THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2024-000826-HS
[2024] UKUT 388 (AAC)
LONDON BOROUGH OF HILLINGDON V AP AND SP

Decided following an oral hearing on 15 October 2024

Representatives

Hillingdon	Joseph Thomas of counsel, instructed by London Borough of Hillingdon Legal Services
Parents	Katherine Anderson of counsel, instructed by Sinclairs Law

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (Health, Education and Social Care Chamber)

Reference:	EH312/23/00021
Decision date:	7 March 2024
Hearing:	Video link

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

The suspension of the effect of the First-tier Tribunal's decision is lifted.

REASONS FOR DECISION

A. Introduction

1. This case is about the Education Health and Care Plan (EHCP) for AA. Those are not her real initials, but I have followed Mr Thomas's choice for anonymity. He described AA in this way:

> AA has profound and complex needs. To give just three examples: AA has a chromosomal abnormality resulting in global delay, she is non-verbal and has epilepsy.

2. AP and SP are AA's parents. They lodged an appeal to the First-tier Tribunal under section 51 of the Children and Families Act 2014. Initially, the appeal concerned Sections B (special educational needs), F (special educational provision) and I (placement) of her EHCP. Part B was agreed before the hearing. That left the tribunal to deal with issues under Parts F and I. The tribunal allowed the appeal, but I gave the local authority permission to appeal to the Upper Tribunal.

B. The legislation

Children and Families Act 2014

3. These are the relevant sections.

20 When a child or young person has special educational needs

(1) A child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her.

(2) A child of compulsory school age or a young person has a learning difficulty or disability if he or she-

(a) has a significantly greater difficulty in learning than the majority of others of the same age, or

(b) has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.

…

21 Special educational provision, health care provision and social care provision

(1) 'Special educational provision', for a child aged two or more or a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in—

(a) mainstream schools in England,

(b) maintained nursery schools in England,

(c) mainstream post-16 institutions in England, or

(d) places in England at which relevant early years education is provided.

…

37 Education, health and care plans

(1) Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan—

(a) the local authority must secure that an EHC plan is prepared for the child or young person, and

(b) once an EHC plan has been prepared, it must maintain the plan.

(2) For the purposes of this Part, an EHC plan is a plan specifying—

(a) the child or young person's special educational needs;

(b) the outcomes sought for him or her;

(c) the special educational provision required by him or her;

…

51 Appeals

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

(2) The matters are—

...

(c) where an EHC plan is maintained for the child or young person—

(i) the child's or young person's special educational needs as specified in the plan;

(ii) the special educational provision specified in the plan;

(iii) the school or other institution named in the plan, or the type of school or other institution specified in the plan;

(iv) if no school or other institution is named in the plan, that fact; …

…

Special Educational Needs and Disability Regulations 2014 (SI No 1530)

4. Regulation 12(1) is relevant.

12. Form of EHC plan

(1) When preparing an EHC plan a local authority must set out—

…

(b) the child or young person's special educational needs (section B);

(e) the outcomes sought for him or her (section E);

(f) the special educational provision required by the child or young person (section F);

…

(i) the name of the school, maintained nursery school, post-16 institution or other institution to be attended by the child or young person and the type of that institution or, where the name of a school or other institution is not specified in the EHC plan, the type of school or other institution to be attended by the child or young person (section I);

and each section must be separately identified.

Education Act 1996

5. Section 9 is relevant.

> **9. Pupils to be educated in accordance with parents' wishes.**
>
> In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.

C. Some basic principles

6. I begin by distilling some basic principles from my reasoning. That will allow for a more coherent statement and save the need for too much repetition.

The role of the First-tier Tribunal

7. The appeal to the First-tier Tribunal lay under section 51 of the 2014 Act. This type of appeal is sometimes called a general or open-ended appeal. Whatever the label, it allows the tribunal to deal with any issue of fact, law or judgment that arises.

The role of the local authority in the First-tier Tribunal proceedings

8. The role of a local authority in the appeal differs from that of a litigant in private litigation. It derives from the nature of the local authority's role under the Act, supplemented by the tribunal's rules of procedure.

