IN THE UPPER TRIBUNAL **Case No**. ***UA-2024-000370-HS***
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 201 (AAC)**

On appeal from the First-tier Tribunal (HESC Chamber)

Between:

TM and SM

Appellants

- v –

Liverpool City Council

Respondent

Before: Upper Tribunal Judge Zachary Citron

Decision date: 11 July 2024
Decided on consideration of the papers

Representation/assistance:

Appellants:	assisted by Leon Glenister of counsel, acting pro bono, and by the Liverpool Law Clinic
Respondent:	by itself

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal dated 3 January 2024 under number EH341/23/00036 involved the making of an error on a point of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set the decision aside as respects the school named in Section I and remit the case to a fresh panel of the First-tier Tribunal (HESC Chamber) (SEND) as respects that aspect of the appeal. I direct that the file be placed before a salaried judge of that tribunal for case management directions to be given.

REASONS FOR THE DECISION

1. In what follows references to

    a. the "**tribunal**" and to the "**decision**" are to the First-tier Tribunal and its decision as referred to immediately above;

b. numbers in square brackets are references to paragraphs of the tribunal's decision (unless otherwise indicated); and

c. "**s**" or "**section**" are to sections of Children and Families Act 2014 (unless otherwise indicated).

The Appellants' appeal to the tribunal

2. The appeal concerned the Appellants' son, a boy of 7 (at the time of the decision), whom I will refer to as "**S**". The decision records that S had a diagnosis of autism spectrum disorder (ASD) with associated sensory processing difficulties and development coordination disorder (DCD) and presented with symptoms of mild cerebral visual impairment (CVI). He was not at the time of the hearing attending school and was being taught from home. (I understand this still to be the case.)

3. The appeal to the tribunal, made under s51(2)(c), was against the contents of the EHC plan made for S by the Respondent and communicated to him by letter on 25 January 2023. The appeal concerned Sections B, F, and I of S's EHC plan. The tribunal dismissed the Appellants' appeal.

4. The issue in respect of section I was that the Respondent favoured School X, a maintained mainstream primary school with a special resourced provision for pupils with ASD, whereas the Appellants had requested School Y, a non-maintained special school (known to them, and to S, as S had been attending enrichment sessions there one afternoon a week). The Appellants argued that School X was inappropriate for S; the Respondent argued that both schools were suitable, but that School Y fell within s39(4)(b)(ii) (and so the parents' preferred school did not have to be named in Section I). The tribunal accepted the Respondent's argument. It concluded its reasoning as follows:

> 36. Given the large cost differentiation between the two placements, the Tribunal conclude the legal test under s.39(4) of the CFA 2014 referenced above has been made out. [S]'s attendance at [School Y] would be incompatible with the efficient use of resources.
>
> 37. Given this conclusion, the Tribunal needed to go on to consider the 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' under section 9 of the CFA 2014.
>
> 38. Under this section the Tribunal considered both the Appellants' views and the views expressed by [S] at the hearing, which were that he wishes to attend [School Y] and that he enjoys the enrichments sessions he attends there. Taking this into account, the Tribunal still found that the difference in cost between the two placements meant that [S]'s attendance at [School Y] was not

compatible with the avoidance of unreasonable public expenditure in accordance with the legal test that must be applied.

5. Neither party was legally represented at the tribunal hearing (which was on 24 November 2023). The Appellants attended the hearing, as did S briefly at the beginning. The Appellants' witnesses were the principal, the deputy principal, and the special educational lead from School Y. The Respondent's witnesses were the assistant deputy head (and former SENCo) of School X and the operational leader from Liverpool Sensory Service.

