



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**UT REF: UA-2023-001548-HS
[2024] UKUT 317 (AAC)**

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

Between:

EM by way of his alternative person and mother Ms EM

Appellant

- v -

Royal Borough of Windsor and Maidenhead

Respondent

Before: Upper Tribunal Judge Price

Decision date: 28 May 2024

Decided following an oral hearing on 17 April 2024.

For the Appellant: Mr O Persey, Counsel

For the Respondent: Mr J Anderson, Counsel

Under rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 it is ordered that no person may disclose or publish any matter likely to lead to a member of the public identifying the young person with whom this appeal is concerned. This order does not apply to (a) the young person's parents, (b) any person to whom a parent discloses such a matter where disclosure is in the best interests of the young person, (c) any person exercising statutory (including judicial) functions in relation to the young person.

DECISION

The decision of the Upper Tribunal is to allow the appeal.

1. This appeal is allowed. The decision of the First-tier Tribunal (20 June 2023, First-tier Tribunal file reference EH868/22/00040) involved an error on a point of law.
2. The Upper Tribunal sets the decision aside under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. The Upper Tribunal remits the Appellant's appeal against the local authority's decision to cease to maintain the Education Health Care Plan to the First-tier Tribunal for re-determination in accordance with the directions given at paragraph 54, which follow the reasons for this decision.

Reasons for decision

Introduction

1. EM was born on 11 September 2004. He has a diagnosis of Autistic Spectrum Disorder (ASD) and associated difficulties with his speech and language skills. EM's mother acting as EM's alternative person submitted an appeal on 29 June 2022. The appeal concerned the Respondent's decision dated 26 May 2022 to cease to maintain EM's Education, Health and Care Plan (EHC Plan) dated 24 July 2021.
2. That appeal was then heard before the First Tier Tribunal (FtT) on 11 May 2023. The FtT made a decision and gave reasons that were sent to the parties on 20 June 2023. On 17 July 2023, the Appellant applied to the FtT to:
 - a. set aside the FtT's decision;
 - b. for a review of the FtT's decision; and failing that
 - c. for a grant of permission to appeal to the Upper Tribunal (UT).
3. District Tribunal Judge Sean Bradley refused these applications on 26 September 2023.

Summary

4. This case concerns a local authority's decision to cease to maintain an EHC Plan for a disabled young person. The authority's decision was upheld by the FtT. The appeal against the FtT's decision succeeds. The FtT's approach to the question of whether on-going social or health care would deliver the special educational provision required by the young person, involved an error on a point of law.

The relevant legal framework

5. Section 45(2) of the Children and Families 2014 Act (2014 Act) provides:

‘The circumstances in which it is no longer necessary for an EHC plan to be maintained for a child or young person include where the child or young person no longer requires the special educational provision specified in the plan.’

6. As held by Upper Tribunal Judge Mitchell in *B & M v Cheshire East Council* [2018] UKUT 232 (AAC) the use of ‘includes’ in section 45(2), shows that the cases in which maintenance of an EHC Plan is no longer necessary are not restricted to the case where the specified special educational provision is no longer required.
7. Section 45 (3) provides ‘When determining whether a young person aged over 18 no longer requires the special educational provision specified in his or her EHC plan, a local authority must have regard to whether the educational or training outcomes specified in the plan have been achieved’.
8. Section 45(3) is supported by section 44(5) of the 2014 Act, which provides, ‘In reviewing an EHC plan maintained for a young person aged over 18, or deciding whether to secure a re-assessment of the needs of such a young person, a local authority must have regard to whether the educational or training outcomes specified in the plan have been achieved’.
9. Section 20 (1) provides ‘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’.
10. Section 21 defines special educational provision in the following terms:
 - (1) “Special educational provision”, for a child aged two or more or a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in—
 - (a) mainstream schools in England,
 - (b) maintained nursery schools in England,

(c) mainstream post-16 institutions in England, or

(d) places in England at which relevant early years education is provided.

...

(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)...’.

11. In *EAM v East Sussex CC* [2022] UKUT 193 (AAC) the UT set out that ‘Section 21(1) defines ‘educational provision’. Section 21(5) refers to ‘health care provision ... which educates or trains a child’. Those expressions are different... A provision may be educational without itself educating a child [8-9].

