IN THE UPPER TRIBUNAL **Appeal No: HS/3460/2015**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the appellant to the extent of holding that the decision of the First-tier Tribunal of 9 September 2015 under reference SE881/15/00021 involved an error on a point of law. However, as a matter of its discretion the Upper Tribunal decides not to set aside the First-tier Tribunal's decision.

This decision is made under section 12(1) and 12 (2)(a) of the Tribunals, Courts and Enforcement Act 2007.

Appearances: Ms Rachel Kamm of counsel for the appellant

Mr Russell Holland of counsel for the respondent

REASONS FOR DECISION

1. After the first oral before the Upper Tribunal in this case I gave Essex County Council permission to appeal against the decision made by the First-tier Tribunal ("the tribunal") dated 21 September 2015. By that decision the tribunal allowed the appeal of [the father] in respect of his daughter, Jessica, and decided, most relevantly, that [D] special school was to be named in Part 4 of Jessica's statement on the basis of a 38 week residential placement. I gave permission to appeal on the following grounds:

> "Permission to appeal is given because I consider that it is arguable with a realistic prospect of success that the tribunal erred materially in law in failing to make sufficient findings of fact and in failing to give adequate reasons for its decision so as to explain why as a matter of Jessica's educational needs a 38 week residential placement was required.
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> Extensive grounds (numbering 10) seeking permission to appeal had been prepared in writing on behalf of Essex County Council. Ms Kamm, in my view quite sensibly, sought to focus all of those grounds on one key issue, namely the adequacy of the First-tier Tribunal's reasoning and findings of fact showing to the reader of its decision *why* it had concluded that Jessica had an educational need (as opposed to a social care need or respite need) for 38 weeks per year 'waking day' curriculum/residential schooling. It is on that more broadly put ground that I give permission to appeal.
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> On the face of paragraphs 12 and 13 of its decision the tribunal directed itself properly as to the law and the legal test(s) it had to apply to the evidence before it and the facts it found. However it is in the reasoned out application of that law and test(s) that the tribunal's decision may arguably be lacking and thus, arguably, be in error of law.
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> Even if the local authority had not challenged the educational purpose of the residential placement sought (see paragraph 20 of the tribunal's decision), arguably it was still for the tribunal to satisfy itself that there was such a purpose and explain what that purpose was. Given the tribunal's acceptance that Jessica was making "pleasing progress" in her ordinary day attendance at [D school], and given the arguable lack of any 'waking day' needs identified in Part II of the statement, it arguably was incumbent on the tribunal to set out findings and reasons to show why in the tribunal's view Jessica needed further educational provision (i.e. for the rest of the day), and those findings and reasoning are arguably lacking.
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> As part of this, it is arguable that the tribunal did not make clear in paragraph 31 of its decision what the differences were between social care/respite needs and educational needs, and why if the provision to be made available at [D school] was the same as for respite care it here amounted to educational provision. Further, the educational need identified by [the father] in paragraph 33 of the tribunal's decision, and seemingly adopted by the tribunal, without at least more by way of reasoning is arguably in conflict with paragraph 27 of *Hampshire CC – v- JP* [2009] UKUT 239 (AAC); [2010] AACR 15; [2010] ELR 413.
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> It is also arguable, as part of the above, that the tribunal failed adequately to identify - per paragraph 31 of its decision – the parts of [D] school's evidence which set out the case for residential accommodation needed to meet Jessica's educational needs."

2. The appeal then came back before me for a further hearing, when the representation was as set out above.

3. It was at that hearing that important information was disclosed which fundamentally affects both the importance of this appeal and how it should be disposed of. That information was that an annual review of Jessica's statement of special educational needs had been conducted since the tribunal's decision, pursuant to section 328(5)(b) and sections 323-324 of the Education Act 1996, and the statement amended. Just as importantly for the purposes of this appeal to the Upper Tribunal, however, I was told (the new statement was not put before me) that the new, post-annual review statement was the same, in terms of providing for a 38 week residential placement at D school, as the statement the tribunal had ordered the local authority to put in place, though it was altered in other, non-controversial respects. I will refer to the statement put in place after the annual review as the "new statement. I was further told that the new statement was not subject to any condition (even assuming such could lawfully be imposed) that it was subject to the decision of the Upper Tribunal on this appeal.

