DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to dismiss the appeal by the Appellant.

The decision of the First-tier Tribunal (Health, Education and Social Care Chamber) taken on 29 December 2016, following the hearing on 5 December 2016 under file reference EH343/16/00020, does not involve an error on a point of law.

There is to be no publication of any matter likely to lead members of the public directly or indirectly to identify the child who is the subject of this appeal.

This decision and ruling are given under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

REASONS FOR DECISION

Introduction

1. This appeal concerns the decision by the First-tier Tribunal ("the Tribunal") that Dean does not require provision to be made to meet his special educational needs in accordance with an education, health and care plan (EHCP). The Tribunal dismissed the appeal by Dean's mother on 29 December 2016, following a hearing on 5 December 2016. I am dismissing this further appeal to the Upper Tribunal for the reasons that follow.

2. I held an oral hearing of the appeal at the Manchester Civil Justice Centre on 17 August 2017. Dean's mother was represented by Mr David Wolfe QC; the local authority was represented by Miss Alexandra Cracknell of Counsel. Neither counsel had appeared at the hearing before the First-tier Tribunal. I am grateful to them both for their well-crafted submissions.

The background to the appeal to the First-tier Tribunal

3. Dean is now aged 14. He has a range of special educational needs. He completed his primary education in a maintained mainstream setting. His mother then placed him in a private school. His attendance at that private school was 78% in the 2014/15 school year dropping to 24% for the very start of the 2015/16 school year. However, since about Christmas 2015 he has not been in school. The local authority carried out an EHC needs assessment but concluded that Dean did not require an EHCP. Dean's mother appealed to the Tribunal.

The First-tier Tribunal's decision

4. The Tribunal's overall conclusion was that the evidence "did not establish that there is currently a need for provision to be made to meet Dean's special educational needs in accordance with an EHCP. Such provision as is required may be made within a mainstream school setting and from within existing resources, including available Top-up" (paragraph 19 of its reasons).

5. Dean's mother applied for permission to appeal on the basis that the Tribunal had applied the wrong test in deciding not to order the issue of an EHCP for Dean. Tribunal Judge Burrow refused permission to appeal on behalf of the Tribunal. In summary, he took the view the Tribunal's reasons were adequate and there was no arguable error of law. He added:

> "In considering the need for an EHCP the Tribunal referred to the relevant provisions of the CFA 2014, and at paragraph 4 to whether or not an EHCP is required to ensure that effective provision is required to be made in order to address the full range of needs, which is in effect the test approved in *SC and MS v Worcestershire CC* [2016] UKUT 267".

The proceedings before the Upper Tribunal

6. Dean's mother, through her solicitors, then applied direct to the Upper Tribunal application for permission to appeal. Upper Tribunal Judge (UTJ) Rowley granted Dean's mother permission to appeal on the papers on 26 April 2017 and she subsequently directed an oral hearing.

7. It is fair to say that the parties' written submissions on the appeal (and more particularly that from the local authority) did not really advance matters very much. Certainly the grounds of appeal were set out clearly enough by the solicitors for Dean's mother. However, regrettably the local authority was distinctly dilatory in filing a written response to the appeal. When it did, that response, drafted by the local authority's Senior SEN Casework Officer, was essentially a combination of a restatement of the council's case on the facts and a statement agreeing with the Tribunal's approach. The local authority's response did not really engage at all with the *legal* issues raised by the grounds of appeal. It is fair to assume, as Mr Wolfe suggested, that omission is precisely why UTJ Rowley took the decision to dispense with the need for the Appellant's reply to be filed and to go straight to an oral hearing.

8. Fortunately, and as noted above, at that hearing I had the benefit of extensive and well-focussed submissions from both Mr Wolfe for Dean's mother and Miss Cracknell for the local authority.

The relevant legislative framework

9. This appeal, of course, was brought under the Children and Families Act 2014, although I consider the legislative framework first by reference to its predecessor legislation.

10. Section 324(1) of the Education Act 1996 provided as follows:

> "**Statement of special educational needs**
> **324.** (1) If, in the light of an assessment under section 323 of any child's educational needs and of any representations made by the child's parent in pursuance of Schedule 27, it is necessary for the local education authority to determine the special educational provision which any learning difficulty he may have calls for, the authority shall make and maintain a statement of his special educational needs."

