IN THE UPPER TRIBUNAL **UT refs: UA-2024-000917-HSW**
ADMINISTRATIVE APPEALS CHAMBER **UA-2024-001442-JR**
[2024] UKUT 439 (AAC)

Before: Upper Tribunal Judge Wright

Anonymity: The parents and child in this case are anonymised in accordance with the practice of the Upper Tribunal approved in Adams v Secretary of State for Work and Pensions and Green (CSM) [2017] UKUT 9 (AAC), [2017] AACR 28.

Permission to Appeal

Applicant: **SWANSEA CITY COUNCIL**

Respondents: **EW and JW**

Judicial Review

R (on the application of SWANSEA CITY COUNCIL)
Applicant

-and-

EDUCATION TRIBUNAL FOR WALES
Respondent

-and

EW and JW
Interested Parties

Decision date: 19 December 2024
Decided on the papers.

DECISIONS

I dismiss the claim for judicial review.

I refuse Swansea City Council permission to appeal the Education Tribunal for Wales's review decision of 22 March 2024 and 5 April 2024.

REASONS FOR DECISIONS

Introduction

1. There are two sets of proceedings which I am dealing with together because they both concern the same issue.

2. The issue I have to address is a jurisdictional one, namely whether a review decision of the Education Tribunal for Wales ("the ETW") is a decision which may be appealed under the statutory appellate structure or instead has to be challenged by way of judicial review.

3. It is an important feature of these proceedings that the underlying appeal to the ETW has been withdrawn and the jurisdiction issue is therefore academic in terms of the ETW proceedings. The fact that there are now no ETW appeal proceedings is also an important consideration in terms of the utility of my ruling on the substantive challenge to the ETW's review decision given that review decision is now of no legal or practical effect.

4. I have also had no real contested argument from the parties as to the jurisdictional issue, in part because the ETW appeal proceedings have been withdrawn but also because neither party (nor the ETW) has identified any particular interest in whether a review decision is challenged by way of an appeal or by judicial review. Nor have I had any contested argument on the substance of the challenge to the ETW's review decision.

Relevant background

5. The origin of Swansea City Council ("Swansea") wishing to challenge the ETW's review decision starts with the ETW's decision of 13 November 2023 on the parents' appeal to that tribunal. It was an appeal against the content of a statement of special educational needs maintained by Swansea in respect of the parents' son. As that appeal has since been withdrawn, in October of this year, I need say no more about that appeal, save insofar as it informs the ETW's review decision.

6. The parents' wished to challenge the ETW's decision of 13 November 2023 and applied to the ETW for permission to appeal. By decisions dated 22 March 2024 and 5 April 2024 the ETW dealt with that application for permission to appeal. It did so without holding any

further hearing. In addressing the application for permission to appeal the ETW first considered, pursuant to regulation 58 of Special Educational Needs Tribunal for Wales Regulations 2012 ("the 2012 Regs") whether to review its decision of 13 November 2023 under regulation 56 of the 2012 Regs. The ETW reviewed the decision, set the decision aside and ordered a fresh hearing of the appeal before a differently constituted ETW. At that stage, the ETW informed the parties that its decision on review could only be challenged by way of judicial review.

7. Swansea considered the review decision to have been made on a wrong legal basis. It therefore challenged the review decision by way of a claim for judicial review, having previously sent the ETW and the parents a pre-action protocol letter. The judicial review application was opposed by the ETW in its acknowledgement of service on the basis that Swansea had a right of appeal against the review decision and so had not exhausted its alternative remedies before bringing the judicial review proceedings. Reliance was placed by the ETW in this regard on the Upper Tribunal's decision in *AB v Newport City Council* [2022] UKUT 190 (AAC).

8. As a result of the ETW's defence to the judicial review claim, Swansea lodged a protective application for permission to appeal with the Upper Tribunal against the review decision. This is why there are two sets of proceedings concerning the same review decision.