4. In short, in its relevant particulars the new statement provides exactly what Jessica and her parents wished for and which the council in pursuing this appeal was otherwise seeking to argue against. Moreover, it is that new statement which now governs the relationship between the parties, and it is not one, as I understand it, about which Jessica or her parents have any complaints or which they would wish to challenge on appeal.

5. Given the new statement had on its face replaced the statement of special educational needs the tribunal had ordered to be put in place, I asked the parties representatives to provide me with written argument after the hearing on the legal effect of that new statement on this appeal continuing. I had in mind, in particular, what the point would be in my allowing the appeal and either remitting it to be re-decided or re-making it myself if the statement giving rise to the parent's appeal had been superseded by the new statement.

The parents positively would not wish to appeal the new statement and the statement they had appealed no longer existed, and no right of appeal vests in the local authority. What therefore would either I or any new First-tier Tribunal be deciding?

6. Both parties have provided such argument. They are at one in agreeing that the Upper Tribunal retains its jurisdiction to decide this appeal notwithstanding the new statement that has since been put in place in respect of Jessica on the annual review. I am persuaded that I retain jurisdiction. Even assuming that the statement as ordered forms part of the tribunal's decision, it is the decision against which permission to appeal was given[1]. That follows from the words "a right of appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal..." (my underlining added for emphasis), in section 11(1) of the Tribunals, Courts and Enforcement Act 2007. The decision of the tribunal remains in place even if it is no longer of any continuing effect as it has been overset by the new statement.

7. The Upper Tribunal therefore being seised of the appeal, a decision is required on this appeal. My first task, per section 12(1) of the Tribunals, Courts and Enforcement Act 2007, is to decide whether "the making of the decision concerned involved the making of an error on a point of law". I do not consider that the later annual review should be taken into account by me at this stage in determining whether any error law the tribunal made was material to its decision because that would allow the decision's materiality to be judged by events of which the tribunal could have had no knowledge and which could not have affected its decision at the time it was made. It seems to me that 'materiality' here must mean something which could have affected the decision at the time it was made, with subsequent

[1] There is no argument that the annual review took place before I gave permission to appeal nor, in consequences, any argument made for me to reconsider the grant of permission to appeal on the basis of material non-disclosure under the set aside provisions found in rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

changes falling to be taken into account in the exercise of the discretion found in section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 as to whether to set the tribunal's decision aside.

8. Looking then at the tribunal's decision and its reasoning, despite the arguments of Mr Holland to the contrary I am persuaded, but not without some hesitation, that it did err materially in law in failing to adequately explain through its reasoning and fact finding *why* Jessica had an educational need for residential schooling 38 weeks of the year. This is perhaps particularly so in the context of what is said in paragraph 27 of *Hampshire County Council –v- JP* (SEN) [2009] UKUT 239 (AAC); [2010] AACR 15:

> "it would be inappropriate to reason from the fact that the care needed by N outside normal school hours would reinforce what had been learned during the school day that N needed a "waking day curriculum" with the overtones of education that the word "curriculum" carries. Where children do not have special needs, they are not regarded as always being at school rather than on holiday merely because much play and engagement in leisure activities outside school hours may have an educational value and support what is taught at school. In *The Learning Trust v MP* [2007] EWHC 1634 (Admin); [2007] ELR 658, Mr Andrew Nicol QC, sitting as a deputy judge of the High Court, pointed out at [41] that "a need for consistency is not to be equated with a need for educational provision outside of normal school hours"".

9. In this case Jessica's parent's evidence was that "the educational purpose [of the residential placement] is that it would bring improvement in Jessica's life skills, communication and working on her sleep and toiletting issues". Furthermore, in its **Conclusions and Reasons** at paragraph 33 the tribunal on its face accepted that the educational need *was* as stated by Jessica's father, namely "[w]hatever contributes to Jessica's life equals education and the longer the days at school the more she will learn. She will receive more education for her life" (my underlining added for emphasis). That it seems to me comes perilously close to committing the error paragraph 27 of *JP* advises against.

10. I appreciate that in paragraph 25 of its reasons the tribunal identified the five (undisputed) learning objectives in Jessica's statement – including general learning skills but also to improve her attention, concentration and flexibility, her communication skills and her social and self-help skills. This was what the tribunal said it would expect for an autistic child. It then said "but for her to make progress and for her to learn they need to be applied consistently across home and school" (my underlining again). These passages, it may be said in the tribunal's favour, show that it was not allying itself solely to the "whatever contributes to Jessica's life" thesis of her father (though it still leaves unexplained why the tribunal did ally itself to this statement).

