HS/0150/2018

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
ON AN APPEAL**

Decision and Hearing

1. **This appeal by the local authority, brought by permission of the First-tier Tribunal, does not succeed.** In accordance with the provisions of section 12 of the Tribunals, Courts and Enforcement Act 2007 I decline to interfere with the decision of the First-tier Tribunal (Health, Education and Social Care Chamber) made under reference EH330/17/00068 after a hearing on 19th October 2017, with written reasons dated 23rd October 2016 and amended on 2nd November 2017, allowing an appeal in respect of the Education, Health and Care Plan (“the plan) ”for the appellant dated on or about 22nd January 2017.

2. I held an oral hearing of this appeal at Field House (London) on 17th July 2018. The appellant is the local authority (“the authority”). It was represented by Paul Greatorex of counsel. The respondent did not attend and was not represented, in circumstances that I explain below. I shall refer to the respondent as “Karen” (not her actual name).

The Legal Framework

3. This appeal concerns a young person as defined in the legislation, rather than a child, and I will structure my references accordingly. Section 36 of the Children and Families Act 2014 (“the 2014 Act”) provides for a local authority to assess the education, health and care needs of a young person in certain circumstances (an EHC needs assessment). This might result in the preparation of an EHC Plan (as it did in the present case). If, in the light of the assessment, it is necessary for special educational provision to be made for a young person in accordance with an EHC Plan, the local authority must secure the preparation of, and maintain, an EHC Plan (section 37(1) of the 2014 Act). Section 37(2) prescribes what must be specified in the plan. This includes specification of the special educational needs, the outcomes sought, and any special educational provision required.

4. Sections 20 and 21 of the 2014 Act, so far as is relevant, provide as follows:

> 20(1) A child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her.
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> (2) … a young person has a learning difficulty or disability if he or she –
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>> (a) has a significantly greater difficulty in learning than the majority of others of the same age; or

> (b) has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.

> 21(1) "special educational provision" for … a young person means educational or training provision that is additional to, or different from, that made generally for others of the same age in [maintained schools or maintained post-16 institutions in England].

5. Section 21(3) defines "health care provision" and section 21(4) defines "social care provision". Section 21(5) provides as follows:

> 21(5) Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision).

I observe that "trains" in section 21(5) must relate to the activities within the meaning of "training" in section 21(1) and that by virtue of section 83(2) of the 2014 Act and section 15ZA(8) of the Education Act 1996, "training" includes full-time and part-time training, apprenticeship training, and (section 15ZA8(b)):

> (b) vocational, social, physical and recreational training.

6. The way that an EHC Plan is structured is specified in The Special Educational Needs and Disability Regulations 2014. Regulation 12 specifies nine sections of the plan, A to G, H1 and H2. Section B specifies the special educational needs and section F specifies the required special educational provision. In general terms the provision specified in section F is predicated on the needs specified in section B.

7. In East Sussex County Council v TW [2016] UKUT 528 (AAC) Upper Tribunal Judge Jacobs explained the working of the above provisions (references are to paragraph numbers of that decision):

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

> 18. Direct special educational provision is identified under [section 20 and section 21(1) and (2)] in the exercise of the local authority's education functions.

> 20. In London Borough of Bromley v SENT [1999] ELR 260 at 295 [Lord Justice] Sedley noted that educational and non-educational provision were not wholly distinct categories.

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

Background

8. Karen was born on 5th May 2000. She has difficulties with dyslexia, numeracy, information and auditory processing, anxiety and PTSD, and self-esteem. The First-tier Tribunal set out details of her educational history but it is not necessary to repeat all of that here. In June 2016, after completing her GCSE exams, Karen started to attend "the College", which is some distance from her home. She did not want to attend a more local college where she might come across those who had bullied her at a previous school.

