IN THE UPPER TRIBUNAL **Case No**. **UA-2021-000264-HS**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Health, Education and Social Care Chamber)

Between:

AA & BB

Appellants

- v –

North Somerset Council

Respondent

Before: Upper Tribunal Judge Mitchell

Representation: Appellants: in person
Respondent: Browne Jacobson LLP Solicitors

DECISION

Decided on consideration of the papers.

The decision of the First-tier Tribunal, taken on 4 August 2021 under file ref. EH 802/20/00009, did not involve an error on a point of law. Under section 11 of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal dismisses this appeal.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 the Upper Tribunal hereby makes an order prohibiting the disclosure or publication of any matter likely to lead to a member of the public identifying the child with whom this appeal is concerned. This order does not apply to (a) the child's parents acting in the due exercise of their parental responsibility; (b) any person to whom a parent so discloses, or authorises publication of, a matter described above (c) the disclosure or publication of such a matter by any

person in the exercise of statutory (including judicial) functions in relation to the child.

REASONS FOR DECISION

Background

1. The Appellant parents appealed to the First-tier Tribunal ("the Tribunal") against the contents of an EHC Plan prepared under the Children and Families Act 2014 ("2014 Act") by the Respondent local authority in respect of their son whom I shall refer to as R, and I trust this causes no offence. The issues arising on the appeal included the placement to be specified in section I of R's Plan. For the purposes of this appeal, I need not describe the Tribunal's findings regarding R's needs and required special educational provision. The final Tribunal hearing was on 23 June 2021, and, in September of that year, R was due to begin his final year of primary schooling. Both parties were represented by counsel at the final hearing.

2. The authority proposed that Belgrave School, an independent special school, be named in section I of R's Plan but the Appellants disputed its suitability. Their case was that R "will not be able to return to formal education for at least another year and they propose he is educated otherwise than at a school [EOTAS] for his last year of primary" and "during that year a long transition to secondary school should be provided so that he can re-enter formal education in a school in September 2022" (paragraph 22 of the Tribunal's statement of reasons).

3. The Appellants argued that R "has suffered trauma from experiences at the schools he attended that causes him significant anxiety over returning to school", it would be inappropriate to put him through two transitions within a year and no suitable primary school had been identified (paragraph 152).

4. The Tribunal remarked that 'EOTAS' was not a concept with "legal status" under the 2014 Act and that the issue of law was instead the application of section 61 of that Act (paragraph 97). Section 61 is headed "Special educational provision otherwise than in schools, post-16 institutions etc." and, for convenience, I shall set out its relevant provisions here:

> "(1) A local authority in England may arrange for any special educational provision that it has decided is necessary for a child…for whom it is responsible to be made otherwise than in a school…

(2) An authority may do so only if satisfied that it would be inappropriate for the provision to be made in a school…"

5. The Tribunal asked itself "whether it is inappropriate to make [the special educational provision required by R] in a school" (paragraph 148) and directed itself that if there were "some obstacle to a school delivering the special educational provision we have identified…it cannot be appropriate for the…provision to be made in a school" (paragraph 151). The Tribunal found that it was more likely than not that a school, mainstream or special, would be able to deliver the required provision which was "nothing so out of the ordinary that a school would be unable to deliver the provision" (paragraph 151). The Tribunal further found that R's school-related anxiety was not such as to prevent it from being addressed in a school setting (paragraph 158).

6. The transition issue was "whether it would be inappropriate to expect [R] to return to school to complete Year 6 when he will then have to manage a further transition to secondary school" (paragraph 159). The parents proposed that R should attend an 'all-through school' and had "identified Brymore [Academy] and report that the headteacher has indicated that they would be willing to work with [R] during his Year 6 as a "shadow pupil" to prepare him for transition to that school in Year 7" (paragraph 159).

7. The Tribunal did not accept that R's anxiety made it inappropriate to "put [R] through two transitions within a year". A child with R's profile, who had been absent from school-based education for a time, would be more likely to make a successful transition back to such education in a primary school setting. From such a setting, he would be better placed subsequently to manage transition to secondary school. The necessary integration into school-based learning would be absent under the "model proposed by the parents" because R would be out of school-based learning for another year (paragraph 160).