11. However, the difficulty generated by what I have highlighted above from paragraph 25 of the tribunal's reasons is how it fits with the tribunal's finding in the immediately preceding paragraph of its reasons that Jessica was making pleasing progress at D school on a school day (i.e. non-residential) basis and "everybody was impressed with the progress she has made". That it seems to me must mean educational progress. I struggle therefore to understand why the tribunal concluded that a residential placement was needed in order for Jessica to learn, if she was already learning and making "pleasing progress" and not, I note, limited or stilted progress or no progress at all.

12. I also accept that in paragraph 26 of its reasons the tribunal found that "Jessica has severe or multiple special educational needs that require a consistent programme both during and after school hours". Again, however, given what I have said immediately above about the pleasing progress Jessica was already making, this in my judgment fails to explain adequately why there was an educational need for an outside of the school day learning curriculum.

13. A further significant factor colouring the inadequacy of the reasoning is that the tribunal seemed to accept that there was no difference in the "after ordinary school day" provision between students at D school on a residential basis and those there on a respite basis. Given this and thus the possibility that the provision might not have been educational but respite care only, it seems to me that it was all the more incumbent on the tribunal for it to make clear findings of fact on, and give clear reasoning explaining, why Jessica had a need for education that fell outside the ordinary school day, and it failed to do that in my judgment.

14. Given where this case has reached however, I do not consider I need to say anything more on this. This is not a case where despite the academic nature of the appeal some wider or important issue of law arises which needs ruling on, as in *Hampshire County Council –v- JP* (SEN) [2009] UKUT 239 (AAC); [2010] AACR 15. The tribunal here may have had a proper basis for deciding on the evidence before it that Jessica as matter of her educational needs required a 'waking day' curriculum provided in a residential school setting. The vice in its decision is simply that it failed to explain clearly enough the basis on which it came to that decision, not that it had misdirected itself as to the law. Beyond reasoning out its decision more adequately and providing appropriate findings of fact relevant to the same, this is not a case in which the law on 'waking day' curriculums needs clarification or where lessons need to be passed on to any new First-tier Tribunal. I also bear in mind here that, for the reasons given below, there is no need for this appeal to return to be re-decided by a new First-tier Tribunal.

15. The tribunal's decision was therefore erroneous in law. However, I do not set aside its decision. I am not required to set its decision aside even given the above error of law finding. All section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 provides is that "[t]he Upper Tribunal may (but need not) set aside the decision of the

First-tier Tribunal [if the Upper Tribunal finds under section 12(1) that the making of the decision concerned involved the making of an error on a point of law]". The reasons I do not set aside the decision are as follows.

16. To set aside the decision would require either the Upper Tribunal to re-decide the appeal or remission to a differently constituted First-tier Tribunal for it to re-decide the appeal. This follows from section 12(2)(b) of the Tribunals, Courts and Enforcement Act's wording that "if [the Upper Tribunal] does [set aside the decision of the First-tier Tribunal it], must either (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or (ii) re-make the decision". What, however, is there to be re-decided? Any such decision would be about Jessica's special educational needs now (or the date of any remittal hearing) and not as they were in September 2015 when the tribunal decided the appeal: see *GO and HO –v- Barnsley MBC* (SEN) [2015] UKUT 184 (AAC).

17. Even if, which I have not accepted, the tribunal had erred in law by arriving at perverse decision and the only decision it could have arrived at on the evidence before it was that a residential placement was not educationally required, that would only show that the tribunal had erred in law at the date it made its decision. Such a conclusion, moreover, would not necessarily require a decision to be made now or on remittal that Jessica had no educational need for a residential placement. That would require evidence as to how Jessica is now (or at the date of the remittal hearing), and that has not been put before me.

18. Ms Kamm at one stage made a (faint, I think) suggestion that if I was satisfied (which I emphasise I am not) that the only correct conclusion to be made on the evidence in September 2015 was that Jessica did <u>not</u> have an educational need for residential schooling, then it was for Jessica's parents to show that something had changed in the intervening period. If they could show no change

then I should conclude that there had been no change and so make the same decision in 2016 as the tribunal ought to have arrived at in September 2015. I am not sure that this would necessarily be the correct approach in what is an inquisitorial jurisdiction. More importantly perhaps, it very arguably was not an issue which had been specifically flagged up in advance of the hearing before me and so it may well have been unfair to Jessica and her parents to make such evidential enquiries and assessments at the hearing before me; even assuming it would otherwise be appropriate for me to do so when not sitting with even one of the specialist members who sit on tribunals in the First-tier Tribunal. And any such argument ignores the effect of the new statement, to which I now turn.