9. On 22nd January 2017 the authority issued an Education, Health and Care Plan in respect of Karen. She objected to much of the content and on 24th March 2017 appealed to the First-tier Tribunal. By the time the First-tier Tribunal considered the matter on 19th October 2017 most of the contested issues had been agreed apart from the question of assistance with transport. The First-tier Tribunal described a multi-stage journey between home and college that could take between 60 and 90 minutes each way. On most days, due to her anxiety, Karen found this too difficult and her mother would drive her some or all of the way. The difficulties resulted in a low level of attendance and promptness.

The First-tier Tribunal

10. The First-tier Tribunal started that it was "mindful of the case law which establishes that transport is not a special educational need and thus the Tribunal has no jurisdiction to consider transport". However, the tribunal then stated that it was relying on my decision in AA v London Borough of Haringey [2017] UKUT 241 (AAC) (the "Haringey" decision or case) and went on to consider Karen's transport difficulties.

11. In section B of the plan the tribunal added (with the agreement of the authority):

> "[Karen] is not yet an independent traveller due to anxiety and specific learning difficulties and therefore …is unable to access public transport without assistance".

12. The tribunal noted that it was unable to quantify the type of transport assistance as no risk assessment had been carried out and neither Karen nor her mother was able to identify the exact type of assistance that would be effective. However, the problem was impacting on college attendance. It inserted the following in Section F:

> "Transport to be provided for [Karen] to secure her attendance at college until the end of the Autumn term to allow an assessment of her transport needs to be concluded. Thereafter, appropriate support to assist [Karen] to become an independent traveller and reduce her anxiety so that she can access public transport without assistance".

Appeal to the Upper Tribunal

13. On 29th November 2017 the authority applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal against the above decision. On 13th December 2017 permission was given by a judge of the First-tier Tribunal, who also stayed the order of the First-tier Tribunal pending further order of the Upper Tribunal.

14. At the request of the authority and after written submissions had been lodged, on 19th March 2018 I directed that there be an oral hearing of this appeal. Unfortunately, this could not take place until 17th July 2018. Meanwhile, on 18th June 2018 Karen's solicitors wrote to the Upper Tribunal indicating that the effective dates of the First-tier Tribunal's amendment to the plan in respect of transport had passed, from Karen's point of view the outcome would be academic and she was no longer seeking to contest the appeal. Her solicitors were content for the matter to be set aside by consent or for the matter to be determined in her absence. In June 2018 the authority had offered her transport by way of a taxi under its transport policy, quite separate from any tribunal jurisdiction.

15. On 29th June 2018 the authority wrote to the Upper Tribunal to the effect that it still wished to go ahead with the appeal in order to clarify the legal position. The following extract is from paragraph 2 of the skeleton argument from Mr Greatorex dated 29th June 2018:

> "… the key issue of general importance is whether transport to and from a school … can constitute special educational provision which can be ordered by the First-tier Tribunal in section F of an EHC plan. As set out below, the clear and consistent answer given by case law from 1998 to 2016 was that it could not but then in [the Haringey case] the Upper Tribunal held that this was a question of fact to be decided in each case by the First-tier Tribunal".

The Haringey Case

16. The Haringey case was about whether and what reference, if any, to the child's transport difficulties, should be made in his EHC plan. The local authority did provide an allowance to his mother to drive him to school, in accordance with section 508 of the Education Act 1996, but the exercise of that power was not one of the matters specified in section 51 of the 2014 Act in respect of which there was a right of appeal to the First-tier Tribunal. Purporting to rely on the decision of the Upper Tribunal in Staffordshire County Council v JM [2016] UKUT 0246 (AAC) the First-tier Tribunal stated that school transport was neither a special educational need, nor special

educational provision and as such the First-tier Tribunal had no jurisdiction to order the provision of school transport.

