TW and KW -v- Hampshire County Council [2022] UKUT 00305 (AAC)

IN THE UPPER TRIBUNAL **Appeal No.** UA-2022-000925-HS
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (HESC Chamber)

Between:

TW and KW

Appellant

- v –

Hampshire County Council

Respondent

Before: Upper Tribunal Judge Ward

Hearing date: 1 November 2022

Representation:
Appellant: David Wolfe KC, instructed by Rook Irwin Sweeney
Respondent: Paul Greatorex instructed by Hampshire County Council Legal Services

DECISION

The decision of the Upper Tribunal is as follows.

Permission to appeal is given on all the Grounds on which the First-tier Tribunal had not itself given permission to appeal.

The appeal is allowed. The decision of the First-tier Tribunal made on 16 February 2022 under number EH/850/21/00136 was made in error of law in the respect identified in the Reasons below. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**

2. The file is to be placed urgently before a duly authorised judge in the Health Education and Social Care Chamber of the First-tier Tribunal for listing and other case management directions to be considered.

REASONS FOR DECISION

1. This case concerns the education of a young woman aged 16 at the time of the FtT's hearing. Although no formal order under rule 14 has been sought or made, I will anonymise this decision in accordance with the Chamber's usual practice in these cases. I refer to her as "S" (not her true initial) in order to preserve both her anonymity and the readability of this decision. No disrespect is intended.

2. S's parents had challenged the content of sections B, F and I of her Education, Health and Care Plan ("EHCP" or "the Plan"). As regards section I, her parents had originally wanted College T to be named but later changed their preference to College N. However, that College was full and had a backlog of people wanting assessment with a view to entry, so – irrespective of any question of its suitability for S – it was not possible at the time. The local authority had proposed College V but by the time of Day 2 of the hearing was proposing School G. As S had been out of education for some time, her parents accepted by the time of Day 2 that, despite their view that it was unsuitable for S in certain respects, School G should be named as a temporary expedient if College N could not be named, until such time as S could go through the admissions process for College N, hopefully successfully.

3. The appeal had started as a National Trial case, but amendments to Parts G and H of the EHCP came to be dropped, as this enabled an earlier hearing date to be allocated by the First-tier Tribunal.

4. The hearing was conducted as a video hearing over 2 days, separated by some 2 ½ months. The parents were represented, then as now, by Mr Wolfe KC. The local authority was represented by its solicitor, Ms Scally. Certain procedural issues arose, discussed in the consideration of the Grounds below. The FtT ordered various amendments to the Plan and named G School in section I.

5. Mr Wolfe groups the grounds of challenge under four issues:

(i) the FtT's treatment of nursing/medical issues
(ii) the amendments made to the Plan so as to refer to S's carers
(iii) the FtT's treatment of support outside school hours
(iv) the suitability of School G.

6. On the application to the FtT for permission to appeal, Judge Eden invited representations as to whether the decision should be reviewed, subsequently concluding that it should not be but that permission to appeal should be given on certain of Mr Wolfe's Grounds. The application for permission was renewed before the Upper Tribunal in relation to the remainder and the matter proceeded before me as a rolled-up hearing in which all grounds were argued. I am grateful to both counsel for their submissions.

Issue (i) – treatment of nursing/medical issues

7. This has a number of sub-grounds. To explain them, some detail concerning the FtT proceedings is needed. At the end of Day 1, the local authority, anticipating Directions from the FtT which duly materialised, sent in a version of the Working Document marked-up to show where matters had got to by that point.[1] This reflected a position established through Day 1 as to the content of Sections B and F (Section I was left for Day 2).

8. Among her special educational needs in Section B of the Plan was stated that:

> "[S] has epilepsy (which involves life-threatening seizures that require resuscitation) and in turn fatigue which impacts on her concentration and engagement within therapy/educational sessions".

Stress, anxiety and fatigue were noted as triggers to seizures, the frequency of which were a barrier to her learning independent living skills. It also noted that she is at risk of trips and falls at all times due to her uncontrolled epilepsy and cerebral palsy.

9. In Section F, it was recorded, once again as agreed text, that:

> "14(a) [S] requires on site nursing and medical support to be able to administer controlled medication due to her poorly controlled epilepsy."

