UPPER TRIBUNAL CASE NO: HS/2479/2017

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference EH860/17/00016, made following a hearing on 18 May 2017, did not involve the making of an error on a point of law.

REASONS FOR DECISION

1. This case concerns the special educational provision needed by Ashley. The issues focus around the local authority's decision that any provision did not have to be provided in an Education, Health and Care plan – from now on an EHC plan. Instead, the local authority set out his needs in a Person Centred Plan.

2. I held an oral hearing to discuss the issues. It took place on 8 February 2018. David Wolfe QC appeared for Ashley's parents and Aimee Fox of counsel appeared for the local authority. I am grateful to them both for their written and oral submissions.

A. Procedural history

3. Ashley's parents asked the local authority to secure an EHC needs assessment for their son. That request was made pursuant to section 36(1) of the Children and Families Act 2014 and triggered a procedure. I set out this procedure in some detail, because at one stage there was confusion about the precise terms of the test to be applied at different stages. This did not feature before me.

4. The local authority first had to decide whether to secure a needs assessment for Ashley. The test is set by section 36(3): 'whether it may be necessary for special educational provision to be made for the child … in accordance with an EHC plan'. There are several important points to notice about this provision.

5. The first point is the stage at which this subsection operates. It is the first step after a request is made. It sets a threshold test of whether to secure an assessment. This leads to the second point: the words 'may be' are appropriate, as the test has to be applied before an assessment is carried out. Third, the subsection envisages a case in which the local authority is able to decide on the information available that an assessment need not be carried out. In other words, it envisages a case in which it is possible to predict that outcome at the outset. Fourth, it is entitled to come to that conclusion in one of two circumstances: (i) if the child does not need special educational provision (as defined by section 21); or (ii) the child needs such provision but it need not be made in accordance with an

EHC plan. Fifth, it is an easier test to satisfy than the test for securing a plan and appropriately so given the stage at which it has to be applied.

6. If the local authority had decided that the test was satisfied, it would have proceeded to secure an assessment pursuant to section 36(8). The language of section 36(8)(b) repeats the language of section 36(3). In the event, the authority decided that it was not necessary to secure an assessment. This brought the procedure to an end under section 36(5).

7. Section 51(2)(a) provides for an appeal against a decision under section 36(5). Ashley's parents exercised that right and the local authority's decision was reversed by the First-tier Tribunal in October 2016.

8. The result was that the local authority had to carry out an assessment and it did so. Having done so, it decided that Ashley required special educational provision. Having come to that conclusion, it had to decide whether to make that provision in accordance with an EHC plan. The test for securing an EHC plan is set by section 37(1): whether 'it is necessary for special educational provision to be made for the child ... in accordance with an EHC plan'. This reflects the language of section 36(3) except that 'is' has replaces 'may be'. It is another threshold test, but this time for securing a plan rather than securing an assessment. As that assessment is now complete, it is necessary and possible to decide whether or not a plan is required. This test is more difficult to satisfy than the section 36(3) test, as the evidence is now available on which to make a definitive decision about the need for a plan.

9. The local authority decided that the test was not satisfied as it was possible to secure Ashley's special educational needs without an EHC plan. Accordingly, the authority informed Ashley's parents pursuant to section 36(9)(b) that it did not propose to secure an EHC plan for their child. Instead, it made a Person Centred Plan – more on this later.

10. Section 51(2)(b) provides for an appeal against a decision under section 36(9). Ashley's parents exercised that right and the appeal came before the First-tier Tribunal in May 2017. It confirmed the local authority's decision. I gave permission to appeal to the Upper Tribunal.

B. The legislation

11. These are the relevant provisions of the Children and Families Act 2014:

> **21 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—
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> (a) mainstream schools in England,
>
> (b) maintained nursery schools in England,
>
> (c) mainstream post-16 institutions in England, or

(d) places in England at which relevant early years education is provided.

(2) 'Special educational provision', for a child aged under two, means educational provision of any kind.

(3) 'Health care provision' means the provision of health care services as part of the comprehensive health service in England continued under section 1(1) of the National Health Service Act 2006.

(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).

36 Assessment of education, health and care needs

(1) A request for a local authority in England to secure an EHC needs assessment for a child or young person may be made to the authority by the child's parent, the young person or a person acting on behalf of a school or post-16 institution.

(2) An 'EHC needs assessment' is an assessment of the educational, health care and social care needs of a child or young person.

(3) When a request is made to a local authority under subsection (1), or a local authority otherwise becomes responsible for a child or young person, the authority must determine whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

(4) In making a determination under subsection (3), the local authority must consult the child's parent or the young person.

