Neutral Citation Number: [2024] EWHC 584 (Admin)

Case No: AC-2023-LON-003615

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2024

Before:

MR JUSTICE FREEDMAN

- -

Between:

THE KING

(ON THE APPLICATION OF LS)

Claimant

- and –

THE LONDON BOROUGH OF MERTON

Defendant

- and –

THE RESIDENTIAL SCHOOL

Interested Party

- -

John Friel (instructed by **SEN Legal Limited**) for the **Claimant**
Leon Glenister (instructed by **the South London Legal Partnership**) for the **Defendant**

Hearing date: 7 February 2024
Submission of draft order: 12 February 2024
Circulation of judgment in draft: 11 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 14 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

This judgment is subject to an anonymity order dated 6 December 2023 which contains detailed orders which continue to apply in order to preserve the anonymity of LS. To this end, in the published judgment, the members of LS's family have been anonymised, as have the schools attended by him.

MR JUSTICE FREEDMAN:

I Introduction

1. This application concerns a young person referred to as "LS". He is now 15 years old, born on 26 February 2009. He has severe autism and extremely complex mental health needs. It is said that his anxiety and other mental health needs have resulted in a significant regression. There have been problems about his being violent at home, particularly to his parents and his younger sibling.

2. The family comprises the following: LS his parents and siblings. The father HS acts as the litigation friend and who has instructed solicitors. He and his wife, the mother, live in the family home. LS is the second of three children, having an older sister about two years older and a younger sister about two years younger (and aged 11 at the time of the observations about her). His father has made witness statements, to which reference will be made.

3. Examples of regression given by LS's father, HS, before the Tribunal in a statement dated 20 July 2023 include regular meltdowns due to extreme anxiety outside the school environment. This has included causing himself harm by punching objects at home and biting his hand regularly. On 31 January 2023, during a meltdown LS punched a window and broke it, but fortunately without serious injury to himself.

4. The first statement of LS's father dated 20 July 2023 at [6] referred to *"challenging behaviour"* towards his mother ES, and to HS when he is defending ES. **"***Whilst historically these have been manageable due to infrequency and physical size, LS has now entered puberty, which has resulted in multiple aggressive incidents on a daily basis with significantly greater physical risk. These incidents have caused actual injury mainly bruising and will likely cause more serious injury in the short term as LS gets bigger, which is a real concern for us."* The statement also referred to controlling behaviour about requesting that ES wore particularly clothes. In meltdown, LS would require his father to shower or re-shower.

5. Arising out of his regression, the matter was referred to the Special Educational Needs and Disability Tribunal ("the Tribunal"), exercising its jurisdiction under section 51 of the Children and Families Act 2014 ("CFA 2014"). This application arises from a decision of the Tribunal which reached a decision on a parental appeal on 5 October 2023. Following that decision, on 9 November 2023, the London Borough of Merton ("the LA") wrote determining that the placement ordered by the Tribunal was a 38-week placement and rejected the Tribunal's recommendations on social care. It offered an alternative social care provision. Following a pre-action protocol letter dated 14 November 2023, the LA responded on 28 November 2023, which set out more fully the position of the LA and rejected the claim in the pre-action protocol letter.

6. There are three issues between the parties:

   (i) Did the Tribunal decide that the Claimant required a 52-week placement as part of the Special Educational Provision?

   (ii) If the Tribunal made its recommendations as a matter of social care, was the letter dated 9 November 2023, stating that it would not follow the

recommendations of the Tribunal, unlawful? In particular, did it fail to set out adequate reasons for its conclusion and/or did it fail to consider relevant considerations in a way that was irrational or contrary to Wednesbury unreasonableness?

(iii) Did the LA fail to make any specification of provision for speech and language therapy, occupational therapy or behavioural management in sections H1 and H2 in the plan as served, and is it therefore unlawful in those sections?

7. Due to the urgency of the matter, it has been agreed between the parties that this is a rolled-up hearing in which the issue of permission is to be considered, and, if granted, the substantive hearing of the application is to take place. There has also been interim relief that LS is boarding at the Residential School. Although there has not been a decision for a 52-week placement (on the contrary the decision has been for LS to return home during holidays), LS has been accommodated at the Residential School over the Christmas and the half-term holiday. This is without prejudice to the determination of the issues which are about a review of a decision of the LA in November 2023, that is before the interim relief which was granted.

II Background

8. The child LS is now 15 years old and has a diagnosis of an Autistic Spectrum Disorder. He has severe learning difficulties, severe receptive and expressive language difficulties and significant sensory problems. He has developed severe behavioural problems relating to dysregulation and linked to anxiety: see the witness statement of his father of 5 December 2023 at [6]. His anxiety and other mental health needs are said to have resulted in a significant regression, which is not uncommon in cases of autism with the onset of puberty. His father's evidence is that his condition declined very quickly from about late 2021.

9. This regression had a number of consequences. First, a carer, Ms Garcia who had supported LS since he was 8 years' old has recently left. LS had assaulted her repeatedly. On 15 February 2023, he punched her repeatedly and pulled clumps out of her hair. Another person, Mrs Erica Nolan, who supported the family and who had experience in working with children with autism, also withdrew her support. The father believes that they both left due to the increasingly aggressive behaviour of LS: see his first witness statement at [8].

10. Other events recounted by the father to the Tribunal in his first statement included the following. On 3 March 2023 LS's taxi chaperone reported that he attacked her in the taxi. On a trip to Cornwall, LS attempted to push a child of about four years old off the harbour wall. The wall was about 5 metres high. Fortunately, he was unable to make contact with the child. The family sleep has been interfered with because about two to three times per week on such nights, LS would sleep for less than 4 hours a night and would roam the house, regularly going into meltdown. There were also related three attempts to abscond. On two of those occasions, LS tried to enter the house of neighbours. Another example of regression has been LS's toileting and his soiling

himself particularly during school holidays. LS is also deliberately vomiting and often throwing the vomit onto the walls of the house.

11. The situation reached a stage where the mother, especially, and the father were the subject of significant aggressive attacks. The siblings, especially the younger sister, were in fear of him. Evidence was given by the father for the parents before the Tribunal as well as from an independent Social Worker Ms Scull that a 52-week placement was necessary.

12. The conduct was observed by professionals. In a report of Vivienne Clifford, an educational psychologist, she commented on a visit of Ms Mundy, a speech and language therapy assistant and Dr Smith, clinical psychologist to the home of the family where she commented:

> *"I observed LS as he went about this morning:*
>
> - *Hitting his mother several times during my visit. At one point, LS hit [ES](his mother) so hard in the back that I could hear the hollow sound reverberate from the other side of the kitchen table but there was no identifiable trigger for this.*
>
> - *I observed LS hitting his mother on her head when she could not find the crisps that he wanted in the larder. Mrs S had to hold LS's hands together to protect herself as she tried to calm him."*

13. Ms Clifford stated at [8.5] of her report: "*LS frequently becomes emotionally dysregulated at home, on a daily basis. His behaviours now include hitting and kicking, particularly aimed at his mother who has bruises and reports this aspect of LS to be frightening. LS also bites himself. Despite his parents being clearly loving and supportive of LS, his behaviour is having an intolerable toll on the family."*

14. The observations of Ms Scull included the very difficult impact on the older and the younger sister. The younger sister had been hit by LS, her sleep is disrupted by LS due to his roaming and meltdowns in the house at night-time. When she is downstairs, she is on edge, and prefers to go up to her room. The older sister also feels on edge due to the current dynamics and is trying to keep it together. She *"has seen her mum cry more than ever and stated that this is extremely difficult to see."* Ms Scull added "*ES (the mother) reports that the relationship between LS and his siblings has become fraught due to LS's increasingly controlling behaviours, particularly towards his youngest sister."*

15. Ms Scull at [6(d)] referred to the impact on the mother as follows:

> *"ES advised that there has been a huge impact on her mental well-being since the deterioration of LS's behaviour. ES explained that she finds it difficult when LS is violent and becomes very upset by this. ES described how she will often feel*

> *shaky 24 hours after the incident, which he feels stems from the adrenaline rush, and this is then followed by a crash. ES advised that she has recently started counselling sessions and has attended 3 sessions so far. ES feels that the benefit of these is very little as she already knows why she is feeling the way she does and that her feelings are very much linked to the current circumstances and therefore will only change once the circumstance does."*

16. Since Reception, LS attended a local authority maintained special school for children with complex needs herein called the Day School. The father relates that it was the hope of the family that LS might be supported to live at home, but the deterioration in LS's behaviour led to this being seriously challenged.