8. Both parties argue that, until the final hearing, they believed that a place was available for R at Belgrave School. The Tribunal's statement of reasons shows that it also began the final hearing under that same assumption. However, Belgrave School's Headteacher gave evidence at the final hearing that R's offer had been withdrawn. The Tribunal was "somewhat surprised" by this evidence but "the only relevant matter is that the place was no longer offered" (paragraph 162). Since Belgrave School was not approved under section 41 of the 2014 Act, it could not be named in section I of R's EHC Plan in the absence of an offer of a place.

9. The Tribunal considered itself unable to name the parents' preferred school because there had not been time to "conduct the necessary consultations" nor consider the school's suitability and whether, if suitable, R's placement there would be compatible with the efficient education of others (paragraph 164). The result was that the Tribunal was required, at the last minute, to deal with an appeal involving a child for whom no specific placement was available.

10. The Tribunal found that, for the purposes of section 61 of the 2014 Act, the absence of a specific placement option did not, "make it inappropriate to make the special educational provision he requires in school" (paragraph 165). The lack of a placement was not relevant because the evidence did not show that "the possible school placements had been exhausted" (paragraph 166). Both parties had stopped looking for placements; the authority once it had identified Belgrave School and the parents once they had identified EOTAS followed by placement at Brymore Academy. The Tribunal only became aware that R's offer of a place a Belgrave School had been withdrawn on the second day of the final hearing and the authority had not had time to review its position.

11. The absence of a specific placement "despite the efforts of the parents and the LA" was not "sufficient to engage section 61", although the Tribunal observed that the authority was required under general education legislation to secure alternative arrangements for R's education until "a school placement can be found" (paragraph 167). That might involve education otherwise than at school but that was because "there was no school place for him at all" not because it was inappropriate for the required provision to be delivered in a school. The Tribunal did not name a specific school in section I. Instead, it specified a type of school namely a mainstream school.

Ground of appeal

12. The Upper Tribunal granted the Appellants permission to appeal on a single ground, described as follows in the Upper Tribunal's permission determination:

> "51. In my view, the strongest…arguments…are those which relate to Belgrave School's withdrawal of an offer of a place for R. On the face of it, the material supplied by the Appellants with this application shows that, in March 2021, Belgrave School withdrew their offer of a place for R. It seems arguably clear that the FtT was unaware of this until the final hearing in June 2021…The FtT noted Mr Skinner's [Belgrave School's headteacher] surprise that his

> 'message' about withdrawal of R's place had not been "passed on"…The FtT may therefore have been unaware that the place was withdrawn about three months before the final hearing.
>
> 52. The FtT found that "the only relevant matter" was that R's place had been withdrawn. Be that as it may, arguably the proceedings were conducted unfairly (albeit the unfairness was arguably not generated by the FtT itself) by the local authority's apparent failure promptly to inform the FtT and the Appellants that Belgrave School was no longer a placement option. The Appellants have a realistic prospect of establishing that the proceedings were unfair because they were left with almost no time to respond to the fact that, by the date of the final hearing, there was no longer any specific placement option for R put before the FtT. Alternatively, the FtT arguably erred in law by failing to consider whether fairness required an adjournment in order for steps to be taken by at least the local authority to try to identify an alternative suitable placement…".

Subsequent developments

13. After the Appellants were granted permission to appeal in this case, they applied for permission to appeal against the First-tier Tribunal's decision on their separate appeal against a subsequent iteration of R's EHC Plan (Upper Tribunal case ref. UA-2022-000786-HS). The Appellants were unable to attend a hearing of that application before Upper Tribunal Judge Wikeley on 22 August 2022, but the local authority's counsel attended and submitted that the appeal had become academic. That case concerned an EHC Plan for the 2021/22 academic year, but the parties had agreed that, from September 2022, R would attend a mainstream Academy. Even if the Appellants' appeal succeeded, "there would be no practical impact on the ground as there would be no purpose in remitting to a new FTT" (as Judge Wikeley described counsel's submission). Judge Wikeley invited the Appellants to withdraw their application for permission to appeal and, if they were not so minded, proposed, subject to any representations they might make, to strike out the application under rule 8(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008 on the ground that it had no reasonable prospect of success.

14. The Appellants made representations against the proposed strike out. The authority also made an application for proceedings on the application to be struck out.

