Neutral Citation Number: [2026] UKUT 113 (AAC)

Appeal Number: UA-2025-000578-HS

IN THE UPPER TRIBUNAL

(ADMINISTRATIVE APPEALS CHAMBER)

Between:

BZP and BZQ

Appellants

v

Warwickshire County Council

Respondent

THE UPPER TRIBUNAL ORDERS that, without the permission of this Tribunal:

No one shall publish or reveal the name or address of BZP or BZQ (the Appellants in these proceedings) or BZR (their daughter) or any information that would be likely to lead to the identification of them or any member of their family in connection with these proceedings.

Any breach of this order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

Before: Upper Tribunal Judge Jacobs

Decided on 09 March 2026 following an oral hearing on 05 March 2026.

Representatives

BZP:	BZP spoke on behalf of himself and BZQ
The Council:	Lachlan Wilson of counsel, instructed by the Council's Legal Department

Summary: Tribunal practice and procedure (including Upper Tribunal) – tribunal jurisdiction (34.10)

First-tier Tribunal reviewed its decision in part – remaining part of decision subject to appeal to Upper Tribunal.

Summary: Special educational needs – special educational provision – other (85.4)

Ratio of adults to pupils in class – lack of evidence to support proposed inclusion in plan – 'small class' sufficiently precise in context.

Provision for psychotherapy – lack of appropriate evidence to justify inclusion – Upper Tribunal could not take fresh evidence into account.

DECISION OF UPPER TRIBUNAL

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

Reference: EH937/24/00003
Decision date: 6 January 2025
Panel: Judge Ian Comfort with Ms Jane Young and Ms Ann Sockburn (specialist members)
Hearing: Online

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 in either of the issues that are the subject of this appeal.

REASONS FOR DECISION

A. Introduction

1. This case concerns the Education, Health and Care Plan for BZR, who was born in 2012. Her parents are BZP and BZQ. The letters were chosen randomly in order to protect BZR's identity. I have not anonymised the local authority or the witnesses mentioned in this decision, as I can see no prospect that naming them, even in combination, would allow BZR to be identified.

2. BZP and BZQ were not represented at the hearing before me. Earlier in the proceedings, they had been represented by Stephen Broach KC. BZP told me that he was not available for the hearing. I asked about a possible adjournment, but he said that Mr Broach has made written submissions that were in the papers and he and his wife were concerned about further delay. For the record, I have read Mr Broach's submissions.

A. Review and appeal

3. This case has an unusual history. It began with an appeal to the First-tier Tribunal by BZP and BZQ under section 51 of the Children and Families Act 2014. The tribunal made a decision, but the parents applied for permission to appeal to the Upper Tribunal. The application was referred to Tribunal Judge McCarthy. He carried out a review under rules 47 and 49 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699):

47. Tribunal's consideration of application for permission to appeal

(1) On receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 49 (review of a decision).

(2) If the Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision, or part of it, the Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.

(3) The Tribunal must send a record of its decision to the parties as soon as practicable.

(4) If the Tribunal refuses permission to appeal it must send with the record of its decision—

(a) a statement of its reasons for such refusal; and

(b) notification of the right to make an application to the Upper Tribunal for permission to appeal and the time within which, and the method by which, such application must be made.

(5) The Tribunal may give permission to appeal on limited grounds, but must comply with paragraph (4) in relation to any grounds on which it has refused permission.

49. Review of a decision

(1) The Tribunal may only undertake a review of a decision—

(a) pursuant to rule 47(1) (review on an application for permission to appeal) if it is satisfied that there was an error of law in the decision; or

(b) pursuant to rule 48 (application for review in special educational needs cases).

(2) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.

(3) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again.

4. The judge referred some parts of the decision back to the tribunal. This is permitted by rule 47(2), which authorises a review of part of a decision. He then decided that he would 'not grant permission to appeal to the Upper Tribunal.' A decision on that issue is required by rule 47(2). The judge's language was equivalent to refusing permission to appeal.

5. The parents then applied to the Upper Tribunal for permission to appeal and the case was referred to me. I had to consider it under section 11 of the Tribunals, Courts and Enforcement Act 2007:

11. Right to appeal to Upper Tribunal

(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (8).

(3) That right may be exercised only with permission (or, in Northern Ireland, leave).

(4) Permission (or leave) may be given by—

(a) the First-tier Tribunal, or

(b) the Upper Tribunal,

on an application by the party.

