IN THE UPPER TRIBUNAL **Upper Tribunal case No.** HS/2828/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Hearing: 7 March 2016, Field House, Bream's Buildings, London (followed by further written submissions)

Attendances: For the Appellant, Mr T Tabori, of counsel, instructed by the Coram Children's Legal Centre

For the Respondent, Mr Mark Small, solicitor advocate Baker Small Solicitors, instructed by the local authority's legal department

Decision: The decision of the First-tier Tribunal (3 September 2015, file reference *EH 885/15/00001)* involved the making of an error on a 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 First-tier Tribunal for rehearing. 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 young person with whom this appeal is concerned. This order does not apply to (a) any person to whom the young person discloses such a matter (and this includes any permitted onward disclosure or publication), (b) any person exercising statutory (including judicial) functions in relation to the young person. The young person's real name is not used in these reasons.

REASONS FOR DECISION

Introduction

1. This appeal raises a number of questions about the operation of the Education, Health and Care (EHC) plan provisions of the Children & Families Act 2014 (CFA 2014) which may be of wider interest, including:

(a) whether local authorities' participative and enabling obligations under section 19 of the CFA 2014 apply to the First-tier Tribunal when it is hearing an appeal under the CFA 2014;

(b) to what extent does the First-tier Tribunal have jurisdiction in relation to the outcomes that must be specified in an EHC plan;

(c) the operation of the CFA 2014 where an appellant seeks to persuade the First-tier Tribunal to name an independent school in an EHC plan.

2. I must straight away apologise to the parties for the delay in giving this decision. It is partly explained by a post-hearing round of written submissions and the need to clarify the party status of the young person concerned. The decision was further delayed by my absence from work with an illness but nevertheless the parties have had to wait too long and I especially apologise to Robbie for that.

Background

3. This appeal concerns the education of a young person whom I shall refer to as Robbie. He was born in November 1998 and aged 17 when the disputed EHC plan was issued on 11 March 2015 (the plan is at p.8 of the First-tier Tribunal bundle). Since Robbie was over compulsory school age, but under 25, he was a "young person" for the purposes of the CFA 2014 (defined by section 83(2) as "a person over compulsory school age but under 25").

4. Robbie was due to sit his GCSEs three months after the plan was issued and this made his educational future uncertain since his options would be influenced by his results. At the date of the EHC plan, Robbie was attending an independent school. He had previously had a statement of SEN.

5. Robbie's independent school predicted that he would achieve an E grade in GCSE English (p.164 of the bundle). That prediction proved correct.

6. The EHC plan followed the general format required by regulation 12 of the Special Educational Needs and Disability Regulations 2014 (S.I. 2014/1530) ("2014 Regulations").

7. Section B of the EHC plan (identification of special educational needs) recorded:

- a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and that Robbie continued to need "in the moment training";

- "communication skills, behaviour, emotional health and well-being, and self-esteem have improved but still require monitoring";

- cognitive skills "fall within the borderline range";

- perceptual reasoning was relatively weak but verbal reasoning relatively strong;

- time management was a challenge;

- emotional difficulties hindered "ability to participate and access a learning environment and social situations";

- new places and "unstructured times" could cause anxiety;

- Robbie needed explanations of breakdowns in communications with others and to be told why at time he felt upset.

8. Section E of the EHC plan specified outcomes and the special educational provision linked to those outcomes was specified in section F.

9. Outcome E1 was "for [Robbie] to achieve the best in his GCSEs so that he is able to progress onto an appropriate further education course". The Part F special educational provision for this outcome was directed to the independent school Robbie then attended.

10. Outcome E2 was for Robbie to continue to improve social communication skills and understanding of "social uses of language. The timescale was "end of FE [Further Education]" but "over the next twelve months" Robbie should develop social skills to keep him safe in a "range of environments". The Part F educational provision for this outcome was:

- small class sizes;

- a named member of staff to monitor Robbie's interactions with peers during non-lesson times;

- weekly small group sessions devised by a SENCO (Special Educational Needs Co-ordinator) to "support the development of…social skills";

- a communication programme developed collaboratively by a speech and language therapist and teaching staff, to be delivered by teaching and support staff and monitored by teaching staff and the therapist;

- being taught rules for games, collaborative work and behaviour.

