

Neutral Citation Number: [2026] UKUT 327 (AAC)
Appeal No. UA-2025-000967-HS

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

AM and SP

Appellants

- v -

Wokingham Borough Council

Respondent

Before: **Upper Tribunal Judge Citron**
Decided on consideration of the papers

Representation:
Appellant: by Sean Bowers of SEN Action
Respondent: by Selena Saroy of Berkshire Joint Legal Team

On appeal from:
Tribunal: First-Tier Tribunal (HESC Chamber) Special Educational Needs and Disability
Panel: Judge C Harris, Specialist Members J Parrott, D Rix
Tribunal Case No: EH872/24/00002
Hearing date: 13 December 2024
Mode of hearing: remote
Decision date: 19 December 2024

SUMMARY OF DECISION

85 SPECIAL EDUCATIONAL NEEDS
85.3 Special educational provision – naming school

This appeal by the parents of a 6 year old, which was supported by the local authority respondent, concerns firstly whether the First-tier Tribunal erred in deciding that section 61 of the Children and Families Act 2014 did not apply; the Upper Tribunal decides that it did so err, because its fact-finding and reasoning was inconsistent with a conclusion that there was no part of the child's necessary special educational provision that would be inappropriate to be made in a school.

The appeal also concerns whether it is an error of law to set out in Section F of an EHC plan, which contains the required special educational provision, the location in which

special educational provision is to be made (such as "home"). The Upper Tribunal decides it is not necessarily in error of law to do so, provided the location in which the provision is made is inherent or integral to the educational or training quality of the provision. The Upper Tribunal observes that such cases will probably be rare, and states that best practice for a First-tier Tribunal setting out the location of special educational provision is to be made, in Section F, is to explain, briefly, why the location is in that particular case inherent or integral to the educational or training quality of the provision.

Finally, the appeal concerns section 33(2) of the Children and Families Act 2014, and concludes that the First-tier Tribunal erred in law in setting out "a special school" as the type of school in Section I, where there was no finding that a mainstream school would have been incompatible with the parents' wishes, or with the provision of efficient education for others.

The decision of the First-tier Tribunal was set aside and the case remitted for reconsideration by a fresh First-tier Tribunal panel, after consolidation with a similar new case in that tribunal between the same parties.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to **allow** the appeal. The decision of the First-tier Tribunal referred to above involved the making of an error on a point of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I **set the decision aside** and **remit the case** for reconsideration (after consolidation with proceedings between the same parties under reference EH870/25/00075) by a fresh panel of the First-tier Tribunal (HESC Chamber) (SEND). I direct that the file be placed before a salaried judge of that tribunal for further case management directions to be given.

REASONS FOR DECISION

1. In what follows references to

    a. the "**tribunal**" and to the "**tribunal decision**" are to the First-tier Tribunal and its decision as referred to above;

    b. numbers in square brackets are to paragraphs of the tribunal decision (unless otherwise indicated);

    c. "**section**" or "**s**" are to sections of the Children and Families Act 2014 (sections 61 and 33 of which are set out in the Appendix to this decision);

    d. "**regulations**" are to the Special Educational Needs and Disability Regulations 2014.

The tribunal decision

2. The tribunal decision provided the following background:

    a. The Appellants' appeal to the tribunal was made under s51 and related to the contents of Sections B, F and I of the EHC plan for the Appellants' son, S.

    b. S was 6 years old at the time of the tribunal hearing. He had a diagnosis of autism spectrum disorder (ASD) and a language delay. He had identified difficulties with communication and interaction, cognition and learning, social, emotional and mental health and physical and sensory needs. He was on roll at a particular infant school and, until shortly before the tribunal hearing, attended part time for 1 hour per day, having previously had a failed placement at another school. In the remaining time he was being supported by his parents and a tutor at home with applied behavioural analysis (ABA).

    c. The issues in dispute in relation to Section F concerned the requirement for ABA and its associated interventions, staffing and quantifications and whether provision should be made for 48 weeks of the year.

    d. In relation to Section I, the Appellants wished S to receive education otherwise than in school (EOTIS) so that he could receive full time ABA provision in the home. They did not consider it appropriate for S's special educational provision to be made in a school. The Respondent considered that all or part of S's special educational needs could be met within a specialist setting and as such an EOTIS package was not necessary, as the threshold in s61 was not met. As the Appellants had not named a school, the Respondent asked the tribunal to name the type of school S required as "specialist".

