HS/3658/2016

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision and Hearing

1. **This appeal succeeds**. In accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal (Health, Education and Social Care Chamber), made on 27th September 2016 (written reasons) after a hearing on 14th September 2016) under reference EH309/16/00010. I refer the matter to a completely differently constituted tribunal panel in the Health, Education and Social Care Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

2. The parties should regard themselves as being on notice to send to the clerk to the tribunal as soon as is practicable any further relevant written evidence. The fact that the appeal has succeeded at this stage is not to be taken as any indication as to what the tribunal might decide in due course. Technically my decision sets aside the whole of the First-tier Tribunal decision, but many matters are agreed between the parties and the new panel of the First-tier Tribunal will probably wish to endorse those areas of agreement and only deal with any outstanding disputes. The new panel may take account of evidence given at the previous hearing but is to make its own independent decision on all relevant matters.

3. I held an oral hearing of this appeal at the Rolls Building (London) on 7th June 2017. The appellant (the mother of the child in question) attended in person and was represented by Louise Price of counsel and Samantha Hale of Simpson Millar, solicitors. The respondent local authority was represented by Janet Miller, one of its senior officers (who is not legally qualified). I am grateful to them all for their assistance.

Background

4. The relevant child is a boy to whom I shall refer as "Adam" (not his actual name). He was born on 21st September 2008. Adam was diagnosed with autistic spectrum disorder in March 2015 and also has language, emotional, behavioural and significant sensory difficulties. In February 2016 the respondent local authority issued an educational, health care and social care ("EHC") plan in respect of Adam and in the same month he started attending an independent special school, which he continues to attend and about which there is no dispute. However, he is unable to walk to the school and the issue between the parties that is relevant for the purposes of my decision is whether and what reference to his transport difficulties should be made in the EHC plan.

5. There is no dispute that in accordance with section 508B of the Education 1996 the respondent local authority is under a duty to provide transport (and they do so by way of an allowance to the appellant who drives Adam to school). There is a dispute over what type of transport is suitable. However, the way in which a local authority exercises that power is not one of the matters specified in section 51 of the Children

and Families Act 2014 in respect of which there is a right of appeal to the First-tier Tribunal. It appears that legal proceedings to challenge a decision on this by the local authority must be by way of judicial review in the High Court. However, there is a right of appeal under section 51 in respect of the contents of any EHC plan.

6. The appellant did not accept that the EHC plan accurately described Adam's special needs or the provision required to meet those needs and appealed to the First-tier Tribunal. The First-tier Tribunal considered the matter at a hearing on 15th September 2016 and its written decision and reasons were signed on 27th September 2016. The appellant was represented at the First-tier Tribunal hearing by Ms Hale. Under the heading "Preliminary Issue" the written decision stated as follows (references are to paragraph numbers):

> 5. Ms Hale submitted that this is an exceptional case where transport should recorded in the EHC plan pursuant to paragraph 9.215 of the 2014 Code of Practice as [Adam] has particular transport needs.
>
> 7. The tribunal took account of the most recent decision of the Upper Tribunal in Staffordshire County Council v JM [2016] UKUT 0246 (AAC), which confirms that school transport is neither a special educational need or special educational provision and, as such, the tribunal has no jurisdiction to order a [local authority] to provide school transport. The legal remedy in school transport cases is judicial review.
>
> 8. The tribunal considers this Upper Tribunal decision makes it clear that whether or not this is an exceptional case is not an issue within its remit, as the avenue of appeal lies elsewhere.

7. The appellant applied for permission to appeal to the Upper Tribunal on this and other points. On 4th November 2016 a judge of the First-tier Tribunal refused to give permission and on 2nd December 2016 the appellant renewed her application to the Upper Tribunal itself. I held an oral hearing of the application on 3rd March 2017 and on 8th March 2017 I gave permission in the following terms:

> "It is arguable that the effect of the decision in Staffordshire [2016] UKUT 0246 (AAC) was wrongly understood and applied. That case dealt with adults. The Upper Tribunal should consider the position in relation to children."

I refused permission on the other matters raised and I have tried to limit my decision on the substantive appeal to the issue identified in the grant of permission.

The Legal Framework

8. Insofar as is relevant the Children and Families Act 2014 provides as follows:

> **20**(1) A child or young person has special educational needs if she 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 … 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 …

21(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 …
>
> …

37(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 purpose of this Part, and EHC plan is a plan specifying –

> (a) the child or young person's special educational needs;
>
> (b) the outcome sought for him or her;
>
> (c) the special educational provision required by him or her;
>
> …

51(1) A child's parent or a young person may appeal to the First-tier Tribunal against the matters set out in subsection (2) …

(2) The matters are –

> (a) a decision of a local authority not to secure an EHC needs assessment for the child or young person;
>
> (b) a decision of a local authority, following an EHC needs assessment, that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan;

(d) where an EHC plan is maintained for the child or young person –

(i) the child 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.

…

There are more detailed provisions in regulations, but they do not need to be set out here. The issue really is whether the plan can ever specify transport needs and provision.

Staffordshire County Council v JM [2016] UKUT 0246 (AAC) ("Staffordshire")

9. It is important to note that Staffordshire concerned an adult (age 21 at the time of the Upper Tribunal decision) and that section 508F of the Education 1996, which was considered in that decision, applied only to those over the age of 19. The decision of the Upper Tribunal was that there could be no jurisdiction in such a case in the First-tier Tribunal. That decision was not about the case of a child and is not authority (nor does it claim to be) in respect of the position of a child of Adam's age.

10. However, certain more general statements were made and other authorities cited. In relation to the predecessor provision of section 21(1) (above) Upper Tribunal Judge S M Lane said (references are to paragraph numbers and the emphasis is mine):

> "23. It is clear from the wording of these provisions that a special educational need must *arise* from a learning difficulty. It is also clear that the learning difficulty must call for special educational provision.
>
> 24. On this language it cannot be sensibly argued that a need for home to school transport arises from a learning difficulty *in and of itself*. Nor, on the wording, can home to school transport be classed as a form of special educational provision. …"

11. There is nothing in these comments, and citations from other decisions to similar effect, that I disagree with, but they go to questions of fact to be decided (on an appeal) by the First-tier Tribunal. They do not go to jurisdiction. I am unaware of any authority that states in terms that as a matter of law transport needs can never constitute a special educational need and that measures to deal with them can never in any circumstances whatsoever be specified in the plan (or in the forerunner statements of a special educational need).

Conclusions

12. For the above reasons I consider that the First-tier Tribunal was in error of law in stating that it had no jurisdiction to consider transport matters in this context and was in breach of the rules of natural justice and fair procedure in refusing to hear argument on this from the appellant's legal representatives. It might well be that the panel could envisage no circumstances in which it would accede to such arguments, and it might well be that the new panel will reject them, but that is not the point. The First-tier Tribunal should have listened to the arguments.

H. Levenson
Judge of the Upper Tribunal

8th June 2017