



DECISION OF

Lord Young

**ON AN APPLICATION TO APPEAL
IN THE CASE OF**

JH
per Govan Law Centre,

Appellant

- and -

Scottish Borders Council

Respondent

FTS Case reference: FTS/HEC/AR/23/0134

23 September 2024

Decision

The Upper Tribunal for Scotland (UTS) in terms of section 47 of the Tribunals (Scotland) Act 2014 quashes the decision of the First-tier Tribunal (FTS) dated 25 March 2024 and remits the reference to a differently constituted First-tier Tribunal.

Introduction

1. The appellant's younger son (child J), currently aged 6, attends school A. Child J has a diagnosis of autistic spectrum disorder with associated ADHD. It is a matter of agreement



that child J has additional support needs. Child J originally attended an early learning centre attached to school A from around age 3. After two years he transitioned into the primary school at school A. School A has a hub attached to the primary school where child J is provided with significant levels of one-to-one support. There are three other primary 1 pupils who are supported within that hub. The majority of child J's education at school A currently takes place within the hub but he will join pupils in the mainstream primary class for some activities.

2. In February 2023, the appellant made a shared placing request to the respondent that child J be enrolled within the respondent's Leader Valley Enhanced Provision (LVEP). The LVEP are specialist schools for children with complex additional needs. At primary level, the respondent operates five such facilities which include school B and school C. The referral form completed by the appellant did not specify a preference for any particular location within the LVEP. The respondent rejected the placing request by letter dated 30 May 2023. Although two reasons were provided for rejecting the placing request, it is now common ground that only one reason is relevant. That reason for refusal of the placing request being that "the education normally provided at the specified school is not suited to the age, ability or aptitude of the child" (para 3(1)(b) of schedule 2, Education (Additional Support for Learning) (Scotland) Act 2004).
3. The appellant referred the respondent's refusal of the placing request to the FTS in terms of section 18 of the 2004 Act. In her application form to the FTS dated 18 July 2023, she identified school B as the school within the LVEP which her placing request related to. The appellant and respondent entered into a joint minute of agreed facts for the FTS hearing in which it was an agreed fact that the placing request related to school B. Following a hearing, the FTS issued its decision dated 25 March 2024 in which it confirmed the decision of the respondent refusing the placing request. Permission to appeal to the UTS on a point of law was granted by the FTS on 4 April 2024.



Grounds of appeal

4. The grounds of appeals, adjusted to preserve anonymity, are as follows:-

“It is submitted on behalf of the applicant that the Tribunal erred in law, namely, that the First-tier Tribunal:

(i) took into account and was influenced by immaterial evidence, namely, that the findings of the First-tier Tribunal outlined in the decision from paragraphs [42] – [51] as being findings made in respect of School B. These findings derive from the witness statement of Witness C, Principal Teacher at the Enhanced Provision at School C. Witness C makes comparisons of Child J compared to the pupils at school C in her statement, and it is submitted that this comparison was not relevant for the purposes of this Tribunal, given that the placing request is for the Enhanced Provision at school B, not at school C. Therefore, the Tribunal’s findings in fact with respect of the afore-mentioned paragraphs relate to the pupils at School C, not at School B, and are immaterial for the current placing request. Furthermore, these observations relate only to the Primary 1 cohort at School C. The Appellant gave evidence in response to the Tribunal’s questions put to her that the classes are arranged by stage, rather than age, meaning that Child J would be placed within a suitable peer group who were functioning at a similar level as him, and therefore, he did not have to be placed with Primary 1 pupils.

(ii) took into account and was influenced by immaterial evidence, namely, with respect of paragraphs [60] and [61] of the First-tier Tribunal’s decision, where the Tribunal found that “witness C was unable to comment on the profile of individual pupils at school B. She restricted her evidence to the applicable entry criteria to LVEP and the profile of the cohort of pupils in the LVEP. We agreed with that approach”, and the Tribunal was “satisfied that witness C was able to speak to the entry criteria which applies equally to