(5) Where the local authority determines that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan it must notify the child's parent or the young person—

(a) of the reasons for that determination, and

(b) that accordingly it has decided not to secure an EHC needs assessment for the child or young person.

(6) Subsection (7) applies where—

(a) no EHC plan is maintained for the child or young person,

(b) the child or young person has not been assessed under this section or section 71 during the previous six months, and

(c) the local authority determines that it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

(7) The authority must notify the child's parent or the young person—

(a) that it is considering securing an EHC needs assessment for the child or young person, and

(b) that the parent or young person has the right to-

(i) express views to the authority (orally or in writing), and

(ii) submit evidence to the authority.

(8) The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted under subsection (7), the authority is of the opinion that—

(a) the child or young person has or may have special educational needs, and

(b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

(9) After an EHC needs assessment has been carried out, the local authority must notify the child's parent or the young person of—

(a) the outcome of the assessment,

(b) whether it proposes to secure that an EHC plan is prepared for the child or young person, and

(c) the reasons for that decision.

(10) In making a determination or forming an opinion for the purposes of this section in relation to a young person aged over 18, a local authority must consider whether he or she requires additional time, in comparison to the majority of others of the same age who do not have special educational needs, to complete his or her education or training.

(11) Regulations may make provision about EHC needs assessments, in particular—

(a) about requests under subsection (1);

(b) imposing time limits in relation to consultation under subsection (4);

(c) about giving notice;

(d) about expressing views and submitting evidence under subsection (7);

(e) about how assessments are to be conducted;

(f) about advice to be obtained in connection with an assessment;

(g) about combining an EHC needs assessment with other assessments;

(h) about the use for the purposes of an EHC needs assessment of information obtained as a result of other assessments;

(i) about the use of information obtained as a result of an EHC needs assessment, including the use of that information for the purposes of other assessments;

(j) about the provision of information, advice and support in connection with an EHC needs assessment.

37 Education, health and care plans

(1) 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.

(2) For the purposes of this Part, an EHC plan is a plan specifying—

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

(b) the outcomes sought for him or her;

(c) the special educational provision required by him or her;

(d) any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs;

(e) in the case of a child or a young person aged under 18, any social care provision which must be made for him or her by the local authority as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 (as it applies by virtue of section 28A of that Act);

(f) any social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person having special educational needs, to the extent that the provision is not already specified in the plan under paragraph (e).

(3) An EHC plan may also specify other health care and social care provision reasonably required by the child or young person.

(4) Regulations may make provision about the preparation, content, maintenance, amendment and disclosure of EHC plans.

(5) Regulations under subsection (4) about amendments of EHC plans must include provision applying section 33 (mainstream education for children and young people with EHC plans) to a case where an EHC plan is to be amended under those regulations.

51 Appeals

(1) A child or young person may appeal to the First-tier Tribunal against the matters set out in subsection (2), subject to section 55 (mediation).

(2) The matters are—

(a) a decision of a local authority not to secure an EHC needs assessment for the child or young person;

(b) a decision of a local authority, following an EHC needs assessment, that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan; ...

C. The Code of Practice

12. These are the relevant provisions of the **Special educational needs and disability code of practice: 0-25 years** of January 2015:

9.54 In deciding whether to make special educational provision in accordance with an EHC plan, the local authority should consider all the information gathered during the EHC needs assessment and set it alongside that available to the local authority prior to the assessment. Local authorities should consider both the child or young person's SEN and the special educational provision made for the child or young person and whether:

- the information from the EHC needs assessment confirms the information available on the nature and extent of the child or young person's SEN prior to the EHC needs assessment, and whether
- the special educational provision made prior to the EHC needs assessment was well matched to the SEN of the child or young person

9.55 Where, despite appropriate assessment and provision, the child or young person is not progressing, or not progressing sufficiently well, the local authority should consider what further provision may be needed. The local authority should take into account:

- whether the special educational provision required to meet the child or young person's needs can reasonably be provided from within the resources normally available to mainstream early years providers, schools and post-16 institutions, or
- whether it may be necessary for the local authority to make special educational provision in accordance with an EHC plan

D. The First-tier Tribunal's reasons

13. After the usual preliminary matters and background summary, the tribunal set out the issues it had to decide. It set out the relevant test in section 37(1) and referred to my decision in *Buckingham County Council v HW* [2013] UKUT 470 (AAC) on the meaning of 'necessary'. It then referred to paragraphs 9.54 and 9.55 of the Code of Practice. Finally, the tribunal set out the issues it had to decide:

a. whether or not the outcome of the EHC Needs Assessment had appropriately identified the provision that is required in order to meet Ashley's special educational needs;

b. whether or not Ashley's current school is able to make that provision, and if so whether or not it is able to do so from within its own resources, including such top-up funding as may be available to Ashley; and

c. whether or not there is real potential for Ashely to make progress towards closing the gap that exists between him and his peers in

> academic attainment if the provisions described in his PCP are appropriately implemented.

