Westminster CC v (1) FTT (HESC) (2) A (SEND)
[2023] UKUT 177 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2022-001731-JR**
(ADMINISTRATIVE APPEALS CHAMBER)

ON APPEAL FROM THE FIRST TIER TRIBUNAL (HESC)
(SPECIAL EDUCATIONAL NEEDS & DISABILITY)
Tribunal Ref EH213/21/00020

Between

WESTMINSTER CITY COUNCIL

Applicant

and

FIRST TIER TRIBUNAL (HESC)

Respondent

and

A

Interested Party

BEFORE UPPER TRIBUNAL JUDGE WEST

Hearing date: 19 June 2023
Decision Date: 12 July 2023

Representation: Mr Alexander Line, counsel (for the Applicant)
(instructed by Westminster City Council)

Mr David Wolfe KC, counsel (for the Interested Party)
(instructed by Simpson Milar)

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 young person in these proceedings. This order does not apply to (a) the young person's parents (b) any person to whom the young person'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 young person where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

DETERMINATION

The decision of the First-tier Tribunal (HESC) (Special Educational Needs & Disability) (which sat on 2 May 2022 and 20 September 2022) dated 23 February 2023 and 20 September 2023 under file reference EH213/21/00020 does not involve an error on a point of law. Permission to appeal against that decision on Ground 1 is refused. Although permission to appeal is granted on Ground 2, the appeal against that decision is dismissed.

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

REASONS

Introduction

1. In this decision I draw attention to the decision of the Court of Appeal in ***Point West GR Ltd v Bassi & Ors*** [2020] EWCA Civ 795 concerning the power to review a decision (or part of a decision), the scope of such review and the importance of the principle of finality in the context of a review. I

refused permission to appeal in respect of Ground 1 of the grounds of appeal. Although I granted permission to appeal is granted on Ground 2, the appeal against that decision is dismissed.

Parties

2. The parties to the application for judicial review are Westminster City Council ("the Council"), which is the Applicant, the First-tier Tribunal (HESC), which is the Respondent and A, the Interested Party. In order to preserve her anonymity, and meaning no disrespect to her, I shall refer to the Interested Party only as "A". A is now 22. There is no suggestion that A lacks capacity to represent herself and make her own decisions, but her parents have supported her in this litigation and act in her best interests. They were present at the hearing of the original appeal and at the hearing before me on A's behalf. A herself did not appear and had not appeared below. The Respondent First-tier Tribunal was a necessary party to the application for judicial review, but took no part in the proceedings and the contest was essentially between the Council and A.

Test for Permission

3. Under the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), there is no right of appeal from the decision of the First-tier Tribunal which is an excluded decision. A challenge to a decision of a First-tier Tribunal in such a case can only be pursued by way of judicial review proceedings to the Upper Tribunal. On an application for permission to bring judicial review proceedings, the test to be applied is whether "there is an arguable ground for judicial review having a realistic prospect of success" (***Sharma v. Brown-Antoine*** [2007] 1 WLR 780 at [14(4)] and ***Wasif v. Secretary of State for the Home Department*** [2016] EWCA Civ 82 at [13]).

Background

4. A's original appeal under s.51 of the Children and Families Act 2014 was against the contents of her Education, Health and Care Plan ("EHCP"). The appeal was against the terms of Sections B (special educational needs), F (special educational provision) and I (placement). On two separate occasions,

the appeal grounds were extended to include health and social care recommendations (Sections C, D, G and H – an extended appeal).

5. The appeal was heard remotely on 2 February 2022 when A's parents were represented by Mr Andrew Barrowclough, solicitor at HCB Solicitors. The Council was represented by Mr Tom Markwell, its tribunal officer. The Tribunal reserved its decision.

The Tribunal's Decision

6. The Tribunal issued its decision on 23 February 2022 (I shall refer to this decision as either "the Decision" or "the February decision"). The appeal was allowed. The Tribunal ordered that

(1) the Council should amend Sections B and F of the EHCP for A by replacing the existing wording with the wording set out in the attached working document (version 8)

(2) the Council should name Lionheart Education, a post 16 institution, in Section I of the EHCP for A.

7. It also recommended that the Council should amend Sections C, G and H of the EHCP for A by replacing the existing wording with the wording set out in the attached working document (version 8).

8. At paragraph 16 the Tribunal agreed that the following were the issues on the appeal, although only (b) is relevant for present purposes:

> "(a) Assessments as provision;
>
> (b) Autism mentor/personal assistant/specialist worker – special educational provision or health/social care provision?
>
> (c) Indirect speech and language and occupational therapy provision during school holidays;

(d) Education otherwise than in a post 16 institution;

(e) Psychotherapeutic counselling - special educational provision or health provision?

(f) Is Lionheart Education capable of being named in section I?; and

(g) Health and social care recommendations.”

9. With regard to issue (b) the Tribunal stated that

> “17. We heard oral evidence from [A’s parents]. In this academic year, A has continued to receive extensive scaffolding support from both of her parents who have been working from home, along with her weekly sessions with Ms Welby-Delimere. A had a breakdown in March 2021 and A and her parents worked very hard to get her to a point where she could reengage with education. She has managed that and is making good progress at Lionheart. There have been many years of ups and downs with A’s education, but [her parents] felt that she is now at a point where she is comfortable with the educational environment and her tutors. A requires structure and when she isn’t attending Lionheart, she finds it very difficult to cope and requires round the clock support. She cannot attend an environment that she has not visited or with which she does not feel comfortable. If anything goes wrong, the day will be completely derailed. [Her mother] cited an example from that week – A’s art tutor had to change the day for their tutorial and it meant A was not able to attend Lionheart the day before the hearing or on the day of the hearing. [Her parents] see A’s education structure as a pillar which supports everything else with her skills development.
>
> …
>
> *Autism mentor/personal assistant/specialist worker – special educational provision or health/social care provision?*
>
> 24. The LA’s position on this was that not all of the daily support from the autism mentor/personal assistant/specialist worker trains or educates A and so it is not appropriate for it to be classified, in its entirety, as special educational provision. There is no dispute from the LA that A reasonably requires this provision to meet

her needs more holistically. I Support is providing five hours per day in the form of functional behaviour analysis. This is now in place following some dispute over funding and payment of invoices.

25. We noted that the LA has previously agreed provision in section F which ensures there is liaison between A's autism mentor, therapist and education setting, as well as the autism mentor implementing a number of programmes to increase A's skills, including her daily living and independence skills.

26. [Her parents] made the point that the autism mentor provision may provide some respite to the family, but this was an indirect result and not the main aim of the provision. The Tribunal panel accepted this. We reviewed the reports from I Support, the service that has been providing behaviour analysts, as the five hours of support per day which was commissioned by the CCG following a CAMHS referral in 2019. Mr Corcoran's email dated 21 May 2021 was helpful in understanding the programme, as well as his view that the provision covers all aspects of A's life, noting, in particular, her mental health and wellbeing, community participation and development of social skills – all three of those areas are listed as educational outcomes for A. The fourth area is the most significant, in our view – access to education, peers and a meaningful life in and beyond education. This most accurately encapsulates the point – that the autism mentor provision (which I Support is currently providing) covers all aspects of her life, not least her access to education. As a Tribunal panel, we found it impossible to account for how many of the five hours per day will be educational. We accepted the recommendations from the I Support report dated 11 October 2021 and the positive behaviour support plan which provide proactive strategies for communicating with A and, crucially, teaching A organisational skills, making informed choices, independent living skills, and social skills and relationships. All of these areas feature in her current educational outcomes. We took into account the observation from Ms Julia Terteryan, occupational therapist – that once A has the support of a regular mentor on a daily basis, it is likely that her occupational therapy can decrease. This led us to the clear conclusion that the provision of an autism mentor is reasonably required in order to educate and train A. This was further strengthened by the recommendations that A's autism mentor attends her speech and language and occupational therapy sessions in order to support A to

> attain the goals in the therapy programmes. Accordingly, the provision should be specified in section F of her EHC plan."

The Amended Final EHCP

10. As a result of that decision, in the Amended Final EHCP of 9 March 2022, 5 hours of mentoring per day were included in Outcome 2 in Section F:

> "A will have up to 5 hours per day with a specialist worker from an organisation such as I-support and/or autism mentors and/or a personal assistant/companion to assist A in accessing her education and travelling independently, helping her with her organisational and planning skills including management of her educational commitments and homework and helping A put into practise strategies she learns as part of her SALT and OT, as well as other independence and communication skills".

11. However, that appeared to duplicate the already existing social care provision in Section H2 which read:

> "Up to 5 hours of support per day with a specialist worker from an organisation such as I-Support, and/or Autism Mentors and/or a personal assistant/companion, who will work on:
> • Assisting A to be more independent of parents, including accessing educational setting and travelling independently".

Application For Permission To Appeal

12. The Council sought permission to appeal against the Tribunal's decision on 23 March 2023. It is important to note, however, that in Section E of the SEND 20A form the only ground of appeal was that the apparent duplication of 5 hours of mentoring support in both Sections F and H was wrong in law. The inclusion of 5 hours per day in both sections suggested that the provision of the service was to be increased to 10 hours per day, which was not what was agreed and accepted by the Tribunal. That was the only ground of appeal.

13. A's solicitor wrote to the Tribunal on 5 April 2022 to suggest that, since the application was in fact seeking to review one aspect of the working document rather than to appeal against the decision itself, it should more appropriately be resolved by way of review and by the Tribunal providing further clarification of the working document rather than by way of an application for permission to appeal.

Review

14. On 16 May 2022 the Deputy Chamber President, Judge Meleri Tudur, decided to review the decision of the Tribunal. Her reasons for the decision were as follows:

> "1. On the 23 March 2022, the LA submitted a request for permission to appeal the First-tier Tribunal SEND's decision dated 23 February 2022 on the basis that it contained an error of law.
>
> 2. It was submitted that the Tribunal had included the same provision in two different sections of the EHC plan thereby doubling the provision to be provided to A.
>
> 3. I have read the decision and note that there is reference in the conclusions to the provision of five hours of support being made available as educational provision for A. Paragraph 26 explains the conclusion and the reasons for it and there is nothing in the decision to indicate that A required ten hours support per day.
>
> 4. I have concluded that this is likely to be an error on the part of the tribunal and that the decision should be set aside as to that element of A's provision only and remitted back to the original tribunal for reconsideration.
>
> 5. Rule 49 provides that before taking any action in relation to a review, the Tribunal must provide an opportunity for every party to make submissions in relation to it. For that reason, I set out the directions below:
>
> It is ordered that:

> 1. The Tribunal is minded to review the decision issued on the 23 February 2022, to a limited extent as set out below:
>
> a) The decision made provision for A to receive five hours per day of support in both Section F and Section H making a total of 10 hours per day of support. The conclusions explain that the tribunal accepted the evidence that five hours support per day was reasonably required for A.
>
> b) Pursuant to Rule 49(3) of the Tribunal Procedure Rules 2008 (as amended), the Young Person shall send her representations in response to the proposed action on review so that it is received by noon on the 30 May 2022.
>
> c) The application shall be considered further on the first available date after the 30 May 2022."

15. On 29 July 2022 the Council sent to A's mother an email explaining that its intention was to provide 5 hours of mentoring in term time only, but only 5 hours per week during the school holidays. It did not agree that the provision in Section F meant that A should have 5 hours a day every day of the year, but acknowledged that there was a need for some mentoring provision during the holiday period. The email continued:

> "Direct payments amount for a mentor agreed as term-time only at 5 hours a day, however for the school holidays, we will give 5 hours a week to allow for continuous provision which will work out as follows for Academic Year 2022-2023:
>
> 39 term-time weeks 25 hrs x 39 weeks x £50/hour = £48,750
>
> 13 weeks holiday 5 hrs x £50 = £3,250
>
> Total for this year £52,000 per year.
>
> For this summer holiday period July/August 2022 we also agree 5 hours a week for 6 weeks.
>
> 6 weeks x 5 hours a week x £50 = £1,500

> As mentioned above the LA do not agree that the provision in section F of the plan means that A should have 5 hours day 365 days year, but acknowledge that here is a need for some mentor provision during the holiday period to support the continuity of the Salt and O provision. We agree to fund 5 hours a week in the holiday period, 13 weeks a year".

