



Neutral Citation Number: [2020] EWCA Civ 226

Case No: C3/2019/2359

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Upper Tribunal (Administrative Appeals Chamber)
Upper Tribunal Judge Wright
HS5202019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/03/2020

Before:

THE SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE NEWEY
and
LORD JUSTICE COULSON

Between:

Nottinghamshire County Council
- and -
SF and GD

Appellant

Respondents

Mr. Andrew Hogan (instructed by **Nottinghamshire CC**) for the **Appellant**
Miss Charlotte Hadfield and **Mr. Mathew Wyard** (instructed by **Sinclairslaw Solicitors**) for
the **Respondent**

Hearing date: 21 January 2019

Approved Judgment

The Senior President:

Introduction:

1. The appellant local authority, Nottinghamshire County Council, appeals an order made by Upper Tribunal Judge Wright on 13 August 2019 which upheld a decision of the deputy President of the FtT, Health Education and Social Care Chamber, Judge Tudur, sitting with two specialist members, which was made on 10 December 2018. The proceedings concern the special educational needs and disability jurisdiction of that tribunal. The core question is whether the tribunals wrongly construed the meaning of ‘necessary’ in section 37(1) of the Children and Families Act 2014 [‘CFA 2014’]. Although the appeal is pursued as a question of law, the answer in this particular case is a question of fact.
2. The error of law that is said to have been made concerned the FtT’s decision that it was necessary for special educational provision to be made for a child known in the proceedings as ‘HD’. That had the effect that the local authority was obliged to make special educational provision for HD in accordance with an Education Health and Care Plan [‘the EHC plan’] formerly known as a ‘Statement of Special Educational Needs’. The circumstances that gave rise to the question are said to arise out of agreed facts, namely that HD’s school had successfully identified his needs and was meeting them and that HD was making progress at the school.
3. An anonymity order has been granted which extends to the name of the child, the names of his parents and the name and address of the school.
4. This is the first time that the Court of Appeal has had to consider the meaning of “necessary” in section 37 CFA 2014 or for that matter the equivalent provision in its predecessor, the Education Act 1996.

Background:

5. The appeal concerns a young boy who is now 7 years old and the special educational provision that he needs. He has an autism spectrum disorder, dyspraxia (a developmental co-ordination disorder) and hypermobility. He has difficulties with sleeping, asthma, eczema and is being investigated for attention deficit hyperactivity disorder. He attends a maintained mainstream primary school where his special educational needs are provided for.
6. A statutory needs assessment took place in late 2017. The assessment considered whether HD needed an EHC plan. A panel meeting of the local authority concluded on 8 August 2018 that all his needs had been identified and that the provision offered by the school met his current needs. A decision letter communicating the decision not to make an EHC plan for him was issued on 14 August 2018.
7. HD’s parents appealed against this decision to the First-tier Tribunal [‘FtT’]. A hearing took place on 28 November 2018. The appeal was allowed by the FtT on 10 December 2018. Neither party was legally represented before the FtT. The local authority unsuccessfully appealed the FtT decision to the Upper Tribunal [‘UT’] and then, with the permission of the single judge, to this court.

The context and the legal framework:

8. Special educational provision is provided to pupils either by their schools in accordance with section 66 CFA 2014 or in accordance with an EHC plan which is secured and maintained by the Local authority under section 37(1) of the same Act.
9. The Department for Education's statistics indicate that in January 2019 there were 1,318,000 pupils with special educational needs of whom 271,000 had an EHC plan. Most children with special educational needs do not have an EHC plan so that responsibility for their special educational provision remains with the school they attend.
10. By section 66 CFA 2014, children who do not have an EHC plan are owed a statutory duty by the governing body of their school to use its "best endeavours" to secure the special educational provision that they need. This duty is not absolute so that resource constraints may be taken into account. By contrast, children with an EHC plan are owed an absolute duty by the Local authority to make the provision specified in the EHC plan. Resource constraints are irrelevant once special educational provision has been identified in the EHC plan. By section 37(1) CFA 2014, an EHC plan will only be made for a child if it is necessary for special educational provision to be made in accordance with an EHC plan. A decision not to make an EHC plan can be appealed to the FtT but the tribunal has no jurisdiction in relation to section 66 arrangements.
11. The local authority submit that it cannot be "necessary" for an EHC plan to be prepared and maintained by them in relation to a child who is making progress at a school which has been found to have successfully identified the child's needs and to be providing appropriate special educational provision. To say otherwise, they submit, would be to go against the fact that most children being given special educational provision do not have an EHC plan. Further, they submit, it would go against the Code of Practice issued to schools and local authorities in relation to children with special educational needs, which at para 9.55 provides that "a local authority should only consider what further provision may be needed" if "despite appropriate assessment and provision, the child or young person is not progressing, or not progressing sufficiently well".
12. HD's parents submit that the statutory framework (and in particular sections 37 and 21 CFA 2014) does not define "necessary" in relation to the provision that a particular child's school gives to that child. Rather, "special educational provision" is defined in the CFA 2014 comparatively by reference to educational provision generally available for a child of the same age in mainstream schools in England, i.e. nationally. If the special educational provision made by HD's school is not educational provision that would be made generally for children of HD's age in mainstream schools in England, then the FtT is entitled to find that it was necessary for an EHC plan to be made for that child. As to the Code of Practice, the parents submit that the Code of Practice is not binding on the tribunal or this court.
13. Part 3 of the CFA 2014 contains the statutory framework which describes the education of children with special educational needs in England.
14. Sections 20 and 21 CFA 2014 define special educational needs and special educational provision as follows:

