



Neutral Citation Number: [2026] UKUT 242 (AAC)

Appeal no. UA-2024-000545-HS

**IN THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

THE UPPER TRIBUNAL HAS ORDERED that, without the permission of the Tribunal, no one shall publish or reveal the name or address of GNY (the Appellant in these proceedings) or of HNY (her mother) or any information that would be likely to lead to the identification of them or any member of their family in connection with these proceedings. Any breach of this order is liable to be treated and punished as a contempt of court.

Between:

GNY

Appellant

v

Hammersmith and Fulham Council

Respondent

Before: Upper Tribunal Judge Jacobs

Decided on 25 June 2026 following an oral hearing on 04 March 2026.

Representation:

GNY: John Horan and Michael Paulin, both of counsel, instructed on direct access

The Council: Ian Perkins of counsel, instructed by Browne Jacobson LLP

DECISION OF UPPER TRIBUNAL

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

Reference: EH205/22/00026

Panel: Judge Katherine Southby with Specialist Members Ann Rhodes and Saima Butt

Decision date: 13 November 2023

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

SUMMARY:

Tribunal procedure and practice (including Upper Tribunal) – fair hearing (34.2)

Significance of Equal Treatment Bench Book for a fair hearing – role of representative in ensuring a fair hearing.

REASONS FOR DECISION

1. This appeal is about the Education, Health and Care Plan for GNY, who is a young person for the purposes of the Children and Families Act 2014. She has been supported by HNY, who is her mother. The letters I have used were chosen randomly.

2. The tribunal referred to HNY by an incorrect surname. I do not know how that happened and it certainly should not have happened. It is not, though, an error of law. The tribunal used the wrong name throughout and its reasoning always referred to the evidence and argument for this case. I am satisfied that the tribunal did not confuse this case with another.

A. GNY

3. GNY was born in 2004. She has a number of physical and mental disabilities as a result of various medical conditions. It is sufficient to say that she needs significant support in order to be able to achieve her potential for living an independent life. The issue for the First-tier Tribunal was the nature of those needs, the resulting educational provision that she required and whether she should attend a college or be supported otherwise than in college.

4. There have been other proceedings relating to GNY, in both the County Court and the Court of Protection. Mr Perkins summarised those in his skeleton argument for the local authority. I mention them for completeness. They do not affect anything I have to decide.

B. The proceedings

5. The local authority issued an Educational, Health and Care Plan for GNY in 2022. The First-tier Tribunal heard the appeal in October 2023 and gave its decision in November 2023. The application to the Upper Tribunal for permission to appeal was dated 12 April 2024 and registered in the Upper Tribunal on 24 April 2024. I gave permission to appeal on 2 July 2025. Much of the time between those dates was taken by matters relating to HNY's application for permission to obtain a transcript of the First-tier Tribunal's hearing. The process for obtaining permission was meticulous and thorough. No doubt, it was devised and implemented with the best of intentions. It does, though, seem to me that in the midst of that process GNY's need to have her education settled was lost sight of.

C. The tribunal legislation

6. Section 12 of the Tribunals, Courts and Enforcement Act 2007 provides:

12. Proceedings on appeal to Upper Tribunal

- (1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
- (2) The Upper Tribunal—
 - (a) may (but need not) set aside the decision of the First-tier Tribunal, and
 - (b) if it does, must either—
 - (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
 - (ii) re-make the decision.
- (3) In acting under subsection (2)(b)(i), the Upper Tribunal may also—
 - (a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;
 - (b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.
- (4) In acting under subsection (2)(b)(ii), the Upper Tribunal—
 - (a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and
 - (b) may make such findings of fact as it considers appropriate.

7. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699) provides:

2. Overriding objective and parties' obligation to co-operate with the Tribunal

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

- (b) interprets any rule or practice direction.
- (4) Parties must—
 - (a) help the Tribunal to further the overriding objective; and
 - (b) co-operate with the Tribunal generally.

D. The grounds of appeal

8. GNY's counsel presented their grounds of appeal under a number of headings. The individual grounds overlapped or interrelated. That has made it difficult to structure my decision in the most efficient way. What I have done is to begin with the argument presented by Mr Horan at the hearing. This was an interesting argument on the significance of the Equal Treatment Bench Book, which he told me reflected his education in philosophy. Mr Paulin presented the other grounds, which I have dealt with largely under the headings used in the skeleton argument.