9. The ETW's acknowledgement of service did not address the substance of Swansea's arguments for why the review decision was wrong in law. Those arguments apply in both sets of proceedings. In short order, the arguments are that the ETW erred in law because: (i) the review decision was in breach of regulation 56 of the 2012 Regs and/or was otherwise procedurally unfair; and (2) the review decision was in breach of regulation 56 and/or based on a misdirection in law and/or not one that the ETW could reasonably have taken. Swansea argues in particular that:

> "one of the errors of law is straightforward and can be seen clearly: the tribunal said it reviewed and set aside the original decision because it had identified two errors of law which "if appealed to the Upper Tribunal would have a reasonable prospect of success". Both as matter of the wording of regulation 56(1)(c) and the relevant case law, this is clearly wrong and only entitled the tribunal to grant permission to appeal, not to review and set aside the original decision."

I will need to return to these arguments, once I have dealt with the jurisdiction issue .

10. As I have indicated above, even assuming the ETW acted lawfully (or unlawfully) in its review decision of 22 March and 5 April 2024, the parents' underlying appeal to the ETW has been withdrawn and there are therefore no ETW appeal proceedings for the review decision to continue to bite on.

11. The judicial review was transferred to the Upper Tribunal by His Honour Judge Lambert, sitting as a Judge of the Administrative Court, on 15 August 2024. Those judicial review proceedings have the Upper Tribunal file reference UA-2024-001442-JR.

12. I should add for completeness that before the judicial review was transferred, on 8 August 2024 in the permission to appeal proceedings (which have the Upper Tribunal file reference UA-2024-000917-HSW), I gave directions which included the following:

> "1. This is an application for permission to appeal decisions made by the Educational Tribunal for Wales on 22 March and 5 April to review and set aside its earlier decision of 13 November 2023 which had been made on an appeal brought by …."the parents" on behalf of their son…..
>
> 2. The sole issue with which these directions are concerned is whether the Upper Tribunal's appellate jurisdiction extends to challenges against review decisions made by the Education Tribunal for Wales.
>
> 3. It appears to be the view of the Education Tribunal for Wales, in the related judicial review proceedings, that the decision in *AB v Newport City Council* [2022] UKUT 190 (AAC) applies with like effect

> to section 81 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018. That is an issue which needs to be decided on this application for permission to appeal.
>
> 4. It is trite law that parties cannot confer a jurisdiction on the Upper Tribunal which in law it does not have. If the Upper Tribunal's appellate jurisdiction under section 81 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 does not extend to review decisions of Education Tribunal for Wales, rule 8(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 would require me to strike these proceedings out and refer them instead to the Administrative Court. Moreover, the determination of whether the Upper Tribunal has this jurisdiction (or not) may at least arguably answer whether the High Court ought to exercise its judicial review jurisdiction.
>
> 5. The directions below require written submissions from the parties on whether the Upper Tribunal has jurisdiction under section 81 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 to determine appeals against review decisions of the Education Tribunal for Wales. Reasons should be given for why it is argued the Upper Tribunal has or does not have that jurisdiction.
>
> 6. The directions also invite the Education Tribunal for Wales to consider making written representations to the Upper Tribunal on the same issue of jurisdiction.
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> 7. It would assist if the parties could, in their submissions on the Upper Tribunal's jurisdiction, update the Upper Tribunal on where the judicial review proceedings have reached and, in particular, whether any decision has been made about transferring those proceedings to the Upper Tribunal.
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> 8. It would further assist if the parents in their written submission could set out whether they agree (or not) with Swansea City Council that the Education Tribunal for Wales erred in law in its review decision(s) of 22 March and 5 April 2024. It is to be observed in this respect that in its application for permission to appeal to the Upper Tribunal Swansea City Council say that there has been no opposition (in the judicial review proceedings) by the parents to the Council's arguments that the Education Tribunal for Wales did err in law in making its review decision(s)."

13. The parents have not filed any submissions in response to these directions.

14. Both Swansea and the ETW have filed submissions in response the above directions. I will take account of those submissions, as necessary, in my consideration of the arguments in these proceedings.

