Case No: CO/3588/2021

Neutral Citation Number [2022] EWHC 1777 (Admin) 6th July 2022

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Before HHJ Sephton QC, sitting as a Judge of the High Court

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Between :

The Queen (on the application of Philip Milburn)

Claimant

- and-

The Local Government and Social Care Ombudsman

Defendant

-and-

Oldham Metropolitan Borough Council

Interested Party

- -
- -

Mr Stephen Broach and Ms Alice Irving instructed by Irwin Mitchell LLP, Manchester for the Claimant

Mr John Bethell instructed by Bevan Brittan LLP, London for the Defendant

JUDGMENT

1. This is an application for judicial review of the decision of the defendant ("the Ombudsman") made on 22 July 2021 that he did not have jurisdiction to investigate complaints the claimant ("Mr Milburn") made to him against the Interested Party, Oldham Metropolitan Borough Council ("the Council").

2. The official title of the defendant is "Commissioner for Local Administration." The office holder in this case is Mr King, whose witness statement is before me. He delegated his functions to various people, including, in this case, Ms Jacki Kreel. For convenience, I refer to the Ombudsman in this judgment as "he". I intend no disrespect to Ms Kreel where she was acting as Mr King's delegate.

Background

3. Mr Milburn is an autistic young man whose educational needs were addressed in an education, health and care plan ("EHCP"). Towards the end of his schooling at Bright Futures Special School, his mother, Zoe Thompson, started discussions with the Council about Mr Milburn's continuing education. Mr Milburn did not want to attend a college; instead, he sought a bespoke package of education which included funding for relationship development intervention programmes designed to address his tendency to ruminate. The Council refused to support the proposed package and, by letter dated 3 September 2018, confirmed its decision to end Mr Milburn's EHCP.

4. Mr Milburn appealed the Council's decision to the Special Educational Needs and Disability Tribunal ("the Tribunal"). On 29 January 2019, the Tribunal allowed Mr Milburn's appeal.

5. Mr Milburn says that the Council treated him badly in the period leading up to the Tribunal's decision. He says that they withheld most of his education in the run up to the Tribunal; they were rude and hostile towards his Mum; they made needless requests for irrelevant information and were obstructive and unhelpful. It is clear from Mr Milburn's witness statement that he was extremely distressed by the conduct of the Council.

6. Ms Thompson pursued complaints about the way in which the Council had behaved. Her initial complaint dated 24 April 2019 was to the Council. She complained to the Ombudsman on 15 August 2019. Ms Thompson completed a form for the Ombudsman which contained the question, "What do you think the body did wrong?". Ms Thompson replied,

> "I raised a complaint on behalf of myself and of my son, Philip Milburn against the local authority for the way my request for a bespoke education package funded by an

education personal budget for Philip was handled and for the way we were both treated over the 8 months that it took to bring matters to a conclusion."

She then identified 11 specific complaints, of which the following are of direct relevance to the matters I have to determine:

(a) "[the Council] made numerous claims that it had sought [Mr Milburn's] views from him but in fact failed to obtain [his] views and wishes; when [the Council] received evidence regarding [Mr Milburn's] views and wishes, it ignored it." I refer to this as "Issue A".

(b) "[the Council] behaved unreasonably during the lead up to the Tribunal hearing." This complaint was elaborated and was later expressed in this way: "in the lead up to the Tribunal hearing, [the Council] failed to comply with the Tribunal's orders and deadlines, failed to produce adequate documents for the Tribunal and sought to postpone the hearing in order to carry out a mental capacity assessment of [Mr Milburn]. [Ms Thompson] considers this unnecessary and inappropriate." I refer to this complaint as "Issue B".

The form makes clear that the complaint was made on Ms Thompson's own behalf and on behalf of Mr Milburn.

7. The Ombudsman circulated a draft decision on 19 February 2020. In the draft, the complaint was summarised as follows:

> "In particular, Ms X complains about:
> a) the Council's decision in July 2018 to cease to maintain Mr Y's Education, Health and Care (EHC) Plan;
> b) the Council's response to her request for a bespoke education package for Mr Y;
> c) the Council's failure to make provision for Mr Y's special educational needs in the period before the Tribunal; and
> d) her dealings with the Council during the Tribunal."

