UPPER TRIBUNAL CASE NO: HS/1906/2016

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 1 April 2016 under reference EH845/15/00030) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel for a complete reconsideration of the issues that are raised by the appeal in accordance with the analysis in my reasons.

REASONS FOR DECISION

A. Introduction

1. This appeal came to the Upper Tribunal by way of permission given by the First-tier Tribunal. It was heard at an oral hearing on 17 November 2016. David Lawson of counsel appeared for the local authority. John Friel of counsel appeared for Theo, whose needs were the subject of the case. I am grateful to both counsel for their presentations to me, especially as I had stepped in to take the hearing at the last minute with no familiarity with the papers. I am also grateful to them for their written submissions following the hearing.

2. There was evidence provided in the papers before me that was not before the First-tier Tribunal. I could have taken that into account if I were re-making the decision, but I am not. I cannot take it into account to show an error in the First-tier Tribunal's decision, as the evidence was not put to it. In the event, I did not read it. It may, of course, be put to the First-tier Tribunal for the rehearing.

B. About Theo

3. This case concerns the education, health and care plan for Theo who was born on 13 October 1993. He has autistic spectrum disorder, attention deficit hyperactivity disorder, associated challenging behaviour, and anxiety issues. He also has a back problem. Theo is registered at a specialist independent college on a day placement, but his attendance has been patchy. He lives in a rented flat with domiciliary support provided by Brighton and Sussex Care Ltd (BASC).

C. The First-tier Tribunal's decision

4. Having heard the appeal, the tribunal set out five questions that it had to answer.

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Whether the description of the primary cause of Theo's needs should centre on his autism and related anxiety

5. The tribunal decided that it should. It accepted evidence to that effect and decided that there was no evidence to show that Theo's back problems were sufficiently severe to constitute part of his special educational needs. This effectively dealt with the tribunal's fourth question also, which was *whether Theo's back problems were part of his special educational needs*.

Whether Theo required a waking day curriculum

6. The tribunal directed itself that a waking day curriculum required not only a need for consistency, but also educational programmes throughout the day. It decided that there was a 'preponderance of persuasive evidence that this was indeed the case.' The tribunal mentioned programmes relating to behavioural management, daily living skills, functional living skills and independent skills, management prospects, and the development of social skills and friendships.

Whether the provision provided by BACS was educational provision

7. The tribunal decided that it did as, although it was identified by the local authority under its social services function, it provided education or training. The tribunal mentioned programmes to deal with Theo's anxiety as a barrier to learning and developing skills enhancing his chance of finding work.

Whether the package of services provided by BACS should be entered into Section I of his plan in addition to his college place

8. The tribunal decided that it should. If the Section only mentioned the college, it said, there was a risk that that placement would break down. The tribunal rejected Mr Lawson's argument that Theo's own home could not be an institution.

D. The legislation

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

> **20 When a child or young person has special educational needs**
>
> (1) A … young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her.
>
> (2) … a young person has a learning difficulty or disability if he or she-
>
> (a) has a significantly greater difficulty in learning than the majority of others of the same age, or
>
> (b) has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.

21 Special educational provision, health care provision and social care provision

(1) 'Special educational provision', for … 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—

…

(c) mainstream post-16 institutions in England …

(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).

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 … young person in accordance with an EHC plan—

(a) the local authority must secure that an EHC plan is prepared for the … 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 … 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 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 … 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 … 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.

42 Duty to secure special educational provision and health care provision in accordance with EHC Plan

(1) This section applies where a local authority maintains an EHC plan for a … young person.

(2) The local authority must secure the specified special educational provision for the … young person.

(3) If the plan specifies health care provision, the responsible commissioning body must arrange the specified health care provision for the … young person.

(4) '*The responsible commissioning body*', in relation to any specified health care provision, means the body (or each body) that is under a duty to arrange health care provision of that kind in respect of the … young person.

(5) Subsections (2) and (3) do not apply if the … the young person has made suitable alternative arrangements.

(6) '*Specified*', in relation to an EHC plan, means specified in the plan.