Jurisdiction – appeal or judicial review?

15. Swansea is content to leave the jurisdiction issue to the Upper Tribunal to determine. It has, however, made what it describes as some brief points on jurisdiction. It observes that the wording of the previous and current statutory provisions do not appear to be materially different. The council continues:

> "17. The case of *AB v Newport City Council* [2022] UKUT 190 (AAC) considered this issue under the previous statutory regime and held that there was a right of appeal to the Upper Tribunal against review decisions of the tribunal. As noted above, the relevant wording in the new statutory regime (whether or not it applies here) does not appear to be materially different. However, that case had a material factual difference in that the review decision under challenge there left the original decision untouched. This may explain the comments made by UTJ Mitchell at paragraph 55 and 65 which are not understood, or at least do not apply in a situation like this where a review decision sets aside the original decision and it is obvious that a party deprived of a decision in this way may want to challenge that.
>
> 18. The *AB* case sets out the arguments for both sides and the UT's reasoning for its conclusion. In summary, the judge appeared to accept at [52] that on the face of it, section 336ZB/section 81 'imports' the relevant provisions in the 2007 Act and so "the range of appealable decisions should be similarly restricted". This may be why the tribunal originally formed the view that the review decision could only be challenged by way of judicial review, and there is a strong argument to be made that this straightforward reading is the correct one. However, the judge then went on to say that there are "difficulties with that construction" which were then set out [53-57], before explaining his preference for the contrary submissions at [58-60], although it is submitted that that reasoning is not always easy to follow.
>
> 19. To the extent practical considerations are relevant (and the observation in *AB* at [57] in this regard is noted), the advantage of such decisions being appealable to the Upper Tribunal like any other is simplicity, both because all appeals would go to the UT with no separate category of excluded decisions, and also because generally appeals to the Upper Tribunal are more straightforward and cheaper than claims for judicial review. On the other hand, the advantage of such challenges proceeding by way of judicial review is that the position in Wales would be the same as the position in England."

16. The ETW took up my invitation to provide its observations on the jurisdiction issue. Those observations read as follows:

"The review decision was made by Judge McConnell, President of the Education Tribunal Wales, in the judicial exercise of the functions of the Tribunal. We are instructed to submit the observations within this correspondence for consideration by the Upper Tribunal within the appeal proceedings, on behalf of the Tribunal. The observations are limited to the issue of the appellate jurisdiction of the Upper Tribunal in accordance with the invitation of the Upper Tribunal. They are made with a view to assisting the Upper Tribunal to determine the jurisdictional issue before it, and in turn the administration of justice generally. In this regard we refer to the case of *SG v Denbighshire County Council and MB* [2018] UKUT 158 (AAC), a copy of which is enclosed for ease of reference. We confirm that Judge McConnell is content with this approach.

We trust that the Tribunal will be afforded an opportunity to make submissions on costs, and upon any other matters of case management arising in the proceedings to which it is a party, in due course.

It is understood that the Upper Tribunal has had sight of the Acknowledgment of Service and accompanying summary of grounds for contesting the claim which were filed and served on behalf of the Tribunal in the judicial review proceedings, and refer to the case of *AB v Newport City Council* [2022] UKUT 190 (AAC) ('the AB case').

In the AB case, Judge Mitchell of the Upper Tribunal determined that there is a right of appeal to the Upper Tribunal against a review decision of the Special Educational Needs Tribunal for Wales under section 336ZB of the Education Act 1996 ('EA 1996').

The Special Education Needs for Tribunal Wales was renamed as the Education Tribunal for Wales by section 91 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 in September 2021. It continues (as the Education Tribunal for Wales) to make decisions on appeals about statements of special educational needs pursuant to the special educational needs legal framework within Part IV of the Education Act 1996 and the Special Educational Needs Tribunal for Wales Regulations 2012 ('the 2012 regulations').

