IN THE UPPER TRIBUNAL **Case No. UA-2021-001315-HSW**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the Special Educational Needs Tribunal for Wales

Between:

AB

Appellant

- v –

Newport City Council

Respondent

Before: Upper Tribunal Judge Mitchell

Hearing date: 25 October 2021.

Venue: Cardiff Civil Justice Centre.

Attendances: For the Appellant, Mr M Wyard of counsel, instructed by Sinclairslaw.
For the Respondent, Mr C Jowett of counsel, instructed by Newport City Council Legal Department.

DECISIONS

Under section 336ZB(2) of the Education Act 1996, the Upper Tribunal grants the Appellant permission to appeal. The Appellant's appeal against the decision of the Special Educational Needs Tribunal for Wales, taken on 17 July 2020 and reviewed on 8 February 2021 (tribunal case ref: S 0025 1019), has a realistic prospect of success.

The decision of the Upper Tribunal is to allow the appeal. The decision of the Special Educational Needs Tribunal for Wales involved an error on a point of law. Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, as applied by section 336ZB(3) of the Education Act 1996, the Upper Tribunal sets aside the Tribunal's decision but makes no further order.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 the Upper Tribunal hereby makes an order prohibiting the disclosure or publication of any matter likely to lead to a member of the public identifying the young person with whom this appeal is concerned. This order does not apply to (a) the young person (who is now an adult); (b) any person to whom the young person discloses, or authorises publication of, such a matter (c) the disclosure or publication of such a matter by any person in the exercise of statutory (including judicial) functions in relation to the young person.

REASONS FOR DECISION

Introduction

1. The issue of principle in this case is whether there is a right of appeal to the Upper Tribunal against a review decision of the SEN Tribunal for Wales. I decide that there is a right of appeal, which is not the case for review decisions of the First-tier Tribunal.

2. While there is in principle a right of appeal against a review decision of the SEN Tribunal for Wales, it should be noted that the Upper Tribunal is likely to be circumspect about granting permission to appeal. Normally, challenges should be restricted to substantive tribunal decisions.

3. In these reasons:

- "2008 Order" means the Transfer of Tribunal Functions Order 2008;
- "2012 Regulations" means the Special Educational Needs Tribunal for Wales Regulations 2012;
- "EA 1996" means the Education Act 1996;
- "TCEA 2007" means the Tribunals, Courts and Enforcement Act 2007;
- "Tribunal" means the Special Educational Needs Tribunal for Wales.

Proceedings before the SEN Tribunal for Wales

Appeal proceedings

4. On 21 August 2019, the Respondent local authority (Newport City Council) gave notice to the parents of S, a young person, that they had decided to cease to maintain her statement of special educational needs. S, whose mother is the Appellant, was about to begin sixth form study W School, the independent school named in Part 4 of her statement and whose fees had previously been met by the authority. Headed "De-statement of Statement of Special Educational Needs", the notice said a statement was not required because S had completed her "formal statutory education".

5. In September 2019, S entered W School's sixth form and, by the date of the Tribunal's decision, had completed her first year of sixth form study. S was studying A-Level English Literature and Psychology, and a BTEC in Sport.

6. The Tribunal made the following findings about S's situation:

> "8…[S] has a diagnosis of Autistic Spectrum Disorder…, anxiety and social difficulties with below average skills in verbal reasoning and working memory. She is 17 years of age…She attends [W] School…a small fee-paying school in [the West of England]. It is some distance from the family home. [W School] caters for children without learning difficulties from 11 to 18 years of age."

7. The Tribunal found that S "is vulnerable and has social communication difficulties" but did not require a small school because, as an older pupil at a Newport school, this should "aid her confidence", and "she is a popular pupil…described as 'bubbly'" (paragraph 22). While S required weekly support of between 2.65 to 5 hours, (paragraph 17 of the Tribunal's reasons), this was available under Newport's arrangements for sixth form education (paragraph 18). The Tribunal's reasons did not deal with the argument that S would not cope with multi-site education in Newport.

8. The Tribunal directed that it was "unable to consider [S's] present school placement" because there was no appeal against Part 4 of her statement (paragraph

25). S's needs could "be met within the resources of a mainstream school in the Newport area" and "at most [S's] needs would require provision under *School Action Plus* (paragraph 27). The Tribunal dismissed the parents' appeal.

Review proceedings

9. Relying on four grounds, the Appellant applied to the Tribunal for review of its appeal decision. On 12 October 2020, the Tribunal Chair declined to dismiss the review application on the ground that it lacked a reasonable prospect of success.

10. The Tribunal's decision notice of 8 February 2021, entitled "REVIEW DECISION", included the following findings:

(a) the Tribunal rejected the argument that fresh evidence could not be admitted. "If a review were to be directed", all available evidence would be considered including that S had not had to leave W School because agreed reduced monthly fees of £250. Alternatively, even if that evidence were excluded "there was insufficient evidence to establish that [S] would have had to change schools before the Tribunal in June 2020";

(b) review ground 1, related to educational disruption, failed because "we are not persuaded that [S] was going to change schools, and now know in any event that she has not done so";

(c) review ground 2 need not be described. Review ground 3 concerned the finding that a mainstream, maintained placement could meet S's needs but was rejected on the basis that the finding was supported by the evidence;

(d) review ground 4 concerned "the package of support and the treatment of the expert evidence" but was rejected because adequate reasons were given for the findings about S's support needs.

11. The Tribunal's reasons ended with "we have…concluded that it is not appropriate to review our Decision and we refuse that application". The Tribunal also refused to grant permission to appeal to the Upper Tribunal.

Legislative framework

Part IV of the Education Act 1996

12. Section 312(1) EA 1996 provides that a child in the area of a local authority in Wales has special educational needs if "[she] has a learning difficulty which calls for special educational provision to be made for [her]".

13. "Special educational provision" is defined by section 312(4) EA 96:

> "in relation to a child who has attained the age of two, educational provision which is additional to, or otherwise different from, the educational provision made generally for children of [her] age in schools maintained by the local authority (other than special schools)".

14. In Part IV EA 1996, "child" includes "any person who has not attained the age of 19 and is a registered pupil at a school" (section 312(5)).

