IN THE UPPER TRIBUNAL **Appeal No. HS/1212/2020**
(ADMINISTRATIVE APPEALS CHAMBER)

ON APPEAL FROM THE FIRST TIER TRIBUNAL (HESC)
(SPECIAL EDUCATIONAL NEEDS & DISABILITY)
Tribunal Ref EH204/20/00001

Between

(1) BK

(2) AK

Appellants

and

HACKNEY LONDON BOROUGH COUNCIL

Respondent

BEFORE UPPER TRIBUNAL JUDGE WEST

Hearing date: 11 November 2020

Representation: Mrs Fiona Slomovic, lay advocate (for the Appellants)

Ms Miriam Benitez, counsel (for the Respondent, instructed by the Council itself)

DETERMINATION

The appeal against the decision of the First-tier Tribunal (HESC) (Special Educational Needs & Disability) (which sat on 31 March 2020) dated 15 April 2020 under file reference EH204/20/00001 is dismissed.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

ORDER

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the child in these proceedings. This order does not apply to (a) the child's parents (b) any person to whom the child's parents, in due exercise of their parental responsibility, disclose such a matter or who learns of it through publication by either parent, where such publication is a due exercise of parental responsibility (c) any person exercising statutory (including judicial) functions in relation to the child where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

PRELIMINARY MATTERS

This decision follows a remote hearing which has been consented to by the parties. As required, I record that:

(a) the form of remote hearing was V (video by Skype). A face to face hearing was not held because it was not practicable in the light of Government guidance on urgent matters of public health and the case was suitable for remote hearing, involving an appeal on pure matters of law. Further delay would be inexpedient as this is an appeal in a case involving the special educational needs of a child in which the decision of the First-Tier Tribunal under appeal was made on 15 April 2020

(b) the documents to which I was referred were contained in (i) a First-tier Tribunal paper bundle of 357 pages (ii) an Upper Tribunal paper bundle of 94 numbered pages (iii) an authorities bundle of 126 pages (iv) additional

submissions from the Appellants of 12 pages and enclosures (v) additional submissions from the Respondent of 17 pages

(c) the order and decision made are as set out above.

REASONS

Introduction

1. This case concerns the following questions:

(i) whether the Tribunal made fundamental errors of fact and/or understanding in relation to the evidence

(ii) whether the Tribunal failed to take relevant evidence into account/to give reasons for disregarding the evidence

(iii) whether the Tribunal failed to put points to the witnesses and/or their representative

(iv) whether there was procedural unfairness in the conduct of the appeal

(v) whether the Tribunal misdirected itself or misunderstood the law as to what constitutes a significant difference in costs and/or properly to carry out the balancing exercise in relation to s.9 of the Education Act 1996 ("the 1996 Act").

2. The parties to the appeal are the child's parents, who are the Appellants, and the Respondent, which is the Council of the London Borough of Hackney ("the Council"). In order to preserve his anonymity, and meaning no disrespect to him, I shall refer to the Appellants' son only as "A". The appeal was against the terms of A's Education, Health and Care Plan ("EHCP"). The Council's

proposal was that A attend Stoke Newington School ("Stoke Newington"), a mainstream community secondary school, for his secondary education, whilst his parents' position was that he should go to The Moat School ("The Moat"), a Crested Accredited independent school for pupils aged 9-18 with specific learning difficulties ("SLD").

The Tribunal's Decision

3. Having considered the evidence, both oral and written, the Tribunal concluded that both Stoke Newington and The Moat would be suitable as placements for A's special educational needs, but that attendance at The Moat would involve unreasonable public expenditure such that the parents' preference for it could not prevail.

4. The Tribunal therefore ordered the Council to amend Sections B, F and I of A's EHCP to conform to the draft annexed to the order and in particular to name Stoke Newington in Section I as the placement for A.

Permission to Appeal

5. That decision was issued on 15 April 2020 after the hearing by video on 31 March 2020 (the Tribunal reconvened on 11 April 2020 in the absence of the parties to consider its decision). The parents sought permission to appeal to the Upper Tribunal from that decision. Permission to appeal was ultimately granted by Tribunal Judge McCarthy on 9 July 2020. I made case management directions for the oral hearing of the appeal on 3 September 2020, which I heard by Skype on the morning of 11 November 2020. The parents were represented by Mrs Fiona Slomovic, lay advocate. The Council was represented by counsel, Ms Miriam Benitez (instructed by the Council itself).

The Grounds of Appeal

6. There were five main grounds of appeal, although each had various sub-grounds of appeal:

(i) the Tribunal made fundamental errors of fact and/or understanding in relation to the evidence

(ii) the Tribunal failed to take relevant evidence into account/to give reasons for disregarding the evidence

(iii) the Tribunal failed to put points to the witnesses and/or their representative

(iv) there was procedural unfairness in the conduct of the appeal

(v) the Tribunal misdirected itself or misunderstood the law as to what constitutes a significant difference in costs and/or properly to carry out the balancing exercise in relation to s.9 of the 1996 Act.

7. I have set out the respective parties' submissions below under the five grounds of appeal. By way of cross-reference to the skeleton arguments which were submitted in advance of the hearing, the submissions were set out as follows (marked FS and MB respectively for ease of reference; the references to e.g. "paragraph 25" are to the paragraph numbers in the Tribunal decision):

(i) the first ground of appeal:

(a) paragraph 25: FS 8; MB 33(a)

(b) paragraphs 29/31: FS 9: MB 33(b)

(c) paragraph 32: FS 10; MB 33(c)

(d) paragraph 48: FS 11; MB 33(d)

(e) paragraph 59: FS 12; MB 33(e)

(ii) the second ground of appeal:

(a) paragraph 50: FS 13; MB 35(a)

(b) paragraph 66: FS 14; MB 35(b)

(iii) the third ground of appeal:

(a) paragraph 49: FS 16; MB 17-29

(b) paragraph 65: FS 17; MB 17-29

(iv) the fourth ground of appeal:

(a) the admission of Ms Wade as a witness: FS 21-26; MB 9-10

(b) the admission of the costs schedule: FS 28; MB 12

(c) the late admission of the Working Document: FS 29: MB 13

(d) technology difficulties: FS 33; MB 31

(e) conclusion about The Moat after release of its witness: FS 34-35; MB 16

(v) the fifth ground of appeal:

(a) paragraph 60: FS 36; MB 36-38

(b) paragraph 68: FS 37; MB 39-44

(c) paragraph 69: FS 38-39; MB 39-44

The First Ground of Appeal

The Parents' Submissions

Paragraph 25: "Some members of staff have SPLD qualifications, others have experience"

8. Mrs Slomovic submitted that Ms Straw, the SENCO, indicated that Stoke Newington had some staff who had SPLD qualifications, but that she did not know what those were (apart from the fact that they were able to assess for additional time in exams) and could not say that they would be teaching A. She also could not give evidence that the people concerned were qualified teachers, but said that some might be teaching assistants. Hence the parents submitted that the evidence did not support the conclusion that the school had members of staff with SPLD qualifications who could support or teach A.

Paragraph 29: "Ms Wade, who has read the papers but not met [A] said that from the reports his social communication needs are his major requirement"

Paragraph 31: "She highlighted the school's SEMH input which was previously considered [A]'s main need"

9. Mrs Slomovic submitted that it was incorrect of the Tribunal to give weight to Ms Wade's evidence when she had never met A and never asked to meet him, or observe or assess him. Her knowledge of A was not reliable (e.g. in her oral evidence she stated that to address his dyslexia he would need encouragement to read books, but that ignored the fact that it was well documented that A loves reading – page 104 of Section B of the EHCP). Hence she submitted that the assumption from a witness who had never met A that social communication and SEMH were his main needs was not borne out by the evidence from Dr Crane who clearly submitted that A had dual diagnoses of dyslexia and ASD.

Paragraph 32: "most professional reports are silent about a need for a specialist setting"

10. Mrs Slomovic submitted that this statement showed a clear lack of understanding and consideration of the facts in relation to the evidence:

(i) no professional reports were commissioned by the Council to consider what was required for secondary education apart from Dr Crane's report and evidence which clearly recommended a specialist setting

(ii) the Tribunal ignored the professional recommendation of the staff who knew A well at Ambler (a setting he had attended since reception) at page 342 "We would be concerned about meeting [A]'s needs longer term, were he not in his final term and a half with us and feel strongly that he would find it exceptionally challenging to engage with and make progress in learning in a mainstream secondary school"

(iii) the Council EP report, carried out by a trainee EP and supervised by an EP who specialised in Visual Impairment, was done at the end of Year 5 and did not contain any formal assessment; nor did it refer to what was required in secondary school nor acknowledge the differences between primary and secondary education. Hence it was not within its remit to make reference to a specialist setting.