11. Section 37(1) of the Children and Families Act 2014 now provides that:

> "**Education, health and care plans**
> **37.** (1) Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan—
> (a) the local authority must secure that an EHC plan is prepared for the child or young person, and
> (b) once an EHC plan has been prepared, it must maintain the plan."

12. For completeness, I should perhaps add that (according to section 51(2)(b) of the Children and Families Act 2014) there is a right of appeal to the First-tier Tribunal against "a decision of a local authority, following an EHC needs assessment, that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan".

The relevant case law

13. The statutory language may have changed but, as Mr Wolfe submitted, the Upper Tribunal has taken the view that this is 'business as usual' as regards the relevant statutory meaning. Mr Wolfe helpfully took me through the authorities to illustrate the evolution of the case law. I did not understand Miss Cracknell to dissent from his analysis of that line of previous judicial decisions. With respect to Mr Wolfe, I think his analysis can be helpfully summarised as follows.

14. In *NC and DH v Leicestershire CC (SEN)* [2012] UKUT 85 (AAC); [2012] ELR 365 HH Judge Pearl put the position in these terms:

> "34. I agree with Ms Hammett [counsel for the local authority] who submits that the LA (and the Tribunal on appeal) must address two questions in determining whether it is necessary under s 324 to issue a Statement. The first question is whether the special education provision identified as necessary for the child in the assessment carried out under s 323 is in fact available within the resources normally available to a mainstream school. The second question is, if so, can the school reasonably be expected to make such provision from within its resources."

15. Mr Wolfe characterized this two-stage process as comprising the "can" question and the "will" question – can the child's special educational needs be met through provision from the resources normally available to a mainstream school and will they actually be so met? Having referred to further tweaks or added nuances in decisions such as *LS v Oxfordshire CC (SEN)* [2013] UKUT 135 (AAC); [2013] ELR 429, *Manchester CC v JW (SEN)* [2014] UKUT 168 (AAC); [2014] ELR 304 and *MC v Somerset CC (SEN)* [2015] UKUT 461 (AAC); [2016] ELR 53, Mr Wolfe took me to the decision of UTJ Mitchell in *SC and MS v Worcestershire CC (SEN)* [2016] UKUT 267 (AAC); [2106] ELR 537 (which, of course, Tribunal Judge Burrow had relied upon when refusing permission to appeal at first instance). UTJ Mitchell set out the issues in that case in this way:

> "1. In this case, the Upper Tribunal is invited to give guidance about the application of its decision in *NC & DH v Leicestershire County Council* [2012] UKUT 85 (AAC). In that case, the Upper Tribunal addressed the statutory test for deciding whether an authority is required, under section 324 of the Education Act 1996, to make and maintain a statement of special educational needs (SEN). The Upper Tribunal identified two questions to be asked, the second of which is whether "the [maintained, mainstream] school can reasonably be expected to make [the special educational provision called for] from within its resources".
>
> 2. I am told that answering this question has caused difficulties where a child does not, when the relevant decision falls to be taken, attend a maintained school.
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> 3. In my view, *NC & DH* should be applied pragmatically where the child in question does not attend a maintained school. In fact, I would respectfully suggest that a more practical route to the *NC & DH* destination is simply to ask whether, without a statement, the decision maker can be satisfied, to a

> reasonable degree of certainty, that the required educational provision will be delivered. In answering that question, regard should be had to the legal consequences of a statement (described in paragraph 40 below) in that a statement generates certainty of, and a significant degree of stability in, educational provision. The child is in part insulated from the trade-offs that, for other children, are an inevitable part of fixing their state educational provision."

16. In a later passage, and referring back to the test as posited by HH Judge Pearl in *NC and DH v Leicestershire CC (SEN)*, UTJ Mitchell held as follows:

> "49. While I do not disagree, I think perhaps a more practical route to the same destination is simply to ask whether, without a statement, the decision maker can be satisfied, to a reasonable degree of certainty, that the required educational provision will be delivered. In answering that question, regard should be had to the legal consequences of a statement as described in paragraph 40 above."