17. The parents appealed an annual review of LS's EHC plan on 19 October 2022 naming that school in Section I of his EHC Plan. The parents wanted LS to attend a residential school.

18. A report was obtained from a practice known as the London Autism Assessment Practice ("LAAP")and the LAAP team prepared mental health, cognition and learning, speech and language therapy, occupational therapy and overview reports. Each report came to the conclusion that:

> *"the LAAP team is of the view that [LS] will require an extended waking day curriculum. This needs to be delivered within a specialist school for children with autism and learning difficulties which provides a residential setting, providing [LS] with an environment where he can remain safe, regulated and where his anxiety can be managed."*

19. There is a dispute as to whether the Tribunal ordered educational provision in which case the LA was bound to follow it or whether it recommended social care provision in which case the LA had to consider it but was entitled rationally not to follow it.

20. In the decision, at paragraph 76, the Tribunal stated:

> *"On balance and considering the combination of provision necessary to meet LS's communication, occupational therapy and behavioural needs and to enable him to build on the limited generalisation observed we prefer the evidence of the LAAP Team that a consistent and highly structured programme of education and training is required. LS's continued challenging behaviour in any environment which is not school leads us to conclude the only way LS will be able to make measurable progress is for the volume of that provision to be increased and applied in all settings. In the first instance we therefore find that*

> *education and training is required pursuant to Section 21(1) of the Children and Families Act 2014".*

21. The Tribunal then went on to say:

> *77. If we are wrong on this and owing to the lack of specificity the provision is not education and training, then we consider a formulation as a social care provision. We do not see a factual or logical split in the provision in a school environment to meet LS's needs and that required outside of the school environment can meet those same needs. LS requires provision outside of the school day which just doesn't support him; this has to a lesser degree already been tried. We accept the LAAP Team evidence provision is required which educates and trains LS in the application of a consistent behaviour programme and to generalise his skills outside the school environment. We therefore decide that the agreed social care provision must be provision which educates and trains LS pursuant to Section 21(4) of the Children and Families Act 2014 and is therefore special educational provision".*

22. As part of its order, the Tribunal attached Working Document 7 as amended by the Tribunal in accordance with its powers under the CFA 2014. Section F begins with the paragraph *"LS requires a highly individualised educational curriculum including a life and independence skills curriculum to be delivered constantly and seamlessly from the moment he wakes until the moment he sleeps. The curriculum will need to be delivered across a longer period of time across the day and week due to the slow rate with which learns and in reflection of his speech and language disorder. LS needs a multidisciplinary team around him to effect change over the long term, including educational, speech and language therapists, occupational therapists and healthcare professionals….. His curriculum must be developed and delivered by a specialist, - multidisciplinary team (MDT) approach to provide education and training for his learning, communication and improve his daily functional skills".*

23. In connection with social care provision, the Tribunal noted (at [104]) a request of the parents that *"LS requires accommodation within a specialist residential school, for 52-weeks of the year, where he will receive consistency of approach from familiar, skilled and qualified adults."*

24. The Tribunal noted that the reports did not state that the curriculum must be provided over a 52-week period. It stated (at [105]) that *"it may be possible for [LS] to have a term time boarding placement at the Residential School and be cared for at home during the holiday with an appropriate package of social care support."*

25. The Tribunal set out at [106] the LA proposal for social care support relating to the 14-week holiday comprising a total of 20 hours per week. It then related the assessment of a social worker Ms Scull some of whose evidence was quoted in detail at [107-109].

In short, it set out that the longer periods at home during the school holidays would be likely to have a negative impact on any progress that LS made when in school residential placement. It recommended a residential placement for 52 weeks of the year, stating that returns home could be planned when LS was able to return, managing the anxiety levels and behaviour of LS.

26. At [113], the Tribunal recommended that a change to a 52-week placement, saying:

> *"In the hearing I described the change from current provision to a 52-week residential placement is going from 5 mph to 70 mph, with the inherent risks that come with that level of acceleration. Having considered all the evidence we conclude this is exactly what is necessary and we follow Mrs Scrull's (meaning 'Mrs Scull's') recommendation. [LS] appears to only be able to make any limited progress in a highly structured school environment, he enjoys it and appears to need it. There is no question that his home environment is a safe, nurturing and warn (meaning 'warm') environment but it does not provide him with the order and structure he appears to crave."*

27. In the light of the foregoing, the Tribunal at [114] recommended that the LA included the parents' requested wording referred to above.

28. The Tribunal's decision was issued on 5 October 2023. Between 9 September 2023 and 6 November 2023, a log was kept by the parents of the behaviour of LS. It noted among other things the following, namely:

(i) violent episodes to the parents (primarily the mother) and the younger sister, primarily punching, kicking and hair pulling. This is reported on most days, albeit that there is no record of the severity of the occurrence. It was noted that the behaviour was more extreme during weekends and holidays;

(ii) self-harm and other meltdowns on a daily basis;

(iii) controlling behaviour towards others on a daily basis;

(iv) poor sleep every night and regular roaming the house at night and on several occasions attempting to escape;

(v) incidents of deliberate soiling and deliberate vomiting;

(vi) occasions during which LS has attacked the driver of a car (when melting down) and/or pulled the handbrake or opened the door when the car was moving.

29. A letter was sent by the LA to the parents on 9 November 2023. This acknowledged the difficulties that the family faced in caring and supporting LS, considering LS had spent his whole life at home with his family. It explained why the Tribunal decision was largely a recommendation about social care provision, whereas the case of the Claimant

is that it was about educational provision. That is the first of the three issues referred to above. As regards social care provision and that which appeared at Section H2 of the EHCP (Education and Health Care Plan), the letter of 9 November 2023 stated as follows:

(i) There had been limited assessment of social care support in that the reference to Children Social Care was in 2023 and so there had not been a clear assessment of the impact of support offered. There had been declined support pending the Tribunal decision and an interim care package was also declined.

(ii) The importance of children having a meaningful relationship with their family was stressed by reference to the evidence of reports and academic literature. LS had rights as a child, and he enjoyed a warm relationship with his mother. LS's voice had not been adequately heard, and the principles of Article 8 of the United Convention of the Right of the Child was invoked about the right of the child to family ties. Further assessment should be undertaken including assessment by a qualified learning disability medical health practitioner.

(iii) There were observations about Mr Hawkins' visit to the home of LS and meeting with the parents. He observed that LS's *"behaviours were not as difficult to manage as usual when I visited".* He was *"comfortable at home, knowing who to go to for what, and having access to a lovely garden where he can play."* He also observed between mother and *"such a warm bond, which was reinforced by the stories you told me of managing to negotiate with LS by making him giggle and tickling him. These are important aspects of any child's life, regardless of their age and development."* The aim would be to support LS and the parents during the holiday period to ensure that LS support can maintain a meaningful relationship with his parents and siblings.

(iv) It would be inconsistent with social care policy *"to immediately fund the social care element of a 52-week residential placement. As a result, implementing social care support during the holiday periods would allow such an assessment to take place, which may evidence the need for a 52-week residential placement."*

(v) To that end, a social care provision during the holiday period was recommended to support his family and LS to have a positive relationship with his family. There was offered a more extensive package of support including a 2:1 care support during the holiday period for 6 hours per day and for 6 days per week, which is a total of 72 hours per week together with other packages each once a week.