Paragraph 48: concerning Dr Crane's evidence "She considers [A] should have more concentrated input in the hope he may increase progress. We have some difficulty in accepting this analysis, it appears to narrow his options and the scope of his inclusion in other subjects"

11. Mrs Slomovic submitted that the conclusion that "it narrows his options and the scope of his inclusion in other subjects" was a misinterpretation of the evidence and quite the opposite of what Dr Crane said; Dr Crane said that A needed more concentrated input in the form of small classes led by specialist teachers and not a reduced curriculum and/or reduced inclusion into other subjects. She gave oral evidence that, by being provided with small classes in a specialist environment, A would be fully included and not need be withdrawn from certain subjects and that the reliance on use of LSAs to support A at Stoke Newington would narrow his ability to act independently and be fully included. Hence there was no evidence that the provision at The Moat or the advice of Dr Crane narrowed options or inclusion in subjects.

Paragraph 59: "We find it unlikely that [A] would be the sole pupil with similar presentation"

12. Mrs Slomovic submitted that there was no evidence to support the fact that there would be other pupils in the school with similar presentation; when questioned, Ms Straw could not indicate how many pupils in the school or A's year group would have dual diagnoses of ASD and dyslexia and with his profile of high cognitive ability.

The Council's Submissions

13. For the Council Ms Benitez submitted that the parents' submissions amounted to no more than a mere disagreement with the Tribunal's findings on the evidence as follows:

(a) **Paragraph 25**: This challenge was misconceived. Firstly, the Tribunal rejected the parents' case that A required specialist teaching at [52] and [56]. Specifically, the panel found at [56] that there was "no persuasive evidence he needs to be taught by staff with specialist knowledge" and it therefore did not accept the proposed parental addition to the Working Document at page 14. In the circumstances, the finding disclosed no error or no material error of law and was an accurate and balanced reflection of the evidence.

(b) **Paragraph 29**: The weight to be given to witnesses' evidence was a matter inherent to the jurisdiction of the expert Tribunal. Paragraph 29 was a summary of Dr Wade's evidence, not a finding and A's SEMH needs were fully recognised in the Working Document. The ground disclosed no legal challenge.

(c) **Paragraph 32**: The Tribunal was entitled to find that *most* reports were silent as to the need for a specialist setting. The specialist teacher reports and the ASD and EP reports did not recommend specialist provision. The grounds of appeal referred to a single letter (not an expert report) from his then school where A had not had the benefit of an EHCP until Year 6 and therefore there had been no targeted support in that school.

(d) **Paragraph 48**: This ground again represented a disagreement on the interpretation of the evidence and disclosed no legal error. Dr Crane's evidence solely or primarily focused on the need for intensive support in literacy and as the Tribunal noted at [49] her evidence paid little attention to the impact of the child's ASD and consequential SEMH needs. As a matter of common sense, the Tribunal was entitled to find that barriers presented by needs arising from his ASD/SEMH could limit scope for inclusion despite intensive dyslexia intervention.

(e) **Paragraph 59**: The Panel did not err in law insofar as the finding that A would have a suitable peer group at Stoke Newington was supported by the oral evidence of both Ms Straw (the SENCO) and Ms Wade (EP). Ms Wade's evidence [29] was that "*his needs could be met at Stoke Newington because they have a range of pupils, including appropriate peers and can offer small group experiences and flexibility for a range of needs within mixed ability classes*." Further, in oral evidence Ms Straw stated "*All our teachers are qualified, experienced, he does not have a complex profile – we have children similar and have made good progress – he would flourish at school*." Much of the first half of the hearing was devoted to the evidence of Ms Straw, and all members of the Panel explored that school's ability to provide a suitable peer group for A. Therefore, it was not understood why this ground of appeal failed to make reference to the oral evidence given on the day of the hearing. Ms Benitez attached her contemporaneous note of the oral evidence on this issue as "Appendix A". Further, the Tribunal at [59] *rejected* the parental proposed addition that "[*A] requires a school setting in which there are children with similar needs to his own, so that he feels less isolated and different from his peers*." The Panel was entitled to reason that the word "similar" was likely to be interpreted broadly. In view of this the Tribunal modified the Working Document to state that "[A] *requires a mixed peer group including peers with similar needs"* and "[*A] requires a peer group at a similar cognitive level to himself to ensure that he is suitably challenged*." This ground of appeal was wholly lacking in merit and was misleading.

Analysis

14. **Paragraph 25:** I accept Ms Benitez's submission that this particular challenge has no legs. The Tribunal rejected the parents' case that A required specialist teaching in paragraph 52 and more particularly in paragraph 56. In that latter paragraph the Panel found that there was "no persuasive evidence he needs to be taught by staff with specialist knowledge" and it therefore did not accept the proposed parental addition to the Working Document at page 14. Moreover, the Tribunal in paragraph 56 was also critical of Dr Crane's evidence and found that the requirement which she identified as to specialist teaching was "not defined by [her] other than as a statement. She has not specified which additional qualifications in SPLD and ASD would be appropriate nor are we aware of any particular qualifications save that we have not seen evidence that a school such as The Moat could fulfil that specification". In the circumstances, the statement disclosed no error of law and was an accurate and balanced reflection of the evidence.

15. **Paragraphs 29 and 31:** again I agree with Ms Benitez that the precise weight to be given to the evidence of particular witnesses was a matter inherent to the jurisdiction of an expert Tribunal and I can see no error of law in the manner in which the Tribunal treated Ms Wade's evidence. Once it had decided to admit her as a witness (as to which see the fourth ground of appeal), it could hardly ignore her evidence, although it had to decide what weight to ascribe to it. The Tribunal specifically noted that she had read the papers, but not met A, so it was perfectly well aware of the point. Moreover, what was said in paragraph 29 was a summary of Dr Wade's evidence, not a finding about her evidence, which begin at paragraph 38.

16. As to the criticism of paragraph 31, it is important to note that the highlighting of the school's SEMH input was in the context of Ms Benitez's comments in the course of her submissions rather than in the context of the Tribunal's findings and conclusions. I can see no error of law in the Tribunal citing counsel's comments and submissions in the course of its recitation of the evidence and submissions of the parties in the course of its decision before it made its findings and reached its conclusions.

17. **Paragraph 32:** again, it is important to note that the question of whether or not most of the professional reports were silent about the need for a specialist setting was made by way of comment in the context of Ms Benitez's submissions rather than in the context of the Tribunal's findings and conclusions. Again, I can see no error of law in the Tribunal citing counsel's comments or submissions in the course of its decision.

18. **Paragraph 48:** there is a clear difference between the two representatives as to the tenor of Dr Crane's oral evidence, but I note that when asked whether the proposed amendment to Section B reflected the nature of A's needs and perhaps a requirement to focus on coping and alternative mechanisms rather than continuation of specialist programmes to improve his literacy abilities, De Crane was equivocal. I accept that as a matter of common sense the Tribunal was entitled to find that barriers presented by needs arising from his ASD/SEMH could limit scope for inclusion despite intensive dyslexia intervention.

19. The parents' submission is in my judgment again really a disagreement as to the interpretation of the evidence and the Tribunal's factual findings and does not disclose an error of law.

20. **Paragraph 59:** I do not accept the proposition that there was no evidence to support the fact that there would be other pupils in the school with similar presentation. On the contrary it is apparent from the evidence cited by Ms Benitez that

much of the first half of the hearing was devoted to the evidence of Ms Straw and that all members of the Panel explored the school's ability to provide a suitable peer group for A.

21. In my judgment, the Tribunal did not err in law insofar as the finding that A would have a suitable peer group at Stoke Newington was supported by the oral evidence of both Ms Straw and Ms Wade.