17. At paragraph 40 of his decision in *SC and MS v Worcestershire CC (SEN)*, UTJ Mitchell had noted that the "question whether it is 'necessary' to determine special educational provision has to informed by the wider legislative scheme of which the statementing provisions are part. If a statement is made, the child enters a world of specific educational entitlements that are not enjoyed by other children." UTJ Mitchell went on to itemise the key features of that "world of specific educational entitlements" (see paragraphs 40(a)-40(f)). Furthermore:

> "41. A statement therefore generates certainty of, and a significant degree of stability in, educational provision. The child is insulated in part from the trade-offs that, for other children, are an inevitable part of fixing their state educational provision. And so the legislative scheme shows that, for certain children with learning difficulties, Parliament decided not to rely on general statutory education obligations, including a governing body's section 317(1) "best endeavours" duty, to secure an appropriate education for the child. For certain children, an additional guarantee of appropriate educational provision was created. This should be taken into account in deciding whether it is necessary to determine a child's special educational provision."

18. For completeness Mr Wolfe also took me to *Hertfordshire CC v MC and KC (SEN)* [2016] UKUT 385 (AAC) and *Gloucestershire CC v EN (SEN)* [2017] UKUT 85 (AAC); [2017] ELR 193, both decided under the new statutory framework, although neither authority suggested the approach to this issue would be any different under the 2014 Act as compared with the 1996 Act.

The parties' submissions to the Upper Tribunal

19. Mr Wolfe's primary submission on the relevant law was that the touchstone was now the question as phrased by UTJ Mitchell in *SC and MS v Worcestershire CC (SEN)*, at paragraph 49 (see paragraph 16 above), building on the original two-stage formulation of HH Judge Pearl in *NC and DH v Leicestershire CC (SEN)*. He also noted that as in the present case, *SC and MS v Worcestershire CC (SEN)* concerned a child who was not currently in school at the material time, making the test as formulated there all the more germane.

20. Turning to the bundle before the Tribunal, Mr Wolfe argued that the local authority itself had applied a very narrow test in deciding whether an EHCP was necessary for Dean. In effect, the local authority had posed the question in terms of *could* Dean's needs be met in the absence of an EHCP, not *would* they be so met.

The local authority's case had been premised on an additional funding stream (top-up funding from the High Needs budget), but any school would need to have to make an application for such extra support and there was no guarantee that such further funds would be made available.

21. Mr Wolfe's submission was that the Tribunal had likewise failed to apply the proper test in considering whether section 37(1) of the Children and Families Act 2014 had been satisfied. The Tribunal, he said, had not properly identified the special educational provision that Dean needed. Moreover, the Tribunal had focused unduly on the question of whether appropriate provision could be made for Dean, and not whether it would be made for him. Put another way, the Tribunal had only asked what Mr Wolfe described as the "can" question, as also set out in paragraph 9.55 of the revised Code of Practice (i.e. the first bullet point, namely "whether the special educational provision required to meet the child or young person's needs can reasonably be provided from within the resources normally available to mainstream early years providers, schools [etc]"). It had failed to ask the "will" question. For example, the Tribunal had not properly addressed the issues of security and enforceability of such provision in the absence of an EHCP.

22. In summary, Miss Cracknell, resisting the appeal, submitted that the Tribunal had correctly identified the relevant legal test and had properly considered a range of evidence in arriving at its conclusion. It had dealt appropriately with the evidence of Dr Pugh, the educational psychologist instructed on behalf of Dean's mother. The local authority's evidence to the Tribunal was that reasonable provision would be made for Dean's special educational needs and the Tribunal had plainly accepted that evidence. The Tribunal may not have used the precise language of the test required by the statute and as re-formulated in *SC and MS v Worcestershire CC (SEN)*, but that was the test the Tribunal had applied.

The Upper Tribunal's analysis

23. Before turning to the First-tier Tribunal's decision under challenge here, I bear in mind three more general matters by way of the context for that analysis.

