THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2023-000056-HS
[2023] UKUT 225 (AAC)
LONDON BOROUGH OF CAMDEN V KT

Decided following an oral hearing on 7 September 2023

Representatives

London Borough of Camden	Aileen McColgan KC, instructed by Baker Small Solicitors
KT	Charlotte Hadfield and Alice de Coverley, instructed by Geldards LLP

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

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

Reference:	EH202/21/00009
Decision date:	Originally 21 September 2022, but re-dated on 15 December 2022

The effect of the First-tier Tribunal's decision is no longer suspended.

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. This appeal concerns the Education, Health and Care Plan (EHCP) authorised for P by the First-tier Tribunal. P was born in 2008 and has had an EHCP since 2019. He has autism, attention deficit hyperactivity disorder and dyslexia. KT is P's mother.

2. The case involves a prolonged attempt to identify a new EHCP for P. The First-tier Tribunal made its decision on 21 September 2022. That followed a hearing that was divided between 17 June 2022 and 26 August 2022, followed by written submissions on 6 September 2022. There had been adjournments in November 2021

and March 2022 to allow a search for a suitable placement and the production of an updated Educational Psychologist report.

3. The essence of the appeal to the Upper Tribunal is that the First-tier Tribunal fundamentally misunderstood the argument put by the local authority's specialist solicitor, leading it to fail to complete one section of the EHCP, and to make special educational provision for P that (to quote Ms McColgan at the hearing) lacked sufficient detail, could not be ensured or enforced, and in one instance was not fit for purpose. Finally, it is (I believe) argued that the tribunal had no power to order education other than at school (EOTAS) at all, or certainly not without the consent of the local authority.

A. History and background

4. I now consider each of the grounds of appeal, adopting as my headings those used by Ms McColgan in her skeleton argument.

B. Ground 1: The FTT erred in law by failing to consider the suitability of CCfL [the Camden Centre for Learning]

5. The essence of the argument is that the First-tier Tribunal misunderstood the local authority's submission to the tribunal. It is accepted that the local authority's solicitor used the acronym EOTAS. As I have said before, I do not understand why that is the acronym, because the legislation refers to education other than *in* a school, not *at* school. Be that as it may, this is governed by section 61 of the Children and Families Act 2014. This provides:

> **61 Special educational provision otherwise than in schools, post-16 institutions etc**
>
> (1) A local authority in England may arrange for any special educational provision that it has decided is necessary for a child or young person for whom it is responsible to be made otherwise than in a school or post-16 institution or a place at which relevant early years education is provided.
>
> (2) An authority may do so only if satisfied that it would be inappropriate for the provision to be made in a school or post-16 institution or at such a place.
>
> (3) Before doing so, the authority must consult the child's parent or the young person.

Regulation 12(1)(i) of the Special Educational Needs and Disability Regulations 2014 (SI No 1530) is also relevant to the argument:

> **12 Form of EHC plan**
>
> (1) When preparing an EHC plan the local authority must set out-
>
> …
>
> (i) the name of the school … to be attended by the child … (section I); …

6. Ms McColgan argued that EOTAS was an imprecise expression. The authority's solicitor had used it in a context that showed the authority did not accept that there would be no involvement from a school, specifically CCfL. Accordingly, the tribunal should have named CCfL in section I.

7. I do not accept that EOTAS is a vague expression. I have only ever heard it used as a reference to a case in which section 61 applies. It was used by a specialist solicitor to a special tribunal, which was entitled to take him at his word. I notice that in the final version of the Working Document – the version of the draft EHCP that the tribunal used as the basis for its decision – this passage was included in Section F:

> P will require special educational provision to be delivered somewhere other than in a school (EOTAS).

The marking in the document shows that it was agreed by both parties. If EOTAS is imprecise, it should not have been included. The local authority must have considered it sufficiently clear when it agreed to it.

8. I am reluctant to criticise the tribunal for taking a specialist solicitor at his word when he referred to EOTAS. I have, though, to accept Ms McColgan's argument that the local authority's written closing submission made clear that the authority did not accept that education at home, or at least exclusively at home, was appropriate. Nevertheless, the tribunal did not make an error of law. It may have misunderstood that the issue was agreed, but it did not simply proceed on that basis. It made its own assessment and came to its independent conclusion that it would be inappropriate for P's special educational provision to be made in a school. That is clear from paragraph 48 of its written reasons:

> 48. … Having considered all the evidence, we agreed with the parties' assessment that at this stage, it would be inappropriate for any such special provision to be made in any school. We observed that P had tried five schools unsuccessfully and there has been great difficulty in identifying suitable placement throughout these proceedings.