3. The appeal was allowed in part: amendments were ordered to Sections B and F, and Section I was amended to state that the type of placement required was a special school and to leave the name of placement blank.

4. The tribunal decision said this at the start of its consideration of Section F:

> 45. The LA noted in submissions that many of the proposed amendments flowed from the main decision before the Tribunal, namely whether the test for EOTIS is met. The Parents agreed that this was the case and that the relevant amendments should reflect whether or not it would be appropriate for S to receive his special educational provision in school.
>
> 46. The Tribunal made a number of amendments to Section F reflecting its decision on EOTIS, but was also mindful that the provision S reasonably requires should be the same regardless of setting. These changes are reflected in the working document.

5. At [52], after making a finding that S reasonably required 30 hours per week of ABA tuition, the tribunal decision said this:

We also considered that, in light of the parties' aspirations that S will return to school and in light of the decisions the Tribunal made on EOTIS and type of school, it was important to reflect that the provision is made with a view towards supporting S's eventual attendance at school. We therefore inserted the following wording to reflect this *"In order to enable S to make a successful transition towards attending school, the following home-based ABA programme will be provided:"*

6. In considering s61, the tribunal decision at [81-86]

   a. found that S's 2 previous placements did not mean that no school might be able to meet his special educational needs and make the special educational provision he required;

   b. noted that in a specialist setting, for example the specialist free school (**FB school**) which the Respondent wished to be named in Section I, which offered ABA, it would be possible for the majority, if not all, of S's identified needs to be met with the provision he reasonably required;

   c. stated that in order to satisfy the test in s61, it is not necessary that the entirety of the special educational provision can be made in school, but it is sufficient any part of the provision can be made in a school setting;

   d. considered it important that S be able to generalise the skills he was learning, including opportunities to interact with other children; and felt that the facilities and set-up which a school setting provides, for example through group activities and structured and unstructured interactions, offered more scope for this;

   e. considered that cost was not determinative in this case;

   f. considered that the Appellants' strong preference for S to receive EOTIS at home was not itself determinative of whether provision was inappropriate to be made in any school;

   g. considered (at [85]) the evidence that S was currently not ready to attend school and was unlikely to attend a school setting in practice at this time. The tribunal noted the Appellants' aspiration for S to be able to attend school when he is ready and that the parties agreed this was the direction of travel. The tribunal noted the Appellants' evidence that S was able to access the community, for example by attending the temple, which suggested that it would be possible for him to attend education outside the home. The tribunal considered that S "could attend alternative provision made through a school where he was on roll, and that this would constitute attendance at a setting for the purposes of the test in s61, amplified by [the case of *NN v Cheshire East Council (SEN)* ([2021] UKUT 220 (AAC)]";

   h. concluded (at [86]) that "it would not be inappropriate for some or all of the special educational provision S required to be made in any school";

"the test in s61 was not met and accordingly [the tribunal] should not order EOTIS".

7. In considering Section I, and sections 39 and 40, the tribunal (at [88-89])

    a. considered that it had insufficient evidence to determine whether FB school would be suitable for S in these circumstances;

    b. determined that it was not appropriate to name a specific school but rather that the tribunal should name type and leave it to the parties to identify a suitable setting in due course;

    c. was particularly persuaded by an ASD assessment report of 2 December 2022, by a consultant paediatrician, which expressed the strong view that S would thrive in a specialist setting which catered for children with ASD;

    d. decided to name the type of school as a special school and to leave the name blank. The tribunal decision states that this meant that S could continue his current arrangements, funded in accordance with the EHC plan as amended by the tribunal decision, until an appropriate setting was identified for him.