16. On 2 August 2022 Judge Tudur decided to review the decision and directed that the case be listed for a case management conference by telephone. That telephone case management conference was heard on 10 August 2022 by Tribunal Judge Brownlee.

Written Submissions Before The Review Hearing

17. Both parties made written submissions on 22 August 2022. In the case of the Council it submitted that

> "7. At a telephone case management hearing on 12 August 2022, Judge Brownlee proposed that the Tribunal would conduct the Review on the basis of the Respondent's 23 March 2022 application and include the question of the provision of support to A outside the school term.
>
> **SUBMISSIONS**
> **Duplication of provision**
> 8. The Respondent asserts it is clear that there has been an error in failing to remove the provision of autism mentoring support from Section H of the Working Document. The Tribunal determined at paragraphs 24-26 of the Decision, under the heading: "Autism mentor/personal assistant/specialist worker- special educational provision or health/social care provision" that "the provision should be specified in Section F of her EHC plan".
>
> 9. There are no findings in the Decision dated 23 February 2022 to suggest that A required 10 hours' support per day and there is no evidence to support this level of provision.
>
> 10. As a result, the Tribunal should remove the duplicative entry from Section H.
>
> **Extended provision**

11. The wording ordered by the Tribunal in Section F is as follows:

> "A will have up to 5 hours per day with a specialist worker from an organisation such as I-support and/or autism mentors and/or a personal assistant/companion to *assist A in accessing her education* and travelling independently, helping her with her organisational and planning skills, including *management of her educational commitments and homework* and helping A to put into practice strategies she learns as part of her SALT and OT, as well as other independence and communication skills (emphasis added)".

12. The source of this wording was the Report from I-Support, dated 11 October 2021 (see para 26 of the Decision and Hearing Bundle page 454). The predominant focus of the wording is on A's education and needs resulting from education, namely: organisation and planning, management of educational commitments, and homework.

13. Only provision which is reasonably required to meet a child or young person's educational needs can be permissibly named within Section F. Whether a need is educational or non-educational is a question for the Tribunal (*London Borough of Bromley v SENDT* [1999] ELR 260); the Tribunal determined in the Decision that the autism mentor provision was special educational provision (para 26).

14. The Tribunal should apply the case law applicable to "waking day curriculum" to the issue of provision during the holiday. Whilst extended provision may offer benefits or advantages, it does not follow that it is provision which is reasonably required to meet special educational needs.

15. See *Hampshire CC v JP* [2010] ELR 213 at paragraph 27:

> "Equally on the other hand, it would be inappropriate to reason from the fact that the care needed by N outside normal school hours would reinforce what had been learned during the school day that N needed a "waking day curriculum" [read: provision during the holidays for these purposes] with the overtones of education that the word "curriculum" carries. Where children do not have

> special needs, they are not regarded as always being at school rather than on holiday merely because much play and engagement in leisure activities outside school hours may have an educational value and support what is taught at school."

16. Further, consistency, i.e. to be dealt with out of school hours/terms in the same way as within school hours, is not necessarily an educational need (see *LB Hammersmith and Fulham v JH* [2012] UKUT 328 (AAC) at paragraphs 18-19). The recommendation of Mazza Welby-Delimere on 9 June 2021 (Hearing Bundle pages 401-402) that mentoring be continued "during the holiday periods, so that A can be supported in maintaining a structure to her day and to continue putting the strategies into practise" goes no further than a suggestion that A would benefit from consistency.

17. There is no evidence that A reasonably requires extended educational provision i.e. in the school holidays. Thus, anything beyond that proposed by the Respondent would not be special educational provision but social care and ought not to be included in Section F.

18. The Respondent's position is that the 5 hours' mentoring support ought to be provided between Monday-Friday during the 38 weeks of term time, as it is special educational provision, not social care provision, with additional limited hours for the carrying over of therapy programmes that take place during the holidays. This level of provision would be in line with the other provision in Section F, for example, the wording for psychotherapeutic counselling is as follows:

> "A will have one *60-minute session per week* of psychotherapeutic counselling, *throughout the 30 weeks of the academic year*. She will receive *one 60-minute session of counselling for every three weeks of the school holiday*. She will receive one 60-minute session in the week before her return to her education setting (emphasis added)".

…

20. The Respondent asserts that at the conclusion of its Review, the Tribunal ought to:

a. Remove the duplicative mentoring provision under Section H;

> b. Find that the mentoring provision under Section F should be:
>
> i. Monday-Friday, during 38 weeks' of term time;
>
> ii. With additional limited hours during the holidays (as with the psychotherapeutic counselling and/or OT support)".

18. In response to the Council's submission, A's solicitors filed a further written submission on 1 September 2022 which stated that

> "2. The Local Authority also appear to be attempting to significantly reduce A's mentoring support when there is no evidence at all to justify a reduction. Further, they did not raise this issue at the Hearing or in the Appeal. The Local Authority accept that A was entitled to 5 hours per day support under social care but now, despite the Tribunal's Decision, are interpreting that Decision as meaning that only some of that support is educational and therefore the Section F provision should be limited. Specifically, the Local Authority at para 17 of their latest submission claim that any mentoring outside their narrow interpretation of the Section F provision (which the Appellants do not consider to be a proper interpretation of the Tribunal's judgement) is social care. But, at the same time, the Local Authority want to remove all entitlement to mentoring from the social care section, including any weekend and holiday cover, and including a number of references to matters which are clearly independence skills (and which the Appellants seek to have transferred, for clarity, to Section F). The Local Authority's position is entirely illogical as, if their argument was followed to its logical conclusion, it would mean that the EHCP should specify 5 hours weekdays during term time (with the limited holiday cover as well) and the social care section should stipulate mentoring support on weekends and holidays. Instead, they are arguing that, despite A having always required and received weekend and holiday support, it is deleted from all sections of her EHCP. This would leave her with no weekend or holiday support under either social care or Section F, save for the limited in scope 5 hours per week during the holidays.
>
> …

4. What the Local Authority state in their submission regarding the very limited scope of what falls within special educational needs is simply incorrect. Paragraph 26 of the Tribunal's Decision made clear that the Section F provision was much more wide ranging than simply access to education and homework and that A's special educational needs encompassed all aspects of her life, many of which skills are set out as educational outcomes for her. If she is required to meet an educational outcome but not provided with the necessary support to do so, she is being set up to fail. Further, it cannot be right that, given A's age (21) the necessary independence and life skills she requires to function as an adult are not educational. The Tribunal specifically accepted that the required mentoring in Section F covered "all aspects of her life" and the Section F wording specifically mentions wider independence skills including requiring the implementation of recommended Functional Behavioural Skills and PEER to PEER programmes by ISupport/the mentor. It is simply not correct that the Tribunal interpreted A's wider needs as non-educational. It is also simply not right for the Local Authority to argue that A does not reasonably require assistance during the weekends and holidays when all reports stress the need for this help. The Tribunal's Decision clearly held that A's wider needs, including independence and functional behaviour skills, were educational and therefore all mentoring should be within Section F. Given A's profile and level of required support, it is also incorrect that her mentoring support should be removed during weekends and holidays. As highlighted below, reports from A's therapeutic team (ISupport and others) are clear that A's needs are such that weekend and holiday support is not only reasonably required but critical.

5. Furthermore, the Local Authority's reference to case law is not relevant to the circumstances of this case. In particular, the analogy made by the Local Authority to the case of *Hampshire CC v JP* [2010] ELR 213, whereby a young person without special needs, who engages in play outside school which may have educational benefits. is simply not relevant here given A's well documented level of educational need on a year round basis. It is required on a year round basis to enable A to receive the level of support she clearly requires and this has never been disputed before by the Local Authority. Therefore, the Local Authority's references to case law are unhelpful. This is not a ''waking day'' case and all that matters is exactly what A

> needs. Those needs are well documented and are such that she needs year round support, which has never before been disputed by the Local Authority,
>
> …
>
> 7. Page H27 of the I Support October 2021 report contains a specific paragraph on A's needs during non-school days (for example the report acknowledges that "On non-school days, there always needs to be a plan or structure and someone available to assist A throughout the day) and elsewhere in the report (see pages H65 and H66, for example) are comprehensive sections on the education and training she needs with independent living skills and the need for structure and support in a very wide range of areas and notably on the importance of A being engaged in meaningful activities with support". The report is clear that the mentor needs to educate and train A in a wide range of independent living skills and functional behavioural skills, self-care, and social communication amongst other matters. The report expressly states on numerous occasions the need for a mentor to educate/train A in learning these skills so that she can progress to independence. The Tribunal accepted that education/training with those independent living and functional behavioural skills constituted special educational provision. It is simply untrue for the Local Authority to represent that I Support sees the provision as purely dealing with access to education and homework etc. In fact, the report confirms the opposite and ISupport's position has always been that not only does she require that assistance year round, but the scope of mentoring duties should fall within special educational provision, given A's profile and level of need. If A's mentoring is reduced as the Local Authority now seek to interpret, her needs will clearly not be met. A's needs are such that it is critical that she receives year round mentoring support as otherwise she will simply not have the necessary time or support to learn the critical life skills that she requires".

The Review Hearing

19. The matter came back before the Tribunal for the review hearing on 3 September 2022.There was no oral hearing and the matter was considered on the papers in the light of additional evidence and the parties' written submissions.

20. The panel noted that it had received a number of documents in advance of the review hearing:

> "4. The Tribunal panel received the following documents in advance of the review hearing on 3 September:
>
> (a) Review submissions from Westminster City Council dated 22 August 2022;
>
> (b) Written submissions from [A's parents] dated 22 August 2022;
>
> (c) Letter dated 9 March 2022 to [her parents] from Mr Markwell;
>
> (d) A's updated Education, Health and Care (EHC) plan dated 9 March 2022;
>
> (e) Email correspondence between [her mother] and Ms Hayley Short, senior EHC/AR coordinator, dated 29 July 2022;
>
> (f) The Tribunal panel's decision dated 23 February 2022;
>
> (g) Letter to the Tribunal from HCB Solicitors, on behalf of [A's parents], dated 1 September 2022; and
>
> (h) A letter from Mr David Corcoran of I Support Behaviour Ltd, dated 31 August 2022."

21. Mr Wolfe KC drew particular attention to Mrs Welby-Delimere's original report of 9 June 2021 which stated that

> "A struggles with holiday periods, without the structure of a school day she is unable to follow a routine, organise herself, or to get going on things, as result her mood dips and she hits what she describes as a "slump". Her sleep pattern deteriorates, she becomes withdrawn, retreats into binge watching TV series and loses her motivation to engage with anything. She also struggles with the transition to holidays and then back to term time, needing time to adjust.
>
> Over the past year, A has become increasingly keen to work towards independence, ultimately wanting to move

out of home. She feels that at 20, she still lacks many of the life skills that she needs and is keen to gain these, she understandably does not want to be so dependent on her parents. She is increasingly open to ideas/strategies to support her in moving forward, however finds these hard to implement. She is also increasingly keen to make friends and to broaden her life experience, she is extremely aware of how far behind she is both socially and academically. She has a very good therapeutic team around her, all of whom are supporting her with understanding herself and working on strategies with her, however, A's ASD means that she finds it hard to generalise strategies outside of the therapy room, as well as to remember what she is meant to be doing and to implement it, largely due to her poor executive functioning and her difficulties with planning and organising her thoughts and actions, as well as staying focused. This applies not only to her life skills in the home and the outside world, but also to her academic studies. She will need support on a daily basis to manage her independent work outside of lessons, to learn how to prioritise and organise, as well as to stay focused.