15. Judge Wikeley was not persuaded by the Appellants' representations:

(a) the Appellants' argued that their aim was to secure an EHC Plan which fully reflected R's needs and required special educational provision. However, R was now attending a new school, which was not named in the EHC Plan under challenge so that, if the appeal succeeded and the matter was remitted to the Tribunal, it would be "dealing with an entirely historic issue";

(b) the Appellants argued that they wanted to prevent recurrence of a situation in which they had no choice but to educate R at home. However, this was not consistent with them having withdrawn their section 61 case during the hearing before the Tribunal;

(c) the present appeal would not have affected the case before Judge Wikeley. Each case must be determined on its merits and the Appellants had not explained how the outcome of the present appeal might influence the case before Judge Wikeley.

16. Judge Wikeley found that the Appellants had "failed to get close to showing there is any arguable and material error of law in the First-tier Tribunal's decision", and their case was "fundamentally flawed". On 31 October 2022, the judge struck out the proceedings on the Appellants' application.

The arguments

The local authority

17. The authority submit that the underlying issue of law on this appeal concerns a local authority's duty to the First-tier Tribunal "within the appeal". The authority rely on Upper Tribunal Judge West's decision in *AJ v London Borough of Croydon* [2020] UKUT 246 (AAC) in which he said, at paragraph 129, that an authority's duty at a hearing is to "assist the Tribunal by making all relevant information available", "not to provide only so much information as will assist its own case" and "should be placing all its cards on the table, including those which might assist the parents' case". The judge added, at paragraph 130, that, in an appropriate case, the authority's duty extended to obtaining further evidence.

18. The question on this appeal, the authority submit, is simply whether they provided all relevant information to the Tribunal. The authority argue that they did, for the following reasons:

(a) the authority received a letter from Belgrave School on 14 March 2021 stating that R's offer of a place had been withdrawn. Had the circumstances not changed, the authority accept that they would have been required to draw the letter to the attention of the Tribunal and the Appellants;

(b) however, there were developments. After receiving the letter from Belgrave School's Headteacher, the authority arranged a *Teams* on-line meeting on 22 March 2021. The attendees included the Headteacher and the authority's solicitors. The outcome of that meeting was that Belgrave School withdrew the letter of 14 March 2021 so that "there was no need to forward that letter on";

(c) following the Teams meeting on 22 March 2021, the authority's understanding was that "the option of a placement at Belgrave remained open";

(d) given that understanding, "there was, therefore, an element of surprise when the Respondent's counsel re-joined the remote hearing [on an unspecified date but presumably 24 June 2021, the second day of the final hearing]…to find the judge already engaged in a conversation with the Respondent's witness from Belgrave School and that the tenor of that conversation and the witness' subsequent evidence was that the offer of a placement had been withdrawn". The authority could not challenge this evidence because "it was given when the Respondent's Counsel was not part of the…proceedings at that point due to connection issues";

(e) so far as the authority knew, nothing had changed after the March 2021 meeting and Belgrave School remained a live placement option. It follows that "the duty to provide an update to the Appellants and the Tribunal was not engaged". The authority was as much taken by surprise as were the Appellants.

19. In any event, submit the authority, the duty described in *Croydon* "would not have been engaged in these circumstances". Since the authority argue that no Croydon-type duty arose, this submission it is not entirely clear. I think, however, that this submission is probably that the nature of the issues before the Tribunal meant that the absence of a specific placement option was not a relevant matter. The Appellants presented a "range of arguments against placement at Belgrave" and "pressed for" continued home-schooling. The key issue was the application of section 61 of the 2014 Act, but the absence of a specific placement proposal was not relevant to that question. The Appellants were not prejudiced by this unexpected turn of events which, in any event, concerned a school to which they objected.

20. The authority also advance the following argument:

> "Whilst the Respondent accepts the Appellants made reference to a potential placement at Brymore Academy, that is a secondary school and their son, if in a school, would have been in year 5. The Respondent would direct the Upper Tribunal to consider the decision of the First Tier Tribunal in the Second Appeal on that point. There was no need for an adjournment when the parties and the First Tier Tribunal were clear about the focus of the appeal – section 61 and EOTAS."

21. I think the above argument is directed at the second aspect of the ground of appeal, namely whether the Tribunal erred in law by failing to consider whether to adjourn.