The grant of permission to appeal and Upper Tribunal proceedings

8. I gave permission to appeal limited to the following grounds:

    a. that the conclusion, at [86], that it was not inappropriate for some or all of the special educational provision which S required, to be made in a school, was irrational or inadequately explained, since

        i. it was based, to a very material extent, on the reasoning in [85], dealing with the evidence of S being currently not ready to attend school, and it being unlikely that S would attend a school setting at this time (to which I referred as the evidence of S's "unpreparedness for school") – and that reasoning was itself (arguably) irrational or inadequately explained, since the only matters cited to counter the evidence of S's unpreparedness for school were

            1. that S was able to "access the community, for example by attending the temple" – this is, arguably, of little relevance to whether it would be appropriate for S to attend a school, given the evidence of his unpreparedness to do so; and

            2. that, in the tribunal's view, S "could attend alternative provision made through a school where he was on roll" – yet there was no explanation of what the "alternative provision through a school" was or how and why it countered or got around the evidence of S's unpreparedness for school (so allowing the tribunal to

conclude that provision made at a school *was* appropriate); in this regard, it is arguably relevant that when looking at the slightly different question, posed by s40(2), of whether FB school would be "appropriate" for S, the tribunal found that there was "no information about what any alternative provision might look like" ([88]); [85] also did not explain what *part* of S's special educational provision could be made via "alternative provision through a school";

(in respect to this point, I noted *NN v Cheshire East* at [27]: where a school offered both conventional special school provision and a varied curriculum outside of the school building, both on site and at community based locations, it fell within the statutory definition of 'school', irrespective of whether the provision it provided was based in a classroom setting, on the school's site or at a community based location);

ii. the tribunal had found at [52] that the special educational provision required by S, as regards 'cognition and learning', was a home-based programme i.e. it specified that this special educational provision should *not* be made in a school; however, the tribunal did not explain how this reconciled with its (implicit if not explicit) conclusion that some of S's special educational provision *could* appropriately be made in a school (such as, by explaining what part of S's special educational provision it had in mind); and

iii. at [81], the tribunal had considered whether S's special educational provision *could* be made at a school (and decided that, in a "specialist setting", most if not all of it could); that paragraph did not, however, consider the *appropriateness* of the provision being made in a school, given the evidence of S's unpreparedness for school – that was considered only at [85];

b. that the tribunal had no power to specify, in Section F of S's EHC plan, the special educational provision in question as "home based" (at it did at [52]), as its power (as regards Section F) was restricted to specifying the special educational provision required (as opposed to the place where the provision was to be made);

c. that the tribunal erred at [88-89] where it applied s40(2) without, on the face of it, considering s33(2): in particular, it did not explain why naming a mainstream (as opposed to a special) school in Section I would be incompatible with the wishes of S's parents, or the provision of efficient education for others.

9. At the time when permission to appeal was being considered, the Respondent argued that the Appellants' appeal was an "abuse of process", because the EHC plan which was the subject of the tribunal decision had been, in effect, superseded, after annual review; the Appellants had lodged an appeal in the

tribunal against S's new EHC plan; and one of the outcomes urged on the Upper Tribunal by the Appellants, if this appeal was successful, was to set aside the tribunal decision and remit the case to the tribunal with directions for its reconsideration (section 12(2)(b)(i) Tribunals, Courts and Enforcement Act 2007) – and the Respondent argued that this is "already done" by virtue of the appeal against S's new EHC plan. In the permission decision, I stated that, although the Respondent was free to develop this argument in its response to the appeal, I was not immediately attracted by it, given the (in my view, quite clear) difference between the Upper Tribunal (a superior court of record) making a binding decision on alleged legal errors in a tribunal's decision, as opposed to a second tribunal making a decision that may well involve some of the same issues as the first tribunal's decision; at first blush, I could see an argument for *coordination* as between the Upper Tribunal's decision and that of the second tribunal (for example, the second tribunal awaiting the Upper Tribunal's decision before making its own) – but that was quite different from saying the Upper Tribunal proceedings are an "abuse". If the issue was that the Upper Tribunal remitting the case to the tribunal, if the appeal is allowed, was seen as practically "pointless" (as the "old" EHC plan will have been superseded), then that could be addressed, possibly, by the Upper Tribunal making its binding decision, but forbearing, under s12(2)(a) Tribunals, Courts and Enforcement Act 2007, to set aside the "old" tribunal decision. I stated that these were my initial thoughts, and the parties were free to make submissions on these issues as part of their (respective) response and reply.