The permission to appeal and the parties' submissions

6. On 22 April 2024, the Upper Tribunal issued my decision granting the Appellants permission to appeal.

7. The permission decision noted that the Appellants' reasons for appealing, as set out in their application form to the Upper Tribunal for permission to appeal (the "**UT4**"), were:

    a. S's views and opposition to attending School X;

    b. the tribunal failed to consider S's views (especially his opposition to School X);

    c. that S did not wish to attend School X – it was causing him to be anxious; he was refusing to leave the house and do the things he used to enjoy; that S gets very angry, upset and tense when School X is mentioned; that he threatens to harm himself if forced to go there;

    d. the summary of S's views provided to the tribunal (for example at pages 210 and 212) were completed before the Respondent stated their named school as School X; "therefore this evidence was not included in the documentary evidence before the panel";

    e. S was not asked about how he felt about School X at the hearing; nor were the Appellants asked about how S felt about going there; the panel therefore had no evidence as to S's views about attending there;

    f. S's views regarding School X should have been considered as it is unclear what is proposed to overcome his opposition.

8. In addition to the UT4, the Appellants also sent the Upper Tribunal a letter from a registrar in developmental paediatrics at an NHS hospital (clinic date 7 February 2024) stating that S was extremely anxious and stressed regarding mainstream school environments; that he had severe trauma from his last mainstream placement; reporting that S said that if he was forced to go to School X, he would harm himself; that S would

not go out and constantly stayed in his room where he felt safe; that the Appellants have to closely monitor S's diet as he refused to eat; that S has cerebral visual impairment which makes him extremely anxious regarding the surrounding environment and the amount of support he needs; and that S has pathological demand avoidance which makes him refrain from doing usual daily activities even the necessary ones. The letter strongly recommended that S's mental health difficulties, his autism, and his pathological demand avoidance are all kept in mind when discussing his educational options;

9. The permission decision said as follows, as to why permission had been granted:

> 11. The letter from the registrar (clinic date 7 February 2024) is, on the face of it, relevant and significant evidence of S's views, wishes and feelings about going to Rice Lane; per section 19 of the Act, a local authority must have regard to those matters; and, per the case law, so does the tribunal (*S v Worcestershire County Council (SEN)* [2017] UKUT 0092 (AAC) at [70]).
>
> 12. But is the letter admissible in these Upper Tribunal proceedings, given that it was not before the tribunal?
>
> 13. I am fairly readily satisfied, given what I say in [11] above, and given the apparent authority of the letter's author, that there is a realistic argument that the second and third of the conditions in the classic enunciation of the relevant principles regarding "fresh evidence" on appeal (*Ladd v Marshall* [1954] EWCA Civ 1), are satisfied; that articulation is as follows:
>
> > "It is very rare that application is made to this Court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions mast be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence most be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."
>
> 14. But what of the first *Ladd v Marshall* condition? I can see the argument that the Appellants could have produced evidence prior to the tribunal hearing, either from themselves or possibly from S, or from a third party expert, anticipating the kind of views, wishes and feelings, on S's part, which appear to be evidenced in the registrar's letter. However, it also seems to me realistically arguable that, due to S's age and health conditions, it was not reasonably possible to anticipate the reactions which, according to the registrar's letter, S has had to being told that he is to attend [School X].
>
> 15. I thus consider it realistically arguable that the registrar's letter is admissible in these Upper Tribunal proceedings.

> 16. Moving on to the question of whether it is realistically arguable that the tribunal erred in law – and assuming, for the limited purpose of considering that question, that the registrar's letter is admissible – it does seem to me realistically arguable that the tribunal erred in not sufficiently taking into account S's views, wishes and feelings, in reaching the view that [School X] was "appropriate" for S (per section 39(5) of the Act). Whilst the tribunal clearly did take these into account, to some extent – see [38] – it (arguably) did not take into account the apparent severity of S's negative reaction to attending [School X], as evidenced in the registrar's letter, or, in the alternative, failed adequately to explain why such a reaction was not relevant to its conclusion that [School X] was appropriate for S.