A requires a mentor who can support her on a daily basis in putting strategies into place in the "real" world, to enable her to generalise them in different situations, as well as regular repetition in order for them to become automated. A is also vulnerable due to her lack of experience of the "real" world, relationships etc, she will benefit from building a relationship with a mentor who can safely guide her. This support will be required both within and without the home, so that she can acquire the life skills that she requires, in order to become more independent and to reach her potential. This will need to be continued during the holiday periods, so that A can be supported in maintaining a structure to her day and to continue putting the strategies into practise".

22. He also relied on the email from Mr Corcoran dated 31 August 2022 which said

"Often people that are autistic/have significant executive functioning difficulties are 'blind' to time and are unable to use time to plan and to function. Difficulties with executive functioning leads to a specific cognitive profile and will lead to significant challenges with managing day-to-day life, daily living skills, and learning. The

impact of this is an increased likelihood that a person will be anxious and avoidant of tasks and engaging in aspects of life that require the ability to utilise executive functioning skills. A, as has been mentioned, has significant executive functioning difficulties, has extreme avoidance, and both generalised and social anxiety.

Day-to-day skills and Activities of Daily living would normally be taught as part of the school curriculum. A requires her programme to be funded fully on a full-time basis, and not just in term time. It is essential that all aspects of functional living skills are covered as part of A's ongoing education. To remove this support outside of term times would be to remove the very foundations that are required for A to learn, to develop, and to function on a day-to-day basis. The programme offered by I Support Behaviour and the Autism Mentors enables A to continue to work on these areas of cognitive deficit throughout the year, to bridge the gap between her current performance in these areas and her peers of a similar age group.

To remove the package of care and support outside of term time will mean that A will not maintain skills that have been learnt to date. Her performance will deteriorate, and time will need to be spent covering areas of functioning that have been taught previously. It is well established that Autistic individuals learn differently from their typically developing peers, require significantly more repetitions of learning, will require opportunities to generalise learning, and will require a consistent programme of maintenance to minimise any degradation in skills acquisition. The generalisation of key concepts in typically developing/neurotypical individuals is a key part of overall cognitive performance. Learning for the neurotypical brain includes the ability to generalise from concepts, class, feature, function and to apply this learning to functionally similar or related activities. It is essential that generalisation is programmed for in autistic learners, and those opportunities for maintenance are provided. To offer this package of support to A on a term time basis, at a point where she is significantly behind her age-related peers, would mean that A would not be afforded the opportunities to learn and develop key skills".

The Post-Review Decision

23. The Tribunal issued its decision on 20 September 2022 (I shall refer to this decision as either "the Post-Review Decision" or "the September decision"). It identified the issues which it should decide:

> **"Issues**
> 5. The Tribunal panel agreed that it had the following issues to consider at the review hearing and, if necessary, to review its decision of 23 February 2022:
>
> (a) Removal of duplication of mentoring provision in section H.
>
> (b) Whether A reasonably requires mentoring support as special educational provision which extends beyond the school days (term time, Monday to Friday) and if so, to what extent; and
>
> (c) What social care recommendations can the Tribunal panel reasonably make, based on the evidence?
>
> …
>
> 8. The Tribunal panel wishes to be as clear as it can be. The Tribunal panel considers that A reasonably requires five hours of mentoring support per day, in order to support her education and learning. Accordingly, the mentoring support should amount to five hours per day, and it should be set out as special educational provision in order to meet A's special educational needs. We have taken into account the updated letter from Mr Corcoran who reaffirms that A has deficits in relation to her executive functioning skills, which lead to significant challenges in managing day to day life, daily living skills and learning. We have no doubt that A requires mentoring support for five hours each day and the provision should be specified in section F. Accordingly, we have amended section H, to remove duplication.
>
> 9. [Her parents], on A's behalf, submit that she reasonably requires mentoring support for five hours per day, 365 days per year. The LA do not accept that sufficient evidence has been provided to support a finding that A reasonably requires special educational provision beyond the school terms. The Tribunal panel has considered the evidence from I Support, as well as the report from Ms Welby-Delimere, which, in our view, is sufficient to support the position that A reasonably

> requires mentoring support for five hours per day, including outside of term time. We noted Ms Welby-Delimere's professional view that without the support on a daily basis, A's learning and progress will regress, leading to an exacerbation of her anxiety. We have concluded that the support in required on a daily basis in order to meet A's anxiety disorder and promote consistent development of her executive functioning skills, which will also meet her needs relating to extreme avoidance. We have concluded that it is more likely than not that A's needs will not be met unless she receives mentoring support for five hours per day, outside of the school term and on the weekends. We had regard to the outcomes in section E and concluded they are unlikely to be achieved without consistent mentoring support outside of the school weeks. Accordingly, we have amended the mentoring provision to specify this."

24. The Tribunal ordered that the Council should amend Section F of the EHCP for A by replacing the existing wording with the wording set out in the attached working document (version 9). The amended wording read (with emphasis added)

> "A will have up to 5 hours per day, *7 days per week, 52 weeks per year,* with a specialist worker from an organisation such as I-support and/or autism mentors and/or a personal assistant/companion to assist A in accessing her education and travelling independently, helping her with her organisational and planning skills including management of her educational commitments and homework and helping A put into practise strategies she learns as part of her SALT and OT, as well as other independence and communication skills".

25. It also recommended that the Council should amend Section H2 of the EHCP for A by replacing the existing wording with the wording set out in the attached working document (version 9). The duplicated wording referred to in paragraph 11 above was therefore omitted from Section H2.

Further Application For Permission To Appeal

26. On 15 October 2022 the Council sought permission to appeal against that decision. The application was based on 2 grounds:

Ground 1: The Tribunal erred in its conclusion that the mentoring support during term time constituted special educational provision. Alternatively, to the extent that the Tribunal was entitled to conclude that some of the mentoring support during term time was special educational provision, it erred by failing to address the extent to which it was special educational provision as opposed to social care provision.

Ground 2: The Tribunal erred by concluding that mentoring support was required as special educational provision, at all or alternatively to the extent ordered, during non-term time periods.

Application Not Admitted

27. A's solicitors wrote a long letter to the Tribunal, opposing the grant of permission to appeal, on 21 October 2022, but in any event the application was not admitted by Judge Tudur on 14 December 2022.

28. In her decision she explained that

> "1. On the 18 October 2022, the Tribunal received an application for permission to appeal the decision of the Tribunal issued following a review hearing held on the 3 September 2022.
>
> 2. Section 9 of the Tribunals Courts and Enforcement Act 2007 provides that:
>
>> "The First-tier Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 11(1) (but see subsection (9))".
>
> 3. Section 11 (1) of the Tribunals Courts and Enforcement Act 2007 provides:
>
>> "(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision".

> And an excluded decision is defined by the same section to include:
>
> > "d) a decision of the First-tier Tribunal under section 9—
> >
> > (i) to review, or not to review, an earlier decision of the tribunal,
> >
> > (ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal,
> >
> > (iii) to set aside an earlier decision of the tribunal, or
> >
> > (iv) to refer, or not to refer, a matter to the Upper Tribunal;
> >
> > (e) a decision of the First-tier Tribunal that is set aside under section 9 (including a decision set aside after proceedings on an appeal under this section have been begun)".
>
> 4. The challenged decision issued on the 20 September 2022 is a decision following a review and set aside of part of the decision of the Tribunal issued on the 23 February 2022. It is therefore an excluded decision in respect of which there is no right of review or appeal under sections 9 and 11 of the Tribunals Courts and Enforcement Act 2007.
>
> 5. The application for permission to appeal is not admitted."

Judicial Review

29. In the light of that decision, on 14 December 2022 the Council sought permission to bring judicial review proceedings from the Upper Tribunal. On 12 January 2023 I made directions for the oral hearing of the application, which was to be a rolled-up oral hearing of the application for permission to bring judicial review proceedings, with the judicial review to follow if permission were granted, so as to obviate the need for a second hearing.

30. I heard the rolled-up hearing on the morning of 19 June 2023 and reserved my decision. The parties were both represented by counsel, the Council by Mr Alexander Line and A by Mr David Wolfe KC. I am indebted to both of them for their concise and well-argued submissions.

The Grounds Of Appeal

31. The Council originally had 4 grounds of appeal:

(1) Ground 1: the Tribunal erred in its conclusion that the mentoring support during term time constituted special educational provision. Alternatively, to the extent that the Tribunal was entitled to conclude that some of the mentoring support during term time was special educational provision, it erred by failing to address the extent to which it was special educational provision as opposed to social care provision.

(2) Ground 2: the Tribunal erred by concluding that mentoring support was required as special educational provision, at all or alternatively to the extent ordered, during non-term time periods.

(3) Ground 3: the Tribunal acted in a procedurally improper way and/or acted in a way which was ultra vires, by re-determining part of its decision only.

(4) Ground 4: in relation to the Review Decision, Judge Tudur acted in a procedurally improper way and/or in a way which was ultra vires, by setting aside only part of the Decision.

Grounds 3 and 4

32. However, in advance of the hearing I drew counsel's attention to the decision of the Court of Appeal in ***Point West GR Ltd v Bassi & Ors*** (to which reference is made in the commentary in vol. III of the Social Security Legislation 2022/23 (Administration, Adjudication and the European Dimension) at 3.46 (page 1101), which deals with the 2007 Act) and in particular the judgment of Lewison LJ at [25] and [35].

33. Lewison LJ said that

> 25. It is common ground, rightly in my judgment, that the statutory power to review is a power to review a decision "on a *matter* in a case." That is distinguished from the whole of the decision. If, following the review, the FTT decides to set aside the decision it must either re-decide "the matter" or refer "that matter" to the UT. It follows that the mere fact that the FTT's power to review has arisen does not without more entitle the FTT to start all over again. The power to review is a discretionary power. That power is vested in the FTT. It follows that it is for the FTT itself to determine the scope of any review that it is willing to undertake. It is not for the parties to define that scope. The FTT must not allow a decision to review to degenerate into a free-for-all.
>
> …
>
> 35. Where the FTT undertakes a review of one of its own decisions, it must make it clear which parts (if any) of that decision it is prepared to review and, following the carrying out of the review, which parts (if any) of that decision it intends to set aside. Otherwise one is left in the thoroughly unsatisfactory situation that has arisen in this case, where the parties are at odds about what exactly the FTT intended to do."

34. Mr Line rightly accepted that that decision was binding upon him and he did not pursue grounds 3 and 4, so that only grounds 1 and 2 remained live for decision.

35. There had hitherto been a conflict of authority in the Upper Tribunal as to whether there was power under s.9(4)(c) of the 2007 Act to set aside and/or review only part of a decision, although both predated the decision of the Court of Appeal in ***Point West***. In ***Harrow Council v AM*** [2013] UKUT 157 (AAC) it was held at [18] by Upper Tribunal Judge Mark that

> "there is no power under section 9(4)(c) to set aside only part of a decision, and the matter which is to be referred to the Upper Tribunal is the whole of the matter which

> was the subject of the decision set aside, not a mere part of it…”.

36. By contrast, however, in ***Essex CC v TB*** [2014] UKUT 559 (AAC) it was said at [43] by Upper Tribunal Judge Rowland that

> “there seems no reason why a discrete part of a decision should not be set aside under section 9(4)(c)…”

37. The question is now definitively resolved by the decision of the Court of Appeal in ***Point West*** and to the extent that ***Essex CC v TB*** holds to the contrary it should not be followed.