“20 (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(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

[...]”

15. Section 36 CFA 2014 imposes an obligation upon Local authorities to carry out a statutory assessment to determine whether it is necessary for special educational provision to be made for a child in accordance with an EHC plan. It provides:

“(1) A request for a local authority in England to secure an EHC needs assessment for a child or young person may be made to the authority by the child’s parent, the young person or a person acting on behalf of a school or post-16 institution.

(2) An “EHC needs assessment” is an assessment of the educational, health care and social care needs of a child or young person.

(3) When a request is made to a local authority under subsection (1), or a local authority otherwise becomes responsible for a child or young person, the authority must determine whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

[...]

(8) The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted under subsection (7), the authority is of the opinion that—

(a) the child or young person has or may have special educational needs, and

(b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

[...]”

16. Section 37 CFA 2014 describes when a local authority must secure and maintain an EHC plan and its content. It provides, in so far as is relevant:

“(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’s 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;

(d) any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs;

(e) in the case of a child or a young person aged under 18, any social care provision which must be made for him or her by the local authority as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 (as it applies by virtue of section 28A of that Act);

(f) any social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person having special educational needs, to the extent that the provision is not already specified in the plan under paragraph (e).

[...]”

17. Section 44 CFA 2014 describes the requirement for a local authority to review an EHC plan that it maintains, as follows:

“(1) A local authority must review an EHC plan that it maintains –

(a) in the period of 12 months starting with the date on which the plan is first made, and

(b) in each subsequent period of 12 months starting with the date on which the plan was last reviewed under this section.

(2) A local authority must secure a re-assessment of the educational, health care and social care needs of a child or young person for whom it maintains an EHC plan if a request is made to it by –

- (a) the child's parent or the young person, or
- (b) the governing body, proprietor or principal of the school, post-16 institution or other institution which the child or young person attends.

(3) A local authority may also secure a re-assessment of those needs at any other time if it thinks it necessary.

[...]"

18. Section 66 describes the statutory duty on schools to make special educational provision. It provides:

"(1) This section imposes duties on the appropriate authorities for the following schools and other institutions in England—

- (a) mainstream schools;
- (b) maintained nursery schools;
- (c) 16 to 19 Academies;
- (d) alternative provision Academies;
- (e) institutions within the further education sector;
- (f) pupil referral units.

(2) If a registered pupil or a student at a school or other institution has special educational needs, the appropriate authority must, in exercising its functions in relation to the school or other institution, use its best endeavours to secure that the special educational provision called for by the pupil's or student's special educational needs is made.

(3) The "appropriate authority" for a school or other institution is—

- (a) in the case of a maintained school, maintained nursery school or institution within the further education sector, the governing body;

[...]"

19. The Code of Practice: section 77 CFA 2014 requires the Secretary of State to issue a Code of Practice giving guidance to local authorities in England and the governing bodies of schools about the exercise of their functions. The relevant parts of The Code of Practice are to be found in paras 9.53 to 9.55, which relate to the decision whether to issue an EHC plan. These provide:

"9.53: Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made in accordance with an EHC plan, the local authority must prepare a plan. Where a local authority decides it is necessary to issue an EHC plan, it must notify the child's parent or the young person and give the

reasons for its decision. The local authority should ensure it allows enough time to prepare the draft plan and complete the remaining steps in the process within the 20-week overall time limit within which it must issue the finalised EHC plan.