Issue A and Issue B presumably fell into paragraph d) of this summary of the complaint. On this issue, the draft decision was as follows:

> "I do not dismiss Ms X's concerns, but I cannot consider her complaint. The Ombudsman cannot consider complaints about matters that have been the subject of an appeal to the Tribunal. In this case, Ms X and Mr Y's dealings with the Council, including their attempts to secure interim provision and to agree amendments to Mr Y's EHC Plan working document, are inextricably linked to their appeal and are not matters the Ombudsman can investigate."

8. By letter dated 4 March 2020, Ms Thompson urged the Ombudsman to reconsider. She said:

> "I did not have a 'right of appeal to a tribunal' in relation to the behaviour of the Council Officers. Therefore section 26(6)(a) does not apply to this aspect of my complaint. As a

result I did not and could not appeal to the Tribunal about Oldham Council's bullying behaviour and perverse decision-making. It would plainly be wrong to characterise this as 'the subject of my appeal to the Tribunal'. The bullying behaviour and perverse, arbitrary decision-making caused Philip and me an inordinate amount of stress, as is clear from the correspondence relating to the Tribunal and judicial review pre-action protocol. As a result of the Council's behaviour, Philip developed a tic and made an attempt on his own life. I was pressurised, harassed and victimised, causing severe stress. These are injustices. The Tribunal's jurisdiction does not extend to the injustice caused by the Council's behaviour, whether during appeal proceedings or otherwise: it only considers matters of law in relation to its jurisdiction (as relevant here) to order a local authority to continue to maintain an EHC Plan and order a local authority to amend the contents of sections B, F and I of a Plan."

9. The Ombudsman agreed to reconsider the decision. A second draft decision was published on 17 July 2020. Paragraph 48 of the draft decision said this:

> "In her complaint, Ms X identified what she believes to be contradictions in statements the Council has made about its attempts to obtain Mr Y's views. Ms X has also identified opinions expressed by Council officers about her role as Mr Y's representative which she finds offensive. I do not propose to investigate the details of these issues further. While I appreciate Ms X and Mr Y remain aggrieved, I do not consider it a good use of the Ombudsman's limited resources to pursue the matter further."

10. Following further correspondence, a "final" decision was published on 28 August 2020 and a revised "final" decision on 18 November 2020. Following a pre-action protocol letter, the Ombudsman issued a third draft decision on 28 May 2021. It is unnecessary to consider the various draft and final decisions in any further detail.

11. The Ombudsman published the decision the subject of this application for judicial review on 22 July 2021. The relevant parts of the decision are as follows:

> "6. We cannot investigate a complaint if someone has appealed to a tribunal. (Local Government Act 1974, section 26(6)(a), as amended)…
>
> 8. Caselaw has established that where someone may appeal or has appealed to the SEND Tribunal, the Ombudsman cannot investigate any matter which is 'inextricably linked' to the matters under appeal. (*R (on the application of ER) v The Commissioner for Local Government Administration* [2014] EWCA Civ 1407)
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> 9. The Court of Appeal confirmed that the Ombudsman cannot consider a complaint when the complainant has pursued an alternative remedy, even if it does not provide a complete remedy for the injustice claimed. (*R v Commission for Local Administration*, *ex parte Field* [1999] EWHC 754 (Admin))…
>
> [Issue A]. – that the Council made numerous claims it had sought Mr Y's views from him but in fact failed to do so and then ignored evidence about his views and wishes when provided.
>
> 60. Based on the evidence I have seen, I consider that the question of the extent to which the Council sought and took account of Mr Y's views is outside the Ombudsman's jurisdiction. Ms X argues that the Council's failure to take proper account of her son's

views resulted in inappropriate provision being included in his EHC Plan. She and Mr Y wanted him to have a bespoke package of education and the Council did not agree. This was a key issue in the appeal.

61. The Tribunal Order in November 2018 ordered the Council to explain why it had "failed to obtain [Mr Y's] views". The Council responded by submitting Document C, described in paragraph 54 above. So the Tribunal considered the matter as part of the appeal process. The Judge then heard evidence from Mr Y directly, took his views about his education into account and allowed the appeal. The Tribunal decision in January 2019 said Mr Y's views were 'key' to its decision.

