IN THE UPPER TRIBUNAL **Upper Tribunal case No.** HS/1050/2016
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E. Mitchell, Judge of the Upper Tribunal.

Hearing: 31 January 2017, Field House, Bream's Buildings, Central London.

Attendances:

For the Appellant: Mr Jonathan Auburn, of counsel, instructed by 'Tri-Borough Legal Services' (one of those boroughs being the Royal Borough of Kensington & Chelsea).

For the Respondent: Ms Deborah Hays, of counsel, instructed by Langley Wellington Solicitors

Decision:

The decision of the First-tier Tribunal (5 February 2016, First-tier Tribunal file reference *EH/207/15/00003*) involved the making of an error on a point of law. The Upper Tribunal sets the decision aside under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

Under section 12(2)(b) of the 2007 Act, the Upper Tribunal re-makes the decision of the First-tier Tribunal as follows:

1. Mr G's appeal against the local authority's decision to refuse, under section 36(3) of the Children and Families Act 2014 to carry out an assessment of his education, health and care needs is allowed.
2. In exercise of the power in regulation 43(2)(b) of the Special Educational Needs and Disability Regulations 2014, the Upper Tribunal orders the local authority to arrange an assessment of Mr G's needs under section 36 of the 2014 Act.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 it is ordered that no person may disclose or publish any matter likely to lead to a member of the public identifying Mr G. This order does not apply to (a) any person to whom Mr G discloses such a matter or who learns of it through publication by Mr G (and this includes any onward disclosure or publication), (b) any person exercising statutory (including judicial) functions in relation to Mr G where knowledge of a matter is reasonably necessary for the proper exercise of the functions.

REASONS FOR DECISION

Introduction and summary

1. The enactment of Part 3 of the Children and Families Act 2014 was an important legislative development for young persons in England with special educational needs. Unlike Statements of Special Educational Needs under the predecessor legislation – Part 4 of the Education Act 1996 – Education, Health and Care Plans under the 2014 Act are available to young people. Under the 2014 Act, a young person is a person aged under 25.

2. Extending statutory special educational entitlements to young people required the 2014 Act to bring within its entitlement scheme further education and "post-16 institutions". However, the Act also excluded higher education from that scheme. This appeal raises issues about the nature of that exclusion and the Act's application to education provided by or under arrangement with institutions within the higher education sector.

3. The appeal arose from a local authority's refusal to make arrangements to secure a statutory assessment of a young person's needs under section 36 of the 2014 Act. The young person was pursuing various Open University 'modules' albeit delivered by an independent institution. The local authority decided that, since the Open University is an institution within the higher education sector, the young person fell outside the system of educational entitlements provided for by the 2014 Act. The First-tier Tribunal allowed the young person's appeal and ordered the authority to secure an assessment.

4. By the time of the Upper Tribunal hearing, both parties agreed that the First-tier Tribunal's decision had to be set aside due to errors of law in its management of the proceedings. The Upper Tribunal was also invited, and agreed, to give guidance about the application of the 2014 Act to higher education and institutions with the higher education sector. I was informed that local authorities have found it difficult to work out how the 2014 Act is intended to apply to young persons.

5. In summary, that guidance is as follows:

> (a) The purpose of the definition of special educational provision in section 21 of the 2014 Act is to identify those young persons for whom standard educational provision will not suffice. It does this by calling for a comparison to be made between the type of educational provision suitable for a young person with that made generally for young people of the same age by English mainstream post-16 institutions and other mainstream educational institutions. Section 21, properly construed, does not have the principal function of operating as a gateway provision;
>
> (b) "special educational provision" is a young person-specific concept. It only has meaning in relation to a particular young person;

(c) the comparative reference point for section 21 purposes is the provision made generally by mainstream post-16 institutions in *England*. This does not mean each and every mainstream post-16 institution in England must be investigated in order to identify the provision made generally in England. Rather, the definition calls for an exercise of professional educational judgement by local authorities, or the First-tier Tribunal, in order to fix the typical nature of provision made in England for a particular age group;

(d) once that typical provision has been fixed, the decision-maker can then answer the question posed by section 21 which is whether the educational provision appropriate for a specific young person is additional to or different from that made generally in England. If so, it is special educational provision;

(e) section 21's definition of special educational provision is capable of being satisfied even if a young person is formally enrolled on a course of higher education or is considering pursuing such education. While, in many cases, this will inevitably lead a local authority to refuse to carry out an assessment under section 36 of the CFA 2014, there may be cases when it will not. For example, a student formally enrolled on a course of higher education may experience some adverse health event or for some other reason be unable to cope with the demands of such education so that, in the near future, he or she wishes to pursue a less demanding course of further education instead;

(f) section 21's role is to identify children and young persons for whom standard state educational provision (other than higher education) will not suffice. It does not do this for its own sake. Rather, once it is integrated with the various provisions of Part 3 of the CFA 2014 that operate by reference to "special educational provision", it serves to define the scope of the powers, duties and rights within those provisions;

(g) the provision of higher education is not a concern of Part 3 of CFA 2014. Functions under Part 3 CFA 2014 cannot be exercised to support a young person through higher education. That follows from section 83(4)'s exclusion of references to higher education from the definition of "education" as it applies for the purposes of CFA 2014;

(h) an institution within the higher education sector, or other institution which provides only higher education, may not be named in section I of an EHC plan;

(i) the test for deciding whether to carry out an EHC assessment, in section 36(3) of the 2014 Act, is whether "it may be necessary for special educational provision to be made for the… young person in accordance with an EHC plan". If the young person simply seeks higher education, the answer to the section 36(3) question must be no.

An assessment would be pointless because it could not lead to an EHC plan that would deliver what the young person wants;

(j) a course provided by or under arrangement with an institution within the higher education sector is not, simply for that reason, a form of higher education. Whether or not a course is a form of higher education depends on whether the course if of a type mentioned in Schedule 6 to the Education Reform Act 1998;

(k) the 2014 permits an independent institution to be named in an Education, Health and Care Plan provided it is a "post-16 institution" within the meaning of the 2014 Act. However, a young person does not have a statutory right to require such an institution to be named. By contrast and subject to specified statutory exceptions, a young person does have the right to require an institution within the further education sector to be named in his EHC plan.

6. I am grateful to both counsel for their assistance, in writing and at the hearing, in navigating through the maze of legislative provisions that come together to supply the legal meaning of terms used in the CFA 2014. These provisions are spread over a number of Acts, a feature of the statute book which must impede the accessibility of this important area of the law. To my mind, this illustrates the practical benefit of having a principal Act in this field, a function that was performed by the Education Act 1996 before many of the education topics it originally encompassed with were hived off to be dealt with in separate Education Acts.

