a transcript of the hearing before the FTT. I therefore consider that our power under section 14 of TCEA 2007 to re-make the decision, and for that purpose to make such findings of fact as we consider appropriate, is one which we should exercise sparingly, if at all. We should not do so if we feel any real doubt about how the FTT, as the primary fact-finding body, would have decided the case if it had the benefit of (a) the guidance given by the CJEU, (b) the relevant case law (both European and domestic) since April 2010 (including, in particular, the decision of the Supreme Court in Pendragon and the judgment of this court in the University of Huddersfield case), (c) the UT Decision, and (d) our judgment on this appeal." (emphasis in original).

Mr Deakin emphasised the Court of Appeal's point that it "should not" exercise its section 14 power "if we feel any real doubt about how the FTT, as the primary fact-

[3] https://www.london-fire.gov.uk/safety/the-home/smoke-alarms-and-heat-alarms/.

finding body, would have decided the case". He submitted that, as in *Newey*, an evaluation of the facts in light of relevant case law (here *RJ*) had not yet been performed in the present two cases by the primary fact-finding body, the First-tier Tribunal.

34. Mr Deakin submitted at the first oral hearing that, if I were against him as to remittal and were to take evidence and decide the matter myself, I should find that each claimant can properly carry out activity 4, washing and bathing, unaided. This was, he submitted, because the statistics which the Secretary of State adduced showed that "the risks complained of are *de minimis* and that properly analysed they are **not** "…*a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in a particular case*." [RJ]" (Mr Deakin's emphasis[4]).

(2) Submissions for the claimants as to remittal

35. Mr Fraser, counsel for the claimants, invited me at the first oral hearing not to remit but to substitute my own decision. He submitted that I could use the First-tier Tribunal's findings to do that and that this "is precisely the situation for which the UT's power under section 12(2)(b)(ii) of the 2007 Act is designed"[5]. He submitted alternatively that I could make my own findings without taking further evidence, and further alternatively that I could take further evidence to make my own findings.

36. Mr Fraser pointed out that the Upper Tribunal in *RJ* was remitting for claimant CS in any event. That was for the First-tier Tribunal to make findings on another activity (daily living activity 10). Mr Fraser submitted that the Secretary of State was dramatically over-complicating what needs to be done. He said that whatever I decided needed to enable a proportionate approach by the First-tier Tribunal. He said that most First-tier Tribunal hearings last 60 to 90 minutes, and that the First-tier Tribunal is considering potentially all the PIP activities, not just washing and bathing. He submitted that the forensic fact-finding exercise that Mr Deakin suggested was wholly disproportionate and burdensome for just one PIP activity.

37. Mr Fraser pointed out that the Upper Tribunal is, unlike the Court of Appeal, a specialist tribunal. He submitted that, even if – contrary to what is envisaged by section 12(2)(b)(ii) – I do not find sufficient the First-tier Tribunal's findings of fact (which I don't), then I can under section 12(4)(b) make further findings of fact. He submitted that *Newey* does not require me to remit.

(3) Outcome of the first oral hearing

38. After the first oral hearing, I gave directions on 10 July 2019, saying—

> "6. I have decided not to remit either case. First, it is not in the interests of justice for there to be further delay in either of these cases. It is some three and a half years since Mr [T] made his claim on 30 November 2015. And it is some three years since Ms [H] made her claim on 25 May 2016.

[4] Paragraph 33, submission 13/3/19, page 257, SH bundle.
[5] Paragraph 39, submission 18/2/19, page 237, SH bundle.

7. Second, the question whether there is a risk that cannot "reasonably"[6] or "sensibly"[7] be ignored is not one which I consider should vary according to different First-tier Tribunal assessments of statistical levels of risk. In other words, I do not consider that, on identical statistics (and identical needs), one First-tier Tribunal panel should – because of its view of those statistics – be able to award no points while another – because of its view of those statistics – awards points. Even if statistics are not used, I take the same view: two different cases with objectively identical levels of risk of burglary or fire should not be capable of different outcomes based purely on the different view taken of that risk by two different panels. I also do not consider that there should be a difference as between geographical areas, where the risks of burglary might differ, for example or, for example, as between residences whose construction materials have different levels of fire retardancy. Although Mr Deakin accepted for the Secretary of State that there should not be geographical differences, a logical extrapolation of considering statistics is that there is potential for such differences.

8. If, on the facts, a claimant has to remove hearing aids to wash and bathe, including showering, and without them is unable to hear a typical smoke or fire alarm or a typical burglar alarm, in circumstances where a person without impairment would be able to hear those alarms, that claimant should be given points for needing an aid or appliance or, if an aid or appliance would not suffice, for needing supervision, to wash and bathe safely (if, of course, the "on over 50% of the days" rule in regulation 7 is met in one or other of the ways in that regulation).

9. I have not, for now, included the sound of a burglar entering or breaking and entering, or the sound of "other emergencies", in the question at paragraph 8 above. This is because I may not need to include them, and not because they must be excluded. I am inviting submissions on those – see paragraph 13(2) and (4) below.

10. If *RJ* decided differently from what I say at paragraphs 7 and 8 above, then I disagree with *RJ*. It is not clear that it did however (see paragraphs 63 and 68 of that decision).

11. In deciding for each of these claimants the question at paragraph 8 above, I shall not be analysing the statistics provided by the Secretary of State. Those are the statistics at pages 259 to 327 of Ms [H]'s bundle, drawn together in Ms Kerstin Parker's witness statement (which I recognise must have taken a great deal of work, for which I thank her). The statistics address the likelihood of a fire or burglary happening, the likelihood of fatality or injury from a fire and the likelihood of encountering a burglar or of being threatened with force by a burglar. None of these risks is fanciful however, even if remote. I need go no further than that.

12. I also do not consider that there are sufficient findings in either First-tier Tribunal decision for me to decide either case without making my own findings of fact. Although in some places the First-tier Tribunal cited evidence without expressly rejecting it, it did not have in mind the considerations in *RJ*. I am not therefore willing to treat those citations as implied findings of fact. In any event, a finding is needed in my judgment

[6] *R(A)2/89*, paragraph 5.
[7] *RJ, GMcL and CS* [2017] UKUT 0105 (AAC), paragraphs 31, 37 and 56.

> on at least one additional point: that is, whether the noise of a shower would prevent a person without a hearing impairment from hearing a typical alarm. I will need evidence on that unless the parties can agree on it.".

39. The second oral hearing was originally fixed to elicit the further evidence I had said[8] I needed. I asked the parties to agree between them before the second hearing, if possible, some or all of the facts that I would need to find. The parties did agree facts. I commend each counsel and those instructing them for that. The agreed facts appear later in this decision.

40. The second oral hearing still however went ahead, at the Secretary of State's request. She wanted counsel to address me further on the need to consider statistics, and on the approach to considering whether the risk of harm, and the nature and gravity of the feared harm, are such that the feared harm cannot be ignored. (After the second hearing, I saw for the first time an email sent at 16.22 on the day before the hearing. It said that the Secretary of State was content for the Upper Tribunal to decide "the matters" on the papers if it considered that appropriate. Mr Deakin did not mention that at the hearing the next day. It may have related only to the facts to be found. But in any event I was not aware of it, and Mr Deakin wished the hearing to proceed for the additional submissions that the Secretary of State wanted him to make.)

3. Joint agreed submissions

41. My 10 July 2019 directions after the first oral hearing had also invited further submissions on certain matters. The submissions I received in response to that invitation meant that the second oral hearing proceeded against the following background.

(1) Leaving the bathroom door open

42. Mr Deakin for the Secretary of State had initially said that a finding was needed as to whether a "closed door" ("a running shower/closed door") would cause a person without a hearing impairment not to hear an alarm[9]. I asked: If merely leaving the bathroom door open would enable the claimant to hear a typical alarm, did that mean that no aid or appliance is needed and no supervision is needed? If it would mean that, then potentially I would need to make a finding as to whether leaving the door open would enable each claimant to hear a typical alarm.

43. Counsel jointly submitted in response as follows. If the claimant "were required to leave the bathroom door open while washing/bathing, [the claimant] would not be washing/bathing to an "acceptable standard"" as required by regulation 4(2A)(b) of the PIP regulations[10].

[8] In paragraphs 12 to 14 of my 10 July 2019 directions.
[9] Paragraph 12a, submission 13/3/19, page 256, SH bundle.
[10] Paragraphs 1(4) and 3(5), joint submission 18/11/19, pages 399 and 400, SH bundle.

(2) Burglary

44. Reference had been made in submissions to hearing a burglar entering a home, and to hearing a burglar breaking and entering. It seemed to me that it could be difficult to decide what the benchmark level of noise is for this, in order to decide what a person without a hearing impairment would hear and then compare that with what each of these two claimants can hear. And it may be unnecessary to decide – in relation to the need for an aid or appliance – whether the claimants would be able to hear a burglar entering if, on the facts, they could not hear a typical fire alarm. But, I asked, would it make a difference to whether supervision is needed as opposed to an aid or appliance being needed? Did I need to make a finding as to whether either claimant would be unable to hear a burglar entering or breaking and entering? If I did, what was the benchmark level of noise to be used in comparison?

45. Both counsel submitted in response as follows. The various factors relating to burglaries make it difficult to assess risk in relation to burglaries, and to assess what the benchmark noises are for burglaries, to compare what these claimants can hear with what someone without impairment can hear[11]. (Although Mr Deakin's position for the Secretary of State was that such a contrast did not of itself render an activity unsafe for these claimants – I address that at paragraph 110 below.) Both counsel submitted that, if the claimants succeed in relation to fire risk (which they do), there is no need for me to consider burglaries.

(3) A louder than typical alarm

46. Mr Deakin for the Secretary of State had submitted that the claimants' witness statements adduced at the first oral hearing before me did not suffice for me to make all the findings I would need to make (if I were not remitting). He said that, since the claimants did not attend for examination before me, their statements had not been adequately tested. He said he was not suggesting that the claimants would seek to mislead the Upper Tribunal. His point was, he said, rather that the claimants themselves might not have sufficiently tested their statements. He said, "For example, does Ms H know if she can hear a louder alarm?". I requested submissions on whether that matters and on whether, if a louder than typical alarm is needed, that is a need for an aid or appliance.

47. Counsel jointly submitted in response that a "louder than typical alarm would constitute an "aid or appliance""[12]. I pause here however to note a point made by audiologist Jenna Quail MSci Msc, Principal Audiologist at James Cook University Hospital. After opining that even a louder than typical alarm was unlikely to be sufficiently audible for KT, Jenna Quail said that a "sound level above 90dBSPL at this frequency carries a significant risk of damaging the cochlea … of a typical hearing person if they also happen to be present"[13]. I doubt therefore that, in practice, any aid or appliance assessed as suitable for each of these two claimants would be a louder than typical alarm.

[11] Paragraph 4(2), Mr Fraser's submission 23/8/19 for the claimants, page 368, SH bundle. Paragraphs 10 and 11, Mr Deakin's submission 25/10/19 for the Secretary of State, page 360 SH bundle.
[12] Paragraphs 1(5) and 3(6), joint submission 18/11/19, pages 399 and 400, SH bundle.
[13] Paragraph 4, report 16/8/19, page 373, SH bundle.

(4) Other emergencies

48. In *RJ*, the three-judge panel of the Upper Tribunal mentioned other emergencies—

> "63. CS had to remove her cochlear implant processors in order to bathe. Without the implants she was profoundly deaf and, she said, would not have been aware of a fire, burglary or other unexpected emergency which would normally be detected by sound. Thus it was necessary for someone to be present in the house in order to alert her should such an event occur. On our analysis of regulation 4 and "supervision", these facts would indicate that she needed supervision to bathe.".

49. I asked the parties whether I needed to address "other emergencies" (or "other unexpected emergencies") in my findings. It provisionally seemed to me unnecessary, and potentially too complex.

50. Both counsel submitted that I need not consider "other emergencies"[14]. Mr Deakin also submitted for the Secretary of State that I should not consider them. This was, he said, because the "concept is too vague to permit of serious scrutiny or consideration by the Upper Tribunal in any event"[15].

51. I accept that I need not consider other emergencies.

4. Reasons for not remitting

52. I said in my 10 July 2019 directions that I had decided not to remit. Before turning to the issue of (to paraphrase) whether the fire risk can be ignored, I will explain in more detail my reasons for deciding not to remit. At the time that I decided not to remit, burglary risks were still in issue. So what I say at paragraph 53(1) and (3) below about burglary was necessary to – and part of – my decision not to remit (although not, in the event, relevant to the substituted decision I have come to make).

53. I had six reasons for deciding not to remit. I will come to the sixth later (paragraph 57 below). My first five reasons were as follows (references to statistics are to those supplied with a witness statement by Ms Kerstin Parker for the Secretary of State)—

(1) First, the First-tier Tribunal should not in my judgment be expected, in a slot of around 90 minutes or an hour or less, to consider statistics as to (a) the risk of a fire or burglary occurring, and (b) the risk from fire of fatality or injury or the risk of an occupier seeing a burglar or the risk that the burglary involves the threat or use of force or violence. It was my judgment, when deciding not to remit, that that would be far too onerous a task. In the event, I have not needed to consider burglary for the purposes of substituting my own decision. But the task of considering

[14] Paragraph 4(4), Mr Fraser's submission 23/8/19 for the claimants, page 369, SH bundle. Paragraph 15, Mr Deakin's submission 25/10/19 for the Secretary of State, page 362, SH bundle.
[15] Paragraph 15, submission 23/10/19, page 362, SH bundle.

even just fire statistics in every case would still be too onerous for First-tier Tribunal panels, in my judgment.