10. In its response to the appeal, the Respondent

    a. stated that it "accepted" the "findings in respect of the grounds of appeal" in the permission decision and made no further representations in respect of the grounds of appeal;

    b. stated that it had acted in compliance with the Act and that "this process had provided the Appellants' new right of appeal to the" tribunal: on 21 August 2025, the Appellants' (new) tribunal appeal (the "**new tribunal appeal**") was registered under EH870/25/00075 and a final hearing was listed for 4 November 2026;

    c. was of the view that as there was similarity between the issues in the tribunal decision under appeal in the Upper Tribunal, and those in the new tribunal appeal; it supported the Upper Tribunal appeal on the basis that the issues would be before a differently constituted tribunal panel. It considered it appropriate for the issues remitted to the tribunal (by the Upper Tribunal) be amalgamated with the new tribunal appeal, given the similarity in the issues. It requested that the Upper Tribunal direct the amalgamation of the issues in the new tribunal appeal, and no order for costs.

11. In their reply, the Appellants asked the Upper Tribunal to issue a reasoned decision; they said the issues in the new tribunal appeal were essentially the same as those in tribunal decision in the appeal to the Upper Tribunal; they asked

that the Upper Tribunal direct a differently constituted panel for the hearing of the new tribunal appeal.

12. Neither party requested a hearing before the Upper Tribunal and both were represented. In the circumstances, it seemed to me fair and just to determine the Upper Tribunal appeal on the papers.

13. The powers of the Upper Tribunal in an appeal such as this are limited to deciding whether there was an error of law in the tribunal decision. If there is such an error, the Upper Tribunal may set the tribunal decision aside, and then either re-make the decision or remit the case back to the tribunal for its reconsideration.

Why I have decided that the tribunal decision erred in law

14. I shall refer to the three permitted grounds of appeal set out at paragraph 8 above, as grounds a, b and c, following their labelling in that paragraph.

Ground a

15. This ground is a challenge to the tribunal decision's conclusion that s61 did not apply in this case: it found that the condition in s61(2) was not satisfied, and so the power in s61(1) – to arrange for any necessary special educational provision to be made otherwise than in a school – did not arise.

16. The condition is s61(2) is satisfied if it would be inappropriate for any part of the necessary special educational provision to be made in a school. It is not necessary, in order to satisfy the condition in s61(2), that it be inappropriate for *all* the necessary special educational provision to be made in a school. But if it would inappropriate for only part of the necessary special educational provision to be made in a school, the power in s61(1) arises only in relation to that part.

17. What I say here is in line with what was said in *NN v Cheshire East* at [30] (emphasis as in the original):

> It will be seen that the wording of [the statutory predecessor to s61, being section 319 of the Education Act 1996] and 61 is not identical. For example, section 319 specifically permits a local authority to arrange for any *part* of special educational provision to be made otherwise than in a school. There is no such explicit empowerment in section 61. Nonetheless, I accept [counsel's] submission that there is nothing to suggest that such a power should not be inferred in section 61 and, indeed, the reference to 'any' in section 61(1) implies that the power does still exist.

18. The tribunal decision, it seems to me, set out the position slightly confusingly in its summary at [81] (and set out at paragraph 6c above): the trigger for the provision applying is not (at least some) provision being made in a school being *appropriate*, but, rather, (at least some) provision being made in a school being *inappropriate*.

