IN THE UPPER TRIBUNAL **Case No HS**/3010/2016
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Ms L Price, instructed by Simpson Millar

For the Respondent: Mr T Tabori, instructed by County Solicitor

Decision: The appeal is dismissed. The decision of the First-tier Tribunal sitting at London on 24 May and 6 July 2016 under reference EH881/15/00035 did not involve the making of a material error of law and is upheld.

REASONS FOR DECISION

1. The appellant is the mother of a girl, S, born in November 2008. S has a condition on the autistic spectrum and developmental delay. Following a review held as long ago as July 2015 which had not resulted in changes to S's statement of special educational needs ("SEN"), the appellant appealed to the First-tier Tribunal ("FtT"). The legal nature of that appeal is disputed and I return to it below. A number of changes of heart on the part of the appellant ensued, but by the time of the final hearing before the FtT, she was seeking placement in school U, a maintained mainstream primary school, preferably with additional ABA (Applied Behaviour Analysis) input. The authority's position was that education of S there would be incompatible with the efficient education of another pupil, also with SEN, who was attending the school already, and that S should be educated at OV, a maintained special school.

2. The case concerns the qualified primacy given to mainstream education by sections 316 and 316A of the Education Act 1996 ("the 1996 Act") and a question of some broader interest in relation to the inquisitorial function of the First-tier Tribunal (HESC) in applying that legislation, specifically the impact of an apparent concession by the appellant's then representative that the appellant was not asking the FtT to give effect to those sections with their fullest potential application. The representative concerned, Mr M, was not appearing as a solicitor or barrister, but is from an organisation which quotes a four figure sum as the fee for conducting a day's hearing and which holds itself out in terms that it

> "provides support and advice for parents seeking the best possible special educational needs provision for their children. We specialise in cases involving children with autism, as we have significant personal and professional experience of SEN tribunal for autistic children."

3. The FtT ordered a number of changes to Parts 2 and 3 of S's statement. As to Part 4 it did not order any change. It found that the appellant had a genuine - if possibly misconceived - preference for mainstream education. It

found that the respondent could properly rely on the exemption in s.316(3)(b) not to place S at school U. No challenge is made to that conclusion before me. The question was, what followed?

4. It is not disputed that because of the relevant provisions of the Children and Families Act 2014 (Transitional and Saving Provisions) (No.2) Order SI 2014/2270, in particular Articles 11, 18 and 19 thereof, the case fell to be dealt with under the provisions of the 1996 Act rather than those of the Children and Families Act 2014 ("the 2014 Act").

5. Sections 316 and 316A of the 1996 Act, so far as relevant, provide as follows:

> **"316 Duty to educate children with special educational needs in mainstream schools**
>
> (1) This section applies to a child with special educational needs who should be educated in a school.
>
> (2) ....
>
> (3) If a statement is maintained under section 324 for the child, he must be educated in a mainstream school unless that is incompatible with–
> (a) the wishes of his parent, or
> (b) the provision of efficient education for other children.
>
> (4) [Defines *"mainstream school"* for the purposes of ss.316 and 316A.]
>
> **316A Education otherwise than in mainstream schools**
> ....
> (5) A local authority may, in relation to their mainstream schools taken as a whole, rely on the exception in section 316(3)(b) only if they show that there are no reasonable steps that they could take to prevent the incompatibility.
> ...
> (8) An authority must have regard to guidance about section 316 and this section issued
> (a) for England, by the Secretary of State,
> …
>
> (9) That guidance shall, in particular, relate to steps which may, or may not, be regarded as reasonable for the purposes of subsections (5) and (6).
> …
> (11) *"Authority"*–
> (a) in relation to a maintained school …, means each of the following–
> (i) the local authority,
> …"

6. There is statutory Guidance (reference 0774/2001) which it is not necessary to set out. It emphasises the very specific and limited nature of the grounds under those sections which can justify a child not being educated in mainstream education.