9.54: In deciding whether to make special educational provision in accordance with an EHC plan, the local authority should consider all the information gathered during the EHC needs assessment and set it alongside that available to the local authority prior to the assessment. Local authorities should consider both the child or young person's SEN and the special educational provision made for the child or young person and whether:

- the information from the EHC needs assessment confirms the information available on the nature and extent of the child or young person's SEN prior to the EHC needs assessment, and whether
- the special educational provision made prior to the EHC needs assessment was well matched to the SEN of the child or young person.

9.55: Where, despite appropriate assessment and provision, the child or young person is not progressing, or not progressing sufficiently well, the local authority should consider what further provision may be needed. The local authority should take into account:

- whether the special educational provision required to meet the child or young person's needs can reasonably be provided from within the resources normally available to mainstream early years providers, schools and post-16 institutions, or
- whether it may be necessary for the local authority to make special educational provision in accordance with an EHC plan."

20. Although this is the first time that this question of law has been raised in the Court of Appeal, it has been addressed repeatedly by the Upper Tribunal whose precedent decisions are binding on the FtT. The essence of the UT's case law is that what is necessary is an evaluative judgment based upon the specific facts of the particular case which are for the specialist tribunal to deduce from the evidence in each case. It is not a concept that is to be over-defined. With respect, and for the reasons I shall give, I agree.
21. In *Buckinghamshire CC v HW* [2013] ELR 519 Upper Tribunal Judge Jacobs held that 'necessary' (under the Education Act 1996) has a spectrum of meanings, "somewhere between indispensable and useful". He emphasised that it was a word in common usage, and it is that which a tribunal must apply.
22. In *Manchester City Council v JW* [2014] UKUT 168, Upper Tribunal Judge Mark noted at [14] that what is 'necessary' may involve a value judgment.
23. In *Hertfordshire CC v MC and KC (SEN)* [2016] UKUT 0385 (AAC) Upper Tribunal Judge Lane cites both of the above decisions with approval before adding at [36] that "what is 'necessary' is a matter to be deduced rather than defined. Its determination will vary according to the circumstances of a particular case and may well involve a considerable degree of judgment".

24. Judge Lane also considered the effect of the Code of Practice in *Hertfordshire*. At [27] she noted that “the Code envisages that the majority of children with additional educational needs will not require EHC Plans. Their needs will be met in a mainstream setting from resources normally available at mainstream schools.” She considers paragraphs 9.53 to 9.55 of the Code before summarising a paradigm case in the following way (at [29]):

“(a) What did we know before? [the assessment]
(b) What do we know now? [after the assessment]
(c) If (a) and (b) are well matched, an EHC Plan is probably not necessary; but
(d) If the child is not making progress/sufficient progress despite (a) and (b) being well matched, can appropriate provision be made from normal mainstream resources? Or may the Local Authority have to go further and issue a plan? In other words, which side of the line does the case fall on.”

And then finally:

“Point (d) is no more than a restatement of the question ‘is an EHC Plan necessary’.”

25. Judge Lane also cited Judge Mark in *Manchester* at [32] as follows:

“I bear in mind that the Code of Practice is precisely what it is said to be – guidance to which the local authority and tribunal must have regard. It does not affect the generality of section 324 [under the Education Act 1996] so as to exclude any possibility that a statement may be necessary for some other reason than those indicated in the guidance”

26. Finally, in this short review of the UT’s decisions on the point, Judge Lane held at [19] that:

“The Code is not, however, binding law. Where there is a difference between the law as set out in statutes, regulations and case law, and the Code, the Tribunal must follow the law”.

27. Despite the eloquence of those who have made submissions to this court and for the reasons I shall describe, I have come to the conclusion that the Upper Tribunal, reflecting the specialist practice of the First-tier Tribunal in this jurisdiction, has correctly described the principles to be applied by that tribunal.