The review decision was made by the Tribunal in exercise of its powers under the special educational needs legal framework, and not under the additional learning needs regime within the Additional Learning Needs and Education Tribunal (Wales) Act 2018 and the Additional Learning Needs (Wales) Regulations 2021. This is apparent from the decision itself which refers to the 2012 regulations, and from the subsequent Order of Judge McConnell dated 5th April 2024 which references the 2012 regulations and states under the heading 'Further directions':

> "*Any decision made in this appeal, whether at a rehearing as ordered or after an unsuccessful application for Judicial Review to the Upper Tribunal, will be time limited as it relates to [the child's] Statement of SEN. This is because the LA must transfer [the child] from having a Statement of SEN under the "old" legal framework to the "new" Additional Learning Needs*

> *statutory framework. The requirement to do this is set out in the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (commencement no. 8 and Transitional and Saving Provisions) Order 2022 and must be done at the latest by the 30 August 2025. Once the LA have finished this process and made a decision then a further right of appeal to the Tribunal will be triggered…..*"

The appellate jurisdiction of the Upper Tribunal in this case is accordingly governed by the Special Educational Needs ('SEN') legal framework within Chapter 1 of Part IV of the Education Act 1996, and specifically section 336ZB thereof.

It is a matter for the Upper Tribunal to determine whether the precedent in the AB case applies in this case.

We understand that the Tribunal has today received notice from the parents' representative that the appeal against the original Statement of Special Educational Needs has been withdrawn. There remains no outstanding matter to be considered or decided by the Tribunal."

17. These observations essentially mirror, as I see it, that which the ETW has said about jurisdiction in the judicial review proceedings. The ETW there argues (in its summary defence):

1. "The Defendant's submissions are limited to procedural matters and do not relate to the substantive matters raised in the Claimant's application.

2. In the case of *AB v Newport City Council* [2022] UKUT 190 (AAC) the Upper Tribunal considered the specific matter of whether there is a right of appeal to the Upper Tribunal against a review decision of the Special Educational Needs Tribunal for Wales. It was held by Judge Mitchell of the Upper Tribunal that section 336ZB(3) of the Education Act 1996 ('EA 1996') provides a right of appeal to the Upper Tribunal against a Tribunal review decision.

3. The Defendant Tribunal's proceedings are not governed by the Tribunal, Courts and Enforcement Act 2007 ('the 2007 Act'). Section 336ZB(3) EA 1996 serves to apply section 12 of the 2007 Act ('the 2007 Act') to appeals against decisions of the Tribunal. It does not apply section 11 of the 2007 Act, which would otherwise serve to exclude a review decision of the Tribunal from appeal:

> *336ZB.— Appeals from the Tribunal to the Upper Tribunal*
> (1) A party to any proceedings under this Part before the Tribunal may appeal to the Upper Tribunal on any point of law arising from a decision made by the Tribunal in those proceedings.
> (2) An appeal may be brought under subsection (1) only if, on an application made by the party concerned, the Tribunal or the Upper Tribunal has given its permission for the appeal to be brought.

> (3) Section 12 of the Tribunals, Court and Enforcement Act 2007 (proceedings on appeal to Upper Tribunal) applies in relation to appeals to the Upper Tribunal under this section as it applies in relation to appeals to it under section 11 of that Act, but as if references to the First-tier Tribunal were references to the Tribunal.

4. Section 336ZB(3) has been partially repealed by paragraph 4(9) of Schedule 1 to the Additional Learning Needs and Education Tribunal (Wales) Act 2018 anaw. 2 ('the 2018 Act'), but is replaced by identical provision within section 81(3) of the 2018 Act (where the appeal takes effect):

> *81 Appeals from the Education Tribunal for Wales to the Upper Tribunal*
> (1) A party to any proceedings under section 70 or 72 before the Education Tribunal for Wales may appeal to the Upper Tribunal on any point of law arising from a decision made by the Education Tribunal for Wales in those proceedings.
> (2) An appeal may be brought under subsection (1) only if, on an application made by the party concerned, the Education Tribunal for Wales or the Upper Tribunal has given its permission.
> (3) Section 12 of the Tribunals, Court and Enforcement Act 2007 (proceedings on appeal to the Upper Tribunal) applies in relation to appeals to the Upper Tribunal under this section as it applies in relation to appeals to it under section of that Act, but as if references to the First-tier Tribunal were references to the Education Tribunal for Wales."