7. It is also necessary to refer to sch. 27, para.8 which states:

> "(1) Sub-paragraph (2) applies where—

(a) the parent of a child for whom a statement is maintained which specifies the name of a school or institution asks the local authority to substitute for that name the name of a maintained school or maintained nursery school specified by the parent, and
(b) the request is not made less than 12 months after—
(i) an earlier request under this paragraph,
(ii) the service of a copy of the statement or amended statement under paragraph 6,
[...]
(iv) if the parent has appealed to the Tribunal under section 326 or this paragraph, the date when the appeal is concluded,
whichever is the later.

(2) The local authority shall comply with the request unless—
(a) the school is unsuitable to the child's age, ability or aptitude or to his special educational needs, or
(b) the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated or the efficient use of resources.

(3) Where the local authority determine not to comply with the request—
(a) they shall give notice in writing of that fact to the parent of the child, and
(b) the parent of the child may appeal to the Tribunal against the determination.

(3A) A notice under sub-paragraph (3)(a) must inform the parent of the right of appeal under sub-paragraph (3)(b) and contain such other information as may be prescribed.

(4) On the appeal the Tribunal may—
(a) dismiss the appeal, or
(b) order the local authority to substitute for the name of the school or other institution specified in the statement the name of the school specified by the parent.

..."

8. Other rights of appeal requiring to be mentioned are those conferred by ss.326 and 328A:

326.— Appeal against contents of statement.

(1) The parent of a child for whom a local authority maintain a statement under section 324 may appeal to the Tribunal–
(a) when the statement is first made,
(b) if an amendment is made to the statement, or
(c) if, after conducting an assessment under section 323 , the local authority determine not to amend the statement.

(1A) An appeal under this section may be against any of the following–
(a) the description in the statement of the local authority's assessment of the child's special educational needs,
(b) the special educational provision specified in the statement (including the name of a school so specified),
(c) if no school is specified in the statement, that fact.

(2) Subsection (1)(b) does not apply where the amendment is made in pursuance of—
(a) paragraph 8 (change of named school) or 11(3)(b) (amendment ordered by Tribunal) of Schedule 27, or
(b) directions under section 442 (revocation of school attendance order);

and subsection (1)(c) does not apply to a determination made following the service of notice under paragraph 2A (amendment by local authority) of Schedule 27 of a proposal to amend the statement.

(3) On an appeal under this section, the Tribunal may—
(a) dismiss the appeal,
(b) order the authority to amend the statement, so far as it describes the authority's assessment of the child's special educational needs or specifies the special educational provision, and make such other consequential amendments to the statement as the Tribunal think fit, or
(c) order the authority to cease to maintain the statement.

(4) On an appeal under this section the Tribunal shall not order the local authority to specify the name of any school in the statement (either in substitution for an existing name or in a case where no school is named) unless—
(a) the parent has expressed a preference for the school in pursuance of arrangements under paragraph 3 (choice of school) of Schedule 27, or
(b) in the proceedings the parent, the local authority, or both have proposed the school, or
(c) in the proceedings the child has proposed the school (whether or not the parent, the local authority or both have also proposed the school).

(5) Before determining any appeal under this section the Tribunal may, with the agreement of the parties, correct any deficiency in the statement."

Section 328A provides:

"328A Appeal against determination of local authority in England not to amend statement following review

(1) This section applies where a local authority in England—
(a) conduct a review of a statement in accordance with section 328(5)(b), and
(b) determine not to amend the statement.

(2) The authority shall give written notice of the determination and of their reasons for making it to the parent of the child concerned.

(3) The parent may appeal to the Tribunal.

(4) Subsections (1A) , (3), (4) and (5) of section 326 apply to an appeal under this section as they apply to an appeal under that section, but with the omission of subsection (3)(c).

(5) A notice under subsection (2) must inform the parent of the right of appeal and of the period within which the right may be exercised.

(6) A notice under subsection (2) must be given to the parent within the period of seven days beginning with the day on which the determination is made."