Decisions appealed:

28. The findings of fact made by the FtT are not challenged. It was a panel with specialist knowledge of special educational needs. Their findings are in summary as follows: the school had fully identified HD’s needs including some identified jointly by the parents and the school which had not been recorded by the school (FtT judgment at [30]); there was a need to be flexible as he matures and his needs change (at [31]); the school was meeting HD’s needs in their educational provision for him (at [34]) i.e. he did not require additional provision; the school is consistently monitoring and adapting their provision to meet his needs as evidenced by small changes that had been made (also at [34]) and HD is making progress (at [33]).
29. The FtT analysed with care the frequency of the activities and support that are provided by the school to HD setting that out in a tabular form, describing the hours and minutes of each

provision. The FtT then came to a further factual conclusion that is important: “We have accepted [the SENCos] evidence that despite the support in place, for the first time [HD] has been demonstrating his anxiety in school and that his provision will need to be adapted as he develops and matures...The need to constantly monitor and adapt his provision is also an additional resource, not currently covered by the provision map...” (FtT judgment at [37]).

30. The FtT’s evaluative judgment can be found at the end of its judgment (at [38]) where it concluded that an EHC plan was necessary:

“The statutory position is now that the relevant comparator is not whether this provision could be made from within the resources of mainstream schools in the area but nationally in England. Those present at the hearing acknowledged that they were not in a position to make that comparison, and perhaps the tribunal as a national jurisdiction is better placed to use its specialism to do so. We have concluded that the level and quality of provision currently made by [the school] for [HD] is unlikely to be replicated in other local authority area mainstream schools, and would require an EHC plan to ensure its delivery and monitoring. We put on record that on the evidence presented to the tribunal, [HD] is unlikely to require any additional provision immediately, over and above what is in place, but his provision will require constant monitoring and adapting to manage his anxieties and to develop his skills and for these reasons we have concluded that it is necessary for the LA to make and maintain an EHC plan for him.”

31. The UT came to the conclusion that “[the FtT] correctly construed and applied section 37 of the CFA to the evidence before it and was entitled to conclude that an EHC Plan was necessary”. In an elegant judgment, Upper Tribunal Judge Wright analysed how in section 21(1) of the CFA 2014 Parliament had changed the comparator that the FtT is to apply when considering whether an EHC plan is necessary to that provision which is additional to or different from that made generally for others of the same age in mainstream schools in England (rather than as hitherto had been the case, within the local authority’s own area). The FtT had undertaken this comparison and Judge Wright concluded at [15] that:

“the Tribunal in my judgment was entitled to conclude, using its specialist expertise, that, notwithstanding the extensive educational provision Nottinghamshire was providing to HD and his ‘progress’, this was not educational provision that would be made generally for children of HD’s age in mainstream schools in England, and for this reason it was ‘necessary’ for an EHC Plan to be made for him.”

32. Judge Wright went on to hold at [16] that:

“The fact that this analysis may appear contrary to the guidance in the Code of Practice is neither here nor there (it is only guidance, and the tribunal had regards to it) if, as I have found it was entitled to do, the tribunal applied the test(s) in the statute to the evidence before it. Nor does this approach contradict or otherwise subvert the longstanding view (see paragraph 27 of *Hertfordshire cc v MC and KC*) that the majority of children with special educational needs will not require EHC Plans. An evaluative judgment still has to be made as to the *extent to which* [original emphasis] the educational (or training) provision the child needs is additional to, or different from, the educational (or training) provision made generally for others of the same age, and thus needs to be made in accordance with an EHC Plan.”

The appeal to this court:

33. There are three grounds of appeal. They are that the tribunals were wrong in law in their construction of what is necessary, that they wrongly applied the test in section 37(1) CFA 2014 to the facts of the case and wrongly applied the Code of Practice. It is to be noted that there is no challenge to the findings of fact.
34. The local authority criticises the tribunals' analysis of the actual provision for HD and that which would be available nationally in mainstream education. They submit that the comparative exercise (which they do not challenge as a matter of statutory construction) misses the point which is that on the facts of this case the specialist educational provision is being made for HD with the consequence that there is no shortfall in provision or risk of the same to compare with national provision. They submit that the comparative exercise is only relevant to gauge the likely availability of future provision in circumstances where the existing provision is inadequate. They pray in aid the Code of Practice which at para 9.55 relates the necessity for a plan with the lack of sufficient progress of a child. It lends support to the local authority submissions. This school was well-matched to this child's needs.
35. The local authority submits that the FtT's value judgment that HD's needs may change in the future is no more than a statement of the obvious that will apply in every case. In any event, they submit, absent particular evidence of the resource implications of a particular provision, actual or foreseeable, which might need to be addressed (and which they submit is not this case) the statutory scheme provides a mechanism for annual review and for the right of children who do not have a plan to ask for a statutory assessment every six months. There is no concept in the scheme of monitoring and adaptation or adjustment being a part of special educational provision. In that circumstance, they say, an EHC plan is not necessary.
36. The parents submit that there is nothing in section 37(1) that defines or limits what is 'necessary'. It says nothing about the adequacy of provision or progress. Both are relevant considerations but neither is exclusive of other considerations that may be relevant on the facts and which may arise, for example, out of the statutory assessment. The range of likelihoods and risks that the statutory scheme has to provide for is as broad as the factual circumstances that give rise to them. It is entirely possible that the fact that an existing school is able to make special educational provision where others would not, may be relevant to the likelihood that over time resources may impact on that provision or that a change to a different school or the change to teaching and support resources may lead to different provision in the absence of an EHC plan. Greater divergence from the national norm may increase the likelihood of the breakdown of provision. Judge Wright had regard to this at [16] in the Upper Tribunal when he commented that the evaluative judgement of a specialist tribunal had to look *at the extent to which* the provision made differed from that made nationally. Where, as in HD's case, the school is providing more than would be expected nationally, there may be a real risk that as the child's needs become even more complex, the school will find itself at the end of its ability or resources to meet them without an EHC plan.
37. The parents also submit that the findings of fact in this case went beyond those relied upon by the local authority. HD had been experiencing anxiety at school for the first time and was under investigation for another diagnosis in what was already a complex situation. He required constant monitoring and adaptation and according to the tool used to demonstrate these matters, the provision map, the school was not resourced for that. The provision map is a tool designed to help Special Education Need Coordinators [SENCOs] as part of their

recording function that is described in para 6.76 of the Code of Practice. The Code of Practice is neither binding nor intended to be exhaustive. The flexibility of the statutory scheme should not be limited only to those situations described in the Code of Practice. Furthermore, the review and re-assessment provisions do not address the reality of the impact on parents and children of those processes and the time that they can take which will sometimes, as it did in this case, extend beyond statutory time limits.

38. As the submissions to this court developed, it became clear that the question in this appeal is not the construction of the word 'necessary' in section 37(1) CFA 2014. No-one seriously questioned the conclusions of the Upper Tribunal in the cases to which I made reference in paragraphs [20] to [27] above, with which I respectfully agree. Necessary is a word in common use and its plain meaning has caused no difficulty in the tribunal. The function of the FtT in these cases is to find facts and to exercise an evaluative judgment by using its specialist expertise about whether an EHC plan is necessary. That is a deduction from the facts and it will depend on the nature and extent of the provision required for the child concerned. It is a fact specific conclusion.
39. It is equally not in issue that the provision that is made for the child has to be compared with that which is available nationally in mainstream education. That is the effect of section 21(1). The tests to be applied by the tribunal are not constrained. The wording of the statutory scheme encompasses both the circumstances suggested by the local authority (for example in their reliance on the Code of Practice) and those suggested by the parents and no doubt other circumstances that may arise out of different fact specific contexts. An EHC plan is necessarily prospective and to that extent a prediction based on the skill and expertise of the decision maker.
40. Focusing on the question that remains, it is whether the value judgment of the FtT in this case is wrong. Given that there is no challenge to the findings of fact, that question is in this case limited to whether a reasonable tribunal properly directed could conclude that an EHC plan is necessary on the facts of this case. It is apt to recollect that the test formulated by the Supreme Court in *Re B (a child) (care order: proportionality: criterion for review)* [2013] UKSC 33, [2013] 2 FLR 1075 in relation to family proceedings is just as applicable to tribunal proceedings. At [53] in the judgment of Lord Neuberger PSC the principle is described in the following way:

“Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it.”
41. Given that (i) and (ii) would be a challenge to the facts, this court would only be entitled to interfere on (iii). That manifestly cannot be a successful argument. The local authority came close to conceding as such when they submitted that this was not a perversity appeal. The FtT cited the relevant legislation and case law, it made findings of fact and it used its specialist experience to come to the conclusion that in HD's case there was sufficient reason for an EHC plan to be necessary. It reasoned its conclusion. The elements identified may well have been marginal and another court or tribunal may have come to a different judgment on the facts but that is not a sufficient reason for this court to interfere on a second appeal.
42. I would dismiss this appeal.

Lord Justice Coulson:

43. I agree.

Lord Justice Newey:

44. I also agree.