(2) Second, remittal would allow for different treatment of claimants not according to differences between their individual characteristics, but according to what view a First-tier Tribunal panel takes of the risk levels arising from factors external to the claimants, whether or not that view is based on statistics. Two different First-tier Tribunal panels presented with identical such factors, or identical statistics, could arrive at different views of the risks. The PIP regulations should not in my judgment be operated in that way if it can be avoided, which in my judgment it can.

(3) Third—

(a) Statistics could vary as to whether the risk of burglary is higher or lower in one geographical area as compared with another. Or they could vary in relation to fire, as between residences whose construction materials have different levels of fire retardancy. And, for example, as I have set out later in this decision, the statistics supplied to me vary between, on the one hand, 75% of dwelling fires being in a house, bungalow, converted flat or "other" type of dwelling and, on the other, 25% of dwelling fires being in purpose-built flats[16]. There were also differences in the percentages of dwelling fires between purpose-built low-rise flats, purpose-built medium-rise flats and purpose-built high-rise flats (with still further differences as how to define "low-rise", "medium-rise" and "high-rise")[17].

(b) What then if a claimant moves, to a different type of dwelling – from a lower risk purpose-built flat to a higher risk house, for example – or to a more fire-retardant residence or to an area where insurance premiums are lower because the risk of burglary is lower? Is there to be a reassessment of the risk in the claimant's individual case? It does not seem to me that the regulations were intended to be so unwieldy to apply. And they should not in any event be so construed, in my judgment. Moreover, Mr Deakin accepted that. He said that the Secretary of State is "not saying that the remoteness of the event occurring will differ across the country".

(c) Even if statistics are not used, I take the same view: two different cases with objectively identical levels of risk of burglary, or of risk of fire, should not be capable of different outcomes based purely on the different view taken of that risk by two different First-tier Tribunal panels. Although Mr Deakin accepted for the Secretary of State that there should not be geographical differences, a logical extrapolation of considering statistics is that there is potential for such differences.

(4) Fourth, I accept Mr Fraser's submission that, on the Secretary of State's position that the risk is too remote, points would never be scored for

[16] Ms Parker's Exhibit 2, internal page 11, fourth bullet, page 272, SH bundle.
[17] Ms Parker's Exhibit 2, internal page 11, fourth bullet, page 272, SH bundle.

washing and bathing for claimants with needs such as in these two cases. That undermines Mr Deakin's submission that it should be left to First-tier Tribunal panels to consider the risk according to statistics in every case. It would, in every First-tier Tribunal appeal, involve a submission being made for the Secretary of State that the statistics meant that the fire risk could reasonably or sensibly be ignored. It would also appear to contradict the view of risk taken by the three-judge panel of the Upper Tribunal in *RJ*. If points could never be scored for washing and bathing by claimants who have to remove their hearing aids (or cochlear implant processors) to take a shower or bath and who cannot without them hear a typical smoke alarm, there would have been no point in the *RJ* panel remitting for claimant CS.

(5) Fifth, I agree with Mr Fraser that the Court of Appeal's decision in *Newey* does not require me to remit. First, unlike the Court of Appeal, the Upper Tribunal is a specialist tribunal (one of two specialist tribunals through which a case passes before reaching the Court of Appeal). Second, I could take evidence myself if necessary, and – unlike the Court of Appeal in *Newey* – I already have the record of proceedings from below. It is not a transcript, which is what the Court of Appeal mentioned in *Newey*. But the record of proceedings still puts the Upper Tribunal in a better position here than that of the Court of Appeal in *Newey*.

54. For the reasons at paragraph 53 above, the question whether there is objectively a risk (a) of a fire occurring and (b) of harm occurring from the fire that should not be ignored should not in any appeal be remitted, in my judgment. (The same went for burglary when I was deciding not to remit, although I have not needed to address in my substituted decision whether points are merited for burglary risks.) In saying the question should not be remitted, I mean that the risk should not be able to differ between different claimants with identical needs and limitations but with different panels' assessments of risk based on different interpretations of the same statistical evidence. Nor should the risk be able to differ based on differences external to the claimants, whether or not derived from statistics, such as type of dwelling or levels of fire retardancy (or, for burglary, geographical differences). It is appropriate in my judgment for the Upper Tribunal to decide, once, that it should not be ignored, as Mr Fraser submitted. And that is what I am doing.

55. I do not suggest that, in every case of hearing impairment or even in every case where hearing aids, or cochlear implant processors, have to be removed to take a shower or bath, the claimant will be entitled to points for needing an aid or appliance or supervision to wash and bathe.

56. What I am saying is that any remittal in other cases – so far as relating to an asserted need to remove hearing aids or cochlear implant processors to wash and bathe – should in my judgment be only so as to establish the following: (i) the existence and extent of the claimant's hearing impairment, (ii) whether there is a need, for taking a shower or bath, to remove hearing aids or cochlear implant processors or anything else that would enable a claimant to hear a typical alarm, (iii) whether, having removed them, the claimant is unable to hear a typical alarm, and (iv) whether an aid or appliance or supervision is needed to address needs arising

from that inability. If, for example, a claimant is hearing-impaired but would still be able sufficiently to hear a typical smoke alarm with the bathroom door shut and despite the sound of the running water, that would not in my judgment merit washing and bathing points, on the basis at least of inability to hear while washing and bathing.

57. My sixth and final reason for not remitting in these two appeals, was the delay in each. By the time I came to consider whether to remit, it had been some three and a half years since KT had made his claim on 30 November 2015 and some three years since SH had made her claim on 25 May 2016. I considered that it was not in the interests of justice for there to be the further delay of remittal and potentially of further appeals to the Upper Tribunal. That made it appropriate, in my judgment, to take further evidence if necessary and to substitute my own decision.

5. The second oral hearing

58. The second oral hearing was against the background that I had decided not to remit. Counsel said they were agreed that the sole issue for the second hearing was "whether the risk of a fire taking place while the Appellants wash/bathe is "*a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in a particular case*", applying *RJ v SSWP [2017] UKUT 105*". I am combining below the submissions on this from both hearings.

(1) Submissions for the claimants

(a) "Safely": the test for "in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity"

59. Mr Fraser submitted for the claimants that the test in *RJ* did not come out of nowhere; it was the *Moran* lineage coming through, he said, from the attendance allowance test (*Moran v Secretary of State for Social Services,* CA, 13 March 1987, The Times, 14 March 1987[18]*)*. He submitted that there is long-standing support for the notion that the risk of fire or burglary – though remote – is "a real possibility that ought not to be ignored", having regard to the nature and gravity of the harm. He cited, as an example, the commissioner's decision in *R(A)2/89*, in which the commissioner cited *Moran*. The needs being considered in *R(A)2/89* arose from the claimant's being tetraplegic rather than from his being hard of hearing. But, said Mr Fraser, that decision was relevant because the commissioner said in it that fire "may be a remote contingency but it is not fanciful" (paragraph 4 of *R(A)2/89*). The commissioner in the same case went on to say "I would define a relevant risk as one that a person can reasonably be expected to guard against (even if remote)". Mr Fraser also cited *R v Secretary of State for Social Services ex parte Connolly* [1986] 1 WLR 421. In that case, he said, the Court of Appeal approved at page 424 a paragraph from the commissioner's decision in *CA/26/1979,* in which the commissioner had said—

> "the word 'required' should be interpreted as meaning 'reasonably required.' … If, as sometimes happens, children are left alone in a house and the

[18] https://www.lawtel.com/UK/FullText/AC1256147CA(CivDiv).pdf.

> relatively small chance of the house catching on fire and the children being killed materialises, those who leave them alone in the house are justifiably criticised, and I think that it would be proper to say of the children that they required supervision to avoid danger to them, even though it is well known that they do not always get such supervision.".

60. Mr Fraser submitted that society has deemed the risk of fire not to be a risk which can sensibly be ignored. The following factors showed this, he said—

(1) First, fire alarms[19] and burglar alarms are, he said, a fact of domestic life in the United Kingdom. He submitted that it is well recognised that making fire safety precautions, and making anti-burglar precautions, are important things to do, notwithstanding the remoteness of the risk[20]. (He made the submission in relation to burglar alarms before it was agreed that I need not consider burglary risks.)

(2) Second, this was, submitted Mr Fraser, further reflected in fire safety legislation—

(a) The Regulatory Reform (Fire Safety) Order 2005 (S.I. 2005/1541) covers, said Mr Fraser, general fire safety in England and Wales. The order applies, he said, to almost all buildings, places and structures other than individual private homes. For example, he submitted, it applies to shared areas in houses in multiple occupation, to blocks of flats and to maisonettes.

(b) Moreover, since 2015, said Mr Fraser, landlords have, by the Smoke and Carbon Monoxide Alarm (England) Regulations 2015 (S.I. 2015/1693), been required to install smoke alarms and carbon monoxide alarms in their rental properties. He said landlords must also (i) check that tenants have access to escape routes at all times, (ii) make sure that the furniture and furnishings that the landlord supplies are fire safe, and (iii) provide fire alarms, and fire extinguishers, if the property is a large house in multiple occupation.

(c) Fire is also, submitted Mr Fraser, included in the 29 hazards covered by the Housing Health and Safety Rating System introduced by the Housing Act 2004.

(d) And fire safety is, he said, covered in Part B of Schedule 1 to the Building Regulations 2010 (S.I. 2010/2214).

(3) A third factor showing that society has deemed the risk of fire not to be one which can sensibly be ignored is, submitted Mr Fraser, that there are "numerous" British Standards specifications for fire doors, portable fire extinguishers, fire extinguishing installations and equipment on premises, emergency lighting, and fire detection and fire alarm systems. And there

[19] Both counsel agreed that, in referring to "fire alarms" in relation to single-dwelling houses and single-dwelling flats, they were really talking about smoke alarms although fire alarms are also relevant of course, albeit more usually for blocks containing more than one dwelling. They agreed however that there is no material distinction for present purposes between smoke alarms and fire alarms.
[20] Paragraph 12(1), submission 20/3/19, page 339, SH bundle.

is, he said, even a specific British Standard entitled "Fire detection and fire alarm devices for dwellings. Specification for smoke alarm kits for deaf and hard of hearing people" (BS 5446-3:2005). I pause to note that that 2005 standard appears to have been replaced on 28 February 2015 – before the effective date for each claimant – by BS 5446-3:2015, entitled "Detection and alarm devices for dwellings. Specification for fire alarm and carbon monoxide alarm systems for deaf and hard of hearing people". That 2015 standard shows on the British Standards Institution website as "confirmed" on 3 July 2020: "Confirm Date 03 July 2020". I asked the British Standards Institution what this meant. They explained that confirmed means "still relevant" rather than "coming into force"; the call handler told me that they have to check relevance every five years. If that is an accurate reflection of the status of the 2005 standard and of the 2015 standard, then I expect the same argument would be made, but citing the 2015 British Standard rather than the 2005 British Standard.

61. Mr Fraser submitted that, given that the risk of fire (and burglary) is a risk that people without hearing difficulties do not reasonably ignore (and are legally required not to ignore "in many cases"), the position should be not different for a person who is deaf or hard of hearing.

(b) Statistics: submissions for the claimants

62. Mr Fraser told me that the claimants had not had sufficient opportunity to carry out their own research to be able to question the Secretary of State's statistics. But he said that, given his position that they make no difference, he did not object to their admission. He invited me however not to consider the statistics, for a number of reasons—

(1) First, he submitted that a precise quantification of the risk, and identification of the possible harm, are not required by *RJ*. It suffices, he said, for the risk to be accepted as remote, and for the consequences to be accepted as serious and potentially life-threatening. He submitted that there was no need to consider statistics because he accepted that the risks were remote. But, he submitted, they were not fanciful, which is what matters.

(2) Second, Mr Fraser mentioned deficiencies in the statistics. The statistics will he said, miss domestic incidents which did not require fire and rescue services' attention.

(3) Third, he submitted, there is no cause for "discounting the Grenfell fire". The fires in the Grenfell flats were still, he said, domestic fires. And this was, he said, a tragic event which highlighted the inadequacies of fire safety measures in domestic properties. It is, he submitted, plainly relevant to the Upper Tribunal's consideration of the risk and of the severity of the consequences should the risk materialise. He submitted

that it "is surprising and regrettable for the SSWP to be suggesting that this national tragedy be "discounted""[21].

63. I asked Mr Fraser: Should there not be room for different First-tier Tribunal panels across the country to make different decisions as to whether there is a risk that cannot reasonably or sensibly be ignored, where the differences between the panels' decisions arise not from differences in claimants' needs but from different assessments of the same objective evidence of risk? Mr Fraser replied: "I'd love that to be my submission, but in light of *RJ*, I can't".

64. Mr Fraser submitted however that, if I were against him on whether to consider statistics, that supported the proposition that it should be done only once, by the Upper Tribunal. There would in that case, he said, be an Upper Tribunal decision on it, rather than the Upper Tribunal telling various First-tier Tribunal panels that they each have to analyse statistics for every case.

65. Mr Fraser asked: On the Secretary of State's position that the risks can sensibly be ignored, when would two points ever be scored for washing and bathing where claimants have to remove their hearing aids to wash and bathe? He submitted that *RJ* did not say that two points could never be scored. The three-judge panel in *RJ*, he said, stated its view that supervision probably was required. And by remitting, the panel was, he submitted, accepting the possibility of points being scored.

(c) Summary of submissions for the claimants

66. To summarise, Mr Fraser for the claimants invited me to hold that—

(1) there is "a low/remote likelihood of a fire occurring whilst the Appellants are washing or bathing";

(2) the severity of harm in issue is high; and

(3) the risk of fire occurring constitutes a risk that cannot sensibly be ignored.

