IN THE UPPER TRIBUNAL **Appeal No. UA-2021-000608-HS**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (HESC Chamber)

Between:

RB

Appellant

- v –

Calderdale Metropolitan Borough Council

Respondent

Before: Upper Tribunal Judge Rowley

Hearing date: 3 May 2022
Decision date: 11 May 2022

Representation:
Appellant: Ms Emma Waldron, Counsel (acting pro bono), and IPSEA
Respondent: Mr Andrew Cullen, in-house Counsel, Browne Jacobson LLP

ANONYMITY ORDER

Of its own motion the Upper Tribunal orders that, pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, there is to be no disclosure of:

(a) The name or address of RB who is the Appellant in these proceedings or

(b) any information that is likely to lead members of the public, directly or indirectly, to identify the Appellant in connection with these proceedings.

Any breach of this anonymity order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment which may be imposed is a sentence of two years' imprisonment or an unlimited fine.

DECISION

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

The decision of the First-tier Tribunal taken on 20 June 2021, amended and re-issued on 30 June 2021 (ref. EH381/21/00001V), did not involve an error on a point of law. Under

section 11 of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal dismisses this appeal.

REASONS FOR DECISION

Introduction

1. Amongst other things, the First-tier Tribunal hears appeals against decisions made by local authorities in relation to children and young persons' special educational needs ('SEN') and special educational provision for those needs. Many appeals are brought by parents or young people without legal representation. Sometimes their cases involve navigating through different pieces of overlapping legislation which may give rise to some confusion around the delineation of the statutes. Until recently, the Appellant in this case did not have the benefit of legal representation. His mother's legal researches led to her grappling with two very different pieces of legislation, namely the Children and Families Act 2014 ('CFA') and the Equality Act 2010 ('EA').
2. This appeal considers the interface between SEN provision under Part 3 of the CFA and obligations under the EA for a child or young person who is 'disabled' within the meaning of the legislation. In particular, the decision discusses whether a First-tier Tribunal dealing with an appeal about the special educational provision specified in an Education, Health and Care Plan ('EHC Plan') should consider the reasonable adjustments required for the child or young person under the EA. The short answer to that question is "no".
3. In this Decision, for reasons of anonymity, I shall refer to the Appellant as R.

The hearing before the Upper Tribunal

4. At R's request, his mother attended the Upper Tribunal hearing on his behalf. R was represented by Ms Waldron of Counsel who had been instructed on a pro bono basis after her assistance had been sought from IPSEA following my grant of permission to appeal. Mr Cullen, in-house Counsel, represented the respondent local authority. I am grateful to both for their assistance.
5. With the parties' consent the hearing was a remote one, conducted over CVP Kinly. The Upper Tribunal's bundle of documents contained 130 pages. The First-tier Tribunal's core bundle (717 pages) and supplementary bundle (56 pages) were also available but not referred to. Once the hearing was underway, no technical difficulties were encountered.

Background

6. R, who is 18, is presently studying for 'A' Levels at a mainstream academy. His exams are due to start in a few weeks' time. In 2013 R was diagnosed with Inflammatory Bowel Disease ('IBD'), a chronic and lifelong condition. He also has anxiety and low mood which can stem from worry about his IBD and can also lead to or exacerbate a flare up of his IBD. There is no dispute that R is disabled within the meaning of the EA.
7. The local authority maintains an EHC Plan for R. R appealed to the First-tier Tribunal ('the tribunal') under section 51 of the CFA against Section B (SEN) and

Section F (special educational provision) of the EHC Plan. In the event of his appeal being successful, R also sought consequential amendments to Section E (outcomes). The appeal was registered under the Special Educational Needs and Disability (First-tier Tribunal Recommendation Power) Regulations 2017, and R requested that the tribunal make recommendations in relation to his health care, and amendments to the recording of events in relation to his social care. The appeal form stated that R did not want to increase his anxiety and wanted his mother to speak for him. Accordingly, R did not attend the hearing before the tribunal, and his mother conducted the case on his behalf, supported by a representative of Support Through Court.