11. Outcome E3 was for Robbie to be able to "independently organise his daily tasks" with a timescale of "end of FE" but, over the next 12 months, "he will have discovered a way to

organise his work and daily tasks". The specified special educational provision in relation to this outcome included:

- monitoring and advice from council support services, to include educational psychology input and specialist teaching advice "as requested by the school";

- setting explicit rules and expectations "in different situations";

- "support" in curricular areas that called for Robbie to draw inferences and make predictions;

- to spend time discussing "why we do this and not that".

12. Outcome E4 was "for [Robbie] to be able to identify accessible education course post [secondary school], apply for a course of his choosing and have a successful transition onto an appropriate course". The specified timescale was the end of 2015 although "over the next 12 months" he should select his desired vocation, identify, apply for and enrol on related courses and "have a successful transition into college". The associated Part F special educational provision was support from Robbie's then school, preparation of a transition plan and a mentor to support Robbie in his transition.

13. The plan stated that all the specified special educational provision was to be funded from the education provider's ordinarily available resources and local authority top-up funding.

14. Section I of the plan specified Robbie's independent school as his educational placement but did not name a school or institution for the next academic year.

What happened after the EHC plan was issued

15. As already noted, Robbie's educational future was uncertain while he waited for his GCSE results although some steps were taken to identify what education might be available to him. In June 2015 Robbie visited B School, another independent school, following which the school's headteacher wrote to his parents on 19 June 2015 offering Robbie a place for the coming academic year. However, the school did not think Robbie would be able to cope with a Level 3 Business Studies course and he was not offered a place to pursue that course. The school normally required at least a C Grade in GCSE English for admission to its Level 3 Sports course but, in Robbie's case, was willing to waive that requirement. This was because its sports teacher was of the view that his written work was of a sufficient standard and displayed greater ability than was suggested by his predicted GCSE grade.

16. The local authority supplied written evidence from their Special Educational Needs and Disability Manager which set out Robbie's "post-16 options" (p. 322 of the First-tier Tribunal papers). The Manager's view was that both W College and H College (described by the parties as mainstream further education institutions) were appropriate placements that could deliver suitable courses of study no matter how Robbie did in his GCSEs.

Why Robbie appealed to the First-tier Tribunal

17. Robbie's notice of appeal to the First-tier Tribunal (p.1 of the bundle) complained that his EHC plan did not identify a post-16 educational placement. He wrote that he wished to attend B school. While he did not tick the box for disputing the educational provision specified in section F of the EHC plan, he did write that he wanted to go to B school because it offered small class sizes and "specialist support".

18. The local authority resisted the appeal. Its response of 22nd May 2015 (p.58 of the bundle) argued:

(a) Robbie's special educational needs could be properly met at H College which could offer him a range of courses even if he failed to obtain at least C grades in GCSE Maths and English;

(b) Robbie had not identified which of his required provision could not be provided at H college from within the resources normally available to it;

(c) in response to Robbie's point that B School had the small classes and specialist support that would enable him to pursue a level 3 course even if he did not attains C grades in GCSE Maths and English, the authority argued this assertion was unsupported by evidence;

(d) for a range of reasons, B School was not a suitable placement;

(e) the authority reserved its position as to whether a placement at B School would constitute unreasonable public expenditure. It said it had not received information about the costs of B School.

Proceedings before the First-tier Tribunal

19. The Tribunal recorded that Robbie's aim was to attend the independent B school to pursue a Level 3 Sports course and re-take English and Business Studies GCSEs (and possibly Science as well). The authority's position was that Robbie ought to attend a state-funded institution (W college rather than the institution previously put forward as their preferred placement) in order to pursue a BTEC Level 2 Sports course.

20. According to the Tribunal, the "key issue…was to determine the appropriate setting for [Robbie's] further education". That involved the Tribunal having to resolve what was in its view an inconsistency between Robbie's wishes "and the provision considered by the LA to be suitable for him in the light of his academic attainment to date". In determining the appropriate setting, the Tribunal said it needed to address: (a) the suitability of the proposed academic provision at the rival placements; (b) the suitability of the provision proposed by the parties for meeting Robbie's SEN; and (c) the respective costs of the rival placements.

21. The Tribunal directed itself that, in determining an educational "setting" it was required:

(a) to apply section 9 of the Education Act 1996 (EA 1996) (the parental preference principle: see below); and

(b) to apply sections 39(3) & (4) of the CFA 2014 (which confers a qualified right on a young person to attend the school or other institution of his choice).