62. In my view, then, the question of whether the Council had properly obtained Mr Y's views is inextricably linked to the matter under appeal. This means that based on the law and case law referred to in paragraphs 6,8 and 9 above, this matter is outside the Ombudsman's jurisdiction. If this is the case it means I cannot make findings of fault on the matter or recommend a remedy for any injustice caused as a result.

63. Ms X and Mr Y achieved the outcome they wanted as the Tribunal upheld the appeal. I recognise that Ms X does not consider this sufficient. She would like a financial remedy to recognise the distress caused to her and her son by the Council's actions in failing to seek Mr Y's views. However the courts have decided that even if a Tribunal does not provide a full remedy, it does not mean the Ombudsman can do so where an alternative legal route has been used.

64. Even if it is disputed that this matter is outside the Ombudsman's jurisdiction, I do not consider it appropriate to comment on it when the Tribunal has already considered it. Also I do not think I could achieve any more for Ms X and Mr Y by pursuing the matter further because, for the following reasons, I consider the Council has offered a suitable remedy for this part of the complaint…

[Issue B] Council's other failings in the lead up to the Tribunal

67. Ms X complains that the Council failed to comply with the Tribunal's orders and deadlines, failed to produce adequate documents for the Tribunal, and sought to postpone the hearing in order to carry out an MCA of Mr Y. We consider that the issues raised in this part of the complaint are outside the Ombudsman's jurisdiction. But even if this is not the case we are exercising discretion not to investigate them further as our view is it would not be appropriate to involve ourselves in Tribunal processes…

Conclusion

71. I find that the Council was at fault in failing to provide for Mr Y's special educational needs under his EHC Plan while he was appealing to the SEND Tribunal. I consider the Council's offer of £2,400 is an appropriate remedy for the disruption to Mr Y's education caused as a result. I consider parts of the complaint are outside the Ombudsman's jurisdiction, or if they are not, then we will not investigate as the Ombudsman does not wish to trespass on the conduct of the Tribunal, and the Council's apology for its failure to seek Mr Y's views about plans for his education sooner is a suitable remedy for the alleged injustice this caused. The Council has also put in place improvements in its procedures and agreed to apologise to Ms X for comments made. I am satisfied with the Council's actions to remedy the injustice caused and so I have completed my investigation."

12. It is agreed that the issues I am required to decide are these:

(1) Did the Defendant misdirect itself in law as to the scope of his jurisdiction, specifically:

(a) What is the correct interpretation of s.26(6) Local Government Act 1974?

(b) Did the Defendant have jurisdiction to investigate the relevant parts of the Claimant's complaint (issues A and B)?

(2) Was the Defendant's decision to exercise any discretion he had not to investigate issues A and B irrational?

(3) Did the Defendant fail to provide adequate reasons for refusing to investigate issue B?

Legal framework

13. Part 3 of the Children and Families Act 2014 ("CFA 2014") makes provision for children and young people with special educational needs or disabilities.

14. A local authority must have regard to the wishes and feelings of a young person in exercising its functions under Part 3: see s 19(a).

15. A local authority may cease to maintain an EHCP for a young person if the authority determines that it is no longer necessary for the plan to be maintained: see s 45(1).

16. A child's parent or a young person may appeal to the First-tier Tribunal in respect of the matters identified in s 51(2), which provides:

> "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;
>
> (c) where an EHC plan is maintained for the child or young person—
>
> (i) the child's 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;
>
> (d) a decision of a local authority not to secure a re-assessment of the needs of the child or young person under section 44 following a request to do so;

(e) a decision of a local authority not to secure the amendment or replacement of an EHC plan it maintains for the child or young person following a review or re-assessment under section 44;

(f) a decision of a local authority under section 45 to cease to maintain an EHC plan for the child or young person."

17. Part III of the Local Government Act 1974 ("LGA 1974") establishes the office of Commissioner for Local Administration, now generally referred to as the Local Government and Social Care Ombudsman. The features of this Act material to this case are as follows:

(a) The Ombudsman may act in accordance with his own discretion in determining whether to initiate, continue or discontinue an investigation: s 24A(6).