8. Paragraph 28 of the tribunal's decision records that at the outset of the appeal the tribunal clarified the issues it was to deal with. For the purposes of the appeal to the Upper Tribunal, the following were of particular relevance: (a) R's mother requested that, to reduce R's commute and associated fatigue, the EHC Plan provide for a short term private furnished rented two-bedroom flat close to the school in the run up to his 'A' Level exams, and that that accommodation be homely and hassle-free; and (b) R's mother requested that R be provided with timely, flexible mental health support, given R's anxiety and how it impacted on him and his ability to remain focussed.

The First-tier Tribunal's decision

9. The tribunal allowed the appeal in part. It ordered amendments to be made to Sections B and F (but not Section E) of the EHC Plan, and it recommended amendments to Sections C, D, G and H.

10. The tribunal declined to include the requested amendments relating to the provision of accommodation, as it said that it had seen no evidence that R would be unable to attend school without the provision of accommodation and, in any event, the tribunal found that the provision was not reasonably required.

11. As for the mental health support, the tribunal relied on the written and oral evidence of Mr Mukhtar, a Cognitive Behavioural Therapist who had recently worked with R. He was very clear that R did not need any further CBT. Mr Mukhtar recommended school counselling, albeit acknowledging that this had previously been declined by R because of his worry about the stigma of school-based counselling. The tribunal said that it was in no doubt that an experienced and expert counsellor would be very able to address R's concerns about appearing different and his need for privacy and would ensure that counselling was provided in an appropriate manner. In deciding that R would be provided with counselling, the tribunal went on to specify that consideration should be given and discussed with R as to whether this should be offered outside the school day and via video, to allow him to feel at ease.

12. I should add that, in relation to R's transition to adulthood, the tribunal noted that a referral had been made to adult psychology. Given that R's condition is a lifelong one, and that he continues to have anxieties and worries in relation to it, the tribunal recommended amendments to Section G (health provision) to reflect its view that R be assessed by a clinical psychologist in the adults' team to consider the support he required with managing the implications of his IBD.

13. The tribunal's Decision recorded that it:

> … took into account the Code of Practice and the relevant sections of the Children and Families Act 2014, SEND Regulations 2014 and statutory guidance.

No further reference was made to the Code of Practice in the tribunal's Decision. Nor was any reference made to the provisions of the EA.

The appeal to the Upper Tribunal

14. On 18 December 2021 the Upper Tribunal received R's application for permission to appeal. The grounds of appeal were drafted by his mother. They are wide-ranging. Having analysed the grounds, they seemed to me to give rise to issues which may be of wider interest beyond this case.

15. On 20 January 2022 I gave permission to appeal to the Upper Tribunal in these terms:

> Whilst I am not limiting permission to appeal, I expect the primary focus of the appeal to be the relevance, if any, of the Equality Act 2010 to an Education, Health and Care Plan issued under the provisions of the Children and Families Act 2014. Matters to be addressed will include:
>
> a. What is the interface between special educational needs provision under the Children and Families Act 2014 and obligations under the Equality Act 2010 for a child who is 'disabled' within the meaning of the legislation?
>
> b. In relation to this issue, how are the paragraphs of the SEND Code of Practice referred to in the grounds of appeal (particularly paragraph 1.35 of the code) to be read with the sections of the 2014 Act that deal with the duties to secure provision to meet a child or young person's special educational needs?
>
> c. What happens in the event that it is decided that there is an inconsistency between the Code of Practice and the 2014 Act? Whilst section 77(6) of the 2014 Act requires a First-tier Tribunal to have regard "to any provision of the code that appears to it to be relevant to a question arising on an appeal under [Part 3 of the Act]", nonetheless it has been said that the provisions of the code cannot override the legislation (see, for example, *Devon CC v OH (SEN)* [2016] UKUT 0292 (AAC)).
>
> d. In this context, did the First-tier Tribunal fail to have sufficient regard to the relevant sections of the Code of Practice? If so:
>
> i. Were these sections raised as an issue before the First-tier Tribunal?
>
> ii. If they were not, should the tribunal have considered them in any case, pursuant to its inquisitorial jurisdiction?
>
> iii. If the Upper Tribunal were to decide that the First-tier Tribunal erred in law because it did not have sufficient regard to the relevant sections of the code, would any such error of law have been one that was material to the outcome of the tribunal's decision?