9. The starting point is the nature of the authority's duty under the 2014 Act. Part 3 imposes a duty on a local authority to identify and make provision for the special educational provision required by a child or young person. The appeal is against a decision made in relation to that duty.

10. Sullivan J captured the essence of the local authority's role in *R (JF) v London Borough of Croydon and the Special Educational Needs Tribunal* [2006] EWHC 2368 (Admin):

> 11. … Although the proceedings are in part adversarial because the Authority will be responding to the parents' appeal, the role of an education authority as a public body at such a hearing is to assist the Tribunal by making all relevant information available. Its role is not to provide only so much information as will assist its own case. At the hearing, the Local Education Authority should be placing all of its cards on the table, including those which might assist the parents' case. …

11. That approach builds on authorities dating back into the 19th century. *Boulter v Kent Justices* [1897] AC 556 concerned the power to award costs against the Justices on a successful appeal against their refusal to renew a licence for a public house. The House of Lords decided there was no liability. Lord Herschell explained at 569 that the Justices' decision was not for their own benefit, but for that of the public generally.

12. *Commissioners of Inland Revenue v Sneath* [1932] 2 KB 362 applied the same approach. The case concerned a surveyor's assessment of liability to super tax. The

Court of Appeal decided that an amount assessed for one year did not operate as an estoppel for future years. That was a very different context from the refusal to renew a licence, but the Court applied the same principle that the decision was made in the public interest, not for the benefit of the surveyor. This time, though, the Court extended the reasoning beyond the nature of the decision into the surveyor's role in the Court proceedings. As Lord Hanworth MR explained at 382:

> There is no interest in the surveyor, except to bring before the Court all facts relevant to the assessment. The decision does not enure in his favour unless he is to be treated as representing the taxpayers at large, exclusive of the one upon whom the assessment in question is made.

13. Each type of case involves a different analysis. That is why Sullivan J included the adversarial element in *JF*. It was, though, a qualification. The judge was not overriding the focus on the discharge of the local authority's duty under the 2014 Act.

14. Turning to the tribunal's rules, the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699) provide:

> **2. Overriding objective and parties' obligation to co-operate with the Tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally.

15. Rule 2 applies to all types of proceedings that may come before the First-tier Tribunal in its Health, Education and Social Care jurisdictions. For the purposes of this case, the following are relevant: full participation for all parties, using the tribunal's special expertise effectively, avoiding delay, helping the tribunal to further

the overriding objective, and co-operating with the tribunal generally. This now bolsters Sullivan J's reasoning in *JF*.

The role of the Upper Tribunal

16. The appeal to the Upper Tribunal lay under section 11(1) of the Tribunals, Courts and Enforcement Act 2007 on 'any point of law arising from a decision made by the First-tier Tribunal'. Having given permission to appeal, the issue for me under section 12(1) is whether 'the making of the decision concerned involved the making of an error on a point of law.'

17. The Upper Tribunal's jurisdiction on the appeal is narrower than that of the First-tier Tribunal. It is not a general or open-ended appeal. Its jurisdiction to set aside a decision is limited to errors of law. There is no definitive list of what may and may not constitute an error of law. Brooke LJ's list in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 is a helpful starting point:

> 9. ... It may be convenient to give a brief summary of the points of law that will most frequently be encountered in practice:
>
> i) Making perverse or irrational findings on a matter or matters that were material to the outcome ('material matters');
>
> ii) Failing to give reasons or any adequate reasons for findings on material matters;
>
> iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> iv) Giving weight to immaterial matters;
>
> v) Making a material misdirection of law on any material matter;
>
> vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
>
> vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.
>
> 10. Each of these grounds for detecting an error of law contain the word 'material (or 'immaterial'). Errors of law of which it can be said that they would have made no difference to the outcome do not matter. …

Adequate reasons

18. Rule 30(2)(b) requires the tribunal to provide written reasons for its decision. They must be adequate, but need not be perfect. This test can accommodate the occasional slip and infelicities of expression. It achieves that by reading the reasons as a whole. Brooke LJ referred to the need to give 'adequate reasons for findings on material matters' (at [9(ii)]). The duty under rule 30 is not, though, limited to reasons for the tribunal's findings. In addition to explaining its findings, the tribunal has to show that it directed itself correctly in law and applied that law appropriately to the facts.