(b) The Ombudsman is required to provide a report on any investigation and to provide reasons if he decides not to investigate a matter or to discontinue investigation: s 30.

(c) The Ombudsman may investigate alleged or apparent maladministration by a local authority: s 26(1) but s 26(6) provides:

"A Local Commissioner shall not conduct an investigation under this Part of this Act in respect of any of the following matters, that is to say,—

(a) any action in respect of which the person affected has or had a right of appeal, reference or review to or before a tribunal constituted by or under any enactment…

Provided that a Local Commissioner may conduct an investigation notwithstanding the existence of such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect the person affected to resort or have resorted to it."

18. In *R(ER) v Commissioner for Local Government Administration* [2014] EWCA Civ 1407, the placement of N, a child who had a statement of special educational needs, broke down in October 2006. The local authority offered a placement at Moorcroft School from November 2007. N's mother was dissatisfied with the placement and appealed to the Special Educational Needs and Disability Tribunal. On 7 May 2008, the tribunal allowed the appeal and N was placed at Penhurst School from June 2008. The claimant complained to the Ombudsman that the local authority had failed to provide N any education between November 2006 and November 2007 (the first period), and secondly of their failure to do so in the period from November 2007 to June 2008 (the second period). The Ombudsman upheld the complaint in respect of the first period, holding that Hillingdon had failed to arrange alternative education provision for N while seeking a suitable full time place for him. She recommended the payment of financial compensation in respect of the first period. The Ombudsman rejected the complaint relating to the second period. She did so on the basis that Hillingdon had

offered education for that period at Moorcroft School; and, although the Tribunal found this to be unsuitable, it was not for her to 'determine the suitability of education, regardless of the decision of the … Tribunal'. Giving judgment in the Court of Appeal, Bean LJ pointed out that the local authority had a general duty to make provision for educating school children under section 19 of the Education Act 1996, and specific duties in relation to children with special educational needs under (what was then) Part IV of that Act. Part IV contained a parent's right of appeal to the Tribunal against the provision identified by the local authority (amongst other things). He concluded:

> "[30] Judge Stewart observed that what ER's complaint to the LGO really boiled down to was failure to provide a service (namely suitable education) under s 19; and that what the appeal to SENDIST boiled down to, albeit under s 324, was whether the type and nature of the school should be in N's statement. 'The reality', said the judge, 'was that there was an inextricable linkage between the two'. I agree.
>
> [31] In my view one could characterise Hillingdon's decision in this case either as an action (the naming of an unsuitable school) or as a failure to act (the failure to name a suitable school); but either way it was fairly and squarely within s 26(6)(a), as being an 'action' in respect of which ER had the right of appeal to SENDIST. It is true that a consequence of that wrong decision was that Hillingdon failed for a period to discharge their s 19 duty to N. But I reject the submission that the LGO has jurisdiction to investigate the consequences of a decision if investigation of the decision itself is excluded by s 26(6)."

19. There are several authorities which recognise that the existence of a remedy in a court or tribunal, even though inadequate or incomplete, is fatal to the jurisdiction of the Ombudsman: see, for example, *R v Commissioner for Local Administration ex parte Field* [1999] EWHC 754 (Admin) (Keene J), *R v Commissioner for Local Administration (ex parte H)* [1999] ELR 314, 316 (Simon Brown LJ) and *ER*.

Submissions

20. Mr Broach, for the claimant, submitted that the Ombudsman erred in concluding that he lacked jurisdiction. He submitted that the Ombudsman had misunderstood *R(ER) v Local Government Ombudsman* and had erred in concluding that Issues A and B were "inextricably linked" with the claimant's appeal to the Tribunal and thus outwith his jurisdiction. He submitted that I should construe LGA 1974 s 26(6) in a restrictive manner. In relation to the failure of the Council to comply with the Tribunal's directions, he submitted that the Tribunal's case management powers and the way in which they were required by authority to be exercised were not apt to address the mischief about which the claimant complains.