16. An oral hearing of the appeal was listed to be heard on 22 March 2022 but regrettably it had to be adjourned. The earliest convenient date for both parties and the Upper Tribunal for the re-listed hearing was 3 May 2022.

17. Realistically, Ms Waldron limited her submissions at the hearing to the matters addressed below. In passing, I record that at the conclusion of the hearing R's mother indicated that she was content with the way in which Ms Waldron had presented the appeal.

The Legal Framework

Children and Families Act 2014

18. Part 3 of the CFA provides the statutory framework for identifying, assessing and supporting children and young persons with special educational needs. The provisions as relevant to this appeal are as follows.

19. Section 37 creates the duty to prepare and maintain an EHC Plan. It sets out what must, and what may, be included in it. Section 37(2) requires that an EHC Plan must, among other things, contain a description of the child or young person's SEN and the special educational provision required by him or her.

20. 'Special educational needs' are defined by section 20, the relevant parts of which are:

> **20 When a child or young person has special educational needs**
>
> (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.
>
> …
>
> (5) This section applies for the purposes of this Part.

21. Section 21 defines 'special educational provision'. These are the relevant provisions:

> **21 Special educational provision, health care provision and social care provision**
>
> (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,
> >
> > (b) maintained nursery schools in England,
> >
> > (c) mainstream post-16 institutions in England, or
> >
> > (d) places in England at which relevant early years education is provided.
>
> …
>
> (6) This section applies for the purposes of this Part.

22. Section 42 imposes the following duties upon a local authority:

42 Duty to secure special educational provision and health care provision in accordance with EHC Plan

(1) This section applies where a local authority maintains an EHC plan for a child or young person.

(2) The local authority must secure the specified special educational provision for the child or young person.

…

(6) "Specified", in relation to an EHC plan, means specified in the plan.

23. Section 83 contains further definitions. Section 83(3) is significant for the purposes of this appeal. It provides:

83 Interpretation of Part 3

…

(3) A child or young person has a disability for the purposes of this Part if he or she has a disability for the purposes of the Equality Act 2010.

24. Section 51 of the CFA contains rights of appeal. So far as relevant in this case, it provides:

51 Appeals
(1) A child's parent or a young person may appeal to the First-tier Tribunal against the matters set out in subsection (2)...

(2) The matters are—
…
(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…

Equality Act 2010

25. The EA protects pupils from discrimination based on protected characteristics, including disability (section 15). Section 6 contains the definition of 'disability':

6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

26. Section 20 contains the duty to make reasonable adjustments. The person upon whom the duty is imposed is referred to as 'A'. The duty to make reasonable adjustments comprises:

20 Duty to make adjustments

…

(3) … a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

…

(5) … a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

27. Paragraph 2 of Schedule 13 applies in respect of reasonable adjustments in schools. Paragraph 2(4)(b) of that Schedule provides that the 'relevant matters' in section 20(3) include 'provision of education or access to a benefit, facility or service'.

28. If a person fails to comply with the duty to make reasonable adjustments, by section 21(2) they will discriminate against the disabled person.

29. Section 85(6) imposes the duty to make reasonable adjustments upon the responsible body of a school (as defined in section 85(9)).

Code of Practice

30. Section 77 of the CFA provides for the Secretary of State to issue a Code of Practice. The Code is the 2015 Special Educational Needs and Disability Code of Practice: 0 to 25 years ('the Code'). Local authorities (among others) must have regard to the Code when exercising their functions under Part 3 of the CFA. In addition, by section 77(6):

> The First-tier Tribunal must have regard to any provision of the code that appears to it to be relevant to a question arising on an appeal under [Part 3].