E. The Equal Treatment Bench Book [ETBB]

The ETBB

9. This is a resource published for the judiciary, which includes judges and specialist members who sit in tribunals. As I type, the current edition is from 2024 with an update in February 2026. Although compiled for judicial office holders, it is available publicly and so it is accessible to those involved in cases in tribunals, including the parties, their representatives and any witnesses. It has two principal purposes. One is to help tribunals to communicate appropriately and effectively with those who appear before them in whatever capacity. The other is to help tribunals understand the submissions and arguments that are made to them. It is written by judges, although no doubt they receive advice on the contents.

The argument

10. Mr Horan referred me to the introduction to the ETBB, and to the sections on demonstrating fairness, diversity and Islamophobia. He argued that this was a collection of judicial wisdom, which provided an objective morality of individual groups. Different rules had to apply to different people. The minds of judges and tribunal members had to be focused on the contents of the ETBB. Their conduct of a hearing had to be governed by it and their decisions had to show that it had been applied. He said, correctly, that the ETBB was not mentioned in the tribunal's decision in this case. He argued that this was an international human right that applied regardless of whether a party was represented. He said that this was a *Meek* case, referring to the decision of the Court of Appeal in *Meek v City of Birmingham District Council* [1987] IRLR 250, which deals with fair hearings.

11. Mr Horan told me that this was a process that had to be followed. I hope I have understood correctly that this explains such references in the grounds and argument as:

- HNY's colour and religion;
- the tribunal failing to mention the ETBB or explain why it had not made stereotypical assumptions about HNY and her credibility;
- the 'deficit of empathy' shown in the hearing.

If I am right, it explains why the other grounds place the burden on the tribunal to demonstrate that it has acted in accordance with Mr Horan's objective morality.

12. I am conscious that that is a wholly inadequate summary of a subtle and wide-ranging argument.

Analysis

13. The ETBB is not law. It provides information to help the tribunal to conduct a hearing fairly and to understand and assess the evidence.

14. The Upper Tribunal can only take account of Mr Horan's duty in so far as it involves an error on a point of law. That is the limit set on the tribunal's powers on appeal by section 12 of the Tribunals, Courts and Enforcement Act 2007. Brooke LJ's list in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 is a helpful starting point for identifying errors of law:

9. ... It may be convenient to give a brief summary of the points of law that will most frequently be encountered in practice:

- i) Making perverse or irrational findings on a matter or matters that were material to the outcome ('material matters');
- ii) Failing to give reasons or any adequate reasons for findings on material matters;
- iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- iv) Giving weight to immaterial matters;
- v) Making a material misdirection of law on any material matter;
- vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
- vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.

10. Each of these grounds for detecting an error of law contain the word 'material (or 'immaterial')'. Errors of law of which it can be said that they would have made no difference to the outcome do not matter. ...

15. As Brooke LJ emphasised, a mistake is only an error of law if it was material. In most cases, that means that it affected the outcome. The position is different if the mistake involved a procedural or other irregularity: see paragraph 9(vi). If there was a procedural irregularity, it will be material if it could have made a difference to the outcome or fairness of the proceedings. As Mr Horan told me that this was a *Meek* case, which deals with fairness, I have treated his argument as based on a procedural irregularity. This is the more favourable test of materiality.

16. Fairness is an essential requirement of procedural regularity. I do not accept that the standard of fairness has to be judged regardless of whether or not a party is represented. Whatever the nature of the Mr Horan's duty, it has to apply in judicial

proceedings. That means it must operate through, and in the context of, the overriding objective and the duty to co-operate.

17. For the overriding objective, the duty will help ensure that the parties are able to participate fully (rule 2(2)(c)). The extent to which the duty is required will depend on what assistance a party needs, which will depend on whether the party is represented. And the duty to co-operate places a responsibility on the parties themselves and that duty extends to a party's representative. As the Court of Appeal said in *Geveran Trading Co Ltd v Skjevesland* [2003] 1 WLR 912:

37. ... Under the Civil Procedure Rules, it is the express duty of the parties, and hence their legal advisers (including advocates), to help the court to further the overriding objective in the Civil Procedure Rules ...