19. That then leaves remittal as the only possible appropriate remedy. But what would any new First-tier Tribunal be deciding and what of the original appeal made by Jessica's parents would remain to be decided?

20. The effect of sections 323-324 and 328 of the Education Act 1996 when read alone might suggest that after the annual review neither the statement which the parents did appeal nor the one then ordered by the tribunal remained in place. This it might be said follows from the opening wording of section 328(1) of the Education Act 1996 - "Regulations may prescribe the frequency with which assessments under section 323 are to be repeated in respect of children for whom statements are maintained" – which take the enquiry back to section 323, a further assessment, and from there section 324 and the "making and maintaining" of "a statement" of special educational needs, all of which might suggest a new statement on each section 323 assessment. It might therefore be argued that what the Education Act 1996 requires on such an annual (or "periodic") review is that the relevant child's education needs are assessed again under section 323 and, in light of that fresh assessment, a new statement is put in place following the annual review under section

324. In other words, the new statement replaces or supersedes the previous statement.

21. This reading, however, would be to ignore the terms and effects of schedule 27 to the Education Act 1996, which pursuant to section 324(7) of the Act "has effect in relation to the making and maintenance of statements under this section". Paragraph 2A of schedule 27 has the heading "Amendments to a statement" and provides in paragraph (1) that "[a] local authority shall not amend a statement except:

> "(a) in compliance with an order of the Tribunal,
> (b) as directed by the Secretary of State under section 442(4), or
> (c) in accordance with the procedure laid down in this Schedule."

The rest of paragraph (2A) then deals with the procedure to be adopted by a local authority in carrying out either a "periodic review" or a "re-assessment review". The former is defined in paragraph (1) of schedule 27 as being what I have termed in this decision an "annual review", that is a review under section 328(5)(b) of the Education Act 1996. If a statement is to be amended following a periodic/annual review then paragraph (2A)(4) of schedule 27 requires the local authority to serve on the parents of the child concerned "(a) a copy of the existing statement, and (b) an amendment notice".

22. It is important to note, however, that schedule 27 also deals with the *making* of a statement under section 324. In this respect, paragraph 2 of schedule 27 sets out that "[b]efore making a statement, a local authority shall serve on the parent of the child concerned of the proposed statement".

23. Later paragraphs in schedule 27 then address issues such as: the ability of parents to make representations on the proposed statement or the proposed amended statement; the ability of parents to express a preference for a school in the proposed statement or the proposed amended statement; service of the

statement as made or amended; the procedure for ceasing to maintain a statement; and the need to provide the parents with a written notice explaining their right of appeal under section 326 of the same Act against, inter alia, an amendment notice under paragraph 2A.

24. Taking stock at this point, the statutory provisions set out above seem to draw a distinction between the statement as (first) made and the statement as then subsequently amended. To use the language of section 324(7), the distinction is between "making" the statement and "maintenance" of the statement, with the latter applying to periodic reviews under section 328(5)(b) and amendments to the statement which may then arise on such reviews. If this reading of the statutory machinery is correct, a statement is (first) made and then that statement is maintained through a process of reviews and, if necessary, amendments to the statement. In other words, a completely new or replacement statement does not come into effect on each periodic (or other) review.

25. This analysis is, it seems to me, expressly underscored by the language of section 326 of the Education Act 1996, which, to use its heading, deals with appeals "against contents of statement". Section 326(1) provides:

> "The parent of a child for whom a local authority maintain a statement under section 324 may appeal to the [First-tier Tribunal]-
> (a) when the statement is first made,
> (b) if an amendment is made to the statement, or
> (c) if, after conducting an assessment under section 323, the local authority determine not to amend the statement."
> (my underlining added in both places for emphasis)

The words I have underlined in section 326 seem to me to make good the argument made in paragraph 24 above that there is, in effect one statement which is then amended over time as necessary.