22. The Tribunal made the following findings of fact:

(a) Robbie wanted to study sports, preferably the Sport Level 3 course offered by B College. He also wanted to improve one or more of his GCSE grades (the Tribunal panel spoke to Robbie at the start of the hearing in order to obtain his views);

(b) W College would be able to make provision to meet Robbie's SEN. It could also make arrangements for Robbie to re-sit GCSEs. Course options at the college were "very flexible". The Tribunal also noted the college principal's evidence that Robbie would be best suited to a Level 2 Sports course;

(c) B school decided a Level 3 Business Studies course would not be suitable for Robbie but, following assessment, offered him a place to study a Level 3 Sports course. He could also re-sit English GCSE and study Business Studies and Science Level 2 courses;

(d) Robbie's result in his GCSE English examination was below the standard normally required by B school (at least grade C in GCSE English) for admission to its Level 3 Sports Course but, having been informed by the sports teacher that his written work was of a higher standard than expected, offered him a place to study Level 3 Sports. The sports teacher was satisfied Robbie could cope with the demands of the course;

(e) B school would be able to make provision to meet Robbie's SEN.

23. The Tribunal also found:

(a) there was nothing in Robbie's academic history to suggest he would achieve a C grade in GCSE English, which was normally required by B school for admission to its Level 3 Sports course;

(b) the only "foundation for optimism" that Robbie would cope with the demands of a Level 3 Sports course was the report of the sports teacher (which was not provided to the Tribunal). The B school witness who gave evidence at the hearing had not been involved in Robbie's assessment;

(c) B school's assessment of Robbie's chances of coping with a Level 3 Sports course was flawed because "there should have been much greater account taken of [Robbie's] longitudinal performance outcomes". Had that been done, the likelihood of finding he could cope would have been lower and "disproportionate weight had been attached to the positive finding of a single assessor made in the course of a relatively brief encounter with [Robbie]";

(d) B school's plan for Robbie to study two additional courses (Level 2 business studies and science), as well as re-sit his GCSE English examination, was over ambitious. This would increase the pressure on Robbie to produce high standard written work. There had been a "mis-assessment" which should have been reviewed once Robbie's GCSE results were known;

(e) overall, the educational programme proposed by B school carried a significantly higher risk of failure than that proposed by W College;

(f) the proposed placement at B school was not suited to Robbie's current attainment levels;

(g) the only appropriate placement was at W College. Accordingly, there was no need for the Tribunal to examine the respective costs of the rival placements.

24. The Tribunal ordered that the appeal be dismissed. Despite finding that Robbie should attend a different educational institution to that specified in the local authority's EHC plan, the Tribunal does not appear to have ordered any amendment to the plan.

Legal Framework

Relevant education legislation

25. Section 19 CFA 2014 frames the exercise of all local authority functions under Part 3. It reads as follows:

"Section 19 - Local authority functions: supporting and involving children and young people

In exercising a function under this Part in the case of a child or young person, a local authority in England must have regard to the following matters in particular-

(a) the views, wishes and feelings of the child and his or her parent, or the young person;

(b) the importance of the child and his or her parent, or the young person, participating as fully as possible in decisions relating to the exercise of the function concerned;

(c) the importance of the child and his or her parent, or the young person, being provided with the information and support necessary to enable participation in those decisions;

(d) the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes."

26. Section 20 CFA 2014 defines "special educational needs". By subsection (1), a child or 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". Subsection (2) identifies when a school-age child, or a young person, has a learning difficulty or disability:

"(2) A child of compulsory school age or 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."

27. It is not disputed that Robbie has special educational needs.

28. "Special educational provision" is defined, by section 21(1) CFA 2014, in relation to a child aged two or more or a young person, as "educational or training provision that is additional to, or different from, that made generally for others of the same age in (a) mainstream schools in England [or] (c) mainstream post-16 institutions in England".

29. Section 33 CFA 2014 is the first of a number of provisions about the preparation and content of EHC plans. It applies where a local authority "is securing the preparation of an EHC plan for a child or young person who is to be educated in a school or post-16 institution" (section 33(1)). In the case of a young person, a local authority is under a qualified duty to

secure that the EHC plan provides for the young person to be educated in a mainstream school or mainstream post-16 institution. I describe the duty as qualified because section 33(2) provides that the duty does not apply where mainstream education is incompatible with:

> "(a) the wishes of the child's parent or the young person, or
>
> (b) the provision of efficient education for others."

30. The statutory sequence of events means that, before there can be an EHC plan, there must be a statutory assessment. Section 36(2) CFA 2014 defines an "EHC needs assessment" as "an assessment of the educational, health care and social care needs of a child or young person".