15. A Welsh local authority must make and maintain a statement of special educational needs for a child if, following assessment, "it is necessary to determine the special educational provision which any learning difficulty [she] may have calls for" (section 324(1) EA 1996).

16. Paragraph 9(1) of Schedule 27 to EA 1996 provides that "a local authority may not cease to maintain a statement except in accordance with paragraph 11". Paragraph 11(1) provides that a statement may be ceased "only if it is no longer necessary to maintain it". A statement may not be ceased under paragraph 11 if an appeal against a cessation decision remains undetermined (paragraph 11(5)).

17. Section 336(1) EA 1996 confers power on the Welsh Ministers to "make provision [in regulations] about the proceedings of the Tribunal". Section 336(2) provides:

> "(2) The regulations may, in particular, include provision—…(o) for enabling the Tribunal to review its decisions, or revoke or vary its orders, in such circumstances as may be determined in accordance with the regulations…".

18. Section 336ZB EA 1996 provides:

> "(1) A party to any proceedings under this Part before the Tribunal may appeal to the Upper Tribunal on any point of law arising from a decision made by the Tribunal in those proceedings.

(2) An appeal may be brought under subsection (1) only if, on an application made by the party concerned, the Tribunal or the Upper Tribunal has given its permission for the appeal to be brought.

(3) Section 12 of the Tribunals, Courts and Enforcement Act 2007 (proceedings on appeal to Upper Tribunal) applies in relation to appeals to the Upper Tribunal under this section as it applies in relation to appeals to it under section 11 of that Act, but as if references to the First-tier Tribunal were references to the Tribunal."

19. Article 6(1) of the 2008 Order also provides that "an appeal against a decision of [the Tribunal] lies to the Upper Tribunal".

Tribunals, Courts and Enforcement Act 2007

20. Section 12(1) and (2) TCEA 2007 provide:

"(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.

(2) The Upper Tribunal—

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either—

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision."

21. Section 11(1) and (2) TCEA 2007 Act confers a right of appeal to the Upper Tribunal "on any point of law arising from a decision" of the First-tier Tribunal. The right does not extend to an "excluded decision", which, under section 11(5), includes:

"(d) a decision of the First-tier Tribunal under section 9 [TCEA 2007]—

(i) to review, or not to review, an earlier decision of the tribunal,

(ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal,

(iii) to set aside an earlier decision of the tribunal, or

(iv) to refer, or not to refer, a matter to the Upper Tribunal".

SEN Tribunal for Wales Regulations 2012

22. Regulation 56(1) allows a party to proceedings to apply for review of a tribunal decision on the following grounds:

"(a) the decision was wrongly made as a result of a material error on the part of the Tribunal administration;

(b) a party, who was entitled to be heard at the hearing but failed to appear or to be represented, had good and sufficient reason for failing to appear;

(c) there was an obvious and material error in the decision; or

(d) the interests of justice so require."

23. Regulation 56(4)(b) permits a panel Chair to refuse a review application:

"An application for a review may be refused in whole or part by…the Chair of the tribunal panel which decided the case, if in the…Chair's opinion the whole or part of it has no reasonable chance of success."

24. For the purposes of regulations 58 to 60, "appeal" means "an appeal to the Upper Tribunal against the tribunal panel's decision" (regulation 2(1)). Regulation 58, about applications for permission to appeal, refers to regulations that are now revoked (regulation 39A, Special Educational Needs Tribunal Regulations 2001; regulation 39A, Special Educational Needs and Disability Tribunal (General Provisions and Disability Claims Procedure) Regulations 2002). On receipt of an application for permission to appeal, the panel Chair must "first consider…whether to review the Tribunal's decision in accordance with regulation 56 unless the…Chair [has] already reviewed the decision or decided not to review the decision" (regulation 58(1)).

Proceedings before the Upper Tribunal

25. The Appellant applied to the Upper Tribunal for permission to appeal. Her request for a 'rolled-up' hearing was granted (a hearing to decide whether to grant permission to appeal and, if so, whether to allow the appeal). Accordingly, the parties' arguments focussed on the merits of the Appellant's grounds of appeal.

Arguments

Ground 1

26. The first ground of appeal concerns the Tribunal's decision of 8 February 2021. I shall refer to it as the review decision and that of 17 July 2020 as the appeal decision. The issues are whether there is a right of appeal to the Upper Tribunal against a Tribunal review decision and, if so, whether the present Tribunal erred in law by refusing to review the appeal decision.

27. Under sections 9 to 11 TCEA 2007, First-tier Tribunal review decisions are excluded from the right of appeal to the Upper Tribunal. Section 336ZB(3) EA 1996 applies section 12 TCEA 2007 to appeals against Tribunal decisions, but does not expressly apply section 11. Even if this is a statutory lacuna, argues the Appellant, it means that she has a right of appeal against a Tribunal review decision.

28. Mr Wyard, for the Appellant, argues that section 336ZB(3) EA 1996's partial application of TCEA 2007 must have a legal consequence. There is no obvious reason why section 336ZB should be read other than literally. The Tribunal was not treated by TCEA 2007, in appellate terms, in the same way as the First-tier Tribunal. Rather than an oversight, this is probably explained by Tribunal's proceedings being governed not by the TCEA 2007 but by the Tribunal itself. The legislative intention was to provide access to the Upper Tribunal but for regulations to specify how the right is to be exercised. The Respondent's case unsettles the balance struck by the legislature. I asked both counsel who makes Tribunal procedural regulations. They agreed that it is the Welsh Ministers (with the consent of the Secretary of State). In other words, not the Tribunal itself.

29. Once a Tribunal determines that a review application has a reasonable prospect of success, submits Mr Wyard, the 2012 Regulations require a review. Under regulation 56(3), this means either setting aside or varying the appeal decision. By refusing to review the appeal decision, the Tribunal acted *ultra vires*.

30. At the hearing, I asked Mr Wyard what practical benefit would accrue from a right of appeal against a review decision. If a review leads to a varied appeal decision, the varied decision may be appealed. If the appeal decision is set aside, the applicant for review would not object. If the review leaves the appeal decision unaltered, assuming that is permitted, the appeal decision may be appealed. A party might object to the conduct of a review but to what substantive end? Mr Wyard accepts appeal decisions clearly attract a right of appeal, but the fact remains that primary legislation includes reviews decisions within the right of appeal under section 336ZB(1) EA 1996.