The Council’s Submissions

Ground 1

38. Mr Line emphasised in particular what was said in paragraph 26 of the February decision to the effect that (with emphasis added)

> “26. [Her parents] made the point that the autism mentor provision may provide *some respite to the family*, but this was an indirect result and not the main aim of the provision ... The fourth area is the most significant, in our view – *access to education*, peers and a meaningful life in and beyond education. As a Tribunal panel, *we found it impossible to account for how many of the five hours per day will be educational*”

and in paragraphs 8 and 9 of the September decision

> “8. … A reasonably requires five hours of mentoring support per day, *in order to support her education and learning*. Accordingly, the mentoring support should amount to five hours per day, and it should be set out as special educational provision in order to meet A’s special educational needs …
>
> 9. … the support is required on a daily basis in order to *meet A’s anxiety disorder and promote consistent development of her executive functioning skills*, which will also meet her needs relating to extreme avoidance. We have concluded that it is more likely than not that A’s

> needs will not be met unless she receives mentoring support for five hours per day, outside of the school term and on the weekends. We had regard to the outcomes in section E and concluded they are unlikely to be achieved without consistent mentoring support outside of the school weeks. Accordingly, we have amended the mentoring provision to specify this."

39. He submitted that it was clear from the emphasised wording that the mentoring support was, at least in part, designed to facilitate access to education, as opposed to providing education per se.

40. It was also clear from the emphasised wording in the February decision that at least some of the time provided by the mentor constituted respite, which was not special educational provision.

41. For provision to be specified in Section F of an EHCP, it must either be direct special educational provision under s.21(1) or, applying s.21(5), deemed special educational provision: ***East Sussex County Council v TW*** [2016] UKUT 528 (AAC) at [21-23]. The first failure of the Tribunal was that it did not make clear whether the mentoring provision, insofar as it was to be included in Section F, was direct or deemed special educational provision

42. Prior to the post-Review Decision, the five hours per day mentoring support had been included in Section H2 of the EHCP as social care provision. The effect of the Tribunal's post-Review Decision, read in light of the Decision, was to move that provision out of Section H2 and place it into Section F. On that basis, it might reasonably be expected that the Tribunal's intention was to apply s.21(5) and treat it as deemed special educational provision, although that was not stated in clear terms in the Decision or the post-Review Decision, which made no reference to either s.21(1) or s.21(5).

43. As per the Upper Tribunal's guidance in ***TW*** at [24], it was the task of the Tribunal to "… identify which parts of social care provision educate or train. Any parts which had that effect must be moved to Section F". The Tribunal acknowledged at [26] of the Decision that it was not able to say which aspects

of the mentoring educated or trained. However, in error, as confirmed by the post-Review Decision, the Tribunal then went on to include all aspects of the mentoring provision in Section F. There was, necessarily, no finding which supported that approach because the Tribunal acknowledged in the Decision that it could not identify the extent to which the mentoring support educated or trained, and in the post-Review Decision it gave no insight into why all of the five hours was devoted to education and training.

44. Inferentially, it followed that if the Tribunal could not do that then at least part of the mentoring provision was not educational. It was, thus, an error for the Tribunal to find that all of it should be included within Section F as opposed to Section H2. That criticism applied regardless of whether the provision was specified in Section F pursuant to s.21(1) or s.21(5), but the Council submitted that, properly construed, this was a s.21(5) case. Furthermore, to fail to specify the division between special educational provision and social care provision in an EHCP ran against the grain of the general principles in law as to specificity, as summarised in ***Worcestershire County Council v SE*** at [74].

45. Further or alternatively, facilitating access to education was not, without more and in the absence of specific and adequately reasoned findings to that effect, provision which was capable of being included in Section F. In error, the Tribunal included the mentoring provision, or at least a part of it, in Section F of the EHCP on the basis that it assisted with facilitating access to education. That was made clear from the wording at page 17 of the final working document accompanying the post-Review Decision:

> "A will have up to 5 hours per day, 7 days per week, 52 weeks per year, with a specialist worker from an organisation such as I-support and/or autism mentors and/or a personal assistant/companion *to assist A in accessing her education and travelling independently, helping with her organisational and planning skills including management of her educational commitments and homework* and helping A put into practise strategies she learns as part of her SALT and OT, as well as other

> independence and communication skills" (emphasis added).

46. The emphasised wording reflected what was stated in the emphasised wording from the Decision and post-Review Decision cited above, demonstrating that facilitating access to education was an important factor in the Tribunal's reasoning for placing the mentoring provision in Section F. The Council contended that, insofar as a mentor assisted with accessing education (whether that be physically accessing a site, or assisting with organisation and planning related to accessing education), that was not special educational provision in either a direct or a deemed sense.

47. Whilst the circumstances were different, the Council relied on the following analogous situations considered in other cases:

(a) in ***East Sussex County Council v KS*** [2017] UKUT 275 (AAC) at [89] the Upper Tribunal held that, even if medical and nursing support was essential for a child to be educated, that did not make it special educational provision

(b) in ***East Sussex County Council v JC*** [2018] UKUT 81 (AAC) at [29] the Upper Tribunal recognised that the provision of a powered wheelchair could only be special educational provision to the extent that its use educated or trained.

48. Only to the extent that mentoring educated or trained was it permissible to be included in Section F. Whilst some special educational provision might have a 'dual use', in the Council's submission the Tribunal was not entitled simply to conclude that all of the mentoring should be treated as special educational provision, when it was clear from both its own reasoning and the final working document that some (and in the Council's submission, a material and/or substantial part) was not directed to education and learning in the sense required by either s.21(1) or (5).

49. Furthermore, as to the quotation from the final working document cited above, the inclusion by the Tribunal of the references to the mentor assisting with SLT and OT programmes was in error because, during term time, there would be no programmes for the mentor to implement. It was clear from the wording at pages 18-19 of the final working document, relating to Outcome 1 (communication and interaction), that weekly direct SLT of one hour per week was to be provided during term time, but there was no reference to the creation of programmes or to indirect therapy during term time. The only reference to indirect SLT and the provision of a programme to be implemented arose in holiday periods. Similarly, in relation to Outcome 4 (sensory and physical), at pages 22-23 of the working document, there was a reference to weekly direct OT of one hour per week during term time, but there was no reference to indirect therapy or the provision of programmes except in relation to holiday periods.

50. Therefore, insofar as the Tribunal's intention was for such programmes to be implemented by the mentor, that only (or materially and/or substantially only) arose in non-term time periods, and could not justify the inclusion of 5 hours per day, 365 days per year, mentoring time as special educational provision. (Whilst paragraphs 27 and 28 of the Decision were noted, they did not read consistently with what the Tribunal directed through the final working document. It was not accepted that by merely attending the direct sessions, the mentor could then be appropriately placed to provide indirect therapy.)

51. Whilst page 17 of the final working document accompanying the post-Review Decision also referred to a limited number of specific programmes which would be followed, the Tribunal's conclusion that all of the mentor's time would be devoted to applying these programmes in an educational sense, thus constituting special educational provision, was unsustainable in view of the arguments set out above.

52. In summary, therefore, the Tribunal's decision to order, during term time, mentoring support of five hours per day, seven days per week, every day of

the year, was in error because: (a) it was inconsistent with its own findings on the evidence before it; (b) it failed properly to engage with, and address, how much of it was special educational provision, as opposed to social care provision, even if it was satisfied that some of it was special educational provision; (c) it wrongly treated provision which facilitated access to education, or at least did so to an extent (and arguably to a material and/or substantial extent), as being entirely special educational provision; and/or (d) it wrongly attributed functions of the mentor in relation to SLT and OT as arising in term time and contributing to the delivery of special educational provision.

Ground 2

53. As above, the Tribunal confirmed through the post-Review Decision that it ordered, as special educational provision (whether applying s.21(1) or (5)), mentoring support for five hours per day, seven days per week, on every day of the calendar year. That would require, for example, mentoring as special education provision even on Christmas Day, if taken in extremis.

54. For such a finding to be permissible, the Tribunal needed to be satisfied that there was an educational need for programmes to be delivered beyond the ordinary school day and term structure. Whilst the Upper Tribunal had warned against attributing significance to terms such as 'waking day' and 'extended curriculum' (***London Borough of Southwark v WE*** [2021] UKUT 241 (AAC)), that was an extraordinary example of such provision.

55. The need for consistency, or reinforcement of learning, was not sufficient to establish that an educational need existed for the delivery of education beyond the ordinary school day and term structure: ***Hampshire CC v JP*** [2009] UKUT 239 (AAC) at [27], ***London Borough of Hammersmith and Fulham v JH*** [2012] UKUT 328 (AAC) at [18-19].

56. As the emphasised wording quoted above showed, a key reason provided by the Tribunal for its approach to mentoring supporting in non-term time related to anxiety and the need for consistency in relation to executive

functioning skills. That approach did not justify the mentoring being treated as special educational provision. Anxiety was generally considered to be a health need and consistency might well be beneficial, but it could not create a need for an extended curriculum

57. Moreover, having regard to the involvement of the mentor in the SLT and OT programmes over the holiday periods, whilst that might provide some justification for mentoring to an extent during holiday periods, it was not open to the Tribunal rationally to conclude that that (or, indeed, anything else) justified the full extent of the provision ordered in Section F over holiday periods. The Tribunal failed to make any finding as to how much of the mentoring was educational and how much non-educational.

58. In light of the evidence and findings made, in error the Tribunal failed to properly engage with, or address, how much of the mentoring during non-term time constituted special educational provision, even if it was satisfied that some of it was.

A's Submissions

Overall Approach

Summary

59. Ground 1 challenged the legality of the Tribunal's second decision that the mentoring input (which it concluded that A required) was Special Educational Provision rather than merely being social care provision (as the Council asserted it to be).

60. Ground 2 challenged the legality of the Tribunal's second decision that A required that special educational provision beyond term time.

61. To be clear: the complaint related to the Tribunal's second consideration of the extent and classification of the mentoring provision, not to the conclusion that A properly required it, which was undisputed (see the February decision at [24]). Indeed, in its 22 August 2022 submission, the

Council accepted at [18] that – at the very least – 5 hours per day mentoring during term time (with additional support out of term) was properly Section F provision. Its argument before the Upper Tribunal expanded even on the arguments it made before, and quite impermissibly.

Overall Approach (1)

62. Anyway, it was well established per ***RB v FTT*** [2010] UKUT 160 (AAC) at [30] (with a panel which included Lord Carnwath SPT) that:

> "The substantial element of judgment or discretion is no doubt a reason for review decisions not being appealable and it is also a reason for expecting that *the Upper Tribunal will seldom interfere with review decisions* when judicial review proceedings are brought" [emphasis added].

63. The position must be all the more so where, as here, the judicial review was to a decision taken following a review in circumstances in which the possibility for an appeal was specifically precluded by the statutory scheme.

64. Even in an appeal the Upper Tribunal must take particular care in relation to issues of judgment by the expert Tribunal. That was all the more so here (in a judicial review of a review decision) where what was in issue was entirely a matter of the Tribunal's expertise having considered the evidence at a full merits hearing and then in a reconsideration. It would take the clearest of legal error to justify Upper Tribunal interference with all that at the present stage. That was simply not the case here, for the following reasons.

Overall Approach (2)

65. A further important starting point here was that the Tribunal decision under challenge was the decision relating to mentoring of September 2022 at [8-9] which set out the Tribunal's conclusions and reasoning on the point following the fresh consideration following the setting aside and remitting back from the 22 May decision of the matter of mentoring.

