IN THE UPPER TRIBUNAL **Case No** HS/549/2017
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed. The decision of the First-tier Tribunal sitting at the Royal Courts of Justice on 16 December 2016 under reference EH318/16/00017 involved the making of an error of law and is set aside. The case is referred to the First-tier Tribunal (HESC Chamber) for rehearing before a differently constituted tribunal. I direct that the file be placed before a salaried judge of the First-tier Tribunal as soon as possible for consideration of whether further case management directions are required.

REASONS FOR DECISION

1. The local authority appeals, with permission given by Judge Lewis of the First-tier Tribunal ("FtT"), against the FtT's decision of 9 January 2017. In giving permission to appeal, the judge, summarising, observed:

> "4. The Grounds are: 1) Incorrect compliance with "parental preference" on the facts of this case 2) The Tribunal erred in determining what was "unreasonable public expenditure" and 3) the Tribunal failed to consider the relationship between its role and that of the authority in undertaking enforcement proceedings under the Education Act 1996.
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> 5. I grant permission to appeal on all Grounds. Each is arguable.
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> 6. I conclude that this is an area of the law that requires further clarification in the public interest of the interpretation of [how wide] *(sic)* "unreasonable public expenditure", following Haining v Warrington BC [2014] EWCA Civ 398."

2. Although the grounds have evolved somewhat in the course of proceedings and, as is not uncommon, the public law issues in this case can be categorised in a variety of different ways, Judge Lewis's summary remains a concise guide to the key issues in the case. So far as I consider I properly can given the course the case has taken, I address the point identified in para 6 of her grant of permission.

3. The appeal was lodged with the Upper Tribunal on 13 February and the case has been expedited, as there are understood to be current proceedings under s.31 Children Act 1989, which make the prompt resolution of the present appeal desirable. Originally an oral hearing of this appeal was set for 27 March but it had to be adjourned because the local authority's counsel had very recently become unwell. The parties agreed that, to avoid the delay if another hearing date had to be found, the appeal should be decided on the papers after further written submissions. I am grateful to all those who have worked, quickly and flexibly, on this case.

4. The case concerns the education of X, a girl aged 8 at the date of the FtT's hearing. Her mother wishes her to attend school A, an independent special school. The local authority considered that school H, a maintained mainstream school, was suitable to meet X's needs and that while placement at A could meet X's needs, it would constitute unreasonable public expenditure pursuant to s9 of the Education Act 1996 ("the 1996 Act"). Mr Wolfe QC, for X's mother, submits that that was the authority's only objection to the placement in the FtT proceedings: so it may have been, but the authority was not required to anticipate the particular twists and turns which the FtT's reasoning took in this case and its failure to do so does not prevent it from challenging them now.

5. X did not attend school in either Reception or Year 1 and has not been in a school setting since October 2015. She had for a while attended school H, albeit there were concerns over the frequency of her attendance. Her mother raised concerns about various matters, whose detail does not matter for present purposes. She is of the view not only that school H cannot appropriately provide for X, but that none of the local authority's schools can do so. Consequently when the local authority named school H in X's Education Health and Care Plan ("EHC Plan") she appealed, seeking that school A be named in part I. She remained steadfast in her view, to the point that she was apparently prepared to be prosecuted in respect of her daughter's non-attendance at any school other than the one of her choice.

6. There had originally been other issues in dispute as well but those in Part B were resolved by agreement and those in Part F were adjudicated upon by the FtT and are not relevant to the present appeal.

7. The FtT applied s.39(3) of the Children and Families Act 2014 ("the 2014 Act"), concluding that placement at school A would amount to an inefficient use of resources for the purposes of that section. Ms Scolding QC for the local authority in submissions suggests that school A is neither a "non-maintained special school" nor an institution approved by the Secretary of State (the two possible contenders) under s41; if it is not, it falls outside s38(3) and in turn outside s39(3). Mr Wolfe indicates that what is in issue is the exercise of the power under s40(2) of the 2014 Act. That applies where s39 does not, so it appears to be common ground that s39(3) does not in fact apply to the case. Nonetheless, the FtT's conclusions on the footing that it was applying s39(3) are relevant to its reasoning on the issues I have to decide.