Terminology

7. In these reasons:

- "2014 Regulations" means the Special Educational Needs and Disability Regulations 2014 (S.I. 2014/1530);
- "CFA 2014" means the Children and Families Act 2014;
- "EA 1996" means the Education Act 1996;
- "EHC" means education, health and care, as in EHC plan and EHC assessment;
- "ERA 1988" means the Education Reform Act 1988;
- "FE" means further education;
- "FHE 1992" means the Further and Higher Education Act 1992;
- "FtT" means the First-tier Tribunal (Health, Education and Social Care Chamber);
- "HE" means higher education.

Background

The local authority's decision-making

8. Mr G was born in December 1992. By letter dated 4 March 2015, Mr G asked his local authority to carry out an EHC assessment under section 36 CFA 2014. His solicitor informs the Upper Tribunal that Mr G had support to write this letter. In this letter Mr G stated:

> (a) he had a diagnosis of autism and Obsessive Compulsive Disorder (OCD) as well as selective mutism;
>
> (b) he had been attending 'Lionheart school' for 20 hours per week where "I am taught on a 1:1 basis with a qualified teacher" studying "Maths, Computer Programming, Literacy Skills and work on my communication skills";
>
> (c) he had cognitive behavioural therapy for one hour each week "in order to work on my OCD symptoms";
>
> (d) "I believe that I need to continue my education in a specialist setting which is also able to offer me speech and language therapy input in order to work upon my social communication skills and psychological input to work upon my OCD. This level of support would not be available without an [EHC] plan";
>
> (e) "I need to be educated in a small specialist college setting which is able to offer small classes with a high staff to pupil ratio and where the curriculum is geared to educating young adults with ASD and social communication difficulties" and "I have to develop my independent living skills";
>
> (f) his current educational placement was funded entirely by his parents.

9. A tutor at Lionheart Education (not 'school') emailed the local authority on 1 May 2015. He wrote that Mr G enrolled with the Open University (OU) in September 2014 although his three OU modules were being taught at Lionheart Education. The modules were describe as Maths MST 124, Maths MST 125 and My Digital Life T100.

10. The Lionheart tutor also wrote that "by early October 2014, it became apparent that [Mr G] would be completely unable to complete OU T100 [My Digital Life]" so that module was "suspended". In its place, Mr G received 6 hours per week tuition in computer programming. While he was working at "post A-Level standard", he was not pursuing an accredited course in programming. In March 2015, Mr G was "registered for the Cambridge Institute of Dog Behaviour and Training's course, 4110 Pet Home Sitting and Dog Walking" but the written requirements were too challenging so he "re-registered for a more basic course, 4110 Pet Home Sitting and Dog Walking".

11. The evidence as to the status of Lionheart Education / School was somewhat thin but a July 2015 educational psychologist's report described it as a "1:1 tutorial college". Its prospectus stated "we work with the best special needs educators in the world and are able to

call upon their services at short notice for our clients' children". The psychologist was unable to locate an OFSTED report on Lionheart Education. At the hearing, I was jointly informed by counsel that Lionheart is neither a registered independent school, a post-16 institution approved by the Secretary of State under section 41 CFA 2014 nor an institution within the FE sector.

12. On 19 May 2015, the local authority refused Mr G's request for an EHC assessment. They refused because (a) "[Mr G]'s learning difficulties are no longer at a level which call for additional provision, such as might be specified in an Education, Health and Care Plan"; and (b) "[Mr G] has made good educational progress in his setting and is now well placed to continue his education at university, where in any event the Local Authority has no role in securing provision for him".

The arguments before the FtT

13. On 15 April 2016, Mr G appealed to the FtT against the local authority's decision. Detailed written reasons for appealing were submitted by his solicitor. Dated 12 August 2015, these:

> (a) stated Mr G's current setting – "Lionheart School" – was a specialist setting catering for a small number of students. Mr G was taking "some courses from the Open University" at Lionheart;
>
> (b) stated that, despite Mr G's "average cognitive levels", he had significantly under-achieved in public examinations obtaining GSCE grade E in Physics, D in Computer Science and C in Maths in 2014;
>
> (c) described his therapeutic input since birth, drawing particular attention to: a 1999 Consultant Psychiatrist's diagnosis of a pattern of selective mutism associated with school or strangers; a 2009 Occupational Therapy report which referred to significant difficulties in neuromuscular development and sensory processing; a 2009 Consultant Psychiatrist's finding of increasing obsessive compulsive behaviour; a 2010 psychologist's recommendation for education-related cognitive behavioural therapy; a 2010 Consultant Psychiatrist's diagnosis of atypical autism; a 2014 Chartered Psychologist's description that Mr G became extremely anxious and entered 'freeze' mode when faced with unfamiliar tasks or environments;
>
> (d) argued an EHC assessment was necessary due to Mr G's very severe and complex difficulties, which had a profound impact on his ability to access a curriculum and his cognitive functioning, and his limited educational progress;

(e) argued Mr G was likely to need specialist teaching, therapeutic and behavioural input delivered on a multi-agency basis through an EHC plan. Without this, Mr G's chances of securing supported employment in the future would be impaired.

14. The local authority's response, drafted by their then solicitors Baker Small, resisted the appeal. Supplied to the FtT on 6 October 2015, the response:

(a) relied on the authority's original reasons for refusing to carry out an EHC assessment;

(b) argued that it had become apparent that Mr G had enrolled on an OU course – an "entry level unit" – and, as such, the local authority "no longer has jurisdiction" in the light of CFA 2014's exclusion of HE from its provisions. The authority relied on paragraph 9.201 of the statutory Code of Practice which states a local authority is no longer responsible for a young person when "the young person enters higher education";

(c) argued it was unclear what course/s Mr G wished to follow "although it seems he wishes to remain at Lionheart School";

(d) argued there was already a clear understanding of Mr G's difficulties and the provision he requires.

15. On 10 December 2015, the local authority supplied the FtT with their own educational psychology report, written by Dr Louise Edgington on 17 November 2015. For what it is worth, I found this to be a perceptive and helpful piece of work. In summary, this report:

(a) recorded the author's impression of Lionheart Education, following her visit, as "friendly, positive and supportive";

(b) thought Mr G's profile of needs were best understood as "the developmental result of an underlying sensory processing difference". He was "a cognitively able autistic individual, whose anxiety behaviours have developed into a severe social, emotional and mental health difficulty, which significantly impacts on his learning, communication, social interactions and functional life skills";

(c) stated that individuals with Mr G's condition deal with anxiety-inducing social interaction by going into 'shutdown' mode but this results in a damaging cycle of further social avoidance. Avoiding difficult situations makes them harder to 'learn';

(d) in Mr G's case, his shutdown mode took the form of 'freezing' and selective mutism. In his late teens his comfort zone grew even smaller;

(e) the impact of Mr G's condition on his personal and social life had been severe: "at the age of 22 he does not have functional independent living skills, and will only speak to his mother". The impact on his education and work prospects was also severe: "[Mr G's] avoidance and control behaviours have extended to his academic work, meaning that he is avoiding written language, which itself also carries uncertainty and requires social interpretation";

(f) Mr G's educational transitions were likely to have caused huge anxiety, leading him to revert to "safety behaviours of avoidance";

(g) stated Mr G's required support included: stability of placement and educators; "1:1 support to access learning which has an open-ended element"; a gradual exposure programme to build up his tolerance for situations in which his anxiety would be monitored by a suitably qualified practitioner such as a psychotherapist or psychologist; weekly access to therapeutic support to address his anxiety and coping skills delivered by a practitioner such as a psychotherapist or psychologist; ongoing involvement and advice regarding speech from a suitably qualified professional such as a Speech and Language Therapist.