21. Mr Broach accepted that the Ombudsman has a very wide discretion whether to investigate a complaint. He submitted nevertheless that the Ombudsman exercised his discretion not to investigate further on an irrational basis because he had not addressed the issues about which the claimant had complained. The Ombudsman had proceeded upon a factually incorrect premise that the Council had apologised to the claimant, whereas a careful reading of the documents demonstrates that the apology did not relate to the matters about which the claimant was complaining.

22. Mr Broach further submitted that the Ombudsman had not given adequate reasons.

23. Mr Bethell, for the defendant, reminded me of passages in several judgments which emphasised the principle that the Ombudsman should not get involved in matters the subject of litigation. He submitted that the Ombudsman had not elevated the expression "inextricably linked" into a statutory principle. He drew my attention to the witness statement of Mr King which, he submitted, demonstrated a clear understanding of the law. He submitted that the defendant had properly applied the law. In relation to Issue A, he drew my attention to a passage in Ms Kreel's witness statement: "If I had investigated [Issue A], then the LGSCO would in substance have been looking at the same issues the Tribunal had already looked at – this time, with a view to a financial remedy for the Claimant and/or his mother." In relation to Issue B, he submitted that the Tribunal was master of its own procedure and if the claimant had a complaint about the way in which the Council conducted itself in the hearing, he could have applied to the Tribunal for relief.

24. Mr Bethell emphasised the width of the Ombudsman's discretion. He reminded me that a rationality challenge based on an error of fact must demonstrate that the mistaken fact was uncontentious, objectively verifiable and played a material part in the decision maker's reasoning: *E v SSHD* [2004] EWCA Civ 49. He submitted that the alleged error was controversial.

25. Mr Bethell submitted that, in the context of the correspondence between the parties and the circumstances of the case, the reasons the Ombudsman gave were adequate.

Analysis

Jurisdiction

26. If the matter were free from authority, I would consider the wording of LGA 1974 s 26(6) to be clear in principle, though I accept that its application may prove difficult in practice. In order to decide whether the Ombudsman has jurisdiction in a case such as the present, it is necessary

to determine whether, in relation to the action (or omission) complained of, the complainant "has or had a right of appeal, reference or review." If yes, then (subject to the proviso) the Ombudsman lacks jurisdiction.

27. Does *R(ER) v Commissioner for Local Government Administration* affect the construction of the statute? In my view, it does not. What HHJ Stewart QC (as he then was) decided, and what the Court of Appeal affirmed, was that the action or omission complained of was in substance the very thing that was the subject of the appeal before the Tribunal, namely, the dispute about the type and nature of the school in N's statement of educational needs. In my opinion, it is necessary to be extremely careful about extracting the words "inextricably linked" as a touchstone for future decisions about jurisdiction, because there is a danger that this phrase might distract from the necessary focus upon the question whether the *substance* of the complaint is something in respect of which the complainant has a right of appeal, reference or review before a tribunal.

28. In order to decide whether the Ombudsman lacks jurisdiction because of LGA 1974 s 26(6), it is necessary properly to characterise the issue which the Ombudsman is being invited to investigate. In the present case, Ms Thompson's complaint contained a long list of issues, including (but not limited to) Issue A and Issue B. When the Ombudsman produced his first draft decision on 19 February 2020, he telescoped Ms Thompson's complaint under 4 headings. Ms Thompson made clear in her letter of 4 March 2020 that she was not satisfied that "her dealings with the Council during the Tribunal" accurately identified her complaint; what she wished to have investigated was the "bullying behaviour and perverse, arbitrary decision-making" by the Council. She said that there was no court or tribunal to which she could resort to address this issue. It appears to me that the Ombudsman recognised that Ms Thompson wished these matters to be dealt with in detail, because the decision challenged in these proceedings clearly identified Issue A and Issue B.

29. In my judgment, Issue A in fact raises two matters:

(a) One matter is that the Council failed to obtain Mr Milburn's views and wishes, and when it received evidence regarding them, it ignored them.

(b) The other matter is a complaint about the "numerous claims" that the Council had sought Mr Milburn's views from him when in fact it had not.