17. I set aside that decision of the First-tier Tribunal on the basis that Staffordshire concerned an adult and that section 508F of the 2014 Act, on which the decision was based, applied only to those over the age of 19. I continued (references are to paragraph numbers of the Haringey decision):

> 10. However, certain more general statements were made and other authorities cited. In relation to the predecessor provision of section 21(1) (above) Upper Tribunal Judge S M Lane said (references are to paragraph numbers and the emphasis is mine):
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> > "23. It is clear from the wording of these provisions that a special educational need must *arise* from a learning difficulty. It is also clear that the learning difficulty must call for special educational provision.
> >
> > 24. On this language it cannot be sensibly argued that a need for home to school transport arises from a learning difficulty *in and of itself*. Nor, on the wording, can home to school transport be classed as a form of special educational provision. …"
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> 11. There is nothing in these comments, and citations from other decisions to similar effect, that I disagree with, but they go to questions of fact to be decided (on an appeal) by the First-tier Tribunal. They do not go to jurisdiction. I am unaware of any authority that states in terms that as a matter of law transport needs can never constitute a special educational need and that measures to deal with them can never in any circumstances whatsoever be specified in the plan (or in the forerunner statements of a special educational need).
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> 12. For the above reasons I consider that the First-tier Tribunal was in error of law in stating that it had no jurisdiction to consider transport matters in this context and was in breach of the rules of natural justice and fair procedure in refusing to hear argument on this from the appellant's legal representatives. It might well be that the panel could envisage no circumstances in which it would accede to such arguments, and it might well be that the new panel will reject them, but that is not the point. The First-tier Tribunal should have listened to the arguments.

The Grounds of Appeal

18. Mr Greatorex wants me to say that the Haringey case was wrongly decided. He argued that the key issue is whether transport to and from a school (or other relevant establishment) can ever constitute special educational provision which can be ordered in section F of an EHC plan. As he put it in his written skeleton argument of 29th June 2018:

> "the clear and consistent answer given by case law from 1998 to 2016 was that it could not but then in [the Haringey case] the UT held that this was a question of fact to be decided in each case …".

He suggested that there were two particular problems with my decision "which have led to uncertainty and confusion", although at the hearing before me he accepted that there is no statutory provision to support his "clear and consistent answer". The two problems are (a) that I had not given an example or indication of facts which could lawfully lead the First-tier Tribunal to conclude that school transport is special educational provision and (b) that I had not indicated the scope or nature of the factual inquiry required or the legal test to apply.

19. His second problem is quite easily dealt with. School transport is capable of being special educational provision if it educates or trains (section 21 of the 2014 Act, and see also ESCC v JC [2018] UKUT 81 (AAC)). It is for an appellant to make the case that the transport fulfils some educational or training function or for the First-tier Tribunal to consider this pursuant to its inquisitorial or quasi-inquisitorial function. The answer will depend on the facts of the particular case. I acknowledge that Mr Greatorex has submitted a list of authorities which have held or appear to have held that transport cannot possibly be special educational provision but this is a statutory regime, the 2014 Act is new legislation and, although it could easily have done so, it did not exclude that possibility.

Conclusions

20. I do accept that in this particular case the decision of the First-tier Tribunal in relation to school transport was made in error of law because it did not consider whether the provision that it ordered to be made would educate or train so as to bring it within what is authorised by the 2014 Act. In that sense it misunderstood and/or misapplied my decision in Haringey. However, section 12 of the Tribunals, Courts and Enforcement Act 2007 provides as follows (my emphasis):

> 12(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
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> (2) The Upper Tribunal -
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> > (a) may (but need not) set aside the decision of the First-tier Tribunal, and
> > (b) …

21. In this particular case, (a) I do not want to interfere with the decision made by the First-tier Tribunal in relation to matters other than transport (b) the passage of time and other developments make a fresh First-tier Tribunal hearing or any order that I might make inappropriate (c) the end of the Autumn term is already some time ago (d) the use of the wording "appropriate support" in the First-tier Tribunal's order does

not really tie the hands of the authority and (e) I accept the suggestion of Karen's solicitors that in effect the appeal in relation to transport has become academic.

H. Levenson **25 July 2018**
Judge of the Upper Tribunal