22. In any event, I do not consider that, if there were any error of law disclosed by the Tribunal's treatment of the paragraphs in issue, any such error of law amounted to a material error such that the appeal should be allowed. The Tribunal decided that both Stoke Newington and The Moat were suitable placements for A. The Tribunal's decision therefore ultimately turned on whether a placement at the latter would involve unreasonable public expenditure. None of the alleged errors on the part of the Tribunal in relation to the impugned paragraphs bore on that issue. In that event, even if there were flaws in the Tribunal's treatment of the issues in those paragraphs, I am satisfied that that would not have given rise to a different result to the appeal when the decision is read as a whole. As Lord Neuberger said in ***Holmes-Moorhouse v. Richmond LBC*** [2009] UKHL 7, [2009] 1 WLR 413 at [51]:

> " … a decision can often survive despite the existence of an error in the reasoning advanced to support it. For example, sometimes the error is irrelevant to the outcome; sometimes it is too trivial (objectively, or in the eyes of the decision-maker) to affect the outcome; sometimes it is obvious from the rest of the reasoning, read as a whole, that the decision would have been the same notwithstanding the error; sometimes, there is more than one reason for the conclusion, and the error only undermines one of the reasons; sometimes, the decision is the only one which could rationally have been reached. In all such cases, the error should not (save, perhaps, in wholly exceptional circumstances) justify the decision being quashed."

23. I do not therefore allow the appeal on that ground.

The Second Ground of Appeal

The Parents' Submissions

Paragraph 50: "We have not found persuasive evidence that [A] will not become accustomed to a larger mainstream environment within a reasonable time and do not find this as a reason his needs could not be met there"

24. Mrs Slomovic submitted on the parents' behalf that this was a major oversight and omission in the decision. The Tribunal failed to reference or give proper reasons why it disregarded the letter from Ambler (page 342) signed by the Assistant Head and Inclusion Lead. Ambler School knew A well as he was educated there for 7 years. They stated "We would be concerned about meeting [A]'s needs longer term, were he not in his final term and a half with us and feel strongly that he would find it exceptionally challenging to engage with and make progress in learning in a mainstream secondary school." The parents submitted that that evidence had been completely ignored by the Tribunal in favour of statements made by witnesses who had never met A, had never assessed his academic performance and had never seen him in a school environment. That could not be a proportionate and balanced assessment of the two sides' evidence.

Paragraph 66: "We were impressed by Ms Straw and the capabilities she described at Stoke Newington. It is clear that staff are familiar with pupils with [A]'s needs and can support him both in specialist classes within its dedicated inclusion classrooms and within mainstream classes"

25. The conclusion that staff could support A in specialist classes within its dedicated inclusion classrooms did not address the point made and referred to in paragraph 34 and on page 409 ("*Students who arrive in year 7 on level 3c or below are taught in KS3 in smaller groups for English, and Maths"*): "Mrs Slomovic also pointed to the evidence about the small groups at Stoke Newington which would normally be for children achieving at Level 3c or below who then proceed to a Foundation Pathway." A was not achieving Level 3c or below as evidenced on page 343 of the bundle.

26. The Tribunal had also failed to reference the oral evidence of Ms Straw that the specialist classes within its dedicated inclusion classrooms catered for the 8 lowest achievers in the year. That would not be appropriate according to the evidence of Dr Crane referred to in paragraph 28 of the decision: "Dr Crane has concerns he would find lower sets inappropriate as he is a bright boy."

The Council's Submissions

27. Again, submitted Ms Benitez, the parents' complaints under this purported heading amounted to a disagreement with the Panel's finding and did not disclose errors or material errors of law in that:

(a) Paragraph 50: The ground was wholly lacking in merit. Despite the evidence from Ambler School, an expert Tribunal could properly draw from its expertise in support of this finding. In addition, Ms Straw's written evidence (page 345) was that the school had experience of meeting the needs of children with high levels of SEN and that they have students with both ASD and dyslexia who are "experiencing success both socially and academically."

(b) **Paragraph 66**: This again amounted to a disagreement and there was no apparent error of law.

Analysis

28. **Paragraph 50**: I agree with Mrs Slomovic that the Tribunal should have cited the conclusion of the letter from Ambler School at page 342 and the evidence of Dr Crane at page 383 to the like effect that A would find it exceptionally challenging to engage with and make progress in learning in a mainstream secondary school/that he would not access a mainstream secondary school.

29. However, the Tribunal did record at paragraph 50 that his parents considered that A would be overwhelmed by a change to a larger school and it accepted that as a pupil with ASD it anticipated that he would have difficulties with change, so that the point underlying the evidence from Ambler and Dr Crane about the difficulty of the transition was squarely raised. It would require a sensitive transition plan and supporting strategies. The Tribunal frankly accepted that, as The Moat had far fewer distractions, the transition might be more easily accomplished there.

30. The Tribunal concluded, nevertheless, that it had not found persuasive evidence that A would not become accustomed to a larger mainstream environment *within a reasonable time* (i.e. not immediately) and did not find that as a reason why his needs could not be met there. On balance it concluded that his needs could be met with specialist support at an appropriate mainstream school. The paragraph, when read as a whole, is in fact much more nuanced than the parents' submission suggests. I do not consider that that is a conclusion which no reasonable tribunal could have reached on the evidence before it.

31. **Paragraph 66:** Mrs Slomovic submitted that the Tribunal had not dealt with the particular points which she had raised in paragraph 25 above, but I do not consider that of itself to be fatal to the decision. As Mr Commissioner Temple said in ***R(A) 1/72*** at paragraph 8

> "It is not, of course, obligatory thus to deal with every piece of evidence or to over-elaborate, but in an administrative quasi-judicial decision the minimum requirement must at least be that the claimant, looking at the decision, should be able to discern on the face of it the reasons why the evidence has failed to satisfy the authority".

32. It is also well established that. when explaining how it has exercised its judgment, a first instance tribunal is not bound to deal with every matter raised in the case. As Tucker LJ explained in ***Redman v Redman*** [1948] 1 All ER 333 at 334:

> "I desire to emphasise as strongly as I can that the fact that judge or commissioner does not set out every one of the reasons which actuate him in coming to his decision will not be sufficient to support an argument in this court that he has not applied his mind to the relevant considerations … The mere fact that, in his judgment, the commissioner may not have mentioned some fact or other or that he emphasised some other fact is quite insufficient to persuade me that he did not, in fact, apply his mind properly to the relevant matters which he does not in terms mention."

33. Similarly, in a more recent decision in the matrimonial and family jurisdiction, Holman J in ***B v B (Residence Order: Reasons for Decision)*** [1997] 2 FLR 602 (at 606) stated that:

> "I cannot emphasise strongly enough that a judgment is not to be approached like a summing-up. It is not an assault course. Judges work under enormous time and other pressures, and it would be quite wrong for this court to interfere simply because an ex tempore judgment given at the end of a long day is not as polished or thorough as it might otherwise be."

34. A tribunal's statement of reasons is not usually an extempore judgment (as here), but the observations of Holman J are just as applicable to decisions of fact-finding tribunals as they are to decisions of courts of first instance.

35. The fact therefore that the Tribunal did not specifically advert to the argument raised by Mrs Slomovic paragraph 25 was not fatal to the lawfulness of its decision.

36. In paragraph 25, the Tribunal did refer to the oral evidence of Ms Straw that the specialist classes within Stoke Newington's dedicated inclusion classrooms catered for the 8 lowest achievers in the year. Although Dr Crane thought that inappropriate because she had concerns that he would find lower sets inappropriate as he was a bright child, the Tribunal also found in paragraph 46 that A's outside activities showed that he was able to function when he felt comfortable and that, whilst that suggested a reason why he should be with peers who had similar difficulties, it equally indicated that he required differentiation and support at a pace which he could manage. The Tribunal had regard to his assessed intellectual ability and found that he was capable of high achievements, although he might require alternative means for recording and access to written aspects of the curriculum. Again I am satisfied that on the evidence before it, that was a conclusion which it was entitled to reach.

37. I do not therefore allow the appeal on the second ground.

The Third Ground of Appeal

The Parents' Submissions

38. Mrs Slomovic submitted that at the beginning of the hearing the Tribunal made it clear that it did not require to hear evidence from the Head Teacher of The Moat as there was no dispute that the school could meet A's needs. Hence the Tribunal released the Head Teacher. Yet the Tribunal then went on to make decisions about the disadvantages of attendance at The Moat and its reservations about the school's ability to provide a comprehensive education for A without putting any of these points to the witnesses or her as the parents' representative at the hearing.