10. The Respondent made the following points in response to the appeal:

a. the tribunal *did* have sufficient regard to S's "views, wishes and feelings" prior to determining that School X was appropriate for him under s39(5)(a)

b. the law states that S's views are not determinative

c. given S's age, it was reasonable for S's views to have been gathered by experts, and by the Appellants (his parents) (prior to the hearing); as there are no comments by S about School X in the tribunal bundle, it was appropriate for the tribunal to proceed on the basis that S's views would be the same as those expressed by his parents (and it was clear the tribunal was aware of the parents' views); *West Sussex County Council v ND [2010] UKUT 349 (AAC)* at [33] was cited:

> > "But as a general proposition, it must follow that a local authority would be making an error of law if it totally disregarded the express wishes of a child. Likewise, it would be making an error of law if it followed the views of the child regardless of any countervailing indications that pointed to a different conclusion. It must always be a question of the weight that is to be attached to the views of the child. The older the child and the more mature the child, the greater the weight that should be attached to those views."

d. *St Helens BC v TE and another* [2018] UKUT 278 (AAC) was also cited, in which it was held lawful for the tribunal to conclude that a school was not suitable solely by reference to its conclusion that the child (a 7-year-old with autism) "has formed an entrenched and currently intractable opposition to attending [R] school or any mainstream provision" given that it recognised that "his attitude to the proposed placement is part of the significant and complex needs that must be met by the provider" and given educational psychologist evidence which linked his attitude to his special educational needs. On the facts this was not unlawfully giving the child or young person a veto

e. the Respondent submitted that S was not yet sufficiently mature to fully understand that his transition to School X would be managed carefully and sensitively, at a pace he would not find overwhelming. Also, he was not mature enough to understand that he would be attending School X's SEN unit (which was quite different to attending a mainstream class at the school)

f. the Respondent adduced a letter from a "specialist practitioner" at an NHS hospital child and adolescent mental health service ("**CAMHS**") to the Appellants dated 3 May 2024; the Respondent cited the following paragraph from the letter:

> "At present [S] is isolated purely because he is out of school and not having the contact he needs to grow and develop. He does get anxious but this is in the context of school and his wishes to go to the school he wants.
>
> Given the present situation and that you have experience of living with ASD within the family and that no other mental health needs were raised, we agreed no role was needed for CAMHS at this time. I advised you of our 24-hour crisis number which you can access should things change in any way for [S]."

g. (The previous two paragraphs stated as follows:

> "At present [S] is not in school and is distressed and upset about the fact he can't go to his choice of school which is [School Y]. In fact, [S's parents] told me he had experienced this school for some enrichment sessions and likes going and was a happier child. He has I believe been assigned [School X] which is a school that caters for ASD children but does not have the specialist expertise around visual impairment that [S] suffers with through his CVI.
>
> In session [S's parents] told me that he found his initial schooling at [a mainstream infant school] very distressing and was overwhelmed by the experience. He was a different child when he went to [School Y] and both [S] and [S's parents] would like him to attend there for his education, appropriate support, and social development.")

h. the Upper Tribunal was asked to note that, in the light of medical evidence submitted by the Appellants, the Respondent had recently decided to carry out a "further statutory review" of S's EHC plan under s44 – the outcome of which could be appealed against under s51. The Respondent asked for that process to take its course.

11. The Appellants made the following points in their "reply":

a. the tribunal did not have material before it on S's views on School X

b. the Respondent was under a duty to provide S's views to the tribunal and did not; and the tribunal was under a duty to consider S's views (on School X)

c. given S's very clear response subsequent to the decision, those views would have been material to the decision, and could have been determinative

d. the tribunal erred by failing to obtain S's views on School X pursuant to its inquisitorial jurisdiction; it failed to consider a relevant factor; alternatively, S's views as expressed after the decision were a relevant change of circumstances which should have led to a review (rule 48 of the tribunal's procedure rules)

e. as to the admissibility of the registrar's February 2024 letter:

    i. It was submitted that the burden (of adducing relevant evidence) does not fall solely on the parties (especially unrepresented parents), give the inquisitorial jurisdiction

    ii. it was known before the hearing that S did not want to attend School X; but the extent of his objections (including threats to self harm) only arose after

    iii. the letter itself (as evidence of S's views when the letter was written) could not have been obtained prior to the hearing; but it is evidence of what he may have said, or indicated, had his views been obtained prior to, or at, the hearing

f. nothing was said in the Respondent's response to the appeal to the tribunal, about S's views about the issues raised in the proceedings

g. a document in the tribunal bundle about S's views, prepared by his parents, said that S loved School Y but hated the mainstream infant school he had attended. It said that every day he went to the latter school he "hates his life"; it said that S was "extremely upset in the morning and repeatedly says he hates [the latter school]

h. this was not about the "weight" afforded by the tribunal to S's views; rather, it fell into error by not having regard *at all* to S's views *about School X*.