51 Appeals

(1) A … 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—

…

(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 … young person in accordance with an EHC plan;

(c) where an EHC plan is maintained for the … young person—

(i) the … young person's special educational needs as specified in the plan;

(ii) the special educational provision specified in the plan;

(iii) the school or other institution named in the plan, or the type of school or other institution specified in the plan;

(iv) if no school or other institution is named in the plan, that fact; ...

(3) A ... young person may appeal to the First-tier Tribunal under subsection (2)(c)—

(a) when an EHC plan is first finalised for the ... young person, and

(b) following an amendment or replacement of the plan.

(4) Regulations may make provision about appeals to the First-tier Tribunal in respect of EHC needs assessments and EHC plans, in particular about—

(a) other matters relating to EHC plans against which appeals may be brought;

(b) making and determining appeals;

(c) the powers of the First-tier Tribunal on determining an appeal;

(d) unopposed appeals.

(5) Regulations under subsection (4)(c) may include provision conferring power on the First-tier Tribunal, on determining an appeal against a matter, to make recommendations in respect of other matters (including matters against which no appeal may be brought).

(6) A person commits an offence if without reasonable excuse that person fails to comply with any requirement—

(a) in respect of the discovery or inspection of documents, or

(b) to attend to give evidence and produce documents,

where that requirement is imposed by Tribunal Procedure Rules in relation to an appeal under this section or regulations under subsection (4)(a).

(7) A person guilty of an offence under subsection (6) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

61 Special educational provision otherwise than in schools, post-16 institutions etc

(1) A local authority in England may arrange for any special educational provision that it has decided is necessary for a child or young person for whom it is responsible to be made otherwise than in a school or post-16 institution or a place at which relevant early years education is provided.

(2) An authority may do so only if satisfied that it would be inappropriate for the provision to be made in a school or post-16 institution or at such a place.

(3) Before doing so, the authority must consult the child's parent or the young person.

77 Code of practice

(1) The Secretary of State must issue a code of practice giving guidance about the exercise of their functions under this Part to—

(a) local authorities in England; ...

(2) The Secretary of State may revise the code from time to time.

(3) The Secretary of State must publish the current version of the code.

(4) The persons listed in subsection (1) must have regard to the code in exercising their functions under this Part.

(5) Those who exercise functions for the purpose of the exercise by those persons of functions under this Part must also have regard to the code.

(6) The First-tier Tribunal must have regard to any provision of the code that appears to it to be relevant to a question arising on an appeal under this Part.

10. Section 83 is the interpretation section. Section 83(2) provides that *young person* 'means a person over compulsory school age but under 25.' There is no definition of 'education', but section 83(4) provides:

(4) A reference in this Part to '*education*'—

(a) includes a reference to full-time and part-time education, but

(b) does not include a reference to higher education,

and 'educational' and 'educate' (and other related terms) are to be read accordingly.

Section 83(2) adopts the definition of *training* has the same meaning as in section 15ZA of Education Act 1996:

'*training*' includes—

(a) full-time and part-time training;

(b) vocational, social, physical and recreational training;

(c) apprenticeship training.

11. Regulation 12 of the Special Educational Needs and Disability Regulations 2014 (SI No 1530) is made under section 37(4):

12 Form of EHC plan

(1) When preparing an EHC plan a 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 health care 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 health care provision reasonably required by the learning difficulties or disabilities which result in the child or young 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 Persons Act 1970 (section H1);

(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 H2);

(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 a 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) where any special educational provision is to be secured by a direct payment, the special educational needs and outcomes to be met by the direct payment (section J),

and each section must be separately identified.

(2) The health care provision specified in the EHC Plan in accordance with paragraph (1)(g) must be agreed by the responsible commissioning body.

(3) Where the child or young person is in or beyond year 9, the EHC plan must include within the special educational provision, health care provision and social care provision specified, provision to assist the child or young person in preparation for adulthood and independent living.

(4) The advice and information obtained in accordance with regulation 6(1) must be set out in appendices to the EHC plan (section K).