Proceedings before the FtT

16. The appeal papers reveal the following about the course of the proceedings before the FtT:

(a) on 5 October 2015, FtT Judge McConnell refused the authority's application for the appeal to be struck out. The task for this judge, given the application made by the authority, was to determine whether the appeal had no reasonable prospect of success. However, the judge made a finding that Mr G's current educational placement was irrelevant to the issues raised by his appeal;

(b) Judge McConnell also stated that evidence supplied by Mr G's solicitors "will be relevant evidence to be taken into account by the LA in making their decision whether they must carry out an EHC needs assessment". That overlooked that the authority had already decided not to assess; this was the very reason why Mr G had appealed to the FtT;

(c) on 18 November 2015, the local authority applied to the FtT for determination of the preliminary issue "whether the Local Authority has jurisdiction in this matter on the basis that [Mr G] is a young person within "higher education" and the statutory process does not apply to him". I am not convinced the language used – in referring to 'jurisdiction' – was particularly helpful. Conventionally, that term refers to the scope of a court or tribunal's authority and would not normally be used to describe the extent of a public body's powers. It was, however, clear, in my view, what the local authority were getting at. They argued Mr G fell outside the CFA 2014 because he was pursuing HE;

(d) the authority's application stated it was made under rule 23 of the FtT's procedure rules. This sets out when the FtT may make a decision that disposes of proceedings without holding a hearing. The authority also stated that, if the FtT decided the authority "had jurisdiction", they would concede they were obliged to carry out an EHC needs assessment and seek a tribunal order to that effect;

(e) on 27 November 2015, FtT Judge Brayne made an 'order' that the authority had applied for Judge McConnell's strike-out decision to be varied as well as for strike-out on the basis that the FtT did not have jurisdiction. It seems to me that Judge Brayne's understanding of the authority's applications was doubly inaccurate. The authority had not applied for variation of the strike-out decision; it made a new application for the FtT to determine a preliminary issue. And the earlier strike-out application argued the appeal had no reasonable prospect of success not that the FtT lacked jurisdiction to decide the appeal (although, as I have said, the authority may have muddied the waters by asserting that it – the authority – lacked jurisdiction);

(f) Judge Brayne directed Mr G to supply a written submission "as to why the appeal should not be struck out for lack of jurisdiction". It is possible that Judge Brayne was proposing a jurisdictional strike-out of his own volition but I think that was unlikely because, had he done so, his order should have recited that fact;

(g) Mr G's submission in response focussed on matters of 'jurisdiction' (as Judge Brayne had required). His solicitor argued he was not in fact pursuing HE. The submission also set out, at length, why Mr G's learning difficulties meant that the threshold for assessment was satisfied. The submission also argued Judge McConnell's decision "was entirely correct in its legal and factual analysis". The submission also addressed the nature of Lionheart Education. It was not a school but an independent tuition centre although some attendees were local authority-funded;

(h) On 22 December 2015, a third FtT Judge (Judge Lewis) completed the case management process begun by Judge Brayne. The Judge decided "the application by the Local Authority for a Strike Out pursuant to rule 8(3)(a) is dismissed" and, in so doing, found "the jurisdiction point taken by the LA is wrong as identified by the Order of Judge McConnell". I note that the erroneous belief persisted that the authority's strike out application was extant. Further, Judge Lewis referred to an application under rule 8(3)(a), which requires the FtT to strike out an appeal falling outside its jurisdiction. Like Judge Brayne, this judge also misunderstood the nature of the authority's application;

(i) Judge Lewis directed the local authority, by 15 January 2016, to supply written confirmation whether they conceded the appeal or whether they wished to "reinstate" the hearing. This judge did not mention another option – determination of a preliminary issue on the papers – which was the only application actually before the FtT;

(j) on 6 January 2016, the authority again requested that the FtT determine the preliminary issue whether the local authority "had jurisdiction". The authority also

pointed out that Judge Brayne's intervention was pointless (that is my precis) since their strike out application had already been determined and what remained for determination was their preliminary issue application;

(k) in reply, Mr G's solicitors argued the authority's application for determination of a preliminary issue had effectively been dealt with by Judge Lewis and, as a result, the authority's commitment to carry out an EHC assessment, if they lost on the 'jurisdiction' point, had been activated;

(l) on 5 February 2016, the matter went back to Judge McConnell whose order recited that the authority had "conceded" the appeal, had not applied for reinstatement of a hearing and "[they] were not prepared to argue the issues in the appeal but chose to concede". I should observe that, when I read this, I thought I may have missed something within the appeal papers but I am confident I have not. The FtT ordered the authority to carry out an EHC assessment;

(m) on 4 April 2016 the Health, Education and Social Chamber's Deputy President, FtT Judge Tudur, refused the local authority's application for permission to appeal to the Upper Tribunal. The Judge expressed the views that the CFA 2016 "contains no reference to an assessment being precluded by reason of a young person accessing higher education" and "I consider the applications to strike out to be spurious and contrary to both the letter and spirit of the legislation".

Proceedings before the Upper Tribunal

17. Regrettably, proceedings before the Upper Tribunal did not run smoothly either. However, I reject the apparent inference, hinted at by the local authority at one stage, that this might have been the responsibility of Upper Tribunal staff. Having examined the case history in depth, I am in no doubt that, if such an inference was made, it was groundless and the conduct of Upper Tribunal staff in administering this appeal was without fault.

18. I shall clear this matter out of the way relatively briefly.

19. The local authority, as well as applying to the Upper Tribunal for permission to appeal, applied for a 'stay' of the FtT's order. A correctly-worded application would have been for an order suspending the effect of the FtT's decision, since those are the terms in which the relevant power is conferred on the Upper Tribunal. (I wish applicants would use the correct terminology and hope that, one day, this will happen.)

20. I granted the authority's application for a suspension order but my order also provided for Mr G to object to the order within a specified timescale. Mr G did so object and his written representations were supplied to Baker Small Solicitors who were on record as acting for the local authority. The authority were required to supply any written response by a specified date. No response in opposition was forthcoming and so I made an order disapplying my earlier suspension order. That order was supplied to the solicitors on record for the local authority.