19. In effect, therefore, the tribunal decision's conclusion was that *no part* of S's necessary special educational provision fell into the category of being inappropriate to be made in a school – and therefore s61 did not apply.

20. Ground a is couched in terms of irrationality or inadequacy of reasoning (being modes of error of law) but, expressed perhaps in somewhat lay terms, what the ground is getting as is the difficulty of understanding the tribunal decision's conclusion, given its findings about S's unpreparedness for school, and its setting out 30 hours a week of *home-based* ABA as part of S's required special educational provision.

21. One way of "squaring the circle" in the tribunal decision's reasoning, particularly on the latter point, is to recognise that the tribunal decision envisaged a "transition towards attending school", and "eventual" attendance at school; it was an "aspiration" for when S was "ready" (see paragraphs 5 and 6g above). However, this suggests that there was a period of time – of uncertain length – during which, in the tribunal's view, at least part of S's required special educational provision *should not* be made in a school. This strongly suggests that the tribunal considered making such special educational provision in a school, during that time, *inappropriate*. This is at odds with the tribunal decision's conclusion that s61 was not satisfied i.e. that the power in s61(1) to arrange for that provision to be made other than in a school, was not triggered. In other words, interpretation of the tribunal decision as meaning that the "at home" special educational provision was transitional, and so limited (temporally), leads to the conclusion that the tribunal decision erred in law in its conclusion on s61.

22. The other challenge to the tribunal decision in this ground is the way it dealt, at [85], with evidence before it of S's unpreparedness for school. In my view, it was not an error of law for the tribunal decision to take into account evidence that S was able "to access the community, for example by attending the temple", to countervail the evidence of S's unpreparedness for school, and to suggest that it would be possible for S to attend education outside the home. This was within the ambit of the tribunal's broad discretion to weigh the evidence as it saw fit. However, the following, and final sentence of [85] – the tribunal "considered that S could attend alternative provision made through a school where he was on roll, and that this would constitute attendance at a setting for the purposes of the test in section 61, amplified by the *NN v Cheshire* case" – raises different concerns. When looking at the slightly different question, posed by s40(2), of whether FB school would be "appropriate" for S, the tribunal decision found that there was "no information about what any alternative provision might look like" ([88]); it is unclear, therefore, what "alternative provision" the tribunal decision was imagining in the final sentence of [85], how it would be made "in a school" for the purposes of s61 (taking on board the point suggested by *NN v Cheshire East* at [27], that "in a school" doesn't necessarily have to mean on the school's site), and how this imagined arrangement would countervail the evidence of S's unpreparedness for school. I conclude that, in this respect, the tribunal decision was inadequately explained; and this was material because, without this reasoning, I do not think the tribunal decision could have concluded that it was not inappropriate to make any of S's necessary special educational provision in a school.

23. I conclude that ground a identifies two material errors of law which affect the tribunal decision's conclusion that s61 did not apply: first, that this conclusion is materially inconsistent with its finding that S's required special educational provision included a *home based* ABA programme; and, second, that the conclusion was based, to a material extent, on a rationale that S's necessary special educational provision could be made via "alternative provision" that would be "in a school", but the explanation of what this provision would be, and how it would countervail S's unpreparedness for school, was materially inadequate.

Ground b

24. Ground b challenges the inclusion in Section F of a *home-based* ABA programme, as, per regulation 12(1)(f), the tribunal's power was limited to setting out the special educational provision required – not the *location* where that special educational provision was to be made.

25. I remind myself that, in this context, special education provision means educational or training provision (of a certain kind) (s21(1)).

26. In my view, if the location where the provision is to be made is inherent, or integral, to its educational or training quality, then it is no error of law to set it out in Section F.

27. In practice, I would expect that to be rarely the case, and so I agree with the note of caution sounded in the tribunal decision itself at [46] (quoted at paragraph 4 above), about "setting" being (usually) not relevant to the provision required. For this reason, it would be good practice for any tribunal including the location in which provision is to be made, as part of Section F, to explain, briefly, why, in that particular case, the location is inherent, or integral, to the educational or training quality of the provision.