The same reasoning applies to the duty under rule 2(4).

18. Nor can Mr Horan's duty override the basic principles by which evidence is assessed for its reliability and witnesses are assessed for their credibility. The ETBB can provide valuable information to help the tribunal apply those principles appropriately to particular evidence. It cannot, though, and does not make recollection more reliable than contemporaneous documentary evidence based on records. Nor can it make more credible an argument that multiple public bodies have ignored their duties, fabricated evidence or deliberately omitted evidence helpful to a party.

19. I do not accept that it is necessary to impose further duties on tribunals.

20. Tribunals have to identify the legal and factual issues. They have to hear and assess evidence in order to make findings of fact. Then they have to apply the law to the facts.

21. In carrying out those tasks, tribunals are subject to the general duty of fairness, acting through and in conjunction with the specific requirements of the overriding objective. That provides a framework for the tribunal to take account of any personal characteristics of the parties and their witnesses. These may affect communication, understanding or assessment of the submissions and the evidence. The ETBB contains an invaluable briefing for tribunals on a wide range of those considerations and the ways in which tribunals can accommodate the needs of those who appear before them. I call it a briefing for two reasons. First, because it is not evidence (as Mr Horan accepted). And second, because individuals differ and do not necessarily conform to any particular stereotype.

22. The responsibility, though, does not lie solely with tribunals. The duty in rule 2(4) requires the parties and their representatives help and co-operate with the tribunal. That is an essential companion to, and limitation on, the responsibility of the tribunal.

23. Coming to the specifics of this case, and leaving aside the use of the wrong surname for HNY, I have found nothing on which to criticise the tribunal. Essentially, counsel's case seeks to impose an additional but unnecessary requirement on the tribunal and criticises it for not complying with it.

F. Was this a fair hearing?

24. This ground begins with the statement that GNY and HNY 'are both Black, and it was evident to the Tribunal that they are Muslim'. It then criticises the tribunal for its reasoning in paragraphs 41, 46, 79-81 and 83-85 of its written reasons. It is not

necessary to set out these paragraphs. In each of them, the tribunal rejected HNY's evidence. It did so, because it found it either (a) unreliable or (b) irrelevant to the issue the tribunal had to decide. I take an example of each. As to (a), HNY told the tribunal that GNY had not gone out in 2022. The tribunal did not accept that evidence, because it conflicted with other independent evidence of GNY's attendance 'at the learning centre daily for a period of time and also at clinic-based OT appointments' (paragraph 79). That was a rational approach to the assessment of the evidence. As to (b), HNY also told the tribunal of the effect on GNY when she visited a College Open Day. The tribunal did not accept that that experience and reaction were comparable to how GNY would react to 'a gradual transition back into a placement, managed by experienced and trained professionals' (paragraph 83). Again, that was a rational approach.

25. The argument continues by criticising the tribunal for not raising the possibility of these findings during the hearing or giving HNY a chance to comment on them. The argument varies between criticising the panel as a whole and the judge in particular. This argument overlooks the important fact that GNY was represented by counsel. The points made by the tribunal in assessing the evidence are ones that would have been apparent to counsel, who could have questioned the witnesses and made points in closing submissions. The tribunal was entitled to rely on counsel to act in GNY's interests. This does not just rely on counsel's duty to their client. Rule 2(4) of the First-tier Tribunal's rules of procedure imposes two duties on the parties. They must 'help the Tribunal to further the overriding objective' and 'co-operate with the Tribunal generally'. And, as I have already said, that duty applies also to the parties' representatives.

26. Another argument made under this heading relates to a point put to HNY by the judge. The point was that HNY might be describing her own trauma rather than her daughter's. The argument was that the judge did not explain why she was making this point. I will deal with this argument in general terms and then come to this particular example.

