



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. HS/930/2021

On appeal from First-tier Tribunal (HESC Chamber)

Between:

JL (by EA as appointed person)

Appellant

- v -

Somerset County Council

Respondent

Before: Upper Tribunal Judge Ward

Decision date: 25 August 2021
Decided on consideration of the papers

Representation:

Appellant: Alexander Line, instructed by Sinclairs Law
Respondent: Ben Mitchell, instructed by Hampshire Legal Services on behalf of Somerset County Council

REASONS FOR DECISION OF 25th AUGUST 2021

1. On 25 August 2021, for reasons I explained, I gave a decision allowing the appeal and setting aside the decision of the First-tier Tribunal (“FtT”), with reasons to follow. These are those reasons.
2. The relatively narrow, but important, point in the appeal is whether the FtT was correct in applying to the case before it its view that:

“there is no provision in the Education Act 1996, or CFA 2014, for the end date of the plan to be extended beyond 31 August 2021. [J] ceases to be a “young person” on 25 August 2021 under s.83(2) CFA but s46 CFA makes clear that the LA may continue to maintain a plan until the end of the academic year in which the young person attains the age of 25....[EA] makes a compelling argument that this is an exceptional year when a placement which was ideal for [J] and which offered significant opportunities for him to develop has been restricted and may not be completed due to circumstances beyond his control. But the tribunal has no jurisdiction to order the LA to extend the Plan, whatever the circumstances.”

Relevant legal provisions

3. Section 37(1) provides:

“(1) Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan—
(a) the local authority must secure that an EHC plan is prepared for the child or young person, and
(b) once an EHC plan has been prepared, it must maintain the plan.”

Who is a “young person” is defined by s.83(2): see [10].

4. Section 42 provides:

“(1) This section applies where a local authority maintains an EHC plan for a child or young person.

(2) The local authority must secure the specified special educational provision for the child or young person.
...”

5. Section 45 provides:

“(1) A local authority may cease to maintain an EHC plan for a child or young person only if—
(a) the authority is no longer responsible for the child or young person, or
(b) the authority determines that it is no longer necessary for the plan to be maintained.

(2) The circumstances in which it is no longer necessary for an EHC plan to be maintained for a child or young person include where the child or young person no longer requires the special educational provision specified in the plan.

(3) When determining whether a young person aged over 18 no longer requires the special educational provision specified in his or her EHC plan, a local authority must have regard to whether the educational or training outcomes specified in the plan have been achieved.

(4) A local authority may not cease to maintain an EHC plan for a child or young person until—
(a) after the end of the period allowed for bringing an appeal under section 51 against its decision to cease to maintain the plan, where no such appeal is brought before the end of that period;
(b) after the appeal has been finally determined, where such an appeal is brought before the end of that period.

(5) Regulations may make provision about ceasing to maintain an EHC plan, in particular about—

- (a) other circumstances in which it is no longer necessary for an EHC plan to be maintained;
- (b) circumstances in which a local authority may not determine that it is no longer necessary for an EHC plan to be maintained;
- (c) the procedure to be followed by a local authority when determining whether to cease to maintain an EHC plan.”

A summary of the relevant provision made under sub-section (5) can be found at [11].

6. Section 46 provides:

“(1) A local authority may continue to maintain an EHC plan for a young person until the end of the academic year during which the young person attains the age of 25.

(2) “*Academic year*” means the period of twelve months ending on the prescribed date.”

For what is the “prescribed date”, which plays an important part in this case, see [13].

7. Section 51 confers rights of appeal. For present purposes the only potentially relevant ones are those under s.51(2)(c) and (f):

“(1) A child's parent or a young person may appeal to the First-tier Tribunal against the matters set out in subsection (2), subject to section 55 (mediation).

(2) The matters are—

...

- (c) where an EHC plan is maintained for the child or young person—
- (i) the child's or young person's special educational needs as specified in the plan;
 - (ii) the special educational provision specified in the plan;

...

(f) a decision of a local authority under section 45 to cease to maintain an EHC plan for the child or young person.

(3) A child's parent or a young person may appeal to the First-tier Tribunal under subsection (2)(c)—

...

(b) following an amendment or replacement of the plan.

(4) Regulations may make provision about appeals to the First-tier Tribunal in respect of ... EHC plans, in particular about—

...

(c) the powers of the First-tier Tribunal on determining an appeal;

... .”

8. Section 61 provides:

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“(1) A local authority in England may arrange for any special educational provision that it has decided is necessary for a child or young person for whom it is responsible to be made otherwise than in a school or post-16 institution or a place at which relevant early years education is provided.

(2) An authority may do so only if satisfied that it would be inappropriate for the provision to be made in a school or post-16 institution or at such a place.
...”

9. Section 77 requires the Secretary of State to issue a code of practice (“the Code”) giving guidance to a list of bodies about their functions under Part 3 of the 2014 Act and, by s.77(6)

“(6) The First-tier Tribunal must have regard to any provision of the code that appears to it to be relevant to a question arising on an appeal under this Part.”