Paragraph 49: "His scope for progress will be enhanced by the full range of opportunities available at a mainstream school"

39. She further submitted that the Tribunal indicated at the beginning of the hearing that they did not need to hear from The Moat as there was no dispute that it could meet A's needs. Thus there was no evidence heard and no questions raised by the panel as to whether there would be a more reduced range of opportunities at The Moat than at Stoke Newington. The issue of a reduced range of opportunities was never raised by the Panel at the hearing and neither party given the opportunity to comment on it, hence the Tribunal used its own expertise without giving the parties the opportunity to comment and discuss the matter at the hearing.

Paragraph 65: "We have some reservations whether it can provide a comprehensive education for him. It is specialist and necessarily will narrowly focus upon literacy skills"

40. She also argued that there was no evidence given that provision at The Moat would narrowly focus upon literacy skills. Having dismissed the witness, once again the Tribunal appeared to use its own expertise without giving the parties the opportunity to comment and discuss the point at the hearing.

The Council's Submissions

41. For her part Ms Benitez submitted that the Panel was reasonably entitled to make the findings at [49] and [65] and no procedural unfairness could be gleaned from the grounds of appeal.

42. The Tribunal asked Mrs Slomovic whether the evidence of the Moat School would be required, and she confirmed that it would not in light of the Council's position that both schools were suitable. The Tribunal was therefore *guided* by her on that and did not rule that the evidence would not be "required". Mrs Slomovic chose to present her appeal in absence of the witness from The Moat.

43. In the event, the Tribunal was not bound to accept the Council's views on suitability and had to form its own reasoned view on the suitability of both proposed placements, see ***IM v Croydon LBC*** [2010] UKUT 205 (AAC). The Tribunal's reasoned findings at [59] and [65] were part of that assessment.

44. The Panel did not materially err in law in respect of its findings at [48], [49] and [65] and was entitled to make the findings that it did.

45. Firstly, the challenged findings needed to be considered against the backdrop of [48] where the Panel found that there was no sound basis for Dr Crane's "empirical" conclusions on the suitability of individual interventions for A and the focus on his SPLD, as opposed to focusing on the impact of his ASD and SEMH needs and his ability to make greater progress if those needs were addressed [48]. It was the Panel's reasonable view that specialist programmes would necessarily "narrow his options and the scope of his inclusion in other subjects" [48].

46. The Panel's concern with placement at The Moat was well-founded insofar as it was described as a school "primarily designed for pupils with SLDs" (not SEMH and ASD) (page 343) and pupils with "dyslexia" (page 321). As reflected in the Final Working Document, the Panel found that, although A required smaller classes for some subjects, "he would benefit by supported

access to larger classes for other areas of the curriculum" [57]. This too went to the issue of the enhanced progress that he would be expected to make across the curriculum, and not simply with reference to literacy.

47. Further, the following oral evidence was supportive of the Panel's findings above:

(a) Ms Wade's oral evidence was that A's needs could be met in mainstream and that, in fact, "*having access to a broad range of pupils would be really helpful to him*." She stated "*given his cognitive abilities, he would have a broader experience in terms of his learning needs"*

(b) Ms Wade also stated that it was likely that SEMH needs "*have been his primary need all the way through"*

(c) there was little evidence supportive of the alleged "severity" of A's dyslexia, and therefore the Panel rejected the use of "severe" as a descriptor [39].

48. The Panel's decision was clear when taking into account the oral and written evidence before it. The duty to give reasons would inevitably vary from one case to another and was "contextually sensitive" [§11, ***MK (duty to give reasons) Pakistan*** [2013] UKUT 00641 (IAC)]. Thus, as the Upper Tribunal observed in ***Shizad*** **[**2013] UKUT 35 (IAC), a Tribunal's reasons need not be extensive if its decision made sense, see also ***R (Iran) and others v Secretary of State for the Home Department***. [2005] EWCA Civ 982.

49. When looked as a whole (as opposed to selectively or in isolation as it was done in the grounds of appeal), the Panel's findings at [48], [49] and [65] "made sense" and the reasoning behind them was sufficiently clear to the parents and their representative. Thus it could not be said that the Panel made "a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made": ***R (Iran) v SSHD.*** The Panel did not err as to a material

fact, but instead made findings which were contrary to the parents' case with regard to the need for a dyslexia SPLD placement.

50. In ***E v Secretary of State for the Home Department*** [2004] EWCA Civ 49 Carnwath LJ (as he then was) found that an error of fact could constitute a separate ground of review, but there were four requirements for such a review to succeed:

(a) the mistake must be on an existing fact (including mistake as to the availability of evidence on a particular matter);

(b) the fact must be uncontentious;

(c) the claimant must not be responsible for the mistake; and

(d) the mistake must have played a material part in the tribunal's reasoning.

51. There was no mistake of fact insofar as the Panel's factual finding on the scope for progress was supported by the oral evidence.

52. The fact, as found, that there was a greater scope for progress if in a mainstream setting was *not uncontentious* and therefore could not be the foundation of a mistake of fact challenge. Further, the Panel properly engaged with the issue of whether placement at a highly specialist setting (The Moat) was necessary, but was concerned that a specialist approach primarily aimed at improving literacy would not address A's SEMH needs which were said to present a barrier to his learning. That was the tenor of [48] and there was no good reason to disturb the findings of the expert Panel on matters which were in dispute.

53. Alternatively, the alleged errors of fact lacked materiality insofar as they would not have made a difference to the outcome. The purported mistakes of fact were not central to the Panel's reasoning on costs in that the Panel made other relevant findings lying at the core of the issue of whether there was an

"additional benefit" of placement at The Moat and these too informed its cost comparison, as follows:

(a) A did not require integrated provision, as argued by his parents, and therefore there would be no benefit in A being placed in a specialist setting. That was reflected in the Final Working Document appended to the decision where the Panel rejected the insertion of the parental proposed addition under "communication and interaction" (1) Section E1 "support should be fully integrated into the classroom with additional training for school staff, and additional support from a SaLT Assistant or LSA to help to meet his needs at school". Further, the Panel, through the Working Document, rejected the proposed addition in respect of the need for "specialist staff" and instead adopted the Council's proposed wording that "A should be taught by staff who have training and/or experience in specific learning difficulties, including Dyslexia and ASD" (and see also [52], [53], [56]);

(b) the Panel was not convinced that an SPLD placement would provide the correct balance [49];

(c) with regard to progress the Panel noted that, whilst at Ambler School (a mainstream school) A had not had an EHCP, he had "made progress in Maths, reading and writing", albeit perhaps not to the extent reported by the school [47]. This was a pertinent consideration supportive of the conclusion reached at [49] with regard to the scope for progress;

(d) the Panel rejected the parental proposed addition that A presented "resistance to learning" [40] and concluded that any lack of progress "may depend on a number of factors" [40], with the logical inference that such lack of progress could not be directly attributed to placement at a mainstream primary school;

(e) in accordance with the Final Working Document, A "*requires a mixed peer group including peers with similar needs"* and did not therefore need to be with children who had similar difficulties [49], [59]. At The Moat he would not

have a mixed peer group insofar as all the children there required specialist teaching;

(f) the Panel found "no persuasive evidence that A would not become accustomed to a larger mainstream environment" [50];

(g) there would be a clear disadvantage of placement at The Moat, namely "the disturbance of increased travel and removal from his community" [69]. Stoke Newington, by contrast, was within a third of a mile of A's home [22].

54. In light of the above, the Panel was entitled to conclude that, on all the evidence before it, "the scope for progress will be enhanced by the full range of opportunities available at a mainstream school" and its conclusion [65] that to have reservations as to "whether [The Moat School] can provide a comprehensive education for [A]. It is specialist and necessarily will narrowly focus upon literacy skills" was one which it was entitled to reach.

55. The Panel therefore approached the issue of costs correctly in identifying that £6,411 per annum was a significant amount of money and then considering whether there were any balancing advantages or benefits that could outweigh the increased costs [69]. No procedural irregularity or error could be identified in this ground.