The rest of the tribunal's reasoning is consistent with it having done what it said – made its own assessment of whether section 61 applied.

9. As there would be no involvement from a school, P would not be attending a school for the purposes of regulation 12(1)(i). So, the tribunal did not need to name a school in Section I.

10. In support of her argument that section 61 did not apply and CCfL should have been named in Section I, Ms McColgan referred me to parts of Section F, ordered by the First-tier Tribunal, which (she said) could only be provided in a school. She referred me to three entries. One refers to P requiring 'highly structured, clear and predictable routines and boundaries and explicit instructions.' A second refers to him requiring 'multi-sensory teaching methods to be employed as often as possible, capitalising on visual methods'. I see no reason why either of those refers to provision in a school. Both are equally applicable regardless of context. The third refers to techniques that must be used by 'Staff working with' P 'both within a group and individually'. This is the strongest of Ms McColgan's points. Leaving aside the words I have quoted, the techniques mentioned are equally applicable outside a school. A few infelicitous words in over five pages of provisions in Section F is not sufficient to make her argument good in the context of consistent statements that the tribunal was relying on section 61.

C. Grounds 2 & 3: The FtT erred in law by describing a school in Section F, having found that it was not appropriate to do so in respect of Section I, and by seeking to amend the decision by removing references to the type of school described in Section F on the basis that this was a clerical error.

11. This is what happened. Section F of the Working Document contained a reference, proposed by KT, that referred to the type of school that would be suitable when P was ready to return to the classroom.

12. When the local authority applied to the First-tier Tribunal for permission to appeal, Judge Tudur refused permission to appeal, but ordered that that passage be removed. She purported to act under rule 44 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699):

> **44 Clerical mistakes and accidental slips or omissions**
>
> The Tribunal may at any time correct any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it, by—
>
> (a) sending notification of the amended decision or direction, or a copy of the amended document, to all parties; and
>
> (b) making any necessary amendment to any information published in relation to the decision, direction or document.

13. This is how the judge explained her decision:

> … the reference to the future proposed placement should have been removed by the tribunal before the final decision was issued. Applying rule 44, the omission was a clerical error which can be corrected and the description of the proposed placement has now been removed and the decision reissued …

14. This is what I said in giving permission to appeal:

> I am doubtful about the change to the decision as a purported correction. Judge Tudur said that the reference to placement should have been removed (paragraph 7 of her decision refusing permission). That is not the test for a correction, which is whether the tribunal intended to remove it but failed to do so.

I stand by that. Rule 44 only applies to bring a decision into line with what the tribunal decided. It does not permit a chance to bring a decision into line with what a tribunal should have decided. The removal of the passage was not authorised by rule 44.

15. I am not, though, going to set the decision aside on this ground for these reasons.

16. The judge could have achieved the same result under the review power in section 9 of the Tribunals, Courts and Enforcement Act 2007:

> **9 Review of decision of First-tier Tribunal**
>
> (1) The First-tier Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 11(1) (but see subsection (9)).
>
> (2) The First-tier Tribunal's power under subsection (1) in relation to a decision is exercisable—
>
> (a) of its own initiative, or

(b) on application by a person who for the purposes of section 11(2) has a right of appeal in respect of the decision.

…

(4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following—

(a) correct accidental errors in the decision or in a record of the decision;

(b) amend reasons given for the decision;

(c) set the decision aside.

(5) Where under subsection (4)(c) the First-tier Tribunal sets a decision aside, the First-tier Tribunal must either—

(a) re-decide the matter concerned, or

(b) refer that matter to the Upper Tribunal.

Those provisions would have allowed the judge to review the decision, set it aside and re-decide the matter with the offending passage removed. The procedure would have taken more time, but the result would have been the same. To put it in a different way, the mistake was not material.

17. I have decided that the mistaken use of rule 44 was not material, for the reason I have explained. The effect is that the First-tier Tribunal's decision stands as changed by Judge Tudur: see the decision of the Supreme Court in *R (Majera (formerly SM (Rwanda))) v Secretary of State for the Home Department* [2022] AC 461.

18. Ms McColgan made the point that if the judge had followed the review procedure, the local authority would have had a chance to persuade the judge of other errors in the tribunal's decision. That is correct, but I am not attempting to rewrite history. My point is that the slip rule was not the only option available.

19. Even if I had decided that the mistake was material, this would not have secured a rehearing. This is a result of the options available to the Upper Tribunal under section 12 of the 2007 Act:

12 Proceedings on appeal to Upper Tribunal

(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.

(2) The Upper Tribunal—

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either-

… or

(ii) re-make the decision.

Applying those provisions, I could have re-made the decision under section 12(2)(b)(ii), removing the offending passage. Or I could have decided not to set the decision aside,

despite the error. This approach is authorised by the words in brackets in section 12(2)(a).