31. In carrying out an assessment, regulation 6 of the 2014 Regulations requires the local authority to seek a range of specified advice and information about:

(a) the young person's needs;

(b) the provision that may be required to meet such needs; and

(c) "the outcomes that are intended to be achieved by the…young person receiving that provision".

32. The specified advice and information includes "where the…young person is in or beyond year 9, advice and information in relation to provision to assist the…young person in preparation for adulthood and independent living". Regulation 2(2) provides that "preparation for adulthood and independent living" includes "preparation relating to (a) finding employment; (b) obtaining accommodation; (c) participation in society".

33. Section 37(1) CFA 2014 requires a local authority to secure the preparation of an EHC plan if, in the light of the assessment, it is "necessary for special educational provision to be made for a…young person in accordance with a plan". Section 37(2) explains what an EHC plan is:

> "(2) For the purposes of this Part, an EHC plan is a plan specifying--
>
> (a) the child's or young person's special educational needs;
>
> (b) the outcomes sought for him or her;
>
> (c) the special educational provision 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) [*this concerns children and young persons aged under 18*]

(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…".

34. EHC plans must be drawn up collaboratively in that:

(a) a draft plan must be prepared first (section 38(1) CFA 2014);

(b) in preparing the draft, the local authority must consult the young person about the content of the plan (section 38(2));

(c) the draft must be sent to the young person (section 38(2));

(d) the young person has the right (within a timescale specified by the authority) to make representations about the content of the draft, and request that a particular maintained school, Academy, institution within the English Further Education sector or institution approved under section 41 CFA 2014 is named in the plan (section 38(4)). The draft plan must name a school or other institution nor a type of school or other institution (subsection (5)). In other words, the CFA 2014 hands the initiative to the young person when it comes to suggesting a school or other institution to be named in the plan.

35. If the young person duly requests a section 38(2) school, Academy or institution, the EHC plan must name the requested establishment unless one of the exceptions in section 38(4) applies, that is where:

> "(a) the school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned, or
>
> (b) the attendance of the child or young person at the requested school or other institution would be incompatible with—
>
> (i) the provision of efficient education for others, or
>
> (ii) the efficient use of resources."

36. If section 38(4) CFA 2014 applies – i.e. where the duty to name the requested establishment is excluded – section 38(5) requires the authority either to name the school or other institution which it thinks would be appropriate for the young person or instead specify the type of school or other institution which the authority thinks would be appropriate.

37. Where no request for a particular establishment is made under section 38(4) CFA 2014, section 40(2) places the local authority – or Tribunal on appeal – under the same duty as provided for by section 38(5) (i.e. to name the school or other institution or type of school or other institution, as considered "appropriate").

38. Regulation 11 of the 2014 Regulations ("Preparation of EHC plans") provides:

> "When preparing a child or young person's EHC Plan a local authority must—
>
> (a) take into account the evidence received when securing the EHC needs assessment; and
> (b) consider how best to achieve the outcomes to be sought for the child or young person".

39. The form of an EHC plan is governed by regulation 12. Leaving out social care and health care provision, regulation 12(1) reads:

> "(1) When preparing an EHC plan a local authority must set out—
>
> (a) the views, interests and aspirations of the…young person (section A);
>
> (b) the…young person's special educational needs (section B);
>
> …(e) the outcomes sought for him or her (section E);
>
> (f) the special educational provision required by the…young person (section F);
>
> …(i) the name of the school…post-16 institution or other institution to be attended by the…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…young person (section I)…
>
> and each section must be separately identified".

40. Regulation 12(3) also provides that "where the…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…young person in preparation for adulthood and independent living".

41. Section 83(7) of the CFA 2014 provides that the EA 1996 and the provisions of Part 3 of the CFA 2014 "are to be read as if those provisions were contained in EA 1996". Since the Acts are to be construed as one, "we must construe every part of each of them as if it had been contained in one Act" (*Canada Southern Railway Co. v International Bridge Co.* (1883) 8

App Cas 723 at 727: Lord Selborne LC). Absent a contrary intention, a term used in the CFA 2014 that is a defined term under the EA 1996 has that defined meaning for the purposes of the CFA 2014. The CFA 2014 also amended section 578 EA 1996 (definition of "the Education Acts") so that a reference in EA 1996 to "the Education Acts" includes Part 3 of the CFA 2014.

42. Section 9 of EA 1996 ("Pupils to be educated in accordance with parents' wishes") provides:

> "In exercising or performing all their respective powers and duties under the Education Acts…local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure."