Analysis

56. So far as the release of the Head Teacher of The Moat is concerned, it is apparent from the exchanges in the hearing of the appeal that the Tribunal asked Mrs Slomovic whether the evidence of The Moat would be required and that she confirmed that it would not in light of the Council's position that both schools were suitable. It is not therefore the case that the Tribunal ruled that the evidence would not be "required". Mrs Slomovic chose to present her appeal in absence of The Moat, but could have insisted on the presence of the Head Teacher if he was thought vital to her case. She accepted during the hearing of the appeal that, in retrospect and with the benefit of hindsight, it would have been better if he had remained to give evidence, but that is not

the basis for ruling that his absence rendered the proceedings unfair. I shall deal with that aspect under the fifth ground of appeal.

57. **Paragraphs 49/65:** for present purposes under the third ground of appeal, Mrs Slomovic's complaint was that the Tribunal then went on to make decisions about the disadvantages of attendance at The Moat and its reservations about that school's ability to provide a comprehensive education for A without putting any of these points to the parents' witnesses or her as their representative at the hearing.

58. In the case of ***S v. SENDIST*** [2007] EWHC 1139 Holman J said that:

> "11. I will describe them more fully in a moment, but the essence of the argument is as follows. On behalf of the parents, Miss Lawrence says, first, that in determining and describing those other needs and the required provision for them, the tribunal reached an outcome which was not based on the evidence adduced by either side and, as it were, was something that they invented or arrived at themselves. She says, second, that the outcome to which they came was not one which the tribunal had canvassed during the hearing itself, and accordingly there was an injustice in that they reached a conclusion without giving either side -- but in particular the parents -- an opportunity to comment upon it. She says, thirdly, and to my mind most importantly, that the outcome to which they came was too lacking in specific detail as to be enforceable or to represent a proper statement of the required educational provision.
>
> 12. I say at once, and briefly, that I am not prepared to consider the first two of those three grounds of complaint. In the first place, it seems to me that a specialist tribunal such as this must, at any rate to some degree, be entitled to come to a conclusion, or outcome of their own, even if it is not one that was advocated by either side, nor even necessarily supported by "evidence" by either side. A specialist tribunal must surely be able to bring its own expertise and judgment to bear in formulating their view as to the needs and required provision for the child."

59. More recently, Judge Jacobs said in ***BB v. Barnet LBC*** [2019] UKUT 285 (AAC)

> "16. The ways in which a tribunal may use its expertise are various, and the circumstances in which they may do so are subject to (possibly infinite) variation. And it is always relevant and necessary for the Upper Tribunal to consider whether what happened affected the outcome of the case: see the emphasis on materiality in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [10] and the approach of the Court of Appeal in *Richardson v Solihull Metropolitan Borough Council and the Special Educational Needs Tribunal* [1998] ELR 319 at 342-343 (Beldam LJ) and 343-344 (Peter Gibson LJ). That makes it difficult to establish precise rules. And this, in turn, affects the way that it is appropriate to rely on earlier decisions. They can properly be relied on for statements of principle. It is wise, though, not to elevate what is really no more than the application of a general principle into a sub-principle or rule. And it is dangerous to reason by comparison from case to case when so much can depend on the particular combination of circumstances and their context, and on their impact on the outcome of the case.
>
> 17. I have made the point about the use of authority in order to deal with one of Mr Friel's argument. He referred to *M v Worcestershire County Council and Evans* [2003] ELR 31 in which Lawrence Collins J found no fault with a tribunal that had used its expertise. Mr Friel sought to distinguish that case on the ground that the tribunal had been presented with a choice of provision in that case, whereas in this case it had not. I do not accept that argument or that approach to the authority. The distinction does not figure in the judge's reasoning and, applying the touchstone of principle, it is not appropriate. The issue is the fairness of the proceeding, not the particular context or the way in which fairness was said to be compromised. Whether the tribunal had a choice or not may be relevant, but it does justify two categories of case or even of outcome.
>
> 18. Fairness depends on the context. In this case, the local authority had not put forward any evidence on occupational therapy. It was clear that the tribunal would have to make a decision on the limited evidence available, with the benefit of its expertise. The duty of fairness does not solely rest on the tribunal. The parties are under a duty to cooperate under rule 2 of the rules of

> procedure, and that duty applies to their representatives as well (*Geveran Trading Co Ltd v Skjevesland* [2003] 1 WLR 912 at [37]). That meant that the parties should have provided evidence, if they wished to do so, and assisted the tribunal by inviting the members to put their ideas to the parties and the witnesses. They should not sit back and then criticise the tribunal for not doing what they could have prevented. I am not saying that this absolved the tribunal from its duty of fairness, only that the parties were required to assist the panel.
>
> 19. The difficulty for a tribunal is how to allow the parties to comment effectively on the case before it has fully deliberated on the case and made its findings of fact. How can the parties effectively comment without knowing what the members are thinking? What should the tribunal do if something new occurs to the members after the hearing? That depends on what it is that arises. It may be an entirely new issue or basis for decision that no one contemplated during the hearing. In that case, fairness will require the tribunal to put it to the parties (*Richardson* at 332 (Beldam LJ)). In other cases where the tribunal's thinking has been effectively, albeit not perhaps directly addressed, putting any new idea to the parties for comment and perhaps more evidence would prolong the proceedings. The tribunal is entitled to proceed on the basis that the submissions and evidence are complete at the end of the hearing and that further reference back to the parties is not necessary unless something new arises that has not been fairly covered. The tribunal is entitled to expect the representatives to anticipate the likely range of options that the tribunal will consider and present their case accordingly."

60. Those authorities, it seems to me, provide the answer to Mrs Slomovic's argument. The issue is the fairness of the proceedings, not the particular context or the way in which fairness was said to be compromised. Fairness depends on the context. If there is an entirely new issue which no one contemplated during the hearing, fairness will require the Tribunal to put it to the parties. By contrast, in other cases where the Tribunal's thinking has been effectively, albeit not perhaps directly addressed, putting any new idea to the parties for comment and perhaps more evidence would prolong the proceedings. In the latter event the Tribunal is entitled to proceed on the basis that the submissions and evidence are complete at the end of the hearing. Further reference back to the parties is not necessary unless something new

arises which has not been fairly covered. The Tribunal is entitled to expect the representatives to anticipate the likely range of options that it will consider and present their case accordingly.

61. Judged by those principles, the course of action adopted by the Tribunal was not unfair. The issue of the suitability of The Moat had been accepted by the Council, but that did not preclude the Tribunal from using its own expertise in deciding about the balance of advantages and disadvantages of the respective placements in relation to the s.9 exercise, which was clearly an issue which was going to have to be decided and should therefore have been anticipated. Mrs Slomovic chose to present her appeal in absence of The Moat, but could have insisted on the presence of the Head Teacher if he was thought vital to her case. The expedient of going back to the parties on that point for yet further comment and possibly yet more evidence would simply have prolonged the proceedings. Moreover, as Ms Benitez submitted (see paragraphs 45 to 47 above) the oral evidence was supportive of the Tribunal's findings about placement. In my judgment the Tribunal was entitled to proceed on the basis that the submissions and evidence were complete at the end of the hearing and to make its decision on the issue of the balance of advantages and disadvantages using its own expertise on the basis of those submissions and that evidence.

62. It seems to me that, in considering whether A's scope for progress would or would not be enhanced by the range of opportunities available at a mainstream school and whether a specialist school could provide an equally comprehensive education for him or might narrowly focus upon some skills rather than others, the Tribunal did what the Tribunal did in ***MM & DM v. Harrow LBC*** [2010] UKUT 395 (AAC):

> "40. In my judgment, the tribunal in this case did no more than use its knowledge and experience to assess the evidence put to it by the parties. That is part of the tribunal's function. It should have taken neither party by surprise that it discharged that function. There is nothing in the reasons given by the tribunal to suggest that it was doing anything else. There is nothing to suggest that it

> was improperly constructing a case that the parents had not had a chance to meet. It is not necessary for a tribunal to put every aspect of its thinking to the parties as the hearing progresses or afterwards.
>
> …
>
> 48. From the tribunal's reasons in this case, it appears to me that the tribunal did no more than use its knowledge and experience in assessing the relevance and persuasiveness of the evidence. The parties put their evidence and arguments to the tribunal in the knowledge that the members had expertise in education matters and that they would use that expertise to assess whether the evidence was relevant to the issues it had to decide and, if so, its persuasiveness. That is how the tribunal used its knowledge and experience and it was proper so to do."