30. There was then a pre-action protocol letter dated 14 November 2023 ("the PAP") from solicitors for LS by his litigation friend, his father. The major part of the PAP was to the effect that the Tribunal's decision was binding on the LA since it was a 52-week placement for educational reasons. This judgment will return to consider whether this was correct. It also sought that the LA should withdraw its decision of 9 November 2023 not to comply with the social care recommendations of the Tribunal. It referred to the paragraphs in the Tribunal's judgment about social care provision, and especially

at paras. [106]-[109] and [113]-[114]. It stated that there are factors ignored and not taken into account and substantial evidence unappreciated or not considered by the LA. It was argued that the decision was not reasoned adequately (there was a missing "not" in the letter) and that the decision was in any event irrational. It concluded as follows:

> *"In short, and in any event, the reasons given in your letter do not show sufficiently cogent reasons for departing from the recommendations of the FTT.*
>
> *As a matter of principle in law, although recommendations can be rejected and not followed, cogent reasons will be required for doing so. Such reasons will need to be even more cogent when the recommendations come from a specialist tribunal which heard evidencing argument."*

31. The response to the PAP of the LA dated 28 November 2023 is significant because it provides further evidence of the reason for the LA to resist the claim made on behalf of LS. It stated in respect of the rationality challenge to the LA decision of 9 November 2023 that it is *"a lengthy and detailed assessment which is based on academic research and expert judgment. It…considers the clear evidence base of keeping children at home with their family, and the lack of detailed assessment of LS's wishes and feelings on such a significant decision for him. The LA was entitled to consider that moving to a 52-week placement would have a much more significant impact on his bonds with his family than a term-time placement."*

32. It said that the expression "several transitions" in Section B was not understood, whilst suggesting the section about managing holiday periods was a consideration of how to manage the transition to home during holidays. It said that the PAP was unspecific in its reference to how the "totality of the evidence" had not been considered. It said that the evidence of the Scull report was taken into account in the decision of the Tribunal and in the LA response, which responded to the decision of the Tribunal. It said that the LA was entitled to consider that moving to a 52-week placement would have a much more significant impact on his bonds with the family than a term-time placement. This judgment will return to a consideration of these points in the discussion of the issues below, and in respect of what is to be identified as the second issue.

III The issues

33. The first issue is whether the Tribunal decided that the 52-week placement should be part of his special educational provision as the Claimant contends or was it a part of the social care provision as the LA maintains. If the former, the LA would have been bound to follow it and would have acted unlawfully in not so doing.

34. The second issue is, if the decision of the Tribunal was as to social care provision and the LA decided not to follow the recommendations of the Tribunal, was the decision of the LA not to follow it, irrational or Wednesbury unreasonable.

35. The third issue is whether there was any or any adequate specification of provision for speech and language therapy, occupational therapy or behaviour management in Sections H1 or H2 in the plan as served.

IV Ground 1: Whether the Tribunal ordered the LA to provide 52-week education

(a) The law

36. It is necessary to determine the first issue in its statutory context. The starting point is one of definition. Special Educational Provision is defined in Section 21 of the CFA 2014:

> *"Special educational provision, health care provision and social care provision*
>
> *(1)"Special educational provision", for a child aged two or more or a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in—*
>
> *(a)mainstream schools in England…*
>
> *…*
>
> *(4)"Social care provision" means the provision made by a local authority in the exercise of its social services functions.*
>
> *(5)Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision)…."*

37. Under section 37 of the CFA 2015, it is provided as follows:

> Section 37 Education, Health and Care Plans
>
> i) *Where, in the light of an EHC Needs Assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC Plan –*
>
> a) *The Local Authority must secure that an EHC Plan is prepared for the child or young person; and*
>
> b) *Once an EHC Plan has been prepared it must maintain the Plan.*

ii) For the purpose of this part, an EHC Plan is a Plan specifying –

a) The child's or young person's special educational needs;

b) The outcomes sought for him or her;

c) The special educational provision reasonably required for him or her; ….

The contents of the EHC plan are set out in the 2014 Regulations, entitled The Special Educational Needs and Disability Regulations 2014 (SI2014/1530). Regulation 12 set out the "Form of EHC Plan" and stated the following:

i) When preparing an EHC Plan the Local Authority must set out –

a) The views, interests and aspirations of the child and his parents or the young person (Section A);

b) The child or young person's special educational needs (Section B);

c) The child or young person's healthcare needs which relate to their special educational needs (Section C);

d) The child or young person's social care needs which relate to their special educational needs or to a disability (Section D);

e) The outcomes sought for him or her (Section E);

f) The special educational provision required by the child or young person (Section F);

g) Any healthcare provision reasonably required by the learning difficulties or disabilities which result in the child or your person having special educational needs (Section G).

h) (i) Any social care provision which must be made for the child or young person as a result of Section 2 of the Chronically Sick and Disabled Person's Act 1970 (Section H(i)).

(ii) Any other social care provision reasonably required by the learning difficulties or disabilities

> *which result in the child or young person having special educational needs (Section H(ii)).*
>
> *i)* (*i) The name of the school, maintained nursery school, post-16 institution or other institution to be attended by the child or young person and the type of that institution or where the name of the school or other institution is not specified in the EHC Plan, the type of school or other institution to be attended by the child or young person (Section I); and*
>
> *j). ….”*

38. The Court has had regard to the Code of Practice in relation to the content of the EHC Plans and section 37 and in particular from paragraph 9.62 onwards. Reference was made in particular to a decision of Mr Philip Mott QC (sitting as a Deputy Judge of the High Court) who said at [71]:

> *“The specificity required in Section F, i.e. the provision required to meet each identified need should be clearly set out in that Section is also well-established by authority. See R v the Secretary of State for Education and Science ex parte 1992 1FLR 377, L v Clarke and Somerset County Council [1998] ELR 129, E v Newham LBC [2003] ELR 286, JD v South Tyneside Council [2016] UK UT0009 (AAC).”*

39. It is important at the outset to distinguish between Special Educational Provision and social care provision. The reason for this is that whether there is direct or deemed Special Educational Provision, the recommendation must be contained in section F of the EHC Plan and gives rise to the absolute duty on the LA to secure that provision as set out in section 42 of the CFA 2014: see *East Sussex CC v TW* [2016] UK UT 528 (AAC)[23]. It is clear from the order of the Tribunal that it had in mind this distinction in that it made an order relating to Sections B, F and I of the EHC Plan, but it made recommendations only to amend the Plan in Sections D, H1 and H2. Section H is for social care provision which does not educate or train. The Tribunal was aware of this distinction because it specifically referred to the position as to deemed provision as having to be set out in Section F: see its decision at [64].

40. An appeal to the Tribunal can be made against Sections B, F and I of the EHC Plan: see section 51(2)(c) of the CFA 2014, where the Tribunal makes an order in respect of these sections, the LA has a duty to amend the EHC Plan accordingly: SEND Regulations 2014 reg 44.