21. The local authority then informed the Upper Tribunal that Baker Small Solicitors ceased to act for them at some point before the Upper Tribunal lifted its suspension order. No one

informed the Upper Tribunal and it therefore (of course) continued to issue its case management directions to the solicitors on record as acting for the authority. I have not had a satisfactory explanation as to why the Upper Tribunal was not informed that Baker Small Solicitors had ceased to act for the local authority.

22. The local authority applied for reinstatement of the suspension order on the ground that they had been deprived of the opportunity to make representations before the order was lifted. I refused that application, at the same time as I granted the authority permission to appeal to the Upper Tribunal. At the hearing of the appeal, Mr Auburn informed me that the local authority had performed all the activities comprised in the assessment apart from the final step of deciding whether an EHC plan was necessary.

Legislative framework

The Education Act 1996

23. In construing Part 3 of CFA 2016 it should be borne in mind that:

> (a) section 83(7) CFA 2014 (the final provision in Part 3) provides "EA 1996 and the preceding provisions of this Part…are to be read as if those provisions were contained in EA 1996". Accordingly, subject to any contrary intention, a term used in Part 3 CFA 2014 that is statutorily defined in EA 1996 bears that definition for CFA 2014 purposes;
>
> (b) section 578 EA 1996 was amended by the CFA 2014 to include that Act within the list of Education Acts (which means, so I understand, the Acts are *in pari materia* and to be read as one). Also within the list of Education Acts is EA 1996, ERA 1988 and FHE 1992.

Core definitions

24. Section 20 CFA 2014 defines when a young person has "special educational needs". It is accepted that Mr G has special educational needs that is "a learning difficulty or disability which calls for special educational provision to be made for him". To put that in context, I shall set out section 20(2):

> "(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".

25. "Young person" means "a person over compulsory school age but under 25" (section 83(2) CFA 2014).

26. "Special educational provision" is defined by section 21(1) CFA 2014:

> " "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—
>
> (a) mainstream schools in England; [or]…
>
> (c) mainstream post-16 institutions in England".

27. Section 2 EA 1996 defines primary, secondary and FE. The definition of "further education" is:

> "(3)…in this Act "further education" means –
>
> (a) full-time and part-time education suitable to the requirements of persons who are over compulsory school age, and
>
> (b) organised leisure-time occupation provided in connection with the provision of such education,
>
> except that it does not include secondary education or…higher education".

28. CFA 2014 also includes an express exception of HE from the meaning of "education" as it applies for the purposes of Part 3 CFA 2014. Section 83(4) CFA 2014 provides:

> "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".

Post-16 institutions, further education and higher education

29. To understand the concept of mainstream post-16 institution, reference needs to be made to various definitions in section 83(2) CFA 2014:

> (a) "post-16 institution" means "an institution which (a) provides education or training for those over compulsory school age, but (b) is not a school or other institution which

is within the higher education sector or which provides only higher education". So three types of institution are excluded: schools; those "within the higher education sector"; and those which provide "only higher education";

(b) "mainstream post-16 institution" means "a post-16 institution that is not a special post-16 institution";

(c) "special post-16 institution" means "a post-16 institution that is specially organised to make special educational provision for students with special educational needs".

30. "Training" has the same meaning in CFA 2014 as in section 15A EA 1996 (section 83(2) CFA 2016) which refers, in subsection (1)(a), to "vocational, social, physical and recreational training" and "organised leisure time occupation…which is provided in connection with the provision of education or of training".

31. The meaning of an institution "within the further education sector" is defined by section 4(3) EA 1996 which refers to an institution conducted by a FE corporation or a designated institution for the purposes of Part 1 of the FHE 1992.

32. The meaning of an institution "within the higher education sector" is defined by section 4(4) EA 1996. An institution is within that sector if it is of a particular type, including a university receiving financial support under section 65 of the FHE 1992 and an institution conducted by a HE corporation. The Open University is an institution within the HE sector, having been constituted and founded as a University by Royal Charter dated 23 April 1969. Article 4 of its Charter confers power on the University, in particular, to grant "Degrees, Diplomas, Certificates and other academic distinctions" (a copy of the Charter may be found at www.open.ac.uk/about/main/sites/www.open.ac.uk.about.main/files/files/ecms/web-content/Charter.pdf). I did not hear argument on the point but I can see no obvious impediment to the Open University providing forms of education other than higher education.

33. For the meaning of "higher education", we begin with section 579(1) of the EA 1996 which provides that "higher education" means "education provided by means of a course of any description mentioned in Schedule 6 to the Education Reform Act 1988".

34. Schedule 6 to the ERA 1998 mentions the following descriptions of course:

"1. The descriptions of courses referred to…are the following—

(a) a course for the further training of teachers or youth and community workers;

(b) a post-graduate course (including a higher degree course);

(c) a first degree course;

(d) a course for the Diploma of Higher Education;

(e) a course for the Higher National Diploma or Higher National Certificate of the Business & Technician Education Council, or the Diploma in Management Studies;

(f) a course for the Certificate in Education;

(g) a course in preparation for a professional examination at higher level;

(h) a course providing education at a higher level (whether or not in preparation for an examination).

2. For the purposes of paragraph 1(g) above a professional examination is at higher level if its standard is higher than the standard of examinations at advanced level for the General Certificate of Education or the examination for the National Certificate or the National Diploma of the Business & Technician Education Council.

3. For the purposes of paragraph 1(h) above a course is to be regarded as providing education at a higher level if its standard is higher than the standard of courses providing education in preparation for any of the examinations mentioned in paragraph 2 above."

35. I note that Schedule 6 does not define higher education to include any course provided by an institution within the higher education sector. In other words, a course is not a course of HE simply because it is provided by an institution within the HE sector.

The statutory sequence of EHC events under the CFA 2014

Stage 1 – deciding whether to assess

36. Section 24 CFA 2014 identifies when a local authority is responsible for a young person. A young person must (a) be "in the authority's area"; and (b) have been identified by the authority or brought to the authority's attention as someone who has, or may have, SEN. It is accepted that the local authority are responsible for Mr G for the purposes of section 24.

37. Section 36(1) CFA permits a young person to request that a local authority secure an EHC needs assessment for him or her. Section 36(2) defines "EHC needs assessment" as "an assessment of the educational, health care and social care needs of a young person".

38. Upon a section 36(1) request being made, section 36(3) CFA 2014 requires the authority to "determine whether it may be necessary for special educational provision to be made for the… young person in accordance with an EHC plan". In making this determination, the authority must consult the young person (section 36(4)). The CFA 2014 requires the local authority, in making their determination (where a young person is aged over 18), to consider "whether he or she requires additional time, in comparison to the majority of others of the same age who do not have special educational needs, to complete his or her education or

training" (section 36(10)). Other than that, and any views and evidence submitted by the young person, the CFA 2014 leaves it to the local authority to decide which matters to take into account in deciding whether to assess.