66. While that decision document said that it “should be read in conjunction with” the February decision, that could not be taken (as the Council would seemingly have it, see below) as meaning that the paragraphs relating to mentoring in the May decision were part of the operative decision of the September decision or somehow displaced what the Tribunal said in September on the point.

67. Indeed, precisely not because those earlier paragraphs were, in substance, the very thing which Judge Tudur had set aside, so they could not have that effect.

Ground 1 – mentoring as special educational provision

68. The September decision at [8] said that:

> “The Tribunal panel wishes to be as clear as it can be. The Tribunal panel considers that A reasonably requires five hours of mentoring support per day, *in order to support her education and learning*. Accordingly, the mentoring support should amount to five hours per day, and it should be set out as special educational provision in order to meet A’s special educational needs. We have taken into account the updated letter from Mr Corcoran who reaffirms that A has deficits in relation to her executive functioning skills, which lead to significant challenges in managing day to day life, daily living skills and learning. *We have no doubt that A requires mentoring support for five days each day and the provision should be specified in section F.* Accordingly, we have amended section H, to remove duplication” [emphasis added].

69. Important to understanding why on any view that was an entirely lawful conclusion, and to understanding why the Council’s critique was so misplaced was (1) an understanding of the law and (2) the appreciation that the evaluation of the evidence and factual position against that law was a matter of judgment and evaluation for the expert Tribunal to which (particularly given that this was a judicial review, not appeal of a second consideration of the matter by the Tribunal) the Upper Tribunal should give the greatest deference.

70. As to (1), special educational provision could either arise as educational provision (s.21(1)) and/or what some have called "deemed special educational provision", namely something which would be health care provision or social care provision but which, because it "educates or trains" took effect by operation of s.21(5) instead as special educational provision.

71. Critically missing from the Council's analysis was that – as a matter of law - something could be educational provision (for s.21(1) purposes), even if it did not educate or train (in the s.21(5) sense). They were separate concepts. Upper Tribunal Judge Jacobs explained the position in ***EAM v East Sussex CC*** [2022] UKUT 193 (AAC):

> "8. Section 21(1) defines 'educational provision'. Section 21(5) refers to 'health care provision … which educates or trains a child'. …
>
> 9. A provision may be educational without itself educating a child. The word means 'of, pertaining to, or concerned with education' to quote the Oxford Shorter English Dictionary (fifth edition). The difference is easy to demonstrate. Suppose a teacher is giving a lesson to a class. One pupil in the class has impaired hearing and wears a hearing aid. The school has installed a loop system and the teacher uses a microphone. With the hearing aid on the T setting, the pupil can hear the lesson. The microphone and the loop system are both educational provision. But they do not themselves educate the pupil. The hearing aid may be both an educational provision and a health care provision, but again it does not educate the pupil. The teacher and the contents of the lesson educate the pupil.
>
> 10. … the correct term for the tribunal to use was 'educational provision'. It is only relevant to decide whether a provision 'educates a child' if it is also health or social care provision."

72. The primary question here was whether for A the mentoring was "educational provision" (per s.21(1)).

73. It was well established that the question of whether any particular provision was “educational provision” was not a question of law; rather, it was a matter for the local authority and, on appeal, the Tribunal. The Tribunal could lawfully give “educational” a broad meaning for that purpose: ***LB Bromley v SENT*** [1999] ELR 260.

74. This Tribunal was thus fully entitled to conclude that the mentoring which it had concluded that A needed to support her education and learning was indeed educational provision (and thus special educational provision) for her (whatever the position for any other person might be). Its conclusion and reasoning were unimpeachable.

75. The Council’s points on that issue were made in a confused order. The response dealt with them in a more logical order.

76. The Council contended that the mentoring input was not s.21(1) special educational provision because (so it contended) the provision was merely “designed to facilitate access to education, as opposed to providing education per se”.

77. The Tribunal referred to the provision in question as “supporting her education and learning” not “facilitating access to [it]”. But, in any event, as explained by Judge Jacobs, provision could be educational without “providing education per se”. Something which supported (or even facilitated) education (in the manner of the hearing aid loop etc. in his example) could lawfully be educational provision. The Tribunal was entitled to decide that it was here, for A. No more was needed for a lawful decision that this for A was special educational provision.

78. The Council nonetheless also complained that the Tribunal did not make clear whether the provision in question was “direct or deemed” special educational provision (i.e. whether it fell within s. 21(1) or 21(5) of the 2014 Act). The Council then argued that the mentoring could only be included in

Section F to the extent that (per s.21(5)) it "educated or trained" A. It also complained that, in its 23 February 2022 decision the Tribunal said it was unable to decide which aspects of the monitoring "educated or trained". It suggested that it followed from the Tribunal not reaching a view on which aspects educated or trained then "*at least* part of the mentoring provision was not educational" [italics in the original].

79. However, as above, there was no need for the Tribunal to consider whether the provision educated or trained (since that would only arise under s. 21(5)). Of course, there was no problem with it doing so in addition to its s. 21(1) consideration (not least because the provision in question had been presented to it by the Council as social care provision), but, given its decision that the provision was educational provision (per s.21(1)) the question of whether it might *also* have been deemed special educational provision by operation of s.21(5)) did not necessarily arise and added nothing. Notably in that context, the Tribunal's mention of the "educates or trains" question arose only in the passage in its February decision which Judge Tudur set aside, and even then, only arose at all from the way in which the Council itself had put its case to the Tribunal. As the Tribunal put it at [24]:

> "*The LA's position on this was that not all of the daily support* from the autism mentor/personal assistant/specialist worker *trains or educates* A and so it is not appropriate for it to be classified, in its entirety, as special educational provision" [emphasis added].

80. As stated above, the Tribunal did not need to consider that "educates or trains" question, but it could not be criticised for looking at the point given the Council's case before it and, as stated above, the answer was not key to its decision overall.

81. What actually mattered though was that, in the operative September decision, the Tribunal concluded that the entirety of the provision was special educational provision.

82. Any permitted criticism of the February passage would thus take things no further. In any event, it would be misplaced since the Tribunal was perfectly entitled to conclude that, however precisely the 5 hours broke down (given the variety of benefits which it was bringing for A), it was nonetheless all properly classified as special educational provision. There was no basis for the Upper Tribunal to declare that unlawful (as it would need to on a judicial review).

83. The Council made two further (and essentially discrete) points. First it argued that "at least some of the time provided by the mentor constituted respite, which is not special educational provision". However, that was a reference to material in the February decision which had been set aside, and so criticism of it was not relevant. But, in any event, the Council misrepresented even what the Tribunal had said at that point. It had merely accepted that the mentoring "may provide some respite to the family, but this was an indirect result and not the main aim of the provision" at [26]. That was an unimpeachable conclusion which – even had it still been operative – would not in any sense undermine the FTT's conclusion that the provision in question was special educational. Most special educational provision - and indeed any special educational provision provided at a school - would have the indirect result of providing respite to the family. That did not make it not special educational provision. The Council's point was an obviously bad one.

84. Secondly, the Council also argued that the Tribunal's mention of the mentor assisting with access to (out of term) SLT and OT programmes undermined its conclusions on the need for mentoring input during term time. The point was a bad one. The passage about which it complained was referring to the whole annual process, including therefore the out of term period to which the SLT/OT element would be directly pertinent.

85. Overall, the Council's conclusion that, for A, the mentoring support was special educational provision to be included in Section F of her EHCP was entirely lawful.

Ground 2 – mentoring every day

86. The Council asserted that a key reason for the Tribunal's conclusion that A required mentoring beyond term time was for "consistency in relation to non-executive functioning skills" in circumstances in which, so it argued "consistency … is not sufficient to establish that an educational need exists … beyond the ordinary school day".

87. The Council argued that: "The need for consistency, or reinforcement of learning [i.e. a consistent delivery of provision], is not sufficient to establish that an educational need exists for the delivery of education beyond the ordinary school day and term structure." But that was not the law: the legal point was that a need for consistency of approach beyond the school day did not mean that that was *necessarily* an educational need: ***R(TS) v Bowen & Solihull*** [2009] EWHC 5 at [39]. That did not mean that, in a particular case, a Tribunal could not lawfully decide that a need for a consistency of provision was special educational provision in the circumstances of this young person.

88. But even that was not pertinent here because this Tribunal was not referring to consistency of provision. It was concerned with provision which would promote A's consistent development. The Council had confused two entirely different things. What the Tribunal said was this:

> "[Her parents], on A's behalf, submit that she reasonably requires mentoring support for five hours per day, 365 days per year. The LA do not accept that sufficient evidence has been provided to support a finding that A reasonably requires special educational provision beyond the school terms. The Tribunal panel has considered the evidence from I Support, as well as the report from Ms Welby Delimere, which, in our view, is sufficient to support the position that A reasonably requires mentoring support for five hours per day, including outside of term time. We noted Ms Welby Delimere's professional view that without the support on a daily basis, A's learning and progress will regress, leading to an exacerbation of her anxiety. *We have concluded that the support in required on a daily basis in*

> *order to meet A's anxiety disorder and promote consistent development of her executive functioning skills*, which will also meet her needs relating to extreme avoidance. We have concluded that it is more likely than not that A's needs will not be met unless she receives mentoring support for five hours per day, outside of the school term and on the weekends. We had regard to the outcomes in section E and concluded they are unlikely to be achieved without consistent mentoring support outside of the school weeks. Accordingly, we have amended the mentoring provision to specify this" [emphasis added].

89. The Council had simply misread the Tribunal decision.

90. But, as stated above, even if the Tribunal had concluded that "consistent support" was the issue and that consistent support was all that was needed, then that would still have been entirely lawful conclusion for it to reach on the evidence and facts of this case. The law simply was that a need for consistent support alone was not necessarily enough to make it special educational provision , but that did not preclude it being enough in any particular case.

91. Overall, the Tribunal's conclusion that A required 5 hours of mentoring support per day throughout the year was entirely lawful.

The Council's Reply

Grounds 1 and 2

92. It was correct that the claim lay against the post-Review Decision, but the Council submitted that that necessarily had to be read in the context of the Decision for the reasons stated previously. Regarding the reference to paragraph 18 of the Council's submissions dated 22 August 2022, that must be read in the context of paragraph 1(a) of Judge Tudur's order in the Review Decision. It could be seen from paragraph 24 of the Decision that the Council's position was that it disputed that "not all of the daily support from the autism mentor/personal assistant/specialist worker trains or educates A and so it is not appropriate for it to be classified, in its entirety, as special educational provision". It was denied that the claim went beyond the position

previously taken by the Council. Alternatively, the Tribunal still made the errors as argued.

93. ***RB v FTT*** [2010] UKUT 160 (AAC) concerned an appeal against a review decision. However, this was a claim against the post-Review Decision, not the Review Decision itself. There was a difference between the discretion to conduct a review and a reconsidered decision which was taken as a result of a review. Ordinary judicial review principles should be applied in the latter situation; no stricter test was required.

94. It was not disputed that the Upper Tribunal should have regard to the expertise of the First-tier Tribunal. There were various authorities to which both parties could undoubtedly direct the Upper Tribunal regarding the approach taken to appeals against first-instance decisions in the SEND context. Whilst this case was not an appeal, but rather a judicial review, the Council acknowledged that some cross-reading of those principles was warranted, but ultimately the Upper Tribunal was applying judicial review principles and was not concerned with an appeal.

95. The point made by A in paragraphs 65 to 67 above was difficult to follow in light of what the Tribunal actually said in the post-Review Decision. The Tribunal plainly still had in mind the Decision when it made the post-Review Decision and expressly incorporated its previous reasoning. The post-Review Decision could not be read in any other way.

96. With specific reference to Ground 1

(a) as was evident, in paragraph 8 of the post-Review Decision (in which the Tribunal said that 5 hours per week should be specified in Section F), the Tribunal did not say whether it was applying s.21(1) or s.21(5). Nor did it clarify that expressly in any other place in the Decision or post-Review Decision.