67. He submitted that, even if I accepted that I should conduct the statistical analysis advanced by the Secretary of State, that would not stop the risk of fire from being a real possibility which should not be ignored, having regard to the seriousness of the potential consequences.

(2) Submissions for the Secretary of State

(a) "Safely": the test for "in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity"

68. A reminder of the definition of "safely" in regulation 4(4)(a)—

[21] Paragraph 11(2)(b), submission 20/3/19, page 339, SH bundle.

> ""safely" means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity".

Mr Deakin submitted, in reliance on paragraph 56 of *RJ*, that *RJ* requires the decision maker to assess (i) the likelihood of the harm occurring, (ii) the severity of the harm in issue and (iii) whether that constitutes a risk that cannot reasonably be ignored. He submitted that this was made explicit in paragraph 68 of *RJ*. In that paragraph, the three-judge panel said "It is appropriate that a tribunal determines on the facts the nature and degree of risk to CS while bathing in accordance with the approach which we have set out" (Mr Deakin's emphasis).

69. Mr Deakin relied on paragraphs 33 and 37 of *RJ,* in which the three-judge panel of the Upper Tribunal said—

> "33. … The Divisional Court [in *Wallis v Bristol Water plc* [2010] PTSR 1986] followed the decision in *In re H*[22] and held that "likely" was being used in the relevant regulations in the sense of "a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm to public health in the particular case" ([18]).
>
> [...]
>
> 37. In summary our analysis supports the conclusion that, having regard to the purpose behind regulation 4(4)(a), "likely" (being the converse of the term used in the definition, "unlikely") is to be read in the manner defined in *In Re H* [sic] and *Wallis*.".

70. Mr Deakin accepted that the three-judge panel in *RJ* rejected that there has to be a probability of harm, in other words, that it rejected that the test is "more likely than not". But, he said, the three-judge panel did not do away with the test altogether; it just imposed a different filter. Without a filter, he submitted, no activity is safe or, putting it another way, an activity is "safe" only if "perfectly safe". He submitted that that was not the right test. He said there is always a degree of risk in every action. For instance, if he picked up his pencil, dropped it, then fell on it so that its point penetrated his face or body, there would he said be a very severe consequence. He submitted however that the risk entailed in picking up his pencil is a risk that can sensibly be ignored. He gave another example: what if there were a one in two risk of stubbing your toe, and a one in 100 risk of dying from it? Just because there is a 50% chance of the event occurring, that does not he submitted mean that the risk of death occurring from the event cannot reasonably be ignored. He submitted that the reference in my 10 July 2019 directions to the risk being "not fanciful" was too low a threshold.

71. Mr Deakin submitted by way of further illustration that, if I found a high probability of a thing occurring, but found also that the harm would be of low gravity, I might still find the thing unsafe. Conversely, if I found a low probability of the thing occurring but found that the harm would be of significant gravity if the thing did occur, I might, he said, again find the thing unsafe. But, he submitted, I do have to consider both the likelihood of the event occurring and the severity of the ensuing harm.

[22] *In re H and others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, [1996] 2 WLR 8.

72. Pausing there for a moment: in these oral submissions, Mr Deakin referred to assessing the risk of the event occurring as the first step, rather than to the risk of the harm occurring. And it is the risk of the event occurring that is mentioned in *R(A)2/89* and in *R v Secretary of State for Social Services ex parte Connolly* [1986] 1 WLR 421 (both of which were cited to me). To my request for clarification, however, both counsel said they meant that I must, pursuant to paragraph 56 of *RJ*, assess as a first step the risk of harm occurring, not merely the risk of the event occurring.

(b) Statistics: submissions for the Secretary of State

73. Mr Deakin submitted that, to consider the risk of harm occurring, I do need to consider the statistical evidence. He said he was not suggesting that I have to come up with a figure. But, he said, I do have to have regard to the statistical evidence to some extent. He said there is no doubt that there is a difference between the risk for these two claimants and the risk for non-hearing-impaired persons. But, he said, that does not suffice to mean that the claimants cannot safely shower and bathe.

74. The statistics on which Mr Deakin relied, at both the first and second hearings before me, were those adduced with a statement dated 13 March 2019 by Ms Kerstin Parker, Deputy Director of Disability Benefits Division at the Department for Work and Pensions (pages 328 to 332, SH bundle). The statistics related to the likelihood of fire in England and the likelihood of burglary in England and Wales. The titles and sources of the documents from which Ms Parker drew the statistics are at **Annex 2** to this decision. Mr Fraser did not wish to cross-examine Ms Parker.

75. Ms Parker said in her statement that "Fires can clearly cause the most serious harm"[23]. She cited evidence that in 2017 there were 22,694,600 households in England and that, in 2017/2018, fire and rescue services attended 30,744 "primary dwelling fires". Ms Parker said that "On average this equates to approximately 85 primary dwelling fires attended daily by FRS [fire and rescue services] and an average risk of fire in any given household in England on any given day of approximately 1 in 270,000"[24]. She said that "Cooking appliances were by far the largest cause of accidental dwelling fires in 2017/2018, accounting for 48% of the total number", and that "Smokers' materials such as lighters and cigarettes were the cause of 7% of accidental dwelling fires"[25]. Ms Parker cited evidence that in 2017/2018 there were 263 in-dwelling fire fatalities[26], including 71 resulting from the Grenfell Tower fire. (I pause to note that "72 people were eventually confirmed to have lost their lives" according to the BBC[27].) Ms Parker's statement went on to say in paragraph 12 that, for the same period, there "were 5,447 non-fatal casualties in dwelling fires, of which 2,451[28] required hospital treatment. This equates to approximately 1 in 117 primary dwelling fires which resulted in a fatality and 1 in 9 which resulted in an injury requiring hospital treatment".

[23] Paragraph 12 of Ms Parker's statement, page 331, SH bundle.
[24] Paragraph 10 of Ms Parker's statement, page 331, SH bundle.
[25] Paragraph 11 of Ms Parker's statement, page 331, SH bundle.
[26] Mr Deakin told me that paragraph 12 of Ms Parker's 13/3/19 statement had a typographical error: the word "fatalities" had been omitted after "263 in dwelling fires" on the first line of that paragraph (page 331, SH bundle).
[27] https://www.bbc.co.uk/news/uk-40457212.
[28] For the 2,451 non-fatal casualties requiring hospital treatment, paragraph 12 of Ms Parker's statement cited internal page 6 of her Exhibit 3 (page 34 in the numbering of all her exhibits, which is page 292 of the SH bundle). But I could not see that figure on that page. I accept the figure for the sake of argument, however.

76. Mr Deakin also took me to the Home Office's burglary statistics. It was common ground however that, if the claimants succeed in relation to the fire risk (which they do), then I need not consider burglary risk. I will not therefore set out the burglary statistics to which Mr Deakin took me. That will not of course prevent the Secretary of State seeking to adduce them in any onward appeal.

77. Mr Deakin submitted that, of the 30,744 fires attended by fire and rescue services shown in the statistics adduced by Ms Parker, 2,451 casualties required hospital treatment. That amounted to 7.97%. In other words, he submitted, there was a 92% chance of not sustaining harm requiring hospital treatment. Mr Deakin accepted that the statistics cited in Ms Parker's statement omit fires caught in time before the Fire Service attended. But, he submitted, "for it to make a difference to you, there has to be a number of non-hearing-impaired persons who caught the fire in time, while in the shower".

78. Mr Deakin submitted that a one in 270,000 chance of fire is remote. When you add in the likelihood of a fire occurring at the time the claimant is in the shower, he said, the risk is too remote. He submitted that it was not appropriate to look at it in the real world, in the sense of what people actually do to guard against a risk, regardless of whether or not there is in fact a risk. He said he was not asking me to ignore that people have smoke alarms; rather he was saying that, if everyone thinks there is a "risk x", but there is in fact no "risk x", then I should not take "risk x" into account. He said however: "I do accept that there is a risk of fire and that people should have a smoke alarm". He submitted that *Moran*[29] and *Connolly*[30], to both of which Mr Fraser referred, are not relevant. Mr Deakin said this was because those cases do not distinguish particular points in time, whereas we are concerned here with the risk during a claimant's shower. Mr Deakin attempted a rough estimate of how long is spent in the shower or bath. He submitted that my job is to assess the likelihood of harm occurring in that time period.

79. I asked Mr Deakin whether the statistics would show evidence of fires to which the Fire Service had not been called. Those are still fires that could, if not attended to quickly enough, require the Fire Service to be called out. He replied that possibly anecdotal evidence could be taken from the Fire Service.

80. Although Ms Parker's statement for the Secretary of State had included the 71 fatalities which Ms Parker said had resulted from the Grenfell Tower fire, Mr Deakin submitted that those fatalities should be discounted from the statistical analysis. (I again note that the figure ended up being 72. That additional fatality matters hugely in human terms, even if not statistically for the purposes of this case.) Mr Deakin accepted that the Grenfell Tower fire was a disaster. But, he submitted, the reason for discounting it was that it was a national disaster versus domestic fires. He accepted my point that the Grenfell Tower fire still involved domestic residences. But, he said, the statistics most useful to me would be the statistics for other domestic fires. The Grenfell Tower fire "had other factors", he said, and there was

[29] *Moran v Secretary of State for Social Services* CA, 13 March 1987, The Times, 14 March 1987. https://www.lawtel.com/UK/FullText/AC1256147CA(CivDiv).pdf.
[30] *R v Secretary of State for Social Services ex parte Connolly* [1986] 1 WLR 421.

an inquiry into it. That was why, he said, he had tried to "disaggregate" the Grenfell fatalities figures.

81. The reference to "discounting" the Grenfell fire figures did cause a little tension between the parties at the hearing, understandably in my judgment. Mr Deakin clarified that neither he nor the Secretary of State or her witnesses sought to suggest that the deaths and injuries from the Grenfell Tower fire in any way mattered less in human terms than any other deaths or injuries. He had been talking merely statistically.

(c) Summary of submissions for the Secretary of State

82. To summarise, Mr Deakin submitted that, on the basis of the statistics supplied for the Secretary of State with Ms Parker's witness statement[31]—

> "a. The risk of a fire occurring in any particular household on any given day is approximately **1 in 270,000** [Mr Deakin's emphasis].
>
> b. Cooking appliances and smokers' materials caused some 55% of these fires.
>
> c. It stands to reason that this already extremely low headline risk will be further reduced if the following are taken into account:
>
> i. The short length of time spent in the shower;
>
> ii. The taking of sensible precautions to minimise any risk while a person was washing and bathing (such as turning off cooking appliances and ensuring that smokers' materials are extinguished prior to washing and bathing).
>
> d. The Tribunal is also invited to note that the above figures address the statistical risk of a domestic fire occurring at all. But, as the RJ test requires the gravity of the threatened harm to be taken into account, it is the risk of death or harm being caused in a domestic fire that is crucial. Further reductions will need to be made as appropriate to capture this risk. The Secretary of State notes that in 2017/2018 only 2,451 people required hospital treatment as a result of fire and (discounting the Grenfell fire in which 71 people died) there were 192 deaths by domestic fire in the United Kingdom.".

83. Two caveats to this summary: First, Mr Deakin's closing position was that, even if the Grenfell Tower fire fatalities were included, they did not alter the figures significantly. Second, it was pointed out to Mr Deakin at the hearing that the exhibits to Ms Parker's statement showed that, as she had said in her statement, the fire statistics related only to England, and not to the United Kingdom, and that the number of households she used as her starting point equally related only to England. Mr Deakin revised his submissions in light of that, to relate only to England the figures he cited.

[31] Paragraph 15, submission 13/3/19, page 256, SH bundle.

84. Mr Deakin accepted that each of the claimants in the these two appeals would – without an aid or appliance or supervision – be disadvantaged in showering and in taking a bath as compared with someone without their needs. But, he submitted, that did not suffice to mean that these two claimants cannot each shower safely and take a bath safely. He did not accept that, at paragraph 63 of *RJ*, the panel in *RJ* saw that distinction as relevant. His submission remained that any risk was de minimis and that I should therefore disregard it.

(3) Discussion

(a) The legislative definition of "safely"

85. A reminder of our starting point: Regulation 4(4)(a) of the PIP regulations defines "safely" as it appears in regulation 4 as—

> "in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity".

86. Two basic points about this definition: First, it does not say "not likely". It says "unlikely". "Not likely" arguably could mean neither likely nor unlikely. Whether or not "not likely" could mean that, however, "unlikely" does not allow of that construction. "Unlikely" requires a positive finding that harm must be unlikely to be caused – a test which is prima facie more difficult to satisfy than "neither likely nor unlikely". Second, the harm has to be unlikely to ensue not merely "during" the activity but also "after completion" of it. So any harm that ensues after the shower or bath, from a fire that started while the claimant was taking the shower or bath, must still be taken into account in assessing whether the claimant can take the shower or bath in a manner unlikely to cause harm. Whether harm can be taken into account that might ensue from a fire that starts after the shower or bath, but which is somehow linked to the manner of taking the shower or bath, was not the subject of submissions. I do not consider that question in this decision.