8. The FtT found (inter alia) that:

a. both placements were suitable to meet X's special educational needs ("SEN") (it did so despite reservations on the part of both the school and X's mother);
b. school A would cost £41,400, while school H would cost some £31,560, thus the cost difference was some £9,840 per annum more than school H (for the purposes of this decision I round to £41K, £31K and £10K for brevity);

c. of the claimed advantages for school A, it accepted that it was "a much smaller school" and that the size of group was "a lot smaller"; and that the speech and language provision to be set out in X's EHC plan in consequence of the FtT's order could be provided within the classroom rather than, as at school H, by withdrawing X from classes;
d. however, other claimed advantages regarding speech and language therapy provision and a more protected environment were not made out;
e. in the light of c. and d., the increased cost of placement at school A would be an inefficient use of resources as the resources required to provide for X could be provided at school H.

9. Section 9 of the 1996 Act provides:

> "9. Pupils to be educated in accordance with parents' wishes.
>
> In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure."

10. The FtT in its decision set the section out, not entirely accurately, including omitting the important word "unreasonable". However, it is clear from what follows that it was aware that "unreasonable public expenditure" is the relevant phrase and no point has been taken by reference to the FtT's slip when setting out the section.

11. The decision then records:

> 64. Once again we took into account the additional perceived benefits for [X] with *[sic]* regards a placement at [school A] but looked at the wider perceived benefits outside those of resource benefits.
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> 65. The tribunal do have to take into consideration the benefits of naming [school A] in the light of [school H's] evidence that they feel that to name their own provision would be potentially harmful to [X] due to her mother's refusal to engage with the school and her refusal to send her to any LA maintained school. [School H] stated that they could not see the placement working due to [X's mother] feeling unable to work with them.
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> 66. This is not a case whereby the child has decided on a whim not to attend a certain school, but is a case where her mother has decided that no other school, than an independent special school is able to provide for her daughter. The tribunal do not agree that the LA is unable to meet the individual needs of [X]. The tribunal felt that the LA are wholly capable of meeting her needs within a mainstream setting as described above and for the reasons as set out above.

> 67. Unfortunately, this is not a case of empty threats on the part of [X's mother] and the tribunal have been provided with significant evidence to show that [she] is willing to be prosecuted for the non-education of her daughter in order to ensure her daughter attends the school of her choice. Due to non-attendance at school there is a cost to the public purse in not only having put in place the provision required to meet [X's] needs but also a cost in pursuing [her mother] to ensure she ensures [X] attends school. The cost of wasted provision and that of prosecuting [the mother] in the tribunal's view outweigh any cost differential[.] Furthermore, whilst the tribunal should not pander to such demands[,] in this instance the child's educational needs are paramount and the tribunal find that in order for this little girl to start to receive an education to meet her individual needs the only way forward is to conclude that the wider perceived benefits (in particular the chance of attending an educational placement) are such as to outweigh any unreasonable public expenditure. For the reasons set out in the above paragraphs the tribunal conclude that the perceived wider benefits do sufficiently mitigate the unreasonableness of the expenditure proposed and name [school A].
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> 68. The tribunal did not make this decision lightly and took solace in the fact that [school A] has a good reputation with regards the reintegration of pupils who have had little education and that they are a school whose main aim is to get children back into the mainstream system as soon as is appropriate. The tribunal found that [X] is able to be educated within a mainstream setting if they are given a chance. There are doubts as to the level of SEN that she has and that her difficulties might be due to lack of education and being placed at [school A] where she hopefully will attend on a regular basis will help to assessment *[sic]* her actual needs more fully."