31. The parties drew my attention to the following paragraphs of the Code:

> P16:
>
> **Disabled children and young people**
>
> …
>
> xviii. Many children and young people who have SEN may have a disability under the Equality Act 2010 – that is '…a physical or mental impairment which has a long-term and substantial adverse effect on their ability to carry out normal day-to-day activities'. This definition provides a relatively low threshold and includes more children than many realise: 'long-term' is defined as 'a year or more' and 'substantial' is defined as 'more than minor or trivial'. This definition includes sensory impairments such as those affecting sight or hearing, and long-term health conditions such as asthma, diabetes, epilepsy, and cancer. Children and young people with such conditions do not necessarily have SEN, but there is a significant overlap between disabled children and young people and those with SEN. Where a disabled child or young person requires special educational provision, they will also be covered by the SEN definition.
>
> …
>
> **A focus on inclusive practice and removing barriers to learning**

…

1.26 As part of its commitments under articles 7 and 24 of the United Nations Convention of the Rights of Persons with Disabilities, the UK Government is committed to inclusive education of disabled children and young people and the progressive removal of barriers to learning and participation in mainstream education. The Children and Families Act 2014 secures the general presumption in law of mainstream education in relation to decisions about where children and young people with SEN should be educated and the Equality Act 2010 provides protection from discrimination for disabled people.

…

1.33 The Equality Act 2010 and Part 3 of the Children and Families Act 2014 interact in a number of important ways. They share a common focus on removing barriers to learning. In the Children and Families Act 2014 duties for planning, commissioning and reviewing provision, the Local Offer and the duties requiring different agencies to work together apply to all children and young people with SEN or disabilities. In carrying out the duties in the Children and Families Act 2014, local authorities and others with responsibilities under that Act, are covered by the Equality Act.

…

1.35 Much of the guidance in this Code of Practice focuses on the individual duties owed to children and young people with SEN. **When early years settings, schools and colleges, local authorities and others plan and review special educational provision and make decisions about children and young people with SEN (chapters 5 to 7 and 9) they should consider, at the same time, the reasonable adjustments and access arrangements required for the same child or young person under the Equality Act**. (Emphasis added).

…

Equality Act 2010

…

7.7 FE colleges, sixth form colleges, 16-19 academies and independent special schools approved under Section 41 of the Children and Families Act 2014 have duties under the Equality Act 2010. In particular, they must not discriminate against, harass or victimise disabled children or young people and they must make reasonable adjustments to prevent them being placed at a substantial disadvantage. This duty is anticipatory – it requires thought to be given in advance to what disabled young people might require and what adjustments might need to be made to prevent that disadvantage

A summary of the parties' submissions

32. Ms Waldron submitted that the provisions of Part 3 of the CFA and EA are inextricably linked to the extent that when a local authority (or tribunal stepping into its shoes) is considering what special educational provision is reasonably required to meet a child or young person's SEN it should consider, at the same time, the reasonable adjustments required for that child or young person under the EA. A tribunal's failure to do so would, submitted Ms Waldron, amount to an error of law.

33. Ms Waldron relied upon paragraphs 1.33, 1.35 and 7.7 of the Code, set out above. She placed particular emphasis on paragraph 1.35. Ms Waldron submitted that that paragraph confirmed that a tribunal hearing an appeal under

section 51 of the CFA has a duty to consider, at the same time, the reasonable adjustments required for the child or young person under the EA.

34. Ms Waldron acknowledged that in most cases any such reasonable adjustments would also amount to provision that was reasonably required for a child or young person's SEN, and so may not significantly alter a tribunal's approach. However, Ms Waldron argued that that was not the position in every case, and that the tribunal's failure consider what reasonable adjustments were required for R in this case led to a material error of law. Highlighting the anticipatory nature of the duty to make reasonable adjustments, Ms Waldron contended that had the provision of accommodation and/or clinical psychological support been considered by the tribunal in the context of reasonable adjustments, the outcome of the appeal to it may have been quite different[1].