27. In general terms, this raises the issue of questioning by a panel. Members of the panel are entitled to question the parties and their witnesses. This furthers the overriding objective of dealing with a case fairly and justly. It can help the parties participate in the proceedings and it uses the tribunal's special expertise effectively: see rule 2(2)(c) and (d). But it has to be used appropriately. The tribunal must not only be independent and impartial, it must maintain the appearance of being so. Disclosing what a judge is thinking at that moment can create the impression that the matter is prejudged or that the judge is siding with one party rather than the other. This, in turn, can lead to questioning becoming, or seeming to become, confrontational and argumentative. Just putting a point for comment avoids those potential problems.

28. I now come to the particular example. The judge made the point on page 212. This followed evidence from HNY about problems with the local authority. The judge asked for a specific example of GNY's trauma, but HNY referred to the problems relating to GNY not having a heater. That is when the judge asked her to pause and said:

So, just pause there. Because what I cannot do is make any decision around the council and the heating and so on, but what I can do is to try to understand, properly understand what you are telling me about [GNY's] trauma. And there are possibly two things happening, where it is possible that something traumatic is

happening in your house that you are finding very difficult as a parent and we also need to understand what is happening to [GNY] and whether that is traumatic for her.

HNY's response was 'Yes.' There is nothing unfair in how the judge put the point to HNY. Despite the argument put to me, the judge did give an explanation of her thinking. Also, picking up the point I have made about the role of a representative, the judge immediately turned to GNY's counsel for assistance in identifying relevant evidence.

29. The final point made under this heading relates to the tribunal's acceptance of the local authority's argument about GNY's attendance at the learning centre. This was contrary to HNY's evidence. The skeleton argues that the tribunal: (a) did not resolve the material discrepancy; (b) did not question the local authority's evidence; and (c) did not explain why it preferred the local authority's case.

30. As to (a), the tribunal was aware of the conflicting evidence and preferred the evidence of the local authority. HNY gave evidence that GNY did not go out at all in 2022. The tribunal did not accept that evidence and explained why:

79. Given the attendance during 2022 at the learning centre daily for a period of time and also at clinic-based OT appointments, we reject the evidence of HNY that GNY 'did not go out at all' during this period. We have carefully tested her evidence in order to give it appropriate weight, and we find it to be unpersuasive, and at times apparently self-serving.

31. As to (b), I repeat the point that GNY was represented by counsel before the tribunal.

32. As to (c), the tribunal quoted from the evidence at paragraph 78 of its written reasons, which it summarised in paragraph 79 (quoted above). The evidence described what GNY had done and how she had behaved. That is inconsistent with HNY's evidence. It was rational to prefer evidence that would have been based on records rather than HNY's recollection. Although HNY was critical of the various bodies in the First-tier Tribunal, there was no evidence on which the tribunal could properly find that the quoted evidence was not accurate, still less that it had been fabricated.

G. Was the Meek rule complied with?

33. After referring to *Meek* and related cases, the skeleton argument made four points.

34. The first point was that the tribunal had not 'engaged or explained why it is not a case where it made stereotypical assumptions about [HNY's] attitudes and credibility as a witness.' I have found nothing to suggest, let alone show, that the tribunal made any stereotypical assumptions at all. When it did not rely on HNY's evidence, it explained why in terms that relate to the evidence as a whole on the particular issue.

35. The second point is that she had 'not been given the opportunity when she understands what the case before her may have been, in terms of the local authority or indeed the Tribunal, to answer the point'. There was no 'case before her ... in terms of ... the Tribunal'. The tribunal was an independent and impartial decision-maker. It had to decide the factual and legal issues that were raised by GNY's appeal. I accept that HNY may not have understood what those points were, but she was represented by counsel. As to the 'case before her ... in terms of the local authority', I refer to what I said earlier about counsel's role.

36. The third point is that the tribunal has ‘given no effective answer as to why such assertions are made about her credibility in the Judgment and must bear in mind what is said about stereotyping her by Judgment.’ The tribunal has given an effective answer. It did so when it explained why it relied on evidence other HNY’s.

37. The fourth point repeats a point I have already dealt with.

38. The skeleton then deals with the arguments put to me by the local authority. I have set out *my* reasons and do not need to deal with these points.