22. The authority submit that this appeal concerns purely historical matters, which affects disposal of the case should the appeal succeed. There have, by now, been a further three iterations of R's EHC Plan. Currently, R "has a school named (by agreement between the parties) in section I of his current EHCP", R began attending that school in September 2022 and his placement "is appropriate and secure". A successful appeal would secure R no practical benefit because he now attends a different school under a different EHC Plan. Furthermore, in the Tribunal proceedings with which Judge Wikeley's case was concerned, the Appellants "surrendered the Section 61 argument and instead sought unsuccessfully to bring forward [R's] secondary placement". I think the point is that, in the authority's view, the parents have abandoned any aim for R to be home-schooled.

The Appellants

23. The Appellants' written reply argues that this appeal is not academic because "there remains an ongoing need to appeal due to the continuous failings of the Respondent to undertake its statutory duties". They also argue that they should not be prejudiced by a matter over which they have had no control namely the passage of time.

24. The Appellants dispute the authority's submission that the main issue before the Tribunal was section 61 of the 2014 Act. This overlooks the authority's own failure to consult any other schools and formulate a 'back-up plan'.

25. The Appellants argue that the authority inaccurately describes events following Belgrave School's letter of 14 March 2021 withdrawing R's offer of a place. The Appellants provide the report of an investigation into a formal complaint that they made against the local authority. The report was written in January 2022 by an individual from outside the authority, presumably as part of the relevant statutory local authority complaints procedure.

26. According to the complaint report, the Appellants claimed that the authority "deliberately withheld the letter [of 14 March 2021] from the SEND Tribunal in order to influence the Tribunal decision". The complaint investigator interviewed local authority officials, the authority's external solicitors and the Headteacher of Belgrave School, and his report included the following:

(a) the letter of 14 March 2021 "specifically requested that the letter was passed on to the Tribunal" but was sent to neither the Tribunal nor the Appellants;

(b) on 22 March 2021, a local authority official and the authority's solicitors met Belgrave School's Headteacher. No formal record of the meeting was obtained by the investigator but the official and solicitors both recalled the Headteacher agreeing to rescind the letter, and to give evidence at a tribunal hearing on 30 March 2021 (that hearing was postponed);

(c) the Headteacher, however, "recalled that he confirmed that he would give verbal evidence at the Tribunal and would make the point in his evidence that, in his view, another school of similar character to Belgrave could meet R's needs", but "still expected that his letter of 14 March 2021 would be forwarded to the Tribunal and that his verbal evidence would be an adjunct to that". The Headteacher was surprised to learn, at the hearing on 23 June 2021, that the Tribunal was unaware of the letter;

(d) the investigator did "not find that the letter was deliberately withheld from the Tribunal…in order to influence the Tribunal's decision";

(e) the investigator found "the outcome of the meeting [on 22 March 2021] was ambiguous and led to confusion about the status of the letter". The local authority attendees thought the letter "had been withdrawn" but the Headteacher "believed that the letter stood and would be forwarded to the Tribunal by the local authority prior to his verbal evidence being given";

(f) the investigator found "there are failings in this case around clarity of communication". There were no notes of the meeting on 22 March 2021 and the status of the letter of 14 March 2021 was not clarified which "should not have been the case". The case "highlights the importance of ensuring that there is a clear summary of outcomes at the end of discussions and that outcomes are recorded in SEND Team case notes".

27. The Appellants submit that Belgrave School did not rescind their letter of 14 March 2021 and the authority remained subject to the requirements of section 42 of the 2014 Act. The authority's duty was to secure a school for R or make other arrangements for the educational provision he required. But the authority did neither.

28. The Appellants dispute the assertion that the authority's counsel experienced connection problems during the June 2021 hearing. The Appellants provide copies of their hand-written hearing notes which record Tribunal Judge McCarthy stating, "after everyone disconnected Mr Skinner [Belgrave School's Headteacher] appeared in the participants list so we let him in to explain that we had paused so that he could be contacted to check he was available this morning". Subsequently, the notes record, "video call lost – people disconnected" but that was when social work evidence was being discussed.

29. The Appellants submit that, having been present at several hearings attended by the authority's counsel, they would have expected him to raise immediately a matter such as the disconnection problem described by the authority. The Appellants recall no such disconnection. The 'element of surprise' felt by counsel, as described by the authority, was not evident at the hearing. Moreover, neither the authority's counsel nor any witness made any mention of a meeting in March 2021 in which Belgrave School's headteacher was supposed to have agreed to rescind the letter of 14 March 2021. The obvious reason why is that the Headteacher did not, at any time after writing the letter, change his mind and restore R's offer of a place at Belgrave School.