14. Next in the tribunal's reasons comes a section headed **Analysis of Issues and Evidence**. In fact, it is mainly a summary of the evidence. In paragraph 27, the tribunal set out the concerns expressed by Ashley's parents:

> They felt strongly that in the past few years he has consistently regressed and that the gap between him and his peers has been widening. They made reference to the evidence of Suzanne Boyd in her most recent written report, and stated that what is happening at his present school is not enabling Ashley to catch up. They had concerns that the proposed provision for Ashley, as set out in the PCP was not specialised enough and did not address Ashley's impending transition to a secondary education setting. They are seeking to change the course of Ashley's future by ensuring that he is in receipt of appropriate special educational provision in an appropriate educational setting.

15. Then comes the final section headed **Conclusions with reasons**. I summarise:

- The educational evidence from those who knew Ashley best uniformly indicated that Ashley could make progress and had done so since the Person Centred Plan was implemented.
- The changes made had benefited not only his learning, but also his happiness, enthusiasm, self-confidence and self-esteem – later for convenience I call this his well-being. He was no longer falling behind; indeed, he was catching up.
- There were still areas of deficit that required targeted support, but these had been identified and the recommended provision 'is capable of being delivered in a mainstream setting.'
- Ashley's progress had been variable and at times negative, but that was not currently the case.
- The areas in which Ashley's level of attainment was low or very low were mostly related to literary attainment and were being addressed. Although there was no formal diagnosis of dyslexia, that was implied by the evidence.
- Ashley did not need a school specialising in significant dyslexia. What he needed was targeted support that could be provided in a mainstream setting.
- The parents' perception of Ashley's progress was not consistent with the up-to-date evidence.
- Paragraph 35 is worth quoting in full:

  > The Tribunal was satisfied that Ashley's needs are currently able to be met from within the resources normally available in a mainstream school, and it was also satisfied that his transition to a secondary setting will not inevitably result in him being places in an inappropriate context for his learning ability, or in him being lost within the system. The evidence provided was not consistent with such an interpretation.

- The additional provision identified was appropriate and no new needs had come to light.
- Ashley's needs were set out in his Person Centred Plan and were normally available in a mainstream school. Even at this early stage, the Plan had been beneficial.
- An EHC plan was not needed.

E. The appeal process

16. I spend time on the nature of the appeal process, because it arose at different points in the argument at the oral hearing and it provides the background against which some of the issues that arise on this appeal have to be resolved.

17. It is worth beginning with the remark of the Canadian Supreme Court in *Housen v Nikolaisen* [2002] 2 SCR 235. The Court was explaining why appellate courts are not in a favourable position to assess and determine factual matters, but the remark is of general application:

> 14. … appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole.

And as a case progresses through the hierarchy of appeals, so the focus narrows and the issues change.

18. The local authority has to look at all relevant matters in accordance with the 2014 Act. That should go without saying. What matters for present purposes is how the approaches taken by the First-tier Tribunal and then by the Upper Tribunal differ from that of the local authority and from each other.

The appeal to the First-tier Tribunal

19. The appeal to the First-tier Tribunal is against the local authority's decision. In this case, that was the decision that an EHC plan was not necessary. This appeal is sometimes called a general appeal. This means that the issue for the tribunal is whether, on the evidence and submissions before it, the local authority came to the correct conclusions on matters of fact, law and judgment. The tribunal is free to form its own view on any matters covered by the decision. But the extent of its powers and duties vary. In some types of case the tribunal is limited to considering the circumstances obtaining at the date of the decision under appeal, whereas in other types of case the tribunal has to consider the circumstances obtaining at the date of the hearing. Special education needs appeals are dealt with as at the date of the hearing: *Gloucestershire County Council v EH* [2017] ELR 193 at [47]. Again, in some types of case the tribunal will undertake the whole process afresh, whereas in other types of case the issues are narrower. Special educational needs appeals regularly limit the issues to those identified as being in dispute in a working document produced by the parties.