And regulation 43 is made under section 51(4)(c):

43 Powers of the First-tier Tribunal

…

(2) When determining an appeal the powers of the First-tier Tribunal include the power to—

(a) dismiss the appeal;

…

(f) order the local authority to continue to maintain the EHC Plan with amendments where the appeal is made under section 51(2)(c), (e) or (f) so far as that relates to either the assessment of special educational needs or the special educational provision and make any other consequential amendments as the First-tier Tribunal thinks fit;

(g) order the local authority to substitute in the EHC Plan the school or other institution or the type of school or other institution specified in the EHC plan, where the appeal is made under section 51(2)(c)(iii) or (iv),(e) or (f); …

E. The Code of Practice

12. There is a Code of Practice, issued in January 2015 under section 77: *Special educational needs and disability code of practice: 0 to 25 years - Statutory guidance for organisations which work with and support children and young people who have special educational needs or disabilities*. It deals with the operation of section 21(5):

Responsibility for provision

Relevant legislation: Section 21 of the Children and Families Act 2014

9.73 Health or social care provision which educates or trains a child or young person **must** be treated as special educational provision and included in Section F of the EHC plan.

9.74 Decisions about whether health care provision or social care provision should be treated as special educational provision **must** be made on an individual basis. Speech and language therapy and other therapy provision can be regarded as either education or health care provision, or both. It could therefore be included in an EHC plan as either educational or health provision. However, since communication is so fundamental in education, addressing speech and language impairment should normally be recorded as special educational provision unless there are exceptional reasons for not doing so.

9.75 Agreement should be reached between the local authority and health and social care partners about where provision will be specified in an EHC plan.

9.76 In cases where health care provision or social care provision is to be treated as special educational provision, ultimate responsibility for ensuring that the provision is made rests with the local authority (unless the child's parent has made suitable arrangements) and the child's parent or the young person will have the right to appeal to the First-tier Tribunal (SEN and Disability) where they disagree with the provision specified.

13. The reference to speech and language therapy as essentially educational follows the decision of the Court of Appeal in *R v Lancashire County Council ex parte M* [1989] 2 FLR 279.

14. At page 165, the Guidance has this to say about the contents of Section F of a plan:

> Provision **must** be detailed and specific and should normally be quantified, for example, in terms of the type, hours and frequency of support and level of expertise, including where this support is secured through a Personal Budget.

F. Direct and deemed special educational provision

Analysis

15. For convenience only, I use the terms direct and deemed special educational provision. Their choice and use carry no significance in the analysis. They are merely useful labels that provide a shorthand to refer to particular provisions.

16. Section 21(1) and (2) deal with special educational *provision* by defining it as provision that is in addition to or different from that generally made for others of the same age in, for this case, mainstream post-16 institutions. This goes into Section F of the plan: regulation 12(1)(f).

17. Section 20 deals with special educational *needs* by reference to whether the person's learning difficulty or disability calls for special educational provision. These go into Section B of the plan: regulation 12(1)(b).

18. Direct special educational provision is identified under those provisions in the exercise of the local authority's education functions.

19. Section 21(4) deals with social care provision by defining it as provision made by the local authority in the exercise of its social services functions. It goes into Section D of the plan: regulation 12(1)(d).

20. In *London Borough of Bromley v Special Educational Needs Tribunal* [1999] ELR 260 at 295, Sedley LJ noted that educational and non-educational provision were not wholly distinct categories.

21. Section 21(5) recognises this by providing that social care provision is to be treated as special educational provision, and not as social care provision, if it educates or trains a young person. This is what I call deemed special educational provision. Although this subsection reflects what Sedley LJ said, I do not consider it appropriate to interpret it by reference to his remarks. It has to be interpreted in the context of the 2014 Act.

22. Section 21(5) only operates in respect of that part of the person's social care that also educates or trains. It does not apply to all social care, regardless of its effect. Take Theo's back problems. He may need some social care in respect of it, but that does not mean that it becomes special education provision just because

other parts of his social care package educate or train him. That would be an absurd result and contrary to the language and intendment of the provision.

