IN THE UPPER TRIBUNAL **Appeal No HS/2685/2019**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from: First-tier Tribunal (SENDIST)

Between:

AC

Appellant

- v –

London Borough of Richmond on Thames

Respondent

Before: Upper Tribunal Judge M R Hemingway

Hearing date: 3 November 2020

Representation:
Appellant: In person
Respondent: Ms C Patry (Counsel)

Order

Under rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 it is ordered that no person may disclose or publish any matter likely to lead to a member of the public identifying the child with whom this appeal is concerned. This order does not apply to (a) the appellant in this appeal to the Upper Tribunal; (b) any person to whom the appellant discloses such a matter where disclosure is in the best interests of the child; (c) any person exercising statutory (including judicial) functions in relation to the child.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

1. The appellant has brought this appeal, with my permission given on limited grounds, from a decision of the First-tier Tribunal (F-tT) which it made following a hearing of 24 September 2019 and which it explained in written reasons of 8 October 2019 (the "written reasons"). I held an oral hearing (a traditional face-to-face hearing) of the appeal at Field House in London, on 3 November 2020. The appellant, who is the mother of the child with whom this appeal is concerned, attended and represented herself. The respondent ("the LA") was represented by Ms C Patry of Counsel. I am very grateful to each of them. I have decided to dismiss the appeal to the Upper Tribunal. What follows is an explanation as to why.

2. The child (I intend no discourtesy in not naming her) is said, in an Education, Health and Care Plan (EHCP) to have speech and language difficulties and to possess overall low/average skills with respect to education. It is said her literacy and numeracy skills are significantly behind her peers. There is, in the material before me, evidence of lengthy ongoing dispute between the appellant and the LA regarding various aspects of her education. The issue of dispute which has ultimately led to this appeal, however, is a single one concerning the content of section I of the EHCP.

3. As to the above issue, the child had been attending a voluntary aided mainstream school following an earlier decision made by a different F-tT. But she had stopped attending in January of 2019. The time for her to transfer to a secondary school was approaching and it was initially the hope of the appellant that she would attend a school I shall call "STMC" which is a mainstream academy. Indeed, as things stood before the F-tT, that school was named in section I of the EHCP in line with parental preference. However, the headteacher of STMC had indicated, in writing, that he thought the LA had not adequately consulted before naming it in the EHCP and that it was in any event not capable of meeting the child's needs. The LA proposed to name a different mainstream academy I shall call "RPA" but the appellant did not consider that to be suitable. By the time matters reached the F-tT, the appellant's position was that section I should not specify a particular school but, rather, should simply describe a type of school which would be suitable. The LA's position was that RPA should be named.

4. In the usual way, the parties provided the F-tT with documentation which appeared to have relevance to the issue it was called upon to decide. The LA, in accordance with what rule 21 of the First-tier Tribunal (Health, Education and Social Care Chamber) Rules 2008, ("the F-tT's Rules) provided the F-tT with a response to the appellant's appeal. That rule, which must be applied in light of the content of rule 2 (the overriding objective), in addition to requiring a respondent to an appeal to provide certain specific information, also requires the provision of "*any further information or documents required by an applicable practice direction or direction*" (see rule 21(2)(f)). That potentially brings into play Practice Direction: First-tier Tribunal, Health Education and Social Care Chamber, Special Education Needs or Disability Discrimination in Schools Cases of 30 October 2008 ("the PD"). As is pointed out on behalf of the LA, the PD was issued under predecessor legislation, that is to say before the coming into force of the Children and Families Act 2014 ("the 2014 Act"). But no-one has identified any later relevant PD or suggested that PD does not continue to have relevance, or that its requirements should no longer be observed. The PD, amongst other things, specifies that in a special educational needs case (which this is) a respondent should supply "*any supplemental evidence and professional reports currently available to the LEA and upon which it intends to rely*" (see paragraph 10(c) of the PD). To complete this particular picture with respect to a respondent's obligations to provide documents, Her Majesty's Courts and Tribunal Service (HMCTS) has provided guidance for local authorities in special educational needs cases concerning, amongst other things, what documents it should send to the F-tT. The guidance was issued on 1 July 2014 and replaced pre-existing guidance. I am not told there has been any subsequent relevant guidance. It specified a need to include in a response to an appeal, "*up-to-date and detailed information about the child*". It was said doing so could involve production of the "*latest assessments by people from school or external agencies*". The LA prepared

and provided the bundle of documents for the purposes of the F-tT hearing. A copy was given to the appellant.