(b) there appeared to be no dispute between the parties that special educational provision could be recorded in Section F of an EHCP on the basis of either s.21(1) or s.21(5). However, on one reading it was suggested at paragraph 79 above that A took the view that provision was capable of being special educational provision under s.21(1) and s.21(5) simultaneously. If that were the intention of the submission, the Council disagreed.

(c) what A failed to address was that the Tribunal did not say whether it was applying s.21(1) or s.21(5). As the Council had previously pointed out, it was much more likely that the Tribunal was applying s.21(5). Thus, even if it were correct that provision could be special educational provision under s.21(1) despite it not educating or training, that was not the case for deemed special educational provision under s.21(5).[1] Furthermore, at paragraph 26 of the Decision the Tribunal used the terminology "educate and train" (and also previously at [16(b)] and [24]), suggesting that s.21(5) was being applied. That provided an additional indication that the point made by A was of limited, if any, relevance: this was a s.21(5) not a s.21(1) case.

(d) A appeared to acknowledge that the material question for the Tribunal was under s.21(5) and not s.21(1), but confusingly that was not consistent with what was then said where the contrary position was adopted.

(e) it was irrational simply to treat all of the mentoring provision as special educational provision under s.21(5) when the Tribunal had acknowledged in the Decision that it was not able to say how much of it educated or trained; and the post-review Decision did not give any further insight into why all of it fell within s.21(5).

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[1] The statutory wording of which expressly required social care or health care provision to educate or train for it to be treated as special educational provision. As noted in ***EAM v East Sussex County Council*** [2022] UKUT 193 (AAC) at [10], if s.21(5) were being applied then the Tribunal must decide if the health or social care provision educated and trained. And see too ***East Sussex County Council v TW*** [2016] UKUT528 (AAC) at [22-25]

(f) the Council's argument was that facilitating access to education was not a sustainable basis for the Tribunal's conclusion that the mentoring support was special educational provision. A hearing loop (to use A's example) potentially encountered the same difficulty that a powered wheelchair or nursing support did. Here, the mentoring was social care provision (it was recorded as such in Section H of the EHCP); therefore the question was whether it was social care provision which educated or trained. If it did not, or not all of it did so, then it was inappropriate to specify it in Section F applying s.21(5).

(g) A wrongly proceed on the assumption that the Tribunal found that the provision was s.21(1) special educational provision. But, for reasons already set out, the Council did not accept that that was a reasonable interpretation of what the Tribunal found, or that that was sufficiently clear from the post-Review Decision read alone or properly in the context of the Decision. A essentially argued that the references to education and training in the Decision (incorporated into the post-Review Decision) were otiose. The Council disagreed. A also overlooked the fact that the mentoring provision was included in Section H of the EHCP, giving a strong *prima facie* indication that it was social care provision, to which the Tribunal then applied s.21(5).

(h) the post-Review decision, like the Decision, did not refer to either s.21(1) or s.21(5), which meant it was necessary to look back to the Decision to give context.

97. With specific reference to Ground 2

(a) the Council relied on the same failure by the Tribunal advanced in Ground 1, save that Ground 2 was focussed on the issue of non-term time provision. It was also argued that a need for consistency was insufficient to justify special educational provision (on whichever basis) for 365 days per year.

(b) a need for consistency was generally not to be equated with a need for special educational provision: ***Learning Trust v MP*** [2007] EWHC 1634 at

[41]. The cases showed that cases where consistency alone justified programmes of learning beyond the ordinary school day would be extremely rare, if ever arising. Very cogent reasons would certainly be expected of a tribunal if that were the sole basis for specifying such provision.

(c) consistency across settings and consistency of development were not necessarily materially distinct. That still went to the point raised by the Upper Tribunal in ***Hampshire County Council v JP*** [2009] UKUT 239 (AAC) at [27] "… it would be inappropriate to reason from the fact that the care needed by N outside of normal school hours would reinforce what had been learned during the day that N needed a waking day curriculum". The Council's point was that consistency in relation to the delivery of special educational provision was not in the circumstances a sound basis for a 'waking day curriculum'. That was what the Tribunal was referring to – at [9] of the post-Review Decision it referred to "the support in [sic] required on a daily basis to promote… consistent development of her executive functioning skills". The Council had not confused what the Tribunal had said, as was alleged.

Analysis

Ground 1

98. Ground 1 relied on two limbs: first, that the Tribunal erred in its conclusion that the mentoring support during term time constituted special educational provision at all; secondly, to the extent that the Tribunal was entitled to conclude that some of the mentoring support during term time was special educational provision, it erred by failing to address the extent to which it was special educational provision as opposed to social care provision.

99. The Council also made three discrete points as part of that submission:

(a) the mentoring support was, at least in part, designed to facilitate access to education, as opposed to providing education per se (paragraph 39 above)

(b) at least some of the mentoring support constituted respite, which was not special educational provision (paragraph 40 above)

(c) insofar as the Tribunal's intention was for the SLT/OT programmes to be implemented by the mentor, that only arose in non-term time periods and could not justify the inclusion of 5 hours per day, 365 days per year, mentoring time as special educational provision (paragraph 49 above). It seems to me that that question arises more naturally in respect of Ground 2 in relation to mentoring out of term and I shall deal with it under that heading.

100. So far as the first limb of Ground 1 is concerned, as to whether mentoring support during term time constituted special educational provision at all, it is important to note that that was not the Council's position at the original hearing in February. Its position then was that "not all of the daily support from the autism mentor/personal assistant/specialist worker trained or educated A and so it is not appropriate for it to be classified in its entirety as special educational provision", but it was not being said that mentoring support during term time did not constitute special educational provision at all.

101. Nor was the point now asserted made when the Council sought permission to appeal against the February decision. As is apparent from paragraph 12 above, it only sought permission to appeal in respect of the duplication of the mentoring provision in both Sections F and H. The Council's application did not seek the removal of monitoring from Section F altogether nor did it seek to have it divided between Sections F and H.

102. Nor was the point now in issue raised at the September hearing arising out of the review ordered by Judge Tudur (and even as subsequently expanded by Judge Brownlee). As is apparent from paragraph 5 of that decision, the relevant issues which that Tribunal had to consider were (a) the removal of the duplication of mentoring provision in Section H and (b) whether A reasonably required mentoring support as special educational provision

which extended beyond the school day (term time Monday to Friday) and, if so, to what extent. As the Council itself submitted on 22 August 2022

> "18. The Respondent's position is that the 5 hours' mentoring support ought to be provided between Monday-Friday during the 38 weeks of term time, as it is special educational provision, not social care provision, with additional limited hours for the carrying over of therapy programmes that take place during the holidays".

103. The argument that mentoring support, even during term time, could not constitute special educational provision at all was first raised when the Council sought judicial review in December.

104. Although it is possible for a new point of law to be taken on an appeal (or judicial review), there are well-settled principles on which the appellate Court or Tribunal acts. They have been set out in, for example, ***Singh v Dass*** [2019] EWCA Civ 360. One of those principles is that permission to take a new point will not generally be granted where the new point would have affected the course of the evidence in the lower court or tribunal.

105. If the argument now made had been raised earlier, it seems to me that in all likelihood it would have potentially affected the course of the evidence in the Tribunal below, in particular from Mrs Welby-Delimere and Mr Corcoran of I-Support. It is inherently unlikely that the case would have been conducted along exactly the same lines in either February or September had the Council's position, as now sought to be adopted, been manifest at an earlier stage in the proceedings. It is not like the position where an argument is raised for the first time about the construction of a statutory provision which had not hitherto been argued (for example, whether a signature on an email constitutes signed writing for the purposes of the formalities required by s.53(1)(a) and (c) of the Law of Property Act 1925). It is now far too late to raise it for the first time. I do not therefore give permission to rely on that first limb of Ground 1.

106. It seems to me that that also applies to the first 2 of the Council's discrete points set out in paragraph 99 above. For the same reason, I do not give permission to rely on those arguments either.

107. Nevertheless, in deference to the arguments addressed to me, I shall consider them as a matter of substance, even though I have not given permission in respect of them.

108. As to the first of the two discrete points made by the Council, that mentoring support was, at least in part, designed to facilitate access to education, as opposed to providing education pe se, I agree with and accept Mr Wolfe KC's submission. The Tribunal referred to the provision in question as "supporting her education and learning" rather than as "facilitating access to [it]", but in any event, as explained by Judge Jacobs in ***EAM*** (see paragraph 71 above), provision can be "educational" without "providing education per se". Something which supports (or even facilitates) education can lawfully be educational provision. The Tribunal was entitled to decide that it was here in the case of A. No more was needed for a lawful decision that this, for A, was special educational provision.

109. As to the second point, that at least some of the mentoring support constituted respite, which was not special educational support, again I accept Mr Wolfe KC's submission. The reference to respite came in the February decision, but the review was - and could only be - against the September decision, so that criticism of what was said in the February decision could not have been relevant. In any event, even then all that the Tribunal had said at [26] was merely to accept that the mentoring "may provide some respite to the family, but this was an indirect result and not the main aim of the provision". That was a conclusion which, even had it still been operative, would not undermine the Tribunal's conclusion that the provision in question was special educational provision. As Mr Wolfe KC said, most special educational provision (and indeed any special educational provision provided at a school)

would have the indirect result of providing respite to the family, but that does not preclude it from being special educational provision.

110. I have considered whether I should say something about the question of whether s.21(1) and s.21(5) are mutually exclusive (as Mr Line contends) or whether they are not mutually exclusive and are capable of overlapping (as Mr Wolfe KC contends). That point was not in terms before Judge Jacobs in ***East Sussex CC v TW*** and ***EAM v East Sussex CC*** and was left open by Judge Levenson in ***East Sussex CC v JC*** (which postdated the former case, but not the latter). However, in the light of the fact that I have refused permission in respect of Ground 1, and that anything which I said on the subject would necessarily be obiter, on reflection I have concluded that that argument should be addressed on another occasion when it is live for decision.

111. The second limb of Ground 1 was that, to the extent that the Tribunal was entitled to conclude that some of the mentoring support during term time was special educational provision, it erred by failing to address the extent to which it was special educational provision as opposed to social care provision.

112. That arose out of the Tribunal saying in its original February decision that

> "24 … Mr Corcoran's email dated 21 May 2021 was helpful in understanding the programme, as well as his view that the provision covers all aspects of A's life, noting, in particular, her mental health and wellbeing, community participation and development of social skills – all three of those areas are listed as educational outcomes for A. The fourth area is the most significant, in our view – access to education, peers and a meaningful life in and beyond education. This most accurately encapsulates the point – that the autism mentor provision (which I Support is currently providing) covers all aspects of her life, not least her access to education. As a Tribunal panel, we found it impossible to account for how many of the five hours per day will be educational …"

113. By contrast, in its September decision the Tribunal found that

> "8. The Tribunal panel wishes to be as clear as it can be. The Tribunal panel considers that A reasonably requires five hours of mentoring support per day, in order to support her education and learning. Accordingly, the mentoring support should amount to five hours per day, and it should be set out as special educational provision in order to meet A's special educational needs. We have taken into account the updated letter from Mr Corcoran who reaffirms that A has deficits in relation to her executive functioning skills, which lead to significant challenges in managing day to day life, daily living skills and learning. We have no doubt that A requires mentoring support for five hours each day and the provision should be specified in section F. Accordingly, we have amended section H, to remove duplication."

114. S.9(11) of the 2007 Act makes it clear that, in the case of a review, the original decision and the decision on review are separate decisions. The only decision under the application for judicial review to the Upper Tribunal is the September review decision. The subsection provides that

> "Where under this section a decision is set aside and the matter concerned is then re-decided, the decision set aside and the decision made in re-deciding the matter are for the purposes of subsection (10) to be taken to be different decisions."