19. The provision of written reasons is a separate step from the tribunal's judicial duty to apply the correct law appropriately to the facts found. The reasons must show that the tribunal performed that duty. But there is more to reasons than that. They have to explain the decision. That does not require the tribunal to give reasons that track the course of its fact-finding and decision-making. That may be a sensible approach in some cases. In other cases, it will not be. Sometimes, there will be no one sensible, let alone perfect, order. In those cases, the tribunal just has to start somewhere.

20. Much of the work of the First-tier Tribunal involves the exercise of judgment. This includes both assessing the evidence and making the finding of facts. It also includes the judgments involved in identifying a child's needs, provision and placement. The specialist members assist with that task. Their role is anticipated by rule 2(2)(d).

21. In exercising its jurisdiction under section 12 of the 2007 Act, the Upper Tribunal takes into account the expertise of the members and the value that it brings to any exercise of judgment involved in the decision under appeal. This is sometimes referred to as respecting the tribunal's specialist knowledge and experience. It also reflects the reality that the Upper Tribunal lacks the specialist members and the value they bring.

D. Ground 1

22. This ground refers to the tribunal's reasoning in paragraphs 12 to 30. These paragraphs were headed:

> **Special Educational Provision – Section F**
>
> **Extended day/residential placement in principle**

23. Mr Thomas identified Ground 1 as:

> The panel erred in its consideration as to whether an extended day and residential placement was required 'in principle'.

He argued that this was demonstrated by four propositions.

24. Before coming to those propositions, it is convenient to begin with the question posed by Mr Thomas in paragraph 1 of his skeleton argument:

> In short, did they [the tribunal] decide matters in the wrong order?

25. This refers to what Mr Thomas called the 'logical chain of need, provision and placement'. I accept that the legislation sets up that chain. The sequence of special educational needs leading to special educational provision is set up in section 20(1). The sequence of special educational provision to placement is not so clearly stated in the legislation. It is, though, surely inherent.

26. To anticipate what follows, the answer to Mr Thomas's question is: no, the tribunal did not decide matters in the wrong order. This is why.

27. I begin with the nature of the panel that heard the appeal. It was a specialist panel. Every judge and specialist member sitting in the special needs jurisdiction of the Health, Education and Social Care Chamber surely knows the correct sequence in which to apply the legislation. I would need some indication in the tribunal's

decision or reasoning before I accepted that the tribunal had failed to follow the chain. Mr Thomas argued from the tribunal's reasons that is what had happened. I do not accept that.

28. The flaw in Mr Thomas's reasoning is to equate the tribunal's explanation with the structure of its decision-making. The tribunal's reasons show that it both knew the 'logical chain' and was following it. It referred repeatedly to the need to move from needs to provision in paragraphs 22, 26, 27, 30, 39 and 48. I may have missed some other references. Paragraph 30 is sufficient to make this point:

> 30. … We confirm that we consider this case to be exceptional on its particular facts, as a result of the profound complex needs that AA has, and as a result of the quantity of highly specialised provision that is reasonably required to meet those needs.

The tribunal also understood that placement followed from provision. In paragraph 39, the tribunal said:

> 39. … The suitability of the proposed educational placements are something we can only go on to consider having made determinations in relation to the provision that AA requires. …

29. Mr Thomas's argument would have merit if paragraphs 12 to 30 of the written reasons had to be interpreted in the light of the heading. That is not the way I have to read those reasons. I have to apply the test of adequacy to the reasons as a whole. I have to take account of both the heading and the reasons themselves. Having done so, I consider that the heading does not aptly describe what the reasons contain.