The law

12. For s9 of the 1996 Act, see above. The Code of Practice (para 9.84) does not materially add for present purposes.

13. Section 40(2) of the 2014 Act provides that where it applies:

> "The local authority must secure that the plan—
> (a) names a school or other institution which the local authority thinks would be appropriate for the child or young person concerned, or
> (b) specifies the type of school or other institution which the local authority thinks would be appropriate for the child or young person."

14. The 1996 Act makes provision in Part VI for requiring school attendance. Section 437 allows a local authority to serve a notice on a child's parent requiring the parent to satisfy the authority within a specified period that the child is receiving suitable education. If the parent fails to do so, by s437(3) the authority is obliged to serve a "school attendance order" requiring the parent to cause the child to become a registered pupil at a named school.

15. Section 441 of the 1996 Act makes special provision in respect of school attendance orders for children with a statement of SEN or an EHC Plan:

> "(1) Subsections (2) and (3) apply where a local authority are required by virtue of section 437(3) to serve a school attendance order in respect of a child for whom they maintain an EHC plan (in the case of a local authority in England) or a statement under section 324 (in the case of a local authority in Wales).
>
> (2) Where the EHC plan or statement specifies the name of a school, that school shall be named in the order.
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> (3) Where the EHC plan or statement does not specify the name of a school—
> (a) the authority shall amend the EHC plan or statement so that it specifies the name of a school, and
> (b) that school shall then be named in the order."

16. In cases where there is no statement of SEN or EHC Plan, s442 makes provision for a parent to request that a school attendance order be revoked on the ground that arrangements are in place for the child to receive suitable education otherwise than at school, with a right to have the matter referred to the Secretary of State in case of disagreement. However, where there is a statement or EHC Plan and a school is named in the statement or plan, those provisions do not apply.

17. By s443(1), "If a parent on whom a school attendance order is served fails to comply with the requirements of the order, he is guilty of an offence, unless he proves that he is causing the child to receive suitable education otherwise than at school." A person guilty of an offence under the section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

18. Section 444 creates two offences: if a child of compulsory school age who is a registered pupil at a school fails to attend regularly, his parent is guilty of an offence. If the parent knows that his child is failing in that respect and fails to cause him to do so, that too is an offence. The former is once again punishable on summary conviction by a fine not exceeding level 3; the latter, involving knowledge, is punishable more severely, including by imprisonment.

Analysis of the FtT's decision

19. How should the FtT's para 67 be understood? Mr Wolfe invites me to conclude that the FtT was (a) concluding that there was no cost differential; but (b) that if there was, the perceived wider benefits were sufficient to mean that it was not unreasonable. I am unable to accept Mr Wolfe's reading: as will become apparent, in my judgment the FtT has muddled up its consideration of what is a cost and whether any particular cost amounts to "unreasonable public expenditure"; those are two distinct questions. There is

not a reasons challenge in this case, but the point is still relevant, as on it Mr Wolfe hangs a substantial part of his submission.

20. In observing that the cost of wasted provision and that of prosecuting X's mother outweigh any cost differential" the FtT cannot be taken as saying that there was no cost differential. That is neither the natural meaning of the words, nor does it follow as a matter of logic from the two factors mentioned. If the cost of prosecuting the mother fell to be taken into account, that would admittedly be an additional part of the calculation of the differential and so might reduce the amount of any differential which, absent the prosecution cost, might be found to exist; however, the same cannot be said of "the cost of wasted provision". The cost of providing a place at school H has already been taken into account in calculating the differential. The fact that such provision might be, as the FtT saw it, "wasted" cannot alter the differential.

21. The cost of prosecuting is at least, if evidenced, a genuine cost. However, it is not evidenced and the FtT had no basis on which it could take it into account.

22. If it was evidenced, it clearly would constitute "public expenditure". *Haining v Warrington* indicates at [2] that the Court of Appeal's preference, when considering what expenditure had to be taken into account for s9 purposes, was for the meaning of "expenditure incurred by any public authority as a result of the discharge by the local authority of the education functions." Typically the debate is between two ways of providing what is deemed to be needed and the "unreasonableness" is examined by reference to whether the benefits of the more expensive way are sufficient to justify the public expenditure required to pay for it, as was the situation in *Haining*. The Court of Appeal did not have to consider the question of whether there were causal limits on the education functions of the authority which needed to be taken into account: its concern was with whose expenditure fell to be taken into account.