35. Whilst acknowledging that the case had not been put in this way to the tribunal, Ms Waldron submitted that the tribunal should nonetheless have considered the matter pursuant to its inquisitorial duty. This was because R's mother had put R's disability at the heart of her case and had broadly raised the matter of the EA in her appeal. Moreover, aspects of the EHC Plan had referred to "reasonable adjustments":

> F6 Staff will allow additional time to complete set tasks and give extended homework deadlines; tasks may need to be differentiated in terms of quantity of work expected while still providing an appropriate level of challenge. College will continue to implement their reasonable adjustment policy.
>
> …
>
> F11 Practical systems in place agreed with [R] to support his self-management, for example:
>
> - Use of a toilet pass – being able to leave lessons urgently without explanation
> - Provision of hygiene facilities, somewhere to keep a change of clothes
> - Asking for rest breaks
> - Arranging extra time for completion of homework
>
> Minimise as far as possible "triple subjects/back to back lessons" on [R's] timetable (reasonable adjustments if this can't be avoided).
>
> …
>
> F15 All teaching and support staff working with [R] will be made aware of his medical needs and the psychological impact that his lifelong condition has and will make reasonable adjustments to accommodate these…

36. Ms Waldron conceded that these references did not touch upon the issues which lay at the heart of this appeal (accommodation and the provision of mental health support) but she nevertheless argued that they were sufficient to have raised the question of "reasonable adjustments" generally, thereby imposing an obligation on the part of the tribunal to consider them in the round.

37. In response to Ms Waldron's submissions, Mr Cullen recognised that there is some limited overlap between the SEN provisions in Part 3 of the CFA and the reasonable adjustments provisions in the EA, in that section 83(3) of the CFA 'borrows' the definition of 'disability' from the EA. He submitted that that, however, is where the legislative interaction ends. Mr Cullen underlined that if

[1] With regard clinical psychological support, Ms Waldron recognised the tribunal's *recommendation* that R be assessed by a clinical psychologist, but her case was that such an assessment should have been included within Section F as special educational provision to 'give it more teeth'.

Parliament had intended appeals under section 51 of the CFA to deal with considerations of reasonable adjustments under the EA, provision would have been made, but that is not the case. Accordingly, nothing in the legislation made it incumbent on the tribunal hearing R's appeal separately to consider reasonable adjustments under the EA.

38. Mr Cullen submitted that the Code provided some useful guidance on the overlap and differences between the Acts. He referred, in particular, to page 16 point xviii and paragraph 1.26, set out above.

39. Before addressing the paragraphs of the Code relied on by Ms Waldron, Mr Cullen highlighted that there had been no more than passing reference to the Code in R's appeal to the tribunal, nor had there been specific reference to any particular paragraphs.

40. Mr Cullen submitted that paragraph 1.35 of the Code should not be read in such a way as to impose on a tribunal a duty to consider EA reasonable adjustments on an appeal under section 51 of the CFA. He contended that one must be careful not to isolate paragraphs of the Code without considering them in their context. Paragraph 1.35, together with paragraphs 1.26 and 1.33, appears in a section headed, "A focus on inclusive practice and removing barriers to learning". Read as a whole, that section (together with the other paragraphs cited by Ms Waldron) amounts to no more than a summary of the duties imposed by the CFA and EA respectively.

41. In the alternative, relying on *Devon CC v OH (SEN)* [2016] UKUT 0292 (AAC) and *Staffordshire CC v JM* [2016] UKUT 0246 (AAC), Mr Cullen argued that if paragraph 1.35 were to be read in the way proposed by Ms Waldron, then that paragraph would fly in the face of the legislative provisions and so it must not be followed.

42. As to the question of whether the tribunal should have considered the matters raised on this appeal pursuant its inquisitorial jurisdiction, Mr Cullen submitted that, in the absence of any more specific or focussed arguments to the tribunal under the EA and/or any particular paragraph of the Code, the tribunal was under no inquisitorial duty to consider or refer to these matters or to explain why it did not do so.

43. In summary, it was Mr Cullen's case that the absence of any reference to the EA or reasonable adjustments in the tribunal's Decision did not amount to an error of law.