12. Section 77 of the 2014 Act provides that the Secretary of State may publish a Code of Practice to provide guidance to local authorities in respect of EHC Plans. Pursuant to section 77, the Secretary of State published the SEND code of practice. It provides the following relevant guidance to local authorities,

9.199 A local authority may cease to maintain an EHC plan only if it determines that it is no longer necessary for the plan to be maintained, or if it is no longer responsible for the child or young person...the legal definition of when a child or young person requires an EHC plan remains the same as that for a statement under the Education Act 1996 ...

9.200 The circumstances where a local authority may determine that it is no longer necessary for the EHC plan to be maintained include where the child or young person no longer requires the special educational provision specified in the EHC plan...’

13. Section 77(6) of the 2014 Act provides, ‘the First-tier Tribunal must have regard to any provision of the code that appears to it to be relevant to a question arising on an appeal under this Part’.

14. In *Buckinghamshire County Council v SJ* [2016] UKUT 0254 (AAC) the UT considered when it was necessary to maintain an EHC Plan. It held ‘*The tribunal had to decide [whether to cease to maintain] as a practical matter. ... the issue was not about what Ryan needed but about access to it. Necessity has to be judged practically and in light of the reality, not by reference to attainments that are more theoretical than real*’ at [33].

15. Further, and helpfully, in *B & M v Cheshire East Council*, the UT came to the very rational conclusion that '*...in deciding whether to cease to maintain an EHC Plan, a local authority should ask itself whether a young person would meet the test for preparing and maintaining an EHC Plan in the first instance. If the answer is 'yes', I do not see how a local authority could properly decide that it is no longer necessary for an EHC Plan to be maintained*'.
16. Relevant case law also assists with the scope of the duty on FtT's to give reasons for their decisions. In *H v East Sussex CC* [2009] EWCA Civ 249 the Court of Appeal explained that the FtT '*is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts*' [16-17].
17. However, there is a general expectation, the FtT will need to make findings on the disputed aspects of the case put such that a party knows why their case on each disputed aspect has been rejected, *JJ & EE v Buckinghamshire Council* [2022] UKUT 345 (AAC) [33].
18. In *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, the court concluded that '*...where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the [FtT] must enter into the issues canvassed before [it] and explain why [it] prefers one case over another. That is likely to apply particularly in [appeals] where, as here, there is disputed expert evidence; but it is not necessarily limited to such cases*'.

Prior to the FtT appeal

19. EM attended School A, a maintained generic special school. The FtT heard evidence that School A was a purpose-built special school which was rated good by Ofsted and 26% of its pupil cohort have a diagnosis of ASD. EM attended School A between September 2013, when he was in year 3 and 13 July 2022, when he was in year 12.
20. It was reported by senior staff at School A that EM's continued attendance would be detrimental to him, in terms of him being isolated and staffed on a ratio of 2:1. During EM's annual review in October 2020, School A outlined that despite being a special school, it did not have a suitable curriculum or cohort for EM and, therefore, they would not be able to accommodate him in Key Stage 5.

21. During the 2021-2022 academic year School A continued to provide EM's provision even though the School had stated it could not meet his needs and was not named on his EHC Plan.
22. It was agreed by the parties to this appeal that the Appellant had not met the outcomes as defined in his EHC Plan.
23. In a decision dated 6 May 2022 the Respondent decided to cease to maintain EM's EHC Plan. The letter stated that '*[EM] has demonstrated recently at School A that he is not able to access formal education and make progress, and it is the Local Authority's view that he can be better supported in the adult care environment. School A is unable to continue to support him due to the level of his complex behaviours, and there is no evidence to suggest that any other education placement would be able to support him more successfully. The local authority is no longer seeking an education placement for [EM] and is of the view that he needs to transition into an adult social care placement for the safety of himself and his peers...*'.
24. Since July 2022, EM has been in receipt of care for six days a week for eight hours each day (totalling 48 hours per week). The care EM receives is from a care agency on a ratio of 2:1. The carers provide support on Monday to Saturday from 9am to 5pm. The activities during the week include attending an activity centre called Thornley. This has trampolines, soft play, bikes and outdoor activities for EM to experience.
25. At the time the matter was heard by the FtT interim tutoring was being provided by a tutoring service called Home School Tutoring. Sessions took place twice a week for two hours a day. This support commenced in the home setting on 9 January 2023.

