IN THE UPPER TRIBUNAL **Upper Tribunal case No.** HS/1185/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

DECISION

Under section 12 of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal decides the decision of the First-tier Tribunal of 20 January 2015 (ref. no SE 393/14/00003) involved a material error of law. The decision is set aside. I direct that the appeal is remitted to the First-tier Tribunal for re-hearing before a differently-constituted Tribunal panel. Any further case management directions are to be given by a judge of the First-tier Tribunal.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 I hereby make an order prohibiting the disclosure or publication of any matter likely to lead to a member of the public identifying the child with whom these appeals are concerned. This order does not apply to (a) the child's parents, (b) any person to whom any parent discloses such a matter or who learns of it through parental publication (and this includes any onward disclosure or publication), (c) any person exercising statutory (including judicial) functions in relation to the children. The child's real name is not used in these reasons.

REASONS FOR DECISION

Background

1. Mr D appealed to the First-tier Tribunal against the contents of a statement of Special Education Needs (SEN) maintained in respect of his daughter, whom I shall refer to as Edith. The statement was maintained by South Tyneside Council. The First-tier Tribunal (FtT) dismissed the appeal. At this point, Edith was aged eight.

2. Mr D's solicitors, Maxwell Gillott, applied to the Upper Tribunal for permission to appeal against the FtT's decision. Having been refused permission on the papers, Mr D's application was reconsidered at a hearing before myself. He was represented by Mr John Walsh of counsel (but since then his counsel has been Ms Louise Price). I granted Mr D permission to appeal on grounds which are dealt with below. The council resist the appeal and their reasons for doing so are also dealt with below.

Issue 1 – whether the Tribunal gave adequate reasons for rejecting Mr D's case

3. Mr D disputed the contents of Parts 2 and 3 of his daughter's statement. By virtue of regulation 16 of and Schedule 2 to the Education (SEN) (England) (Consolidation) Regulations 2001 ("2001 Regulations"), Part 2 must specify special educational needs and Part 3 must specify special educational provision and also the objectives the provision aims to meet.

4. The FtT's reasons for rejecting Mr D's case on Part 2 and Part 3 were entwined. They were simply that "[Edith's] educational and care needs have been significantly overestimated by Mr & Mrs [D] and their account of her level of functioning lacks credibility in the face of

other objective evidence". Mr D argues these reasons were inadequate. I note the FtT did not expressly set out why it rejected Mr D's case on Part 3.

5. Special educational provision is a response to special educational needs. The provision aims to meet those needs. In theory, therefore, the FtT might properly reject a parent's case as to Part 3 of a statement by rejecting the parent's case as to the child's special educational needs. However, it is better to give express consideration to Part 3 even in a case where parent and local authority have very different views about the nature of a child's needs and hence different views about the foundations of the provision to be specified in Part 3 . However, I do not need to decide whether this FtT properly explained its rejection of Mr D's case on Parts 2 and 3 since its decision is set aside on other grounds.

6. Mr D also argued before the FtT that the provision in Part 3 was not sufficiently specific. Since his main argument as to specificity succeeds, it follows that he also persuades me that the FtT gave inadequate reasons for rejecting his case on specificity.

Issue 2 – whether the Tribunal adequately specified the required special educational provision

7. The requirements of the law in this respect are settled. In *L v Clarke & Somerset County Council* [1998] ELR 129 Laws J held "the real question … is whether [the statement] is 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". I accept Mr D's argument that the statement ordered by the FtT does not meet this standard.

8. Part 3 of Edith's statement begins "it is recommended that the needs and objectives as previously outlined should be met by the following". A recommendation clearly leaves doubt as to what is being required; in fact it suggests nothing at all is *required*. It also raises doubt as to whether the FtT was aware that its task was to specify provision that the local authority would be required to arrange (section 324(5) EA 1996).

9. Part 3 of the statement also specifies "individual programmes tailored to her needs. She will require a handwriting programme, a PE programme and a reading programme. These programmes can be provided on an individual basis or in a group situation as deemed appropriate by her school (SENCO)". The bare provision for programmes tailored to needs adds nothing. It cannot possibly have been thought that, without this, the local authority would have set out to provide educational programmes that did not meet Edith's needs. And, while the programmes required are described, their content is not specified at all.