44. Mr Cullen went to submit that, in any event, the tribunal gave proper thought to the issues of accommodation and mental health support, and there was nothing to suggest that had it considered them through the lens of reasonable adjustments its decision would have been any different. Thus, it was Mr Cullen's case that even if the tribunal could be said to have erred in law in the way proposed by Ms Waldron, any such error would not have affected the outcome of the case.

Authorities

45. The parties did not refer to any Upper Tribunal case which has dealt with the issues on this appeal. Ms Waldron drew my attention to two decisions of Upper Tribunal Judge Lane which made passing reference to the interface between the

CFA and EA (*Hertfordshire County Council v MC and KC (SEN)* [2016] UKUT 0385 (AAC) and *RD and GD v The Proprietor of Horizon Primary (SEN)* [2020] UKUT 278 (AAC)) but those cases did not address the matters I have to decide, and I have not found them of any assistance.

Discussion

46. I start from the uncontested proposition that there is undoubtedly some interface between the EA and Part 3 of the CFA. As paragraph 1.33 of the Code states, both statutes have a shared aim of removing barriers to learning. Furthermore, section 83(3) of the CFA requires one to turn to the EA in order to interpret the meaning of 'disability'. In other words, the issue of whether a child or young person has a disability for the purposes of Part 3 of the CFA is determined by reference to whether they have a disability for the purposes of the EA.

47. But that is as far as it goes. The statutory regimes are entirely different and distinct, the CFA's being one of SEN, and the EA's one of disability discrimination. Under the CFA a local authority is responsible for making provision for a pupil's SEN (section 42). In contrast, under the EA, the duty to make reasonable adjustments is placed squarely upon the responsible body of a school (section 85).

48. How does this distinction play out in practice? Of course, some disabled children do not have SEN, but often an individual child or young person with SEN may be disabled within the meaning of the EA, and for those children or young persons it may well be that matters that arise in relation to their SEN provision may also overlap with questions of reasonable adjustments under the EA. Some examples may be illustrative. They are taken from the Equality and Human Rights Commission's Technical Guidance on Reasonable Adjustments for Disabled Pupils, 2015.

(a) A disabled pupil may receive support in school solely through the SEN framework:

> Example - A disabled pupil has an EHC plan and attends a maintained mainstream secondary school. Through her EHC plan, she receives two hours a week of specialist teaching and uses an electronic notetaker in lessons. Because the support that she requires is provided through her EHC plan, the school does not therefore have to make reasonable adjustments by providing these auxiliary aids and services for her. (pp7,8)

(b) A disabled pupil may need reasonable adjustments to be made in addition to the special educational provision that he or she is receiving:

> Example - An infant school disabled pupil with attention deficit hyperactivity disorder (ADHD) receives some individual teaching assistant support through the SEN framework. He is diagnosed with severe asthma and needs assistance with his nebuliser. Although this is not a special educational need, his asthma is likely to be a disability for the purpose of the Act and so a failure to provide a reasonable adjustment will place him at a substantial disadvantage. The school trains his teaching assistant and she provides him with the assistance that he needs. This would be a reasonable adjustment for the school to make. (p8)

(c) Some disabled pupils are not classified as having SEN, but if they are disabled and are suffering a substantial disadvantage, they may still need reasonable adjustments to be made.

> Example - A disabled pupil at an infant school has diabetes, and requires daily support with reading blood sugar levels and insulin injections. He is not classified as having SEN and therefore receives no support through the SEN framework. He is, however, disabled and therefore, if the lack of daily support places him at a substantial disadvantage, the school would be under a duty to make the adjustment of providing the support, if it would be reasonable to do so. (p8)

49. It will be seen from example (a) above that the SEN framework may in practice result, without more, in what may be considered to be reasonable adjustments. However, with respect, and despite her eloquence in putting forward her client's case, Ms Waldron did not come anywhere near persuading me that it must follow that a tribunal hearing an SEN appeal under the CFA must simultaneously consider reasonable adjustments for the child or young person under the provisions of the EA. The regimes under the two Acts are not one and the same, and nothing has been put before me to suggest that the reasonable adjustment provisions of the EA should be imported into the CFA.