20. The facts that the issues may change or evolve during the proceedings presents a difficulty for the Upper Tribunal. Mr Wolfe took me through the

documents that were before the First-tier Tribunal, but as Ms Fox pointed out we did not have a record of the evidence or submissions given at the hearing, except insofar as they were mentioned in the tribunal's reasons. The Upper Tribunal must be aware of this when deciding an appeal and make appropriate allowance for the absence of part of the record. It may be that the evidence before the tribunal only becomes apparent from the tribunal's reasoning. It can be a mistake to look for the evidence, fail to find and then argue that it was not available.

21. The procedure before the First-tier Tribunal is often said to be inquisitorial rather than adversarial. It is also said to be enabling. In part, this language merely serves to emphasise that tribunals do not take so formal an approach as the courts. But it also imposes a positive obligation on tribunals. This can lead to a tension between the power to limit the appeal to the issues raised by the parties and the tribunal's positive obligation to ensure that the facts have been properly found and the law correctly applied. The overriding objective provides a way to resolve this tension. It is set out in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699):

> **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.
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> (2) Dealing with a case fairly and justly includes—
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> (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;
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> (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.

22. The overriding objective does not necessarily provide a definitive answer to the issue of the extent of the tribunal's positive obligation to look into matters. What it does do is provide a framework for consideration of that issue. The tribunal may find it helpful to set out that framework in its reasons, but it should by now be embedded in the way judges and members think so that its application is instinctive. Just to give an example, assume that there is more evidence that could have been obtained or provided. The tribunal will consider:

- whether the cost and delay of adjourning are justified (rule 2(2)(a) and (e));
- whether the evidence is necessary to allow full participation in the proceedings (rule 2(2)(c));
- the existence and quality of any representation available to the parties;
- whether the tribunal should use its special expertise to help the party identify relevant evidence or to avoid the need for further evidence (rule 2(2)(d)); and
- whether one or other of the parties has provided all the evidence available to them (rule 2(4)).

Having considered those and, no doubt, other matters, the tribunal has to exercise its judgment to decide on balance how to proceed.

23. The tribunal has case management powers, which are used in different ways in different jurisdictions. The special educational needs jurisdiction uses its powers to try to ensure that all the evidence is available for the tribunal in advance of the hearing. That in part reflects the nature and detail of the evidence and the need for the parties and the tribunal to have time to study it in advance. As part of that process, the tribunal may use a case management hearing to direct the parties on what needs to be provided and when. Mr Wolfe showed me a copy of the order made in this case on 16 May 2017.

24. It is not unusual for evidence to be produced late or further evidence to be provided at the start of the hearing. It is also possible that some of the evidence that was directed to be provided is not made available. Mr Wolfe told me that this is what happened in this case. The tribunal has power to adjourn for this evidence to be made available, but this does not mean that the proceedings are necessarily defective if the evidence is not made available as directed and the tribunal proceeds on what is available; that is the effect of rule 7(1). The tribunal has to decide what steps if any to take, given the way that the issues develop during the hearing and the need for the tribunal to decide on the circumstances obtaining at that time. It has power under rule 7(2)(a) to waive any requirement imposed by a direction.

25. I trust that the previous paragraphs are sufficient to show that there is no simple answer to what a tribunal has to do in any case. That will depend on the particular circumstances of the individual case.

26. There is nothing inconsistent in what I have said with the authorities cited to me by Mr Wolfe. In *W v Gloucestershire County Council* [2001] EWHC Admin 481, Scott Baker J commented on the lack of evidence before the tribunal:

> 15. … if there was inadequate information about the proposed school placement, the tribunal should have taken the necessary steps to obtain it, if necessary adjourning to do so. Tribunals, so it seems to me, cannot proceed on a purely adversarial basis, but have a duty to act inquisitorially when the occasion arises by making sure they have the necessary basic information on which to decide the issues before them, rather than rely entirely on the evidence adduced by the parties. The tribunal will usually have much greater relevant expertise than the parents who appear before them.

Those remarks are carefully qualified – 'when the occasion arises' and 'necessary basic information' – and would now be caught by rule 12(2)(c) and (d).

27. And in *R (JF) v London Borough of Croydon* [2006] EWHC 2368 (Admin), Sullivan J criticised the local authority's failure to provide evidence:

> 11. I find the first defendant's attitude to this case very troubling indeed. It betrays a complete failure to understand the role of a Local Education Authority in hearings before the Tribunal. Although the proceedings are in part adversarial because the Authority will be responding to the parents' appeal, the role of an education authority as a public body at such a hearing is to assist the Tribunal by making all relevant information available. Its role is not to provide only so much information as will assist its own case. At the hearing, the Local Education Authority should be placing all of its cards on the table, including those which might assist the parents' case. It is not an adequate answer to a failure to disclose information to the Tribunal for a Local Education Authority to say that the parents could have unearthed the information for themselves if they had dug deep enough.