The FtT appeal

26. Both parties attended the appeal hearing and were represented. At the end of the oral hearing the parties were both provided with an opportunity to make written submissions and duly did so. The bundle before the FtT was 930 pages in length and included a variety of expert reports as well as other factual evidence, which the FtT listed as 'including reports ... from therapy professionals, behaviour analysts, psychiatrists and health professionals, annual review meetings and a social worker'. The FtT heard oral evidence from: Miss Hilary Whitlock (East Berkshire Continuing Healthcare), Miss Jacqui Steel, (Head of Campus Ambitious College), Miss Rebecca Askew (Educational Psychologist) and Mrs Helen Hannam (Associate Headteacher of School A).

27. The Appellant argued in closing submissions that:

- The Local Authority acknowledge that [EM] has more to learn, but consider the question is whether [provision] should be delivered in a care environment or an educational one.
- Ms Askew recommended a range of provision which she assumes should be available through continuing healthcare. Ms Askew considered it would be the carers who would be responsible for observing [EM]'s baselines and measuring his progress. However, the evidence before the FtT suggested this task was not part of a carer's role. Therefore, EM could not access the education and training he needs without input from teaching staff, part of whose role will be to work with the carers on developing [EM's] skills.
- EM has an educational need for OT as special educational provision, and this cannot be delivered without an EHCP.
- EM requires input from a speech and language therapist (SLT). Input cannot be obtained without an EHCP. It was accepted by both parties that EM has significant communication challenges. A referral was supposed to be made to a SLT by NHS continuing health care. The purpose of the referral was to obtain a therapist's advice on strategies to be incorporated into EM's daily activities. The referral could not be progressed as the NHS would only accept the referral if it was made by EM's GP.
- If the care agency were to hire their own SLT or Occupational Therapist (OT) (which was being explored) this would be to provide training to carers rather than providing any direct therapy to EM.
- There was a clear identified recommendation from a music therapist that music therapy should continue.

28. The LA's response in closing submissions was that:

- The reality is that EM will not benefit from further special educational provision.
- That EM has been unable to make educational progress for some time. EM is resistant to educational demands being placed upon him.

- Ms Askew, specifically considered the question of whether further educational provision was needed for EM. Her report was extremely thorough and concluded that EM does not require educational provision as such but that his needs will be better met through adult social care.
- SLT and OT services are available for adults where needed and, in any event, training by an SLT and OT for carers is not uncommon. The FtT heard evidence that there had already been meetings between carers and such professionals in this case.
- Music therapy could be commissioned.
- The care agency were recruiting their own OT and SLT.

The FtT conclusions

29. There was a dispute before the FtT about the level of progress EM had made whilst he attended at School A. On that issue the FtT concluded ‘We find that despite EM appearing to make some progress towards his outcomes, this is the result of intensive adult support’ and that ‘[the local authority’s] submission is that EM’s attainment is in line with his potential; we find this is the case. Whilst we accept that with sufficient practice in consistent and settled circumstances, routines might develop, we do not consider this to be evidence of significant learning potential’ [35].
30. The FtT considered that ‘even with a very high level of support, the 2022 review identified progress and Ms Askew’s assessment indicate that progress was “minimal”’ [34]. EM’s attainment was in line with his potential [35]. EM had been in education within a specialist environment until year 12 and that ‘he had failed to make significant progress over that time nor have his adaptive skills increased [33] ... ‘evidence we have shows he made some progress during his period at School A although this has not been maintained. He has failed to sustain and make progress despite a bespoke provision including a high level of staffing and specialist advice’ [37].
31. The reasons continued, ‘In summary, noting EM’s inability to function both within a school and his requirements to participate in current tuition sessions, we do not consider it realistic that he can acquire independence and employment skills beyond those that might be developed as part of a daily living or social care routine’ [38].