Upper Tribunal proceedings

12. Neither party sought an oral hearing of this appeal. It seems to me fair and just in the circumstances to determine this appeal on the appears. I

am grateful to both parties for their written submissions; and recognise Mr Glenister for acting pro bono.

Some relevant case law

13. In *S v Worcestershire CC (SEN)* [2017] UKUT 0092 (AAC), the Upper Tribunal considered a ground of appeal based on s19 (concerning the need to have regard to views, wishes and feelings – in this case, it was the views, wishes and feelings of the child that were at issue):

> 70. I am not persuaded by the local authority's argument that the section 19 obligations cannot apply to the First-tier Tribunal because they are high-level strategic functions that could not have been intended to apply to the Tribunal. They are not strategic functions. They are obligations which apply to and are designed for the benefit of specific children and young persons.
>
> 71. Nevertheless, this was an appeal brought by a young person. It was Robbie's appeal. Dealing with his case inevitably involved the Tribunal having regard to his views, wishes and feelings. I do not accept that the Tribunal failed to give adequate reasons for not following his wishes. While the Tribunal did not in terms explain why it would not implement his wishes, it explained why it rejected his case which amounts to the same thing. This ground does not succeed.
>
> 72. The participation and enabling aspects of section 19 did not feature prominently in argument. However, if the First-tier Tribunal discharges its obligations under its procedural rules, including the overriding objective, it will be doing as much as would be required if it were subject to the section 19 obligations.
>
> 73. For the above reasons, by way of general guidance to the First-tier Tribunal I do not see any need for it to complicate its business by expressly seeking to act in accordance with section 19 of the CFA 2014. It should simply act in accordance with the overriding objective and, if it does, will be acting in the spirit of section 19.

14. In *M & M v West Sussex CC (SEN)* [2018] UKUT 347 (AAC), the Upper Tribunal said:

> 55. My attention has not been drawn to any legislative provision that expressly requires the First-tier Tribunal to take into account, or have regard to, a child's views (or views, wishes and feelings) about the subject-matter of an appeal. Nevertheless, I am satisfied that such a requirement exists. If the full legislative context is considered, we see that:
>
> > (a) Whenever a local authority is exercising functions relation to an EHC Plan, section 19 of the 2014 Act requires the authority to have regard to the "views, wishes and feelings of the child". It would not accord with the statutory purpose if this requirement were to fall away once an appeal is made to the First-tier Tribunal. And, in any event, the Upper Tribunal has already

decided that the section 19 (a) to (c) obligations apply on appeal (*S v Worcestershire CC (SEN)* [2017] UKUT 0092 (AAC)). That case involved a young person who, as a party to the appeal, took the benefit of the overriding objective of the tribunal's procedural rules so that the Upper Tribunal doubted whether section 19 would make any practical difference. The present case, however, involves a parent's appeal so that the application of section 19 at the appeal stage might add something in practice;

(b) In securing an EHC needs assessment, a local authority must take into account the child's views, wishes and feelings (regulation 7 of the SEN and Disability Regulations 2014). In preparing an EHC Plan, the local authority must take into account the evidence received during the assessment (regulation 11) which should therefore include the child's views, wishes and feelings. The Plan itself must set out the child's views, wishes and feelings. To leave the child's views, wishes and feelings out of account at the appeal stage would, again, run counter to the wider statutory purpose;

(c) Rule 21(2)(e) of the tribunal's procedural rules requires a local authority appeal response to include "the views of the child about the issues raised by the proceedings". If the child's views were not available when the response was supplied, a practice direction requires them to be supplied before the final hearing. While the Rules contain no express requirement to take into account the child's views, there would seem little point in requiring them to be supplied if a tribunal was not expected to take them into account.