That decision is consistent with the authorities on the proper non-contentious role of public decision-makers that dates back at least to *Commissioners of Inland Revenue v Sneath* [1932] 2 KB 362 at 382. It would now be caught by the rule 2(4) duties and be subject to the points I have made about the tribunal's exercise of its case management powers.

The appeal to the Upper Tribunal

28. The appeal to the Upper Tribunal is on error of law. This means that the issue for the tribunal is whether the making by the First-tier Tribunal of its decision involved the making of an error on a point of law (section 12(1) of the Tribunals, Courts and Enforcement Act 2007). That means that the Upper Tribunal is concerned not with the local authority's decision, but the First-tier Tribunal's decision. That is what section 12(1) provides and it is the inevitable – or at least the natural - consequence of the rule that the operative force of an appellate decision replaces that of the decision under appeal. As the Tribunal of Commissioners wrote in *R(I) 9/63*:

> 19. … Even if the appellate body affirms the original decision, that original decision retains its validity only by virtue of having been affirmed by the

appellate decision and expressly or impliedly incorporated into it. The rights of those concerned are controlled by the appellate decision.

29. As the Upper Tribunal can only set aside the First-tier Tribunal's decision if it involved an error of law, the tribunal cannot take account of evidence that was not before the tribunal, unless it relates to what happened at the hearing. The approach set out in *Ladd v Marshall* [1954] 1 WLR 1489 does not apply. See *VH v Suffolk County Council* [2010] UKUT 203 (AAC) at [7]-[9] and *Forager Ltd v Natural England* [2017 UKUT 148 (AAC) at [44]-[46].

F. The can/will questions

30. The argument here is that the First-tier Tribunal considered whether Ashley's special educational provision could be delivered in a mainstream school, but failed to consider whether there was a reasonable degree of certainty that it would in fact be made. This was important because the use of a Person Centred Plan had consequences:

- there was no consultation on its contents;
- it was not compulsory, as it contained only recommendations; and
- as it did not deal with placement, there was no consultation and no appeal on that issue.

31. I begin by taking a linguistic and, to some extent, a personal point. It has long been a matter of regret to me that the word 'can' is not used in the precise way I was taught at school. I have slowly and painfully come to accept that it is used more flexibly than I was taught. So the question 'can you pass the pepper?' means 'will you pass it?' That is why I would be reluctant to rely too much on the precise choice of words in the tribunal's written reasons and would look at the substance and context of what was said as much as at the language used.

32. Having said that, I accept that analytically as a matter of law, both the can and the will issues arise when deciding whether the test in section 37(1) is satisfied. Apart from authority, it seems to meet that the decision must look at both aspects in order to decide what is 'necessary'. If authority is needed:

- *NC and DH v Leicestershire County Council* [2012] ELR 365 at [32] deals with the 'can' question;
- *SC and Ms v Worcestershire County Council* [2016] ELR 537 [3] deals with the 'will' question.

33. The principal flaw in Mr Wolfe's approach is that it failed to take account of the tribunal's duty to consider the appeal in the circumstances obtaining at the time of the hearing. Mr Wolfe showed me that some of the documents that led to the local authority's decision were contradictory on the precise provision that was being made for Ashley. If the tribunal had been charged with reviewing the process undertaken by the local authority, those would be valuable points to make. But by the time of the hearing, the Person Centred Plan had been issued and implemented. The tribunal found that, following the implementation of the plan, Ashley's learning and personal well-being had improved significantly. That finding showed that Ashley's needs could be met, and were being met, at that

time. Remember that Ashley was in his final term at the school. The difference between present and future and between can and will were artificial over the short timescale of the rest of the summer term. Ashley's needs at secondary level were a different matter and are the subject of the second ground of appeal.

34. Mr Wolfe gave me a copy of a letter sent by the local authority to Ashley's parents dated 1 August 2017, which was of course after the date of the hearing before the tribunal. It referred to the tribunal's decision and said: 'As the [secondary] School has already indicated they can meet needs then it will be their decision on the level of support that they provide Ashley.' Leaving aside the fact that that letter was not before the tribunal, this sentence is a correct statement of the law, as Ms Fox pointed out. A Person Centred Plan is not obligatory. It ultimately leaves decisions, as the letter said, to the school. This part of the letter is not evidence of any doubt that Ashley's needs would be met. It is merely an accurate record of the legal position following the First-tier Tribunal's decision that it was for the School to decide how to do so. It correctly recorded the division of responsibility between the local authority and the school.