10. Section 83(2) states that

“*young person*” means a person over compulsory school age but under 25.

11. Regulation 31 of the Special Educational Needs and Disability Regulations 2014/1530 creates obligations to inform and consult when a local authority is considering ceasing to maintain a child or young person's EHC plan and, where it has decided to cease to maintain it, as to who must be informed and the accompanying information to be provided.

12. Regulation 43 provides:

“(2) When determining an appeal the powers of the First-tier Tribunal include the power to—

...

(e) order the local authority to continue to maintain the EHC Plan in its existing form where the local authority has refused to do so, where the appeal is made under section 51(2)(f);

(f) order the local authority to continue to maintain the EHC Plan with amendments where the appeal is made under section 51(2)(c), (e) or (f) so far as that relates to either the assessment of special educational needs or the special educational provision and make any other consequential amendments as the First-tier Tribunal thinks fit;

...”

13. Regulation 46(1) provides:

“For the purposes of section 46 of the Act, an academic year is the period of twelve months which ends—

(a) in relation to a young person attending an institution within the further education sector on 31st July;

(b) in relation to a young person receiving apprenticeship training, on the date that that apprenticeship training finishes, or on the day before the young person attains the age of 26 if earlier;

(c) in all other cases, on the day that the young person's course of education or training is scheduled to end, or on the day before the young person attains the age of 26 if earlier.”

Code of Practice

14. This provides:

“9.207 Support should generally cease at the end of the academic year, to allow young people to complete their programme of study. In the case of a young person who reaches their 25th birthday before their course has ended, the EHC plan can be maintained until the end of the academic year in which they turn 25 (or the day the apprenticeship or course ends, or the day before their 26th birthday if later).”

What on a first reading looks like a mismatch between the final “later” in the extract from the Code and the final “earlier” of reg.46 may be explicable on the basis that the drafter of the Code was referring to possible end dates which fall after the end dates mentioned before the words in parentheses.

Key issues before the FtT

15. By the time of the FtT hearing, the parties had reached agreement as to the description of J's needs. What remained was an appeal under s.51(2)(c) against the provision specified in the plan (dated 31 January 2020¹). It was not an appeal against a decision to cease to maintain the plan. It was common ground that provision under s.61 for education otherwise than in a post-16 institution was appropriate. The issues were around the content and extent of such provision; in particular, EA submitted that the plan should be extended because the Covid-19 pandemic had meant that a supported internship at a museum, which had been a key part of special educational provision for J, had not materialised in the form anticipated, instead being restricted to remote working and with reduced hours.

16. In resisting the suggestion that the plan could continue beyond the end of the academic year in which the young person turns 25 (which in the context of this case meant 31 August 2021), the submission to the FtT on behalf of the respondent was that while it may exceptionally be possible to continue to maintain a plan to enable a young person to complete a qualification which would otherwise be missed, that was not the position here, where J is receiving education otherwise than at college.

The submissions

17. Mr Line submits that the FtT, in limiting its consideration to section 46(1) and 83(3), failed to have regard to regulation 46 or the Code of Practice. As subparagraphs (a) and (b) of reg.46(1) do not apply to J, he falls within “all other cases” and so within reg. 46(1)(c).

¹ The reference in the FtT's decision to 31 January 2019 appears to be a slip.

18. He submits that in performing its task of standing in the shoes of the respondent, the FtT could specify special educational provision which might extend beyond J's 25th birthday. It would then be a matter for the respondent to determine later whether the plan should be extended beyond that date in accordance with regulation 46. The impact of the Covid-19 pandemic on provision for J provides a compelling reason why the respondent should agree to extend the plan for another year.

19. Mr Mitchell, latterly instructed for the purposes of making written submissions on the present appeal, submits that the FtT had no jurisdiction to order the respondent to extend the plan beyond J's 25th birthday nor any other power to order the respondent to name special educational provision which might extend past that date; and that the FtT did not err in law, but even if it did, any error was immaterial given that it had no jurisdiction to do what is sought. He submits that the FtT's jurisdiction is limited to the matters in s.51(2). This was not an appeal under s.51(2)(f); rather, the plan would cease by operation of s.37(1), which only requires a plan to be maintained "for a child or young person" which following his 25th birthday J would not be.

20. He counters the point in [18] by suggesting that it amounts to "a provisional decision on this issue that the respondent could revise if it wished". He submits that there is no power to do this: the powers available to the FtT under reg.43 do not extend to permitting the FtT to order or advise a local authority to exercise its s.46 power. For the FtT to do what Mr Line contends would amount to conferring a discretion on the respondent whether to implement its decision or not, which the FtT has no power to do. Once the FtT orders a local authority to continue to maintain a plan with amendments, the local authority is obliged by s.42(2) to do so.

21. In any event, submits Mr Mitchell, one should not assume that the FtT was unaware of reg.46 simply because it did not refer to it. The FtT did say that it had had regard to the Code of Practice. The FtT was not obliged to set out every potential argument and legislative provision, especially as it correctly concluded it had no jurisdiction. In any event, (a) if there was an error of law, it was cured by the review which the FtT carried out and (b) given the FtT's lack of jurisdiction, the appeal is academic.