31. Mr Jowett, for the Respondent, submits that a review is a pre-appeal filter and appeals against review decisions cannot have been intended. It would create a convoluted system involving two simultaneous appeals, one against a substantive appeal decision and another against a review of that decision.

32. Mr Jowett argues that the 2012 Regulations differentiate between decisions and determinations. For instance, regulation 56(10) refers to both within a single provision. Rather than sloppy drafting, the intention is to delimit Tribunal acts that attract a right of appeal. Regulation 58(2), in referring to applications for permission to appeal against *decisions*, reinforces this distinction. Mr Wyard disagrees, arguing that labels cannot determine the scope of a right of appeal granted by primary legislation.

33. Mr Jowett concedes that section 336ZB EA 1996 expressly applies only section 12 TCEA 2007. However, it is applied "as it applies in relation to appeals to [the Upper Tribunal] under section 11 [TCEA 2007]". By this means, excluded decision under section 11 TCEA 2007 are imported into section 336ZB(3). Had the intention been otherwise, section 336ZB(3) would have said something like 'section 12 of TCEA 2007 applies as if references to section 11 are omitted'.

Ground 2

34. If ground 1 succeeds, the ground 2 issue is whether the Tribunal erred by taking into account, on review, what the Appellant describes as 'new evidence', but is more accurately described as evidence relating to events post-dating the appeal decision.

35. On a review, argues Mr Wyard for the Appellant, the Tribunal is precluded from considering evidence not before the appeal decision Tribunal. The present Tribunal, however, relied on fresh evidence to reject review ground 1. I asked Mr Wyard whether some review grounds might be of diminished utility were fresh evidence prohibited. For example, take the review ground that "the interests of justice so require". For example, it might transpire that one party withheld important evidence

from the Tribunal. Mr Wyard argues that if there might, in principle, be scope for admission of new evidence, there was no justification for its admission on S's review.

36. I asked Mr Wyard whether his case was that, if a review survives the regulation 56(4) 'reasonable prospects of success' filter, the end result must be some substantive alteration to an appeal decision. His answer was yes. Once S's review application was found to have a reasonable prospect of success, the Tribunal had to give a 'positive' review decision which altered the appeal decision in some way favourable to S.

37. Mr Jowett, for the Respondent, submits that a Tribunal may refuse to review an appeal decision despite an earlier finding that a review has a 'reasonable prospect of success'. I asked him whether by 'refusal to review' he meant 'a review that results in no change to the appeal decision'. Mr Jowett said that was another way of putting it, and there is a material difference between an application for review and the review itself. Mr Wyard's argument erodes that difference to nothing.

38. The Tribunal's reasons demonstrate, argues Mr Jowett, a thorough review of the appeal decision. In substance, this was not a tribunal refusing to carry out a review. Read carefully, the reasons disclose that, in relation to educational disruption, the interests of justice review ground was applied. The Tribunal pragmatically admitted fresh evidence about S's current education and was entitled to do so. In any event, the Tribunal gave sound alternative reasons, in which new evidence was ignored.

39. Mr Jowett also argues that educational disruption was not a live issue on the appeal itself. Even if review decisions may be appealed, the present review was carried out in accordance with the 2012 Regulations without any error on a point of law.

Ground 3

40. The third and fourth grounds of appeal are more typical Upper Tribunal fare, challenging the appeal decision rather than the subsequent review decision.

41. The Appellant argues that the Tribunal unlawfully and/or irrationally failed to consider the significant educational disruption associated with ceasing to maintain S's Statement. This was a relevant consideration (*W v Gloucestershire CC* [2001] EWHC Admin 481) and the subject of detailed evidence (described in the Appellant's skeleton argument) The Tribunal failed even to acknowledge that ceasing S's statement would, or might, lead to her changing school half-way through her sixth form studies.

42. Mr Jowett, for the Respondent, argues that *W v Gloucestershire CC* was not applicable; the evidence was insufficient to support a finding that S might have to change school. For this reason alone, grounds 3 and 4 should be rejected.

43. Had the Tribunal considered *W v Gloucestershire CC*, submits the Appellant, it would have been bound to find a statement remained necessary since the local authority's evidence did not rebut the Appellant's disruption evidence. Alternatively, the decision was irrational since the Tribunal overlooked 'strong evidence' about educational disruption. Given the authority's stance that, absent a statement, it would not fund S's placement, a reasonable tribunal would have accepted a statement remained necessary so that S could complete her A-Level studies.

44. The Appellant argues that the Tribunal's reasons were inadequate. It failed to deal with disruption issue despite it having been argued in submissions and addressed in both expert evidence and parental oral evidence.

45. Mr Wyard argues that the Tribunal's decision was inconsistent with *Manchester City Council v JW* [2014] ELR 304; it failed to ask whether the required provision was available within the resources normally available to a maintained provider. It was also inconsistent with *SC & MS v Worcestershire County Council* [2016] UKUT 267 (AAC); the Tribunal failed to ask whether, absent a statement, it was satisfied to a reasonable degree of certainty that the provision S required would be made.

46. Mr Jowett submits that the Appellant's description of the case before the Tribunal is inaccurate. The evidence failed to establish that S would have to leave W School and, on review, the Appellant herself provided evidence that S had remained there.

Ground 4

47. The Tribunal found that S's needs could be met under Newport's arrangements for sixth form education. The Appellant submits there was no evidence that "provision within the LA's area could meet S's needs from within its own resources, nor that anywhere would offer her a place". No reasonable tribunal could have ceased S's statement without ensuring a suitable alternative was available. The evidence was that S would not cope under Newport's arrangements, but this was not addressed.

48. The Appellant submits that, under Newport's arrangements, S would have had to attend at least two separate institutions and transport herself between sites. The Tribunal failed to address whether this was suitable. The Appellant's evidence was that it would not given S's ASD-related anxiety, social communication difficulties and 'rigidity'. A reasonable tribunal would have fully considered S's ability to attend at least two separate placements before concluding that her needs would be met. The Tribunal should have found that S's need for single-site provision was special

educational provision within section 312(4) EA 1996 (provision additional to or different from that made generally in the Newport local authority area).