H. Dr J’s evidence

39. Dr J is a Consultant Psychiatrist. The tribunal accepted her evidence in part. It explained why in paragraph 41 of the written reasons:

Accordingly, on the balance of probabilities, whilst we accept Dr J’s observations as per the first half of the proposed wording above, we are not persuaded that we can be confident that the diagnoses themselves are robust and reliable. We are not persuaded that the relatively brief report indicates that Dr J carried out a full diagnostic assessment. We note that [HNY] gave oral evidence that Dr J had not seen any previous reports and had arrived at her own diagnoses on the basis of her own observations, however we did not find the evidence of [HNY] to be persuasive or transparent around the origin of the diagnoses and found her account to vary upon questioning. We consider that establishing a diagnosis is a significant matter and accordingly in the absence of sufficient evidence for us to conclude that they are reliable, the second part of the proposed wording is therefore removed.

40. The skeleton argument describes this reasoning as based on irrelevant considerations, perverse, irrational, unsupported, undermined by other evidence, unfair and in error of law. I do not accept those arguments.

41. Paragraph 41 contains the tribunal’s explanation for how it assessed Dr J’s evidence. It was an assessment made by a specialist tribunal, using its experience to assess the strengths and weaknesses of the evidence. The criticisms of the tribunal’s reasoning may show that it was possible to construct an argument for accepting Dr J’s evidence in full. But the test for error of law is whether the tribunal was entitled to assess the evidence as it did. I consider that it was for the reasons it gave.

42. It is worth picking out one remark from the skeleton argument: ‘The Tribunal had no evidence to counter her [Dr J’s] report.’ That would be a relevant point for the First-tier Tribunal, as a fact-finding body, to take into account in assessing the evidence. But it would not be decisive. The tribunal was entitled to reject Dr J’s evidence, in whole or in part, without having competing evidence.

I. Education otherwise than in college - Ms R’s evidence

43. Ms R is a Paediatric Occupational Therapist. The skeleton criticised the tribunal’s use of her evidence in paragraph 75:

The report of Ms R from 2021 is based upon an assessment in the home. The report in 2023 is based upon both a home assessment and an assessment at the SI clinic. Ms R states [page 343] ‘*GNY happily engages in therapy sessions and demonstrated a continued positive approach in testing procedures.*’ We find Ms

R's evidence in her professional report persuasive, and we do not accept HNY's evidence regarding GNY's presentation in the OT clinic setting.

The grounds criticise this for lacking logic and for failing to deal with Ms R's later report in 2023. I am going to *assume* that that criticism is valid.

44. The tribunal dealt with education otherwise than in college in paragraphs 66 to 87. It set out the law in paragraphs 66-68. It reviewed and assessed the evidence in paragraphs 69-86. It gave its conclusion in paragraph 87. Paragraph 75, which I have quoted, is the only paragraph that mentions Ms R's evidence.

45. The issue for me is whether a single mistake undermines the reliability of the tribunal's reasoning and conclusion on education otherwise than in college. In *HK v Secretary of State for the Home Department* [2006] EWCA Civ 1037, Neuberger LJ explained how to identify whether an isolated error contaminated a decision as a whole so as to make it material:

46. ... the issue cannot be resolved simply by asking how many of the Tribunal's reasons survive. The issue has to be determined partly by reference to the probative value of those reasons, both in absolute terms and by comparison with the rejected reasons, and objectively, but also subjectively, in the sense of seeing what weight the tribunal gave to the various reasons it gave. The issue also has to be determined bearing in mind the overall picture including reasons which a tribunal would have had, but which were not expressed. An example would be the impression made by a witness (a factor which is not, in my view, high in the hierarchy of cogency, especially in an asylum case which will normally involve an appellant from a very different cultural background from that of the Tribunal).

46. Applying that approach, the tribunal's reasoning as a whole took account of evidence from HNY and six other people. It assessed that evidence as a whole, and considered any conflicts within it. It considered a range of issues relevant to where GNY's education should take place and the nature of her educational needs. It also took account of GNY's views and found that they were in accordance with the tribunal's conclusion. In that context, I consider that the problems with paragraph 75, if they exist, do not undermine the tribunal's conclusion.

J. Failure to provide reasons

47. This heading of the skeleton argument is short and general. The argument adds nothing of substance to the more particular points made elsewhere.

**Authorised for issue
on 26 June 2026**

**Edward Jacobs
Upper Tribunal Judge**