23. Section 9 is widely drafted, but in the particular context of which school a local authority or FtT should name, the question is of the financial consequences of the exercise of the functions of making a placement. The provisions of Part VI of the 1996 Act are such that for there to be a successful prosecution, a parent will not only not be sending the child to the school named in the statement or plan, but will be failing to cause the child to be receiving a sufficient education by another route. There is no obligation on a parent to send a child to the school named in the statement but there is an obligation to secure that the child is properly educated. If a parent defaults in that regard, the costs of dealing with that default do not in my view fall to be taken into account as part of calculating the cost of the placement of the child, which is not the cause of the prosecution action requiring to be undertaken. Even if Mr Wolfe's view is accepted, that *Haining* says that "all public expenditure (saved or incurred by acceding to the parental preference or not) is to be taken into account", the necessary element of causation is missing here.

24. I have expressed the view in [20] above that the so-called "wasted" cost cannot give rise to an additional cost reducing the cost differential. It follows in my view that to the extent that it did take it into account as going to the cost differential between the schools, the FtT erred in law by doing so.

25. If a "wasted" cost is not a cost, can its alleged wasted nature be taken into account as going to the unreasonableness or otherwise of the public expenditure? The argument would have to be along the lines that, in a situation where there is a choice between two schools, spending £41K on the school of parental preference (to which the parent would send the child) and thereby achieving something in return for the expenditure could not be seen as unreasonable when set against the alternative of spending £31K on provision at a school which the child would not attend. I have seen no evidence (and in the absence of an oral hearing of the appeal, am unable to explore whether there was any) that, if X were not to attend school H, the local authority would have to carry on paying £31K for it. Even though as school H is an out of borough placement the authority's scope for adjusting its costs in that event might be somewhat reduced, it seems unlikely. In any event, in my view the argument would be a form of the "fancy accountancy footwork" deprecated by the Court of Appeal in *EH v Kent CC* [2011] EWCA Civ 709: the authorities are essentially concerned with determining cost and encourage an uncomplicated approach. Even if, contrary to my view, such an approach be legitimate, in my view, one can only look at reasonableness of public expenditure in the round and that the FtT failed to do. There are plenty of parents and children who have to accept the naming of a placement that might be less than their ideal, because the benefits of the "ideal" are not such as to justify the additional expenditure. Local authorities owe duties of a fiduciary character to payers of council tax. There is a legitimate public interest in the intended operation of the system, including fairness between families affected.

26. Mr Wolfe then seeks to argue that, by saying that the factors on which it relied would anyway "sufficiently mitigate the unreasonableness", the FtT was saying that, even without s9 behind it, it would decide the same way. In my view the submission opportunistically takes a phrase out of context. The sentence is merely "wrapping up" the paragraph and looks back to the FtT's approach, legally inadequate as I have judged it to be, to the question of unreasonable public expenditure and to its view that X's educational needs are paramount, to which I now turn.

27. It is a further ground of appeal that the FtT erred in law by applying a test of the paramountcy of the child's educational needs. Children's welfare is a paramount consideration under s1 of Children Act 1989 but that provision does not apply in SEN proceedings: *White v LB Ealing* [1998] ELR 203; *C v Buckinghamshire* [1999] ELR 179 per Thorpe LJ. In my view the tribunal did so err. It had found that school H could meet X's needs (there had been issues over this – and I acknowledge Mr Wolfe's point by reference to *L v Wandsworth* [2006] ELR 376 that the existence of a strained relationship between parent and school may be a relevant consideration, but if the FtT's view was that the school could not meet those needs, it should have said so);

it expressly disagreed with the suggestion that the authority could not meet X's needs and found that it could do so in a mainstream setting, a view for which there was evidence. What stood in the way was X's mother's view that she would not send X to school H or to any maintained school. The tribunal was well aware that it "should not pander to such demands". Faced with what I accept was a difficult situation, not only did it say that the child's educational needs are paramount, but it did indeed apply that as a legal test. It elevated the child's needs over all other considerations. That, according to the FtT, was the "only" way forward. It had not worked out what sufficiently what public expenditure, or unreasonable public expenditure, there was, but "any" unreasonable public expenditure was, in effect, trumped by the child's educational needs.