49. The Tribunal failed, argues the Appellant, to consider whether the provision required would be delivered without a statement. Indeed, the point could not have been addressed without evidence that S was offered a Newport placement.

50. Mr Wyard criticises the finding that 2.5-5 hours of weekly pastoral support would be available. There was no specific evidence in support and the Tribunal could not have relied on its specialist knowledge because the point was not put to the parties (see *LB v London Borough of Waltham Forest* [2004] ELR 161).

Conclusions

Ground 1

51. The first issue is the construction of section 336ZB(3) EA 96, in particular whether it applies or incorporates section 11 TCEA 2007 so that review decisions of the Tribunal attract no right of appeal.

52. Section 336ZB(3) EA 1996's wording provides some support for the Respondent's case. Section 12 TCEA 2007 applies "as it applies in relation to appeals to [the Upper Tribunal] under section 11". For section 12 to operate, in relation to the Tribunal, as it operates in relation to the First-tier Tribunal, arguably the range of appealable decisions should be similarly restricted. But there are difficulties with that construction.

53. Many section 11 TCEA 2007 excluded decision' relate to particular First-tier Tribunal jurisdictions, such as appeals against national security certificates. New excluded decisions may also be created by order of the Lord Chancellor, but only in relation to the First-tier Tribunal. Certain excluded decisions, in section 11(5), may be viewed as part of a scheme for revisiting substantive decisions, namely: to review, or not to review, an earlier decision; to take no action on a review; to set aside an earlier decision (section 11(5)(d) also specifies decisions whether to refer a matter to the Upper Tribunal but those are of a different type). As it happens, the Tribunal has certain powers to revisit substantive decisions, e.g. its power of review. However, the Tribunal's powers are conferred by the 2012 Regulations, not under the TCEA 2007.

54. The 2012 Regulations are made powers conferred on the Welsh Ministers. Section 336(2) EA 1996 authorises, in particular, provision "(o) for enabling the Tribunal to review its decisions, or revoke or vary its orders, in such circumstances as may be determined in accordance with the regulations". Of the 'revisitation' types of excluded decision in section 11(5)(d) TCEA 2007, the only common ground with the section 336(2) enabling powers concerns reviews. If section 336ZB(3) imports section 11's excluded decisions, it may readily be appreciated that there would be no right of appeal against a Tribunal review decision. However, it is not clear how it might operate to exclude other Tribunal decisions, of the revisitation-type, which are not analogues of section 11(5)(d) excluded decisions. It would be anomalous for Tribunal review decisions to fall outside the right of appeal but not for the other alteration-type decisions, which could be provided for under the Tribunal's procedural regulations. That consideration supports the Appellant's construction.

55. I should add that I am not convinced of a practical benefit to a right of appeal against a Tribunal review decision. A review decision has no independent existence in the sense that it is always associated with a substantive Tribunal decision which clearly does attract a right of appeal. Furthermore, the four review grounds, in regulation 56(1), describe a limited set of flaws in Tribunal decisions or proceedings. It is difficult to see how these grounds, or at least the first three, might allow a party to advance a case that could not be advanced on appeal to the Upper Tribunal.

56. Mr Jowett rightly submits that a purpose of review is to act as a pre-appeal filter. This is apparent on the face of the 2012 Regulations and there is no need for recourse to explanatory material. Mostly, the review grounds describe deficiencies that, if made out, would be likely to result in a successful appeal to the Upper Tribunal. Allied to this is regulation 58(1)'s requirement to consider, on receipt of an application for permission to appeal, whether to review a substantive decision under regulation 56. However, I would not go so far as to say that the only purpose of review is to act as a pre-appeal filter. The fourth review ground – "the interests of justice so require" – might accommodate arguments that would not found a ground of appeal on a point of law. However, I accept that an important purpose of review is to act as a pre-appeal filter.

57. I agree with Mr Jowett that a legislator would be unlikely to grant rights of appeal against pre-appeal filter decisions. However, that is not determinative of ground 1. Suppositions of presumed practicality are not a trump card allowing the Upper Tribunal to overlook legislative wording.

58. I prefer Mr Wyard's submissions for the Appellant. The mismatch between the 'revisitation' category of excluded decisions in section 11(5) TCEA 2007 and the

powers which section 336 EA 1996 regulations may confer on the Tribunal (review of decisions; variation and revocation of orders) is too great to support Mr Jowett's construction. Section 336ZB(3)'s enactment that section 12 applies to appeals against Tribunal decisions, as it applies to appeals against First-tier Tribunal decisions under section 11, cannot even out this mismatch to produce the result sought. That would strain the statutory language too much. Mr Jowett's case has some force if one simply considers powers of review but there is no clear analogue between the independent powers to revoke and vary, for which provision might be made in regulations, and the 'revisitation' category of excluded decision under section 11(5)(d). Section 336ZB(3)'s application of section 12 cannot properly be construed as incorporating, in relation to that category, section 11's excluded decisions. If there is no right of appeal in those cases, there is no good reason for a contrary conclusion for Tribunal review decisions. Since these are Tribunal powers of the same general type, that would be anomalous and, in the absence of clear words, not the legislative intention.

59. Mr Jowett argues that the 2012 regulations distinguish between Tribunal determinations and decisions, with only the latter attracting a right of appeal. As I understand it, he does not argue that rights of appeal track, and are limited to, decisions given under those provisions of EA 1996 which confer express parental rights of appeal. I say that because Mr Jowett argues that there is a right of appeal to the against a Tribunal costs order decision.

60. Mr Jowett's argument overlooks the limits of the enabling powers for the 2012 Regulations, which do not authorise provision about rights of appeal. The general power is to "make provision [in regulations] about the proceedings of the Tribunal on an appeal and the initiation of an appeal [to the Tribunal]" (section 336(1) EA 1996). Section 336(2)'s particularisation of the power does not mention rights of appeal against Tribunal decisions. Rights of appeal are provided for on the face of EA 1996, in section 336ZB, which neither mentions 'excluded decisions' nor confers power for regulations to provide for excluded decisions. I also take into account that the right of appeal under section 336ZB(1) relates to "a decision made by the Tribunal in those proceedings [*that is proceedings under Part IV EA 96*]". The reference to "in those proceedings" supports Mr Wyard's argument that, read literally, section 336ZB's right of appeal is not limited to Tribunal 'outcome' decisions. I also note that the TCEA 2007 assumes that, absent the concept of the excluded decision, a First-tier Tribunal review decision would attract a right of appeal.