32. Finally, the FtT concluded that ‘We do not accept that EM’s presentation arises from an historic failure to provide appropriate provision, it is a reflection of his deep-seated difficulties. Accordingly, we conclude that it is not necessary for W&M to maintain EM’s EHCP. His daily needs must now pass to adult care’ [39].

Permission to appeal

33. I granted the Appellant permission to appeal to the UT on two of the grounds advanced.

34. The first ground concerned whether the FtT applied the correct legal test when determining whether to cease to maintain the appellant’s EHCP. I summarised the potential error in my determination of the application for permission to appeal in the following terms:

‘...the FtT decision was based on their conclusion that the appellant was not ever going to achieve his current learning outcomes; he was not going to learn a specific set of skills (those that would enable him to acquire independence and go to his employability); and he was not going to make a certain level of progress, as he did not have the necessary significant level of learning potential.

The tribunal did not conclude that this was a case where the young person was not going to achieve anything if education continued.

It is clearly arguable from the reasons given that the test the FtT applied was whether or not the appellant was able to develop a certain type of skills (‘independent and employment’) to a certain level. This is not the statutory test’ [10-12].

35. The second ground of appeal concerns the adequacy of the reasons given by the FtT for their decision.

Conclusions

36. The correct legal test is set out in section 45 of the 2014 Act. In essence it is one of necessity. The language of section 45 makes clear ‘necessity’ is not limited to the circumstances where special educational provision is itself no longer necessary. It follows from this that it may include the position where special educational provision is necessary, but for some reason does not require a EHC Plan in order to provide it.
37. At the outset of the conclusions section of its decision, the FtT reminded itself that *‘Both parties’ closing submissions set out the legal framework surrounding a Local Authority’s decision to cease to maintain. We have borne this in mind along with the totality of evidence within the bundle’*. I accept the submission of the Respondent that it is important to note that there was no dispute as to the applicable legal framework and the Tribunal’s expression of its reasons has to be considered in that context.
38. Whilst I agree with the Respondent’s submission that the conclusions of the FtT must be considered in the context in which they were made. I do not accept their submission, that the FtT knew the test to apply, applied it and that there is nothing to demonstrate to the contrary contained within the FtT’s reasons.
39. The essence of the FtT’s reasoning is that EM has ‘deep seated difficulties’ and the tribunal did not consider that he was able to ‘acquire independence and employment skills beyond those that might be developed as part of a daily living or social care routine’ [38]. The FtT reasoned that the ‘Appellant’s level of attainment was in line with his potential and that although ‘routines might develop’ this was not evidence of ‘significant learning potential’ [35].
40. The phrase ‘beyond those that might be developed’ clearly demonstrates that this is not a set of circumstances in which the FtT concluded there was no potential for further learning. It was also agreed between the parties for any learning to take place some degree of specialist provision was necessary. The FtT had found (and it was not disputed by either party) that there had been a need for a high level of support for EM to learn to date. The Respondent’s evidence supported the need for a high level of input and support moving forward. The Educational Psychologist instructed by the Respondent, Ms Askew, made recommendations for outcomes and provision that stretched over six pages of her report.
41. The FtT’s reasons were brief. They concluded that EM’s capacity for learning is limited to acquiring ‘independence and employment skills ... that might be developed as part of a daily living or social care routine’ (paragraph 38 of the

FtT's reasons) and therefore an EHC Plan is not necessary. Why they reached this conclusion is not clear.