30. As to the first of these matters, I agree with the Ombudsman that he lacked jurisdiction. The Council was obliged to have regard to Mr Milburn's wishes (CFA 2014 s 19). The Council ceased to maintain Mr Milburn's ECHP because it considered that it was no longer necessary

for the plan to be maintained. The gravamen of Mr Milburn's complaint about the Council's decision to cease his ECHP was that it had not consulted him or considered his views. The *substance* of Mr Milburn's appeal, made pursuant to CFA 2019 s 51(2)(f), was the Council's failure to consider his views. The Council's failure to seek and consider Mr Milburn's views was egregious, having regard to the Council's statutory obligation to consider them, and particularly deplorable in the light of Mr Milburn's vulnerability. I have no doubt that it caused Mr Milburn and Ms Thompson enormous upset. But in my view there can be no doubt that the failure to obtain and act on Mr Milburn's view was something in respect of which he had a right of appeal to a tribunal. It therefore fell outwith the jurisdiction of the Ombudsman. Consistently with authority such as *Field* and *ER*, the consequence is that, since the Ombudsman is precluded from investigating this issue, Mr Milburn has no remedy in respect of the Council's deplorable conduct in not seeking or acting on his views.

31. In my view, the Ombudsman's decision identifies and explains these matters clearly in paragraphs 60-63. Although, for the reason given earlier in this judgment, I am wary of the phrase "inextricably linked", I believe that the decision correctly concludes that the Ombudsman lacks jurisdiction because the Council's failure to seek or heed Mr Milburn's views formed the substance of the appeal before the Tribunal.

32. The "numerous claims" are a different matter. It seems to me that the fact that a council is making claims that it has complied with a statutory obligation when in fact it has not is at least arguably maladministration of a kind that the Ombudsman can investigate. Although Mr Broach's placed these unfounded claims in the forefront of his submissions, I heard no submission from the defendant that a complaint about such claims could be the subject of an appeal, reference or review before a tribunal or in a court of law or that such claims were excluded from the jurisdiction of the Ombudsman by the operation of LGA 1974 s 26(6).

33. The "numerous claims" plainly formed part of Ms Thompson's complaint to the Ombudsman. As I understand it, the first sentence of paragraph 48 of the draft decision of 17 July 2020 specifically addressed this issue: it is significant that the reason the Ombudsman gave for not investigating the issue was plainly an exercise of discretion and not an assertion that he lacked jurisdiction. However, the "numerous claims" do not feature at all in the part of the decision under review that deals with Issue A. The decision subject to review does not explain why the "numerous claims" issue is not addressed, even though it appears to have been considered in the draft of 17 July 2020. I am bound to conclude that, in making the decision under review, the Ombudsman did not turn his mind to the complaint that the Council made claims that it

had sought Mr Milburn's views from him when in fact it had not. That was a complaint that he had jurisdiction to entertain.

34. In my judgment, all of the matters raised in Issue B concern the procedure of the Tribunal. Mr Broach argued that whereas the sanctions available to a court under the Civil Procedure Rules are apt to control a litigant's bad behaviour, the Tribunal's sanctions to order costs or to strike out are so hobbled as to be toothless. I make no judgment whether a tribunal's sanctions are ineffective; it seems to me that the only question I have to decide is whether Mr Milburn was entitled to refer to the Tribunal about the matters complained of. I conclude that they were all matters in respect of which Mr Milburn had the right to refer to the Tribunal, which is master of its own procedure: see Tribunal Procedure (First-Tier Tribunal)(Health, Education and Social Care) Rules 2008, rule 5; and which had the express power to deal with failures to comply with directions: see rule 7(2). These matters are therefore excluded from the jurisdiction of the Ombudsman by LGA s 26(6). If the Council conducted itself in relation to the Tribunal proceedings in the manner alleged by Mr Milburn, their behaviour was reprehensible. However, since the Ombudsman lacks jurisdiction to entertain the complaint about such behaviour, Mr Milburn cannot raise these issues before him.

Discretion and reasons

35. In the light of my conclusion about jurisdiction, it is unnecessary to consider the Ombudsman's exercise of his discretion, save in relation to the complaint about the "numerous claims" that the Council had sought Mr Milburn's views from him when in fact it had not.

36. I accept that the Ombudsman's discretion is wide. In relation to the "numerous claims", the Ombudsman could have exercised his discretion not to investigate on the grounds that such was not an efficient use of scarce resources (as in the draft decision of 17 July 2020) or for many other sound reasons.