41. Regulation 5 of the SEND (FTT Recommendations Power) Regulations 2017 **(“Recommendations Regulations**”) provides that where an appeal is brought under section 51(2)(c) CFA 2014 (as here), the FTT has power to recommend social care provision is specified in an EHC Plan:

> *"(2) When determining an appeal on the matters set out in section 51(2)(c), (d), (e) or (f) of the Act, the First-tier Tribunal has the power to recommend that…*
>
> *(b) the social care provision specified in the EHC plan in accordance with regulation 12(1)(h) of the 2014 Regulations is amended…*
>
> *(d) social care provision, or social care provision of a particular kind, is specified in the EHC plan in accordance with regulation 12(1)(h) of the 2014 Regulations where that provision has not been specified in the EHC plan."*

42. There is an equivalent FTT power to recommend social care needs: regulation 4(2). Where recommendations on needs or provision are made the LA is under a duty to respond to that recommendation. Regulation 7 provides:

> "*(1) When the First-tier Tribunal makes a recommendation in respect of social care needs or social care provision, the local authority must respond to the child's parent or the young person within 5 weeks beginning with the date of the recommendation.*
>
> *(2) The time limit specified in paragraph (1) does not apply where the First-tier Tribunal directs that a different time limit is to apply for the local authority's response.*
>
> *(3) A response under paragraph (1) must—*
>
> *(a) be in writing,*
>
> *(b) state what steps, if any, the local authority has decided to take following its consideration of the recommendation, and*
>
> *(c) give reasons for any decision not to follow the recommendation, or any part of it."*

43. The LA's skeleton argument at [43] summarises the nature of social care recommendations as follows:

> *"In relation to recommendations:*
>
> *a. Only the procedure, not the provision itself, is enforceable in relation to social care recommendations: VS and RS v Hampshire CC [2021] UKUT 187 (AAC) §41.*
>
> *b. Whilst educational provision in Section F must be specific, recommendations do not require the same level of specificity. The FTT is "free to make constructive*

recommendations" and "how specific it feels it can be is essentially a matter for the FTT": VS §46-57, 57.

c. The procedural consequences of a recommendation for the body responsible are not "unduly onerous": NHS West Berkshire CCG v FTT [2019] UKUT 44 (AAC) §92.

d. The fundamental test is one of rationality, although the LA recognises that it must carefully examine the facts of an individual case: see De Smith (9th edition) 1-096-1-099, R (AT) v LB Barnet [2019] EWHC 3404 (Admin) §13-15."

(b) The application of the law to the instant case

44. In deciding whether the LA has failed to comply with the Tribunal decision, it is first necessary to consider the Order itself. That required the LA to replace the existing wording in sections B, F and I. They are prescriptive orders as to replacing parts of section B, F and I and they have been complied with. Below the order there appears the following: it is recommended that the LA amends the EHC Plan of LS as follows:

(i) in section D, by replacing the existing wording in the EHC plan with the amendment set out in the attached final working document version 7.

(ii) in section H1, by replacing the existing wording in the EHC plan with the amendment set out in the attached final working document version 7;

(iii) in section H2, by replacing the existing wording in the EHC plan with the amendments set out in the attached final working document version 7.

45. The reasoning in the Tribunal's decision was that Claimant required educational provision outside of the normal day, which is an extended day curriculum. A waking day or extended day curriculum is one where a child requires education provision before and after the school day. This occurs where a pupil requires therapies and activities outside school hours to assist with the development of skills of daily living. It is required where a pupil's Special Educational Needs ("SEN") makes them unable to generalise skills from the classroom to other environments: see *LB Hammersmith & Fulham v JH* [2012] UK UT 328. It is a judgment for the Tribunal whether this provision is Section F (Educational Provision) or Section H (Social Care Provision).

46. The concept of an extended day curriculum is distinct from a 52-week curriculum. Both an extended day curriculum and a 52-week curriculum are additional to the provision generally made for others of the same age in mainstream education.

47. In addition to the order about an extended day curriculum, the Tribunal recommended by way of social care provision that the Claimant should have a 52-week placement, ie provision during the school holiday. That was a part of the recommendations in Sections H1 and H2 and therefore does not form part of the educational provision. If it had been a Special Educational Provision, it would have formed a part of Section F,

and it would have been made into a mandatory order. The fact that it was a recommendation as a social care provision within Section H1 and H2 is conclusive of the position and therefore of the first issue being resolved against the Claimant.

48. The remaining reasoning which is supportive of this position is confirmatory, but not strictly necessary. There are the following points. First, the arguments were not presented by the Claimant before the Tribunal. The Claimant presented the case in the Working Document, which is a document showing how they sought that the EHC plan should be varied, by putting the 52-week provision into Section H2. There, they stated that the Claimant *"requires accommodation within a specialist residential school, for 52 weeks of the year, where he will receive consistency of approach from familiar skilled and qualified adults."* If the Claimant's case was that 52-week provision was Special Educational Provision and not social care provision (whether direct or deemed educational provision), it was for section F alone. As the LA rightly submitted para 23 of their skeleton argument, *"the parents placed it in section H as social care provision, and the FTT considered it accordingly."*

49. Second, the implementation of sections B, F and I of the EHC Plan are not in dispute. There is no issue that this part of the order has been complied with and the wording in the final working document is in the issued EHC plan.

50. Third, the Tribunal rejected the LA argument that the educational provision of LS could be met within the school day and provision outside of that was social care provision. There were findings about an extended day curriculum being part of the educational provision, and that was reflected in the ordered change to Section F. The decision of the Tribunal to name the Residential School rather than the Day School was because only the former could offer an extended day curriculum. It was not because the Residential School could provide a 52-week curriculum. In the section of the Tribunal judgment prior to para. 96, the Tribunal considered the educational provision. At that stage, there was no consideration of what was required during the holidays.

51. Paragraphs 76 and 77 set out above are about special educational provision by reference to the extended hour provision and not by reference to 52-week residence. The reason for the two paragraphs was because [76] was on the assumption that the extended hours could be classed as special education provision. If it could not, [77] was on the basis that it would be treated as social care provision. The primary point in [76] was then reflected in the change to Section F. The fact that the implementation of the extended hours might indirectly lead to a 52-week placement did not mean that there was a special educational provision to that effect.

52. The remaining part of the decision was about social care provision, and it was in that context that there was consideration of the 52-week placement. To this end, the recommendation about the 52-week placement was as part of social care provision with changes to Section H of the EHC plan being recommended. All of the above confirms that the order itself was a proper reflection of a division between that which was in Section F as being the relatively narrow finding of what is special educational provision, relative to the less narrow focus of what was called social care provision as contained in Section H.

53. For all these reasons, Ground 1 of the challenge must fail. It follows that the relief sought of a declaration that the Tribunal decided that LS required a 52-week placement on educational grounds is rejected. Although the arguments have been considered in full as if the full hearing had been heard, the Court rejects permission in respect of Ground 1 in that it did not satisfy the threshold for permission.

V Ground 2: Rationality/Wednesbury reasonableness of the social care letter

(a) The law

54. For this purpose, it is necessary to assume that the decision cannot be challenged on the basis that the LA was mandated to follow the decision of the Tribunal. That is not to say that the decision cannot be challenged on the basis either that there are not adequate reasons for departing from the recommendation of the Tribunal, or, even if there are, that the decision was irrational or Wednesbury unreasonable.

55. Relevant law has been advanced on the part of the Claimant. The Recommendations Regulations provides in Regulation 7 in summary, that the local authority must respond to the child's parent within 5 weeks of the Tribunal decision. The response is required by Regulation 7(32):

> (a) in writing.
>
> (b) state what steps if any, the local authority decided to take following its consideration of the recommendation; and
>
> (c) give reasons for any decision not to follow the recommendations or any part of it.
>
> The local authority must send a copy of this response to the Secretary of State by reason of Regulation 7(4).