(5) For the purposes of subsection (1), an "excluded decision" is—

(a) any decision of the First-tier Tribunal on an appeal made in exercise of a right conferred by the Criminal Injuries Compensation Scheme in compliance with section 5(1)(a) of the Criminal Injuries Compensation Act 1995 (c. 53) (appeals against decisions on reviews),

(b) any decision of the First-tier Tribunal on an appeal under section 28(4) or (6) of the Data Protection Act 1998 (c. 29) (appeals against national security certificate),

(c) any decision of the First-tier Tribunal on an appeal under section 60(1) or (4) of the Freedom of Information Act 2000 (c. 36) (appeals against national security certificate),

(d) a decision of the First-tier Tribunal under section 9—

(i) to review, or not to review, an earlier decision of the tribunal,

(ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal,

(iii) to set aside an earlier decision of the tribunal, or

(iv) to refer, or not to refer, a matter to the Upper Tribunal,

(e) a decision of the First-tier Tribunal that is set aside under section 9 (including a decision set aside after proceedings on an appeal under this section have been begun), or

(f) any decision of the First-tier Tribunal that is of a description specified in an order made by the Lord Chancellor.

(6) A description may be specified under subsection (5)(f) only if—

(a) in the case of a decision of that description, there is a right to appeal to a court, the Upper Tribunal or any other tribunal from the decision and that right is, or includes, something other than a right (however expressed) to appeal on any point of law arising from the decision, or

(b) decisions of that description are made in carrying out a function transferred under section 30 and prior to the transfer of the function

under section 30(1) there was no right to appeal from decisions of that description.

(7) Where—

(a) an order under subsection (5)(f) specifies a description of decisions, and

(b) decisions of that description are made in carrying out a function transferred under section 30,

the order must be framed so as to come into force no later than the time when the transfer under section 30 of the function takes effect (but power to revoke the order continues to be exercisable after that time, and power to amend the order continues to be exercisable after that time for the purpose of narrowing the description for the time being specified).

(8) The Lord Chancellor may by order make provision for a person to be treated as being, or to be treated as not being, a party to a case for the purposes of subsection (2).

6. As part of my consideration, I had to consider how section 11(5) worked together with the power to set aside part of a decision under rule 47(2). I described that as 'an interesting question'. I told the parties:

> My provisional interpretation is that the part of the decision that is not subject to the review is not excluded from section 11. The parties may, of course, make submissions on it.

At the hearing, Mr Wilson supported my interpretation of section 11(5).

7. On the basis that my interpretation was correct, I gave permission on these grounds:

(i) The Tribunal reached a decision in relation to the adult:pupil ratio BZR requires which was plainly not open to it (ie irrational).

(ii) The Tribunal's decision not to specify psychotherapy as special educational provision for BZR was irrational and/or inadequately reasoned.

8. The First-tier Tribunal has now made a new decision, which has incorporated the tribunal's original reasons on the grounds of appeal. I have quoted below from the original decision, as that is the decision that is under appeal.

B. The adult:pupil ratio issue

What the tribunal decided

9. These were the tribunal's reasons on this issue:

> **Adult:pupil ratio**
>
> 31. The parties agreed that BZR needed to be educated in a small class which can offer a low arousal environment. There was disagreement as to whether an adult: pupil ratio of 1:5 should be included.
>
> 32. Dr Grace was of the view that 1:5 was a reasonable ratio and that it was necessary to specify this to ensure that BZR had a high level of direct teacher input throughout the day.

33. Ms Underwood disagreed. She said that the adult: pupil ratio should be based on the needs of all children in a class. It also had to take account of the capacity of a classroom. She said that being prescriptive impacts on the flexibility that is required in any setting.

34. The Tribunal was not provided with any specific guidance that recommended an adult: pupil ratio for any given class. In the absence of any specific guidance, the Tribunal agreed with Ms Underwood that settings needed flexibility when providing education for pupils.

35. The Tribunal was satisfied that the following wording would allow a degree of flexibility, whilst also ensuring that BZR had an appropriate level of direct teacher contact:

> "BZR will be educated in a small class which can offer a low arousal environment, with an adult pupil ratio sufficient to ensure a high level of direct teacher input throughout the day.

Dr Grace's evidence

10. Dr Grace included as part of BZR's 'Required Provision':

> A small class which can offer a low arousal environment with an adult pupil ratio of 1:5 to ensure a high level of direct teacher input throughout the day.

11. The low arousal environment was agreed and the tribunal adopted Dr Grace's objective. I am concerned only with the precise ratio of 1:5. At the hearing, Dr Grace said that this was a reasonable ratio in order to obtain the objective of a high level of direct teacher input throughout the day.