all five of the LVEP sites. We accepted her evidence about the profile of learners within the LVEP was representative of all learners in the five LVEP sites, including the cohort of pupils in school B.” It is submitted that the Tribunal could not reasonably conclude this given that Witness C stated in evidence that she only ‘imagined’ the needs of the pupils at School B were broadly similar to those at School C, and that her descriptions of the pupils at School C described a “typical learner” who entered an Enhanced Provision. She was unable to confirm the diagnoses of the pupils in attendance at school B, what their additional support needs were, or what academic level the pupils were performing at. Witness C did not have any direct knowledge of the pupil profile or the general management of School B. Witness C’s evidence of the pupils at school B was of a very general nature, and beyond her description that the pupils have ‘complex additional support needs’ in an enhanced provision, she was unable to provide any specific information or detail about the pupils in attendance at school B or the education carried out there. Witness C stated in evidence that she cannot recall when she last visited school B, the last time she met the children at school B was in September, and that she does not have any oversight of the management at school B as the Enhanced Provision at school B has their own Principal Teachers. The extent of Witness C’s knowledge of school B is from Senior Management meetings. In a similar vein, it is submitted that the Tribunal’s conclusions at paragraph 76 and 79 of the decision could not reasonably have been concluded based on the evidence heard.”

5. In summary, these grounds of appeal challenge the FTS’s findings in fact in relation to the abilities and needs of pupils at school B as these findings were based on the evidence of witness C who was describing the abilities of pupils at school C.
6. The respondent’s written response to the grounds of appeal is twofold. In the first place, it is contended that the original placing request had been to the LVEP in general rather than to a particular location. The refusal of the placing request had also been to LVEP in



general. Thus, it is contended, the FTS's analysis has to be understood in that context in which, presumably, the evidence of pupil profiles at school C would be directly relevant. In the second place, the respondent contends that pupils are accepted into the LVEP, regardless of the ultimate location, on the basis of a common criteria. There is no grading within the five locations whereby pupils with particular levels of additional needs are allocated to a particular location. Therefore, consideration of the pupil profiles for school C is a relevant proxy for pupil profiles at school B.

7. The appellant has lodged her own response to the respondent's response. There are two points to note from that response. First of all, the appellant accepts that the original placing request was to the LVEP in general but she observes that by the time of the FTS hearing, it was apparent to all that the appellant was seeking a placing request for child J to attend school B. In the second place, the appellant argues that it is not reasonable for the FTS to compare child J to the typical child within the LVEP but rather the FTS ought to have considered what education was normally provided at School B and whether that education was, or was not, suited to child J's age, ability and aptitude.

Discussion

8. In its decision, the FTS made a series of factual findings in relation to the profile of pupils at school B (see paras [42]-[51]). Most of these factual findings relate to pupils entering primary 1 at school B although a few findings extend to the abilities of older pupils within that school. These findings of fact provide the basis by which the FTS proceeds to compare child J's abilities and needs with the cohort of pupils in school B. The FTS expressly identify witness C's written statement as the basis of these findings in fact.



9. Witness C is a teacher with extensive experience of working with children with additional needs. She qualified as a teacher in 1995. Between 2006-2012, she was a support co-ordinator within the additional needs service of another Council. She has been employed by the respondent since 2012. She is responsible for the day to day running of the LVEP at school C as well as managing the respondent's Autism Outreach Service. She participates in senior leadership meetings with the management teams responsible for the other LVEP locations. The FTS's description of witness C as an educational expert with extensive experience, particularly in additional support needs, appears to be a fair one (see para [58]).
10. The FTS was well aware that witness C was describing the pupil profiles at school C rather than the individual profiles of pupils attending school B. The FTS makes this clear at para [60] of the decision. The reason why the FTS felt able to make findings in fact on pupil profiles for school B is that the FTS also accepted witness C's evidence that both the entry criteria and pupil profiles were common to all of the LVEP facilities (see paras [60], [61] & [74]).
11. The FTS's findings in fact at paras [42]-[51] could undoubtedly have been framed with greater precision. It would have been more accurate if the findings in fact had simply recorded that pupils at school C had particular abilities and then, if appropriate, a further finding in fact that all five LVEP primary locations catered for children with broadly similar profiles. However, I do not consider that this appeal turns upon the wording of the findings in fact as it is reasonably clear from reading the whole of the decision why the FTS felt able to make findings in fact in relation to school B based on evidence relating to school C.
12. Before turning to the substance of this appeal, it is appropriate to deal with the respondent's observation that the original application and its refusal were not location