30. The Appellants ask why the authority did not discuss the case with their witnesses as part of their preparation for the final hearing. Had they done so, the reported misunderstanding between the authority and Belgrave School would have come to light and could have been addressed. The Appellants' reply also criticises other aspects of the authority's conduct in the Tribunal proceedings but in my view, these are not material to this appeal.

31. The Appellants find it difficult to understand why no note was kept of the reported meeting on 22 March 2021. It was attended by a firm of solicitors paid for by the authority and the record-keeping provisions of SEN Code of Practice required a note to have been made and filed.

32. The Appellants submit that the authority misrepresent their case before the Tribunal. They were not 'very much opposed' to any school being named in R's EHC Plan. For at least three years, they had been trying to persuade the authority to secure a suitable school placement. The Appellants made their own enquiries, but it was difficult, if not impossible, to visit potential schools during Covid-related lockdowns. The Appellants requested 'EOTAS' as a last resort in response to the authority's prolonged failure properly to discharge their statutory duties.

33. The Appellants argue that they were prejudiced by the late revelation that Belgrave School had withdrawn R's offer of a place. Their preparation for the final hearing focussed on their argument that Belgrave School was not suitable. Once it became clear that Belgrave School was no longer a placement option, the Tribunal should at least have considered whether to adjourn the hearing.

35. There are deficiencies with R's current EHC Plan, submit the Appellants, but I shall not deal with that submission because this appeal does not relate to R's current Plan although I record their statement that "while [R's current] placement is stable and [he] is happy attending, he is still not receiving sufficient support because of the Respondent's failure to recognise need or update the plan".

Conclusions

Observations on the local authority's case

36. The local authority's written response to this appeal is deficient. It is an amalgam of legal submissions and (largely new) written evidence. The evidence, if that is the correct term, largely takes the form of mere factual assertions. Many of these assertions appear to be second or even third hand hearsay. The response is also presented without any obvious consideration having been given to the fact that the Upper Tribunal's function is to determine whether a Tribunal's decision involved an error on a point of law.

37. The authority's response deals with the conduct of proceedings before the Tribunal. That is not surprising since this appeal is about the fairness of proceedings.

I did not, however, expect the response to include a number of factual assertions all of which were new to me namely:

(a) Belgrave School's Headteacher agreed to rescind the letter of 14 March 2021, withdrawing R's offer of a place, at a meeting held on 22 March 2021 between the Headteacher and local authority representatives;

(b) the authority's counsel had connection problems during the Tribunal hearing when Belgrave School's headteacher was giving evidence via video link;

(c) someone (presumably the authority's counsel) felt surprise at the hearing, once counsel's connection was restored, that the Headteacher's oral evidence was that a place was no longer available for R at Belgrave School;

(d) counsel thought he could not challenge that evidence because he was disconnected from the remote hearing when the Headteacher's evidence was given. I note that the response does not explain how, in those circumstances, counsel became aware of the evidence.

38. No attempt was made in the authority's response to support these assertions by reference to documentary evidence in the Tribunal's bundle or any part of its statement of reasons. There was nothing approaching a formal written witness statement accompanied by a statement of truth. It is not clear whether the maker of the statement (the drafter of the response) sought to convey first, second or third-hand information. For instance, the response states that someone, presumably the authority's counsel, felt surprise at the Headteacher's oral evidence yet counsel thought he could not possibly engage with the evidence because it was given while he was disconnected from the hearing. The authority's response was not written by counsel, so this was not a first-hand report. How did the authority learn about these matters? Did counsel inform the authority's solicitors? Or did counsel inform a local authority official who then informed the solicitors? I have no idea, of course, but that is the point. It is as if the authority think that any assertion will be accepted as fact by the Upper Tribunal simply because it is made by a local authority. By contrast, the unrepresented Appellants provided documentary evidence to support the factual assertions made in their reply to the authority's response.

39. The deficiencies in the authority's response did not end there. The authority obviously knew about the February 2022 complaint investigator's report. The

authority's solicitors must have been aware of the investigation as well because two members of its staff were interviewed by the investigator. Not only does the authority's response make no reference to this report, it asserts as undisputed fact certain matters expressly found in the report to have been uncertain. Belgrave School's Headteacher agreed at the meeting of 22 March 2021 to rescind the letter of 14 March 2021, according to the authority's response, but the complaint investigator recorded a very different recollection on the part of the Headteacher. According to the report, the Headteacher thought the withdrawal letter of 14 March 2021 stood and he would be questioned on it at a forthcoming tribunal hearing. All this uncertainty arose because, according to the report, no 'formal notes' were kept of the meeting or, if kept, not retained which, if correct, is surprising because, in my experience, solicitors invariably maintain attendance notes for all solicitor-client interactions.