23. The result of section 21(5) is that the social care provision becomes special educational provision. That means:

- it is within section 37(2)(c);
- it properly belongs in Section F of the plan and not in Section D; and
- the local authority must secure the provision under section 42(2).

24. When a case comes before the First-tier Tribunal, the local authority may already have applied section 21(5). If not, the tribunal must apply it and, if necessary, move the relevant provision from Section D to Section F. In order to apply section 21(5), the tribunal must identify the person's social care provision – this should be clear from Section D of the plan – and then identify which parts of social care provision educate or train. Any parts that have that effect must be moved to Section F.

25. The nature of the tribunal's task differs between direct and deemed special educational provision. For direct provision, it may make its own decision on what the person's needs are and what provision is called for in the light of those needs. In doing so, it may add to the provision in the plan, amend it, or remove it. For indirect provision, the task is different. The tribunal's only role is to classify the social care provision to filter out that part of the provision that is properly classified as special educational provision under section 21(5). The tribunal has no jurisdiction over the social care provision as such, because section 51 does not provide for an appeal. The tribunal only has jurisdiction in so far as it is properly classified as special educational provision, at which point it comes within section 51(2)(c). It has no power to change in any way the provision that remains social care provision under section 21(4). Nor has it power to include social care provision in Section F of the plan. All it can do is to include additional direct special educational provision.

26. Mr Friel produced an extract from Parliamentary debates relevant to section 21(5). Mr Lawson argued that it actually supported him. I don't need to resolve that dispute. I have reached my conclusions without reference to the Parliamentary debates. The wording of the section is clear; there is no need or benefit to go beyond the wording.

How the tribunal went wrong in law

27. I accept that the tribunal said it was undertaking the analysis that I have just set out, but its reasons do not support that it did so. One possibility is that the tribunal did not undertake the analysis in sufficient detail, in which case its reasons are inadequate. It is, for example, difficult to understand, at least without more specific findings on the nature of the provision and an accompanying explanation, why helping with anxiety is of itself educational provision. The other possibility is that the tribunal considered that all aspects of Theo's social care educated and trained him, in which case the tribunal failed to

make findings and provide an explanation to show that that was so. Either possibility is an error of law.

G. The waking day curriculum

28. Mr Lawson argued that it was time to retire this expression. I doubt whether even a judge of the Upper Tribunal has the power to achieve that. It is hallowed by usage and, I suppose, does no harm so long as everyone understands what it means. But therein lies the problem: what does it mean? As I understand it, it means only that the person's special educational needs are such that they call for special educational provision to be delivered beyond 'normal hours'. These paragraphs from Upper Tribunal Judge Lane's decision in *London Borough of Hammersmith and Fulham v JH* [2012] UKUT 328 (AAC) give an indication of the kind of circumstances in which this typically arises:

> 18. A waking day curriculum may be called for where a pupil's SEN mean that he is unable to generalise skills from the classroom to other environments, unlike other pupils without SEN. If the pupil needs to have therapies and activities outside of school hours which enable him to develop the skills of daily living (*LB Bromley v SENDIST* [1999] ELR 260 CA) and to 'translate into his home and social and indeed all areas of his life and functioning, the skill which he learns within the school and school room', a waking day curriculum may be justified (*S v Solihull MBC* [2007] EWHC 1139 at [19] and [17]). In this context 'need' is what is reasonably required (*R(A) v Hertfordshire County Council* [2006] EWHC 3428 (Admin), [2007] ELR 95 at [25] *per* His Honour Judge Gilbert QC, sitting as a deputy judge of the High Court).
>
> 19. The Tribunal must, therefore, decide whether it is necessary for child to have an extended extracurricular educational programme continuing after the end of the school day. The fact that the child needs consistency of approach in his dealings with adults outside of school, as well as inside school, does not necessarily mean that this is an educational need which should be met with educational provision beyond the school day in a residential setting (*The Learning Trust v SENDIST and MP* [2007] EWHC 1634 (Admin), [2007] ELR 658; *R (o/a T.S. v Bowen (Chair of SENDIST)* [2009] EWHC 5 (Admin) at [27] [39]).