specific. It is correct that the original application and the respondent's decision letter dated 30 May 2023 did not refer to any particular location. However, the focus of the proceedings before the FTS was that the placing request concerned school B. The application form which commenced the reference before the FTS made that clear. Paragraph [1] of the FTS decision states that the reference by the appellant relates to a "refusal by the respondent to place the child in the school specified in the placing request (school B)" and this reflects the terms of the joint minute entered into by parties. The evidence led from the appellant was that she considered school B to be the appropriate placing for her son. The conclusion of the FTS was that school B was not suited to child J's ability or aptitude, (see paras [80] & [81]). As such, parties clearly understood that the reference before the FTS was to focus on school B's suitability or otherwise for child J. This appeal has to proceed on the basis of that reference as the parties and FTS understood it. To do otherwise would also, it seems to me, create a doubt as to whether the FTS properly exercised its full jurisdiction if it did not find that the LVEP in general was unsuitable for child J.

13. Although I have expressed some criticism of the wording used by the FTS in formulating the findings in fact on school B, that does not raise a material error of law which would alone justify quashing this decision. In my opinion, there are a number of more fundamental difficulties with the FTS's decision.
14. The FTS recognised that the respondent had not led any direct evidence from teachers at school B as to the normal education provided to pupils at that school and the broad span of abilities of pupils within that school. The FTS described that failure as "regrettable" (para [61]). I agree with that observation. The best evidence available for the FTS to carry out its assessment of whether school B is suitable or unsuitable for child J is likely to come from a senior teacher at school B who has a good overview of the education which the school is able to provide to its pupils. Another possible source of helpful evidence could



be a representative from the body which took the decision to refuse the placing request. In this case a multi-disciplinary group called the Central Overview Group determined the placing request. Such a witness would be able to explain to the FTS why the particular placing request was refused.

15. In the absence of direct evidence from school B or from the decision making body, the respondent elected to lead the evidence of witness C in relation to school C as a proxy for the pupil profiles at school B. The FTS at para [74] accepted witness C's evidence that all LVEP sites follow the same entry criteria and that all children across the various sites had a similar profile. Witness C's written statement contains no statement to that effect. Nor does her written statement explain how she would be able to express such an opinion. While her written statement refers to the Central Overview Group which determines whether a child should enter the LVEP, I do not understand from her statement that witness C was a member of that body. The FTS heard oral testimony from witness C and it is possible that she provided more information on her experience and knowledge relevant to school B but, if that is so, the FTS have not explained within the decision what that evidence was. I note that the appellant at para (ii) of her grounds of appeal contends that witness C's evidence about pupils at school B was based on an assumption as opposed to actual knowledge. The short point is that the FTS were correct to express concern that the respondent, on whom the burden of proof lay, chose not to lead evidence from witnesses with direct knowledge of school B's pupils and the educational environment at that school. The FTS ought to have been careful to clarify why a witness giving indirect evidence on school B was an acceptable alternative. That would involve the FTS making clear findings as to witness C's knowledge and experience in relation to school B's pupils; its facilities and curriculum; the practical application of the entry criteria; and the profiles of children at all ages throughout the LVEP. It is not difficult to envisage circumstances in which no appropriate individual from the school for which the placing request relates is available to provide testimony and therefor an alternative



witness with a less direct connection has to be led. But if that occurs, and the FTS's decision rests on that witness's testimony, the FTS should be clear as to what qualifies that witness to give evidence of appropriate relevancy and weight on the workings of the school in question.

16. In its decision, the FTS have not adequately explained the basis on which witness C was qualified to opine on pupil profiles for all locations. On the face of the decision, it would appear that witness C's evidence that a common entry criteria was applied across all five locations may be why she formed the view that the pupil profile at all five locations was broadly the same. The FTS has not interrogated that assumption by considering how the entry criteria has in practice been applied by the Central Overview Group in recent years, or by way of a comparison of pupils additional needs across the five locations. Just as the FTS found parts of the appellant's evidence of limited weight because the FTS was unable to properly test that evidence (see para [54]), it might be said that the FTS's decision does not demonstrate how witness C's evidence in relation to pupil profiles throughout the LVEP has been adequately tested.