61. Insofar as ground 1 concerns the construction of section 336ZB(3) EA 1996, permission to appeal is granted and the ground is made out. Section 336ZB(3)

provides a right of appeal to the Upper Tribunal against a Tribunal review decision However, there is a further aspect to ground 1. Did the Tribunal err in law by refusing to review the appeal decision? I grant permission to appeal in relation to this aspect of ground 1.

62. The Tribunal said that it refused to review the appeal decision. In my judgment, this statement is not quite what it seems. The Tribunal seems to have misconstrued the 2012 Regulations by assuming that, without a set aside, or variation of, an appeal decision there was no review.

63. Regulation 56(4) empowers a tribunal panel to "review and set aside or vary any decision made by the tribunal panel". It also permits a review application to be refused under regulation 56(6) where it "has no reasonable chance of success". Mr Wyard argues that, once an application survives the regulation 56(6) filer, it is set on a definite course towards a review decision that either sets aside, or varies, the appeal decision. It is true that regulation 56(4) does not, in terms, provide for a review which results in no action being taken. However, regulation 56(4) is not expressed in mandatory terms: Mr Wyard's construction would denude regulation 56(6) of its purpose. Under regulation 56(6), the Tribunal considers, in effect, whether an application for review is arguable. If Mr Wyard is right, it is 'game over', as Mr Jowett put it in argument, once the application is adjudged arguable. The review must succeed regardless of its actual merits. That cannot have been the intention. Regulation 56(4) is to be construed so that, on review, the Tribunal may either set aside the appeal decision, vary it or decide to take no action. This is not judicial re-writing of legislation. The term "review" is not defined by the 2012 Regulations, but its ordinary meaning, as a verb, is given by the Oxford English Dictionary (2nd edition, revised) as "assess (something) formally with the intention of instituting change if necessary". Given the ordinary meaning of 'to review', there was no need for express mention of a review that resulted in no action. That went without having to be said given the ordinary meaning of 'review'.

64. I agree with Mr Jowett that the Tribunal did in substance carry out a review. The statement 'we refuse to review' obscured what really happened. The Tribunal gave intelligible reasons for rejecting each review argument advanced by the Appellant. In substance, the Tribunal carried out a review. The second aspect of ground 1 is not made out.

65. I should add that the above findings should not encourage independent challenges to review decisions. In most cases, the Upper Tribunal would probably refuse permission to appeal because the challenge is premature or of no substance. What really matters is the appeal decision itself, and parties should recognise this.

Pointless challenges to review decisions are likely to amount to a breach of a party's obligation under rule 2(4) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to help the Upper Tribunal to further the overriding objective of dealing with cases fairly and justly, and to co-operate with the Upper Tribunal generally.

Ground 2

66. I grant the Appellant permission to appeal on Ground 2. Since I have decided that, in principle, a review decision may be appealed to the Upper Tribunal, I should determine ground 2, which has been fully argued.

67. The Appellant submits that the Tribunal erred in law by relying on new evidence that, at the review date, S remained at W School under a reduced-fee agreement. The evidence is more accurately described as evidence relating to post-appeal decision events. It is not new evidence in the sense of evidence that could have been, but was not, put before the appeal decision Tribunal.

68. The 2012 Regulations contain no express temporal restriction on the evidence that may be relied on at review. However, the nature of the grounds of review circumscribes the evidence that may properly be taken into account. The question is one of evidential relevance to a particular ground.

69. The first review ground (regulation 56(1)(a)) is that a decision was "wrongly made" as a result of a material error by Tribunal administration. I do not see how evidence about post-decision events could be relevant. The ship has already sailed. The second review ground (regulation 56(1)(b)) concerns parties or representatives who fail to appear at a hearing but have good and sufficient reasons for not doing so. Similarly, once a person has failed to appeal failure to appear, subsequent events would not have a bearing on the reasons for the failure.

70. The third review ground (regulation 56(1)(c) is that there was "an obvious and material error in the decision". Clearly, a Tribunal does not err by failing to consider something that has yet to happen. I cannot envisage circumstances in which post-decision events might be relevant to the third review ground.

71. The final review ground (regulation 56(1)(d)) is "the interests of justice so require". The interests of justice may be informed by multiple considerations and therefore evidence. Furthermore, this ground is not tied to "the decision" or "the hearing". In my judgment, excluding, as a rule, evidence relating to post-decision events would impair the Tribunal's ability to deliver justice. For instance, it might become apparent that material evidence was wrongly withheld from the Tribunal, a circumstance that does not readily fit within the other review grounds. I do not

therefore accept the Appellant's argument that, on review, the Tribunal is in all cases precluded from taking into account evidence about post-decision events.

72. It is not entirely clear which statutory review ground/s were relied on by the Appellant. The Tribunal's reasons recite the statutory grounds, but do not mention them again. However, the first two grounds may be discounted. The Appellant relied on neither an administrative mistake nor a failure to attend a hearing. It also seems to me that the Appellant did not rely on the 'interests of justice' review ground because her case was essentially an attack on the appeal decision's reasoning. I approach the review decision on the basis that the Appellant relied on the third ground of review: "an obvious and material error in the decision".

73. Whether a decision contains an obvious and material error is to be judged by reference the case before the Tribunal. I therefore agree with the Appellant that the Tribunal erred by relying on new evidence that, despite S's statement having ceased, she remained at W School following the appeal decision. That evidence could not have demonstrated an obvious and material error in the appeal decision. However, as the Respondent submits, the Tribunal employed alternative reasoning which ignored the new evidence. The Tribunal's findings, made on this alternative evidential basis, were open to it. While the Tribunal erred by relying on the new evidence, it was not a material error. Overall, ground 2 fails.