40. Turning now to matters that are not purely procedural, the authority's response states that R began at a new school in September 2022, which was an "appropriate and secure" placement so that the provision in the EHC Plan at issue in these proceedings was now of only historical interest. I accept that R started at a new school in September 2022 but that is because the Appellants' subsequent reply confirms this. The authority should have provided at least a copy of the current iteration of R's EHC Plan rather than simply assume that everything they said would be uncritically accepted by the Upper Tribunal.

41. The new evidence advanced by the authority probably falls outside the *Ladd v Marshall* [1954] EWCA Civ 1 restrictions on the admission of new evidence on appeal (the evidence could not with reasonable diligence have been obtained for use at the first instance trial; the evidence would probably have had an important influence on the result; the evidence must be apparently credible). The evidence does not relate to matters of fact that were in issue before the Tribunal. Evidence about the fairness of proceedings relates to an issue that the Upper Tribunal determines for itself namely whether proceedings were conducted fairly. The other evidence supplied by the authority is relevant to disposal of the proceedings (if the appeal succeeds). However, parties cannot assume that unsupported factual assertions / evidence, which fall outside the *Ladd v Marshall* conditions, will nevertheless be accepted by the Upper Tribunal without further ado.

42. This is not a call for greater formality in proceedings before the Upper Tribunal. A strength of the tribunal system is its relative informality and flexibility. But parties should ask themselves for what reason the Upper Tribunal, as it endeavours to

conduct proceedings fairly, might accept unsupported factual assertions of the type advanced by the authority. Why, for example, might the Upper Tribunal consider it fair to accept what a third party asserts about how counsel 'felt' during a tribunal hearing? And why should the Upper Tribunal accept an assertion made about the outcome of a meeting, at which no notes were taken, when one of those present (the Headteacher) subsequently gave an account that could not be reconciled with the authority's description of a meeting with a supposedly clear agreed outcome? It seems to me that asking the question provides the answer. If the Upper Tribunal were uncritically to accept unsupported factual assertions, such as those relied on by the authority, there would be a real risk of unfairness.

Did the First-tier Tribunal's decision involve an error on a point of law?

43. The Appellants say that they were taken by surprise at the final Tribunal hearing when it became apparent that the local authority's preferred placement, Belgrave School, had withdrawn R's offer of a place. This is consistent with the authority's appeal response which says that they were also taken by surprise (the authority say it was all the fault of Belgrave School's Headteacher who, for whatever reason, unilaterally resiled from the 22 March 2021 agreement to reinstate R's offer of a place).

44. The authority's account of events has peculiar features. The 22 March 2021 meeting with Belgrave School's Headteacher concerned a significant issue for ongoing proceedings and a Tribunal hearing was imminent. However, according to the complaint investigator's findings no one, including the authority's solicitors, thought it necessary to take a note of the meeting or, if a note was taken, to retain it. None of the participants thought it necessary subsequently to confirm the meeting's outcome in writing either. At the final Tribunal hearing, the authority's counsel considered himself unable to question the Headteacher about his (on the authority's account) extraordinary decision to renege on an agreement to restore R's offer of a place because counsel had been disconnected from the remote hearing. A matter entirely beyond counsel's control, a deficient internet connection, therefore prevented him from dealing with a point that he would otherwise have addressed. On the authority's account, their counsel did not inform the panel that, for reasons beyond his control, he had not heard the Headteacher's evidence (of which he had nevertheless become aware) and did not ask for the evidence to be re-given or a summary provided. It is not for me to make findings about professional conduct but those reported actions were, at the very least, surprising.

45. I should make it clear that the counsel in question has not been involved in these proceedings and, for all I know, is ignorant of the authority's description of his feelings during the Tribunal hearing and their explanation for his passivity after being disconnected from the hearing. I make no finding at all as to the correctness of the authority's description and I wish to emphasise that nothing in these reasons is to be read in any way as a criticism of the conduct of the authority's counsel.