(b) The test for "in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity"

87. In this decision, I use interchangeably the phrases "cannot reasonably be ignored" and "cannot sensibly be ignored". "Reasonably" was used in *R(A)2/89*. In that decision, Commissioner Monroe said at paragraph 5 (my emphasis)—

> "5. The claimant is a tetraplegic and if he were left alone in a house he would be unable to fend for himself in the event of an emergency as [sic] a fire or to stop a fire spreading. This may be a remote contingency but it is not fanciful. And anyone who left the claimant alone in a house where such an emergency actually arose would be criticised. The result could be catastrophic. In a passage from numbered decision CA 15/79 cited in paragraph 28 of decision R(A) 1/81 the Commissioner said that the question that a DMP should put to himself in this context was "Is there a relevant (i.e. not remote) risk of such an incident occurring?" and if so "if such incident does occur is it likely to give rise to substantial danger to the claimant or others?" Save that I would define a relevant risk as one that a

> person can reasonably be expected to guard against (even if remote) I would endorse this".

88. In this passage, Commissioner Monroe found that, even if the risk of fire is remote, the consequences to the claimant if a fire occurs are relevant. Commissioner Monroe did also use the phrase "not fanciful", which Mr Deakin for the Secretary of State objected to my using in the present case. I return to that at paragraph 94 below.

89. I accept that *R(A)2/89* is relevant. Commissioner Monroe there said that the Secretary of State was wrong to say that, because the claimant in that case was not epileptic, then *Moran* was not relevant (paragraph 4 of *R(A)2/89*). And the three-judge panel of the Upper Tribunal in *RJ* did not disagree with *R(A)2/89*. Leaving aside the facts of *R(A)2/89*, I see no reason not to follow the broad principle – as enunciated by Commissioner Monroe in that case – that "a relevant risk [is] one that a person can reasonably be expected to guard against (even if remote)". Mr Deakin's argument was that once something becomes too remote, it is no longer reasonable to be expected to guard against it. I accept that what I have to consider is whether the risk is too remote to be reasonably (or sensibly, see below) expected to guard against it. It is this that I take from *R(A)2/89*.

90. "Sensibly" was used by the three-judge panel of the Upper Tribunal in *RJ*. At paragraph 31, the panel rejected the approach seen in *CE v Secretary of State for Work and Pensions (PIP)* [2015] UKUT 643 that "likely" for the purposes of the regulation 4(4)(a) definition of "safely" means "more likely than not". The *RJ* panel held instead, at paragraph 37, that "having regard to the purpose behind regulation 4(4)(a), "likely" (being the converse of the term used in the [regulation 4(4)(a)] definition, "unlikely") is to be read in the manner defined in *In Re H* and *Wallis*". The manner defined in those two cases was, said the three-judge panel, whether there is "a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm" (paragraph 33 of *RJ*).

91. The three-judge panel in *RJ* went on to conclude, at paragraph 56 (my emphasis)—

> "56. In conclusion, the meaning of "safely" in regulation 4(2A) and as defined in regulation 4(4) is apparent when one considers the legislation as a whole and with the assistance of the approach by the House of Lords to the likelihood of harm in the context of protecting people against future harm. An assessment that an activity cannot be carried out safely does not require that the occurrence of harm is "more likely than not". In assessing whether a person can carry out an activity safely, a tribunal must consider whether there is a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case. It follows that both the likelihood of the harm occurring and the severity of the consequences are relevant. The same approach applies to the assessment of a need for supervision.".

92. The three-judge panel referred in this passage to "a real possibility that cannot be ignored" rather than to one that cannot "sensibly" be ignored as mentioned in *In re H* and in *Wallis*. But since the three-judge panel specifically held that the manner

defined in those two cases was to be used, the panel must have meant in this paragraph 56 passage to refer to "a real possibility that cannot sensibly be ignored".

93. If there is a difference between "can reasonably be expected to be guarded against", "cannot reasonably be ignored" and "cannot sensibly be ignored" for the purposes of applying the definition of "safely", the difference is not apparent to me. In any event, I am deciding that the risk of a fire occurring and of harm occurring from the fire should not be ignored (given the nature and gravity of the feared harm, to which I turn below). I am so deciding whether because the risk can reasonably be expected to be guarded against, or because it cannot reasonably be ignored or because it cannot sensibly be ignored.

94. Mr Deakin objected to my use of "not fanciful". He said it was too low a threshold. It seems to me that Commissioner Monroe used that phrase in *R(A)2/89* to explain what he meant by "a relevant risk [is] one that a person can reasonably be expected to guard against (even if remote)". And "fanciful" as he used it could be said to be the opposite of "a real possibility", or the opposite of "a real possibility that cannot sensibly be ignored", to which the three-judge panel in *RJ* referred.

> Conclusion: "in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity"

95. In any event, I need not get wrapped up further in whether there are material distinctions between "can reasonably be expected to be guarded against", "cannot reasonably be ignored", "cannot sensibly be ignored" and "not fanciful". Whichever of those phrases I were to apply, my decision is that the risk is not one that should be ignored, for the reasons below.

(c) Why the risk should not be ignored of a fire occurring and of harm occurring from the fire, having regard to the nature and gravity of the feared harm

(i) Introduction

96. Mr Deakin's submissions mentioned at one point the "risk of injury by fire while bathing"[32]. I pause with a reminder that the "injury" caused by fire does not itself have to happen while the claimant is taking the shower or bath; the injury can happen after completion of the activity, according to the definition of "safely" in regulation 4(4)(a). As I said at paragraph 86 above, however, in considering harm that occurs after the shower or bath, I am limiting my consideration to where the harm comes from a fire that started while the claimant was taking the shower or bath.

97. I do not agree with the Secretary of State that "the risks complained of are *de minimis* and that properly analysed they are **not** "…a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in a particular case.""[33] (Mr Deakin's emphasis). I say that for the following reasons.

[32] Paragraph 18, submission 13/3/19, page 257, SH bundle.
[33] Paragraph 33, submission 13/3/19, page 257, SH bundle.

(ii) Nature of the feared harm

98. The three-judge panel of the Upper Tribunal in *RJ* said that regard is to be had to the "nature and gravity of the feared harm" in assessing whether a risk can sensibly be ignored. The nature of the harm feared from fire is self-evidently injury or death. I do not consider that I – or First-tier Tribunal panels – need to drill down further, in relation to injury, to specify the nature of the injury.

99. Mr Fraser was not in a position to take me to detailed evidence as to types of non-fatal injuries from dwelling fires (which detail was not in any event required, in his submission: paragraph 62 above). If I do need to say something about the nature of the feared injuries, I start with what was said in Exhibit 3 to Ms Parker's statement for the Secretary of State[34]—

> "There were 4,805 non-fatal casualties from accidental dwelling fires in 2017/18, including those who received first aid (1,541) and who were advised to seek precautionary checks (1,208). When these two groups are removed and non-fatal casualties requiring hospital treatment are looked at, the largest category of injury was 'overcome by gas or smoke' (962; 47%) followed by 'burns' (415; 20%) and 'other breathing difficulties' (310; 15%). All other categories combined comprised the remaining 18% of injuries.".

100. I cite this passage not to consider and apply numbers or percentages, but simply because it is the only evidence before me that mentions types of injury from fire. Even this passage does not, however, specify the types of casualty that "received first aid". Nor does it specify the types of casualty "who were advised to seek precautionary checks" (which could, according to the "Fire Statistics Definitions document"[35] – signposted in the footnote to that passage – include checks by a doctor or at the hospital). And, although the passage specifies "overcome by gas or smoke", "burns" and "other breathing difficulties", among the non-fatal casualties requiring hospital treatment, it also mentions "all other categories" without attempting an exhaustive definition.

101. If I had to attempt greater particularity, self-evident physical injuries, apart from "overcome by gas or smoke", "burns" and "other breathing difficulties", might include injuries sustained while attempting escape – or sustained from the building or parts of it falling on the person – such as orthopaedic injuries, neurological injuries such as spinal cord injury or brain injury, and soft-tissue injuries. Burns could vary from a first-degree burn on a small area of skin, to a third-degree burn on a larger area of the body. There is an infinite number of combinations including a first-degree burn on a large area, a third-degree burn on a small area and combinations in between. The other injury types that I mention admit of infinite variations too. There could also be mental health injuries, such as anxiety, depression and post-traumatic stress disorder. Futile to attempt comprehensively to list all injury types, of course.

[34] Internal page 9 of Exhibit 3, second bullet, page 295, SH bundle.
[35] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/858045/fire-statistics-definitions-160120.pdf.

(iii) Gravity of the feared harm

102. As to the gravity of death or injury, it is the "feared" harm that is to be considered, according to *RJ*. The feared harm from fire is death or injury. If "death or injury" are considered together to be one description of potential harm, then clearly a risk of "death or injury" should not be ignored. If I have to assess the gravity of each of death and injury individually, the gravity of harm where the harm is death self-evidently suffices; the risk of death clearly should not be ignored. As to the gravity of harm where the harm is injury, "gravity" and "grave" are relative terms, even when "grave" is preceded by "very" or "not very". So too are terms such as "severe" and "high". I find simply that, for the reasons throughout this decision, feared harm in the form of injury renders the feared harm of sufficient gravity that the risk from fire should not be ignored.

(iv) Complete safety

103. Mr Deakin submitted that there does not have to be complete safety in an activity in order for it to be performed in a manner unlikely to cause harm. I accept that, of course. If that were the test, the definition of "safely" would say "in a manner that will not cause harm" rather than "in a manner unlikely to cause harm".

104. Mr Deakin submitted also that, just because the nature and gravity of the harm could be severe, that did not alone mean that a risk should be guarded against. He submitted, by way of example, that it is possible that he could drop his pencil and then fall on it in a way that it entered his face or body causing death or serious injury. He submitted that, just because that is a possibility, that does not mean it is one which cannot sensibly or reasonably be ignored. Or, to avoid the double negatives, it is in his submission a possibility which can sensibly or reasonably be ignored.

105. I see that point. I understand that Mr Deakin was using an extreme example to make the point. But, using his example, the risk relating to the pencil is commonly ignored. The risk of fire is not however commonly ignored, as he seemed to accept. I say that it is not commonly ignored for the following reasons—

(1) First, there are those who fit smoke alarms because they choose to, although not required to do so by legislation, such as homeowners of a single-dwelling house.

(2) Second, the Fire Service does not ignore them. It appeared to be common ground that, even where there is no legislative requirement to fit smoke alarms, the Fire Service will in some cases visit one's home free of charge and recommend smoke alarms. (My own experience has been that the Fire Service has also fitted, free of charge, the alarms that it has recommended. But my reasoning does not depend on that. I did not, so far as I recall, discuss that with counsel.)

(3) Third, Parliament considered it reasonable to legislate to require smoke alarms to be fitted inside tenanted houses and inside tenanted flats (regulation 4(1) of the Smoke and Carbon Monoxide Alarm (England) Regulations 2015 (S.I. 2015/1693)).

(4) Fourth, Parliament also considered it reasonable to legislate to require that a much broader category of premises be fitted with appropriate fire detectors and alarms. See, for example, articles 4, 5, 6(1), 8, 13(1)(a) and 31(10) of the Regulatory Reform (Fire Safety) Order 2005 (S.I. 2005/1541) and the definitions of "premises" and "domestic premises" in article 2 of that order.

(5) Fifth, there was, as Mr Fraser said, even a British Standard for detection and alarm devices for deaf and hard of hearing persons. The one he cited was entitled "Fire detection and fire alarm devices for dwellings. Specification for smoke alarm kits for deaf and hard of hearing people" (BS 5446-3:2005). That appears to have been replaced on 28 February 2015 by BS 5446-3:2015, entitled "Detection and alarm devices for dwellings. Specification for fire alarm and carbon monoxide alarm systems for deaf and hard of hearing people" (see paragraph 60(3) above). Whichever was in force at the relevant times, however, my point is the same: that there is a British Standard for such devices is another way in which the risk from fire is not ignored. I have set out at **Annex 3** to this decision the "Overview" from the British Standards Institution website for each of those two standards. I have included the overview for the 2005 standard since that is the one that Mr Fraser cited. Mr Fraser submitted also that there were "numerous" British Standards specifications related to fire risks. He did not specify others, however. I do not take account of any others, and do not need to.

(v) Common misperception

106. Mr Deakin submitted however as follows. If there were a common perception in society (a) that there is a risk of harm from something and (b) that that risk should be guarded against, when in fact that perception was wrong, then if non-impaired persons guarded against that perceived risk that would not of itself mean that these two claimants are entitled to guard against it for PIP purposes. In other words, just because a risk is <u>perceived</u> by society or a section of society to be a risk that cannot reasonably or sensibly be ignored, that does not of itself mean that the risk <u>in fact</u> cannot reasonably or sensibly be ignored. I accept as a general principle that a series of perceptions do not of themselves make the perceived phenomenon a fact. But I do not accept that that applies in relation to a dwelling fire. Indeed, Mr Deakin accepted that it does not apply in relation to a dwelling fire.

(vi) Window of time when in the shower or bath

107. I see the argument for assessing the risk only throughout the period or periods of time that the claimants in the present cases each spend in the bath or shower; that is the only occasion when they cannot hear an alarm. Or at least, that is the occasion when they have to remove their hearing aids which is the subject of these two appeals. I see also that that is different from *R(A)2/89*. The claimant in that case was tetraplegic. The risk was there all the time, not only when he was showering or bathing.

108. I do not suggest that the risk of harm is there for these two claimants outside of the period or periods in a day that each is taking a bath or shower (apart from any harm that occurs after the bath or shower but from a fire that started while the claimant was taking the bath or shower – see paragraph 86 above). But, what if I were to decide the case by saying that the risk of harm occurring is reduced because we are looking at a "small" window (as Mr Deakin put it) in the day, and not at larger windows and not at the whole day? That would be a decision that, although there is a risk in that "small" window, the risk can reasonably or sensibly be ignored. But that in turn depends on, among other things, how long the so-called "small" window is. What if a claimant spends an hour in the bath each morning, and an hour again each evening? That is two hours out of 24. Is that still small enough as a percentage of 24 to mean the risk can reasonably or sensibly be ignored? Is there a minimum time for each bath or shower that a person must spend before the risk cannot reasonably or sensibly be ignored? Am I to set one? Do First-tier Tribunal panels have to ask how long the person spends in the bath or shower, and how many of each the person takes each day, and potentially decide the case differently for one claimant in contrast to another, based on the different times spent in the bath or shower?