50. Where does this leave the provisions of the Code? Self-evidently, the Code seeks to summarise the legislative duties under the two Acts in simple terms. With the possible exception of paragraph 1.35, the paragraphs relied on by the parties simply provide a clear and uncontroversial summary of the law. They add nothing more to this appeal.

51. Paragraph 1.35 of the Code is set out above. It is not for me to carry out a thorough analysis of the wording of that paragraph, not least because the question is largely an academic one. In short, I am minded to prefer Mr Cullen's submissions on the interpretation of paragraph 1.35.

52. I have said the question is largely an academic one because *even if* paragraph 1.35 were to be interpreted in such a way as to support Ms Waldron's submissions, in my judgment such an interpretation would render the paragraph inconsistent with the clearly delineated statutory regimes. In those circumstances, there would be no breach of the duty imposed by section 77(6) of the CFA to have regard to the provisions of the Code in the case of a tribunal on an SEN appeal under section 51 omitting to consider reasonable adjustments.

53. As Upper Tribunal Judge Lane said in *Staffordshire County Council v JM* [2016] UKUT 0246 (AAC) [40]:

> … A Tribunal must apply the law. If a Tribunal finds guidance in the Code which flies in the face of legislative provisions, its duty is to apply the law as laid down by Parliament.

54. This proposition was pithily underlined a few weeks later by Upper Tribunal Judge Ward in *Devon CC v OH (SEN)* [2016] UKUT 0292 (AAC) [45]:

> … It is axiomatic that the Code cannot override the statute (or indeed a relevant statutory instrument)…

55. In summary even if, contrary to my view, paragraph 1.35 of the Code were to be interpreted in such a way as to require a tribunal specifically to consider reasonable adjustments under the EA for a disabled child or young person on an appeal under section 51 of the CFA in respect of provision for their SEN, it must not be followed. Accordingly, the fact that the tribunal's Decision did not refer to the Code in any more than general terms does not amount to an error of law in this case.

56. In the light of the above it is not strictly necessary for me to consider whether, as Ms Waldron submitted, the tribunal acted in breach of its inquisitorial duty in omitting to refer to the EA. Suffice to say, I am satisfied that the issue was not sufficiently apparent from the evidence or submissions to the tribunal as to necessitate further exploration. Whilst it may be that the use of the phrase "reasonable adjustments" in the EHC Plan perhaps understandably set the hare running insofar as R's mother is concerned, such references cannot have imposed a duty on the tribunal, which was considering an SEN appeal under section 51 of the CFA, to consider the issue of any reasonable adjustments under the EA or to explain why it had not done so. Rather, the tribunal fulfilled its clearly delineated statutory task under section 51 of the CFA in that it properly and adequately considered what special educational provision was reasonably required to meet R's SEN.

Outcomes

57. Finally, I should briefly address one further matter. R's mother was very keen for Ms Waldron to raise the matter of "outcomes". As I had not limited permission to appeal, it was open to Ms Waldron to make submissions on the issue.

58. The parties agreed that regulation 12 of the Special Educational Needs and Disability Regulations 2014 requires an EHC Plan to specify, in Section E, the outcomes sought for a child or young person. By section 51(2)(c) of the CFA there is no right of appeal against the specification of outcomes, but it may be open to a tribunal which has re-cast the specified SEN and provision to alter outcomes that no longer related to them (*S v Worcestershire CC (SEN)* [2017] UKUT 0092 (AAC)).

59. Put shortly, Ms Waldron submitted that, the tribunal having re-cast some of the special educational provisions for R, it should have modified the outcomes which were insufficient as a consequence. In my judgment this submission was without merit. I agree with Mr Cullen's submission that the tribunal sufficiently considered the issue of outcomes at paragraph 72 of its Decision and gave adequate reasons to explain why it did not make any consequential amendments to them.

Conclusion

60. For the reasons set out above, the tribunal's decision does not involve any material error of law and its decision stands. The appeal is accordingly dismissed.

A. Rowley
Judge of the Upper Tribunal
Authorised for issue on: 11 May 2022