63. Equally, for the reasons set out by Ms Benitez in paragraph 53 above, I am satisfied that, if there were any error on the part of the Tribunal in relation to the findings which it made in paragraphs 49 and 65 of its decision, those were not material in that they would not have made a difference to the outcome. The determinations on the points in issue must be understood in the full context of its reasoning on costs given that the Tribunal made other relevant findings relating to the issue of whether there was an additional benefit of placement at The Moat and these additional findings also informed its comparison of costs as between the two schools.

64. I therefore dismiss the third ground of appeal.

The Fourth Ground of Appeal

The Parents' Submissions

The Council being permitted to call Ms Wade, its EP, as a witness who was only notified to the parents at 21.25 the night before the hearing

65. At paragraphs 5, 6 and 7 of the Tribunal decision it is stated:

> "5. Ms Wade was not named on the attendance list submitted by Hackney. Mrs Slomovic objected to her

> participation stating this was a clear breach of Tribunal Rules & Procedure. Whilst she submitted that Mr and Mrs Kelway would be prejudiced in their case, she did not identify particular instances.
>
> 6. Ms Benitez explained that Hackney's EP report had been completed by a trainee EP supervised by an EP with visual impairment (VI) who could not participate in the video conference. Hackney had considered reasonable adjustments to allow full participation, however, this was not possible particularly in relation to the hearing bundle. Mrs Slomovic pointed out that the VI EP mentioned had not also been listed as a witness.
>
> 7. Having regard to the overriding objective within the Tribunal Regulations, we did not consider that significant prejudice would arise and felt it of advantage to hear evidence from a Local Authority EP bearing in mind Dr Crane was a witness for Mr and Mrs Kelway. Ms Wade was admitted."

66. Neither Ms Wade nor any other EP was listed on any attendance form submitted within the appeal, despite the Council being ordered by the Tribunal to provide an attendance form by 24 March 2020.

67. Furthermore, neither Ms Wade nor any other EP had asked to see A within the course of the appeal. The only EP advice from the Council within the hearing bundle was dated 13 June 2019 and failed to consider the issue of secondary provision or placement. However, Ms Wade gave extensive evidence on the provision which she considered that A required in secondary school.

68. It was not the case that Mrs Slomovic did not indicate particular instances as why the appellants would be prejudiced in their case if Ms Wade was permitted to give evidence. She clearly indicated to the Tribunal that there was prejudice in that a witness appearing, who had not been listed until the night before and had not written a report, put the parents at a disadvantage as they and their witnesses had no idea what evidence they would need to discuss/prepare; by comparison the Council and their witnesses had sight of the parents' evidence within all the timeframes set by the Tribunal. Thus the

attendance of Ms Wade prejudiced the parents. Mrs Slomovic argued that she had also clearly indicated that the late notice of Ms Wade as a witness and allowing her to give evidence to the Tribunal without having produced any written report or given proper notice was in breach of the rule which ensured that parties could participate fully in the proceedings.

69. It was of note and relevance that, at a User Group meeting of SEND Users hosted by Judge McConnell and Judge Tudur on 2 April 2020, Judge McConnell indicated that witnesses would not be permitted to attend for either party if they had not produced a report for the purposes of the Tribunal or seen the child.

The admission of costs evidence by the Council at 21.59 the night before the hearing

70. Mrs Slomovic criticised the admission of costs evidence by the Council at 21.59 the night before the hearing, which she said was changed again on the morning of the hearing. She argued that the Council's conduct in the case was unreasonable; the local authority was ordered to provide costs information by 24 March 2020, but failed to do so.

The failure by the Council to respond to the parents' latest version of the Working document until 21.25 on the night before the hearing

71. She also criticised the failure by the Council to respond to the parents' latest version of the Working Document until 21.25 on the night before the hearing. She had sent the Working Document to the Council on 9 March 2020; what was the excuse of the Council for responding to it the night before the hearing?

Procedural irregularity and unfairness in relation to technological issues

72. The hearing was amongst the first video hearings and held before the panel checked with participants that all parties were happy with the conduct of the hearing. The technology on the day, she submitted, was far from ideal, with participants regularly dropping off the video link and the hearing having to be stopped to readmit participants as well as significant difficulties hearing

parties. Hence the parents were not content that the conduct of the hearing led to all issues being properly heard or considered.

Procedural irregularity and unfairness in relation to the decision of the Tribunal to make conclusions about The Moat when no evidence had been heard

73. It was the Tribunal's decision to release the Head Teacher of The Moat on the basis that he was not required given that the Council had no objections to the suitability of the school. Yet the Tribunal in its decision then identified that The Moat had certain disadvantages (paragraph 69), despite the parents' witness from The Moat having been released early without having given any evidence to the Tribunal. It was reasonable and appropriate to remit the decision to another panel in full to allow The Moat's evidence to be presented and to enable this matter to be properly addressed.

74. The advantages or disadvantages of placement at The Moat had relevance when considering the difference in costs between the two placements and whether the difference in costs represented unreasonable public expenditure once the required balancing act had taken place.

The Council's Submissions

75. As to the alleged procedural irregularities, Ms Benitez submitted that the Tribunal had properly exercised its powers to admit late evidence, despite a breach of directions, and in doing so expressly referred to the overriding objective at [7] as required by rule 2(3) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008.

76. At the hearing, Judge Bennett specifically asked Mrs Slomovic to identify the prejudice that the late evidence and witness attendance would cause to the parents. However, Mrs Slomovic was unable to identify any specific prejudice that would be caused by the witness evidence of Ms Wade, the Senior Educational Psychologist for the local authority, or the costs schedule. Instead, she rehearsed her complaints with regards to the failures to comply with directions and referred to "potential prejudice" without more. There were

therefore no submissions to "record" on the impact or prejudice of such evidence.

77. The Council had not listed the EP's attendance on the attendance form due to an oversight. However, the EP report formed part of the bundle (and the EHCP process). The Council indicated that Ms Wade had had an opportunity to discuss the case with the Visually Impaired EP who authored the report, and who, by reason of disability, was unable to attend the hearing on behalf of the Council. It was anticipated that Ms Wade would be in a position to assist the Tribunal. Ms Wade also had knowledge of the local authority's proposed setting and therefore her evidence would extend to assisting the Tribunal in determining the issue of suitability. The Tribunal was aware that Ms Wade had not met with the parents or A [29], but properly held that it would be for the Tribunal to determine what weight, if any, would be afforded to Ms Wade's evidence. The Tribunal found that Ms Wade's evidence would assist the Tribunal, particularly "bearing in mind Dr Crane was a witness."

78. At paragraph 8 of the parents' response Mrs Slomovic made reference to an SEN User Group. That reference ought to be disregarded insofar as it was unsupported by evidence.

79. With regards to the costs schedule, Mrs Slomovic had been aware of the school costs and the only issue was whether the AWPU should be taken into account. Therefore, the accuracy of the schedule of costs was a matter for legal submissions at the hearing in the usual way.

80. Version 4 of the Working Document, as sent to the parents' representative the day before the hearing, was not materially different from Working Document Version 3. The majority of the changes related to the Council's acceptance of the parental proposed additions and therefore no unfairness arose due to the late service.

81. It was therefore clear that the Tribunal took into account all relevant considerations and acted in accordance with the overriding objective as required by rule 2(3) of the 2008 Rules. There was no arguable error of law.

82. The parents alleged that "the technology was far from ideal" and that there were "significant difficulties hearing parties". Firstly, Mrs Slomovic has years of experience in conducting SENDIST hearings, but did not raise *any issues* on the day regarding the conduct of the remote hearing or the quality of the online platform. Whilst there were some difficulties with parties losing connection, Judge Bennett was alert to this possibility and paused the proceedings until the party re-joined. There was no difficulty in hearing the parties. Having sought the consent of the parties to conduct the hearing remotely at the outset of proceedings, Judge Bennett later asked both parties to confirm that they had been satisfied with the conduct of the remote hearing. Mrs Slomovic confirmed that she and her clients had been satisfied with the conduct of proceedings.

83. Finally, the Tribunal asked Mrs Slomovic whether the evidence of The Moat would be required and Mrs Slomovic confirmed that it would not in light of the Council's position that both schools were suitable. The Tribunal was therefore *guided* by Mrs Slomovic on that matter and did not rule that the evidence would not be "required". Mrs Slomovic chose to present her appeal in absence of a witness from The Moat.