10. Part 3 also includes "access to multi-sensory teaching may be helpful using visual, auditory and kinaesthetic teaching". Whether provision may be helpful is beside the point. Part 3's purpose is to specify the educational provision that is required. It is not at all clear what, if anything, is required by this entry.

11. Finally, Part 3 specifies "opportunities to encounter success in her work in order to increase her confidence and self-esteem". Since it cannot seriously be suggested that, without this, the local authority would have designed opportunities for Edith to encounter failure, I cannot understand what this entry seeks to achieve.

12. For the above reasons, I decide the FtT's statement does not meet the required standard of specificity as described in *Clarke*. The local authority argued that the statement was not flawed simply because the provision was not quantified numerically. I accept that but it does not meet the other arguments put forward by Mr D. The FtT erred in law by making provision in Part 3 that did not meet the required standard of specificity.

Issue 3 – NHS provision included within Part 3

13. Part 3 of Edith's statement includes this entry: "an Occupational Therapy programme will be devised and implemented by Children's Integrated Therapies, South Tyneside NHS Foundation Trust following any recommendations from the Royal Victoria Infirmary where [Edith] is due to be assessed".

14. A statement of SEN has legal force because section 324(5) EA 1996 imposes a duty on a local authority to arrange the special educational provision specified in Part 3. The SEN legislation (Part 4 of the EA 1996) does not impose a similar duty on NHS bodies and that is reflected in the requirement under the 2001 Regulations for a statement to specify special educational provision and non-educational provision in different sections. Non-educational provision is to be specified in Part 6 of a statement.

15. While section 322 of the EA 1996 empowers local authorities to ask NHS commissioning bodies for assistance in exercising SEN functions, the duty to comply with the request is qualified. There is no duty where the NHS body considers the help requested is not necessary for the purposes of the authority's functions (section 322(2)) or, having regard to the NHS body's resources, it is not reasonable to comply with the request.

16. The FtT erred in law by including this NHS provision in Part 3 of Edith's statement. The council argue this must have been a slip of the pen and the words should be read as if they were contained in Part 6 of the statement. The FtT must have known it could not direct NHS provision in Edith's statement.

17. I do not accept the local authority's argument, which is really an argument that the inclusion of NHS provision within Part 3 was not a material error of law. For all I know, this provision was the hinge on which everything else in Part 3 turned. I cannot legitimately hold that this was an error that could not have made a difference to the outcome.

Issue 4 – what happens next?

18. In my grant of permission to appeal, I said this:

> "I give directions below for the future management of this case. However, I also draw to the parties' attention the transitional arrangements for implementation of the Education, Health and Care (EHC) plan provisions of the Children and Families Act 2014. EHC plans are a replacement for statements of SEN.
>
> The Children and Families Act 2014 (Transitional and Saving Provisions) (No.2) Order 2014 (S.I. 2014/2270) ["the transitional order"] deals with the transition between the old and new regimes. Article 16(3) of the Order requires an EHC assessment to be carried out once proceedings that were underway in September 2014 are finally determined.

I also note that the Code of Practice under the 2014 Act says at p.13 that:

> "it is expected that all those who have a statement and who would have continued to have one under the current system, will be transferred to an EHC plan – no-one should lose their statement and not have it replaced with an EHC plan simply because the system is changing."

It is open to the parties to invite the Upper Tribunal to make a consent order disposing of these proceedings on the basis that the First-tier Tribunal made an error of law but without remitting the case for re-hearing. In those circumstances, the transitional legislation would require the council to carry out an EHC assessment and that could be reflected in the terms of any consent order."