12. Ms Underwood gave evidence that a precise ratio was inappropriate. The tribunal accepted her evidence on the ground that there was no specific guidance. I originally read that as referring to some official form of guidance. On reflection, this is unlikely, as any ratio would need to be tailored to the specific needs of the child. I therefore accept Mr Wilson's suggestion. On his reading, the tribunal was saying that, in the light of Dr Grace's oral evidence, she was qualifying 1:5 as merely reasonable rather than essential. On that basis, the tribunal was entitled to omit 1:5 and adopt the remainder of Dr Grace's proposal.

Sufficient specificity

13. BZP argued that the tribunal's decision was not sufficiently precise to be enforced. He referred not only to the adult:pupil ratio, but also to what would amount to a 'small class'.

14. Upper Tribunal Judge West considered the issue of precision in *Worcestershire County Council v SE* [2020] UKUT 217 (AAC). I accept the conclusions that he distilled from a thorough coverage of the case law. At first reading, there seems to be a tension in the cases between precision and flexibility. At least in part, that is more apparent than real. Context is always important, in special education needs cases all the more so. And, as Mr Wilson pointed out, the First-tier Tribunal has to work on evidence. In this case, I would make these points.

15. First, a tribunal cannot make more specific findings of fact than the evidence allows, even when making use of the knowledge and experience of the specialist members. Second, there may be a point beyond which it is not possible to be more

precise, regardless of the evidence. Take this example, which I have made up but based on the tribunal's use of 'small class'. Is it possible to say that a class of 4 would be small, but a class of 5 would not? There may be cases in which such a difference would be significant, but there would need to be evidence to justify drawing such a fine distinction. Third, a tribunal must have a reasoned basis for any change it makes to a plan. This will depend, at least in part, on the reasons given by the witnesses, especially the expert witnesses.

16. Bringing those points together in this case, Dr Grace linked the class size to a low arousal environment. On that evidence, it was sufficient to specific a small class. Anything more precise would set an arbitrary figure, as arousal would depend not just on the number of pupils in the class, but also on the activities that were taking place, the behaviour of the other pupils, the noise levels and so on.

C. The psychotherapy issue

What the tribunal decided

17. These were the tribunal's reasons on this issue:

> **Psychotherapy**
>
> 36. Section F of WD16 [working document version 16] states:
>
> > *"A cycle of weekly individual sessions with a psychotherapist (who could be a play therapist) to help BZR develop her sense of her own identity, explore and learn to manage her emotional needs, and to work through the consequences of the traumatic primary school experience. At least ten sessions will be required, to help BZR establish a therapeutic relationship with the therapist, as well as exploring specific issues."*
>
> 37. Dr Grace had included this in the EHC plan based on the recommendation from Jamie Scott, Clinical Nurse Specialist at the RISE Access and Engagement Team in a letter dated 9 September 2024. That letter says that a meeting with BZR and her Parents was held online early in 2023. At that meeting BZR found it '*difficult to engage with the process'*. An agreement was reached to meet again online; however, there were difficulties in arranging the meeting. The letter says that '*it wasn't until quite recently that we were able to complete the assessment'*.
>
> 38. It is unclear from the letter when or how the assessment took place or whether it included a meeting with BZR.
>
> 39. Section G of WD16 includes an extract from the RISE letter:
>
> > *"Referral has been submitted by RISE for child psychotherapy to arrange for a meeting to explore therapeutic work. In addition, consideration of specific trauma related therapy will be considered at the same time and there is a possibility that the psychotherapy offered will also be informed by specific trauma informed therapy."*
>
> 40. The Tribunal was not provided with a report from a qualified psychotherapist who had assessed BZR. In the absence of any professional report, the Tribunal was unable to assess what therapy, if any, was required and if so how many sessions would be needed.
>
> 41. In these circumstances, it did not find it necessary to determine whether therapeutic provision should form part of Section F, in that it educates and trains.

It was satisfied there was insufficient evidence to include this provision in Section of the EHC plan.

Analysis

18. The passage quoted by the tribunal in paragraph 36 was a proposal inserted into the draft working document by the parents. The tribunal decided not to include the proposal. Its reasoning is in paragraphs 38 and 40. The tribunal did not have the necessary evidence from an appropriate expert on which it could make the finding necessary to support the parents' proposal. That was a rational approach to the evidence.

19. I have to decide whether the tribunal made an error of law on the evidence before it. The parents have now provided evidence that was not before the tribunal. If I had a jurisdiction equivalent to that of the First-tier Tribunal, I could take it into account. But I do not. That tribunal is entitled to take account of evidence that was not available to the local authority when it drafted the plan. The Upper Tribunal, in contrast, can only set aside a decision of the First-tier Tribunal for error of law.

Authorised for issue
on 09 March 2026

Edward Jacobs
Upper Tribunal Judge