4. The key paragraphs of the FtT's decision are as follows:

"71. The Tribunal was not satisfied that it would be incompatible with the efficient education of other children if [S] were placed in *any* mainstream setting and rejected the authority's submission to that effect. There may be mainstream primary schools elsewhere which would be willing and able to meet [S]'s needs by making bespoke provision for her. This was effectively conceded by [the respondent's then representative] when she presented her schedule of costs, including the costs of placing [S] in a mainstream primary school with a different package of individual

> support. The Tribunal were told by [educational psychologists who were witnesses on behalf of the appellant] that there are many mainstream schools up and down the country who meet the needs of pupils with autistic conditions by employing trained ABA tutors and accepting the advice and assistance of ABA Consultants. The Tribunal accepted that this may well be true. However, Mr [M] specifically rejected the idea that the Tribunal should order the authority to name only a type of school in Part 4 since that would achieve nothing for the benefit of [S] and provoke an inevitably fruitless, further search for an amendable [sic] mainstream primary school in Essex.
>
> 72. Although it was not necessary for the purposes of this decision (because the Tribunal decided that the placement of [S] in [school U] would be incompatible with the education of other children and the steps required to remove the incompatibility would be unreasonable), the Tribunal took the view that section 316(3) of the Act did not apply in this case because, when the amended statement was made, [the appellant] wanted [S] to attend [OV school]. That was the sole reason for the issue of the amended statement. Section 316A of the 1996 Act provides that, if an authority decide to make a statement but not to name in the statement the school for which a parent has expressed a preference they shall, in making the statement, comply with section 316(3). In this case the authority were not making the statement but were declining to change the name of the school following an annual review of an amended statement they had made in 2014. There is authority for the proposition that section 316 does not apply when considering a parental request under Schedule 27 to change the name of the placement in Part 4 *(Slough v SENDIST* [2004] EWHC 1759; [2004] ELR 546) and this is a comparable situation."

5. Logically, the first matter in dispute concerns the provision under which the appeal to the FtT was being made. Ms Price submits that it was an appeal under s.328A, Mr Tabori that it was an appeal under sch. 27, para.8. It matters because on the *Slough* decision holds at [28] that the duty created by s.316 does not apply to a determination under para.8 of sch. 27. There was no suggestion before me that *Slough* was wrongly decided in this respect and so, if Mr Tabori is right, the issues relating to s.316, the central point of this case, would never be reached and the appeal would fail at the outset.

6. However, I do not consider that he is right. As a preliminary, *Slough* at [28(v)] follows earlier authorities (*R v Kirklees Metropolitan Council ex p Ali* CO/193/2000, unreported, 23 May 2000 and *M v Essex CC* [2001] EWHC Admin 956) to hold that on an appeal under para.8(3)(b) of sch.27, the tribunal does not have power to amend parts 2 or 3 of a pupil's statement of SEN.

7. On 24 August 2015 the respondent's casework manager had written to the appellant that:

> "Following your request for the local authority (LA) to consider a change of placement for [S] from [OV school] to [T Specialist School and College], this has been given very careful consideration. The LA is not in agreement with your request…"

The letter went on to explain that, contrary to the appellant's views, it was considered that there was no evidence that school OV was not meeting S's needs, that to transport S to school T would be an inefficient use of resources and that school T was at capacity and had no place for S. It advised the appellant of her rights of appeal.