43. "Pupil" is defined by section 3(1) EA 1996 as follows:

> "In this Act "pupil" means a person for whom education is being provided at a school, other than—
>
> (a) a person who has attained the age of 19 for whom further education is being provided, or
>
> (b) a person for whom part-time education suitable to the requirements of persons of any age over compulsory school age is being provided."

Rights of appeal and powers of the First-tier Tribunal

44. Section 51 CFA 2014 contains rights of appeal. So far as relevant in this case, it provides:

> "(1) A child's parent or a young person may appeal to the First-tier Tribunal against the matters set out in subsection (2)…
>
> (2) The matters are—
>
> …(c) where an EHC plan is maintained for the child or young person—
>
> (i) the child's or 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…"

45. Regulation 43 of the 2014 Regulations is entitled "Powers of the First-tier Tribunal". So far as relevant in this case, regulation 43(2) provides:

> "(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);
>
> (h) where appropriate, when making an order in accordance with paragraph (g) this may include naming—
>
> (i) a special school or institution approved under section 41 where a mainstream school or mainstream post-16 institution is specified in the EHC Plan; or
>
> (ii) a mainstream school or mainstream post-16 institution where a special school or institution approved under section 41 is specified in the EHC Plan".

46. Tribunal procedure is governed by the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008. Rule 2(1) provides that "the overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly". Rule 2(2) provides that this includes "(b) avoiding unnecessary formality and seeking flexibility in the proceedings" and "(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings". The Tribunal is required to 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 (rule 2(4)).

Proceedings before the Upper Tribunal

The grounds of appeal

47. I granted Robbie permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision on the following grounds:

Ground (1) – having regard to [child]'s views, wishes and feeling

48. While the Tribunal recorded Robbie's views, it may have erred in law by failing to explain what it made of them. If the Tribunal was required to have regard to Robbie's views, did this call for it to do more than simply record them. Permission to appeal was also granted on this ground so that the Upper Tribunal could address whether the obligations under section 19 CFA 2014 also applied on an appeal to the First-tier Tribunal.

Ground (2) – whether the Tribunal erred in law in finding that B school was not appropriate

49. Permission to appeal was granted on the grounds advanced by Robbie's representative. Arguably the Tribunal: failed to take into account evidence given at the hearing that B school could offer Robbie Level 2 courses; alternatively the Tribunal failed to make sufficient inquiries into this possibility; and the Tribunal failed adequately to explain why a Level 2 course at W college would be suitable.

50. In granting permission, I requested that submissions address the questions whether (a) the Tribunal may have erred in law by failing to name B school despite its finding that it could meet Robbie's special educational needs; (b) the Tribunal, in its desire to fix Robbie's educational arrangements before the start of the new academic year, may not have discharged its inquisitorial obligation.

Ground 3 – "outcomes"

51. Permission was granted on the ground that the Tribunal may have erred in law by failing to analyse the rival placement by reference to the outcomes specified in Robbie's EHC plan. I also raised the question whether the Tribunal had power to alter the outcomes in the light of its decision on the appeal.

Ground 4 – failure to amend the plan

52. Permission was granted on the ground that the First-tier Tribunal may have erred in law by simply dismissing the appeal without ordering any amendments to an EHC plan that was out-of-date by the time of the hearing.

Ground 5 – how the CFA 2014 operates where a parent / young person seeks an independent school placement

53. Permission was granted on the ground that the Tribunal may have erred in law by directing itself to regard to sections 39(3) & (4) CFA 2014. Those provisions contain a local authority's qualified duty to name a school or other institution put forward under section 38 by a parent or young person. Arguably section 39 did not apply because B school was not a section 41 approved school.

The funding ground of appeal

54. I did not grant permission to appeal on grounds which challenged the Tribunal's decision not to consider the respective costs of the rival placements. The Tribunal did not provide a reasoned analysis of the costs of the rival placements because it decided that only one was suitable. I could not assess the adequacy of the Tribunal's analysis of a topic that it did not address.

The arguments

Ground 1 – having regard to Robbie's wishes and feelings

55. The local authority argue the obligations under section 19 CFA 2014 are conferred on local authorities, not the First-tier Tribunal. While the authority accepted the First-tier Tribunal on appeal 'stands in the shoes' of the local authority,that cannot extend to the adoption of the "strategic duties" set out in section 19. In any event, the Tribunal's processes, as governed by its procedural rules and practice directions, are designed to capture the views of a young person. The authority further argue the Tribunal did in fact obtain and take into account Robbie's wishes. They spoke to him at the start of the hearing after which he left having confirmed he did not wish to be present for the rest of the hearing.