42. There is no distinction in the language of the 2014 Act as to what 'subjects' are educational. Learning daily living skills or independence may be educational as much as training in a vocational skill or practising for an academic examination may be. In *Buckinghamshire County Council v SJ* [2016] UKUT 0254 (AAC) the Upper Tribunal concluded that it *'reject[ed] any suggestion that the attainment of qualifications is an essential element of education. For many of those to whom the 2014 Act and Regulations apply, attaining any qualifications at all is not an option. That does not mean that they do not require, or would not benefit from, special educational provision [30]...It is true that Ryan was functioning only at a pre-school level. That meant, no doubt, that any further achievements would be small. That does not mean that they would not be valuable for Ryan in his adult life'* [31]. Although Buckinghamshire was considered in the context of section 37 of the 2014 Act and whether it was necessary to make special educational provision in accordance with a EHC Plan, the point is equally applicable to the circumstances of whether an authority should cease to maintain a Plan (see B & M, as set out above).
43. The crux of the FtT's reasoning is that because a significant amount of special educational provision had been needed to achieve what they considered amounted to a small amount of progress, an EHC Plan was no longer necessary. The conclusion that the amount of learning must reach a certain degree in proportion to the amount of provision made for a EHC Plan to be necessary is not supported by the wording of section 45. Although the potential for learning may be a relevant factor as to the question of whether an EHC Plan is still necessary, a particular level of learning potential is not an essential prerequisite for an EHC Plan.
44. This analysis is supported by the language of section 21(1) which does not specify that the 'educational and training provision' needs to actually 'educate or train', unlike under section 21 (5) where this is expressly specified.
45. The Respondent made the submission before the UT that *'If EM was not going to acquire independence or employment skills beyond those that he would acquire through a package of social care, it is difficult to see what purpose maintaining an EHC Plan would serve. Educational provision cannot be necessary in the context of a person, beyond compulsory school age, if it will not materially affect their life skills'*. The argument was developed that having had an EHC Plan and having been in receipt of special educational provision throughout the period of compulsory schooling, there is no reason to believe

that he will attain more through continued educational provision than he would through adult social care.

46. If the FtT considered the provision necessary to support the acquisition of independence skills could be met in an adult social care setting and would be arranged even if an EHC Plan were not in place, there was no explanation provided in their reasons as to how this view was reached.
47. The FtT's reasons did not address the question of what provision was necessary to enable EM to develop independence skills. The FtT's reasons did not address whether that provision fell within the definition of special educational provision set out in section 21. It is difficult to see how the FtT could conclude that the necessary provision could be made by social care and without an EHC Plan without first addressing the question of what provision was necessary.
48. The FtT's reasons did not include any view as to whether the necessary support was educational provision even if it did not educate. Something can be the former, even if does not do the latter, they are two different concepts as was explained by the Upper Tribunal in *EAM v East Sussex CC*.
49. The lack of any reasoning on the above issues was of particular significance as this was a primary issue between the parties before the FtT. The appeal had specifically raised the question of whether social care provision could meet EM's needs, specifically his therapeutic needs for speech and language therapy, occupational therapy and music therapy. Ms Askew recommended a very wide range of input for EM going forward, including therapeutic input. The Respondent's position was that such therapy was not available currently through the adult social care provider, but could be commissioned and this was being looked into.
50. I agree with the submission of the Appellant that where the evidence includes specialist advice that a young person requires special educational provision, the FtT must explain, to some degree, why it has concluded that the provision can be made without an EHC Plan.
51. The Respondent submitted to this tribunal, that the FtT had formed the view that the necessary continuing support and provision was not to be classified as educational provision or educational. If that is correct then the FtT ought to have addressed this conclusion in its reasons because there was evidence before the FtT from an expert educational psychologist which made lengthy recommendations for continuing provision.

52. The Respondent submitted that this was an immaterial error. I do not agree. There was a factual dispute before the FtT as to whether the necessary continuing provision could be made without an EHC Plan. This was a key issue in the appeal. I would therefore have expected the FtT to have considered the point and to have provided a conclusion on a. whether the necessary future provision was special educational provision and b. if it could be provided without a EHC Plan. It did not do so and that was a material error of law.

Disposal of the appeal

53. The FtT's decision involved an error on a point of law. I set aside its decision. The appeal against the local authority's decision to cease to maintain an EHC Plan is remitted to the First-tier Tribunal for re-determination.

Directions

54. I direct as follows:

- (1) The appeal against the local authority's decision to cease to maintain EM's EHC Plan is remitted to the First-tier Tribunal for re-determination;
- (2) The First-tier Tribunal is to hold a hearing before re-determining the appeal;
- (3) The panel hearing the remitted appeal is to be wholly different from the panel that previously heard this matter;
- (4) The case file is to be placed before the Deputy President of, or a salaried judge assigned to, the Health, Education and Social Care Chamber of the First-tier Tribunal to consider whether any further case management directions are required.

Upper Tribunal Judge Price
28/5/2024