5. The F-tT held an oral hearing of the appeal. The applicant represented herself and the LA was represented by Counsel. It is clear that, at the outset of the hearing, the F-tT decided to admit further documentary evidence provided to it by the LA (see paragraph 3 of the written reasons). The F-tT heard oral evidence from the applicant and from two members of the teaching staff at RPA. It made it clear (paragraph 12 of the written reasons) that it had considered all of the evidence both oral and documentary before deciding the appeal. It correctly directed itself as to matters of law (paragraphs 13, 15 and 16 of the written reasons) and it reminded itself that the applicant was urging it to describe, in section I, a school that "*must be capable of providing small classes and a bespoke all-round education, GCSE's for students, and keep them safe*". The F-tT observed that such did not represent a type of school in any technical or legal sense but, rather, "*a description of the provision*" (paragraph 14). It decided that, based on the evidence before it, including the oral evidence, RPA could supply the provision set out in section F of the EHCP and could meet the child's needs (paragraph 17). It added, for good measure, that it thought there was no basis for taking the "*exceptional course*" of simply describing a type of school in section I when RPA was able to make "*the appropriate provision*" (paragraph 18). Finally, although this did not form part of its reasoning on the appeal, it expressed the hope that the applicant would now feel able to work with the staff at RPA "*to ensure a successful transition to RPA*" and observed that it was vital that the child return to school without delay.

6. An application to the F-tT to have its decision set-aside followed. That application was made by Solicitors then acting for the applicant. The application was treated as one for permission to appeal to the Upper Tribunal (permissible under rule 50 of the F-tT's Rules) but permission was refused. The Upper Tribunal was then invited to give permission to appeal, though the application appeared to have been erroneously targeting the F-tT's refusal of permission to appeal rather than the actual decision of the F-tT on the appeal itself. But Upper Tribunal Judge Wikeley helpfully interpreted what had been said, insofar as it was possible, as arguments directed towards the decision the F-tT had made on the appeal. I pause to note that one of the arguments translated into a contention that there had been unfairness through the LA failing to provide relevant evidence when it compiled the bundle which was before the F-tT when it heard the appeal. Indeed, the grounds listed six separate reports relating to the child which it was claimed had not been included. In refusing permission Upper Tribunal Judge Wikeley observed, amongst other things, that not all the reports specified had been omitted from the bundle, that there was some responsibility upon the applicant to provide documentary evidence she wished to rely upon, and that the reports did not appear to have material relevance to the issues the F-tT had to decide.

7. The applicant (as is her right) asked for matters to be reconsidered by way of an oral hearing. That hearing took place, before me, on 14 February 2020. The applicant was, by this time, once again unrepresented. So, she argued matters in person before me. The LA did not attend the hearing and, indeed, it had not been required to do so. In addition to the points raised by her now former legal representatives, the applicant relied upon multiple other grounds. I considered all of what she had to say with care but ultimately concluded that the bulk of the grounds advanced were not arguable. I did, though, give permission on a limited basis, in fact on one ground

only, because I thought the LA might have been under a duty to provide the missing reports and that there might have been unfairness as a result of its not having done so. I explained why I was refusing permission on all of the other grounds in my written permission decision of 27 February 2020. There has been no subsequent challenge to my decision to give permission only on the limited grounds set out above and it is not necessary for me to repeat, in this decision, my reasons for rejecting all but one of the grounds advanced before me. My having given permission on the basis upon which I did, the parties provided written submissions in the usual way and, at the request of the appellant (the LA taking the view matters should be resolved on papers) I directed an oral hearing of the appeal.