56. On Robbie's behalf, it is argued that the First-tier Tribunal did not take into account his wishes or, alternatively, failed to give reasons for rejecting his wishes. The argument that the section 19 obligations could not apply to the First-tier Tribunal on the basis that they were high-level strategic functions overlooked the child/young person focus of the provisions. At the hearing, Mr Tabori drew my attention to long standing authority that section 9 of the Education Act 1996 has been held to apply to tribunals despite in terms only conferring an obligation on local authorities and the Secretary of State.

Ground 2 – whether the Tribunal erred in law in finding that B school was not appropriate

57. The parties agreed that B school was not an approved school under section 41 of the CFA 2014. The local authority conceded that the First-tier Tribunal wrongly directed itself to section 39 of the CFA 2014 (since section 39 only applies to independent schools that are approved under section 41). However, this was in fact an error in Robbie's favour.

58. The local authority concede there was nothing "intrinsically unsuitable" about B School but the key question was whether "the course it was offering was suitable for him". The course itself was not a form of special educational provision but its suitability was a relevant factor. The Tribunal gave clear reasons for its conclusion that the proposed B School course, and hence the proposed placement itself, was unsuitable.

59. On Robbie's behalf, it is argued the Tribunal's decision drew an unjustified distinction between a child's special educational needs and a child's educational needs. It is also argued

that the Tribunal erred in law by failing to consider, once it had decided Robbie would not cope with a Level 3 course, whether B School could offer him a Level 2 course. At the hearing, Mr Tabori argued the Tribunal had failed properly to consider whether W college could deliver the special educational provision specified in Robbie's EHC plan.

Ground 3 – EHC plan outcomes

60. The local authority accept that, under the CFA 2014, the special educational provision specified in an EHC plan must be sensibly linked to the outcomes specified in the plan. However, the outcomes are not amenable to appeal and the First-tier Tribunal has no jurisdiction in relation to the outcomes specified in a plan. Parliament clearly decided to exclude 'outcomes' from the Tribunal's jurisdiction by omitting them from the list of appealable matters. While this is "perhaps unhelpful" it was clearly Parliament's intention.

61. The local authority also argue that, while the Tribunal did not refer to the outcomes in Robbie's EHC plan, it did consider them. This is shown by the consideration it gave to the appropriateness of the post-16 courses proposed for Robbie and the capacity of the rival placements to deliver the provision specified in the plan. Further B School could not satisfy the outcomes in Robbie's plan because it could not provide an appropriate course of study.

62. On Robbie's behalf, it is argued that, as a result of the First-tier Tribunal's decision, he was left with an EHC plan of little practical benefit. To a significant extent, the plan's focus was on his transition to post-16 education but, by the time the Tribunal gave its decision, his period for transitioning was over. He needed a plan that governed his post-16 education. It is also argued that the Tribunal erred by failing to address whether the W college placement would meet the outcomes specified in Robbie's EHC plan. If the outcomes needed to be re-drawn in the light of a Tribunal's decision on appeal, it must surely be the case that a Tribunal has the power to do so if that is necessary to render its decision workable.

Ground 4 – failure to amend the plan

63. The local authority argue that, since Robbie's appeal only challenged the local authority's naming of a school or other institution, the Tribunal could only amend section I of his EHC plan (placement). The authority accepted that some of the plan was redundant by the time the appeal came before the Tribunal but this could be remedied at the next statutory annual review.

64. On Robbie's behalf, it was pointed out that the Tribunal did not even order an amendment to the plan to reflect is placement decision. He also relied on those of his ground 3 arguments which concerned the Tribunal's powers to amend the contents of a plan on an appeal.

Ground 5 - how the 2014 Act operates in cases where a parent / young person prefers an independent school

65. The local authority concede the First-tier Tribunal fell into error by assuming section 39 applied in this case. It did not because Robbie's preference was for an independent school that was not approved under section 41 CFA 2014. However, this was not a material error since it granted Robbie the benefit of the CFA 2014's presumption in favour of a young person's preferred placement.

66. Robbie's counsel conceded at the hearing that the Tribunal's mistaken self-direction regarding section 39 did not work against his interests. He also submitted that the First-tier Tribunal would be assisted by any guidance the Upper Tribunal could give on the application of the CFA 2014 preference provisions where a young person seeks a placement at an independent school.