28. I conclude that it was not an error of law for the tribunal to set out a *home-based* ABA programme in Section F, albeit that it would have been good practice for it to explain in terms why the location where this provision was to be made was inherent or integral to its educational quality.

Ground c

29. Ground c challenges the tribunal decision's setting out "a special school" as the type of school to be attended by S – the ground alleges that if, on the basis of the tribunal decision's conclusion that s61 did not apply, Section I was not to be left blank, "a mainstream school" should have been set out.

30. It appears unchallenged that this was a case where s40 applied i.e. no request had been made by the Appellants to the Respondent to secure that a particular school or other institution was named in S's EHC plan – this is consistent with the tribunal decision's finding that the Appellants wished S to received EOTIS (see paragraph 2d above). That in turns means that the Respondent was obliged to secure that S's EHC plan name an appropriate school or type of school, under

s40(2); and so, under s33(2), that the Respondent was obliged to secure that S be educated in a mainstream school, unless that was incompatible with the Appellants' wishes or with the provision of efficient education for others. There was clearly no consideration of the latter point in the tribunal decision; and as for the Appellants' wishes, there was no finding, or indication, in the tribunal decision that, if a type of school was to be set out in Section I, they did not want a mainstream school to be set out there.

31. I conclude that this ground is made out: it was an error of law for the tribunal decision, having decided that s61 did not apply and that Section I could not be left blank, to set out "a special school" in Section I, as (1) the Appellants hadn't requested that a particular school be named in S's EHC plan, and (2) there was no finding that a mainstream school was incompatible with the Appellants' wishes or with the provision of efficient education for others.

Why I have set aside the tribunal decision and remitted the case to the tribunal, to be consolidated with the new tribunal appeal

32. Both parties favour my setting aside the tribunal decision and remitting the case to the tribunal, to be consolidated (under rule 5(3)(b) of tribunal's procedure rules) with the new tribunal appeal, and to be heard by a different panel from the one that made the tribunal decision. This appears to me, too, to be the right course, given the material errors of law I have found in the tribunal decision, and the similarities both parties tell me exist as between the issues in the tribunal decision and those in the new tribunal appeal.

Zachary Citron
Judge of the Upper Tribunal

Authorised by the Judge for issue on 21 August 2026
Corrected on 12 October 2026

APPENDIX: TEXTS OF SECTIONS 61 AND 33

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.

33 Children and young people with EHC plans

(1) This section applies where a local authority is securing the preparation of an EHC plan for a child or young person who is to be educated in a school or post-16 institution.
(2) In a case within section 39(5) or 40(2), the local authority must secure that the plan provides for the child or young person to be educated in a maintained nursery school, mainstream school or mainstream post-16 institution, unless that is incompatible with—

(a) the wishes of the child's parent or the young person, or
(b) the provision of efficient education for others.

(3) A local authority may rely on the exception in subsection (2)(b) in relation to maintained nursery schools, mainstream schools or mainstream post-16 institutions in its area taken as a whole only if it shows that there are no reasonable steps that it could take to prevent the incompatibility.
(4) A local authority may rely on the exception in subsection (2)(b) in relation to a particular maintained nursery school, mainstream school or mainstream post-16 institution only if it shows that there are no reasonable steps that it or the governing body, proprietor or principal could take to prevent the incompatibility.
(5) The governing body, proprietor or principal of a maintained nursery school, mainstream school or mainstream post-16 institution may rely on the exception in subsection (2)(b) only if they show that there are no reasonable steps that they or the local authority could take to prevent the incompatibility.
(6) Subsection (2) does not prevent the child or young person from being educated in an independent school, a non-maintained special school or a special post-16 institution, if the cost is not to be met by a local authority or the Secretary of State.
(7) This section does not affect the operation of section 63 (fees payable by local authority for special educational provision at non-maintained schools and post-16 institutions).