74. Before departing ground 2, I should point out that my findings do not necessarily mean that, where an obvious and material error is made out, the Tribunal is bound either to set aside or vary its appeal decision. Regulation 56(4) is not expressed in mandatory terms so that, arguably, (a) the Tribunal retains a discretion not to set aside or vary an appeal decision; and (b) in exercising that discretion, post-appeal decision evidence might, in certain cases, properly be taken into account.

Ground 3

W v Gloucestershire CC

75. The main authority relied on in argument was the High Court's decision in *W v Gloucestershire CC* [2001] EWHC Admin 481, which involved a child who was being educated at an independent school, without local authority involvement, but whose statement of SEN named a maintained secondary school. By the tribunal hearing, the child had completed one term of GCSE studies. Scott Baker J held that, in determining whether the maintained school was "appropriate" (see section 324(4) EA 1996), relevant considerations included "the work that was actually being undertaken…at [the independent school] when the tribunal hearing took place and the difficulty that a move…would cause in that context" (paragraph 21). The

maintained school's courses of study differed from those at the independent school: "even after one term…with modular examinations and course work, [the child] would be in serious difficulties trying to catch up and adjust" and "the evidence suggests that any significant change would be an additional burden to him" (paragraph 23). Detailed evidence about differences between the respective courses of study was not before the tribunal, and it was "unable properly to evaluate the extent of the difficulties for him in moving schools and therefore whether [the maintained school] was, in the circumstances, appropriate" (paragraph 25).

Background to the SENTW proceedings

76. In a moment, I shall describe the arguments on educational disruption, as put to the Tribunal. To put matters in context, I shall describe events preceding the Respondent's decision to cease to maintain S's statement:

(a) *17 June 2019*, S's parents wrote to the local authority requesting S's transfer from W School to another independent school closer to her home, but which also offered single-site provision and small class sizes (page 373, Tribunal bundle). The parents explained why they thought S would not cope in a 'local [maintained] Newport School', but I have not found written evidence that, beforehand, the authority had indicated that funding for the W School placement might be at risk;

(b) *19 June 2019*, the authority convened a SEN funding panel (page 377). Ostensibly convened to consider a transfer request, the panel nevertheless decided that S's additional learning needs were not complex and could be met in any "mainstream High School Sixth Form" and "the current provisions within her Statement…would continue if [S] were to attend a state Sixth Form";

(c) *2 July 2019*, the parents enquired about an amended statement, adding "whilst we are preparing to challenge the panel's decision, we also need to plan ahead should [S] need to return to [W School] for 6th form…Ultimately, [S] needs to know where she will be going in September" (page 388). An amended statement was issued on 4 July 2019 but said nothing about transition and continued to name W School (page 453).

(d) *17 July 2019*, the transfer request was now construed as a request for S to "continue her private education in sixth form". S's parents were given informal notice

that her statement would cease in September 2019 because she was no longer of compulsory school age and would not be attending a special school (page 416);

(e) *20 August 2019*, S's parents thought they were still negotiating about the contents of S's Statement, and urgently requested an amended statement (page 477);

(f) *21 August 2019*, the authority issued a notice of 'de-statement' (page 479). On the same day, the authority also issued a further amended statement which, again, made no mention of transition and continued to name W School. The statement did, however, take account of certain parental comments, made "in August 2019", for example that S had a clear idea of what she wanted to achieve, and could manage her difficulties in a classroom environment with appropriate support.

SENTW proceedings

77. S remained at W School during the Tribunal proceedings so that, by the date of its decision, she had completed the first year of sixth form studies. The respective cases before the Tribunal regarding educational disruption and whether Newport's arrangements for sixth form education could meet S's needs were:

(a) the parent's notice of appeal complained that suitable, alternative 6th form provision had not been identified (page 14 of the Tribunal bundle);

(b) the parental case statement (page 45) argued: S's 'local catchment Sixth form' could not replicate her courses of study at W School; there was no evidence that a Newport placement could meet her needs; she would require additional support in more challenging social environments with larger class sizes; she was extremely anxious about travelling alone between sites;

(c) the authority's case statement (page 279) argued: S's special educational needs were not "severe" and "could be met by local…providers"; there were no identifiable benefits "of a private school placement at [W School]" and "the parental request is based on the prestige of attending a private school placement"; "had [the authority] received confirmation that [S's parents] were re-enrolling [S] at [W School] at their own expense…the Statement…would have been maintained specifying the 10 hours of additional support"; sixth form provision within Newport is "delivered across numerous school sites", as explained in a booklet provided to S's parents to which

the authority "did not receive any formal response…and therefore the Statement of SEN was ceased as opposed to naming an alternative provision";

(d) S provided a written statement that "going to a public school" would make her anxious and scared because she would have to cope with crowds, public transport and a loud environment (page 57);

(e) Mr Parkhouse, educational psychologist commissioned by the parents, reported in September 2018: "a degree of hypersensitivity to noise"; "some social communication difficulties"; "not always able to interpret language in a non-literal manner"; "vulnerable…to manipulation from superficially charming individuals"; "can be anxious" (page 126). He recommended a quiet classroom, opportunities to think alone before discussing a topic, early warning of changes to routine, opportunities to observe social situations before joining in, and concluded "it will be important to maintain [S's] Statement" (page 126);

(f) Appellants' skeleton argument (page 705): the authority had effectively conceded a statement was necessary by saying that, were S to attend a State sixth form, her statement would be maintained, and they failed properly to consider S's circumstances, overlooking that that her progress was due to placement at a school with W School's characteristics;

(g) Respondent's skeleton argument (page 713): the sixth form support recently assessed as required by W School, 2.65 hours weekly, could be provided under *School Action Plus*. For the Appellants to succeed, they had to "discredit or question the expertise of professionals [at W School]"; S's statemented needs and provision did not describe a pupil with severe needs nor one requiring specialist provision; the Appellants provided no evidence that local sixth form providers were unsuitable for S, who was "a young lady…working within her appropriate chronological age group";

(h) Mr Parkhouse's updated report of 4 February 2020 (unnumbered): S should be able to continue her chosen A-Levels and BTEC; she would be "extremely anxious" travelling between school sites; should be educated at a single site with a low arousal environment and a smaller number of students; minimal support requirements at W School were due to its characteristics rather than diminution of need;

(i) the Respondent provided written evidence about Newport's arrangements for sixth form education (unnumbered): S could study A-Level English literature at her local

school but would have to travel to another for A-Level Psychology and Sport BTEC; those qualifications were offered by the WJEC (not the examining board for S's courses at W School); S would travel between sites by a free, regular shuttle bus.