46. The authority argue that they could not have failed to provide relevant information to the Tribunal because they went into the final hearing believing that a place remained open for R at Belgrave School. Until the Headteacher's *volte face* at that hearing, there was simply no information to be provided. It is for the Appellants to make out their case on this appeal. As matters stand, they have not proven on a balance of probabilities that the authority knew, at the outset of the final Tribunal hearing, that Belgrave School had withdrawn R's offer of a place. This is not, however, a finding of fact that events occurred as described by the authority. Neither party's evidence has been tested and I could not fairly make a finding one way or another without receiving further evidence about the events of March 2021. I do not however consider it is necessary to receive further evidence in order fairly to determine this appeal. In fact, I do not consider it necessary to conduct any hearing to determine this appeal. No party has requested a hearing, the issues arising are not matters of particular legal complexity and I consider it unlikely that oral argument would make me any better informed about the parties' cases.

47. The Appellants' case before the Tribunal was that Belgrave School was unsuitable and section I of R's EHC Plan should instead specify a year's EOTAS followed by attendance at Brymore Academy, a mainstream school. I am informed that Belgrave School was an independent school but was not approved by the Secretary of State under section 41 of the 2014 Act. This meant that, were Belgrave School named in section I, it would have been under no duty to admit R under section 43(2) of the 2014 Act. Once it became clear that R's offer of a place had been withdrawn, Belgrave School ceased to be a practical placement option and its suitability or otherwise became a non-issue. The Appellants argue that their preparation for the final hearing focussed on their case that Belgrave School was unsuitable so that they were prejudiced by the late revelation that R's offer of a place had been withdrawn. However, the parents were represented by counsel at the Tribunal hearing. They do not argue that their counsel sought an adjournment and there is no indication in the Tribunal's statement of reasons that an adjournment was sought to allow the parents

to respond to the changed context to R's case. The Appellants were not in my judgement materially prejudiced by the late disappearance of Belgrave School as a placement option. Given the issues on the Tribunal appeal, this was not a case in which the need for an adjournment was obvious. Since the Appellants' counsel did not request an adjournment, it is more likely than not that the view was taken that an adjournment was not required. It is now too late to re-open that point. Upper Tribunal proceedings do not provide represented parties with an opportunity to re-visit the litigation strategy adopted in the tribunal below.

48. Did the late disappearance of Belgrave School as a placement option materially affect the Appellants' ability to argue their case for EOTAS followed by placement at Brymore Academy? That argument was dependent on a finding that section 61 of the 2014 Act applied. The power to arrange for special educational provision to be made otherwise than at a school under section 61(1) only arises if a finding is made that "it would be inappropriate for the provision to be made in a school" (section 61(2)). I agree with the Tribunal that this was a discrete issue whose resolution was unaffected by the disappearance of Belgrave School as a placement option. In my judgment, the Tribunal directed itself correctly in law when it framed the section 61 issue as being whether, in general, it would be inappropriate for the provision required by R to be made in a school. The generality of the section 61 test is shown by the enactment's reference to "a school". I am therefore satisfied that the late disappearance of R's offer of a place at Belgrave School did not impair the Appellants' ability to argue that R's EHC Plan should provide for a year's EOTAS followed by placement at a specific mainstream school.

49. For the above reasons, I decide that the ground on which permission to appeal was granted is not made out. This appeal is dismissed. This may well be considered unsatisfactory by the Appellant parents. While I have not made findings of fact about the events of 2021, the parents' complaints are not, on the face of it, fanciful. However, the Upper Tribunal's role in an education case is circumscribed by the law under which it operates as well as the particular grounds of appeal. I cannot ignore those limitations and carry out a roving examination of one party's conduct during Tribunal proceedings.

50. The Appellant parents' probable disappointment at the outcome of this appeal may be lessened by the fact that, had I allowed this appeal, I would not have set aside the Tribunal's decision. If the Upper Tribunal sets aside a decision of the First-tier Tribunal, it must either remit the case to that Tribunal for reconsideration or re-make

the decision itself (section 12(2), Tribunals, Courts and Enforcement Act 2007). Neither option would be appropriate (serve any practical purpose) in this case because R's current EHC Plan, which is not at issue in these proceedings, has materially changed not least because it now includes a specific placement in section I. If the contents of the current Plan are to be challenged, a fresh appeal to the First-tier Tribunal would be required.

Mr E Mitchell,
Judge of the Upper Tribunal.
Authorised for issue on 15 February 2023