(As explained above, that power includes a power to review or set aside part of a decision as well as a whole decision.)

115. Whatever may have been the position under the February decision, in the September decision the Tribunal had no doubt about the extent of the mentoring support needed as educational provision since it said in terms

> "8. The Tribunal panel wishes to be as clear as it can be. The Tribunal panel considers that A reasonably requires five hours of mentoring support per day, in order to support her education and learning. Accordingly, the mentoring support should amount to five hours per day, and it should be set out as special educational provision in order to meet A's special educational needs."

116. On this occasion there was none of the previous hesitation about the extent to which mentoring provided educational provision or social care provision. Nor was this a mere reheating or regurgitation of the Tribunal's hesitation in February since it now had the benefit of updated evidence from Mr Corcoran on which it could rely for its conclusion:

> "We have taken into account the updated letter from Mr Corcoran who reaffirms that A has deficits in relation to her executive functioning skills, which lead to significant challenges in managing day to day life, daily living skills and learning. We have no doubt that A requires mentoring support for five hours each day and the provision should be specified in section F."

117. In other words, whatever its hesitations in February, when it came to reviewing the matter in September, and on the basis of updated evidence, the Tribunal was satisfied that the 5 hours of mentoring support each day constituted special educational provision. It was clearly resiling from its earlier hesitation since it specifically said at the outset of paragraph 8 of its decision "The Tribunal panel wishes to be as clear as it can be", in contradistinction to its position in February. I can see no error of law in that conclusion.

118. Mr Line argued that paragraph 1 of the September decision stated that "this review decision should be read in conjunction with the decision issued as the end of the appeal hearing (dated 23 February 2022)". That is correct, but it is not correct to assert, as he went on to do, that the Tribunal "expressly incorporated its previous reasoning". On the contrary, it found on the basis of Mr Corcoran's updated evidence that A reasonably required five hours of mentoring support per day in order to support her education and learning, in contradistinction to its conclusion in February that it "found it impossible to account for how many of the five hours per day will be educational".

119. Moreover, the extent to which mentoring support within term time was special educational provision, as opposed to social care provision, was not in issue before the Tribunal in September. As set out in paragraph 102 above, the relevant issues which that Tribunal had to consider were (a) the removal

of the duplication of mentoring provision in Section H and (b) whether A reasonably required mentoring support as special educational provision which extended beyond the school day (term time Monday to Friday) and, if so, to what extent. It was only the mentoring support outside term time and the extent to which *that* support was special educational provision which was in issue. The Tribunal can hardly be criticised for not explaining with perhaps fuller reasons than it did why the whole of the 5 hours within term time constituted special educational provision rather than social care provision when that had not been put in issue before it.

120. The correct time at which to challenge what the Tribunal had said about the respective extent of the two types of provision was in the aftermath of the promulgation of the February decision. That would have been the correct time to challenge that aspect of what the Tribunal had said in paragraph 24 of its decision, but the only challenge then mounted by the Council was as to the duplication of the provision in both Sections F and H2.

121. After the Council's argument about the extent of the provision had been rejected in February, the argument about the extent to which mentoring support, even during term time, did or did not constitute special educational provision was only raised again when the Council sought judicial review in December. The reasons which I have set out in paragraphs 104 and 105 above for not permitting a new point to be raised now apply with equal force to the second limb of Ground 1 and for the same reasons I do not give permission to appeal in respect of it.

122. Seeking to raise a point at the fourth time of asking is not acceptable. I therefore refuse permission to appeal in respect of the first ground of review.

Ground 2

123. In Ground 2 the Council submitted that the Tribunal erred by concluding that mentoring support was required as special educational provision, at all or

alternatively to the extent ordered, during non-term time periods. That ground arose out of the September decision to the effect that

> "9. [Her parents], on A's behalf, submit that she reasonably requires mentoring support for five hours per day, 365 days per year. The LA do not accept that sufficient evidence has been provided to support a finding that A reasonably requires special educational provision beyond the school terms. The Tribunal panel has considered the evidence from I Support, as well as the report from Ms Welby-Delimere, which, in our view, is sufficient to support the position that A reasonably requires mentoring support for five hours per day, including outside of term time. We noted Ms Welby-Delimere's professional view that without the support on a daily basis, A's learning and progress will regress, leading to an exacerbation of her anxiety. We have concluded that the support in required on a daily basis in order to meet A's anxiety disorder and promote consistent development of her executive functioning skills, which will also meet her needs relating to extreme avoidance. We have concluded that it is more likely than not that A's needs will not be met unless she receives mentoring support for five hours per day, outside of the school term and on the weekends. We had regard to the outcomes in section E and concluded they are unlikely to be achieved without consistent mentoring support outside of the school weeks. Accordingly, we have amended the mentoring provision to specify this."

124. It therefore has none of the problems about raising a new point for the first time so late on in the judicial process associated with the various elements of Ground 1. I am satisfied that the point raised is an arguable one and I grant permission in respect of it.

125. Mr Wolfe KC sought to impugn that second ground of review on the basis that it did not arise out of the review ordered by Judge Tudur. However, Judge Tudur and Judge Brownlee had commensurate jurisdiction as Judges of the First-tier Tribunal and as a matter of jurisdiction it was open to Judge Brownlee to expand the scope of the review, so that it is open to the Council to raise the second ground in support of its application.

126. For the purposes of this decision, I shall proceed on the assumption that it was appropriate to expand the ambit of the review. I do, however, draw attention for future occasions to the remarks of the Court of Appeal in ***Point West*** about the importance of finality in litigation (which I set out at the end of this decision).

127. I am, nevertheless, satisfied that Mr Wolfe KC is right in his submissions and that the substantive review on this ground should be dismissed.

128. Although Mr Line submitted forcefully that the need for consistency, or reinforcement of learning (in other words, a consistent delivery of provision), was not sufficient to establish that an educational need existed for the delivery of education beyond the ordinary school day and term structure, what emerges from the decisions in ***Hammersmith & Fulham LBC v JH*** at [18-19] and ***R(TS) v Bowen & Ors*** at [39] is that a need for consistency of approach beyond the school day does not mean that that is *necessarily* an educational need. That does not mean that, in a particular case, a Tribunal cannot lawfully decide that a need for a consistency of provision is special educational provision in the circumstances of the particular young person. The question in each case, to paraphrase Upper Tribunal Judge Lane in ***Hammersmith & Fulham LBC v JH*** at [19], is that in each case the Tribunal must decide whether it is necessary for the child or young person to have an extended extracurricular educational programme continuing after the end of the school day or the school term. As she said in that case

> "18. A waking day curriculum may be called for where a pupil's SEN mean that he is unable to generalise skills from the classroom to other environments, unlike other pupils without SEN. If the pupil needs to have therapies and activities outside of school hours which enable him to develop the skills of daily living (*LB Bromley v SENDIST* [1999] ELR 260 CA) and to 'translate into his home and social and indeed all areas of his life and functioning, the skill which he learns within the school and school room', a waking day curriculum may be justified (*S v Solihull MBC* [2007] EWHC 1139 at [19] and [17]). In this context 'need' is what is reasonably

> required (*R(A) v Hertfordshire County Council* [2006] EWHC 3428 (Admin), [2007] ELR 95 at [25] *per* His Honour Judge Gilbert QC, sitting as a deputy judge of the High Court).
>
> 19. The Tribunal must, therefore, decide whether it is necessary for child to have an extended extracurricular educational programme continuing after the end of the school day. The fact that the child needs consistency of approach in his dealings with adults outside of school, as well as inside school, does not necessarily mean that this is an educational need which should be met with educational provision beyond the school day in a residential setting (*The Learning Trust v SENDIST and MP* [2007] EWHC 1634 (Admin), [2007] ELR 658; *R (o/a T.S. v Bowen (Chair of SENDIST)* [2009] EWHC 5 (Admin) at [27] [39])."

129. Moreover, I accept that the Tribunal was not referring to consistency of provision, but was concerned rather with provision which would promote A's consistent development. In addition, the Tribunal concluded that the mentoring support was required on a daily basis, not only meet A's anxiety disorder (which is a health need), but also to promote consistent development of her executive functioning skills.

130. What it said was that:

> "[Her parents], on A's behalf, submit that she reasonably requires mentoring support for five hours per day, 365 days per year. The LA do not accept that sufficient evidence has been provided to support a finding that A reasonably requires special educational provision beyond the school terms. The Tribunal panel has considered the evidence from I Support, as well as the report from Ms Welby Delimere, which, in our view, is sufficient to support the position that A reasonably requires mentoring support for five hours per day, including outside of term time. We noted Ms Welby Delimere's professional view that without the support on a daily basis, A's learning and progress will regress, leading to an exacerbation of her anxiety. *We have concluded that the support is required* on a daily basis in order to meet A's anxiety disorder *and promote consistent development of her executive functioning skills*, which will also meet her needs relating to extreme

> avoidance. We have concluded that it is more likely than not that A's needs will not be met unless she receives mentoring support for five hours per day, outside of the school term and on the weekends. We had regard to the outcomes in section E and concluded they are unlikely to be achieved without consistent mentoring support outside of the school weeks. Accordingly, we have amended the mentoring provision to specify this" [emphasis added].

131. Although I accept Mr Line's point that consistency alone would only justify programmes of learning beyond the ordinary school day in extremely rare cases, I am satisfied that the Tribunal's conclusion was an entirely lawful one for it to reach on the evidence and facts of this case. The law is that a need for consistent support alone is not necessarily enough to make it special educational provision, but that does not preclude it from being enough in any particular case.

132. As to Mr Line's argument that consistency across settings and consistency of development are not materially distinct concepts, so that reference to the latter fell into the territory of what the Upper Tribunal was discussing in ***Hampshire CC v JP*** at [27], I repeat what I said in paragraph 128 above. A need for consistency of approach beyond the school day does not mean that that is *necessarily* an educational need, but that does not mean that, in a particular case, a Tribunal cannot lawfully decide that a need for a consistency of provision is special educational provision in the circumstances of the particular young person. The question in each case, to paraphrase Upper Tribunal Judge Lane in ***Hammersmith & Fulham LBC v JH*** at [19], is that in each case the Tribunal must decide whether it is necessary for the child or young person to have an extended extracurricular educational programme continuing after the end of the school day or the school term. That is what the Tribunal did in this case - and as Sedley LJ said in ***Bromley LBC v SENT*** [1999] ELR 260 at 295:

> "Special educational provision is, in principle, whatever is called for by a child's learning difficulty. A learning difficulty is anything inherent in the child which makes learning significantly harder for him than for most others

> or which hinders him from making use of ordinary school facilities ... It is when it comes to the statement under s.324 that the LEA is required to distinguish between educational provision and non-educational provision; and the prescribed form is divided up accordingly. Two possibilities arise here: either the two categories share a common frontier, so that where the one stops the other begins; or there is between the unequivocally educational and the unequivocally non-educational a shared territory of provision which can be intelligibly allocated to either. It seems to me that to adopt the first approach would be to read into the legislation a sharp dichotomy for which Parliament could have made express provision had it wished to do so, but which finds no expression or reflection where one would expect to find it, namely in s.312. Moreover, to impose a hard edge or common frontier does not get rid of definitional problems: it simply makes them more acute. And this is one of the reasons why, in my judgment, the second approach is then to be attributed to Parliament. The potentially large intermediate area of provision which is capable of ranking as educational or non-educational is not made the subject of any statutory prescription precisely because it is for the local education authority, and, if necessary, the SENT, to exercise a case by case judgment which no prescriptive legislation could ever hope to anticipate."