39. If an authority determines it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan, section 36(5) requires the authority to notify the young person of its reasons and that, accordingly, it has decided not to secure an EHC assessment.

Stage 2 – assessment

40. The information and advice that must be obtained as part of an EHC assessment is set out in regulation 6 of the 2014 Regulations. The matters to be taken into account are set out in regulation 7.

Stage 3 – decision whether EHC plan necessary

41. After an EHC assessment has been carried out, the authority must notify the young person of the outcome of the assessment, whether the authority proposes to secure that an EHC plan is prepared and the reasons for the decision (section 36(9) CFA 2014).

42. Where the authority decides it is not necessary to secure an EHC plan, regulation 10(1) of the 2014 Regulations requires notice to be given to the young person as soon as practicable but in any event within 16 weeks of the date of the request for assessment. The cases in which a local authority need not comply with the time limit are set out in regulation 10(4) and include where "exceptional personal circumstances" affect the young person during those 16 weeks.

Stage 4 – EHC plan

43. A local authority's duty to secure preparation of an EHC plan for a young person arises "where, in the light of an EHC assessment, it is necessary for special educational provision to be made for a…young person in accordance with an EHC plan" (section 37(1)(a) CFA 2014).

44. By section 37(2) CFA 2014, the matters to be specified in an EHC plan include:

> (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.

45. Further matters are set out in regulation 12 of the 2014 Regulations and include, in reg. 12(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."

46. During preparation of an EHC plan, the local authority must consult the young person about the content of the plan (section 38(1) CFA 2014). It must then take the steps specified in section 38(2) which include sending a draft plan to the young person and informing him of his right to request that the authority secure that a particular maintained school, Academy, institution within the English FE sector or institution approved under section 41 CFA 2014 is named in the plan. It can be seen that this right does not extend to all types of post-16 institution.

47. It is accepted in this case that Lionheart Education is not a type of institution described in section 38(2) CFA 2014. On that basis, Mr G would not have had the right under section 38 to request that Lionheart Education be named in an EHC plan.

48. If the young person duly requests a section 38(2) institution, the EHC plan must name that requested 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."

49. If section 38(4) applies – i.e. it excludes the duty to name the requested institution – 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 thought appropriate.

50. Where no request for a qualifying establishment is made under section 38(4), the authority comes under the same duty as provided for by section 38(5) (i.e.to name an appropriate school or other institution or a type of school or other institution). The CFA 2014 does not limit the field to institutions within the FE sector. This may arise, for example, if no request is made

under section 38 or a request is made for an establishment falling outside section 38(4) such as an independent post-16 institution that is not approved under section 41.

51. Where a local authority maintains an EHC plan for a young person, section 42(2) CFA 2014 requires it to "secure the specified special educational provision for the child or young person".

52. Where a local authority is securing the preparation of an EHC plan for a young person who is to be educated in a post-16 institution, in two cases section 33(2) CFA 2014 requires the authority to secure that the plan provides for the young person to be educated in a mainstream post-16 institution "unless that is incompatible with (a) the wishes of the child's parent or the young person, or (b) the provision of efficient education for others". The cases are where the authority has rejected a request duly made under section 38 (section 39(5)) and where no request has been made under section 38 (section 40(2)).

General obligations of a local authority under CFA 2014

53. While not relied on in argument, since I am being asked to give general guidance I also note the general obligations placed on local authorities by sections 19 and 32 CFA 2014.

54. Section 19 requires a local authority, in exercising its functions under Part 3 of CFA 2014, in the case of a young person, to have regard to the following matters:

> "(a) the views, wishes and feelings of the…young person;
>
> (b) the importance of the … young person participating as fully as possible in decisions relating to the exercise of the function concerned;
>
> (c) the importance of the … young person being provided with the information and support necessary to enable participation in those decisions;
>
> (d) the need to support the …young person, in order to facilitate the development of the …young person and to help him or her achieve the best possible educational and other outcomes."

55. Section 32(1) CFA 2014 requires a local authority in England to "arrange for…young people for whom it is responsible…to be provided with advice and information about matters relating to the special educational needs of the…young people concerned".

Role of the First-tier Tribunal (Health, Education and Social Care Chamber)

56. Section 51 CFA 2014 confers on a young person a right of appeal to the FtT against various local authority decisions including "a decision of a local authority not to secure an

EHC needs assessment for the … young person". Regulation 43(2)(b) of the 2014 Regulations confers power on the FtT, when determining such an appeal, to "order the local authority to arrange an assessment of the child or young person under section 36".

57. Procedure in the FtT is governed by the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008. I draw attention to the following provisions of the Rules:

> (a) rule 8(3) requires the FtT to strike out proceedings if it does not have jurisdiction in relation to the proceedings;
>
> (b) rule 8(4)(c) permits the FtT to strike out proceedings if it "considers there is no reasonable prospect of the applicant's case…succeeding";
>
> (c) before striking out under the above rules, the FtT must give the "applicant" an "opportunity to make representations in relation to the proposed striking out" (rule 8(5));
>
> (d) if proceedings are struck out, the applicant may apply for the proceedings to be reinstated (rule 8(6));
>
> (e) in the above rules, "applicant" means the person who starts Tribunal proceedings (rule 1(3)). The applicant before the FtT was Mr G. The rules also apply to respondents, such as the local authority, except that "a reference to the striking out of the proceedings is to be read as a reference to the barring of the respondent from taking further part in the proceedings";
>
> (f) rule 23(3) permits the FtT to make a strike out decision without holding a hearing;
>
> (g) rule 5(3)(e) gives the FtT express power to deal with an issue as a preliminary issue.

The arguments on this appeal

58. The authority argue the FtT was plainly wrong to determine that it had conceded Mr G's appeal. The approach taken by the FtT also meant that the necessary "factual inquiry and determinations" had not been carried out. At the hearing, Mr G's counsel conceded that he could not seriously dispute the authority's criticisms of the FtT's case management and, on that basis, no longer sought to defend the FtT's decision. Therefore, both parties agree the FtT's decision/s should be set aside.