D. Ground 4: The FTT failed to give any reasons why it ordered the specified dyslexia provision in Section F despite the objections from the Local Authority

20. Ms McColgan accepted at the hearing that this was a reasons challenge, not a challenge to the finding that P had dyslexia. I reject this ground of appeal.

21. The tribunal relied on the evidence of Dr Kelly. The tribunal said early in its conclusions:

> 40. We found the evidence of Dr Kelly particularly impressive. Dr Kelly provided well-reasoned and clear answers to the questions that he was asked. …

The tribunal made the same point when it dealt with section F:

> 49. The question therefore arose as to what should be specified as the EOTAS provision in section F. Mr Small [solicitor for the local authority] acknowledged in his submission that he was unable to refer to any report which set out the LA's proposals around the EOTAS provision.
>
> 50. We accepted the report of Dr Kelly. We found Dr Kelly's evidence on this issue to be particularly impressive. His evidence was also more recent. Dr Kelly explained his conclusions with substantive reasons as to what underpinned those conclusions. We accept all his recommendations around EOTAS with the exception of the therapies. …

The tribunal then explained that the therapies were health provision. In paragraphs 53-57, it accepted the doctor's recommendations on a number of specific matters.

22. The law requires a tribunal to give adequate reasons for its conclusions. It was not obliged to accept Dr Kelly's evidence, despite the fact that it was expert evidence. It did not simply accept it; it explained why it did so. And in giving that explanation, it referred to the doctor's reasons. Those were the conclusions of a specialist panel who heard evidence from Dr Kelly, including answers on cross-examination and to questions from the panel. They accepted the doctor's conclusions and his reasons for them. Their reasons adopted his reasons. That was adequate.

23. I accept that the tribunal did not deal with the local authority's criticisms, but that was not necessary. The tribunal had to explain why it made its decision and that is what it did.

E. Ground 5: The FTT erred in law by ordering provision in Section F that was neither special educational needs provision nor was enforceable or deliverable provision and failed to give reasons why it did not accept the [local authority's] objections in relation to each of them.

24. As presented at the hearing, there were three aspects to this ground. First, there were some provisions that were not sufficiently specific. Second, there was an overarching argument that the provisions were unworkable. Third, there was an argument that I find difficult to summarise, because Ms McColgan changed the way

she expressed it in response to my questions. The best I can do is quote from her skeleton:

> 57. … The home may be the venue in which some EOTAS is delivered by agreement with parents. This cannot, however, be ordered by an FtT which has no power to impose obligations on parents via an EHC Plan. Nor can a local authority require that parents provide access to the home (real or virtual) for the purposes of delivering EOTAS provision. …

25. As presented, this argument would be determinative of the appeal and of fundamental importance as a limitation on the jurisdiction of the First-tier Tribunal. It puzzled me that so important an argument was left until almost the end of Ms McColgan's skeleton argument and literally to the end of the oral hearing. which made me wonder if I had misunderstood it.

26. The best way I can find to deal with this ground is to begin at the beginning and proceed methodically through the legislation that the tribunal had to apply.

27. The starting point is with P's special educational needs. Section 20(1) provides that he has such needs if he 'has a learning difficulty or disability which calls for special educational provision'. Section 21(1) provides that special educational provision means 'educational or training provision that is additional to, or different from, that made generally for others of the same age in mainstream schools in England'.

28. P satisfies those conditions. (a) The tribunal found that he has a disability: autism, attention deficit hyperactivity disorder, and dyslexia. The local authority has not challenged those findings, including the finding of dyslexia. (b) The tribunal found that this disability called for a range of provision. This provision included that it be delivered for the time being outside a school. That finding was based on and supported by the evidence of Dr Kelly and by P's experience at five different schools. In order for P's education to be effective, it had to be delivered at his home, at least for the time being. (c) By definition, a provision for a child's education to be delivered outside a school is different from provision generally available in schools. In conclusion, on the evidence in this case, I see no objection in principle to EOTAS being included in Section F. If Ms McColgan was arguing that EOTAS can never have any place in Section F, as I thought she was at one point, I reject it.

29. So much for the principle, I now come to section 42 of the 2014 Act:

> **42 Duty to secure special educational provision and health care provision in accordance with EHC Plan**
>
> (1) This section applies where a local authority maintains an EHC plan for a child or young person.
>
> (2) The local authority must secure the specified special educational provision for the child or young person.
>
> …
>
> (5) Subsections (2) and (3) do not apply if the child's parent or the young person has made suitable alternative arrangements.
>
> (6) 'Specified', in relation to an EHC plan, means specified in the plan.