35. Mr Wolfe was right to insist on a rigorous approach by tribunals to the legal requirements, but that needs to be qualified by including a reference to the context in which the tribunal was operating, deciding the issues that were put to it at the time of the hearing. The result can be, and was on this issue in this case, that the tribunal can take a practical approach to the ultimate issue of whether an EHC plan was necessary. Mr Wolfe pointed out that Ashley's needs were not clear, but, as I suggested at the hearing, whatever they were the steps taken by his school were addressing them effectively and doing so from existing resources.

36. Finally, this is a convenient point to deal with one of Mr Wolfe's criticisms of the tribunal, which he actually presented on a different issue. He pointed out that the tribunal did not have before it all the evidence that the local authority had available – he produced a Decision Making Record – and that the tribunal had directed be made available – he referred to the tribunal's order of 16 May 2017 in this context. I have already commented on the local authority's responsibility as a non-contentious public body and on tribunal's power to adjourn to obtain evidence that has not been provided. As I have said, the tribunal has to decide in the context of the case as it develops at the hearing whether it is necessary to adjourn for evidence to be provided. As part of its consideration, it has to bear in mind that it is concerned with circumstances as they are at the date of the hearing. The tribunal did not exercise its powers to remedy any failure to comply with the May order and I can see no reason to criticise its judgment that it was able to decide the issues before it on the evidence it had. As to the local authority's Decision Making Record, this was historic and, as I have explained, the tribunal was concerned with the changed circumstances in May 2017.

37. Mr Wolfe also drew attention to the *Additional Comments* section of the Decision Making Record and the words written there:

> Above criteria for EHC plan.

> Issue PCP.

I do not know what the first sentence means, but the important point is that this evidence was not before the First-tier Tribunal and cannot be used to show that it made an error of law.

G. The imminent transfer to secondary school

38. The argument here is that the First-tier Tribunal failed to give consideration to the secondary provision proposed for Ashley; he was about to move to secondary school.

39. I accept that this was potentially an issue that the tribunal had to address. As Kay J said in *Wilkin v Goldthorpe and Coventry City Council* [1998] ELR 345 at 349:

> If by the time of the hearing of the appeal the situation has arisen where there is but a short term left of the primary education, it seems to me clear that the tribunal is bound to reach a conclusion as to the mode beyond that very short period and look to the future needs of the child.
>
> There may, of course, be circumstances in which it is impossible to look beyond even a very short period, but no one suggests that that was the situation in this case.

40. I say *potentially* an issue, because what Kay J said has to be qualified in two respects. First, it may be that the parents do not raise any issue on transfer to secondary education. That may be rare, but it is possible. And the tribunal would want to ensure that the parents had understood the consequences of not raising the issue, but it is possible that they had received competent advice. Second, if the parents do raise the issue, it is important to notice how it is raised. In this case, the parents put their concerns in writing:

> Ashley is to transfer to secondary school in September 2017. This is a very worrying time. Any progress is very, very slow borne out of the available evidence. We have grave concerns that Ashley is likely to have inadequate support at secondary school. Although we have no evidence to support this submission, we assert that we have visited the local potential secondary school for Ashley and have gained the clear impression that in the absence of an EHCP, the school would have difficulty in making appropriate provision.

That is general, unparticularised and unsupported by evidence. It might be argued that it was nonetheless sufficient to require the tribunal to investigate and consider whether the provision for transition to secondary education was sufficient. However, the parents' written argument was based on the premise that Ashley was making only slow progress. The tribunal did not accept that. It found that he was not only improving, but catching up with his peers, and that his well-being as well as his learning was improving. Moreover, there was more focus given to the issue of transfer to secondary education. The tribunal set out how those concerns were presented at the hearing in paragraph 27. The educational psychologist who gave evidence for the parents identified concerns

that Ashley would be educated with pupils less academically able than he was. The educational psychologist who gave evidence for the local authority disagreed; she said that the risk of Ashley becoming lost in a mainstream school was low, and that such schools had adaptable approaches to providing for pupils like Ashley. Paragraph 35 of the tribunal's reasons, which I have quoted in full, shows that the tribunal accepted the latter evidence.