56. As I understand it, the authority argues that, in dealing with L's parents' case, the First tier Tribunal of necessity took into account, or had regard to, her views, wishes and feelings. I have found this a difficult point.

57. On the one hand, it may be said that the authority's stance reduces the requirement to take into account a child's views, wishes and feelings to a dead letter. In my experience, at any rate, a child's views tend to be broadly aligned, and rarely inconsistent, with the parental case. If the requirement to take into account a child's views etc is satisfied by simply deciding an appeal, the child's voice may be lost.

58. On the other hand, is it in a child's interests for a tribunal's decision to be set aside where (a) it deals properly with all the relevant issues but the only flaw is that it failed to show that the child's views, wishes and feelings were taken into account; and (b) had the child's views been expressly taken into account, the result would have been exactly the same (on the assumption that the child's views and parental case were aligned)? If the tribunal gave an otherwise sound decision, there must be a real chance that all will be achieved is the same decision on remission to the First-tier Tribunal but only after some months have passed.

> 59. However, as I explain below, I need not, in this case, decide whether the local authority's argument is correct. I will say though that there is a simple way of avoiding the issue recurring, which is for First-tier Tribunal statements of reasons expressly to deal with a child's views, wishes and feelings. I do not wish to add unnecessarily to the burdens faced by that tribunal but would not expect this to take up too much time. A paragraph or two should normally be sufficient or perhaps even less if there is no mismatch between the child's views etc and the parental case.

15. In *W v Gloucestershire CC* [2001] EWHC Admin 481, it was said at [15]:

> Whatever the reason, it seems to me that if there was inadequate information, the tribunal should have taken steps to obtain it, if necessary adjourning to do so. Tribunals, so it seems to me, cannot proceed on a purely adversarial basis, but have a duty to act inquisitorially when the occasion arises by making sure they have the necessary basic information on which to decide the appeal before them, rather than rely entirely on evidence adduced by the parties. The tribunal will usually have much greater expertise than the parents who appear before them.

Why I have decided that the tribunal decision erred in law and should be set aside

16. The tribunal decision structured its reasoning on the appeal against School X being named in Section I, as follows:

    a. first, it decided, and explained, that School X and School Y were both "able to meet S's needs" (this was said at [25], [29] and [31]) and so were both "suitable" (as was said at [34]);

    b. it then considered "cost differentials", and concluded, at [36], that S's attendance at School Y would be "incompatible with the efficient use of resources" (tracking closely the wording of s39(4)(b)(ii));

    c. it then said that, given that conclusion, it needed to consider the principle in s9 Education Act 1996 ("**EA**") ([37] refers to "CFA 2014", but this is clearly a slip of the pen, as s9 EA is cited verbatim in [37] (as indeed it was earlier in the decision, at [14]));

    d. it then summarised the Appellants' views, and the views expressed by S at the hearing, as being that S wished to attend School Y and enjoyed the enrichment sessions he attended there;

    e. finally it concluded, taking those views into account, that the difference in cost between School X and School Y meant that S's attendance at School Y was not compatible with the avoidance of unreasonable public expenditure (being, it said, the legal test that must be applied).

17. In terms of the statutory code, the above analysis reached three key conclusions:

    a. first, that s39(4) applied, by virtue of s39(4)(b)(ii) applying; (and so School Y, the parents' preference, did not have to be named in Section I);

    b. second, that School X would be appropriate for S, such that it should be named in Section I (s39(5)); and

    c. third, the naming of School X in Section I was not prevented by the operation of s9 EA.

18. Section 19 is relevant to the second of the above conclusions, that applying s39(5) (as deeming a school "appropriate for" a child under s39(5) is a function of the local authority under Part 3 of the Act). The tribunal did not expressly refer to s19 in making that decision. That, in itself, is no error of law – what matters is whether, in substance, the tribunal, when deciding that School X was appropriate for S, did what s19 requires: in particular, did it have regard to S's views, wishes and feelings.