Why the SEN Tribunal for Wales erred on a point of law: ground 3

78. The parents argued S's needs could not be met in any school (see, in particular, Mr Parkhouse's reports). The Tribunal dealt with the parental case as follows:

(a) *small school / social anxiety* – Newport sixth forms were "smaller than whole school provision…often in a separate part of the school with separate facilities" (paragraph 22). S had "a diagnosis of Autistic Spectrum Disorder…, anxiety and social difficulties with below average skills in verbal reasoning and working memory" (paragraph 8), and "is vulnerable and has social communication difficulties" (paragraph 22). However, she would be "one of the older students in the school which should aid her confidence", "is a popular pupil…described as 'bubbly'". The Tribunal was not persuaded that a small school setting was required (paragraph 22);

(b) *small class size* – W School's evidence was that, for 70% of the time, S was 'on task' in a class of 14 pupils. Sixth form classes tend to be smaller, quieter "and more attentive classes as well"; there was no need to specify a class size (paragraph 23).

79. Other aspects of the parental case were not addressed. The Tribunal's reasons did not mention S's ability to cope with a school transfer half-way A-Level studies or with travel between Newport sixth form sites. The possible implications of S switching to courses study offered by a different examining board were not addressed.

80. The Respondent argues that *W v Gloucestershire* is distinguishable. In S's case, the evidence did not support a finding that she might have to leave W School. In my view, the evidential picture was unclear. While the authority's case statement asserted that S's parents were paying school fees themselves, this may have been supposition. I have not been taken to confirmatory parental evidence and the fact that S remained at W School is not determinative. Paragraph 11(5) of Schedule 27 to EA 1996 provides that a local authority may not, under paragraph 11, cease to maintain a statement if there has been appeal and "the appeal has not been determined by the Tribunal or withdrawn". It appears that, for a time at least, the local authority disclaimed any liability for school fees pending determination of the appeal although the point may have been conceded once judicial review proceedings were

threatened. As it was, S entered W School's sixth form and remained there at the date of the appeal decision. This could not, of itself, have proven that S's parents were funding the placement. An equally plausible explanation was that W School postponed payment of fees since an education law specialist would surely have advised that, pending determination of the appeal, the authority remained bound to secure the provision, including the named school, specified in S's statement.

81. It transpired that S completed her sixth form studies at W School, which agreed a much-reduced monthly fee of £350 (at least for the second sixth form year). However, I have not been taken to evidence that the Tribunal knew, were the appeal to fail, that a reduced-fee agreement would allow S to remain at W School. In my view, the evidence was inconclusive. This raises the question whether the Tribunal should have required evidence about the likely consequences of S's statement ending, in particular whether it would entail her transfer to a new school.

82. The Tribunal's reasons do not address S's ability to cope with transition to Newport's sixth form arrangements although the issue was raised in parental argument. The Tribunal may have thought that, were the appeal to fail, S would remain at W School so that (a) transfer/disruption considerations did not arise; and (b) all that was required was a notional analysis of whether Newport's sixth-form arrangements would satisfactorily meet S's special educational needs.

83. Turning now to *W v Gloucestershire*. In my judicial experience, this was not a typical transition case. Transition issues tend to arise where a local authority decides to cease to maintain a statement or review a statement and name a different school in Part 4. *W* was an appeal against a refusal to name the independent school currently attended by a child. However, that does not render the decision inapplicable in cessation cases. So far as a child's needs are concerned, the cause of educational disruption does not really matter. In my judgment, the ratio of *W v Gloucestershire* is applicable in cessation cases. As a decision of the High Court in a jurisdiction now exercisable by the Upper Tribunal, I should follow it unless satisfied there is a good reason not to (*Secretary of State for Justice v RB* [2010] UKUT 454 (AAC)). I am not so satisfied. Indeed, Mr Jowett, for the local authority, did not argue that, as a matter of law, *W* was inapplicable in cessation cases.

84. The relevant considerations before the Tribunal included the educational difficulties that S might face on a transfer to Newport's sixth form arrangements (*W v Gloucestershire*, paragraph 21). Whether or not the Tribunal rightly excluded the

appropriateness of W School, this remained a relevant consideration. If the Tribunal thought transition issues did not arise because, whatever the result, S would remain at W School, its reasons should have said so. If the Tribunal thought that S would cope with transfer without material educational difficulty, it should again have said so. These deficiencies left the Appellant unable to understand why her case failed, and therefore rendered the Tribunal's reasons inadequate. Alternatively, if the Tribunal thought transition was irrelevant on a cessation appeal, it misdirected itself in law. Permission to appeal is granted on ground 3 and the ground succeeds.

85. I record that I make no ruling on the question whether, in cessation cases, a Tribunal may, as a matter of law, ignore transfer-related educational considerations if satisfied that, absent a statement, a child would remain at a previously named independent school (e.g. where school fees would be met by parents). It is not necessary for me to rule on this point, which has not been argued.

Ground 4

86. Since this appeal succeeds on ground 3, I shall deal with ground 4 briefly. The Tribunal dealt with the argument that S's needs called for a smaller educational environment with small classes. The reasons did not deal with S's ability to travel between Newport sites by bus. The parental argument was not fanciful. The undisputed evidence was that S experienced anxiety and social communication difficulties. In failing to explain why this aspect of the parental case was not dealt with, the Tribunal gave inadequate reasons for its decision. Permission to appeal is granted on ground 4 and the ground succeeds.

Disposal

87. The parties agree that, if this appeal succeeds and the Tribunal's decision is set aside, there is no need for any consequential order because S has now completed her sixth form education. There are two reasons why, despite the appeal being academic as between the parties, it has been heard. Firstly, the grounds of appeal have been fully argued. When the appeal was registered at the Upper Tribunal, S was still pursuing sixth form studies and so arrangements were made for a rapid 'rolled-up' hearing in early 2021 (in which argument would be heard both on whether permission to appeal should be granted and the merits of the appeal). At the parties' request, the hearing was vacated but, by the date of the re-listed hearing, S had completed sixth form education. The other reason is that grounds 1 and 2 raise

issues of potentially wider significance. For these reasons, I decided that the Upper Tribunal should hear this appeal despite it having become academic as between the parties.