28. I also accept the ground of appeal that the FtT's approach failed to apply section 9 correctly. The duty under that section is to "have regard to" the "general principle" that pupils are to be educated in accordance with the wishes of their parents. As the Court of Appeal noted, by reference to the predecessor legislation, in *Watt v Kesteven CC* [1955] 1 QB 408, cited with approval in *Haining*:

> "Section 76 does not say that pupils must in all cases be educated in accordance with the wishes of their parents. It only lays down a general principle to which the county council must have regard. This leaves it open to the county council to have regard to other things as well, and also to make exceptions to the general principle if it thinks fit to do so."

That is a relatively weak obligation. Further, as noted in *C v Buckinghamshire CC* [1999] ELR 179:

> "A bare preference might be ill-informed or capricious. In practice, parental preference may mean a fair opportunity to the parents to contend by evidence and argument for one school in preference to another. Therefore, preferences must be reasoned to enable the parent to demonstrate that they rest on a sound foundation of accurate information and wise judgment."

Mr Wolfe makes the point that disagreement with a parent's view does not mean that that view was capricious: indeed not, but that view might still be ill-informed or not rest on a sound foundation and in my judgment the FtT's decision, read as a whole, indicates that that was its view.

29. Mr Wolfe relies on the need for a broad balancing exercise (see *Hampshire v R* [2009] EWHC 626 (Admin) and for a holistic approach. However, merely because the FtT, as Mr Wolfe submits needed to be (and was) aware of the consequences for a pupil of attending or not attending and of the reasons for the mother's preference (largely ill-founded though they considered them to be) did not entitle it to redraw s9 so as to alter the balance provided for by statute between a parent's wishes and other considerations.

30. What the FtT has done in my view is to subvert rather than promote the legislative intention behind s9 by accepting that the consequences of a parent's extreme intransigence prevail, despite its earlier findings that the parent's reservations were unjustified.

31. In view of the conclusions I have reached above I need not deal more than briefly with the authority's further arguments. Lest the matter go further, I accept the submission on behalf of the authority that the FtT's decision was one that no reasonable tribunal could reach. Ms Scolding submitted at para 29 of her skeleton argument:

> "Given the FtT's clear conclusion that (a) there was no educational reason related to Xwhy she could not be educated within [school H] and/or another school; (b) the sole reason for naming the provision was because of [X's mother's] intransigence including being prosecuted for non school attendance (paragraph 67); (c) that it recognised that it should not pander to such demands (paragraph 67) and that (d) her SEN may well be due to her lack of education rather than being SEN per se (paragraph 68), it was perverse for it to reach the conclusion that it did and name [school A]. No rational tribunal could have reached that conclusion and it was wrong to do so."

Mr Wolfe seeks to characterise this as "no more than disagreement with the FtT's conclusion." I am mindful that the test for perversity is a demanding one, but for the reasons given by Ms Scolding and in particular the FtT's acknowledgment that it should not pander to the mother's intransigence but then doing so leads me to the conclusion that the test was met in this case.

32. The authority has a further ground that the EHC Plan was being used by the FtT for an improper purpose, namely to secure school attendance. It is not necessary to rule on this point and I express no view. It also raised a fall-back point about how the FtT ought to have tackled the matter, had it not found school H to be suitable. As it did find school H to be suitable, the point is of no consequence.

CG Ward
Judge of the Upper Tribunal
25 April 2017