30. The tribunal began by saying that it initially approached the issue 'thematically'. I am not sure why the tribunal used that word, but it must have been intended to describe what followed in the rest of the section.

31. What followed was an assessment of the evidence. The tribunal took the evidence produced by the parents and by the local authority separately. It summarised each report and evaluated it. Having dealt with the evidence produced by the parents, the tribunal said:

> 22. Thus, the parents have provided a plethora of expert evidence which details the extent of AA's complex needs and the provision said to be reasonably required to meet these.

The tribunal then performed the same exercise on the local authority's evidence. It anticipated what followed in the opening words of paragraph 23:

> 23. In contrast the LA have provided little in the way of comprehensive and up to date expert evidence to counter these assertions.

In paragraph 26, it stated its conclusion:

> 26. … We are not satisfied, for reasons that are outlined more fully in this decision later, that AA's needs can be met in a normal school day, and given the evidence of the various experts, are satisfied that she requires an extended day and residential provision. …

The tribunal then explained this further.

32. This approach meant that the tribunal dealt with the evidence relating to links in the logical chain out of order. This allowed it to set out a coherent and efficient assessment of the evidence of each witness. Assessing evidence in relation to each link of the chain would have involved a disjointed assessment of the evidence of each witness. There are advantages and disadvantages of each approach. The tribunal had to make a choice. The result was not consistent with its chosen heading. It might be better described as a general assessment of the evidence before the tribunal. But the use of an inappropriate heading does not render the reasons inadequate. The tribunal showed a number of times that it knew the logical chain.

33. I now come to Mr Thomas's four propositions.

a. The purpose of section F is to identify provision, no more, no less.

34. I accept this proposition. But it is about the location of provision in the EHCP and the sequence of decision-making. It is not about the structure of the tribunal's explanation in its written reasons.

b. The panel considered placement whilst identifying provision.
c. The panel considered placement whilst specifying provision and
d. The panel identified provision after specifying residential placement

35. I take these together as they are based on the same flaw by reading everything in the context of the tribunal's heading rather than reading it for what it is.

36. That deals with the propositions as originally stated. When he came to elaborate proposition b, Mr Thomas changed it to:

> Residential placement extended day are not in themselves forms of special educational provision.

This merely changes the focus of the argument rather than its essence, so the reasons I have already given still apply. This is more a problem with the heading for this section of the tribunal's reasoning. There is no basis for this argument if it is treated for what it is: a general assessment of the evidence produced by the parties.

E. Ground 2

37. This refers to placement. Mr Thomas identified this ground as:

> The panel skirted its duty under s.9 [of the Education Act 1996] to assess whether naming School E avoided unreasonable public expenditure.

38. The tribunal considered two schools: School E and School M. It decided to name School E in Section I of the EHCP. It said:

> 48. … we have determined that only School E can provide the provision that AA needs, and having considered the evidence very carefully do not consider that School M can meet her needs, and therefore we do not need to go on to consider the reasons for parental placement or carry out the placement cost comparison.

39. Mr Thomas argued that the tribunal had fettered its discretion. Instead of naming School E, it could have named a type of school or adjourned for the local authority to update its proposal to see if there was a more cost-effective alternative.

He argued that: 'The importance of retaining their discretion is critical in the context of the s.9 duty that requires local authorities to avoid unreasonable expenditure.'

40. I accept that the tribunal had the option to name a type of school and, of course, it had the power to adjourn with directions. I also accept that it is important and part of the local authority's responsibility to avoid unreasonable public expenditure. I do not, though, accept that the tribunal made an error of law in this case. That part of the argument overlooks the local authority's role in the proceedings.