18. In my judgement, the decision in *AB* applies in this case and is an authority which I should follow. I explain these two points in turn.

19. The decision in *SB* was about challenges to review decisions by the Special Educational Needs Tribunal for Wales. However, that difference from this case is cosmetic only, it is not a difference of legal substance. That is made clear by the introduction to the Additional Learning Needs and Education Tribunal (Wales) Act 2018 ("the 2018 Act") which states that it is an Act, "to reform the law on education and training for children and young people with additional learning needs; and to <u>continue</u> the Special Educational Needs Tribunal for Wales and to <u>rename it</u> the Education Tribunal for Wales" (the underlining is mine and has been added for emphasis). All the 2018 Act is therefore doing in this respect is rebadging the Special Educational Needs Tribunal for

Wales with a different name. This general starting point is confirmed by section 1(10) of the 2018 Act which states that:

> "Part 3 (sections 91 to 94) continues the Special Educational Needs Tribunal for Wales and renames it the Education Tribunal for Wales."

This is then underscored by section 91(1) of the 2018 Act which sets out that the "Special Educational Needs Tribunal for Wales is to continue and is renamed the Education Tribunal for Wales".

20. On the face of it, and without more, section 336ZB of the Education Act 1996 would therefore continue to apply, and with it the analysis in *AB*.

21. However, insofar as section 96 and paragraph 4(9) of Schedule 1 to the 2018 Act has repealed Chapter 1 in Part 4 of the Education Act 1996, and so has repealed section 336ZB, the relevant governing provision is section 81 of the 2018 Act, the terms of which are materially identical to section 336ZB of the Education Act 1996. In particular, the terms of section 81(3) of the 2018 Act mirror the wording in section 336ZB(3) of the Education Act 1996. It was not argued before me that there are any contrary statutory indicators in the 2018 Act pointing against section 81(3) having the same legal effect as that found in respect of section 336ZB(3) of the Education Act 1996 in *AB*, nor can I identify any.

22. Accordingly, whichever Act applied to the parents' then appeal to the ETW, in my judgement the analysis in *AB* applies and confers a right of appeal to the Upper Tribunal (if permission is given) against a review decision made by the ETW.

23. It is not argued by anyone in either sets of the proceedings before me that *AB* was wrongly decided or should not be followed by me. It cannot be distinguished, as Swansea might be suggesting, by the different factual circumstance in play in *AB*. The critical analysis of Judge Mitchell in paragraphs [51]-[61] of *AB* did not turn on the particular review decision in issue before him.

24. The decision in *AB* is a carefully constructed one and was arrived at after hearing contested argument as to the legal effect of section 336ZB(3) of the Education Act 1996 (an advantage which I have not had). Nor, as I have said, is anyone before me arguing that *AB* is wrong. In these circumstances, and in the interests of comity and certainty, I consider I should follow *AB*.

25. The consequence of all of the above is that Swansea's claim for judicial review of the ETW's review decision must be dismissed because the correct route of challenge to that decision is by way of statutory appeal. That appeal route provides Swansea with the alternative remedy which means the judicial review is not the appropriate route to challenge that decision. Parliament has provided a right of statutory appeal to the Upper Tribunal against the review decision, and given this the judicial review claim should be dismissed.