8. The oral hearing was, notwithstanding the impact of the coronavirus pandemic, a face-to-face hearing. Representation was as indicated above. Unsurprisingly, the applicant urged me to allow the appeal and the LA urged me to dismiss it.

9. Going back to the written grounds of appeal to the Upper Tribunal, there were, as I have noted, six reports said in those grounds to be absent from the F-tT bundle. It was, in effect, contended that the LA should have supplied the F-tT with copies of all of them, that the content was relevant, and that unfairness resulted from the F-tT deciding the appeal without them.

10. In fact, a report which had been prepared by Ruth Jacobs, an independent speech and language therapist and which was dated 6 January 2016, had been before the F-tT when it heard the appeal (though it did not find it necessary to refer to it) notwithstanding an assertion in the grounds that it had not (see B66-B74 of the F-tT bundle). The grounds did specify other reports being one prepared by Simon McDowall, an independent educational psychologist on 14 November 2016, two reports prepared by Amanda Christie, a speech and language therapist which were dated 11 March 2016 (not 2017 as stated in the grounds) and 17 May 2017 respectively, a report of Trudi Baily a speech and language therapist of 1 October 2018 and a report of Sarah Bentley, a speech and language therapist of 1 June 2017. Copies of all the missing reports have now been placed before the Upper Tribunal though there was some delay (though I make no criticisms) in that being achieved.

11. Logically, there might be a case for saying I should, first of all, deal with the nature and extent of a respondent's duty to provide documentation to the F-tT in an appeal such as that which was before the F-tT in this case. But it seems to me that really the most obvious question to be considered relates to what might have been expected of the appellant. So, I shall address that matter first of all.

12. There is no dispute about the fact that the appellant did not take steps to place the five missing reports specified above before the F-tT herself. Whatever obligations the LA might or might not have had, there were obvious opportunities for her to have done so. Directions had been issued requiring the LA to provide its response to the appeal by 12 June 2019 and then requiring the appellant to send, by 13 August 2019, "*any further written information, including professional reports, upon which they intend to rely*". The timescale for compliance was not overly demanding. Further, as Ms Patry points out, since the F-tT had obviously been amenable to considering applications for late evidence (see above) an application to admit the reports by way of late evidence could have been made at the outset of the hearing. But that was not attempted. This is against a background of the parties, which includes appellants as well as respondents, being under a duty to "help the Tribunal to further the overriding

objective" and to "co-operate with the Tribunal generally" (see rule 2 of the F-T's Rules). I do not underestimate the difficulties people may have as litigants in person nor the pressure people might feel under in preparing cases which are of real importance to them and/or their children. And I make clear I am here making no criticism of the appellant whatsoever. But in my judgement, if she wanted to rely upon anything in those reports, bearing in mind they had not been supplied by the LA and bearing in mind the above opportunities, and further bearing in mind that actually she could have attempted to submit them (even if late with a request for late admission) at any point from the lodging of the appeal up to the commencement of or even during the hearing, she was required to do so. So, I have concluded that, on this basis alone, I have to dismiss this appeal to the Upper Tribunal.

13. I shall also say something about the relevance of the content of the reports. The LA has argued that there is nothing in the material contained within the reports which could have had relevance to the issues the F-tT was required to decide. Of course, the only real issue was that of placement in section I of the EHCP. The point is made in writing on behalf of the LA that the reports are old. It is suggested (respectfully) that I understated the position when, in giving permission, I described them as "somewhat dated" and "now quite old". I do accept that it is difficult to regard any of the reports as being truly current in the context of an evaluation of the educational needs of the child which was being made by the F-tT on 24 September 2019. But I would be resistant to an argument that age alone precludes relevance. However, there is no meaningful explanation in the written grounds as to how the content of any of the reports might have been relevant or might have influenced the outcome of the appeal before the F-tT in any way. The appellant, before me, was steadfast in her view that the LA had deliberately omitted the reports, a contention which I shall say something more about below. But she too was unable to say how the content of the reports might have been relevant or might have assisted the F-tT. Her view that the reports "*needed to be respected*" is almost certainly true in general but that does not establish relevance to the issue at hand before the F-tT. Further, her not submitting the reports herself would be consistent with the view that they did not have relevance.