56. The Department for Education Guidance March 2018, states as follows.

> *"Although any recommendations by the Tribunal on health or social care elements of an EHC plan are non-binding, there is no requirement to follow them than an LA and/or Responsible Health Commissioning Body are generally expected to follow them. They are recommendations made by a specialist Tribunal and should not be ignored or rejected without careful consideration. Any reasons for not taking them forward must be explained and set out in writing."*

57. In relation to the quality of the reasons, the case of *The Queen on the Application of AT and BT by their Father and Litigation Friend CT v The London Borough of Barnet*

(2019) EWHC 3404 (Admin) Phillip Mott QC, sitting as a Deputy Judge of the High Court, at paragraph 13, summarised the law:

> *"I was referred to various authorities on the extent and cogency of reasons required for not following the recommendation from the Local Government Ombudsman (Gallagher v Basildon DC (2011) LGR 277 at 33) The Parliamentary Commissioner (Bradley v Secretary of State v Work & Pensions (2009) QB 119 at 91) and other advisory bodies AT v Newham LBC (2009) 1 FLR 311 at 71; and R v Avon CC ex parte M (1994) 2 FLR 1006, at page 1019; R v LB Islington ex parte Rixon (1996) 32 BMLR 136 at page 142. Although such recommendations can be rejected or not followed, cogent reasons will be required for doing so. Such reasons will need to be even more cogent when the recommendation comes from a specialist Tribunal or it has heard evidence and argument."*

58. The issue is considered in De Smith's Judicial Review 9th Edition at paragraph 1.098, citing the appeal in *R (on the application of Bradley) v the Secretary of State for Work and Pensions* EWCA Civ 36, [2009] QB 114 at [70] per Chadwick LJ as:

> *i) "The decision maker whose decision is under challenge…. is entitled to exercise his own discretion as to whether he should regard himself as bound by a finding of fact made by an adjudicative Tribunal…. in the related context.*
>
> *ii) The decision to reject the findings of fact by an adjudicative Tribunal in a related context can be challenged on Wednesbury grounds.*
>
> *iii) In particular, the challenge can be advanced on the basis that the decision to reject the finding was irrational.*
>
> *iv) In determining whether the decision to reject the finding of fact was irrational the Court will have regard to the circumstances in which in a statutory scheme within which the finding of fact was made by the adjudicative Tribunal.*
>
> *v) In particular, the Court will have regard to the nature of the fact found (e.g. the immigrant was an adulterer), the basis on which the finding was made (e.g. oral testimony tested by cross-examination or purely on the documents) the form of the proceedings before the Tribunal (e.g. adversarial or in public or investigative with no opportunity for cross-examination) and the role of the Tribunal within the statutory scheme."*

59. What is required is cogent reasons. De Smith's Judicial Review 9th Edition states:

> *"The cogent reasons requirement is not a precise test but requires a careful examination of facts of the individual case – with the focus resting on the decision to reject the findings of the Ombudsman rather than the Ombudsman's findings themselves. See R (on the application to the Equitable Members Action Group) v Her Majesty's Treasury [2009] EWHC 24955 Admin at paragraph 66. The legal and constitutional position of the LGO is different from recommendations of the LGO. The grounds therefore are based on irrationality".*

60. In *R v Secretary of State for the Home Department ex parte Danaei* (1997) EWCA Civ 2704, Simon Brown LJ stated at page 8 of the judgment in summary:

> *"On an issue such as this (where the Secretary of State rejected the findings of an adjudicator) it does not seem to me reasonable for the Secretary of State to disagree with the independent adjudicator who has heard all the evidence, unless –*
>
> *a. The adjudicator's factual conclusion was demonstrably flawed as irrational or failing to have regard to material consideration or for not having regard to immaterial ones – none of which is suggested here;*
>
> *b. Fresh material has become available to the Secretary of State such as could realistically affected the adjudicator's finding – this too was a matter we considered in Powergen.*
>
> *c. Arguably if the adjudicator has decided the appeal purely on the documents or, if despite having oral evidence, his finding of fact owe nothing whatever to any assessment of the witnesses. This third scenario seems unlikely and I express no concluded view as to whether in the event the Secretary of State could properly ignore the fact that the adjudicator is an independent Tribunal whereas he is not."*

(b) Submissions on behalf of the Claimant

61. In the present case, also the statutory scheme is relevant. In particular the following features of the statutory scheme arise:

(i) The appeal before the Tribunal related to an EHC Plan. That Plan was intended to be a unitary plan and read as one. It is therefore interrelated.

(ii) The decision of the Tribunal is based on considering written and oral evidence, having written submissions and detailed questioning. Whilst it is not an adversarial body, it is an inquisitorial body. It is held in private solely because it involves vulnerable children and vulnerable adults.

(iii) The statutory provisions including Section 37 and Regulation 11 require specificity in all areas of the Plan, not simply just in the educational areas of the Plan, but also health care and social care provision.

62. The Claimant submits that the reasoning of the LA in its decision letter of 9 November, supported by its 28 November response letter, do not address the *"totality of the evidence"* of the Tribunal. The LA said that this was an unspecific criticism such that they could not reasonably respond. However, this was a part of the Tribunal's reasoning in para. 113 of the decision as quoted fully above *"having considered all the evidence"*, and not just the social worker's evidence. The Tribunal's reference to all the evidence was in context a reference to all of the evidence, some oral and some written, to include that of the father, the LAAP evidence, both written and orally, the evidence of both social workers and the school evidence and other relevant records.

63. The Claimant submits that the letters of 9 and 28 November do not contain reference to all the above evidence. They contain a reference to the LA's position, but they do not contain reasons for the rejection of all the evidence considered. Therefore, it is submitted that the reasoning is inadequate to deal with the Tribunal decision on the established case law, alternatively that it was irrational in the sense described in the above case law.

(c) The submissions of the LA

64. It is stated on behalf of the LA that it is hard to decipher the precise reason why the decision is said to be irrational. It is said that there is a failure to engage in the detailed reasoning of the decision letter of 9 November 2023. The reasons for the LA's amendments to Section D are all said to be rational. It is noted that the Tribunal did not hear oral evidence on social care. Instead, they relied on the written evidence in the bundles and the written submissions of the parties: see para. 96 of the Decision of the Tribunal. The case is therefore said to be very different from one where there is a hearing and a decision on contested facts which are then not followed by government, whether by central or local government. In these circumstances, the LA submits that it is not incumbent on the LA to demonstrate that they acted irrationally in order not to accept a recommendation of the Tribunal.

65. It is pointed out that there has not been a reasons challenge in the Statement of Facts and Grounds and that there has been no application to amend. The duty to give reasons does not extend to referring to every item before the FTT. The reasons given were detailed and said to be plainly rational. In particular, the author of the letter was said to have observed LS demonstrate particular skills. In relation to the 52-week placement, the letter of 9 November 2023 was said to identify a number of important factors which were not considered by the FTT. Therefore, it was submitted that the letter was not even arguably unlawful. That was said in the context of this being a

rolled-up hearing of permission, and the substantive merits to follow, if permission were given. In short, permission should be refused.

(d) Discussion and outcome

66. This is not a case where the decision maker has given no reasons. The decision letter of 9 November 2023 contains reasons which have been summarised above. The letter is amplified by the LA's letter of 28 November 2023 in response to the PAP letter.

(i) The nature of Wednesbury unreasonableness

67. The challenge is of Wednesbury unreasonableness. It is important to go back to first principles. In the case of *Braganza v BP Shipping Ltd* [2015] UKSC 17, Lady Hale at [24] referred to the two limbs of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, 233-234.*

68. The two limbs were identified per Lady Hale at [30] and Lord Neuberger agreeing at [113]:

(i) First, focussing on the decision-making process, whether the right matters have been taken into account in the process. It is part of the rational decision-making process to exclude extraneous considerations and to take into account only those considerations which are relevant to the decision.

Lord Greene MR in *Wednesbury*: limb 1
The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account.

(ii) Second, focussing on outcome, whether even if the right matters have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. It is not to substitute the court's own decision on what is reasonable.

Lord Greene MR in *Wednesbury*: limb 2**:** Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.