The permission to appeal application

26. Swansea seek permission to appeal the ETW's review decision on a number of grounds. Central to those grounds is the terms of regulation 56 of the 2012 Regs. This regulation provides as follows:

> "**Application or proposal for review of the Tribunal's decision**
> **56.**—(1) A party may apply to the Secretary of the Tribunal for the decision of the President or the tribunal panel to be reviewed on the grounds that—
> (a)the decision was wrongly made as a result of a material error on the part of the Tribunal administration;
> (b)a party, who was entitled to be heard at the hearing but failed to appear or to be represented, had good and sufficient reason for failing to appear;
> (c)there was an obvious and material error in the decision; or
> (d)the interests of justice so require.
> (2) An application that a decision of the President or the tribunal panel is reviewed must be made—
> (a)in writing stating the grounds;
> (b)no later than 28 days after the date on which the decision was sent to the parties.
> (3) The President may—
> (a)on the application of a party or on the President's own initiative, review and set aside or vary any decision made by the President on a ground referred to in paragraph (1);

> (b)refuse an application for a review of the President's decision in accordance with paragraph (6).
> (4) The President or the Chair of the tribunal panel which decided the case may—
> (a)on the application of a party, or on the President's or Chair's own initiative, review and set aside or vary any decision made by the tribunal panel on a ground referred to in paragraph (1);
> (b)refuse an application for a review of the tribunal panel's decision in accordance with paragraph (6).
> (5) The Chair of the tribunal panel which decided the case may order a rehearing before the same or a differently constituted tribunal panel.
> (6) An application for a review may be refused in whole or part by the President, or the Chair of the tribunal panel which decided the case, if in the President's or the Chair's opinion the whole or part of it has no reasonable chance of success.
> (7) Unless an application for a review is refused in accordance with paragraph (6), the review must be determined after the parties have had an opportunity to be heard—
> (a)by the President, where the decision was made by the President;
> (b)where the decision was made by a tribunal panel, by the President or the tribunal panel which made the decision or by another tribunal panel appointed by the President.
> (8) If the President or the Chair of the tribunal panel which decided the case proposes, on the President's or the Chair's own initiative, that a decision is reviewed—
> (a)the Secretary of the Tribunal must serve notice on the parties no later than 28 days after the date on which the decision was sent to the parties; and
> (b)the parties must have an opportunity to be heard.
> (9) In determining an application or a proposal for a review under paragraphs (3), (4) or (7), the President or the Chair may give directions to be complied with before or at the hearing of the review.
> (10) If a party fails to comply with a direction made under paragraph (9), the tribunal panel may take account of that fact when determining the review or deciding whether to make an order for costs.
> (11) The President or the Chair may on the application of a party, give permission for that party to change a witness for the purpose of the review hearing.
> (12) An application made under paragraph (11), must be received by the Secretary of the Tribunal and served by the applicant on the other party, no later than 14 days before the review hearing.
> (13) The President or the Chair must give the parties the opportunity to be heard on any application made under paragraph (11).
> (14) If a decision is set aside or varied following a review under this regulation the Secretary of the Tribunal must alter the entry in the Register and must notify the parties accordingly."

27. It may be observed that regulation 56 of the 2012 Regs covers both procedural grounds for set aside (regulation 56(1)(a) and (b)), substantive errors both legal and it seems factual (per regulation 56(1)(c)), and a separate and free-standing 'interests of justice' test.

Regulation 56 may thus be contrasted with rules 45 and 49 (and 48) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008.

28. Swansea argue the review decision was flawed on a number of bases. It argues that there was procedural unfairness in the ETW making the review decision because, inter alia,(i) an oral hearing had to be held before a decision can be reviewed, and (ii) even if an oral hearing was not required, Swansea was not given a proper and fair opportunity to address the grounds for the review. Swansea also argue that in substance the review decision under regulation 56(1)(c) was unlawful because, contrary to *R(RB) v First-tier Tribunal* [2010] UKUT 160 (AAC); [2010] AACR 41, the ETW set aside the appeal decision on the basis that the grounds of appeal were arguable rather than that they were bound to succeed. Further, and in any event, the two grounds of appeal on which the ETW founded to set aside its decision were not obvious or material grounds that were bound to succeed.

