IN THE UPPER TRIBUNAL **Case No** HS/1469/2018
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant:	Mr M Mensah, instructed by Jan Bakewell, Head of Legal Services
For the Respondent:	Mr D Wolfe QC, instructed by Simpson Millar

Decision

The appeal is dismissed.

Pursuant to rule 12(4) of the Upper Tribunal's rules of procedure I direct that any application for permission to appeal against this decision must be received by 17 September 2018, with the consequence that rule 12(3) does not apply.

REASONS FOR DECISION

1. This case concerns the education of F, a boy aged 7, who has autistic spectrum disorder ("ASD"). By the second of the two hearing dates before the First-tier Tribunal ("FtT"), the local authority was proposing that school R, a maintained primary school with a resource base, be named in section I, while the parents sought school O, an independent special school approved under s.41 of the Children and Families Act 2014.

2. The FtT named the latter and the local authority now appeals, with permission of the Deputy Chamber President of the FtT.

3. I am grateful to Mr Mensah and Mr Wolfe, neither of whom had appeared below, for their submissions at the oral hearing. At the end of the hearing, bearing in mind the desirability of the parties knowing the decision in good time before the start of the Autumn term, I announced that the appeal was dismissed, with reasons in writing to follow. These are the reasons.

4. Section 38(3) of the 2014 Act specifies a list of types of school or other institution which fall within the mechanism for which s.39 provides. They include schools approved under s.41. Where a parent requests a school on the s.38(3) list, sections 39 (3) –(5) provide as follows:

> "(3) The local authority must secure that the EHC plan names the school or other institution specified in the request, unless subsection (4) applies.
>
> (4) This subsection applies where—

> (a) the school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned, or
> (b) the attendance of the child or young person at the requested school or other institution would be incompatible with—
> (i) the provision of efficient education for others, or
> (ii) the efficient use of resources.
>
> (5) Where subsection (4) 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, or
> (b) specifies the type of school or other institution which the local authority thinks would be appropriate for the child or young person."

5. In other cases, by s.40(2):

> "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."

6. What the FtT did, tackling the issues in a way which appears was supported by the representatives of both sides before it, was to hold that school R was unsuitable and that in consequence school O should be named. The local authority's challenge is to the basis on which school R was considered inappropriate.

7. I have had some difficulty in piecing together the FtT's pattern of reasoning. It is evident from the materials before me that while the local authority may have had some concerns about the suitability of school O, they were not such as to make any submission to that effect in the FtT proceedings. The local authority's concern was that a placement there would amount to an inefficient use of resources.

8. The FtT did not address in terms whether school O fell foul of s39(4). However, it is evident from the decision that the representatives in the FtT proceedings and the FtT itself agreed that the suitability of school R would be considered first. It appears to have been conceded that if school R was adjudged unsuitable, the local authority's objections to school O would not be pursued. There were no other options on the table at the hearing and the case had already been adjourned once.

9. It appears that I am not alone in having had difficulty with the intended logic of the decision. In giving permission to appeal, the Deputy Chamber President concluded that "it is arguable that the child's attitude towards a school is not relevant evidence when considering the suitability of the placement under section 39(4) and that permission should be granted on this ground." Section 39(4) can only have any relevance in relation to the school

of parental preference (school O). That makes the case unsuitable, in my respectful view, for a ruling on the interpretation of s.39(4).

10. Mr Wolfe posited two suggestions as to how the FtT's decision should be interpreted, as to which Mr Mensah said nothing in reply. I proceed on the basis that what the FtT was in fact doing was as follows. The local authority's objections to school O, a more expensive school, had been on the basis that to send F there would be an inefficient use of resources and unreasonable pubic expenditure. It would only be an inefficient use of resources if there was a more efficient use of resources which would represent "appropriate" provision for F; similar logic would apply in respect of "unreasonable public expenditure". Thus it was that the FtT came to be considering the "appropriateness" of school R. Support for this interpretation can in my view be found from the reference in the closing part of para 34 of the FtT's decision to "efficient use of resources, which only needs consideration when comparing two suitable schools' costs." As to paras 8 and 12 of the FtT's decision, which do not sit particularly comfortably together, I read para 12 as setting out the authority's position in general terms, but para 8 as setting out a more specific agreement reached in the course of the hearing, apparently in response to a shortage of time, as to how the case would be dealt with. Mr Mensah acknowledged that the local authority's then representative had acquiesced in the proposed procedure.

11. The local authority's objection, put very shortly, is that the FtT erred in law by giving so much weight to the views of F that it allowed them to turn an otherwise appropriate placement into an inappropriate one. I therefore turn to looking, in some detail, at the FtT's decision and in particular how it dealt with F's views.

12. The FtT recorded at [25] that F had wanted to tell the FtT about his wishes. His mother had taken him on a preliminary visit to the tribunal to help him to prepare for this but he had been unable to cope. There was evidence of his views provided through the National Youth Advocacy Service (C200), indirectly through reports from his parents and in detailed evidence from his mother in a witness statement which gave a detailed report on her visit with F to school R.

13. The FtT then turned to examining the suitability of school R. In lengthy and careful sections it made findings as to the provision at school R generally (paras 27-34) and then in detail (paras 35-51) with regard to particular concerns which had been expressed by the F's parents. At para 52 it recorded its conclusion that "we have dismissed all bar one of the specific reasons put forward by Ms Bright [the parents' representative] for finding [school R] inappropriate".