41. I am satisfied that, although the tribunal failed to set out the transition issue in its statement of the issues in paragraph 14, it did address relevant concerns that emerged in the evidence and gave its conclusions in paragraph 35. There was evidence to support those conclusions on the issue as it arose and, in assessing the evidence, the tribunal no doubt took advantage of its specialist knowledge and experience.

H. The local authority's use of a Person Centred Plan

42. Instead of securing an EHC plan, the local authority produced a Person Centred Plan, which was essentially in the form of an EHC plan but with the disadvantages I have noted. The grounds of appeal contain this assertion:

> ... that production here of a PCP and its deployment in that way to resist the making of an EHC plan appears to be consistent with Staffordshire's wider practice (whether or not it is also specified in a particular policy) of making PCPs in the light of the EHC needs assessments in essentially the same form as an EHC plan (and sometimes indeed derived from a document described as a 'draft EHC plan') as the basis for then refusing to make an EHC plan in even the same terms as the PCP in question.

Later the grounds describe the local authority's approach as unlawful.

43. Insofar as this argument criticises the local authority's approach, it is attacking the wrong target. As Ms Fox pointed out, neither the First-tier Tribunal nor the Upper Tribunal was conducting a judicial review of the local authority's decision. The correct target, for the First-tier Tribunal, was the local authority's decision, whereas the correct target for the Upper Tribunal is the First-tier Tribunal's decision. As I have explained when discussing the appeal process, it is the First-tier Tribunal's decision that became the operative authority for the local authority's decision. As I understood his argument at the hearing, Mr Wolfe accepted that point, but sought to limit his argument to the circumstances of this case and to the issue I come to next.

I. Regard to the stability of the provision

44. Mr Wolfe argued that the First-tier Tribunal should have taken account of the issues of Ashley's placement and of the lack of certainty in the terms of Ashley's provision in deciding the threshold question of whether it was 'necessary' to secure an EHC plan. He relied on Upper Tribunal Judge Mitchell in *SC and MS v Worcestershire County Council* [2016] UKUT 267 (AAC), arguing that placement and precision of provision were essential to the stability of Ashley's provision. This is what Judge Mitchell said:

40. The question whether it is "necessary" to determine special educational provision has to informed by the wider legislative scheme of which the statementing provisions are part. If a statement is made, the child enters a world of specific educational entitlements that are not enjoyed by other children. In particular:

(a) the local authority must "arrange that the special educational provision specified in the statement is made for the child" (section 324(5)(a)). The specification of a school in a statement involves specifying special educational provision, as is made clear by sections 324(3) & (4). Section 324(3) requires the statement to specify the special educational provision needed "including the particulars required by subsection (4)". Within those particulars, we find "the name of any school or institution…which they consider would be appropriate for the child and should be specified in the statement" (this does not apply if the parent's preferred maintained school is already required to be specified by Schedule 27 to EA 1996). If the specified school is an independent school, section 324(5)(a) requires the authority to fund the child's education at the school but, if there were any doubt about this, section 348(2) puts it beyond doubt;

(b) if the name of a maintained school is specified in the statement, the school's governing body must admit the child to the school. This even overrides the statutory class size limit in section 1 of the School Standards and Framework Act 1998;

(c) statements are entrenched to a significant degree because Schedule 27(2A) to the EA 1996 only permits an amendment in three cases: following a statutory review carried out in accordance with the procedure laid down in Schedule 27; where ordered by the tribunal; where directed by the Secretary of State;

(d) if a child moves to the area of a different local authority, his/her statement is transferred. The new authority is required to arrange the special educational provision specified in the statement (regulation 23 of the 2000 Regulations). Hence, the new authority cannot immediately argue that, because it is less well-resourced than the previous authority, the educational provision specified imposes an unreasonable burden. The provision specified may only be amended in accordance with the statutory procedures for altering statements;

(e) a local authority does not have a free hand to cease to maintain a statement. The test is whether "it is no longer necessary to maintain it" (Schedule 27(11)(1) to EA 1996). And provision is made so that a determination not to maintain cannot take effect until any appeal is determined or withdrawn (Schedule 27(11)(5));

(f) statements must be regularly reviewed, at least annually, with the review taking the form of a re-assessment (section 328(1)).