29. Swansea's grounds of appeal raise some potentially interesting points. Its argument that the words in regulation 56(7) of the 2012 Regs - that the review may only be decided after the parties have had an opportunity to be heard - required an oral hearing to be held of the review, may face the difficulties: (a) that 'being heard' might not necessarily equate with making representations at an oral hearing, and (b that when an oral hearing is required under the 2012 Regs, clearer language is used to that effect: see regulation 41. On the other hand, it may be arguable that the ETW did not sufficiently enable Swansea to be heard before it made the review decision on the grounds on which it did.

30. As for Swansea's reliance on the *R(RB)* decision, two issues might face Swansea's arguments. First, the review power in *R(RB)* may be materially different because it was based on satisfaction that there **was** an "error of law" in the decision whereas regulation 56(1)(c) of the 2012

Regs is not so limited; though it does require satisfaction that there **was** an obvious and material error in the decision. Regulation 56(1)(c) might therefore arguably be more widely cast and thus the *R(RB)* concern about usurping the Upper Tribunal's function have less purchase. Second, it may be arguable that the review decision was properly based on the *R(RB)* thesis as it begins by stating that the President had found that "there are two clear errors of law" in the decision under review. The later phrases used in the review decision that "[t]his was a material error of law" and "the Tribunal's decision was materially flawed as it did not examine the evidence fully" might arguably back up this perspective. On the other hand, the language later used by the President of the ETW when refusing to set aside her review decision – that she remained of the view that the material errors of law that were identified in the review decision "would have a reasonable prospect of success" if the appeal decision had been appealed to the Upper Tribunal – might at be said to at least cloud matters.

31. However, regardless of the potential merits of Swansea's arguments, I refuse it permission to appeal the ETW's review decision because the appeal proceedings to which that review decision related no longer exist, the arguments would thus be being decided in a vacuum and would have no consequence for either party in terms of the child's educational provision. If I gave permission to appeal and allowed Swansea's appeal, setting aside the review decision would require either the Upper Tribunal or the ETW to redecide the review decision, see section 12(2)(b) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). There could no useful basis for the review decision being remade, and the lawfulness of doing so may be open to question where the appeal proceedings no longer exist. Given this, the better approach if permission to appeal was to be given would be not to set aside the review decision if the appeal were allowed: per section 12(2)(a) of the 2007 Act. However, the same result would obtain if permission was not given for the appeal.

32. It might be argued that even if the review decision were not to be set aside on appeal (assuming at least one of Swansea's arguments to be a good one), the Upper Tribunal's decision on the 'academic' appeal would provide a binding precedent as to the scope of regulation 56 of the 2012 Regs. That may be so but I do not consider I should take that step here. Two particular considerations have weighed against my doing so. First, I am satisfied that I would, in all likelihood (and wholly understandably given they have withdrawn their appeal to the ETW), not receive any argument from the respondent parents on Swansea's appeal. It would be better to decide these potentially important issues in a case in both parties continue to be invested and in which they would wish (and be able) to argue the points out. Second, any review decisions of the ETW are, as I have held above, appealable, and so Swansea's arguments, assuming for the sake of argument some or all of them are correct and the ETW continues to make review decisions contrary to such arguments, can (and very likely will) be decided in a later and contested appeal to the Upper Tribunal in circumstances where the ETW appeal proceedings are continuing.

33. Having refused Swansea permission to appeal on the papers alone, it has the right to apply for a reconsideration of this decision refusing permission to appeal at an oral hearing before the Upper Tribunal, usually in front of a different judge. Any such application must be made in writing and within 14 days of the date that this determination is sent out – see Tribunal Procedure (Upper Tribunal) Rules 2008, rule 22(3)-(5). I would respectfully suggest that if such an application is to be made, it will assist the judge if Swansea can explain why these proceedings are being pursued in circumstances where there are now no appeal proceedings before the ETW upon which the review decision can bite.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

Dated 19th December 2024