24. First, it is axiomatic, as Miss Cracknell rightly reminded me, that the Tribunal's decision must be read as a whole. As Lord Hope has put it, "judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it" (*Jones v First Tier Tribunal and CICA* [2013] UKSC 19 at [25]). That was a case in which the First-tier Tribunal's decision was in effect upheld by the Supreme Court even though its reasoning was "rather compressed" (*per* Lord Hope at paragraph 20). Furthermore, as Lloyd Jones LJ held in *Department for Work and Pensions v Information Commissioner and Zola* [2016] EWCA Civ 758 at paragraph [34] (dissenting on the outcome in that case but not on this point):

> "Given such expertise in a Tribunal, it is entirely understandable that a reviewing court or Tribunal will be slow to interfere with its findings and evaluation of facts in areas where that expertise has a bearing. This may be regarded not so much as requiring that a different, enhanced standard must be met as an acknowledgement of the reality that an expert Tribunal can normally be expected to apply its expertise in the course of its analysis of facts."

25. Second, I bear in mind that the challenge in this case has not been explicitly made on the basis that the Tribunal failed to explain adequately the reasons for its decision. Rather, Mr Wolfe's argument is that the Tribunal applied the wrong legal

test under section 37(1) of the Children and Families Act 2014. That submission must be considered through the prism of my first preliminary point as made in the preceding paragraph.

26. Third, it also seems to me this challenge must also be read against the background of the two competing cases being put to the Tribunal below. These were not simply competing cases with differences at the margins but wildly divergent cases. The case as put by Dean's mother was that Dean's special educational needs were so acute that he did not just need provision through a specialist school. Rather, he required full-time 1:1 support in a specialist school to meet those needs. The Tribunal noted that it was a disagreement over such an intensive level of provision that led to Dean's mother withdrawing him from the private school where he had been placed (see Tribunal's reasons at [3] and [10]). The local authority's case, on the other hand, was (in summary) that Dean had special educational needs, but they could (and would) be met in a maintained mainstream school setting within the available resources and without the need for an EHCP. I note in this context that the Tribunal expressly stated that it "did not find any expert specialist opinion that supported the contention that Dean requires full-time 1:1 support in order to meet his special educational needs" (Tribunal's reasons at [10]). I did not understand Mr Wolfe to be challenging that finding of fact.

27. So what then of the specific challenges to the Tribunal's decision?

28. Mr Wolfe's first main point in his oral submissions in this regard was that the Tribunal's characterisation of the local authority's case (Tribunal's reasons at [2]) was incomplete, in that the reference to the "existing resources of such a [maintained mainstream] school" was actually a reference to a combination of both such a school's ordinary budgetary allocation together with the opportunity to apply for (and not the guarantee of) top-up funding. However, the Tribunal's discussion at [15] and conclusion at [19] makes it plain that it was aware that the possibility of top-up funding was part of the wider picture. I return to this point later.

29. Secondly, Mr Wolfe attacked the Tribunal's formulation of the issue it had to address at [4] – "whether or not an EHCP is required in order to ensure that effective provision is required to be made in order to address the full range of Dean's identified special educational needs" – as not being a helpful way of putting the question. However, I bear in mind this is a decision by a specialist First-tier Tribunal, not a High Court Judge sitting in the Queen's Bench Division. The drafting may be a little rough and ready around the edges but that does not necessarily mean that the underlying process of reasoning was deficient.

30. Thirdly, Mr Wolfe focused on the Tribunal's treatment of the various professionals' evidence. For example, at [14] the Tribunal found that Dean's special educational needs were not so significant "as to make provision for those needs beyond the scope of what may reasonably be expected of a mainstream school". Similarly, in dealing with Dr Pugh's evidence at [15] – and this passage had been highlighted in the original grounds of appeal – there was reference to "resources that would normally be available to a mainstream school, including Top-up funding from the LA in accordance with its Local Offer." All this, Mr Wolfe submitted, showed that the Tribunal had exclusively focused its attention on the "can" question and not properly addressed the "will" question. However, to my mind this again involves reading the Tribunal's decision as though it had been drafted with the same degree of rigorous, lexicographical precision as a statute.