19. The tribunal decision *did* expressly refer to, and apply, s9 EA; and there is some overlap between that provision and s19, in that both require the views of the parents to be taken into account. But, significantly (in my view) for the facts of this case, there are differences between s9 EA and s19, even accepting (as was said in *M & M v W Sussex* – see extract above) that, often, the "views" of the parents and the child "tend to be broadly aligned":

    a. first, s19 extends to taking into account the "feelings" of the child (as well as their "views" and "wishes). I note that, whereas 7-year-olds may not, in circumstances of relative family harmony, have "views" and "wishes" very different from those of their parents (due to their relative immaturity), "feelings" are something typical 7-year-olds do have, very much in their own right; the statutory language, by expressly referring to "feelings", requires that they be identified and considered;

    b. second, s9 EA requires that regard be had to a general principle that is directive in nature (the parents' wishes "are to be" followed) subject to a proviso ("so far as compatible with …"); s19, in requiring that regard be had to (amongst other things) the child's views, wishes and feelings, is looser (i.e. less prescriptive) but broader (not just about following one party's wishes, subject to a proviso).

20. Because the tribunal decision expressly considered s9 EA, but not s19, it is not clear, on its face, that the tribunal had regard to S's feelings about the appropriateness of School X for him. The sentence in [38] that deals

with S's "views" focuses on his positive wish to attend School Y; it does not, on its face, say anything about his feelings about School X.

21. In a "typical" case, that would probably not denote any error of law, in that it could quite reasonably be inferred that S's feelings about the appropriateness of School X for him were, simply, that it was not the right school for him (because School Y was). In this case, however, we have the following particular circumstances:

    a. the Respondent's response to the appeal to the tribunal, which was required, by the tribunal's procedure rules (rule 21(2)(e)), to include the S's views about the issues raised by the proceedings, or the reasons why the Respondent had not ascertained those views, said this: "[S] reports that he likes [School Y]. His views are being gathered by his parents and will be made available to the tribunal."; the response was made on 23 May 2023; it was not until 28 June 2023 that the Respondent notified that tribunal that it wished to name School X;

    b. in the event, the tribunal bundle, it appears, included nothing specifically as to S's feelings about School X: there is a note on page 213 from his parents' (the Appellants) visit to School X on 6 July 2023, but this records the parents' (critical) views of the school, rather than S's feelings about it. There is also a note of S's views on page 210 of the bundle, including his "hatred" of the mainstream infant school he last attended, but it does not give his views on School X (possibly because it predates 28 June 2023 (when School X first entered the fray) – one cannot be sure, as the document is undated);

    c. S attended the tribunal hearing briefly at the beginning;

    d. the letter from the registrar (clinic date 7 February 2024), whose contents are summarised at paragraph 8 above.

22. Before considering how these particular circumstances impact on the question of whether there an error of law was disclosed by the tribunal decision not expressly considering S's feelings about School X, I must first consider the admissibility of the letter from the registrar, which post-dates the tribunal hearing by more than two months. I approach that question as follows:

    a. the letter seems to me highly relevant as to S's feelings about going to School X. It also comes from an impartial and authoritative source, on the face of it. It is evidence of strength of feeling of a high degree: it speaks of "severe trauma" as regards

S's last mainstream placement; it reports S's saying that he would harm himself if forced to go to School X;

b. the letter thus seems to satisfy the second and third of the classic conditions for admitting "new" evidence at the appellate level (*Ladd v Marshall*, cited in the extract from the permission decision at paragraph 9 above);

c. as regards the first of those conditions – could this evidence have been obtained with reasonable diligence for use at the tribunal? – the answer is clearly "no" in the sense that the letter did not come to be written until the developmental paediatrics clinic S and his parents attended on 7 February 2024. The question is whether equivalent evidence, showing the strength of S's feelings, could, with reasonable diligence, have been obtained prior to the tribunal hearing. The answer is, again, "no": because the distinctive qualities of the evidence are (i) that it comes from an objective, medical specialist; and (ii) that it observes, and analyses, S's actual reaction to being told that he would be going to School X; any evidence adduced prior to the hearing would not, even with reasonable diligence, have been able to combine those two qualities;