26. How does the above inform whether there is anything usefully left to remit to the First-tier Tribunal? The best case for the council it seems to me is that if the tribunal's decision was to be set aside its order amending the statement would fall as well and that would leave in place the statement as originally appealed by the Jessica's parents to the First-tier Tribunal. That however in my judgment cannot be correct. I accept, for the reasons given above, that the statement appealed by the parents has not been replaced by a new statement after the annual review and so to that extent cannot be said to have lapsed by operation of law following the review. I also accept, again for the reasons given above, that the statement as (first) made continues in one sense legally.

27. However, it seems to me that the effect of the statutory provisions outlined above is that the statement which the parents appealed (the one the council want to get back to in terms of having an adjudication upon by the First-tier Tribunal) no longer exists as it has been reviewed and amended following the periodic/annual review. To that extent it is only the statement *as amended on the annual review* which now exists as the statement, and not the statement the parents did appeal, and there is **no** appeal by the parents for the First-tier Tribunal to decide under section 326(1)(b) of the Education Act 1996 against the amendment(s) made to the statement after the annual/periodic review.

28. To hold otherwise, and keep the pre-annual review statement as made by the council before it was appealed still alive, would in my judgment be to run contrary to the right of appeal and review conferred by sections 326 and 328 respectively of the Education Act 1996. This can be tested in this way. Assume that the statement the parents appealed was the statement as first made. The right of appeal therefore vested in the parents under section 326(1)(a) of the Education Act 1996. But it only vested for as long as the statement under appeal met the requirements of section 326(1)(a). It would

continue to do so even after an annual/periodic view if no amendment was made to the statement, as it would still be the statement as first made, and it would be that statement which as a matter of law governed the relationship between parents, council and school. If, however, the statement as first made is then (as here) amended following the annual/periodic review, the appeal against the statement as first made no longer has anything to bite on as there is no longer a statement as "first made" in terms of a legal document governing the relationship between the parties. Any appeal would then arise as a matter of law against the statement as amended not under section 326(1)(a) but under section 326(1)(b) of the Education Act 1996.

29. No doubt in most cases such jurisdictional matters would not be of any real importance or significance. Effective case management by the First-tier Tribunal could 'convert' a section 326(1)(a) appeal into a section 326(1)(b) appeal after an annual review if the parents remained dissatisfied with statement as amended. But as a matter of proper legal analysis it seems to me that a legally distinct appeal right arises (and needs to be exercised) once the statement has been amended. The effect of the argument now made by the council would be to require the parents to continue with an appeal right which no longer arises and which, in any event, they no longer wish to exercise and, perhaps more importantly, to treat them as having appealed against the amendments made to the statement following the annual review under section 326(1)(a) when no such appeal right has been exercised and where the parents positively have no interest exercising that right. In sum, it would have the effect of allowing the council to appeal against its own decision when the statute does not confer any right of appeal on the council. That in my judgment is not the effect of section 326 of the Education Act 1996, but even if it may be argued to have such an effect it is not one that my discretion arising under section 12(2)(a) of the Tribunals,

Courts and Enforcement Act 2007 should allow to occur on the facts of this case.

30. I accept that the above result will disappoint Essex County Council. It no doubt made the recent child favourable annual review decision out of the best of motives. However, for the reasons given above it has led the council into a legal cul-de-sac. This, however, as a matter of legal analysis is not surprising. The council in exercising its legal powers and duties had to do so lawfully. Its case has been, and I understand remains, that Jessica had, and has, no educational need for a 'waking day' curriculum or residential school placement. If that is what the council considered was the correct position on the evidence then that is what it should have decided. Indeed, if it did not consider that Jessica needed a residential placement then it may be that it acted unlawfully in making the annual review decision it did. No doubt a properly reasoned out decision of the First-tier Tribunal, one way or the other, may have influenced any subsequent review decision made by the council, as it would not be in its interests to have each review decision unnecessarily appealed.

31. It may be that Essex County Council will now, as it indicated it would, make a further review decision to unpick that which, from its perspective, it knowingly wrongly decided on the annual review. When and how such a review might lawfully arise is not a matter for me. Plainly any such decision, if made, will need to be based on Jessica's up to date educational needs. If any new decision finds on the evidence that Jessica does not need a residential placement at D school then her parents will have a right of appeal against that decision, and any such appeal will require careful fact finding and adequate reasoning addressing her educational need for residential schooling. To that extent, if such an appeal needed this decision might provide some assistance.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal
Dated 17th October 2016