109. My answer to each question at paragraph 108 above is "no". Even if the maximum amount of time that may be spent taking baths and/or showers each day or week is not enough to render more than low or remote the risk of harm occurring from a fire that starts during that time, that makes no difference in my judgment. The risk is already "low / remote", to use Mr Fraser's description, even for non-hearing-impaired persons, as he said. But on the Secretary of State's case, I am still being asked to distinguish between the claimants on the one hand and non-hearing-impaired persons on the other. Is it right that the claimants should run a risk every time they shower or bathe that non-hearing-impaired persons commonly guard against by using smoke alarms? No, the legislation is not on its face required to work that way, in my judgment. And I do not accept that the legislation should be made to work that way.

110. I emphasise, though, that the mere distinction between hearing-impaired and non-hearing-impaired persons would not of itself make each of these claimants unable safely to wash and bathe without their hearing aids. I agree with Mr Deakin on that. My point is that (i) non-hearing-impaired persons do commonly guard against the risk of a fire occurring and of harm occurring from the fire, (ii) they do so based on a correct – and not imagined or mistaken – perception of a risk from fire, as Mr Deakin accepted, and (iii) it would not be right in my judgment if these hearing-impaired claimants were not permitted – in effect – to guard against the risk under the PIP regime where the PIP regime can be construed so as to avoid that disadvantage.

(vii) Other cases

111. Mr Fraser submitted that both Commissioner Monroe in *R(A)2/89,* and the Court of Appeal in *Connolly,* seemed to think that the risk of fire cannot reasonably be ignored. But Mr Deakin sought to distinguish both cases on their facts. The Upper Tribunal decision in *RJ* is more obviously relevant. The three-judge panel's observation in paragraph 68 of *RJ* that "descriptor 4c would seem to apply" does not appear to have been based on any objective assessment of the likelihood of

burglary, fire or other emergency happening for the claimant. Nor does it seem to have been based on the likelihood of injury or of encountering a burglar or of being threatened with force by a burglar. It was based solely on the claimant's inability to hear. See paragraphs 63 and 68 of *RJ* (set out at paragraph 15 above).

112. I need not decide whether *R(A)2/89* and *Connolly* must, as Mr Deakin submitted, be distinguished on their facts. I derive from no other judicial view my judgment that the risk relating to a fire which starts while the claimant is taking a shower or bath should not be ignored. I turn next to statistics.

(d) Statistics

(i) Introduction

113. I have set out at paragraph 53(1) to (3) above my concerns in principle about the effect of asking First-tier Tribunal panels to consider statistics in relation to fire (and burglary, which was still in issue when I was deciding whether to remit). That was relevant, as I said, to why I considered it not right to remit for consideration purely of the objective risk (as opposed to considering the limitations and needs of a particular claimant), whether in these two cases or in other cases.

114. I have decided that the objective risk of a fire occurring and of harm occurring from the fire[36] should not be left to First-tier Tribunal panels to come to different interpretations of identical statistics. But the Secretary of State asks nonetheless that, in deciding the risk at Upper Tribunal level, I consider the statistics she supplied.

(ii) Likelihood, nature and gravity of feared harm: using statistics

115. I agree however with Mr Fraser: even if I consider the statistics, the outcome will be the same as if I do not consider them. Mr Fraser accepts that the risk of harm from a fire that starts while the claimant is taking a shower or bath is "low" or "remote". The statistics had deficiencies to which I will turn in a moment. But let us assume that I rely on the 92% chance of not sustaining harm requiring hospital treatment, on which Mr Deakin relied for the Secretary of State. That gives an 8% chance of requiring such treatment from a fire attended by fire and rescue services (and that was only in England, contrary to Mr Deakin's initial submission that the figures related to the United Kingdom[37]). Mr Deakin's submission was however that the risk is even less than that when you add to the "1 in 270,000 chance of fire" (which itself was inaccurate, see paragraph 134 below) "the likelihood of a fire occurring at the time the claimant is in the shower". He submitted that that further dilution of the figures made the risk too remote.

116. Although Mr Deakin attempted an estimate of how long a person would spend in the bath or shower, I do not recall a definite submission as to what the length would be. He also did not attempt a calculation of what the further diluted figure would be that he had mentioned (paragraph 115 above). I do not attempt an

[36] For claimants who have to remove hearing aids to shower or take a bath and cannot without them hear a typical alarm.
[37] Paragraph 15d, submission 13/3/19, page 256, SH bundle.

estimate of either of those. Some persons might spend an hour or more twice a day in the bath. Some might take a three-minute shower once a day. Some might take a five-minute bath or shower once a week. And so on. And no figure for either the length of time or the further diluted figure appears in the statistics which the Secretary of State relied on. Nor can such a figure be worked out from those statistics. The statistics permit of calculation of percentages for (i) the number of dwelling fires in England which were attended by fire and rescue services, (ii) the number of fatalities from those fires, (iii) the number of non-fatal casualties and (iv) the number of non-fatal casualties requiring hospital treatment (and figures about what started fires). The percentage that Mr Deakin was able to supply based on the statistics was the 92% risk which he said there was of not sustaining harm requiring hospital treatment. I do not accept that the corresponding 8% risk, if I were to use his figures, of sustaining such harm should be ignored.

117. Even if the risk from a fire were substantially less than 8% once the figures were further diluted in the way advanced by Mr Deakin (leaving aside that a figure has not been supplied for such dilution), my judgment would be the same. The risk of death or injury is not one that I consider can reasonably or sensibly be ignored – in other words, it should not be ignored – by claimants who because of impairment cannot hear a typical alarm when taking a shower or bath. And that would be my judgment regardless of the exact percentage likelihood of harm occurring from a fire, including any further dilution to the figures that might be supplied in statistics. I say that because the feared harm from fire is harm that people commonly guard against and are in some cases legally required to guard against.

(iii) Different ways of using the same set of statistics

118. As I will illustrate, the statistics can be used in more than one way. Accepting that statistics should be used would entail having to specify how they were to be used. Specifying how they were to be used would in turn entail deciding which sets of figures are more important than which other sets of figures, all in relation to the same set of statistics. That is not an exercise that should be left to First-tier Tribunal panels to attempt, in my judgment. Nor do I consider that I should attempt that, especially not on the statistics before me, with the deficiencies I mention at paragraphs 129 to 138 below.

119. To illustrate my point: Mr Deakin submitted that, of the 30,744 primary dwelling fires mentioned in the statistics[38], 2,451 of the non-fatal casualties required hospital treatment. That amounted to 7.97% of the total primary dwelling fires (this is the "8%" mentioned at paragraphs 115 to 117 above). In other words, he submitted, there was a 92% chance of not sustaining harm requiring hospital treatment.

[38] Exhibit 3 (internal page 6) to Ms Parker's statement, relating to statistics for casualties from fires, said that the 263 fatalities were "in dwelling fires", rather than "in primary dwelling fires" which is how her Exhibit 2 (internal page 11) referred to the "30,744 primary dwelling fires attended by FRSs in England in 2017/18". It appears, from that same internal page 11 of Exhibit 2 (page 272, SH bundle, first bullet), that a "primary dwelling fire" is not the same as a primary fire (as opposed to a secondary fire): "Primary dwelling fires made up 41 per cent of primary fires and 18 per cent of all fires in 2017/18" (emphasis in original). That is why I have used "primary" in referring to the dwelling fires figures taken from Exhibit 2, but not in referring to the statistics taken from Exhibit 3. No distinction between "primary dwelling fire" and "dwelling fire" was however drawn in submissions. "Primary fires" are defined in footnote 3 on internal page 9 of Exhibit 2 (page 270, SH bundle): "Primary fires are those that meet one of the following criteria – a) occurs in a (non-derelict) building, vehicle or outdoor structure, b) involve a fatality, casualty or rescue or c) attended by five or more pumping appliances".

120. Mr Deakin's submissions were however based on (i) only fires attended by fire and rescue services, (ii) only fires in England (as he came to accept), and (iii) only those non-fatal casualties who required hospital treatment. Ignoring for a moment the first two of these three limitations, the third is troubling. Mr Deakin submitted that approximately one in 117 (0.85%) dwelling fires resulted in a fatality. He submitted that approximately one in nine[39] resulted in an injury requiring hospital treatment: that is 2,451 casualties requiring hospital treatment divided by 30,744 primary dwelling fires. But what if I calculated, using figures from the same set of statistics, the percentage of non-fatal casualties involved "in dwelling fires"[40] in England attended by fire and rescue services, without distinguishing between those who required hospital treatment and those who did not? That would be 5,447 casualties divided by 30,744, rather than the lower figure 2,451 divided by 30,744. That would produce a higher percentage of casualties: 17.72% (and even then, they are only the casualties from fires that fire and rescue services attended, to which I return below). What justification is there for ignoring casualties (2,996 on these figures, 9.74% of 30,744) that did not require hospital treatment?

121. I did ask Mr Deakin about casualties that had not required hospital treatment. I gave the example of a burn on the arm, for which the person does not receive hospital treatment but which is still painful. (I did not mention other injuries, but the same reasoning would apply to any other injury from fire, such as slight smoke inhalation if the casualty did not require hospital treatment for it, <u>if</u> there is any such case.) Mr Deakin accepted that an injury such as a burn on the arm that did not require hospital treatment was still a significant injury. Yet his position was, in effect, that the additional 2,996 casualties (5,447 minus 2,451) I have arrived at using his statistics <u>can</u> be ignored for the purposes of my calculating the risk from a fire to each of these two claimants, because the casualties did not require (or in any event did not receive) hospital treatment. In other words, I am asked to find that it is acceptable that a claimant should sustain an injury from a fire if the claimant does not require hospital treatment for it. Or at least, I am asked to find that claimants should not get to guard against such an injury using PIP. That is not a reasonable construction of the legislation in my judgment.

> (iv) Considering statistics would allow for differences based on where claimants live, on different levels of fire retardancy or on different types of dwelling

122. Moreover, one of my reasons for not remitting the question of the objective risk (separate from the limitations and needs of individual claimants) was that there should not be scope for differences based on where claimants live (in relation to the geographical risk of burglary) or based on, for example, what type of construction materials are used in their dwellings. Although Mr Deakin submitted that there should <u>not</u> be such differences, it seems to me that using statistics to calculate the risk for any particular claimant <u>would</u> allow for such differences.

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[39] The one in nine is taken from paragraph 12 of Ms Parker's statement dated 13/3/19, at page 331 of the SH bundle. She there cited for that calculation the statistics on internal page 6 of Exhibit 3 to her statement (page 292, SH bundle). One in nine is however 11.11% (as agreed with Mr Deakin at the second oral hearing), whereas 2,451 (casualties requiring hospital treatment) divided by 30,744 (primary dwelling fires) = 7.97%, not 11.11%. But I have not used the one in nine ratio in my reasoning, and it makes no difference to the outcome. Apologies if I have misunderstood the submission.

[40] According to Ms Parker's Exhibit 3, internal page 6, page 292, SH bundle.

123. Take a claimant who lives in a flat in a block known, for example, to have cladding identical to that on the Grenfell Tower, or to have other factors similar to those involved in the spread of the Grenfell Tower fire[41]. That claimant might be found to be at higher risk of harm from a fire than a claimant living in a block which does not have those factors, or living in a house which has much better fire retardancy. (Even if cladding or other factors involved in the spread of the fire do not cause the fire, the role of those factors in spreading the fire to a flat where a claimant might live is still relevant.) Mr Deakin sought to "discount" the Grenfell Tower fire. But other examples would serve just as well. For example, an older dwelling or, say, one with a thatched roof, might both have less fire retardancy than a newer dwelling.

124. Other scenarios could be posited too, relating to the risk of a fire occurring and of harm occurring from the fire, in any particular case. Take an example from the myriad different ways in which the statistics supplied for the Secretary of State were categorised—

> "Of the 30,744 primary dwelling fires attended by FRSs in England in 2017/18, three-quarters (75%) were in houses, bungalows, converted flats and other properties whilst a quarter (25%) were in purpose-built flats. Of those fires in purpose-built flats, 16 per cent were in purpose-built low-rise flats; six per cent were in purpose-built medium-rise flats and three per cent were in purpose-built high-rise flats."[42].

125. A footnote to that paragraph explained "other properties", but not exhaustively—

> "[7] Other includes sheltered accommodation, caravan/mobile home, HMO (House in Multiple Occupation) etc.".

126. And, adding yet more ways of carving up those same figures, a second footnote said—

> "[8] In the IRS low-rise is defined as 1 to 3 storeys, medium rise 4 to 9 storeys and high rise as 10 storeys or more. These IRS definitions are different to those from the English Housing Survey which defines low rise as a flat in a purpose-built block less than 6 storeys high. This includes cases where there is only one flat with independent access in a building which is also used for non-domestic purposes. High rise is defined as a flat in a purpose-built block of at least six storeys high.".

So a claimant living in a purpose-built flat could, if the statistics cited at paragraph 124 above were relied on, be said to be at less risk than a claimant living in a house. And of those claimants living in purpose-built flats, a claimant living in a high-rise block could be said to be at less risk than a claimant living in a low-rise block. But, whether the claimant was living in a low-rise block, for example, would depend on which definition of "low-rise" was used.