14. I had, in giving permission, noted that Simon McDowall had expressed the view, albeit in November 2016, that at that time the child would have difficulty accessing a mainstream school curriculum. I had also noted that Sarah Bentley had, in June 2017, expressed the view that her needs "*would be met appropriately in a specialist school*". But that was then. Further, as Ms Patry points out, the child had been attending a mainstream school since October 2017, the appellant had not argued for a specialist school when she was before the F-tT and the school she had previously wanted the child to attend (STMC) was not such a school.

15. In light of the above I have concluded that there was nothing in the missing reports which did have relevance to the question the F-tT had to resolve with respect to section I of the EHCP. It follows that, even if I had decided the appellant need not have supplied them to the F-tT herself and was entitled to say the LA should have done so, the appeal would still have failed in consequence of the lack of materiality in the content of the reports. That then is a second reason why this appeal must fail.

16. Having concluded as I have, it is really unnecessary for me to say anything at all about the scope of a respondent's duty generally or the extent of the LA's duty in this particular case to provide documentation to the F-tT on an appeal in a special

educational needs case. But I will say something even though anything I now do say is not essential to this decision.

17. On a strict reading it might be thought that rule 21 of the First-tier Rules when read in conjunction with the PD simply requires a respondent in an appeal concerning special educational needs, to produce only particular specified documents and information as well as supplemental evidence and professional reports currently available to it and upon which it intends to rely (to borrow from the wording of the PD). But I suspect it is uncontroversial to say that, as a result of rule 2 of the F-tT's Rules (the overriding objective) such a respondent ought also to supply any such material which it does not wish to rely upon but which it nevertheless thinks is likely to assist the F-tT in reaching a just decision on the appeal before it. I would add that, where a LA is in doubt about whether such material in its possession would assist the F-tT in reaching a just decision it should play safe and produce it. This does seem to me to be, in general terms, consistent with the HMCTS guidance. That guidance also serves to supplement a respondents' obligations to an extent by requiring up-to-date information which, it is said, may include a range of the "*latest assessments*". But I accept the submission made on behalf of the LA that there is not a blanket duty to disclose all expert assessments or reports whenever they were prepared. The key as to older reports or assessments will, it seems to me, be relevance to the issues to be determined in an appeal. In this particular case I am satisfied that there was no failure to comply with any requirement to produce documentary evidence because the extent of any such duty to provide anything other than specified documents is limited to relevant material which may assist the F-tT in reaching a just result. The material not produced here did not fall within that category.

18. I did say I would comment further on the allegation that the LA deliberately withheld the documents to help secure the result it was seeking. I acknowledge the strength of the appellant's feeling that this is so and the strength of the denial given by Ms Patry on behalf of the LA and on instructions. It is undoubtedly the case that 5 of the above reports were not put before the F-tT. But I have concluded they did not have relevance to the issues the F-tT was tasked with resolving. Whatever the strength of feeling about this, it seems to me that that lack of relevance is a much more plausible explanation for the lack of inclusion than anything else. So, insofar as it might be necessary for me to do so, I have concluded that there was no bad faith.

19. This appeal to the Upper Tribunal then is dismissed.

20. Finally, I will express my hope that the child's schooling will resume soon. As I understand it she is not currently attending school. Without seeking to put any blame at all on any individual or any organisation (and the determination and vigour with which the appellant pursued matters was impressive), I would observe that this is an unfortunate state of affairs and I would express the wish that a way forward may be found even if that involves some degree of compromise.

(Signed on the original)

M R Hemingway

Judge of the Upper Tribunal

20 November 2020