14. Turning to the reason which did lead the FtT to conclude that school R was not suitable, the FtT found as fact that F "has formed an entrenched and currently intractable opposition to attending [school R] or any mainstream provision". It made clear that there was no evidence to suggest that F was being manipulated by his parents or that his opposition was attributable to

opposition on the part of his parents. It explained its reasoning in terms that it was not allowing F to exercise a veto, but that his "attitude to the proposed placement is part of the complex and significant needs which must be met by the provider." It explained by reference to the history of provision for F how in the FtT's view F's opposition came about to the point that his parents could no longer get him to attend school. It accepted his mother's evidence reporting F's resistance, noting that:

> "His fear and anxiety about having to attend [school R] is extremely worrying and would probably and presently override any ability of a skilled parent to persuade him, or otherwise modify his decision".

It noted that school R's strategies for getting F to attend were appropriate but that "even that school's skilful handling will not overcome [F's] opposition".

15. Importantly, it noted that F's opposition stems from the special educational needs outlined in his EHC Plan, drawing on the undisputed evidence of Dr Grace, an educational psychologist. The FtT considered that:

> "if he had learned strategies to reduce his anxieties, to see beyond a black and white, good and bad, understanding of events, then skilled interventions might assist him to understand the merits of going to [school R]. We cannot make a finding that he would be able to make that mental adjustment, and we conclude that what would happen if [school R] was named is that he would experience a failed placement, a long delay in finding another placement, and an even more difficult process of recovery from the loss of self-esteem involved."

16. Mr Mensah for the local authority originally sought to attack the FtT's decision by submitting that it took into account factors which were impermissible for the purposes of s.39(4). However, as indicated at [9], evaluating school R was not a s.39 exercise at all, so I dismiss that challenge.

17. He then submits that, while s.19 of the 2014 Act requires a local authority (and so a tribunal on appeal) to have regard to the views, wishes and feelings of the child and his or her parent, the effect of the decision was to allow F's views to become paramount. Clearly F's opposition played a central part in the FtT's decision to reject school R, but that does not mean that the FtT misapplied s.19. Among other things, it satisfied itself as to the genuineness of those views and that they were rooted in his special educational needs, examined their genesis in his school experiences to date, and considered whether the strategies which his parents had employed, and those which school R would employ, would overcome them. In my view that is conscientiously to "have regard" to them, as s.19 requires. As the FtT noted, the views were part of F's "complex and significant needs" and it was on the basis of those needs that the FtT reached its decision.

18. Mr Mensah criticises the evidence that was provided to the FtT as "anecdotal" and the lack of medical evidence to confirm/corroborate F's opposition to the placement. He seeks to rely on the decision in *MW v Halton*

BC [2010] UKUT 34(AAC) to suggest that the FtT should have sought further evidence in the exercise of its inquisitorial jurisdiction. Mr Mensah does not suggest that any application was made by the local authority's then representative that there be an adjournment for further evidence to be obtained. There is no requirement to be derived from *MW* or elsewhere that evidence as to a child's opposition must be medical in character, though I accept that a GP or a practitioner from CAMHS may have useful evidence to give.

19. There was however evidence from an educational psychologist as to F's ASD and the issues it raised for him (see e.g. B128), the evidence from NYAS and evidence from his mother. Mr Mensah suggests that the difficulties disclosed by the latter were not particularly unusual, but the evaluation of that, and the other, evidence and the weight to be given to it was a matter for the tribunal of fact. Disagreement with it does not amount on an error of law. Given the evidence that there was, the submission that there was no evidence fails.

20. Mr Mensah accepts, citing *Hampshire v R & SENDIST* [2009] EWHC 626 [2009] ELR 371, that consideration of "appropriateness" involves a balancing exercise, but submits "that the balance was unduly weighted towards the child's preference in this case". That is in effect a submission inviting the Upper Tribunal to substitute its view of the merits for those of the FtT. Such a step would not be appropriate in an appeal from a specialist tribunal which is confined to a point of law.

21. There is in my view no parallel with decision *in LB Richmond-upon-Thames v AC (SEN*) [2017] UKUT 173(AAC), on which he also seeks to rely. In that case, the FtT had found that the school could meet the child's needs yet her mother would not send her to that (or any maintained) school. In the present case by contrast the FtT concluded that the school could not meet F's needs.

22. Nor do I accept that the FtT assumed "without any rational basis" that transition/integration would be impossible or too difficult to even attempt. As I have noted, the FtT's consideration of the nature of F's special educational needs (which were appropriately evidenced) and the history of provision for him led the FtT to its conclusion that F's opposition would defeat even the skilled attempts to facilitate transition/integration that were on offer.

23. It is not necessary to burden this decision with detailed examination of the uncontroversial authorities about the limits of an error of law jurisdiction or about the respect which should be given for conclusions reached by a specialist tribunal on matters falling within its specialism. In my view the FtT's findings I have summarised in [14]-[15] were conclusions open to a specialist tribunal on the evidence before it. Other tribunals might or might not take a similar view of the evidence but that does not mean that the FtT whose decision is before me erred in law in the view it took.

24. I do not think the local authority's concern that the FtT's decision "opens the floodgates" is justified. The decision of the particular FtT on the evidence before it does not establish any kind of precedent and the Upper Tribunal's decision is authority for no novel proposition, merely affirming the autonomy allowed to decisions properly made by specialist tribunals of fact.

25. In my view the local authority's case is a resourcefully expressed expression of disagreement with the decision, not establishing any error of law on the FtT's part, and so its appeal must be dismissed.

CG Ward
Judge of the Upper Tribunal
15 August 2018