31. Fourthly, Mr Wolfe argued, as had the original grounds of appeal, that the Tribunal had simply failed properly to identify the special educational provision (SEP) that Dean needed. I readily accept that the Tribunal's decision does not comprehensively articulate that SEP. However, it is important to read the Tribunal's decision both as a whole and against the background of the respective cases being presented to it and also in the light of the issues on which it had to adjudicate. There was no dispute but that Dean has special educational needs (these were summarised in headline terms in the Tribunal's decision at [11]). One of the primary issues for the Tribunal to determine was whether those needs required the type of SEP regarded by Dean's mother as an absolute necessity or rather that much less intensive level of SEP envisaged by the local authority. On that fundamental question, the Tribunal plainly came down on the council's side of the argument, and explained why. The Tribunal also found, applying its specialist knowledge, that the SEP advocated by Dr Pugh was of a type that "could all be met from within a mainstream school setting" (at [16]). In addition, the Tribunal had specifically identified four discrete contentious issues about Dean's required SEP on which it had to rule (at [5a]-[5d]), matters which were all addressed in its later reasons (at [21a]-[21d]).

32. Finally, the Tribunal's concluding paragraph at [19] was said to demonstrate its erroneous approach to the relevant legal test (see paragraph 4 above). Again, the point was made that the Tribunal had asked itself the "can" question – namely "such provision as is required may be made…". On balance I prefer Miss Cracknell's submissions on this point. Paragraph [19] of the Tribunal's decision cannot be read in isolation. It is not the Tribunal's application of the relevant legal test, but rather a summary of its conclusion, having considered all the evidence in the case. The Tribunal's reasoning in this decision may well be "rather compressed", to borrow Lord Hope's formulation in *Jones*, but it is not so squeezed as to persuade me that it has misunderstood and misapplied the relevant test.

33. Mr Wolfe also took me to the way that the local authority had put its case to the Tribunal in its written response to the appeal. Again, he highlighted the focus in that response on what he said was the "can" question to the alleged exclusion of the "will" question, a failing which he argued was adopted by the Tribunal. Again, however, I consider this is falling into the trap of taking an overly literal and semantic approach to the interpretation of documents which are plainly not written with the same degree of precision as legislation. In the light of the competing cases as presented to the Tribunal, it is evident that the local authority's case was that Dean's special educational needs were akin to those of many other children whose such needs are catered for in mainstream schooling but without the need of the extra support provided by an EHCP. The logical inference was not only that his needs could be so met but they would be so met, were he actually being educated in maintained mainstream schooling.

34. In his submissions Mr Wolfe also made considerable play of the fact that the local authority's case was that the relevant resources included not just the school's standard budgetary allocation but also top-up funding, which required a separate application to the council's central funds, with no guarantee of success. The Code of Practice, of course, advises that councils, in deciding whether an authority is required to make and maintain an EHCP, should take into account whether the special educational provision required to meet the child's needs can reasonably be provided from within "the resources *normally available* to mainstream schools" (emphasis added). It is not immediately obvious whether this formulation refers (only) to generic mainstream provision, or whether the phrase can include further adjustments a

school might be able to make with supplementary funds, such as any top-up funding that may be available to it.

35. However, I do not consider this issue is decisive in the present appeal. For a start, the Code of Practice is of course just that, namely guidance, albeit important guidance, as to good practice. Moreover, a specialist Tribunal such as this will be well aware of the practicalities of any such supplementary funding arrangements. In addition, in the present case, as Miss Cracknell argued, it was not immediately obvious that such an application would actually be required. The Tribunal found, as noted above, that Dean's special educational needs were not so significant "as to make provision for those needs beyond the scope of what may reasonably be expected of a mainstream school" (at [14]). Furthermore, although the local authority had made considerable progress in identifying Dean's SEP, some of the specific details of that provision may not be identified until he was back in school. The question for the Tribunal was whether the terms of section 37(1) were met, as applied through the relevant case law discussed above. In my assessment this Tribunal, applying its specialist knowledge, had come to the view that in terms of what was known by way of Dean's needs for SEP, such provision was available and would be made available through a mainstream school setting. The Tribunal may not have adhered the precise language of *SC and MS v Worcestershire CC (SEN)*, but I am satisfied the test applied was whether the Tribunal was satisfied "to a reasonable degree of certainty, that the required educational provision will be delivered".

Conclusion

36. For the reasons explained above, and despite the attractively presented arguments advanced by Mr Wolfe, I agree with Miss Cracknell that the decision of the Tribunal does not involve any material error of law. I must therefore dismiss the appeal.

Signed on the original
on 12 September 2017

Nicholas Wikeley
Judge of the Upper Tribunal