8. The appeal was lodged with the FtT on 25 October 2015. It referred to the decision letter as being that dated 24 August 2015. The appeal used form SEND1A (version 01.15). That contains a series of boxes to be ticked as appropriate. There are 4 main headings: "A. Refusal to carry out a statutory assessment"; "B. Refusal to amend the statement following a review"; C. "Refusal to make a statement of special educational needs"; and D. "Contents of a statement of special educational needs." The form – perhaps anomalously - does not have an equivalent heading directed to an appeal under para.8(3)(b) of sch.27. Of the headings set out above, A and C are plainly inapplicable. There is only one box under sub-heading B - "the local authority has reviewed my child's statement and decided not to amend it" - and that box was ticked, while under D - "the local authority made a statement of special educational needs for my child, or refused to change it after a statutory reassessment and…" - the appellant had ticked boxes for "I disagree with what part 2 of the statement says about my child's special educational needs", "I disagree with what part 3 says about the educational help or provision my child should receive" and "I disagree with the school named in part 4 of the statement." To the application form, the appellant attached a number of documents, including a 4 page document which was, in effect, grounds of appeal. It refers to the school having "completed the annual review as attached", dated 2015-16. She attached the letter of 24 August saying that "This has been given to me [on] the completion of the annual review process and as such I believe I have the entitlement to appeal parts 2,3 and 4 of my statement". She attached S's original statement dated 25 October 2013 pointing out that it had not been amended in the two subsequent annual reviews. In this respect she was mistaken, as there is a statement dated 10 July 2014 on the FtT's file at p152.

9. The case was understood by the respondent in the following terms (FtT p37) in a response prepared in December 2015:

> "[The appellant] has appealed under section 326 of the Education Act 1996 against Parts 2, 3 and 4 of the statement [of special educational] needs made by [the respondent] on 19 [sic] July 2014 following an annual review."

In the "Background" section, the response referred to the amendment of the statement on July 2014 to name school OV, before recording that "following the recent annual review of the statement, a school placement was sought at school T". The response goes on to cite various provisions of SEN law, not including sch.27, para. 8.

10. Whilst I can see Mr Tabori's argument based on the wording of the letter of 24 August 2015 alone, that in my view is wrongly to isolate that letter from what the appellant said she was appealing about in her grounds of appeal and their various attachments and how the appeal was understood both by the FtT and the respondent themselves. As noted above, the FtT could not have addressed Parts 2 and 3 of the appeal (as it did) if the appeal was made under para. 8 of sch. 27. For its part, the respondent did not treat the appeal as being under that provision either, but under s.326. That analysis may itself

have been deficient if, as appears, there was no amendment made to the statement, unless a further assessment had been carried out before a decision not to amend. Either of those would have brought the case within s.326, but if, as appears, there was a review followed by a determination not to amend, it is properly a s.328A case, as Ms Price submits. The miscategorisation by the respondent in the FtT was of limited importance, as s.328A(4) creates a substantial overlap between ss.326 and 328A. I therefore prefer Ms Price's submission on this issue and proceed to the FtT's handling of s.316.

11. Ms Price submits that though the FtT dealt adequately with s.316(3)(b) in relation to school U, it failed to do so in relation to its schools generally, as s.316A(5) and *R(MH) v SENDIST* [2004] EWHC 462 (Admin) require. The FtT found that the appellant maintained a preference for mainstream education. Mr M's remarks had not withdrawn that preference. They could be understood as a fall-back, as it is understandable that the appellant should prefer her school of preference if possible. Faced with the position adopted by Mr M, the tribunal did not, as it should have done, probe that matter with Mr M to establish a way forward. The issue had been placed firmly within the jurisdiction of the tribunal and it could not avoid making a decision which applied the law. She submits from the opening words of [72] of the tribunal's decision that it failed to do its duty of ensuring s.316 was applied, in accordance with s.316A(5). There was evidence indicating that a successful outcome might be a possibility, as the tribunal noted at [71], in the form of the schedule of costs provided by the respondent's then representative, referring to such placement. She further submits that in [72] the tribunal erred further, by applying *Slough* outside its correct context of sch.27, para. 8.