30. Ms McColgan relied on section 42(2). I accept that it imposes a duty on a local authority to 'secure' the special educational provision specified in an EHCP. But that duty is subject to section 42(5). It does not arise for so long as the child's parent has made 'suitable alternative arrangements'.

31. Ms McColgan argued that neither a local authority nor the First-tier Tribunal could impose on a parent the responsibility of making alternative arrangements. I accept that. It would render the legislation redundant if that were possible. But that is not what has happened in this case. The local authority did not impose EOTAS on KT, nor did the First-tier Tribunal. It was KT who argued for the provision and the tribunal accepted her argument. She could, of course, refuse to provide the provision. I cannot think of reason why she might do that, but if she were to do so, the plan would have to be revised and different provision ordered.

32. Ms McColgan relied on the language of section 42(2) to criticise some provisions in Section F on the ground that they were not enforceable or that the local authority could not ensure delivery. Just to take one example, the tribunal approved a provision that 'Noise levels must be kept to a minimum where possible and practicable'. Ms McColgan argued that that could not be enforced and therefore not secured. I reject that argument. The issue in this case is not whether the local authority can secure the provision. There is a prior issue, which is whether KT has made suitable alternative arrangements.

33. It may be possible in some cases to know at the time of the hearing in the tribunal that the parent has not made, and cannot or will not make, suitable arrangements. In such cases, a local authority could argue that section 42(5) was not satisfied. Following on from that, it could then argue that Section F should only make provision that it could secure. That is not how the local authority's case was put in the closing written submission to the First-tier Tribunal. The focus there, as in Ms McColgan's argument to the Upper Tribunal, was on the local authority's responsibility to secure the provision.

34. Given the contents of Section F in this case, the issue is rather one of enforcement. Issues of enforcement arise, by definition, after the tribunal has made its decision and are, therefore, outside the scope of an appeal to the Upper Tribunal, which is a challenge *to the decision*. What happens if, after the tribunal has made its decision, the local authority is not satisfied that KT has made suitable alternative arrangements? If that were to happen, the appropriate course is for the local authority to review the EHCP and, if not necessary, remove the EOTAS provision. But that is for the future, not for an appeal.

35. I come now to the provisions that Ms McColgan said was insufficiently specific. This almost always involves an element of judgment. There is a limit to the amount of detail that can realistically and sensibly be included. They should be read and applied with that in mind.

36. Ms McColgan identified two provisions in her skeleton that 'are vague and insufficiently specific to be delivered'. The first related to the provision for dyslexia. She argued that the reference to 'dyslexia specialist' was 'wholly unclear' and that there had been 'no attempt whatsoever to particularise the nature of the intervention'. I do not accept those arguments. As to the reference to a specialist, this is a borderline question. There will be people who are specialists on any definition. It should surely be

possible to identify someone within that category, even if there are others whose status may be more doubtful. As to the nature of the intervention, the tribunal specified that this 'would be dependent on the assessments done by the specialist teacher'. That was sensible and I do not see how it could have been made more specific. The second provision referred to 'a daily EOTAS package, at home, delivered by specialist staff (with specialism in ASD and SEMH)'. Those acronyms refer to autistic spectrum disorder and social, emotional and mental health needs. Ms McColgan criticised this for being 'wholly unparticularised both as to the nature of the package and the nature of the staff'. ASD and SEMH again raise borderline questions, which I have already dealt with. As to the failure to particularise the nature of the package, the sentence following the words I have quoted begins: 'It will need to include the following.' Indeed, the whole of Section F could in a sense be seen as providing the necessary particulars.

37. At the hearing, Ms McColgan also referred to a long entry beginning: 'P will require positive, sympathetic, caring and knowledgeable management strategies that aim to help P develop social confidence and skills, and facilitate social inclusion.' She described this as being not fit for purpose. I do not accept that. The passage goes on to identify some matters that would be included. Otherwise, this is something that may properly be left to the judgment of individual teachers and others. If this passage is open to criticism, it is that it should not be necessary to specify something that every teacher would wish to deliver.

38. That is sufficient to give a flavour of the arguments on particular provisions. There was more, but I am not going to analyse each provision that Ms McColgan criticised. It is sufficient to say that I accept Ms Hadfield's submissions in her skeleton argument.

39. That leaves the overarching unworkable argument. Having presented her criticisms of specific provisions, Ms McColgan made an overarching argument that the contents of Section F were unworkable. In so far as this merely repeated her specific criticisms, I have already dealt with them. In so far as she intended to make an additional point, it is unparticularised and too general to deal with, so I reject it.

Authorised for issue
on 13 September 2023

Edward Jacobs
Upper Tribunal Judge