A footnote linked this to passages in the evidence of Ms Jeffrey (EP), Dr Whitney (Consultant Paediatric Neurologist) and Ms Reid (OT).

At 14(d) the agreed wording was:

> "Staff to be trained and experienced in dealing with poorly controlled epilepsy as identified in the epilepsy care plan and any other risk management plan which might exist".

10. Between Day 1 and Day 2, Ms Read (Head of School, School G) provided a witness statement dated 11 January 2022. It appears not to be in dispute that it was served a reasonable time before Day 2 took place on 1 February. In her statement she indicated:

> "There is no on-site nurse; however, staff are trained where needed to administer emergency medication for epilepsy and do so currently for a number of young people. The welfare officer and several other staff are trained in the use of the VNS magnet…"

11. Ms Read's statement was updated shortly before the hearing to make clear that if a nurse on site was required, the local authority would have to fund it but otherwise left materially unchanged.

[1] This was one of two versions of the Working Document, both termed version 7. I refer to this one as Version 7A

12. The FtT in para 46 of its decision recorded as follows (emboldening in original):

> "The final issue within Section F was that of the agreement of on-site nursing and medical support to administer controlled medication. The tribunal note that controlled medications are able to be administered from those suitably trained to do so and thus add the following words to the agreed provision. **"[S] requires on site nursing/or equivalently trained staff and medical support to enable…"** and in the final column there shall be an addition of wording in front of school/college staff of: **"or equivalently trained staff"**.

As noted above, it went on to name School G.

13. Mr Wolfe KC attacks this on three sub-grounds; first, that the FtT's departure from the previously agreed position recorded in version 7A, on his case without any or any adequate warning, was procedurally unfair; second, that Ms Read had been describing what School G did and that by accommodating that by the change in para 46, the FtT was impermissibly tailoring Section F to meet the requirements of Section I, contrary to the sequential approach mandated by authorities such as *R v Kingston-upon-Thames and Hunter* [1997] ELR 223; and third, given the expert evidence supporting the requirement for an on-site nurse (see [9] above), the FtT had failed to give reasons for reaching a different view.

14. Both advocates before the FtT have provided witness statements. Ms Scally refers to the Epilepsy Protocol prepared by the local NHS Trust, which had been in evidence and which had indicated "NURSE ONLY" to give Buccal Midazolam and that "School staff should not give Buccal Midazolam as they are not yet trained in BLS". The Protocol formed part of a Care Plan prepared in March 2020, expressly for school use. She observes that 14(a) and (d) (see [9] above) indicate that the agreement was that a nurse was needed purely to administer the controlled medication in question; and that in any case the point "had no real significance" at that point in proceedings as both the placements then under consideration did have on-site nursing support, so, while there were lots of points in dispute, this was not one of them. She subsequently established from Ms Read that Buccal Midazolam did not need to be administered by a nurse but did require specific training; thus, at S's previous school, where no other staff had been trained, it had to be the nurse who administered it. She recalls that on Day 2 Ms Read confirmed what she had said in para 16 of her statement in the context of discussion around placement at School G, S's father saying it was not a suitable placement because it did not have a nurse on site. It is Ms Scally's belief that it was clear the local authority was telling the FtT that nursing provision on site to administer S's medication was not necessary.

15. Mr Wolfe states that at the start of Day 2 the judge asked why the parents' three professional witnesses were logged in, receiving the answer that it was in case matters came up on section I for which their assistance might be useful. He indicates that at no stage during Day 2 did Ms Scally or the FtT indicate it was contemplating revisiting or reopening the agreed position, nor did it invite comment or submission on such a proposal.

16. The FtT invited written closing submissions. The local authority went first, setting out the matters summarised at [14] above, including that the understanding that the administration of Buccal Midazolam was a procedure which could only lawfully be carried out by a nurse was incorrect. In response, Mr Wolfe KC took the same points of procedural unfairness and of impermissibly tailoring Section F to fit Section I as he has taken before me and referred the FtT to the evidence from Dr Whitney (arguably not entirely accurately quoted[2]) and to evidence from Vicky Sweeney, S's Deputy, about the role played by the school nurse at the school which S had previously attended.