133. Mr Line submitted in paragraph 27 of his skeleton argument that the Tribunal's approach to non-term time provision was undermined for the same reasons as set out in Ground 1, in that the Tribunal fundamentally failed to address properly the extent of which the mentoring was educational as opposed to social care provision. However, what the Tribunal decided in its September decision after the review hearing was that

> "The Tribunal panel has considered the evidence from I Support, as well as the report from Ms Welby-Delimere, which, in our view, is sufficient to support the position that A reasonably requires mentoring support for five hours per day, including outside of term time. We noted Ms Welby-Delimere's professional view that without the support on a daily basis, A's learning and progress will regress, leading to an exacerbation of her anxiety. We have concluded that the support in required on a daily basis in order to meet A's anxiety disorder and promote consistent development of her executive functioning

> skills, which will also meet her needs relating to extreme avoidance. We have concluded that it is more likely than not that A's needs will not be met unless she receives mentoring support for five hours per day, outside of the school term and on the weekends. We had regard to the outcomes in section E and concluded they are unlikely to be achieved without consistent mentoring support outside of the school weeks. Accordingly, we have amended the mentoring provision to specify this."

134. It did not fail to address the extent to which the mentoring was educational as opposed to social care provision; it decided that it was all educational provision.

135. That leaves the discrete point made in relation to Ground 1, but which falls more naturally to be considered here. That was that, insofar as the Tribunal's intention was for the SLT/OT programmes to be implemented by the mentor, that only arose in non-term time periods and could not justify the inclusion of 5 hours per day, 365 days per year, mentoring time as special educational provision. However, it is quite clear that the Tribunal's conclusion as manifested in the working document was not solely dependent on the provision of SLT and OT programmes since the document in its final form stated (with emphasis added) that

> "A will have up to 5 hours per day, 7 days per week, 52 weeks per year, with a specialist worker from an organisation such as I-support and/or autism mentors and/or a personal assistant/companion *to assist A in accessing her education and travelling independently, helping her with her organisational and planning skills including management of her educational commitments and homework and* helping A put into practise strategies she learns as part of her SALT and OT, *as well as other independence and communication skills*".

136. Moreover, that passage refers to the whole annual process, including the out of term period to which the SLT/OT element would be directly pertinent.

137. As I mentioned in paragraph 118 above, paragraph 1 of the September decision stated that "this review decision should be read in conjunction with

the decision issued as the end of the appeal hearing (dated 23 February 2022)". What should therefore be read in conjunction with the September decision is what the Tribunal said in paragraph 17 of its February decision. Mr Line said that that was merely a recitation of the evidence, but it seems to me that the Tribunal was implicitly accepting that evidence (and certainly did not seek to criticise it). That evidence supports the need for daily educational provision, whether inside or outside term time.

> "17. We heard oral evidence from [A's parents]. In this academic year, A has continued to receive extensive scaffolding support from both of her parents who have been working from home, along with her weekly sessions with Ms Welby-Delimere. A had a breakdown in March 2021 and A and her parents worked very hard to get her to a point where she could reengage with education. She has managed that and is making good progress at Lionheart. There have been many years of ups and downs with A's education, but [her parents] felt that she is now at a point where she is comfortable with the educational environment and her tutors. *A requires structure and when she isn't attending Lionheart, she finds it very difficult to cope and requires round the clock support.* She cannot attend an environment that she has not visited or with which she does not feel comfortable. If anything goes wrong, the day will be completely derailed. [Her mother] cited an example from that week – A's art tutor had to change the day for their tutorial and it meant A was not able to attend Lionheart the day before the hearing or on the day of the hearing*. [Her parents] see A's education structure as a pillar which supports everything else with her skills development."*

138. Although I grant permission in respect of Ground 2, I therefore dismiss the substantive application for judicial review on that ground.

The Exercise Of The Power To Review

139. The decision in ***Point West*** is well-known in the social entitlement jurisdiction, hence its appearance in vol.3 of the Social Security Legislation. It does not, however, appear to have had wide currency in the special educational needs context, perhaps because it was a decision on appeal from the Upper Tribunal (Lands Chamber) in the context of a service charge

dispute rather than the Health, Education and Social Care Chamber. It is therefore opportune to set out what it says about the proper scope of the power to review a decision (or part of a decision) and the need for finality in litigation.

140. As to the first point, Lewison LJ said towards the end of his judgment:

> “46. The exercise of the power to review a decision of the FTT was considered in *R (RB) v First-tier Tribunal (Review)* [2010] UKUT 160 (AAC) by a strong panel of the UT (Administrative Appeals Chamber) presided over by the then Senior President of Tribunals, Carnwath LJ. They held:
>
> i) that the power of review on a point of law is intended, among other things, to provide an alternative remedy to an appeal. In a case where the appeal would be bound to succeed, a review will enable appropriate corrective action to be taken without delay;
>
> ii) It was not intended that the power of review should enable the FTT to usurp the UT's function of determining appeals on contentious points of law. Nor was intended to enable a later FTT judge or panel, or the original FTT judge or panel on a later occasion, to take a different view of the law from that previously reached, when both views are tenable. Both these considerations demonstrated that if a power of review is to be exercised to set aside the original decision because of perceived error of law, this should only be done in clear cases;
>
> iii) There were occasions when it would be desirable for a case to be reconsidered by the FTT so that further findings might be made even if it was likely to go to the UT eventually.
>
> iv) The key question was what, in all the circumstances of the case including the degree of delay that may arise from alternative courses of action, would best advance the overriding objective of dealing with the case fairly and justly.
>
> 47. Thus the primary purpose of the power to review is to avoid an unnecessary appeal to the UT, where the FTT has made an obvious error of law. In this context an "error of law" would undoubtedly include a case in which

the FTT had reached a factual conclusion which had no evidence to support it; or which was contrary to the only reasonable conclusion on the evidence. In this context a point of law is widely defined. In *Railtrack plc v Guinness Ltd* [2003] EWCA Civ 188, [2003] 1 EGLR 124 at [51] Carnwath LJ said:

> "This case is no more than an illustration of the point that issues of "law" in this context are not narrowly understood. The Court can correct "all kinds of error of law, including errors which might otherwise be the subject of judicial review proceedings ... Thus, for example, a material breach of the rules of natural justice will be treated as an error of law. Furthermore, judicial review (and therefore an appeal on law) may in appropriate cases be available where the decision is reached "upon an incorrect basis of fact", due to misunderstanding or ignorance … A failure of reasoning may not in itself establish an error of law, but it may "indicate that the tribunal had never properly considered the matter…and that the proper thought processes have not been gone through."

48. But as the UT held in *Vital Nut Co Ltd v HMRC* [2017] UKUT 192 (TCC), a review is not an occasion on which the FTT can reconsider the whole case. They said:

> "(7) Of course, the fact that the 2007 Act and FTT Rules say nothing about the substance of a review of a decision once the "gateway" requirements are met does not mean that the FTT can – through the review – re-write its original decision in an unfettered way. In *JS v Secretary of State for Work and Pensions* [2013] UKUT 100 (AAC), the Upper Tribunal made this clear. The Upper Tribunal conducted a thorough review of the relevant authorities, which we adopt and do not repeat.
>
> (8) We consider the position, as regards the FTT, to be as follows: (a) The purpose of the review is clarificatory. The process is intended to give the FTT a second chance to provide adequate reasons for its decision without the inconvenience that might be involved were the Upper Tribunal to allow a reasons challenge and then have to remit the case … (b) The FTT should avoid the temptation to advance arguments in defence of its decision and

> > against the grounds of appeal. The FTT should not engage or appear to engage in advocacy rather than adjudication ...
> >
> > (9) In short, whilst it is perfectly permissible for the FTT to use the review process to clarify what has *already* been decided, the FTT should refrain from seeking to justify its decision on other, even better, grounds or from seeking to defend its decision in advance from an attack that is anticipated in an appeal." (Original emphasis)
>
> 49. I agree, subject to one qualification. If, having considered the grounds of appeal the FTT is satisfied that that one or more of the grounds are likely to succeed, it may set aside its decision (or part of its decision) and re-decide the matter. That may require the FTT to promulgate a decision based on different grounds in relation to that part of the decision that it has set aside.
>
> 50. Mr Dovar relied on the power given to the FTT by section 9 (8) of the 2007 Act to make further findings of fact. But in my judgment that does not give the FTT *carte blanche* to re-open all its factual findings …".

141. As to the second point, he said

> "53. As far as the ground on which the FTT eventually absolved the liability of the leaseholders to pay anything is concerned, I do not consider that the FTT ought to have allowed the leaseholders to take an entirely new point on a review. In so doing, the FTT (and for that matter the UT) lost sight of the important principle of finality in dispute resolution. That principle was endorsed in ringing tones by Lord Wilberforce in *The Ampthill Peerage case* [1977] AC 547, 569:
>
> > "English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. The principle which we find in the Act of 1858 is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law

> aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

54. The importance of finality, even in tribunal proceedings, was emphasised by Elias LJ in *Ministry of Justice v Burton* [2016] EWCA Civ 714, [2016] ICR 1128 which concerned the power of an employment tribunal to review its own decision where it was necessary in the interests of justice. He said at [21]:

> "An employment tribunal has a power to review a decision "where it is necessary in the interests of justice": see rule 70 of the Employment Tribunals Rules of Procedure 2013. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, … the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. *In particular, the courts have emphasised the importance of finality* … which militates against the discretion being exercised too readily; and in *Lindsay v Ironsides Ray & Vials* [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a

> review. In my judgment, these principles are particularly relevant here." (Emphasis added)

55. At [25] he added that:

> "… to allow a case to be reopened in order for further argument or cross-examination would undermine the important principle of finality. Moreover, if a party wished to adduce more evidence, as again seems likely if the review application had been granted, that would conflict with the principle that it will only be in the interests of justice to allow fresh evidence to be introduced on review if the well known principles in *Ladd v Marshall* [1954] 1 WLR 1489 have been satisfied. The first of these is that the evidence could not have been obtained for the original hearing. Plainly that would not be the case here."

56. The new point that the FTT entertained was not consequential on a review of that part of the decision that the FTT had decided to review. It was, as both sides acknowledged, a new and free-standing point. Nor was it a ground of appeal against the original decision. It was not, therefore, a case like that postulated in *Scriven* where setting aside a mistaken legal conclusion necessarily opened up a line of factual enquiry which the tribunal had erroneously not undertaken. Nor was it a case of obvious error, as the decision of the UT on the same point plainly shows. Dealing with cases "fairly and justly" (which is part of the overriding objective in rule 3 (1) of the tribunal rules) includes respecting the principle of finality: see *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24 at [239]. Far from clarifying what it had already decided (as *Vital Nut* expressed it), the FTT in effect reopened the question of liability, and re-decided the case on what appeared to it to be "even better" grounds. In my judgment it should not have done so …

57. In addition, although it is possible for a new point of law to be taken on an appeal there are well-settled principles on which the court acts. They have been set out recently in *Singh v Dass* [2019] EWCA Civ 360. One of those principles is that permission to take a new point will not generally be granted where the new point would have affected the course of the evidence in the lower court."

142. Finally, he explained that

> "60. Section 9 (11) of the 2007 Act makes it clear that, in the case of a review, the original decision and the decision on review are separate decisions. The only decision under appeal to the UT was the review decision."

Conclusion

143. I refuse permission to appeal in respect of the first ground of review.

144. I am satisfied that the second ground of the Council's remaining ground of review was reasonably arguable and accordingly I grant permission in relation to that ground.

145. I am, however, also satisfied that when read as a whole the decision of the Tribunal below does not betray an error of law and accordingly I dismiss the substantive application for judicial review on Ground 2.

Mark West
Judge of the Upper Tribunal

Signed on the original 12 July 2023