Analysis

84. Ms Wade's name had been omitted from the attendance list and was only introduced the night before the hearing. That was clearly late and was equally clearly in breach of the Tribunal's case management directions. At one point in her submissions Mrs Slomovic seemed to suggest that the omission not accidental, but I have no reason to doubt what was said in paragraph 6 of the Tribunal's decision to the effect that the Council's EP report had been completed by a trainee EP supervised by an EP with visual impairment (who had also not been listed as witness) who could not participate in the video conference. The Council had considered reasonable adjustments to allow full

participation, but that was not possible, particularly in relation to the hearing bundle, and it had omitted the name of the witness through oversight rather than through any nefarious intent. Although there was no evidence on the point, Ms Benitez said that it was only on 30 March 2020 that Ms Wade confirmed that she could attend the hearing.

85. Although Mrs Slomovic could not point to particular prejudice caused by Ms Wade's late appearance as a witness, I accept her point that there was prejudice to her clients in that a witness appearing, who had not been listed until the night before and had not written a report, put the parents at a disadvantage as she and they had no idea what evidence they would need to discuss or prepare or what Ms Wade would say in cross-examination; by comparison, the Council and their witnesses had had sight of the parents' evidence within all the timeframes set by the Tribunal.

86. As against that, the Tribunal considered the evidence of prejudice, had specific regard to the overriding objective and ultimately did not consider that significant prejudice would arise if Ms Wade was admitted to give evidence. Moreover, it considered that it would be of advantage to hear evidence from a local authority EP, bearing in mind that Dr Crane was a witness for the parents.

87. It seems to me that the Tribunal weighed the evidence of prejudice and had regard, as it should have done, to the overriding objective. Given that Dr Crane was giving evidence, it considered that it would be advantageous to hear from another EP. In fact Ms Wade's evidence does not seem to have been particularly central to the Council's case; the only reference to Ms Wade's evidence was in paragraph 29 where it was specifically recited that she had read the papers, but had not met A. There is much more reference in the decision to the evidence and opinions of Dr Crane. In those circumstances I consider that the Tribunal was properly entitled to admit Ms Wade to give evidence pursuant to the overriding objective, notwithstanding the breach of its earlier directions. The weight to be attached to Ms Wade's evidence I have dealt with in relation to the first ground of appeal in paragraph 15 above.

88. The fact that other judges might have indicated extra-judicially on another occasion in a different forum that witnesses would not be permitted to attend for either party if they had not produced a report for the purposes of the Tribunal or seen the child seems to me to be neither here nor there. What matters is what this Tribunal did on this particular occasion.

89. The updated costs schedule produced at the eleventh hour by the Council was not in the appeal bundle (since it was submitted the night before, so it was difficult to see what had then divided the parties). Nevertheless it was apparent that a large measure of agreement had been reached on the morning of the hearing and an agreed costs schedule was put in after the conclusion of the hearing (see paragraphs 21 and 22 of the decision). What was agreed was that the cost of a placement at Stoke Newington was £26,899, the costs of a placement at The Moat was £33,540 (a difference of £6,411) and the cost of transport to and from The Moat was in the region of £23,400. On that basis it is difficult to see that there was any unfairness caused by the late admission of the costs schedule or any prejudice caused to the parents thereby.

90. So far as the late submission of the Working Document is concerned, although it was undoubtedly submitted at the eleventh hour, Mrs Slomovic could point to no precise prejudice caused by its late production. I accept what Ms Benitez says to the effect that Version 4 of the Working Document, as sent to Mrs Slomovic the evening before the hearing, was not materially different from Working Document Version 3. The majority of the changes related to the Council's acceptance of the parental proposed additions and no unfairness arose due to its late service.

91. With regard to the alleged technical difficulties at the hearing, I accept that there may have been teething difficulties in the first few days of the lockdown, such as the connection being lost, but there is nothing to suggest other than that the Judge was alert to the problem and paused the proceedings until the relevant party rejoined. There is nothing to suggest that

there was any difficulty in hearing the parties or that one side was unfairly disadvantaged by the problems with the link being broken. Moreover, it appears that, having obtained the consent of the parties to conduct the hearing remotely at the outset of proceedings, the Judge later asked both parties to confirm that they had been satisfied with the conduct of hearing remotely. It is Ms Benitez's case that Mrs Slomovic confirmed that she and her clients had been satisfied with the conduct of proceedings. When I pressed Mrs Slomovic on the point in the hearing, she accepted that she had not in terms made any objection until after she and her clients had seen the Tribunal's decision. That is too late to take the point about any technological difficulties.

92. In ***CS/343/1994*** at paragraph 6 Mr Commissioner Rice said that:

> "If the claimant was dissatisfied with the way the proceedings had been conducted, it was incumbent upon him, or his representative, to complain at the time, or at least to write in afterwards before the tribunal gave their decision. It is not generally open to claimants, who are dissatisfied with the way in which the proceedings have been conducted, to sit back doing nothing awaiting the outcome of the decision, and when it is adverse to them, then and then only to complain."

93. He went on to say at paragraph 7:

> "I cannot normally go behind the record of the proceedings. There has to be clear and convincing evidence that the position has not been properly represented. I am not satisfied that such is the case in the present instance. The mere assertion by the claimant, without some independent backup or other supporting circumstances, is simply not enough."

94. So here. The point was not raised at the time when it should have been, at or immediately after the hearing, but was raised for the first time some time after the event. I reject it as a ground of appeal.

95. So far as the release of the Head Teacher of The Moat is concerned, and as I have explained in relation to the third ground of appeal, it is apparent from

the exchanges in the hearing of the appeal that the Tribunal asked Mrs Slomovic whether the evidence of The Moat would be required and that she confirmed that it would not in light of the Council's position that both schools were suitable. It is not therefore the case that the Tribunal ruled that the evidence would not be "required". Mrs Slomovic chose to present her appeal in absence of The Moat, but could have insisted on the presence of the Head Teacher if he was thought vital to her case. She accepted that, in retrospect and with the benefit of hindsight, it would have been better if he had remained to give evidence, but that is not the basis for ruling that his absence rendered the proceedings unfair.

The Fifth Ground of Appeal

The Parents' Submissions

Paragraph 60: "Bearing in mind our conclusions relating to additional means of recording we have included provision of a laptop and appropriate touch-typing programmes"

96. Mrs Slomovic for the parents submitted that this was not costed by the Council or the parents and might change the costings assessed by the Tribunal. As the difference in costs between the two placements was only £6,411 any additional costs might have affected the costs balance.

Paragraph 68: "Hackney's objection to The Moat is based on Section 9 of the Education Act 1996, that is attendance at the school would involve unreasonable public expenditure. The parties have provided a schedule of costs which does not now appear in dispute. It was accepted at the hearing by Mrs Slomovic on behalf of [the parents] that with transport there is a significant difference in cost. However, we have to consider whether their offer of transport is a sustained offer and whether the reduced difference in cost in the order £6,411 p.a. is reasonable public expenditure"

97. She argued that this paragraph demonstrated confused reasoning and an inaccurate recording of facts and agreements. At the beginning of the hearing the Council agreed with her that the difference in costs without transport was

not a significant difference in accordance with the consideration of unreasonable public expenditure as described in s. 9 of the 1996 Act. On the basis that the Council accepted that the cost differential without transport was immaterial and did not represent unreasonable public expenditure, the difference in costs without transport was not challenged or discussed during the hearing as it was assumed that the Tribunal had both accepted the parents' undertaking to provide transport and that the difference in costs of £6,411 did not amount to unreasonable public expenditure. However, that acknowledgement had been ignored in the decision and the cost differential was a primary basis for its conclusion.

98. The costs were never agreed; it was also in dispute as the Tribunal has ordered additional provision (laptop and touch typing) and within the course of the hearing the Council said that it could increase the hours of support to 25 hours if needed. Yet the laptop/touch typing and additional support hours was never costed by the Council or the Tribunal.

99. Moreover, the Tribunal did not challenge the parents on their offer of transport at the hearing and made no point as to whether the offer was a sustained one. The parents made clear that they could fund and arrange transport to and from school.

Paragraph 69: "That minimum difference is still a significant amount of money"

100. At the beginning of the hearing, argued Mrs Slomovic, the Council agreed with her that the difference in costs without transport was not a significant difference in accordance with the consideration of unreasonable public expenditure as described in s.9 of the 1996 Act. On the basis that Hackney accepted that the cost differential without transport was immaterial, that was not challenged or discussed during the hearing, but that acknowledgement had been ignored in the decision and the cost differential was a primary basis for its conclusion.