37. However, the purported exercise of discretion can be challenged on the grounds of irrationality. In order to assess the rationality of the exercise of a discretion, it is necessary to examine the reasons the decision was made. The Ombudsman is obliged to give reasons: see LGA 1974 s 30. As to the reasons, I was referred to the well-known passage in the speech of Lord Brown in *South Bucks DC v Porter No 2* [2004] UKHL 33 at [36], to *R(The Asha Foundation) v The Millennium Commission* [2003] EWCA Civ 88 at [27] and to *R(Alconbury Developments Limited) v Secretary of State* [2001] UKHL 23 at [170] (Lord Clyde). As to

irrationality, I was referred to two helpful authorities: in *R(Law Society) v Lord Chancellor* [2018] EWHC 2094, the Divisional Court said at [98]

> "A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it - for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error."

In *R(Morris) v Health Service Commissioner* [2014] EWHC 4364 Jay J said at [35]

> "I interpret that as meaning a very broad discretion, reviewable only on a conventional *Wednesbury* basis, including demonstrating that the decision maker has plainly asked itself the wrong question or has plainly misinterpreted the complaint."

38. In the present case, the "numerous claims" do not feature at all in the part of the decision under review that deals with Issue A. I read paragraph 64 of the decision to be an exercise of discretion expressed in case the Ombudsman is wrong about the issue of jurisdiction. The Ombudsman says "I do not consider it appropriate to comment on it [*sc.* Issue A] when the Tribunal has already considered it." The Tribunal considered Mr Milburn's views, which had been neglected by the Council, but the Tribunal did not consider the complaint that the Council had made "numerous claims" that it had considered Mr Milburn's views when in fact it had not. Paragraph 71 states, amongst other things: "I consider parts of the complaint are outside the Ombudsman's jurisdiction, or if they are not, then we will not investigate as the Ombudsman does not wish to trespass on the conduct of the Tribunal, and the Council's apology for its failure to seek Mr Y's views about plans for his education sooner is a suitable remedy for the alleged injustice this caused." The Tribunal was not concerned with the allegation that the Council made the "numerous claims" and the Council has not apologised for those claims. This detailed textual analysis reinforces my conclusion that in the decision under review the Ombudsman simply did not turn his mind to the complaint that the Council made claims that it had sought Mr Milburn's views from him when in fact it had not, or at least, wholly failed to explain why he had not dealt with this part of the complaint.

39. In my judgment, in relation to the "numerous claims", the Ombudsman has plainly asked himself the wrong question or has plainly misinterpreted the complaint. The reasons given for the purported exercise of the discretion simply do not apply to the complaint about the "numerous claims" that the Council had sought Mr Milburn's views from him when in fact it had not. I believe that the more likely explanation is that the Ombudsman simply did not consider this part of the complaint, but on any view, he has advanced no reasoned basis for exercising his discretion not to investigate this part of the complaint.

Conclusion

40. I have found that Issue A in fact comprises two matters, namely:

(a) the complaint that the Council failed to obtain Mr Milburn's views and wishes, and when it received evidence regarding them, it ignored them;

(b) the complaint that the Council made "numerous claims" that it had sought Mr Milburn's views from him when in fact it had not.

I consider that the Ombudsman's jurisdiction to consider the first of these matters is excluded by LGA 1974 s 26(6). Accordingly, the issue of discretion does not arise in relation to this matter. The second matter was not an issue where the Ombudsman's jurisdiction was excluded by LGA 1974 s 26(6). The Ombudsman has not advanced a rational basis for the exercise of his discretion not to investigate this part of the complaint. Accordingly, the decision must be quashed to the extent that it purports to relate to this matter.

41. I consider that the Ombudsman's jurisdiction to consider Issue B is excluded by LGA 1974 s 26(6). Accordingly, the issue of discretion does not arise in relation to this Issue.

42. I was addressed summarily on the question of relief. I am not minded to make any declaration about the meaning of LGA 1974 s 26(6) because I consider the provision to be clear and because I do not consider that I can formulate a declaration that will have any useful universal application in future cases. I invite the parties to agree a form of order on the basis of the conclusions set out in this judgment.