Post-hearing submissions

67. At the hearing of the appeal, Robbie's counsel requested permission to file further submissions about the respective costs of the rival placements to be taken into account by the Upper Tribunal in deciding how to dispose of the appeal in the event that it was successful. I allowed this. The submissions were supplied to the local authority who supplied a detailed reply refuting the accuracy of Robbie's submission.

68. Next Robbie made a submission on his own behalf requesting that the Upper Tribunal, in the event that it allowed the appeal, re-makes the First-tier Tribunal's decision rather than remits to the First-tier Tribunal for reconsideration.

69. A further complication concerned Robbie's party status. His application to the Upper Tribunal was incorrectly registered in his parents' name. And his representative supplied a written submission that he did not wish to be made a party to the appeal. After the hearing, I arranged for Upper Tribunal staff to inform Robbie that, under the CFA 2014, he was the Appellant and hence had to be a party to the proceedings. Robbie has not objected to that nor has he applied to withdraw his appeal.

Conclusions

Ground 1 – having regard to [child]'s views, wishes and feelings (section 19 of CFA 2014)

70. I am not persuaded by the local authority's argument that the section 19 obligations cannot apply to the First-tier Tribunal because they are high-level strategic functions that could not have been intended to apply to the Tribunal. They are not strategic functions. They

are obligations which apply to and are designed for the benefit of specific children and young persons.

71. Nevertheless, this was an appeal brought by a young person. It was Robbie's appeal. Dealing with his case inevitably involved the Tribunal having regard to his views, wishes and feelings. I do not accept that the Tribunal failed to give adequate reasons for not following his wishes. While the Tribunal did not in terms explain why it would not implement his wishes, it explained why it rejected his case which amounts to the same thing. This ground does not succeed.

72. The participation and enabling aspects of section 19 did not feature prominently in argument. However, if the First-tier Tribunal discharges its obligations under its procedural rules, including the overriding objective, it will be doing as much as would be required if it were subject to the section 19 obligations.

73. For the above reasons, by way of general guidance to the First-tier Tribunal I do not see any need for it to complicate its business by expressly seeking to act in accordance with section 19 of the CFA 2014. It should simply act in accordance with the overriding objective and, if it does, will be acting in the spirit of section 19.

Ground 2 – whether the Tribunal erred in law in finding that B school was not appropriate

74. Section 36(2) CFA 2014 requires an EHC assessment to assess a young person's educational needs (not simply the young person's special educational needs). However, the EHC plan itself is only required to specify the special educational provision required by the young person.

75. Since this was not a case in which the section 39 CFA 2014 presumption in favour of a young person's preferred placement applied, section 40(2) CFA 2014 required the Tribunal to specify the institution (or type of institution) it considered appropriate. The general educational provision (i.e. non-special educational provision) offered by an institution is clearly a legitimate factor to take into account in deciding which of two rival institutions would be appropriate to specify. The fact that B School could meet Robbie's special educational needs did not mean it had to be specified. The Tribunal rightly took into account its finding that the educational provision offered by B School was not suitable for Robbie being, in its opinion, too demanding. It did not err in law in this respect.

76. On Robbie's behalf, it is also argued the Tribunal erred by failing to consider, once it had decided Robbie would not cope with a Level 3 course, whether B School could offer him a Level 2 course and it is argued that the B School witness gave evidence that they offered Level 2 courses in Sports and Engineering. Since I have set aside the Tribunal's decision on other grounds, I make no finding as to whether this argument is made out. I simply observe

that the impending start of a new academic year is, in principle, a legitimate factor for a Tribunal to take into account in deciding how to case manage an appeal but it will always need to be weighed in the balance along with other relevant considerations.

Grounds 3 & 4 – the role of 'outcomes' and the Tribunal's failure to amend the plan

77. I take these grounds together because, in my view, they are linked.

78. I agree with the parties that the special educational provision specified in an EHC plan must be sensibly linked to the outcomes specified in the plan. Otherwise, what is the point in specifying outcomes? The provision and outcomes need to work together.

79. I do not accept the local authority's argument that the First-tier Tribunal could not, in this naming appeal, trespass in any way on the special educational provision and outcomes specified in Robbie's EHC plan.

80. It is true that only certain aspects of an EHC plan can be appealed to the First-tier Tribunal. However, the First-tier Tribunal is not placed in the jurisdictional strait-jacket envisaged by the local authority's submissions.