101. She also submitted that the Tribunal gave no explanation as to why it considered the sum at issue a significant amount of money given the case law referenced on pages 35-36 of the bundle.

Paragraph 69: "We have not identified balancing advantages save that [the parents] believe and have presented evidence that The Moat is the school for [A]. We have found some disadvantages in the range of opportunities it could provide. We are not convinced that there are balancing advantages which could outweigh the increased cost"

102. Mrs Slomovic submitted that the Tribunal had dismissed and not referred to the evidence of Dr Crane and Ambler School concerning the advantages of attendance at a specialist setting and had assumed disadvantages without canvassing the views of the parties on those questions. As the Tribunal had indicated that it did not need to hear from the Head Teacher of The Moat, the parents did not have the opportunity to present evidence on the advantages or disadvantages of provision and placement at The Moat.

The Council's Submissions

103. Ms Benitez submitted that, firstly, the Panel did not need to take into account the cost of a laptop or touch typing [60] for the purposes of the costs comparison because *there would be no additional cost to the school*.

104. As part of their consultation response, Stoke Newington confirmed that A would be provided "a laptop for every literacy lesson" and a "touch typing programme" [345] and therefore it was the evidence before the Panel that there would be no additional cost to the public purse.

105. In any event, it was not an issue before the Panel who confirmed that "a schedule of costs does *not* now appear to be in dispute" [68] and the provision of a laptop and touch-typing software had been agreed by the Council.

106. Secondly, she submitted that it was incorrect that she as counsel for the local authority agreed that £6,411 per annum difference in cost would not constitute unreasonable public expenditure. The Council's position was

accurately recorded at [32] that Counsel "reviewed the cost difference which she submitted even without transport is significant".

107. Thirdly, contrary to the assertion in the grounds of appeal the costs schedule was agreed and document forwarded to the Tribunal on 3 April 2020 at 16.26 with all parties copied in. The attached document was headed "Agreed Costs Schedule".

108. Fourthly, the Tribunal did not order an increase in the hours of LSA support and therefore there was no need to consider the cost of any hypothetical future provision. Level 4 funding, as per the Agreed Costs Schedule, covered the required hours of support.

109. Finally, the Tribunal did not need to consider whether the parental offer of transport was a reliable one insofar as it deemed the costs difference without transport costs to be sufficiently material to be incompatible with the avoidance of unreasonable public expenditure.

110. The Tribunal's reasoning at [69] took into account all pertinent considerations and, as argued above, the Tribunal properly conducted a balancing exercise designed to identify whether there was a clear explanation as to the additional benefit to be derived from the parental placement.

111. Therefore, in the context of the case as a whole, the Tribunal could reasonably and rationally come to the decision that the parents' preference should not prevail in light of the difference in cost, see ***MM & DM v Harrow LBC***.

Analysis

112. As to the cost of a laptop or touch typing for the purposes of the costs comparison, I accept Ms Benitez's submission that there would be no additional cost to the school because, as part of their consultation response, Stoke Newington had confirmed that A would be provided "a laptop for every literacy lesson" and a "touch typing programme" [345] and therefore it was the

evidence before the Tribunal that there would be no additional cost to the public purse.

113. There was an obvious difference between the two representatives as to what at the beginning of the hearing the Council had or had not agreed as to whether the difference in costs without transport was a significant difference in accordance with the consideration of unreasonable public expenditure as described in s. 9 of the 1996 Act. The best contemporaneous evidence, which I accept, comes from the decision of the Tribunal when the point was still fresh in mind at paragraph 32, that Ms Benitez reviewed the costs difference which she submitted even without transport was significant, and at paragraph 68 when it recorded that it was accepted at the hearing by Mrs Slomovic that with transport there was a significant difference in costs, but that the key question which the Tribunal had to decide was whether the offer of transport was a sustained offer and whether the reduced difference in costs in the order of £6,411 was reasonable public expenditure.

114. Although during the course of the hearing the Council had said that it could increase the hours of support to 25 hours if needed, the Tribunal did not in fact order an increase in the hours of support and there was therefore no need to consider the cost of any hypothetical future provision. Level 4 funding, as per the agreed costs schedule, covered the required hours of support.

115. Nor did the Tribunal need to decide whether the parents' offer of transport was a reliable or sustained one since it considered that the costs difference without transport was sufficiently material to be incompatible with the avoidance of unreasonable public expenditure.

116. Mrs Slomovic in fact accepted at the hearing of the appeal that there was no binding rule as to whether a particular amount of expenditure was or was not significant for the purposes of s.9 of the 1996 Act and that each case turned on its own facts. I can therefore see no error of law in the Tribunal not specifically adverting to the case law set out on pages 35 and 36 of the bundle.

117. The real gravamen of Mrs Slomovic's submission on costs was that in paragraph 69 the Tribunal had not referred to the evidence of Dr Crane and Ambler School concerning the advantages of attendance at a specialist setting and that as it had indicated that it did not need to hear from the Head Teacher of The Moat, who had been released from attendance, the parents did not have the opportunity to present evidence on the advantages or disadvantages of provision and placement at The Moat.

118. As to the first point, what the Tribunal concluded was that

> "69. That minimum difference is still a significant amount of money. We have not identified balancing advantages save that [the parents] believe and have presented evidence that The Moat is the school for [A]. We have found some disadvantages in the range of opportunities it could provide. We are not convinced that there are balancing advantages which could outweigh the increased cost. We further note the disturbance of increased travel and removal from his community. Accordingly, we find naming The Moat would involve unreasonable public expenditure. [The parents'] preference cannot prevail."

119. As to the first point, and as set out in paragraphs 28 to 30 above in relation to the second ground of appeal, I agree with Mrs Slomovic that the Tribunal should have cited the conclusion of the letter from Ambler School at page 342 and the evidence of Dr Crane at page 383 to the like effect that A would find it exceptionally challenging to engage with and make progress in learning in a mainstream secondary school/that he would not access a mainstream secondary school. However, the point underlying the evidence from Ambler and Dr Crane about the difficulty of the transition was squarely raised by the Tribunal and I there concluded that the Tribunal's finding that on balance A's needs could be met with specialist support at an appropriate mainstream school was one which a reasonable tribunal could have reached on the evidence before it.

120. As to the second, I have dealt with that in relation to the third ground of appeal in paragraphs 56 to 61 above. The issue of the suitability of The Moat had been accepted by the Council, but that did not preclude the Tribunal from using its own expertise in deciding about the balance of advantages and disadvantages of the respective placements in relation to the s.9 exercise, which was clearly an issue which was going to have to be decided and should therefore have been anticipated. Mrs Slomovic chose to present her appeal in absence of The Moat, but could have insisted on the presence of the Head Teacher if he was thought vital to her case.

121. For these reasons I dismiss the fifth ground of appeal.

Conclusion

122. The Tribunal's decision is careful and detailed, running to 70 paragraphs over slightly over 10 pages. It has considered all relevant evidence in detail and has provided cogent and comprehensive reasons for the findings of fact which it made. I can see no arguable error of law in its determination. Essentially the appellants do not agree with certain of the findings of fact made by the First-tier Tribunal, but it is not open to them to seek to appeal the findings of fact made by the Tribunal nor to seek to relitigate questions of fact determined by the Tribunal. They have not identified a material error of law on the part of the Tribunal.

123. As Lewison LJ put it in ***Fage UK Ltd v Chobani UK Ltd*** at [114-115]:

> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23 [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR

2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include

(i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

(ii) The trial is not a dress rehearsal. It is the first and last night of the show.

(iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

(v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

(vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039 [2003] Fam 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] UKCLR 1135."

124. There is no error of law made out by the appellants and the question is really one of judgment as to the appropriate weight to be given to the relevant evidence. I am not satisfied that the Tribunal's conclusions cannot reasonably be explained or justified nor do I consider that the Tribunal's conclusion lay outside the bounds within which reasonable disagreement is possible. That I myself might, or might not, have reached a different conclusion on the evidence does not matter. What matters is whether the decision under appeal is one which no reasonable tribunal would have reached and I am not so satisfied.

125. The appeal is therefore dismissed.

Mark West
Judge of the Upper Tribunal

Signed on the original 24 November 2020