This may be linked with residential placement, but I accept Mr Friel's argument that that is not necessarily so. Some types of provision, he gave the example of independent living skills, may be best acquired outside a formal educational setting. Where better to learn such skills than when attempting to live independently?

29. The best I can do to meet Mr Lawson's wish is to advise tribunals that their best course, as always, is to avoid reasoning by reference to labels; they should direct themselves, and analyse the issues, in the terms of the legislation.

30. Mr Lawson and Mr Friel were, I think, agreed that a waking day curriculum required educational programmes outside of school hours. I am inclined to accept that in respect of direct special educational provision. I am less sure about deemed special educational provision. It is the nature of the latter that the education or training is, as it were, an incidental aspect of the person's social care. It may be unrealistic to expect that to take the form of a programme. It is, though, not necessary for me to decide this, as the flaw that I have identified in respect of the tribunal's application of section 21(5) inevitably undermines its analysis of this aspect of its decision.

H. Section I

31. The tribunal substituted the following for the type of placement in Section I:

> An independent specialist day college working together with an off college site residential setting.

And it substituted this for the name of the placement:

> A day placement at ... College ..., together with supported living provided by Brighton and Sussex Care Ltd.

How the tribunal went wrong in law

32. There are a number of problems with these entries. The most fundamental is that they do not comply with regulation 12(1)(i). That subparagraph provides that Section I must contain the name or type of institution 'to be attended by' the person. It is not necessary for me to define precisely what types of institution are within that provision. It is sufficient to say three things. First, a tribunal may not add information to Section I in order to avoid the risk of a placement breaking down. That is not permitted under regulation 12(1)(i). Second, there must be something that is 'attended by' the person. The phrase 'supported living provided by Brighton and Sussex Care Ltd' identifies the form of the provision that is to be made for Theo and the body that is to provide it. It does not identify something that Theo can attend. Third, in so far as the tribunal's version envisages that the supported living will be provided in Theo's home, that is not permissible within regulation 12(1)(i). Theo's home is where he lives. It is not a proper use of language to say that his home is somewhere 'to be attended by' him. Nor is it a proper use of the word to describe his home as an institution, whatever the specific meaning of that word.

Section 61

33. The tribunal tried to avoid this by adopting an argument put by Mr Friel. He argued that a local authority may approve home tuition under section 61. That may be so, but it does not follow that the home can properly be entered into Section I. It does not fit into the language used by regulation 12(1)(i), which deals with just the type of school or institution that must be inappropriate in order for section 61 to apply.

34. I am grateful to Judge Melanie Lewis, who gave permission to appeal in the First-tier Tribunal, for drawing to my attention a change in the wording of the legislation. Section 61 re-enacts and extends section 319 of the Education Act 1996. Section 324(2)(c) of that Act required that the statement of special educational needs should:

> specify any provision for the child for which they [the local authority] make arrangements under section 319 and which they considered should be specified in the statement.

And Schedule 2 to the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001 (SI No 3455) required this to go into Part 4 of the Statement. There is, as Judge Lewis pointed out, no equivalent in the 2014 Act. That confirms my analysis.

Accommodation

35. Moreover, it would be surprising if the special educational needs legislation were to impose on a local authority a duty to provide accommodation and fund it. That would overlap with other local authority functions such as those relating to homelessness and housing benefit. Mr Lawson argued that there was a general principle that social care legislation does not create an implied right to housing provision. He is certainly right that the courts have decided that there is no right to housing under section 21(1)(a) of the National Assistance Act 1948 (*R (M) v Slough Borough Council* [2008] 1 WLR 1808 at [33]) or the Mental Capacity Act 2005 (*Doncaster Metropolitan Borough Council v Secretary of State for Health* [2011] EWHC 3652 at [34]-[35]). Rather than accept Mr Lawson's argument, I prefer to say that each piece of legislation has to be interpreted in its own context, with the possibility of impinging on other legislative schemes forming part of that context.