41. When the tribunal expressed its conclusion in paragraph 48, it was not directing itself in law. It was stating its conclusion in the case before it. It dealt with the case as presented. The local authority was under duties to help the tribunal to further the overriding objective, which includes avoiding delay, and to co-operate with the tribunal generally. All local authorities have specialist staff in their education Departments. They have solicitors either inhouse or under contract. And, as in this case, they can afford to, and do, instruct counsel. That combination of expertise should allow them to anticipate what may not go their way in the tribunal and to prepare accordingly. That may involve, for example: offering other possible schools to the tribunal, suggesting a description of a type of school for the tribunal to accept or adapt, or asking to make further submissions in the light of the tribunal's findings on special educational needs or provision. This ground seeks to place responsibility for what happened on the tribunal. It does not lie solely there and, left as it was, the tribunal was entitled to decide as it did.

Ground 3

42. Mr Thomas identified this ground as a failure to provide sufficient precision in specifying educational provision. He referred to the tribunal's use of 'extended day', 'an intensive and individualised education', and to specialist staff being 'consistently' available.

43. Upper Tribunal Judge West considered the issue of precision in *Worcestershire County Council v SE* [2020] UKUT 217 (AAC). I accept the conclusions that he distilled from a thorough coverage of the case law.

44. It is wrong to micromanage the provision that is required. Doing so, limits the scope for misunderstandings and disputes, but hampers the teachers and other specialists in delivering the educational provision and adjusting appropriately according to AA's response to the provision and her development. It is also wrong to fail to be sufficiently precise. That will inevitably lead to misunderstandings and disputes, and make the task of the teachers and other specialists more difficult. Either way, the result can be detrimental to the child.

45. The specialist members play an important role in finding the right balance between precision and flexibility. And the local authority can draw on its practical and legal resources to present the tribunal with arguments to assist it in finding appropriate wording.

46. The important point in this case is whether it is possible for those who have to implement the EHCP to understand what is required to make it workable. Too much detail can hamper the teachers and other specialists from adjusting appropriately. That is a difficult balance to set. The specialist tribunal is better placed than the Upper Tribunal to identify the right place.

47. I accept Ms Anderson's argument for the parents that 'extended day' was just a convenient shorthand for what the tribunal ordered. I consider that the other expressions are both sufficiently precise and sufficiently flexible to allow the teachers and other specialists to deliver the provision that the tribunal has ordered.

F. Ground 4

48. This relates to provision for physiotherapy. Mr Thomas identified this ground as:

> The panel provided inadequate reasons as to whether Physiotherapy was an educational need/acted *Wednesbury* unreasonably.

49. The tribunal dealt with this in paragraphs 27 and 38.

50. In paragraph 27, the tribunal noted the local authority's educational psychologist had deferred to the parents' expert in physiotherapy; see also paragraph 23. The parent's expert was described by the tribunal as 'a highly specialist paediatric physiotherapist' (paragraph 20). The local authority argued that the provision was not educational provision. The tribunal rejected this argument (paragraph 27). It applied *Westminster City Council v First-tier Tribunal (Health, Education and Social Care Chamber) and A* [2023] UKUT 177 (AAC) at [108] and emphasised that this was an issue of fact for the First-tier Tribunal. I have already commented on the significance of the specialist nature of the panel. The tribunal noted that, if this was a health issue as the local authority argued, it was not mentioned in Section H of the EHCP. In paragraph 38, the tribunal added that it could be deemed educational provision under section 21(5) of the 2014 Act.

51. I consider that the better analysis is that the physiotherapy was special educational provision rather than deemed provision. The evidence of the parents' physiotherapist, summarised by the tribunal in paragraph 20, contains sufficient detail to show that this would qualify as educational, albeit that it would benefit her health also. I consider that the tribunal's reasons within its specialism, are adequate.

52. As to being irrational, I do not accept Mr Thomas's analogy with sleep and food. They may not be the result of a learning difficulty or disability that calls for the provision. But the tribunal's findings do show how the physiotherapy satisfied the test in the *Westminster City Council* case. I refer for the final time to the specialist nature of the panel in this case.

G. Conclusion

53. Having found no error of law, I must dismiss this appeal and lift the suspension of the effect of the First-tier Tribunal's decision.

Authorised for issue
on 29 November 2024

Edward Jacobs
Upper Tribunal Judge