12. Mr Tabori submits, effectively without prejudice to his primary contention that this was a sch.27, para.8 case, that in the light of Mr M's observations, the tribunal was acting consistently with the appellant's wishes as they then stood. The tribunal was entitled to conclude that the appellant's preference for mainstream was all tied up with her preference for school U.
Mr M and the organisation he represents could be relied upon by the FtT. There was good reason why Mr M said what he did: there is evidence that a number of other schools in Essex had already been looked at, without success, and thus his reported statement that a further search would be "inevitably fruitless" was entirely understandable. The evidence of the educational psychologists had been concerned with provision "up and down the country": whatever the position elsewhere, it did not mean that there would be suitable schools in Essex. The respondent's schedule of costs was purely hypothetical, showing the cost <u>if</u> it could be done. The tribunal's jurisdiction, whilst inquisitorial, is not so without limit: see e.g. s.326(4), which prevents a tribunal from considering schools not put forward by one or other of the parties. The tribunal is entitled to rely on the position adopted by a representative. As was said in *Jeleniewicz v Secretary of State for Work and Pensions* [2004] EWCA Civ 1163 at [31]:

> "In this case the Claimant was represented by solicitors and counsel both before the Appeal Tribunal and the Commissioner. It was proper and reasonable for the Commissioner to proceed on the basis that the Claimant's legal representatives had supplied him with all the information relevant to questions that he had to decide and that the submissions made to him by counsel were based on the available information and were directed to the relevant provisions of the Directive and the 2000 Regulations."

13. I do not consider that it is possible successfully to argue, in the face of the FtT's [68], that the appellant's presence for mainstream was inextricably linked to her school of choice. On the other hand, Ms Price puts the matter in terms of whether it is possible to conclude that the appellant's preference for mainstream education had been withdrawn, suggesting that it is not, but in my view that is to ask the wrong question. Mr Tabori does not need to show that her preference for mainstream was withdrawn, which from his point of view is just as well, since in my view in the light of the FtT's [68] he cannot do so.

14. Nor do I consider that there is any evidence that Mr M's position was in fact put forward as a fall-back. As the experienced tribunal advocate that Mr M presumably is, it would have been very easy for him to have adopted a position based on the primary submission that school U be named, but with a fall-back secondary submission that if it could not be, the other schools in the county should be considered, applying s.316A(5). On the contrary, he "specifically rejected" the latter approach.

15. It seems to me to come down to whether ss.316 and 316A, reflecting a Parliamentary view that integrated education is, in general, strongly to be encouraged in the interests of children with SEN, are a trump card which tribunals are required to apply even in the face of a reasoned submission from a competent representative that in part they are not being asked to.

16. It is true that in an inquisitorial jurisdiction, the tribunal is not compelled to give effect to what the parties agree: thus, for instance, rule 29 of the rules of procedure of the FtT(HESC) SI2008/2699 empowers it to make consent orders where the parties have agreed "but only if it considers it appropriate". A tribunal does not have to accept a concession made to it and should not do so it if appears to it that it is ill-founded.

17. I do not consider that the structure of ss.316 and 316A is such that the tribunal ought to have concluded that Mr M's submission was ill-founded and that reliance should not be placed on it. Whilst ss.316 and 316A reflect a particular view as to what is likely to be best for children with SEN, the right is not given to the child. The right itself is subject to, inter alia, the wishes of the child's parent. It is the parent, not the child, who has the right of appeal under both s.326 and s.328A and the child's interests may be defeated by the parent not appealing at all or by the way in which the appeal is conducted. If a right under ss.316 or 316A is to be enforced, it is the parent who has to enforce it.

18. With that in view, I return to the wording of s.316A(5):

> "(5) A local authority may, in relation to their mainstream schools taken as a whole, rely on the exception in section 316(3)(b) only if they show that there are no reasonable steps that they could take to prevent the incompatibility."

Following the concession made by Mr M in the proceedings by which, if at all, the s.316 right was to be enforced, the local authority no longer needed to "rely on the exception in section 316(3)(b)" and Ms Price's appeal to s.316A(5) and *R(MH)* do not avail her.. Why? Because the representative of the person with the ability to enforce the right had indicated that they were not seeking to enforce that part of the right.