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[41] The nature and number of factors involved in the spread of the Grenfell Tower fire have not affected the outcome of these two appeals. But I have included at **Annex 4** an extract from the Phase 1 Report on the fire, to show why I mention "factors" – plural – involved in the spread of the Grenfell Tower fire.

[42] Ms Parker's Exhibit 2, internal page 11, fourth bullet, page 272, SH bundle.

127. Two more examples of how the statistics differentiate between categories within the same set of statistics—

> "In dwelling fires, 40 per cent of all fire-related fatalities were 65 years old and over in 2017/18, compared with 23 per cent of non-fatal casualties"[43].

> "Men are at a greater likelihood of dying in a fire than women"[44].

The first of these two examples goes on to say that "a large proportion of the fatalities from the [Grenfell Tower] fire were people under the age of 65". But my point is not about the exact figure. It is that both these passages are yet more examples of how the statistics can be applied in different ways.

128. Using statistics would mean that, where a factor is shown in them to render a particular claimant more at risk than others from a fire to which that claimant has not been alerted, that factor could be relied on to request points for washing and bathing, even though those others might not be entitled to such points. To avoid that, still more statistics might have to be adduced – the fire risk of "safer" cladding, for example. Alternatively, as mentioned at paragraph 118 above regarding using statistics in different ways, a decision would be needed – perhaps again from the Upper Tribunal – that certain sets of figures within the statistics should not be taken into account (such as the distinction between the risk for flats in purpose-built blocks and the risk for houses). But, although Mr Deakin invited me not to take account of non-fatal casualties not requiring hospital treatment, the submissions from both counsel did not invite me to decide between other ways of using the statistics, such as those mentioned at paragraphs 123 to 127 above; that was not the focus of this case. Moreover, the Secretary of State's position that individual cases should not so vary requires in my judgment that statistics should not be used (and I have said already that I, too, consider that cases should not so vary).

(v) Deficiencies in the statistics

129. Even if statistics were to be used, the ones provided to me had deficiencies. I do not mean that the statistics were deficient in what they set out to show. I mean simply that, for the purposes for which the Secretary of State adduced them, they were lacking. I say that for the following reasons.

The fire statistics related only to England

130. First, the fire statistics related only to England. On the Secretary of State's case that statistics should be used, statistics for Wales would need to be produced and adduced for any claimant who lived in Wales. Even if it were said that, because England and Wales are one legal jurisdiction, statistics need not drill down as far as to distinguish between England and Wales for PIP purposes, the fact is, the fire statistics provided to me have already done that, by excluding Wales. Similarly, statistics for Scotland would need to be produced and adduced for any claimant who lived in Scotland (and potentially the same would apply for Northern Ireland resident claimants).

[43] Ms Parker's Exhibit 3, internal page 7, second bullet, page 293, SH bundle.
[44] Ms Parker's Exhibit 3, internal page 7, fourth bullet, page 293, SH bundle.

The statistics related to particular periods

131. The second deficiency in the statistics – perhaps better described as a drawback to using them – was that they (of course) related to particular periods. In these two appeals, the fire statistics I was taken to ran from April 2017 to March 2018 (although the number of households said in the statistics to be in England seemed to relate to the 2017 calendar year[45]). If I accepted generally that statistics were to be used, new statistics would need to be adduced for the period to which the claim relates in any particular case. And if a claim related to more than one period mentioned in the statistics, then the statistics for each such period would have to be aggregated differently, to apply them to the period of the claim. For instance, a claim running from August 2017 to May 2018 would straddle the fire statistics for April 2017 to March 2018 on the one hand and, on the other, the fire statistics for April 2018 to March 2019. The crossover point is from 31 March to 1 April. So the statistics for August 2017 to March 2018 would need to be separated out from the April 2017 to March 2018 statistics. And the statistics for April 2018 to May 2018 would need to be separated out from the April 2018 to March 2019 statistics. The separated-out statistics for (i) August to March and (ii) April to May, would then need to be aggregated to apply to the period of the claim.

132. The alternative to adducing statistics correlating to the period of the claim would be to use only one set of statistics, relating to one particular statistical period, either for all cases or by choosing just one set to cover all periods of the claim in any particular case. A decision would have to be made as to how old the statistics have to be before the decision maker or tribunal moves on to a newer set. (There were differences in the statistics supplied for the Secretary of State. For example, there was a difference of 7% between an 82% rate of non-fatal casualties in dwelling fires in 2007/08 and a 75% rate of such casualties in 2017/18[46].) I doubt that it would be rational to decide – without at least considering what margins of difference there are in the statistics from year to year – that a claim can be decided by reference to statistics which do not relate to the period of the claim.

133. Moreover, as heralded at paragraphs 131 and 132 above, the periods within the statistics to which I was taken did not all match each other. The fire statistics were categorised by periods of 12 months from April to March. But the household statistics were categorised by 12 calendar months, from January to December. They were cited to me in combination, as if they all related to the same 12-month period. But whether that would produce material versus minimal differences would need to be considered before the statistics were used in combination like that.

The statistics ignored fires not attended by fire and rescue services

134. The third deficiency in the statistics was this. Mr Deakin's submission that "the risk of a fire occurring in any particular household on any given day is approximately 1 in 270,000**"** was inaccurate. That was, according to the figures that Ms Parker had supplied, only the risk of a fire occurring at which fire and rescue services attended: 30,744 fires attended by fire and rescue divided by 22,694,600 households. No

[45] Ms Parker's Exhibit 1, internal page 3, final column, row 20, page 261, SH bundle.
[46] Ms Parker's Exhibit 3, internal page 6, third bullet, page 292, SH bundle.

figure or percentage was given, in submissions or within the statistics relied on, for the total number of fires starting out of all of the 22,694,600 households said to be in England, so as to give a percentage of such fires which were not attended by fire and rescue services. I accept that that figure cannot be known, because it would require knowledge of all fires even those that had not been reported. Mr Deakin submitted that the impact of the omission from the statistics of unreported fires was "likely to be statistically minimal, and could be guarded against by taking precautions". For example, he said, "Don't leave chips in the oven while you have a shower". He submitted that a figure for the unreported fires could possibly be reached from anecdotal evidence from the Fire Service. I am not sure I understand how that would work. I suppose estimates could be done, based on surveys of the public. But, in any event, no such estimates or anecdotal evidence appeared in the statistics supplied to me.

135. But that the number of unreported fires is not known does not necessarily mean that such fires should not be taken into account. There can be no doubt that such fires still happened. Yet reliance on the statistics supplied by the Secretary of State would ignore them. I see no basis for me to accept Mr Deakin's bare assertion that the figure for those was "likely to be statistically minimal". Mr Deakin's submission appeared to be that fires that were put out before needing the fire and rescue services did not need to be considered (although it was not clear whether that submission had been shaped by the absence of such figures from the statistics adduced). I disagree. For a fire to be extinguished before the fire and rescue services are needed, the fire has to be caught in time. If the claimants in the present cases are each taking a shower or bath (a) without their hearing aids, (b) with the bathroom door closed (since the parties agree that being required to leave it open would not be washing and bathing to an acceptable standard), and (c) while alone in the dwelling, how are they going to catch the fire early enough not to need the fire and rescue services? I cannot assume that they would. And I have been taken to no figures to show that they would.

136. Moreover, if there is a fire that is caught in time, whether by the claimant or someone else, so as not to need to call the fire and rescue services, that does not of itself mean that the claimant has sustained no injury from the fire. A burn (if not smoke inhalation) could be sustained, for example, in putting out the fire or in helping to put it out. Other injuries might be sustained in scrambling to put it out or in helping to put it out.

The statistics did not distinguish between harm to hearing-impaired persons and harm to others

137. The fourth deficiency in the statistics supplied to me was that they did not distinguish between on the one hand, harm which occurred to hearing-impaired persons[47] who, when the fire occurred, had no supervision, aid or appliance, and on the other, harm which occurred to non-hearing-impaired persons. Even if the risk of the event occurring is the same for both groups, the risk of harm occurring from the event may not be the same. Indeed, the risk of harm occurring may be higher for those hearing-impaired persons for the obvious reason that they will not be alerted to

[47] Who are unable, without aids, to hear a typical alarm while taking a shower or bath.

try to escape, or to deal with the fire, until one of their other senses alerts them, such as by smelling smoke or fire, feeling heat, or seeing flames, or until someone from outside the residence alerts the hearing-impaired person. And any such other warning may well be later than a warning from someone who is inside the residence.

138. Mr Deakin submitted however that, for my considerations to be affected by the lack of distinction between the two groups mentioned at paragraph 137 above, there would have to be a number of non-hearing-impaired persons who caught the fire in time, while in the shower. (By "while in the shower", I think he meant that the fire started while they were in the shower, or that they were in the shower when they realised there was a fire.) In other words, of the two groups mentioned at paragraph 137 above, one of them would need to be sub-divided into two further groups. That submission does not in my judgment help the Secretary of State's case that I should take statistics into account. Still less does it help her case that First-tier Tribunal panels should take statistics into account. This is yet another "deficiency" in the statistics. I put it in inverted commas because I do not suggest that statistics should be compiled which specify the number of situations where non-hearing-impaired persons caught in time a fire which started while they were in the shower. Rather, that further suggested distinction between one group of persons and another – yet another distinction not shown in the statistics supplied to me – reinforces my judgment that statistics should not be used in deciding whether the risk of a fire occurring and of harm occurring from the fire should not be ignored for claimants with the needs and limitations seen in these two appeals. The obvious questions are: if we use statistics, where do we stop in terms of what we expect the statistics to show? What distinctions do we do without?

139. The three-judge panel of the Upper Tribunal in *RJ* did not, incidentally, appear to expect the First-tier Tribunal on remittal to consider statistics for activity 4.

(vi) The Grenfell Tower fire

140. I have decided that neither I, nor the First-tier Tribunal, should use statistics to assess the risk and feared harm from fire. But if I am wrong on that, two points about the Grenfell Tower fire—

(1) First, I see no material distinction for present purposes between the Grenfell Tower fatalities and those from other dwelling fires. The units within the Grenfell Tower were residential, and so could have housed each of these two claimants. The exact factors which caused or contributed to the fire, or which caused or contributed to its spread, do not alter the fact that the units were residential. In addition, any dwelling fire can have a number of factors causing or contributing to it, or causing or contributing to its spread. It was not the Secretary of State's position that no block of flats in the United Kingdom (or in England, or in England and Wales) has any of the factors – or has the combination of factors – which caused or contributed to the Grenfell Tower fire or to its spread. Nor was I taken to evidence to suggest that only a minimal number of blocks of flats have any such factors or have the Grenfell combination of such factors. I see no reason, therefore, to exclude the Grenfell Tower fatalities.

(2) Second, "discounting" the 72 Grenfell Tower fatalities from the 263 dwelling-fire fatalities in England would not in any event result in my accepting that the remaining 191 "should reasonably be ignored", as Mr Deakin invited me to find[48].

Finally, I remind readers of what I said at paragraph 5 of this decision: My discussion of the Grenfell Tower fire in statistical terms does not mean that it has become merely a number.

(e) Conclusion

141. It will be recalled that I asked Mr Fraser: Should there not be room for different First-tier Tribunal panels across the country to make different decisions from each other as to whether there is a risk that cannot reasonably or sensibly be ignored, where the differences between the panels' decisions arise not from differences in claimants' needs but from different First-tier Tribunal panels' different assessments of the same objective evidence of risk? It will be recalled that he replied: "I'd love that to be my submission, but in light of *RJ*, I can't". I am however deciding that there should not be such room. If and to the extent that this contradicts *RJ*, then I respectfully disagree with *RJ*.

142. I turn next to what I am doing in these two appeals in light of my above judgment.

(4) Partly setting aside the First-tier Tribunal's decision in each of these two cases

143. The Secretary of State originally submitted that—

> "2. … the appeal should be remitted back to the F-tT for further fact finding in relation to daily living activity 4" and
>
> "7. … the Secretary of State considers that a PIP decision comprises determinations in relation to each of the assessed activities. Accordingly, when the UT allows an appeal, and sets aside the FtT's decision, pursuant to s. 12 of the Tribunal, [sic] Courts and Enforcement Act 2007, it necessarily sets aside the whole PIP decision. However, in the circumstances of this particular case, and if the claimant prefers this course, the Secretary of State would not object to the case being remitted back to the same F-tT panel." (submission 4/12/17, pages 183 and 184, KT bundle).

144. Mr Deakin for the Secretary of State submitted however that—

> "13. The Secretary of State accepts (contrary to her submissions of 4.12.2017 (T/183-185 at §70)[49] that section 12 of the Tribunal [sic] Courts and Enforcement Act 2007 does empower the Upper Tribunal to remit a case to the FtT with directions that only parts of that case falls [sic] to be reconsidered (see Sarkar v Secretary of State for the Home Department

[48] Submission 13/3/19, paragraphs 15d and 16, pages 256 and 257, SH bundle. Mr Deakin's submissions cited 71 fatalities and 192 remaining rather than, as I have said, 72 and 191. Although that extra one of course makes a difference in human terms, it makes no difference to the statistical point for which these figures are here used.

[49] "§70" must be a typographical error for "§7"; there is no paragraph 70 in that submission.

> [2014] EWCA Civ 195.)" (Mr Deakin's emphasis, submission 13/3/19, page 249, SH bundle).