59. So far as matters of education law are concerned, the local authority argue:

(a) the FtT "erred in treating the trigger for an EHC assessment as applicable to adults receiving education in the higher education sector". The statutory test for an EHC assessment, in section 36 CFA 2014, is whether it may be necessary for special educational provision to be made for a young person in accordance with an EHC plan. Given the CFA 2014's definition of special educational provision, which involves comparing provision for the instant young person with that generally provided in mainstream schools or mainstream post-16 institutions, the issue for resolution was whether either Lionheart Education or the Open University were types of such institutions;

(b) the Open University is not a mainstream post-16 institution. This is clear and "the effect of that is that any provision [Mr G] may need is outwith what the Education Acts define as "special educational provision". That was reinforced by section 83(4) CFA 2014's exclusion of higher education from the term "education" as it applies for the purposes of that Act;

(c) a crucial question is whether a young person has been receiving education in a mainstream post-16 institution;

(d) Mr G could not have a need for special educational provision provided by the Open University so that the statutory test for assessment could not be met by reference to education provided by that University;

(e) it is wrong to focus simply on the definition of HE in the EA 1996. What matters under the CFA 2014 is whether an institution meets the definition of "post-16 institution" and, under section 83(2) CFA 2014, that excludes an institution within the HE sector or which provides only HE. Accordingly, argues the authority's skeleton argument, "whether the Open University is a university level course, entry level course, starter or other course is not to the point. The scope of EHC needs assessment as defined under the Education Acts is defined not as a matter of the courses the young person is undertaking, but by the above provisions [including section 83(2)], which turn on the nature of the institution";

(f) responding to an issue I raised in case management directions, the authority argue there is no basis for saying Parliament was unlikely to have intended to deny young people the opportunity to follow potentially beneficial courses simply because they were provided by an institution within the HE sector. This was misguided since the real issue is "whether Parliament provided for a SEN regime in which EHC plans supported higher education courses or modules" and it clearly did not;

(g) so far as Lionheart Education is concerned, the local authority concede that it might amount to an "institution" for the purposes of the CFA 2014. However, it cannot be assumed that the same questions arose in relation to Lionheart as for the

Open University. The issue is whether, for the purposes of the definition of special educational provision in section 21 CFA 2014, the Lionheart provision was additional to or different from that provided generally by the comparator institutions set out in section 21. This was never examined by the FtT;

(h) Lionheart Education describes itself as a "private tuition provider" and so it cannot be a school. Whether or not it is a post-16 institution depends on whether it provides education or training for those over compulsory school age (section 83(2) CFA 2014)? The focus should be on whether "education" is provided, since Lionheart's self-description indicates a minimal training element. That takes one to the definition of "education" in section 2(3) EA 1996 and its requirement for "education suitable to the requirements of persons who are over compulsory school age". Whether or not that definition is satisfied by the Lionheart provision is a factual issue that the FtT failed to address. This matter should be remitted to the FtT for that issue to be resolved.

60. Mr G argues:

(a) the CFA 2014 does not prevent an independent college from being named in an EHC plan (provided it meets the definition of "post-16 institution"). That fact that such a college, if not approved by the Secretary of State under section 41 CFA 2014, cannot be the subject of a statutory request does not prevent it from being named. If the test of appropriateness in section 41 CFA 2014 is met, it is open to a local authority or the FtT to name an independent college;

(b) a HE institution is in principle free to provide courses that are not HE courses. If it does, the course is not necessarily a HE course. That will depend on whether the course falls within Schedule 6 to the ERA 1988;

(c) the Open University modules delivered to Mr G by Lionheart Education were not HE courses and, further, preparing a young person for the requirements of HE may itself amount to further education;

(d) while the Open University, as an institution within the higher education sector, could not be named in any EHC plan prepared for Mr G, there was no impediment to an EHC plan taking account of further education provided by an institution within the HE sector;

(e) the mere fact that a young person participates in a non-HE course provided by an institution within the HE sector does not exclude the young person from the ambit of the CFA 2014;

(f) the FtT's approach to the law was essentially correct. There was no 'jurisdictional point' to the appeal before the FtT and it was right to reject the authority's argument that there was;

(g) Mr G's situation was unusual, complex and unlikely to be repeated. For that reason, his counsel at the hearing doubted the authority's argument that this appeal raised issues of substantial wider importance.

61. In the local authority's skeleton argument, they argued the appeal should be remitted to the FtT for re-hearing. Various "fact sensitive" issues remain to be determined concerning Mr G's educational difficulties and the support he requires. The preliminary issue, which the authority asked the FtT to decide, could only properly be determined by the FtT on remittal although the FtT ought to have the Upper Tribunal's guidance on the legal principles to be applied.

62. At the hearing, I invited argument on the question whether the purpose of the definition of special educational provision in section 21 CFA 2014 was simply to evaluate the nature of a young person's educational needs. In other words, is it simply a tool whose purpose is to calibrate educational need rather than determine the application of the CFA 2014? The real world application of the Act appears to be the job of subsequent, albeit connected, provisions of the Act. Arguably, that was reinforced by section 21's requirement for a comparison to be made with types of educational provision made generally throughout *England.*

63. I posited certain examples that might suggest the central importance of the 'current placement' in the local authority's arguments was flawed. What of a young person newly arrived in the UK without a current educational placement? Or a young person enrolled on a course of HE who experienced some crisis meaning continued pursuit of a course of HE was no longer feasible. Both counsel agreed there could be cases in which the fact that a young person had no current placement, or was currently formally enrolled on a course of HE, would not prevent the young person from having entitlements under CFA 2014.

64. At the hearing, I also raised further possible disposal options including that the Upper Tribunal might re-decide the appeal made by Mr G to the First-tier Tribunal's and, in so doing, order the local authority to carry out an assessment. On instructions, I understood Mr Auburn for the local authority to argue that the Upper Tribunal should consider remitting the matter to the authority for it to reconsider its refusal decision while Ms Hay for Mr G remained of the view that the matter should be remitted to the First-tier Tribunal for re-hearing of Mr G's appeal.

Conclusions

65. I agree with the parties that the FtT made mistakes amounting to errors on points of law in its management of the local authority's case. The FtT failed, at a number of stages, to

understand the nature of, or deal fairly with, the authority's case. I acknowledge the demands faced by the FtT, which can only be exacerbated when it is having to get to grips with a new piece of legislation. Regrettably, however, the FtT's management of the proceedings does not make for happy reading. Throughout, the FtT appeared unable to appreciate the true nature of the applications made to it by the local authority.

66. I find the following flaws, amounting to errors of law, in the FtT's management of the proceedings as a result of which its decision/s must be set aside.

67. Judge McConnell, in her determination of the local authority's strike out application in October 2015:

> (a) failed to direct herself that the issue to be resolved was whether Mr G's appeal had a reasonable prospect of success; and
>
> (b) did not appreciate that the local authority had already decided not to carry out an EHC assessment, as was shown by her finding that evidence supplied by Mr G's solicitors "will be relevant evidence to be taken into account by the LA in making their decision whether they must carry out an EHC assessment".

68. Judge Brayne, in dealing in December with the local authority's application for determination of a preliminary issue:

> (a) misunderstood the nature of the application. The Judge thought the authority had applied for variation of Judge McConnell's strike out decision;
>
> (b) misunderstood the nature of the authority's earlier strike out application. The Judge thought the authority had applied for strike out on the basis that the FtT lacked jurisdiction.

69. Judge Lewis, in completing the case management process begun by Judge Brayne, also mistakenly thought the local authority were seeking strike out on the basis that the FtT lacked jurisdiction. In so doing, the Judge failed to decide the authority's application for determination of a preliminary issue.