69. The second is therefore focussing on outcome such that a reasonable decision maker could only arrive at one (or a different) decision. The other *"focusses on the decision-making process-whether the right matters have been taken into account in reaching the decision."*

70. In the instant case, it is the decision-making process and not the outcome which is the essence of the judicial review. In my judgment, this is not a case where conclusion that the only outcome which could be arrived at rationally was to agree with the Tribunal's decision. Indeed, this is not a case where the Court could or should substitute its decision for that of the LA. It is recognised that in the circumstances of any given case, the Court is to assess how broad is the range of reasonable responses. As Lord Sumption said in *Pham v SSHD* [2015] UKSC 19 at [107]: *"that must necessarily depend on the significance of the right interfered with, the degree of interference involved, and notably the extent to which... the court is competent to reassess the balance which the decision maker was called on to make given the subject matter... in some cases the range of rational decisions is so narrow as to determine the outcome."*

(ii) The Wednesbury unreasonableness in the instant case

71. I do not regard this as a case where the Court can or ought to determine the outcome. The case is multi-factorial. This is not a case where the Tribunal was bound to follow the result of the Tribunal such as to admit only that as a rational response. However, returning to the decision-making process, it behoved the decision maker to undertake a process of assessment of the various factors. To the extent that they identified factors which were not identified by the Tribunal or were not centre-stage, the decision maker had to have a process of evaluation, calibration and balancing of the factors which he did identify with the other relevant factors and in particular those identified in the Tribunal and in the evidence before the Tribunal.

72. If and to the extent that the decision-making letter did not contain that evaluation, calibration and balancing, the issue is whether that infringed the first limb of Wednesbury unreasonableness. Was there a failure to take into account matters which they ought to take into account? Were the matters taken into account the right matters if they were not weighed, calibrated and balanced against other relevant considerations? There is a leeway given to the decision maker. The decision letter is not to be construed like an Act of Parliament. Often, it will be safe to be assumptions of what has been taken into account from the surrounding circumstances. Each case is fact sensitive. Having made these allowances, what is to be said about the decision making process in the instant case?

(iii)The decision letter of 9 November 2023 (and the letter of 28 November 2023)

73. The 9 November 2023 decision of the LA has been summarised above. Whilst having considered the totality of that letter as well as the letter of 28 November 2023, the following matters in particular stand out. First, there are a series of matters which are challenged in Section D of the EHC Plan, but they are matters of detail and do not affect the overall emphasis e.g.

(a) whether the behaviour of LS was 'extremely' unpredictable as per Section D or simply unpredictable as per the view of the LA;

(b) whether LS was unable to prepare himself a drink as per Section D or whether this should be excised or qualified bearing in mind that LS was observed to be filling a water bottle; and

(c) whether LS is unable to get dressed as per Section D or whether this should be excised or qualified in that he can pull up shorts and socks not requiring fine motor skills.

I have to say that in the context of the decision as a whole, these are points of detail or degree. They are not significant errors or matter of such importance that they give rise to the basis of a different analysis from the Tribunal.

74. Second, the decision letter referred to the *"love and dedication"* of the parents having been demonstrated and it was acknowledged that they felt that they could no longer manage. The LA wished *"to support you in maintaining a meaningful relationship with LS"* and the LA social care *"is not at this stage in agreement with contributing to the care element of a 52-week residential placement."*

75. The reasons given for this were as follows:

(i) There had been limited assessment of social care support in that LS was only referred to Children Social Care for the first time in 2023, and so there has not been a clear assessment of the impact that support offered under children's services would have to support LS's needs at home. Offers had been declined during the Tribunal process.

(ii) There then followed 1½ pages about the importance of children having a meaningful relationship with their family and about LS's *"rights as a child"*. All this section comprises valid general remarks derived from a review of relevant literature and from the UN Convention on the Rights of the Child, but it is not specific to LS.

(iii) The observations of Mr Hawkins on his visit to the family home and observing the bond between mother and son and finding that *"LS's behaviours were not as difficult to manage as usual".* He was *"comfortable at home, knowing who to go to for what, and having access to a lovely garden where he can play."* He also observed between LS and his mother *"such a warm bond, which was reinforced by the stories you told me of managing to negotiate with LS by making him giggle and tickling him. These are important aspects of any child's life, regardless of their age and development."* The aim should be to support LS and the parents during the holiday period to ensure that LS support can maintain a meaningful relationship with his parents and siblings.

(iv) There were then proposals about a package of support during the holidays (6 days a week at 6 hours per day for two carers) and further sessions.

76. In my judgment, whilst this was intended to be constructive and whilst the factors were ones to be considered in a balance of factors, there was a failure in the decision letter

to identifying counter-veiling factors and to assess, calibrate and balance the relevant factors. Examples are as follows:

(i) The decision does not identify the degree of regression of LS in recent times as reported by various professionals in the reports, and balance the impact of his against the factors taken into account by the LA. This includes:

(a) the observations about repeated assaults by LS on his mother and causing bruising, and whose mental health has been affected as she has obtained psychological support which she has not found helpful because of her insight into the source of her anxiety;

(b) the observations about assaults on others including the younger sister who is afraid of LS and tries to keep out of the way;

(c) The observations of repeated assaults on a long-term carer who felt that she had to leave. The challenges were such that another carer left. There was an incident of an assault on a taxi chaperone.

(d) The impact on the family of wakeful nights as LS roamed the house in a state of meltdown. The descriptions above about poor toileting, vomiting and spreading the vomit on the walls are a part of the problems experienced. The family feels withdrawn from the outside world as LS becomes restricted to the home.

(ii) The decision does not address expressly the belief of the parents and balance this against the factors taken into account by the LA. In the end, the main burden is on the mother because of the professional demands of the father. The observations about the mother lead to a real issue as to how the family can continue to cope.

(iii) The decision does not engage with the views of the professionals about the contrast between LS in a managed school environment and his inability to deal with transition and balance this against the factors taken into account by the LA. It does not seek to balance the observations of the parents supported by other professionals including the LAAP team and especially the independent social worker Ms Scull against the factors taken into account by the LA.

77. Referring to the factors of the LA and the need for assessment, calibration and balancing, examples are as follows:

(i) It has laid emphasis on the right of the child and on the importance of a child having a meaningful relationship with their family. It does not follow from a starting point that a child's contact with a parent should be maintained that in every case it will be appropriate for the child to live at home during school holidays. There is a balancing exercise which is missing in the reasoning.

(ii) Without balancing that adequately or at all against the particular challenges of LS in his current circumstances, as regards his behaviour outside the

school environment, how he reacts to transition and the parents' belief that they can cope no longer. This includes the evidence that caring for LS was affecting in particular the mother's mental health and being assaulted repeatedly (as observed by outside professionals and the problems being evidenced by the departure of the carers) led to the family believing that they could not cope further.

(iii) The fact that everything had not been done to explore possibilities in the past might have been caused due to polarised positions prior to the Tribunal decision. The question was whether the new package put forward by the LA required to be tested prior to a 52-week placement. Here too the decision does not balance a perceived need to make sure that everything had been tested with the considerations summarised above about the situation at home and the inability to cope.

(iv) It was said that more had to be tried before taking the potentially final step of cutting off in a day to day sense any contact between parent and child. The LA has failed to calibrate that consideration and balance it against the constancy of support and absence of transition that a 52-week placement provided. This begged an assessment first as to whether, even with more support at home, the point had been reached when these aspirations had to take second place to the impact of LS being at home during on holidays on LS himself and on the welfare and ability to cope of the family.

(v) As regards the holiday periods, whilst noting the plentiful supply of assistance, most of the time would be without assistance (one complete day and 18 hours per day, bearing in mind that many of the nights were ones of LS roaming round the house and often going into meltdown). There is a failure adequately to balance what can be done against the reality reported by the parents and the independent professionals.

(vi) There is a touching account of the visit of the author of the report to the family home on evidently a good day. Here too there is no apparent balance between the impact of that visit on the author and the evidence that this might not have been representative. There was a whole body of evidence about the regression and specifically about the mother being repeatedly hit and bruised, her crying, the concerns for her mental health and her belief, not said to be anything other than conscientious, that she could not cope.