I. Other matters

36. My analysis so far has provided more than sufficient errors to require me to set aside the tribunal's decision. There are, though, other issues on which I need to comment.

Residential care home

37. I can get one small matter out of the way first. The tribunal accepted a change proposed by Mr Friel that referred to a 'residential care home'. Before me, Mr Friel admitted that this was his fault. This should have read 'residential setting', but he forgot to alter it when he made other changes. Mr Friel's admission is very gracious, but it cannot avoid the fact that the tribunal adopted his mistake and thereby made it its own. I accept his argument that this could properly be corrected under the correction power given by rule 44 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699), but the tribunal has not done so. As those Rules apply only to proceedings in the Health, Education and Social Care Chamber (rule

1(2)), I cannot exercise that power. Nor can I use the equivalent power under the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2685). These Rules apply only to proceedings in the Upper Tribunal (rule 1(2)) and the power itself can only be exercised in respect of a decision, direction or any document produced by this tribunal (rule 36). If it is any consolation to Mr Friel, I would not have directed a rehearing if this had been the tribunal's only error, as the Upper Tribunal has power to re-make a decision under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

38. The lesson for tribunals is obvious: do not adopt or accept suggested wording without checking it. I have a degree of sympathy for tribunals that have to use the working documents produced by the parties. They consist of the original plan with additions in bold, italics and underlined, according to which party has proposed the changes and whether they are agreed. In this case, there were further changes in manuscript. I understand why these documents are provided, but I do wonder whether, given the stage that computer technology has reached in the second decade of the third millennium, it may not be possible to provide this information electronically in a more user-friendly format. I leave that thought for the deputy President of the Health, Education and Social Care Chamber to consider.

Specificity

39. Of much greater importance than the stray reference to 'care home' is the degree of specificity necessary in a plan. The position is clear on the caselaw. As Laws J explained in *L v Clarke and Somerset County Council* [1998] ELR 129 at 137:

> The real question ... in relation to any particular statement is whether it is so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case.

The Court of Appeal approved of Laws J's approach in *R (IPSEA) v Secretary of State for Education and Skills* [2003] EWCA Civ 7 at [14] and it is applied by the Upper Tribunal, most recently in *JD v South Tyneside Council* [2016] UKUT 0009 (AAC) at [9]. The passage I have quoted from page 165 of the *Guidance* is to the same effect.

40. Laws J accepted (at 136) that: 'There will be cases where flexibility should be retained.' The Court of Appeal said the same in *E v London Borough of Newham and the Special Educational Needs Tribunal* [2003] ELR 286 at [64]-[65]; the degree of flexibility required would depend on the circumstances of the case. But in *S v City and Council of Swansea and Confrey* [2000] ELR 315, Sullivan J said at 328:

> Whilst there may have been a need for some flexibility, this should not have been used as an excuse for lack of specificity where detail could reasonably have been provided.

41. Mr Friel argued that those cases showed that flexibility was permissible when provision was being made at a special school or college. I am not prepared to lay that down as a general proposition. I do, though, accept that this is a factor to be taken into account that may in an appropriate case permit more flexibility than when a mainstream school is involved.

42. The remarks I have quoted from the authorities were directed to the legal issue of whether the contents of the plan satisfy the minimum legal requirements. That does not mean that a tribunal has to limit itself to that minimum.

43. As there will be a rehearing of this case, there is no profit to be gained from analysing what the tribunal did in the decision I am setting aside. An example may, though, be helpful. The tribunal inserted into Section I a reference to 'supported living'. It had, Mr Lawson told me, no evidence of what that meant in this case. Accordingly, more was required. It would be different if there were an accepted meaning. But there isn't. I was referred to the definition in regulation 5(1) of the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 (SI No 2828), but it only applies for the purposes of those Regulations.

Signed on original
on 25 November 2016

Edward Jacobs
Upper Tribunal Judge