70. Judge McConnell, in February 2016, erroneously decided that the authority "chose to concede" the appeal. The authority's persistence in seeking determination of a preliminary issue showed they had not conceded the appeal.

Guidance on dealing with EHC cases with a HE dimension

71. At the hearing, Mr Auburn for the local authority urged the Upper Tribunal to give guidance to local authorities and the FtT on dealing with EHC cases with a HE dimension. In

his submission, local authorities are generally uncertain how to apply Part 3 of the CFA 2014 in such cases and would welcome guidance. Ms Hay for Mr G was not certain that authorities were having problems applying the CFA 2014 but did not in terms object to the Upper Tribunal giving guidance.

72. Mr Auburn's view matches the impression I have gained from my Upper Tribunal caseload. I think it is right that the Upper Tribunal should give general guidance on this topic which is of particular importance to young persons with disabilities and/or learning difficulties, a group who were largely excluded from the SEN-statementing provisions of the predecessor legislation (Part 4 of the EA 1996).

73. In my view, the local authority's arguments on this appeal concerning the definition of "special educational provision" in section 21 of the CFA 2014 overlook the structure, context and purpose of that provision. The following general points can be made about section 21;

> (a) the definition of special educational provision is designed to identify those young persons for whom standard educational provision will not suffice. It does this by calling for a comparison to be made between the type of educational provision suitable for a young person with that made generally for young people of the same age by English mainstream post-16 institutions;
>
> (b) "special educational provision" is a young person-specific concept. It only has meaning in relation to a particular young person as is shown by the opening words of section 21: ""special educational provision", for a … young person means…";
>
> (c) the comparative reference point for section 21 purposes is the provision made generally in *England*. It is not, in terms, the provision made in a local authority's area nor is it the provision currently made for a young person;
>
> (d) this does not mean each and every mainstream post-16 institution in England must be investigated in order to identify the provision made generally in England. That would waste scarce resources and cannot have been Parliament's intention. Instead, what the definition calls for is the exercise of professional educational judgement by local authorities, or the specialist FtT, in order to fix the typical nature of provision made in England for a particular age group;
>
> (e) I would be surprised if the provision made in any particular local authority's area was atypical for England. As a general rule, therefore, local provision can be relied on as being typical of the provision made generally in England. If a young person or his or her representative wishes to argue otherwise that should be supported by cogent evidence;

(f) once that typical provision has been fixed, the decision-maker can then answer the key section 21 question which is whether the educational provision appropriate for a specific young person is additional to or different from that made generally in England. In a case like Mr G's, the comparison will be with the provision made by mainstream post-16 institutions;

(g) section 21's definition of special educational provision is capable of being satisfied even if a young person is currently formally enrolled on a course of HE or is considering pursuing HE. It is true that, in many cases, the fact of such enrolment or wish will lead inevitably a local authority refusing to carry out an EHC assessment under section 36 of the CFA 2014 (see below). But there may be cases when it will not. For example, a student formally enrolled on a course of HE may experience some adverse health event or for some other reason be unable to cope with the demands of HE so that, in the near future, he or she wishes to pursue a less demanding course of FE instead;

(h) section 21 confers no active function on a local authority (other than the function of making a judgement as to how it operates in a particular case). Its role is to identify children and young persons for whom standard state educational provision (other than higher education) will not suffice. It does not do this for its own sake. Rather, once it is integrated with the various Part 3 provisions of the CFA 2014 that operate by reference to "special educational provision", it serves to define the scope of the powers, duties and rights within those provisions.

74. The provision of HE is not a concern of Part 3 of CFA 2014. Functions under Part 3 CFA 2014 cannot be exercised to support a young person though HE. That follows from section 83(4)'s exclusion of references to HE from the definition of "education" as it applies for the purposes of CFA 2014. However, I see no reason why preparing a person for the requirements of HE should be left out of account. Such an activity should amount to a form of education that is not itself HE. This is reinforced by regulation 47 of the 2014 Regulations which provides for a copy of the EHC plan for a young person who intends to undertake a course of HE to be disclosed to the principal of a HE institution or in connection with an application for a disabled student's allowance.

75. An institution within the HE sector (or some other institution which only provides higher education) may not be named in section I of an EHC plan. Such an institution falls outside the category of institutions that the CFA 2014 permits to be named in an EHC plan. It cannot be a post-16 institution within the definition in section 83(2) CFA 2014.

76. The test for deciding whether to carry out an EHC assessment, in section 36(3) of the CFA 2014, is whether "it may be necessary for special educational provision to be made for the… young person in accordance with an EHC plan". The issue will typically be whether it may be necessary for special secondary or FE provision to be made in accordance with an

EHC plan. If the young person simply seeks HE, the answer to the section 36(3) question must be no. The necessity element of the test will not be satisfied and an EHC assessment should be refused. However, this begs an important question. What is HE?

77. The local authority's stance before the FtT was that the doors to the CFA 2014 shut on Mr G as soon as it became clear he was pursuing an Open University course. He was undoubtedly pursuing a course provided under the auspices of an institution within the HE sector. However, it does not follow that a course must be a HE course if it is provided by, or under arrangement with, an institution within the HE sector.

78. Section 83(4) CFA 2014 provides that a reference to "education" in Part 3 of the Act does not include "higher education". The exclusion does not refer to "education provided by an institution within the higher education sector". In my view, the exclusion encompasses "higher education" as defined for the purposes of the EA 1996 which, as described above, means certain categories of course mentioned in Schedule 6 to the ERA 1998. If a course of education falls outside the Schedule 6 list it is not a form of HE.

79. The Schedule 6 list includes a "first degree course" and it seems to me that the other courses are of either commensurate or greater complexity than such a course. This is not a matter for me to determine but I would not be surprised if the OU modules pursued by Mr G fall outside Schedule 6 and, accordingly, are not a form of HE. But that is not something I need to decide. If the authority think they need to decide the point as part of assessing Mr G's needs, I am sure it will be simple enough for them to do so with Mr G's co-operation.

80. This case is about the duty to assess under section 36 CFA 2014. The duty arises where "it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan". As I have said, it is quite right for a local authority to have regard to the provision sought in determining whether the necessity condition is satisfied. If the provision sought is HE, it is not a form of special educational provision for CFA 2014 purposes given the exclusion of HE from the definition of "education". An assessment would be pointless because it could not lead to an EHC plan that would deliver what the young person wants. But there are two important related points to make.

81. First, it is a young person's prerogative to be uncertain about what he wishes to do with his life. One cannot expect all young persons to present with clearly formed plans about their educational future. A vague aspiration to pursue HE or the inclusion of HE amongst the educational options that a young person is thinking of pursuing should not be seized upon as a reason to exclude a young person from the CFA 2014 system of entitlements. In this respect, local authorities should bear in mind their general obligations under section 19 and 32 CFA 2014. They may need to explain to a young person that, if he wishes to pursue HE, the CFA 2014 cannot operate to support him through a course of HE.