(iv) Additional factors referred to in the letter of 28 November 2023 and especially the departure from the decision of the Tribunal

78. In respect of the factors identified in the letter of 28 November 2023, it was said that:

(i) The LA was entitled to consider that moving to a 52-week placement would have a much more significant impact on his bonds with his family than a term-time placement. That is again only a part of the story. What was missing was the assessing, calibrating and balancing of the bonds with the family against the body of evidence above about LS's security and dislike

of transitions contrasting his conduct at a school from home and the related evidence of the perceived inability of the family to cope. The reference to not understanding the expression about "several transitions" evidences that there has been a failure to take into account an important part of the reasoning militating in favour of a 52-week placement.

(ii) The LA referred to the PAP being unspecific in its reference to how the *"totality of the evidence"* had not been considered, but the Tribunal at [113] referred to *"having considered all of the evidence"*. This was a necessary and legitimate thing to do. Before deciding on matters about the importance of the bonds of LS or the rights of the child, there was an exercise of assessment, calibration and balance which had not been undertaken.

(iii) Whilst not bound by the decision of the Tribunal, this was a specialist tribunal whose findings deserved weight. Whilst the social care findings were not based on the determination of contested oral evidence, nevertheless there had been a very detailed consideration of factors of importance in order to determine whether the recommendation of a 52-week placement should be rejected. Although only Ms Scull dealt expressly with this, the other evidence was relevant to the subject. Despite this, the decision has not adequately engaged in why the recommendation of the Tribunal should be departed from. The broad reasoning of the rights of the child and not having tried everything are not a sufficient explanation absent the assessment, calibration and balancing referred to above.

79. The point made that the Tribunal considered the evidence as a whole is significant. There are examples of this. First, it refers to the occupational therapy report of Mrs Melinda Eriksen at [41]. This report (e.g. at [11.6) refers to how LS required an extended day curriculum, requiring strategies to implemented in a consistent manner across his waking day within the learning and residential environments. At [11.3] she referred to his residential setting being as close to his educational environment as possible and preferably onsite *"in order to avoid any additional transitions within his day."*

80. Second, there was reference to the view of Dr Carolyn Smith's views (the clinical psychologist) at [52-55] of the decision of the Tribunal. At [54] Dr Smith was quoted (from 5.2 of her report) as saying *"the evidence indicates that LS's mental health and behavioural challenges are beyond the capacity of detached therapies or family interventions. LS clearly requires a much more holistic waking day approach which incorporates very structured behaviour management and specialist".* Her report referred in detail to the some of the disturbing behaviour at home and the parents' belief that LS is regressing (2.7 of Dr. Smith's report). At 2.9, she stated *"the high level of control he has over his mother and sister is not acceptable. LS is clearly extremely anxious when he feels confused by changes to routine and reacts with challenging behaviour every day he hits his mother and the family are trapped in their home LS determines their life clearly at school with familiar routines and extensive cueing he does comply with some activities disability has not transferred to her... his care at home is a relentless demand."* At 2.10, she added "*the situation at home now puts LS and his family in danger. He is getting bigger and stronger, and this situation is not sustainable*

for the safety of his family and for LS himself. Although School Report that LS has acquired communication and self-help skills, I observed no generalisation of these skills at home…" At [4.9-4.10], she referred to the need for LS to be placed a residential waking day setting where transitions were minimised and managed.

81. The overall reasoning of the Tribunal was that the 52-week placement would reduce the regular disruption and transitions which affected LS's anxiety level and his behaviour around these contacts. The Tribunal heard the evidence of Ms Scull at [106-109] balancing an increase in home support against the support provided by a residential placement of 52 weeks a year which the Residential School could provide. The Tribunal took into account the view of the father [110] about how LS craves routine and order which can be provided in a predictable and ordered world. The Tribunal's para. 105 was criticised in which it referred to the possibility of being cared for at home during the holidays. This paragraph has to be seen in context as part of the journey of assessing, weighing and calibrating the factors and then conducting an overall balance in coming to the conclusion at [113] of the decision.

82. The Tribunal took into account a concern about moving to a 52-week placement all at once. This was made clear in its motoring analogy in para. 113 of its decision, about moving from 5 mph to 70 mph *"with the inherent risks that come with that level of acceleration."* In context, it was considering not moving from shared home and school care to school care all at once, or in context, changing school, but not moving beyond 38-week care all at once. However, having taken into account the totality of the evidence, and especially the evidence of Ms Scull, it took the view that the move to a 52-week placement was appropriate.

83. The evidence before the Tribunal and the conclusions of the Tribunal were matters to be considered by the decision maker in the letter of 9 November 2023 or in the letter of 28 November 2023. As set out above, there was a failure in the letters to carry out an exercise in assessment, calibration and balancing of the various factors. If there was to be a departure from the decision of the Tribunal, that exercise was required, and it did not suffice simply to identify the factors which were identified. That was a failure of process in failing to take into account and assess all relevant considerations.

(v) Other arguments about considerations of the decision maker

84. It was suggested in argument that the position of the LA and in particular the author of the letter of 9 November 2023 was to be seen in the context of the author's *"updated child and updated family assessment."* It was completed by him, Mr Joseph Hawkins on 24 August 2023 and dated 31 August 2023. It comprised 20 pages and it contained at pages 1-5 reference to further information about LS's former school's therapy teams, information from Tom Connor, the LAAP reports and an independent social worker report. He also conducted a home visit, there was a meeting with the Merton Child and Adolescent Mental Health Service ("CAMHS LD") team and completed a carer's assessment. This set out detailed information regarding the physical health of LS, his sleep, his weight and his self-care. It also contained a general update about LS's emotional and behavioural development. The report refers to the need for a bespoke plan for LS. The view of the parents is recorded that they feel that there is nothing else which can be done at home as they feel that all options have been exhausted. This was

a concern to Mr Hawkins in that the despondency of the parents might be communicated to LS. Mr Hawkins referred to the need for support from CAMHS to act as a bridge between the home and school and develop a shared language that works particularly at home.

85. On this basis, it is suggested that Mr Hawkins' position took into account all of the concerns referred to above concerning the ability or otherwise to manage LS at home in addition to school, and that therefore the Court should assume that the balancing had been done. I do not accept this reasoning for the following reasons:

(i) The Addendum was more than 2 months prior to the letter of 9 November 2023 in respect of a fast-developing situation.

(ii) It preceded not only the move, but the contemplated move, from the the Day School to the Residential School, and to a placement for 52 weeks.

(iii) It preceded the decision of the Tribunal, drawing together the threads that militated, in its judgment, in favour of a 52-week placement.

(iv) There was not a calibration and a balance in the Addendum between observations there and the views of the independent professionals and the views of the parents about the inability to cope at home.

(v) There was not a calibration and a balance in the Addendum about how LS reacts to transition and his behaviour in the unregulated environment of his home.

(vi) In short, the Addendum was not a decision-making document.

86. It is not necessary to rehearse all of this which has been set out in detail above. It is not for this Court to decide whether these points trump the concerns of the LA. This Court is not equipped to make such judgments and it would go outside what is right on a judicial review application where the decisions are for the LA.

87. The concern however is that the LA has emphasised the matters identified above, especially (a) the importance of the relationship of a parent and a child, (b) the positive sign observed by the author on a home visit about the relationship in particular of LS and his mother and (c) the fact that additional supportive steps had not been adequately explored. Despite these concerns, the decision letter of 9 November does not balance these factors against the factors in the large body of evidence before the Tribunal and the particular factors highlighted by the Tribunal. In my judgment, the decision of the LA in its letter of 9 November 2023 fails to carry out this process of assessing, weighing, calibrating and balancing the relevant factors. With the weight of the evidence which led the Tribunal to the decision which they did, there is not a necessary inference that the LA must have considered them, leading to the conclusion which they did. The decision letter of 9 November 2023 indicates that they considered the factors which they had in mind without a proper calibration and balance of these factors against all relevant factors.