17. In *Midlothian Council v PB* 2021 UT 17 at paras [59]-[62], Lady Carmichael made a number of helpful observations on the manner in which the FTS should approach the making of findings in fact. At the risk of both repetition and possible over-simplification, the informed reader of any Tribunal decision should be able to discern (i) the reasons for the decision, (ii) the facts found established on which that decision rests, and (iii) the broad nature of the evidence accepted by the Tribunal from which those facts were found. In this reference, the informed reader is left in real doubt as to how witness C is qualified by knowledge or experience to confirm that the profile of pupils throughout all five locations are sufficiently similar that her evidence about pupils at school C can be taken as a proxy for pupils at school B.



18. A further problem with the FTS's decision concerns its treatment of the entry criteria for LVEP. The FTS note that witness C spoke to the entry criteria being common to all five locations. At para [41], the FTS found as fact that child J does not meet the criteria for entry into LVEP. A further finding in fact at para [40] states that all five locations apply the same entry criteria which are set out in a document entitled "SBC working description regarding Complex Additional Support Needs". The case papers include a copy of this document which notes that a pupil with complex additional support needs will demonstrate all or most of the complex factors listed in that document and that these factors are likely to continue for more than a year. The document then lists headings of "social", "sensory", "physical" and "cognitive" under each of which are a series of bullet points.
19. Although the FTS has found as a matter of fact that child J does not meet these entry criteria, there is no reasoning or discussion within the decision as to the particular parts of that document which child J does not satisfy. If child J does not meet the entry criteria listed in the document, it should be comparatively easy for the respondent to identify which bullet points are not met. As far as I can see from the case papers, at no stage has the respondent articulated in what respect child J does not meet the published criteria. The respondent's letter dated 30 May 2023 refusing the placing request does not specify how the entry criteria are not satisfied. The respondent's response lodged in advance of the FTS hearing did not set out which entry criteria were not met. While there is an attachment to witness C's written statement in which witness C has expressed her opinion that the complex needs criteria are not met in relation to child J, there is no specification as to why the criteria has not been met. In my opinion, the FTS have erred in law by making a bare finding in fact on the failure to meet the entry criteria without identifying for the informed reader in what respect the entry criteria are not met or the evidence on which such a finding in fact has been made.



20. For the reasons set out in paragraphs 14-19 above, I consider that the FTS has erred in law and the appeal falls to be allowed. As this matter will be remitted to a newly constituted FTS, there is one further issue raised in the papers which I would wish to highlight. This is a point raised by the appellant but which was not part of the grounds of appeal on which permission to appeal was granted.
21. In the appellant's response to the respondent's own response to the grounds of appeal, the appellant contends that it is not sufficient for the FTS to compare child J to the typical child in LVEP but rather, the FTS ought to have considered whether the education normally provided at school B was, or was not suited to child J's ability and aptitude. There is an echo in this formulation of Lady Carmichael's observations in *Midlothian Council v PD* at paras [27-28] that the issue under consideration is what education is normally provided by the school in question and whether it is suited to the child's age, ability and aptitude. It seems to me that an analysis of the pupil profile of existing children within a particular school will often be a helpful guide as to what education is normally provided by the school. It may also assist the FTS in assessing matters such as whether the child under consideration is likely to be able to interact socially with those existing pupils. But the assessment of a placing request should not be reduced to a simple comparison of the child's profile with a profile of existing pupils at the school in question. There is a risk that an individual child whose profile differs to some extent from the current cohort may be excluded even though the school has the expertise to provide suitable education for that child and the child would benefit from being placed at that school. It is important to focus on the statutory test of whether the educational facility is, or is not, suited to the particular child's age, ability or aptitude. Where a comparison of pupil profiles forms part of the assessment undertaken by the education authority, it is crucial to ask the following up question of what, if anything, that comparison tells the authority about whether the school is suitable for the child in question. If the authority is refusing the placing request, it should be able to explain in what respects it considers the



child would not benefit, or may suffer actual detriment, from being educated in the school under consideration. There is a sense from the FTS's reasoning at paras [78] and [79] in this case that the identification of differences between child J's abilities and the cohort pupils was seen as sufficient in itself for the conclusion that school B was not suitable to child J's abilities and aptitude. As a general observation, an education authority refusing a placing request on the basis that the child's profile differs in material respects from the general profile of pupils attending that school, needs to articulate in what respect it considers those differences would adversely affect the child's education if placed at the school.

Conclusion

22. For the reasons set out above, I have concluded that the FTS have erred in law and its decision falls to be quashed. I shall remit the matter to be decided anew by a differently constituted FTS.

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*

Lord Young
Member of the Upper Tribunal for Scotland