145. In oral submissions, Mr Deakin repeated the submission, citing *Sarkar*, that section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 empowers the Upper Tribunal, if it remits, to give directions limiting the scope below. I asked whether he was saying that I do not have power to part-remit. Mr Deakin said "we say there is only one decision made up of sub-decisions" and "you would be remitting the whole decision, but directing the First-tier Tribunal to maintain the rest of the findings, and just consider activity 4". He submitted that that would not mean that I would be directing a certain view of the facts; it would mean only, he said, that I would be saying the First-tier Tribunal must "keep the previous FTT findings".

146. It seemed to me however that, if I were to tell the First-tier Tribunal to "keep the previous FTT findings", then I would be doing one of two things. Either (a) I would be telling the First-tier Tribunal to make on remittal certain findings of fact, to reproduce the findings made by the previous First-tier Tribunal panel, or (b) I would not be putting before the First-tier Tribunal the possibility of making any findings at all on the points which were to be, as counsel put it, "kept" or "maintained". If I did (b), that would, it seemed to me, be a partial remittal. Discussion of this analysis did not result in any final submission (from either counsel I think[50]) as to the accuracy of that analysis. But both counsel agreed (i) that these two appeals had not been listed to decide the issue of whether the Upper Tribunal can make a partial remittal, and (ii) that, regardless of how it is analysed, I have power to put only washing and bathing before the First-tier Tribunal and I have power to decide only washing and bathing myself. I am doing the latter, to which I now turn.

I. Question 3: Do the claimants each merit points for washing and bathing, and if they do, how many?

147. I have decided above that there should not be room for different First-tier Tribunal panels across the country to make different decisions as to risk based on factors external to claimants. But that still means findings are needed as to what these claimants can and cannot hear, what needs arise from their individual functioning and individual limitations, and ultimately what that means for whether each can wash and bathe safely. I turn therefore to the third and final question of those mentioned at paragraph 16 above.

1. The claimants' hearing impairments

148. The parties agreed as follows[51]—

(i) KT's audiogram showed a right ear average of 66 dBHL, a left ear average of 59 dBHL, and so a 62.5 dBHL average for both ears. SH's audiogram showed a right ear average of 57 dBHL, a left ear average of 65 dBHL, and so a 61 dBHL average for both ears.

[50] Apologies if this does not reflect Mr Fraser's position.
[51] Joint submission from both counsel 18/11/19, pages 399 and 400, SH bundle.

(ii) The claimants' audiograms were "clinically very similar" to each other "in terms of hearing thresholds".

(iii) The claimants each have to remove their hearing aids "to wash/bathe".

(iv) Each claimant, "while washing/bathing, is unable to hear a typical smoke or fire alarm, in circumstances where a person without impairment would be able to hear those alarms".

149. I find that the claimants each have to remove their hearing aids to take a shower and to take a bath. I find that each claimant, while taking a shower and while taking a bath, is unable to hear a typical smoke alarm or typical fire alarm. I need not specify whether this is only with the door closed, given counsel's joint agreement that having to leave open the bathroom door would not be washing and bathing "to an acceptable standard" (as required by regulation 4(2A)(b) of the PIP regulations). I find that, even when showering with the bathroom door closed, a person without hearing impairment would be able to hear such alarms. This was the evidence of the Secretary of State's own witness, Mr Andrew Parker, the consultant Ear Nose and Throat surgeon who supplied an audiology report dated 18 October 2019 to the Secretary of State—

> "I agree with [Jenna Quail's] response (1). Even with the door closed the alarm level should be sufficiently loud as to be heard by a person without hearing impairment." (page 3 of report, antepenultimate paragraph, page 352, SH bundle).

150. Both counsel also agreed that neither claimant can, while "washing/bathing, hear a fire alarm with sufficient clarity so as to identify it as an alarm"[52]. It appeared that that additional agreed fact – with its reference to "sufficient clarity" – was not intended to vitiate the agreement between counsel that each claimant, "while washing/bathing, is unable to hear a typical smoke or fire alarm". It seems rather to have been included to address the level of detail to which the thorough audiology reports descended (based on commendably thorough questions by the claimants' representative, Ms Siddiqui). No point was taken by either counsel as to any distinction between, on the one hand, being unable to hear a typical smoke or fire alarm and, on the other, being unable to hear it with sufficient clarity to identify it as a smoke or fire alarm. And I accept that the two concepts amount, in these two appeals, to the same thing: that is, being unable to hear the alarm as an alarm, in other words as a warning. I say that for two reasons. First, counsel were agreed on that. But second, it is clear from the audiology reports that the questions the audiologists were answering dealt specifically with whether the claimant would be able to distinguish the sound "as being a warning sound" (for KT[53]) and with whether the claimant would be able to distinguish it "to an extent that she would know it [to] be a sign of danger" (for SH[54]).

[52] Joint submission from both counsel 18/11/19, pages 399 and 400, SH bundle.
[53] Report 6/11/19 of Jenna Quail MSci Msc, Principal Audiologist CS19511, James Cook University Hospital, page 384, final paragraph, SH bundle.
[54] Report 5/11/19 of Dr Linda Grimmett, Manager and Clinical Lead Audiology, Southend University Hospital, page 387, point 2(b), SH bundle.

2. The claimants' washing and bathing needs

151. The claimants' representative, Ms Siddiqui, submitted a witness statement dated 21 November 2019 for each claimant after the second hearing before me. Those statements came after counsel had already jointly agreed the impairment points at paragraph 148 above, and have not been contested. The statements were made in November 2019, some years after the effective date for each claimant (and after each had turned 18). But they were not the first statements made by each claimant. Mr Fraser had said at the second oral hearing before me – when discussing the possibility of submitting final statements to tie up loose ends – that what happens now is what also happened throughout the relevant period, for each claimant. That statement, made on instructions, was not contested by Mr Deakin.

152. I accept, from KT's statement dated 21 November 2019, that the following was so at that date. KT lives in a three-storey house (it is not stated whether it is detached, but that does not matter). The bathroom is on the second storey and that is where he takes a shower. He lives with his mother, father and four brothers. At the time KT made the statement, his brothers were aged 23, 17, and (twins) 14. He informs either his mother or his father that he is going to take a shower, so that he knows that "someone is hearing for me". Either his mother or his father will remain in the house while he takes the shower. His brothers are not involved in supervising him while he showers. The bathroom door is fitted with a lock that can be unlocked from the outside. KT keeps that door locked while taking a shower, but knowing that it can be unlocked if necessary from the outside.

153. I accept, from SH''s statement dated 21 November 2019, that the following was so at that date. SH lives in a four-bedroomed, two-storey, semi-detached house with her parents, two sisters and her little brother. At the time she made the statement, SH's sisters were aged 25 and 22, and her little brother was 10. SH informs either her mother or her father that she is going to take a shower so that she knows "someone is hearing for me". If her parents are not at home, she will – instead of informing one of them – inform her 25-year-old sister that she is going to take a shower. The bathroom door is fitted with a lock that can be unlocked from the outside. SH keeps that door locked while taking a shower, but knowing that it can be unlocked if necessary from the outside. Should there be an emergency, someone will be able to unlock the door from the outside. SH has not expressly stated that, after she has informed a parent or her sister that she is going to take a shower, the person she has informed of that then remains in the house while she takes the shower. That is however implicit in her statement. I find that that is what happens.

154. It will be noticed that each claimant has – in these post-second hearing statements – used the phrase "someone is hearing for me". That does not affect the veracity of the points I have accepted at paragraphs 152 and 153 above. Each claimant had given a statement, prior to the second hearing before me, about what the claimant could and could not hear[55]. Each claimant has consistently claimed a need for supervision or an aid or appliance. The material facts as to that had already been agreed. (The Secretary of State had said in an email the day before the second hearing, which I first saw after the hearing, that there were minor, immaterial

[55] SH's statement 30/7/19, page 370, SH bundle. KT's statement 28/7/19, page 375, SH bundle.

discrepancies, "in particular between their lay and expert evidence". Mr Deakin did not seek to address me on any discrepancies.[56]) The claimants are represented jointly by the same legal adviser. It is not surprising if, by this stage, against a background of mostly uncontested evidence, they use similar language to each other to express materially identical needs. For KT, it was just a different way of saying that "he likes the reassurance of there being somebody in the house" as the First-tier Tribunal had already recorded him to have said (paragraph 29 of the statement of reasons). And for SH, it was consistent with her statement in her claim form that "I need supervision to be able to wash/bathe because without my hearing aids on, I can't hear anything e.g. smoke alarm, bang on the door or a warning shout in emergency" (page 21, SH bundle).

155. Therefore, given all of my preceding findings and reasons, I reject Mr Deakin's submission that each claimant can wash and bathe in a manner unlikely to cause harm to that claimant. I instead accept Mr Fraser's submission that neither claimant can wash and bathe safely – without an aid or appliance or supervision – because each removes hearing aids to take a shower and to take a bath. I accept also that each of these claimants has supervision when taking a shower and when taking a bath. I accept that that supervision is done outside of the bathroom, on the other side of a closed and locked bathroom door, but with the supervising family member still in the house. (I need make no finding in these two appeals as to whether the supervisor stands immediately outside the bathroom; the houses are not large enough for it to make a difference.) Mr Fraser invited me to find that, because the claimants have until now <u>had</u> supervision, then that is what they <u>need</u>, and that descriptor 4c therefore applies in each case. He submitted that that will change when each claimant leaves home. From then, the need of each claimant will, he said, be for an aid or appliance, since the family members will not be there to supervise.

156. What actually happens is not of itself conclusive as to need, of course, although it can be evidence of need. In the present cases, there was, on the evidence before me, no reason why each claimant's need could not be met by a visual alarm while the claimant was showering or bathing. One of the audiologists, Dr Linda Grimmett, said that "a louder alarm <u>or a visual alerting alarm placed within the bathroom</u> would be beneficial" (my emphasis)[57]. Ms Siddiqui had, in written submissions dated 8 January 2018, stated—

> "Although the National Deaf Children's Society does not endorse any specific make of alarm, there are alarm systems currently on the market for use by a deaf person when showering/bathing. This will consist of a battery powered "receiver" which alerts with bright flashes if a fire should occur. This is used in conjunction with a "smoke alarm transmitter" which discovers smoke and fire and relays the alarm to the receiver" (page 201, SH bundle).

157. That statement was made at the start of 2018. And submissions were not made about the nature of the aid or appliance that would (a) suffice for each claimant and (b) be legally permitted in each claimant's bathroom. It was however common

[56] Email 19/11/19, at 16.22, from Ms Tessa Hocking, Government Legal Department.
[57] Dr Grimmett's report 5/8/19, paragraph 4, page 377, SH bundle.

ground that the Fire Service could advise each claimant about aids and appliances that could be fitted and which would suit that claimant's needs. For devices that might be suitable, there is also BS 5446-3:2015. I do not therefore go so far as to specify the exact type of aid or appliance, or the exact aid or appliance, for which I am awarding points. I find instead that the claimants each merit two points under daily living descriptor 4b for needing to use an aid or appliance to be able safely to wash and to be able safely to bathe, but subject to two caveats: (i) for each claimant, that there is an aid or appliance that can address that claimant's need, and (ii) for each claimant, that there is nothing stopping the claimant having an aid or appliance in the bathroom so that the claimant can shower, and can take a bath, with the door shut (both counsel agreed that having to leave the door open would mean the activity was not done to an acceptable standard for the purposes of regulation 4(2A)(b)). Otherwise, each claimant merits two points under descriptor 4c for needing supervision to be able safely to wash and to be able safely to bathe.

158. The need for an aid or appliance or supervision was present for each claimant throughout the period covered by that claimant's claim. It was common ground that, if I accepted the claimants' cases in principle, then the "on over 50% of the days of the required period" test in regulation 7 of the PIP regulations would be met. I find that it is. I need say no more than that about regulation 7.

J. Potential distinctions

159. Although activity 4 is entitled "Washing and bathing", no submissions were made as to whether each claimant also has to remove hearing aids to wash short of taking a bath or shower, such as washing their faces at the bathroom basin. I have not needed to make a finding on that in the present cases, however; each claimant's need to remove hearing aids to take a bath, and to take a shower, suffices to merit the points I am giving.

160. Similarly, I have seen no need to consider any period of time which either claimant spends in the bathroom with the door closed, after having removed the hearing aids but before beginning to take the bath or shower, or after taking the bath or shower but before reinserting the hearing aids. While those periods of time might, on one view (not necessarily mine), not be included in "washing and bathing", those periods without the hearing aids are necessary in order to take a shower and to take a bath. But more importantly, they are not in any event material for these claimants since I am giving two points anyway for needing to remove the hearing aids to take a bath or shower.

161. There were other potential distinctions that, absent the helpful joint agreement from counsel, might have needed to be addressed in these cases. I say this to make clear that the concise, agreed facts which counsel jointly presented to me were based on much more detailed evidence, and much more analysis, than I have needed to go into. I have listed at **Annex 5** the audiology reports that were in evidence. There were also reports about SH's needs from her teachers (for example that from Rachel Charlton, dated 26/4/17, page 127, SH bundle) and in SH's Education, Health and Care Plan. The outcome of this case has not, in other words, been influenced by evidence in the form of bare assertions, contrary to what might otherwise appear from paragraph 148 above.

162. Finally, in some places in the papers there was reference to not hearing an alarm without hearing aids while the shower was running. By the time of the hearings before me, however, no distinction was made or sought to be made by either counsel as to ability to hear without the hearing aids when the shower is not running, or when the bath water has finished running. It was common ground, after the audiology reports had been submitted, that the impairments I have found above, and which counsel had jointly agreed, were not materially less when the water was not running. I have not therefore had to address whether either claimant's needs are different in the time spent in the bath after the water has stopped running into the bath, as compared with when the water was running. Reasoning similar to that at paragraph 160 above would probably apply to that time period if I had to decide that point. Similarly, I have not had to address whether the claimants' needs are different in the brief moments in the shower after the water has been turned off and before the claimant emerges, as compared with when the water was running – although those brief moments would probably be de minimis anyway.