19. Mr M's submission was made for good reason. However the respondent's schedule of costs is to be understood (and I do not favour Mr Tabori's reading of it that it was essentially hypothetical), the fact is that - for reasons that are understandable on the evidence the FtT had – Mr M had said that a trawl through other schools was not required. The context of *Jeleniewicz* was that of proceedings before a Social Security Commissioner (like the FtT in SEN matters, exercising an inquisitorial jurisdiction) and whilst the situation here does not squarely fall within the cited wording from that decision, I apply it by analogy in concluding that the FtT was entitled to rely on what Mr M had said to it about the issues about which he, on behalf of his client, wanted to appeal.

20. Such a reading of the wording of ss.316 and 316A does not lead to a conclusion which is unreasonable or impractical: quite the opposite. I have not been told how many primary schools there are in Essex, but it is quite a large county and the number is likely to be substantial. Can it really have been the legislative intention that ss.316 and 316A should be applied so as to require a local authority to search through each and every one of its schools of the relevant type, even where the person with the ability to enforce the legal duty was asking it not to? The result would be additional administrative cost and delay, detracting no doubt from resources which could be applied to other parts of the maintained education system, which in my judgment is most unlikely to have been what the legislator had in mind.

21. I also consider that to insist on the primacy of ss.316 and 316A in the way which would be required for the appellant to succeed in this appeal is inconsistent with the unique nature of resolving SEN disputes. The system has long sought to promote the resolution of such disputes by agreement, recognising that even before the extension of the upper age limit by the 2014 Act parents and local authority officers might have to work together in the interests of the pupil concerned for possibly 13 or 14 years, including through a process of regular reviews, each of which itself has the potential to lead to a further right of appeal. It is a reflection of that framework that, even before the 2014 Act introduced compulsory consideration of mediation and local arrangements for dispute resolution (see sections 52 to 57), such or similar arrangements were heavily encouraged. Against that background, it is highly unlikely that the legislator intended to force the parties to pursue a point which neither of them sought to pursue.

22. For these reasons, I do not consider that ss.316 and 316A imposed a duty on the tribunal which, despite Mr M's remarks, it could not escape deciding upon and, though not entirely for the reasons he advances, I prefer Mr Tabori's submission on this point.

23. In relation to Ms Price's further points based on the FtT's [72], I am doubtful whether the FtT was correct in seeking to apply *Slough* by analogy or – if its remarks are to be so understood – in saying that s.316 had no purchase because the respondent had not been "making" the statement. In fact, the FtT did apply s.316(3) to school U (decision, [69] and [70] and words in parentheses in [72]) and also addressed in [71] what the position was across the respondent's mainstream schools as a whole. Where that would have led it was displaced (note the use of the word "however" in [71]) by Mr M's remarks. Its consideration of s.316 was - in the light of the conclusions I have reached about reliance on Mr M's remarks – correct and complete. I do not read the words in parentheses in [72] as indicating that the tribunal was, after all, concerned only with the application of s.316 in relation to school U. Rather, having just dealt at some length in [71] with the position across the authority's schools as a whole, the words in parentheses are in my judgment by way of reminder of what it had said in the paragraph before that concerning specifically school U. The content of [72] was, as the tribunal itself plainly indicated, not necessary for the purposes of its decision. If in its [72] it made what might otherwise have amounted to an error of law, it was not one, on the ground of lacking materiality.

24. I should in conclusion record that the reason the case may appear to have taken such a considerable time is that it has come back to the Upper Tribunal following proceedings in the Administrative Court. Two other Upper Tribunal judges had previously refused permission to appeal, one on the papers and one following an oral hearing. On an application for judicial review of the refusal of permission to appeal, Mostyn J gave permission to bring judicial review proceedings. Neither party requested a substantive hearing of those proceedings and accordingly, as provided for in CPR 54.7A(9), on 8 June 2017 Master Gidden allowed the judicial review application and quashed the refusal of permission. In those circumstances there was no substantive ruling on the matters I have had to consider, but having regard to Mostyn J's observations I considered it appropriate to give permission to appeal and for the points in issue to be considered in the present case before me.

CG Ward
Judge of the Upper Tribunal
29 August 2017