(vi) The appropriate order

88. I do not regard this as a case where the Court can or ought to determine the outcome. There is a balance of factors. Some, but not all, factors were assessed by the Tribunal with a certain result, but without a process of evaluation, calibration and balancing of factors. The failure of the decision letter (even if read with the letter of 28 November 2023) to evidence that this was done makes the decision liable to be quashed because that it was vital to the decision-making process. This is not deciding the case on the failure to give reasons for the decision. It is that the reasons given do not show that all relevant considerations were taken into account, and in particular the assessment, weighing, calibration and balance of relevant factors.

89. At the conclusion of the hearing, the parties were asked to formulate more precisely the relief required, providing where appropriate examples. To this end, on 12 February 2024, various draft heads of relief were provided. As regards issue 2, the draft order first (at 2A) *"have an order quashing the decision of the London Borough of Merton dated 9 November 2023 which rejects the recommendations of the Special Educational Needs and Disability Tribunal, contained in its decision, dated 6 October 2023."*

90. It then advances two alternatives, the first of which (2B) is that the LA to withdraw the current EHC plan for LS dated 9 November 2023 and to reissue it, amending Section H2 in accordance with the decision of the Tribunal dated 6 October 2023. The second alternative (2C) is as follows:

> *"an order that the London Borough of Merton reconsider and reissue their decision of 9 November 2023, particularly having regard to the totality of the reports before the Special Educational Needs and Disability Tribunal, including the reports of the LAAP team, in particular those sections of the reports that deal with the position within the family home, the witness statement of HS (the father) the witness statements of both carers for LS, the report of Ms Scull, both local authority social care assessments, and any information in relation to the position both at home (day and night) and at the Residential School, in relation to child LS and his social care needs."*

91. In the light of the above reasoning, the first of those orders is granted, namely the quashing order of the decision of the LA dated 9 November 2023. It follows also from the finding of unreasonableness is from a process driven perspective rather than an outcome perspective. Thus, no order is made to compel the LA to reissue the decision dated 9 November 2023 in accordance with the decision of the Tribunal as per the order in 2B of the draft. That would be appropriate in a case where the view of the Court could be substituted for that of the decision maker. As noted, that is not appropriate in this case. It is recognised that there is a multi-factorial decision to take, but the quashing of the decision is due to a failure to take into account all relevant matters or a failure to assess, weigh, calibrate and balance those factors. The order which will be made is the one set out in 2C above which requires the LA to undertake that exercise.

92. The LA should make their decision again, but this time undertaking the assessment, the calibration and the balancing of the relevant factors including but not limited to those found by the Tribunal against the matters which the LA has taken into account. The decision ought to be quashed on these public law grounds, and the assessment, calibration and balance ought to be undertaken so as to reach a lawful decision.

(vii) The application for new evidence

93. One of the problems in this case has been the fast-moving nature of the case. There has been evidence served after the decision, some of which refers to conduct after the decision. In a witness statement of Mr Hawkins dated 21 December 2023, he criticises a lack of engagement of the parents in cooperating regarding arrangement to transition LS home for holiday. It refers to interim relief by agreement which has involved LS remaining at the Residential School over the Christmas holiday. This has continued over the half term in February pending this decision. As of December 2023, there was no detailed transition plan of the LA. This has not been considered in any detail because it is after the event of the decision. This has led to evidence in response being sought to be adduced by the father in a second witness statement dated 22 January 2024. This has been opposed by the LA on the basis that it post-dated the decision and did not inform about the decision itself but was about subsequent developments.

94. Faced with the objection of the LA to the evidence, I received the evidence de bene esse, and said that I would rule on it in the judgment. The objection of the LA is valid for the reasons which they give, and I uphold their objection and do not admit the second statement.

95. In a new assessment, matters subsequent to the decision of November 2023 will fall to be taken into account if the LA consider them to be relevant. It will therefore be for the LA, and not the Court, to make a new decision.

VI Ground 3: lack of specification of provision for various therapies

96. The last paragraph of the skeleton argument on behalf of the Claimant read as follows:

> *"[57] It is submitted that there is no specification of provision for speech and language therapy, occupational therapy or behaviour management in Sections H1 or H2 in the plan as served. It is plain from the Tribunal findings and evidence that this other professional input would be essential to supporting any social care provision, assuming such social care provision is separate to Section F of the plan. The case law on specificity cited above apply to Section D and Sections H1 and H2. The Code is clear on the points. The current plan lacks specific details of the provision required, and in fact omits essential provision and is unlawful in those sections.*

97. The case law referred to in the skeleton argument on behalf of the Claimant to which reference was made includes the following:

(i) In *L v Clarke and Somerset County Council* [1998] ELR 129, Laws J, stated that Statements and now this applies to EHC Plans, must be so specific and clear as to leave no room for doubt as to what has been decided and what is needed in the individual case;

(ii) *In London Borough of Bromley v The Special Needs Tribunal* [1999] ELR 260 at page 295 onwards Sedley LJ dealt with a duty to specify and agreed with the judgement of Laws J in *L v Clarke and Somerset County Council.* In the *Bromley* case, the provision of occupational therapy, physiotherapy and speech therapy was inadequately particularised.

98. The order which is sought in respect of this grounds in the draft submitted to the Court at 3A is in the following terms, namely:

> *"an order that the London Borough of Merton withdraw the EHC Plan for LS, issued on 9 November 2023, and reissue it, amending section H2 so that it contains all relevant social care provision required to meet child LS's social care needs."*

99. The LA resists this criticism and order, submitting that the degree of specificity is sufficient, and that especially as regards recommendations in the nature of social care, it is important not to take the level of specificity to too high a degree: see para. 43 above and in particular the case of *VS and RS v Hampshire CC* [2021] UKUT 187 (AAC) [41], [46-57].

100. It is important to see Ground 3 in perspective. It is not as central as the first ground and the second ground. On the basis of that which has been found in respect of Ground 2, the decision is quashed. The LA will therefore have to reconsider the matter along the lines referred to above. In the event that the LA decides in its re-evaluation to follow the recommendation of a 52-week placement, it is unlikely that this issue will arise for consideration. In the event that the LA were still to reject a 52-week placement, then it would arise for consideration, and the need for specificity, particularly where there has been so much scope for disagreement in this case. On the facts of this case, in the event of there being no 52-week placement, it is important that the precise therapies are defined so that there is certainty about the precise programme for LS.

101. Ground 3 must be seen in perspective, and as to how less fundamental it is than the other grounds. This has been reflected in the relatively short time devoted to it in argument on Ground 3. Ground 2 is vitally important between the parties in itself. The extent of specificity in respect of the therapies is unlikely to affect the balancing of the factors referred to in the discussion of Ground 2. The real battleground is between the impact on LS and the family of transition to and being cared for at home for the holiday periods on the one hand and a 52-week placement on the other hand. It is unlikely that greater specificity of the therapies will have a measurable impact on, let alone be

decisive of, the assessment, calibration and balancing of the factors referred to in Ground 2.

102. Since the EHC plan is to be drawn up again, this matter may be subsumed within the order on Ground 2, and the above criticisms may be noted. The Court would be assisted by the consideration of the parties to consider as to whether an additional order is required in a modified form or at all to reflect the finding on Ground 3.

VII Conclusion

103. It therefore follows that Ground 1 has been resolved in favour of the LA. Permission to bring an application for judicial review is refused on this ground.

104. As regards Ground 2 of the application for judicial review, permission to bring an application for judicial review is granted. For the reasons set out above, the decision of 9 November 2023 is quashed. The matter is remitted for the LA to reconsider the matter in the light of the matters set out in this judgment and by reference to relevant factors at the time of making the decision. The precise wording is set out above, derived from para. 2C of the draft order submitted to the Court.

105. As regards Ground 3, permission to bring the application is granted. There is not sufficient specificity in the EHC plan. Having regard to the decision in respect of the second ground, it remains for the parties to consider whether any relief is required in modified form or at all in respect of Ground 3 (in addition to the relief in respect of Ground 2).

106. It remains to thank the parties for their expertise and assistance in their written and oral submissions. The parties are asked to provide the Court with a draft order to reflect the decision and any consequential matters.