> 41. A statement therefore generates certainty of, and a significant degree of stability in, educational provision. …
>
> …
>
> 49. HHJ Pearl went on to hold, in [*NC & DH v Leicestershire* CC [2012] UKUT 85 (AAC) at] paragraph 32 of his decision, that two questions must be addressed in applying section 324 (that is deciding whether an authority is required to make and maintain a statement):
>
> (a) "The first question is whether the special educational provision identified as necessary for the child in the assessment carried out under section 323 is in fact available within the resources normally available to a mainstream school";
>
> (b) "The second question is, if so, can the school reasonably be expected to make such provision from within its resources".
>
> 49. While I do not disagree, I think perhaps a more practical route to the same destination is simply to ask whether, without a statement, the decision maker can be satisfied, to a reasonable degree of certainty, that the required educational provision will be delivered. In answering that question, regard should be had to the legal consequences of a statement as described in paragraph 40 above.

I have corrected an obvious typo, but not the numbering of the paragraphs; there really are two paragraph 49s.

45. To begin with placement, it would be wrong to secure that an EHC plan was prepared just so that parents could have a right of appeal, but the need for provision about placement is one factor that Judge Mitchell identified (paragraph 40(a)) as one of the factors relevant when considering necessity. In this case, the First-tier Tribunal found that the provision Ashley needed was available in any mainstream school without additional resources. There was evidence on which to make that finding and the tribunal was entitled to make it. Given that finding, there was no basis on which the tribunal could properly have found that it was appropriate to specify a particular school.

46. Now I come to the uncertainty over Ashley's provision. I accept that this could have been clearer in the record, both the evidential record and the tribunal's reasons, but as I have said, the tribunal was dealing with an appeal against a decision that an EHC plan was not necessary. The tribunal was entitled to find on the evidence that it was not, given the way that Ashley had improved in response to the changes made under the Person Centred Plan. His school knew what was being done and it would, no doubt, pass that information to the secondary school, which would need to adjust provision as his learning and well-being progressed and in light of the demands of study at secondary level. Whatever the uncertainty, the findings made showed that the new provision was effective. In those circumstances, viewed at the time of the hearing, an EHC plan was not necessary.

J. The additional ground – exclusion of witness

47. Mr Wolfe introduced a new ground in his reply to the appeal, although the evidence in support had been provided as part of the application; a further statement by him has been provided during this appeal. Ashley's parents wanted him to attend a particular school. The principal of that school was Dr B, who was also a chartered psychologist. He was mentioned in the papers before the tribunal in the latter capacity. The presiding judge told him that he would not be allowed to give evidence in view of his 'financial benefit' in the school. He remained in the room during the hearing, but appears on the record only as principal of the school. He says that he could have given evidence relating to the local authority's late evidence. I have no record of what was said to him and the judge has not been asked to give his account of what took place. There is no mention of it at the beginning of the tribunal's written reasons, where it dealt with other matters relating to evidence.

48. This is the aspect of the case that has concerned me most. Tribunals often hear from the head teachers of schools that are being considered as placement. A person's financial interest in a school may be a factor to take into account in assessing their evidence, but is not of itself a reason for refusing to admit their evidence.

49. If the position is as recounted by Dr B, that would have been an error of law. Even if there were an error, I would exercise my power under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and refuse to set the decision aside despite the error. I say that for these reasons;

- The matter was never put to the First-tier Tribunal so that it could comment.
- The parents were represented. There is no evidence whether their representative challenged what the judge said.
- Dr B was able to attend the hearing and to feed any points about the evidence to the tribunal through the parents' representative.
- The tribunal already had, as Ms Fox pointed out, written evidence from two educational psychologists.
- Dr B says that he would have been able to persuade the tribunal that the evidence put to it did not support the conclusions that were being drawn from it, but I do not know whether that is so, given the tribunal's own knowledge and experience.
- For those reasons, the tribunal would have been entitled to exercise its case management powers to proceed with the evidence before it.
- The parents are also able to make a new application under section 36. I accept Mr Wolfe's point that this takes time, but it would also take time to prepare for a rehearing after so long, especially given the progress he was making last May. The point is that the process is available.

50. In the event, I prefer not to exercise my powers under section 12(2)(a), because it would not be appropriate to characterise what the tribunal did as an error of law without giving that tribunal a chance to comment. That would then

lead to further submissions, which would only increase the period of time for which the legal position remained uncertain. I have therefore found that no error of law has been shown.

K. Final remarks

51. There are certainly infelicities in the way that the tribunal's written reasons were composed. There often are. As Ms Fox pointed out, the test the law applies is adequacy, not excellence. When the tribunal's reasons are set in the context of the way that the appeal process operates at that level, I find no error of law in its decision.

Signed on original
on 12 February 2018

Edward Jacobs
Upper Tribunal Judge