Rachel Perez
Judge of the Upper Tribunal
21 August 2020

Annex 1 to Upper Tribunal decision

Legislation

PIP generally

(1) Entitlement to personal independence payment ("PIP") is, by virtue of section 77(1) of the Welfare Reform Act 2012 ("the 2012 Act"[58]), governed by Part 4 of that act. There are two components to PIP: the daily living component (by virtue of sections 77(2)(a) and 78 of the 2012 Act), and the mobility component (sections 77(2)(b) and 79).

(2) The present cases concern only the daily living component.

(3) Section 78 of the 2012 Act provides, so far as relevant, that—

> "(1) A person is entitled to the daily living component at the standard rate if—
>
> (a) the person's ability to carry out daily living activities is limited by the person's physical or mental condition; and
>
> […]
>
> (2) A person is entitled to the daily living component at the enhanced rate if—
>
> (a) the person's ability to carry out daily living activities is severely limited by the person's physical or mental condition; and
>
> […]".

(4) Regulations made under section 80 of the 2012 Act govern how to determine whether a claimant's ability to carry out daily living activities is limited, or severely limited, by the claimant's physical or mental condition.

(5) The Social Security (Personal Independence Payment) Regulations 2013[59] ("the PIP regulations") provide a scoring system for assessing these questions. By virtue of regulation 3(1), the daily living activities are those in column 1 of the table in Part 2 of Schedule 1 to the regulations. The activities in that Part 2 are numbered. They carry scores according to increasing levels of need. By virtue of regulation 5(3)(a), a claimant has limited ability to carry out daily living activities where the claimant scores at least eight points from that table in relation to those activities. By virtue of regulation 5(3)(b), a claimant has severely limited ability to carry out daily living activities where the claimant scores at least 12 points in relation to those activities.

[58] c.5.
[59] S.I. 2013/377, as amended.

(6) In other words, a person is entitled to the daily living component at the standard rate if the person scores at least eight points for the daily living activities in Part 2 of Schedule 1 to the PIP regulations. And a person is entitled to the daily living component at the enhanced rate if the person scores at least 12 points for daily living activities. Regulation 4(3) prevents double counting: a person who scores 12 points is entitled not to both the enhanced rate and the standard rate, but only to the enhanced rate.

The legislation: Activity 4, washing and bathing

(7) The table in Part 2 of Schedule 1 to the PIP regulations, as in force at the relevant times, provided so far as relevant—

"*Column 1* *Activity*	*Column 2* *Descriptors*	*Column 3* *Points*
[…]	[…]	[…]
4. Washing and bathing.	a. Can wash and bathe unaided.	0
	b. Needs to use an aid or appliance to be able to wash or bathe.	2
	c. Needs supervision or prompting to be able to wash or bathe.	2
	d. Needs assistance to be able to wash either their hair or body below the waist.	2
	e. Needs assistance to be able to get in or out of a bath or shower.	3
	f. Needs assistance to be able to wash their body between the shoulders and waist.	4
	g. Cannot wash and bathe at all and needs another person to wash their entire body.".	8

(8) The PIP regulations make provision for how to assess which descriptor in Part 2 of Schedule 1 is satisfied, for each of the activities in that part. Regulation 4, as in force at the relevant times, provided—

"**Assessment of ability to carry out activities**

4.—(1) For the purposes of section 77(2) and section 78 or 79, as the case may be, of the Act, whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment.

(2) C's ability to carry out an activity is to be assessed—

(a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or

(b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.

(2A) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so—

(a) safely;

(b) to an acceptable standard;

(c) repeatedly; and

(d) within a reasonable time period.

(3) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activities.

(4) In this regulation—

(a) "safely" means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity;

(b) "repeatedly" means as often as the activity being assessed is reasonably required to be completed; and

(c) "reasonable time period" means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity.".

End of Annex 1

Annex 2 to Upper Tribunal decision

Evidence cited for the Secretary of State in Ms Kerstin Parker's witness statement dated 13 March 2019

Exhibit 1	"Households in the UK by region, 1996 to 2017" "Source: Labour Force Survey (LFS), Office for National Statistics" "Produced by Demographic Analysis Unit, Office for National Statistics". https://www.ons.gov.uk/file?uri=/peoplepopulationandcommunity/birthsdeathsandmarriages/families/adhocs/005374totalnumberofhouseholdsbyregionandcountryoftheuk1996to2015/totalnumberofhouseholdsbyregionandcountryoftheuk1996to2017final.xls	Pages 259 to 261 SH bundle
Exhibit 2	"Home Office" "Fire and rescue incident statistics: England, year ending March 2018" "Statistical Bulletin 16/18" "9 August 2018". ISBN: 978-1-78655-699-8. ISSN: 1759-7005. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/732555/fire-and-rescue-incident-march-2018-hosb1618.pdf	Pages 262 to 283 SH bundle
Exhibit 3	"Home Office" "Detailed analysis of fires attended by fire and rescue services, England, April 2017 to March 2018" "Statistical Bulletin 17/18" "6 September 2018". ISBN: 978-1-78655-701-8. ISSN: 1759-7005. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738432/detailed-analysis-fires-attended-fire-rescue-england-1718-hosb1718.pdf	Pages 284 to 309 SH bundle
Exhibit 4	"Office for National Statistics" "Overview of burglary and other household theft: England and Wales" "Release date: 20 July 2017". https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/overviewofburglaryandotherhouseholdtheft/englandandwales	Pages 310 to 325 SH bundle
Exhibit 5	"Nature of crime: Burglary" "Data tables shown in this workbook relate to the Crime Survey for England and Wales (CSEW)". https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/natureofcrimeburglary	Pages 326 to 327 SH bundle

End of Annex 2

Annex 3(1) to Upper Tribunal decision

British Standards Institution: BS 5446-3:2005

This version appears to have been in force until and including 27 February 2015.

BS 5446-3:2005 (£214.00 to non-members)

"Fire detection and fire alarm devices for dwellings. Specification for smoke alarm kits for deaf and hard of hearing people"
https://shop.bsigroup.com/ProductDetail/?pid=000000000030157019

The landing page for this version says—

"Overview

> Smoke alarms for use in dwellings have been available for many years, and are specified in BS 5446-1. These devices are intended to warn of the presence of a potential fire condition by emitting a loud piercing sound. However, people with hearing loss can be unaware of such an alarm sound.
>
> There are recognized methods of alerting deaf and hard of hearing people, including the use of vibro-tactile and visual alarm devices. To provide a fire warning for those who are deaf or hard of hearing, it has become common practice for such devices to be coupled to domestic smoke alarms. There has therefore been an increasing need for standardization of such smoke alarm systems.
>
> This part of BS 5446 addresses that need by specifying requirements for smoke alarm kits that include smoke alarms and associated warning devices used in dwellings to warn deaf and hard of hearing people in the event of fire.
>
> This Standard includes tests and requirements for vibro-tactile and visual alarm devices, for smoke alarms by reference to BS 5446-1, and for the interconnections of these components.
>
> The kits specified in this part of BS 5446 are specifically intended to give warning in the event of fire. Since any smoke alarm that forms part of a kit for deaf and hard of hearing people is required to conform to BS 5446-1, it will incorporate a functioning sounder. BS 5446-3 therefore specifies requirements for the additional vibration and flashing light functions."

End of Annex 3(1)

Annex 3(2) to Upper Tribunal decision

British Standards Institution: BS 5446-3:2015

This version appears to have replaced BS 5446-3:2005 on 28 February 2015.

BS 5446-3:2015 (£254.00 to non-members)
Detection and alarm devices for dwellings. Specification for fire alarm and carbon monoxide alarm systems for deaf and hard of hearing people
https://shop.bsigroup.com/ProductDetail?pid=000000000030277276

The landing page for this version says—
"Overview

What is this standard about?

Fire and carbon monoxide alarms in dwellings have been available for many years. They are intended to warn of the presence of a potentially dangerous condition by emitting a loud piercing sound. However, people with hearing loss might not be able to hear such an alarm sound adequately. This standard is about fire and carbon monoxide alarm systems for people who are deaf and hard of hearing.

Who is this standard for?

The execution of this standard's provisions should be entrusted to appropriately qualified and experienced people.

Why should you use this standard?

It's become common practice for vibratory, visual alarm and low frequency audible devices to be coupled to domestic alarms to provide a fire or carbon monoxide warning for people who are deaf or hard of hearing. This standard tackles the increasing need to standardize such alarm systems.

This part of BS 5446 specifies requirements and test methods for components and their means of interconnection (e.g. by electrical wiring or by radio links).

What's changed since the last update?

This is a full revision of the standard and introduces the following key changes:

- Inclusion of carbon monoxide alarms
- Change from 'kits' to individual components that may be used to form a system appropriate to individual requirements or needs
- Inclusion of references to European standards for visual alarm devices and low frequency sounders
- Removal of requirements specific to leisure accommodation vehicles (LAVs)
- Inclusion of guidance on systems suitable for varying levels of hearing loss"

End of Annex 3(2)

Annex 4 to Upper Tribunal decision

Executive Summary extract from the Grenfell Tower Fire Inquiry: Phase 1 Report

REPORT of the PUBLIC INQUIRY into the FIRE at GRENFELL TOWER
on 14 JUNE 2017
Chairman: The Rt Hon Sir Martin Moore-Bick October 2019 HC 49–I
https://assets.grenfelltowerinquiry.org.uk/GTI%20-%20Phase%201%20full%20report%20-%20volume%201.pdf#:~:text=REPORT%20of%20the%20PUBLIC%20INQUIRY%20into%20the%20FIRE,printed%2030%20October%202019%20Volume%201%20HC%2049%E2%80%93I

Page 12:

"**Part III: Conclusions**

The cause and origin of the fire and its escape from Flat 16

2.12 In **Chapter 21** I consider the cause and origin of the fire and find that it was started by an electrical fault in a large fridge-freezer in the kitchen of Flat 16, for which Behailu Kebede bears no blame. I have not been able to establish the precise nature of the fault in the fridge-freezer, but consider that to be of less importance than establishing how the failure of a common domestic appliance could have had such disastrous consequences. That question is pursued in **Chapter 22**, in which I find that:

a. The fire is most likely to have entered the cladding as a result of hot smoke impinging on the uPVC window jamb, causing it to deform and collapse and thereby provide an opening into the cavity between the insulation and the ACM cladding panels through which flames and hot gases could pass. It is, however, possible (but less likely) that flames from the fire in the fridge-freezer passed through the open kitchen window and impinged on the ACM cladding panels above.

b. The fire had entered the cladding before firefighters opened the kitchen door in Flat 16 for the first time at 01.14.

c. A kitchen fire of that relatively modest size was perfectly foreseeable.

The subsequent development of the fire

2.13 The progress of the fire after it had entered the cladding is considered in **Chapter 23**. Once the fire had escaped from Flat 16, it spread rapidly up the east face of the tower. It then spread around the top of the building in both directions and down the sides until the advancing flame fronts converged on the west face near the south-west corner, enveloping the entire building in under three hours. I find that:

a. The principal reason why the flames spread so rapidly up, down and around the building was the presence of the aluminium composite material (ACM) rainscreen panels with polyethylene cores, which acted as a source of fuel. The principal mechanism for the spread of the fire horizontally and downwards was

the melting and dripping of burning polyethylene from the crown and from the spandrel and column panels, which ignited fires lower down the building. Those fires then travelled back up the building, thereby allowing the flame front to progress diagonally across each face of the tower.

b. The presence of polyisocyanurate (PIR) and phenolic foam insulation boards behind the ACM panels, and perhaps components of the window surrounds, contributed to the rate and extent of vertical flame spread.

c. The crown was primarily responsible for the spread of the fire horizontally, and the columns were a principal route of downwards fire spread."

End of Annex 4

Annex 5 to Upper Tribunal decision

Audiology reports

The following audiology reports were in evidence before me—

(1)	Report dated 13/7/15 from the Audiology Department at The James Cook University Hospital for KT.	Page 51 KT bundle
(2)	Report dated 30/3/17 by Mr Thomas Nubbert, Audiologist, Southend University Hospital, for SH.	Pages 125 to 126 SH bundle
(3)	Report dated 5/8/19 by Doctor of Audiology, Dr Linda Grimmett for SH.	Page 377 SH bundle
(4)	Report dated 16/8/19 by Principal Audiologist, Jenna Quail for KT.	Pages 372 to 374 SH bundle Pages 352 to 354 KT bundle
(5)	Report dated 18/10/19 for the Secretary of State by Mr Andrew J Parker DLO ChM FRCS, Consultant ENT Surgeon.	Pages 350 to 355 SH bundle Pages 330 to 335 KT bundle
(6)	Further responses dated 5/11/19 by Dr Linda Grimmett for SH.	Pages 387 to 388 SH bundle
(7)	Further responses dated 6/11/19 by Jenna Quail for KT.	Pages 384 to 386 SH bundle
(8)	Second further responses dated 13/11/19 by Dr Linda Grimmett for SH.	Page 389 SH bundle
(9)	Email 14/11/19 from Vicki Kirwin, Paediatric Audiologist and Senior Policy Officer at the National Deaf Children's Society: comments in response to Mr Andrew Parker's evidence (at pages 350 to 355, SH bundle).	Pages 394 to 396 SH bundle

End of Annex 5