22. In reply, Mr Line accepts that the FtT cannot issue an order which directs (in the sense of equating to a mandatory order to do so) a local authority to extend a plan beyond a person's 25th birthday. Contrary to Mr Mitchell's suggestion, the FtT is not making an "advisory" decision. Rather, in the context of an appeal by a young person approaching their 25th birthday against the provision specified in a plan, the FtT's task is the same as in any other such appeal – to determine the special educational provision which is reasonably required to meet the person's special educational needs. Such provision may be capable of extending beyond a person's 25th birthday, just as the provision ordered for a younger person might likewise be capable of being provided in a subsequent academic year. By assuming that the plan would end by 31 August 2021 the FtT unlawfully fettered its discretion.

23. Mr Line goes on to make submissions about whether, when a local authority wishes to terminate a plan following a person's 25th birthday, it is obliged to go through the "ceasing to maintain" provisions of s.45. I do not set them out in detail

because they are not in my view the subject of this appeal, the position is not clear-cut (see, for instance, in relation to the predecessor - though not identical - regime under the Education Act 1996, *Essex CC v Williams* [2011] EWCA Civ 1315) and the point has not been fully argued before me.

24. The FtT's reference to the Code is, he submits, a generic statement contained in most, if not all, decisions of the FtT and is not enough to counter the lack of any reference at all to reg. 46 or para 9.207 of the Code. While a tribunal is not obliged to go into each and every point, this was a key aspect. If the FtT had addressed the relevant provisions, it would not have made the error that it did. The review did not remedy the position and it appeared that the reviewing judge had not grasped the point being made. The appeal is far from academic as the error that the FtT is asserted to have made infected its consideration of a number of aspects of the plan.

Consideration of the submissions

25. It is a core feature of the legislation that it only requires a plan to be maintained in appropriate cases for children and young people, i.e. by s.83(2), those up to the age of 25. It is common ground that the FtT lacks the power to make an order compelling a local authority to exercise its s.46 power in favour of an extension. Section 46 however permits a plan to be maintained for somewhat longer - how much longer is permitted is determined by reg.46 and I accept that in the case of someone receiving provision otherwise than at college and which is not apprenticeship training it is reg.46(1)(c) that is applicable, meaning that an extension of up to one year is permissible. The FtT was not deciding whether to order the respondent to extend the plan, which it correctly noted – and is undisputed – it had no jurisdiction to do. However, that did not mean that s.46 and reg.46 were irrelevant to the provision to be specified and in my judgment the FtT erred in law by stopping where it did.

26. Reg.46 and the Code clearly envisage that an exercise of the s.46 power may be appropriate to allow an individual to complete a course leading to a qualification. That is unsurprising. If one thinks about a person seeking to start, a few months over their 23rd birthday a 2 year vocational course with a qualification if adequately completed, it would be a startling conclusion if the FtT could not specify it because, on turning 25, they would cease to be a “young person”. Rather, the legislator has chosen not to exclude that possibility, but to leave the continuation of the plan thereafter in order to facilitate it to the discretion of the local authority. The fact that for J the key form of special educational provision is a supported internship by way of provision otherwise than at a post-16 institution rather than a college course leading to a qualification is immaterial. It is the clear intention of reg.46 via the wide words of sub-paragraph (1)(c) to make provision wide enough to apply to his situation.

27. The basis for the FtT's jurisdiction is accordingly, as Mr Line submits, the same as in any other case where the provision specified in the plan is challenged, namely s.51(2)(c) and the possibility of extension of the end date via s.46 and reg.46 will be a relevant factor for the FtT to take into account in cases where it arises. Mr Mitchell does not dispute that the FtT's view impacted upon the provision ordered- his basis for saying that the appeal is academic is, rather, the asserted lack of jurisdiction -and I agree with Mr Line that the view did so impact.

28. Whether ceasing to maintain a plan by virtue of a decision not to exercise the s.46 power is subject to the s.45 procedure will have to await another case but if it is not, the decision will be subject to the normal constraints of administrative law and justiciable, though not by the FtT, by the Administrative Court or by this Chamber on a discretionary transfer to it under s.31A(3) of the Senior Courts Act 1981. Either way, what the FtT, looking at the matter some time before a person reaches 25, thinks is appropriate special educational provision for them will be a relevant factor and the FtT can reach its view knowing that at least to that extent administrative law will provide some buttressing of the view that it reaches.

29. Finally, I agree with Mr Line's submission that it is not possible to infer that the FtT did in fact have reg.46 and para 9.207 of the Code in mind. The review was refused and I also agree that there is no indication that, without the benefit of the submissions which I have received, the point was understood by the judge considering whether to review.

Conclusion

30. Consequently the appeal has succeeded. I gave Directions with the decision of 25 August setting out what should now be the next step.

C.G.Ward
Judge of the Upper Tribunal
Signed on the original on 16 September 2021