82. The second point for local authorities to bear in mind is that a course is not necessarily a HE course because it is provided by, or under arrangement with, an institution within the HE sector. What matters is whether the course falls within the list specified in Schedule 6 to ERA 1998.

Disposal of the proceedings

83. Now that I have decided to allow the local authority's appeal, the following disposal options are open to the Upper Tribunal:

(a) remit the case to the FtT for it to re-decide Mr G's appeal;

(b) re-make the FtT's decision, in which case the possible outcomes are:

(i) refuse Mr G's appeal; or
(ii) allow Mr G's appeal and order the authority to arrange an assessment of Mr G under section 36 CFA 2014.

84. I have decided not to remit the case to the FtT for it to re-decide Mr G's appeal. Instead I decide to re-make the FtT's decision. I am conscious that I do not have the benefit of sitting with specialist members, as would the FtT if it re-decided the appeal. In the perhaps unusual circumstances of this case, I am satisfied that the absence of specialist expertise does not prevent me from fairly re-deciding the appeal.

85. I allow Mr G's appeal against the local authority's refusal to secure an assessment of his needs under section 36 CFA 2014. The authority's refusal decision was flawed because they mistakenly concluded that Mr G could not possibly have rights under the CFA 2014 because he was pursuing courses that would lead to the grant of qualifications by an institution within the HE sector. The authority's mistake was to assume that such courses had to be a form of HE but without considering whether they fell within the definition of HE in Schedule 6 ERA 1998.

86. I note I am disposing of the appeal in a manner not suggested by either party.

87. It seems to me that Ms Hay's argument that the matter should be remitted to the FtT possibly assumed that it would itself be able to carry out an EHC assessment or at least make findings of a type that would be made on an assessment.

88 At the hearing, Ms Hay argued that, if the Upper Tribunal ordered the local authority to arrange an assessment, Mr G would not have the benefit of a judicial determination of the numerous new issues that had arisen during the initial stages of the authority's assessment. At the hearing, I put it to Ms Hay that the FtT did not appear to have power to order preparation of an EHC plan on an appeal against a refusal to assess. She did not disagree but argued

remittal to the FtT was preferable because it could make binding findings of fact. However, there is no guarantee that the FtT will make the findings of fact Mr G wants it to make. Its only obligation would be to make such findings of fact as are necessary for a proper disposal of Mr G's appeal against the local authority's decision refusing an assessment. No one can be sure the FtT would consider it necessary to make detailed findings of fact about Mr G's special educational needs and the provision required to meet those needs. Such findings may well be expected on an appeal against a refusal to prepare an EHC plan, following statutory assessment, but not necessarily on an appeal against a refusal to assess.

89. This is an appeal against a refusal to secure an EHC assessment. It is not an appeal against a refusal to prepare an EHC plan following assessment. The FtT's powers on a refusal to assess appeal (those powers also being exercisable by the Upper Tribunal when it re-makes a FtT decision) are provided for by regulation 43 of the 2014 Regulations. They do not include power to order the local authority to make and maintain an EHC plan. That power is available on appeals brought under section 51(2)(b) CFA 2014 but those are appeals against refusals to prepare an EHC plan.

90. The local authority argue the matter should be remitted to them to reconsider whether to assess. But, again, such a power is not provided for by regulation 43 on a refusal to assess appeal (on a refusal to prepare an EHC plan appeal, the FtT does have power to refer the case back to the local authority for reconsideration: regulation 43(2)(d)).

91. I would not order an assessment if I was satisfied that Mr G intends in the near future to pursue HE as the next stage in his education. However, the evidence before me suggests that is unlikely to be the case. In any event, not all of his education at Lionheart Education involves pursuing Open University modules. Further, the extent of Mr G's difficulties in accessing education and the provision that might be required in order for him to overcome the educational barriers created by his mental health condition, as described in particular in Dr Edginton's report, lead me to conclude there is a realistic prospect that he will require an EHC plan. Whether or not a plan is required will fall to be decided by the local authority, in the light of their assessment and my decision is not to be read as expressing any view on that matter. I am however satisfied that it may be necessary for special educational provision to be made for Mr G in accordance with an EHC plan. In other words, the section 36(3) test is met.

92. The local authority's argument that assessment is not necessary because Mr G's needs are fully understood, as is the special educational provision required to meet those needs, does not necessarily obviate the need for a statutory assessment. Even if those assertions are correct, on the evidence before me there is a realistic prospect that it will be necessary for special educational provision to be made for Mr G in accordance with an EHC plan. I have already referred to Dr Edgington's analysis of the educational provision that Mr G might require to overcome the barriers created by his health condition. Paragraph 9.14 of the statutory SEN Code of Practice suggests that an EHC plan might be required, even if a child or young person's needs have been appropriately assessed, where the young person is "not progressing,

or not progressing sufficiently well". Paragraph 9.14 also provides that local authorities should take into account "whether the special educational provision required…can reasonably be provided from within the resources normally available to…post-16 institutions". In the light of Dr Edgington's report, I am satisfied that there is a realistic prospect that Mr G will require special educational provision to be made in accordance with an EHC plan.

93. In deciding to order an assessment, I also take into account that virtually all of the assessment 'heavy-lifting' has already been done. As I was informed at the hearing, the authority have carried out all of the assessment steps considered necessary apart from the final determination whether it is necessary for the local authority to determine the special educational provision for Mr G (i.e. whether to secure preparation of an EHC plan).

94. Ms Hay argued that, if the Upper Tribunal did order the local authority to arrange an assessment, it should set clear timescales for completion of the assessment. That is not necessary because the matter is dealt with by legislation. Regulation 44(2)(b) of the 2014 Regulations provides that, where the FtT orders a local authority to secure an assessment:

> (a) if the local authority decides, following assessment, not to make an EHC plan, that decision must be notified as soon as practicable and, in any event, within 10 weeks of the date of the First-tier Tribunal's order (which, in the present case, needs to be read as referring to the date of the Upper Tribunal's order); and
>
> (b) if the local authority decides to make an EHC plan, the plan must be finalised as soon as practicable and, in any event, within 14 weeks of the date of the tribunal's order.

95. Finally, I record here the order I made at the hearing that the effect of the First-tier Tribunal's order was to be suspended in part until the issue of my decision. I ordered that suspension applied to the First-tier Tribunal's order but only in so far as it related to the final stage of the statutory assessment process namely taking the decision whether it is necessary for special educational provision to be made for Mr G in accordance with an EHC plan (i.e. i.e. the decision whether to prepare an EHC plan).

(Signed on the Original)

E Mitchell
Judge of the Upper Tribunal
25 March 2017