81. Regulation 43(2)(f) of the 2014 Regulations provides:

> "When determining an appeal the powers of the First-tier Tribunal include the power to…
>
> (f) order the local authority to continue to maintain the EHC Plan with amendments where the appeal is made under section 51(2)(c)…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".

82. Section 51(2)(c) deals with rights of appeal where an EHC plan is being maintained. Four matters may be the subject of an appeal; the special educational needs specified in the plan (section 51(2)(c)(i)); the specified special educational provision (section 51(2)(c)(ii)); the named school or other institution, or type of school or other institution (section 51(2)(c)(iii)); a decision not to name a school or other institution (section 51(2)(c)(iv)).

83. The Tribunal's principal power to amend under regulation 43(2)(f) (the first power to amend conferred by the regulation) is indeed limited. It extends only to the special educational needs or special educational provision specified in the EHC plan. But there is nothing in regulation 43(2) that restricts the power to amend by reference to the type of section 51(2)(c) appeal under consideration. On a naming appeal, amendments may be made to the specified educational provision. This is exactly what one would expect. For example, the Tribunal's analysis of the suitability of a proposed placement may well be far more

rigorous than that undertaken by the local authority and that process may highlight a need to alter the special educational provision specified in the plan.

84. What, then, of the specified outcomes? It is true there is no right of appeal against the specified outcomes. But there is a right of appeal against the specified special educational provision and the school or institution (or type) named in an EHC plan. The outcomes are a function of the special educational provision. They describe what the provision is designed to achieve. It is also conceivable that a child's placement might have an influence on which outcomes should be specified or how they should be described. In any event, it is obvious that a child or young person's special educational needs will influence the desired outcomes of his or her special educational provision.

85. It would be absurd if a Tribunal, having allowed an appeal and re-cast the specified special educational provision in an EHC plan, or the specified special educational needs, was unable to alter outcomes that no longer related to the provision or needs determined by the Tribunal. That is surely why regulation 43(2)(f) confers power on the Tribunal to make "any other consequential amendments" to the EHC plan as it thinks fit. This power allows the Tribunal to modify the outcomes section of an EHC plan to fit with any amendments it has ordered to an EHC plan. The EHC plan should not be left with outcomes that are pointless and confusing artefacts.

86. Turning to Robbie's case, the Tribunal's decision left him with an EHC plan which was in certain respects past history. It is true that the Tribunal found that W College could make provision that 'corresponded' to that specified in Robbie's EHC plan (para. 24) but, in that case, why did the Tribunal not amend the plan to reflect that and give Robbie certainty as to the provision he would receive? For example, the EHC Plan refers to weekly small group sessions devised by a SENCO (Special Educational Needs Co-Ordinator) but it is not clear from the evidence whether W college has a SENCO (I have not heard argument on the point but it may not be statutorily required to have a SENCO). It is also not clear to me on what basis the Tribunal concluded that all the provision specified in the plan (and which remained relevant) would be delivered by W college. For example, the EHC plan specified "small class sizes" but the Tribunal found that at W college Robbie's class sizes could not be precisely predicted but "typically would be expected to be in the mid-teens". This seems to me to represent a de facto watering down of the provision required by his EHC plan.

87. I decide that the First-tier Tribunal erred in law by failing to consider whether its decision called for it to order amendments to Robbie's EHC plan to make it workable and up-to-date. For that reason, its decision is set aside.

Ground 5 - how the CFA 2014 Act operates in cases where a parent / young person prefers an independent school

88. I have largely dealt with this point above. The section 39 presumption in favour of a young person's preferred placement does not apply where he seeks an independent school that is not approved under section 41 CFA 2014. The test to be applied under the CFA 2014 is one of appropriateness – which school or other institution, or type of school or other institution, is it considered appropriate to specify. Where the terms of section 9 of the Education Act 1996 apply, the First-tier Tribunal must also act in accordance with the requirements of that section (see the summary of the law in *Hammersmith & Fulham LBC v L* [2015] UKUT 0523 (AAC)).

Disposal

89. I am afraid I cannot accede to Robbie's request to re-make the First-tier Tribunal's decision. As I hope the above reasons make clear, the final resolution of his appeal against the local authority's EHC plan needs to be informed by specialist educational expertise which I do not have but the First-tier Tribunal does. His case is remitted to the First-tier Tribunal for re-hearing and that Tribunal must decide all the issues arising on his appeal afresh.

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
23 February 2017