d. I note that the Respondent did not, in its response, oppose admission of the registrar's letter as evidence; in fact, it adduced a further piece of post-hearing evidence, the CAMHS letter of 3 May 2024;

e. in my view, the *Ladd v Marshall* conditions amount to an assessment of whether admitting a "new" piece of evidence, on an appeal against a first-instance decision, is fair and just in all the circumstances; I conclude that those conditions are satisfied and that it is fair and just, in the circumstances of this case, that I have regard to the registrar's letter (the Appellants did not oppose introduction of the CAMHS letter, so I have had regard to that, as well).

23. Returning now to the question of whether, in the particular circumstances of this case, one can infer that the tribunal did have regard to S's feelings about School X: it seems the position was that there was nothing in bundle about this; the tribunal does not seem to have elicited evidence about it from S in the course of his short attendance at the hearing; and yet, as the registrar's letter indicates, S had very strong feelings on the subject, indeed. It seems to me that the tribunal decision did not, in fact, take these feelings into account; that was an error of law, and a material one, as the strength of feeling was such that it may have had an impact on the decision as to the appropriateness of School X for S.

24. As to *why*, procedurally, the tribunal did not have evidence of S's strength of feeling before it: this seems, in part, to be due to some

"passing of the buck" as between the Respondent and the Appellants, as regards the responsibility to present S's views (I am referring to what was said in the response, quoted at paragraph 21a above); in part due to the Respondent's naming of School X occurring a month or so after its response (and so, for a period during the tribunal proceedings, there was no reason for S's feelings *about School X* to be identified); and in part due to the inherent difficulty, and sensitivity, in identifying, and exposing, potentially negative emotions of a 7-year-old boy with special education needs. It seems to me unsurprising that his "brief" attendance at the hearing did not elicit this evidence, as this was not the appropriate setting at which to delve into, and potentially expose, negative feelings of this kind. Ideally, the need for evidence of (potentially upsetting) feelings on the part of the child concerned would have been identified earlier in the appeal process and then gathered in a sensitive way with the welfare of the child, as ever, paramount. One cannot be prescriptive about how this is to be done (although I note in this appeal there was no educational psychologist amongst the witnesses before the tribunal, and neither party has referred to an educational psychologist's report in the written evidence); one can do no more than cite the guidance given in the Senior President of Tribunals' Practice Direction (First-tier and Upper Tribunals: Child, Vulnerable Adult and Sensitive Witnesses) of 30 October 2008, particularly paragraphs 6 and 7.

Why I have set aside the decision as respects the school named in Section I and remitted the case for reconsideration of that aspect of the appeal by the tribunal

25. The error of law identified is material to the decision as respects the school named in Section I and so it is right that I set the decision aside as respects that aspect of the appeal. Equally, I see no reason to interfere with the other aspects of the decision, as they have not been challenged, and are distinct.

26. I do not accept the suggestion that, having set aside the decision, I should neither re-make it nor remit the case for reconsideration, on grounds that, I am told, the Respondent has recently decided to review S's EHC plan under s44: the Appellants did not agree to this suggestion and, it seems to me, their statutory right to appeal against the contents of S's plan as it now stands can not be affected by this separate process.

27. As to whether I should remake the decision as respects the school named in Section I or remit it for reconsideration, it would not be fair and just for me, as a single judge of the appellate tribunal, who heard none of the evidence first hand, to do the former. The matter in hand calls for an evaluative judgement by the fact-finding, specialist first-instance tribunal, normally comprised of a judge and specialist members. I have therefore remitted the case for rehearing of the Section I appeal. Whilst

I do not doubt that the original panel would be appropriate for the rehearing, it is in the interests of all concerned to avoid any possible question of not looking at matters with an open mind – and it would slow matters down to reserve the rehearing to the original panel. I have therefore directed that a fresh panel consider the remitted case.

Zachary Citron
Judge of the Upper Tribunal

Authorised for issue 11 July 2024