88. I apologise for the delay in giving this decision. In late 2021 I became ill with Covid-19 which necessitated a prolonged period of absence from my duties on sick leave. Upon my return to work, I have given priority to other special educational needs cases (cases that are not academic is between the parties).

Observations about the local authority's conduct

89. I wish to conclude with some remarks about the local authority's conduct in this case. While these were not the subject of argument, it may assist the authority in its management of other statements of SEN if I set them out:

(a) if a local authority intends to cease to maintain a child's statement in the final year of compulsory schooling, and the child wishes to proceed to sixth form studies at the school named in Part 4 of a statement, the decision needs to be timed to suit the interests of the child, not the authority. Children and parents need a reasonable opportunity to adjust. In this case, the local authority gave S's parents a notice of 'de-statement' during the summer holidays, only two weeks before S intended to return to W School to begin sixth form studies;

(b) the difficulties that S's parents must have faced due to the late notice of 'de-statement' must have been compounded by mixed messages about the authority's intentions. On the same date as the notice of 'de-statement', they also issued an amended statement. Not only did this continue to name W School, it also recorded parental comments of August 2019 about S's classroom support needs. Since S's parents were not commenting on her summer holiday support needs, it must have been obvious these comments related to sixth form support needs. The amended statement said nothing about A-Level studies nor transition arrangements. This cannot be explained by an authority's duty to maintain a statement pending determination of an appeal. In this case, the authority initially denied a duty to maintain S's statement, a stance that only seems to have altered once S's parents had threatened to bring judicial review proceedings;

(c) the local authority criticised S's parents for not keeping them appraised of plans for S's sixth form education. Evidential support for this assertion is elusive. Events

were set in train in June 2019 when the parents requested transfer to another independent school. It is not clear why, but the authority's response was that S's needs did not justify placement at any independent school. During July 2019, S's parents tried to persuade the authority to reconsider and, in tandem, sought amendments to S's statement. In these circumstances, it was surely obvious that, at least until the notice of 'de-statement' on 21 August 2019, the intention was for S to remain at W School. In any event, the local authority could have simply asked S's parents about their plans if W School ceased to be an option;

(d) the authority consistently described W School as a "private school" placement. There is no such thing as a 'private school' under EA 1996; the correct term is "independent school". Repeated use of the term 'private school', rather than 'independent school', is not helpful. It runs the risk of obscuring the child's needs beneath a debate as to whether parents are merely seeking a 'privileged' education, which was in fact argued by the present authority in its case statement. I also do not understand why the authority's written Tribunal submissions described S as "a young lady" rather than a child or a young person;

(e) my judicial experience is that parental emotions often run high when seeking particular special educational provision for their child. I think any parent, especially one whose child's needs make her more vulnerable, can understand why. In my experience, local authority education officials also understand this and, accordingly, tend to exhibit due sensitivity in their dealings with parents. I was therefore shocked to read the local authority's assertion, in their case statement that "the parental request is based on the prestige of attending a private school placement". The basis for this was that S's parents failed to provide information about the benefits of W School. Apart from this assertion being arguably unsupported by any evidence, it risked goading the parents away from focussing on S's needs. To S's parents' credit that they did not rise to this bait nor to the assertion that their arguments discredited staff at W School . No matter how sensitively proceedings are managed by tribunals, the experience must remain a difficult and stressful one for parents. It is in no one's interests for a local authority to make matters more trying by impugning a parent's motives. A local authority is entitled to disagree with parental preference but must not lose sight of the fact that the process has a single focus - a child's needs;

(f) the authority argued that S's parents provided no information about the benefits of W School. This is difficult to understand because, for at least five years, the authority had funded S's placement there. It was named in Part 4 of her statement, and the

authority were therefore expected to monitor its continued appropriateness. Moreover, an interim Statement review report of 5 June 2019 (page 309) described how W School might support S in her sixth form studies. While it may take some time for local authority officials to interrogate a statemented child's case file for the purposes of tribunal proceedings, the task cannot be avoided. If done without sufficient care, there is a real risk of a local authority misleading a tribunal;

(g) the authority's understanding of their duties under the EA 1996 was deficient. Their case statement argued that, had they known S would be enrolled at W School's sixth form, they would have maintained her statement in order to continue her 10 hours of additional weekly support. The authority also said they would "re-activate" S's statement pending determination of the appeal but not pay her fees since W School was not a "specialist school". The authority seemed to assume that they could pick and choose which parts of S's statement to fund (refuse to fund a W School placement, despite it being named in Part 4, but continue to fund Part 3 support costs at the school). The authority further asserted that, even without a statement, W School had direct obligations to support S under Welsh *School Action Plus* arrangements even though it was both an independent school and in England;

(h) the authority gave multiple reasons, at different times, for ceasing to maintain S's statement some of which were clearly invalid. The notice of 'de-statement' said the statement had to end because S had completed secondary schooling. This overlooked that, for the purposes of Part IV of EA 1996, a "child" includes "any person who has not attained the age of 19 and is a registered pupil at a school" (section 312(5)). Another reason was that S would not be attending a special school, an assertion without any legislative basis. A further reason was that children in further education could not have statements of SEN, but the parents wanted S to remain at a school, not a Sixth form college, and the authority's case was that she could attend a Sixth form attached to a maintained secondary school (i.e. not further education). The fourth unsound reason was that the Statement ceased because "no confirmation was received by Parents of an application being made to a Newport School" (email dated 23 October 2019, page 550). In other words, S could keep her statement but only if her parents agreed to abandon her education at W School. All this could be suggestive of a local authority that did not know what it was doing. Whether or not that is fair, advancing five separate reasons (the above plus the, in principle, legitimate reason that S's needs could be met without a statement) for ceasing to maintain S's statement must have made it far more difficult for S's parents than it should have been to mount an appeal against the authority's decision.

Mr E Mitchell,

Judge of the Upper Tribunal.

Authorised for issue on 28 June 2022