19. Perhaps I am guilty of viewing my own suggestions through rose-tinted glasses but I thought that was a reasonably good idea because:

(a) article 11 of the transitional order postpones the commencement of the EHC provisions of the Children and Families Act 2014 ("2014 Act") in relation to children for whom statements were maintained at the principal commencement date of 1 September 2014. In these cases, the SEN legislation in the EA 1996 continues to apply;

(b) that saving of the old law ceases to apply, so that the 2014 Act does, once a local authority decides under Part 5 of the transitional order whether it is necessary to maintain an EHC plan for a child. Before such a decision may be taken, an EHC assessment must be carried out under article 20 of the transitional order. Various assessment trigger points are identified;

(c) however, a different approach is taken where "at any time…(b) the parent of a child…had brought an appeal under section 326 of EA 1996 against any of the matters listed in subsection (1A) of that section…but the appeal had not been finally determined, in which case [article 16(3)] applies" (article 16(1)(b)). The present appeal to the FtT was of a type referred to in article 16(1);

(d) article 16(3) provides:

> "In the circumstances set out in paragraph (1)(b) the local authority that maintains the statement for the child or young person must secure that an EHC needs assessment for him or her is carried out and concluded as soon as is reasonably practicable after the appeal has been fully determined".

20. It seems to me that ultimately these proceedings will result in the local authority coming under a duty to secure an EHC needs assessment for Edith. I had thought the parties might consider it to be in Edith's interests to arrive at that destination sooner rather than later. However, the council objected – even though they also urged me to take into account the number of assessments that Edith has already had in deciding how to dispose of this appeal – so that is the end of that. A consent order cannot be forced on the parties.

21. The council requested that the Upper Tribunal postpone deciding the appeal and refer the matter back to the FtT with an invitation to provide additional reasons for it decision. This was supported by reference to the Court of Appeal's decision in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605 in which it was said:

> "if an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to that court that the application is well founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings."

22. Neither party referred me to the Court of Appeal's decision in *R (Oxfordshire CC) v GB* [2001] EWCA Civ 1358 which, unlike *English*, was an SEN case. Sedley LJ said:

> "9. We would add, however, that we do not consider it generally appropriate that a statutory tribunal which is required to give reasoned decisions should respond to an appeal by purporting to amplify its reasons. As Steyn LJ pointed out in *R v Croydon LBC, ex parte Graham* (1993) 26 HLR 286, 292, the very existence of material gaps in the reasons accompanying the decision may have rendered it unlawful."

23. I decline to take the course suggested by the local authority. The approach in *English* may be well suited to mainstream civil litigation appeals where the grounds of appeal are connected to the first instance court's findings on the evidence. However, I find it difficult to see how it can be applied in most Upper Tribunal SEN cases appeals without an unacceptable risk that the FtT panel will in fact re-run the reasoning process. I should add I do not in any way mean to cast doubt on the integrity of FtT panel members. Typically, findings of and disputes over the primary facts are not matters on which SEN appeals turn. The facts are the raw material for a complex process of educational evaluation undertaken with the benefit of the FtT's specialist members. If that has not been properly reasoned the first time, can the FtT panel – assuming they can be re-assembled – really be expected to avoid the trap of re-running the reasoning process? In any event, the local authority in the present case do not identify which aspects of, or deficits in, the FtT's reasons should be referred back. I decline to take the course suggested by the council.

24. Mr D's counsel requests a hearing of this appeal. The local authority do not. I decline to direct a hearing. The arguments as to the lawfulness of the FtT's decision have been well rehearsed in writing and I do not need to hear further legal argument.

25. Mr D's counsel argues that, rather than remitting the appeal to the FtT for re-hearing, the Upper Tribunal should make an order for Edith's statement to be converted into an EHC plan.

26. The transitional order does provide special tribunal transitional powers in some cases, for example article 8 provides for certain appeals against a refusal to assess under the EA 1996 to proceed as if they were appeals against a refusal to assess under the 2014 Act. But I am not aware of any power to take the course suggested by counsel for Mr D. Moreover, Edith has not had an assessment for the purposes of the 2014 Act. Since the parameters of that Act are not the same as the EA 1996, I do not have the raw material necessary for deciding – even if I had the expertise to do so – how any EHC plan should be framed. I do not take the course suggested on Mr D's behalf. Instead, I set aside the FtT's decision and remit Mr D's appeal to

a differently-constituted FtT panel for re-determination. However, I do draw the parties' attention to those provisions of the transitional order which trigger the duty to carry out an EHC assessment once an appeal under the EA 1996 is determined.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
4th January 2016