17. Taking Mr Wolfe's objections slightly out of order for presentational purposes, I do not consider that the FtT was tailoring section to fit section I. In my view, it was proceeding as Ms Scally described – it had become apparent during the course of evidence on section I that the previous understanding that a nurse was required to administer Buccal Midazolam was mistaken. This in my view is evident from its para 46. Its opening sentence shows the FtT was well aware that there had been an agreement. Its second sentence records that it "noted" that "those suitably trained" could administer controlled medication. That reads as a reference to the evidence given by Ms Read. I do not accept Mr Wolfe's submission that Ms Read's evidence was not directed to provision for S. Ms Read was well aware that this was what the case concerned, hence her comment about funding if a nurse was ordered to be provided. Provision to meet a pupil's needs does not cease to be such merely because that is how the school does things. Even if, contrary to my view, Ms Read was merely explaining how School G dealt correctly with administering medication, it still resulted in the misapprehension about the administration of Buccal Midazolam coming to light, which I regard as holding the key to this point. The FtT was correcting the misapprehension that the local authority and through it, the FtT itself had been under. Whether it did so fairly or not is another matter, to which I return, but it was striving to get the content of Section F right, in effect avoiding what on that view of the evidence would have been "gold-plating", rather than adapting the content of Section F to fit the school it wished to name in Part I.

18. Did it do so procedurally fairly? In my view, it did. In the context of proceedings aimed at identifying what provision was necessary for the young person concerned, there was nothing intrinsically unfair in revisiting the position agreed at the end of Day 1, provided it was adequately raised and the party affected had a chance to comment. Ms Scally's evidence is a little equivocal about the context in which the evidence equating to para 16 of Ms Read's statement was received by the FtT and Mr Wolfe's evidence took a different view. It is entirely possible for two people to have a different view of what was going on in something as relatively informal, yet complex, as the online hearing of an SEN appeal by the FtT. Ultimately I do not need to resolve those differing perceptions as I am satisfied that through closing written submissions, Mr Wolfe KC, going second, had an adequate chance to address the point and thoroughly took it. As part of that his response was not to say that, had the point been raised, or raised more overtly, on Day 2, he would have

[2] As presented in the submission, Dr Whitney's evidence was said to be "Such a school placement needs to have nursing and medical support…" . Her evidence was actually "Such a school placement needs to have the nursing and medical support to care for a young person with epilepsy." I do not consider the two to be quite the same, in that the latter focused on a result (the provision of care, care which the FtT's amendment achieved, while leaving open that it could be done by an alternative strategy to provision of onsite nursing.).

wished to recall any of his witnesses. Rather, it was to direct the FtT's attention to relevant parts of the written evidence. Thus he was able to make his case on the changed position. If there is a ground here, it therefore must be a challenge to the adequacy of the FtT's reasons for making the amendment, notwithstanding Mr Wolfe's written submission why they should not.

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19. When paras 14a and 14d of Version 7A are read together (see [9] above), it is clear in my view that the agreed purpose of on-site nursing and medical support had been to administer controlled medication. Para. 46 of the FtT 's Reasons explained why that was not needed after all (see [17] above). The evidence cited in the closing submission did not make out a reasoned case for on site nursing support exclusively. Dr Whitney's evidence was a bare assertion and Ms Sweeney's a description of provision that had been in place at a different school rather than a recommendation as to what was required. The FtT was not obliged to refer to every piece of evidence and, given the uncompelling evidence on the point, did enough by explaining why administration of medication (the point in connection with which the above evidence, like that of Ms Jeffrey, had originally been referenced) did not after all necessarily require a nurse, resulting in amendment to para 14a, along with leaving in place the agreed provision at 14d, dealing with the training and experience of staff in dealing with epilepsy, and indicating at para 54 that:

> "The parents were also concerned that there was no nursing staff on site. [School G] confirmed that they have staff trained and experienced in giving controlled medications for conditions such as [S's] and have other students with similar needs. They are confident they are able to meet those needs."

That was clearly accepted by the FtT, leading to its conclusion at para 56 that School G could meet S's needs.

20. Mr Wolfe submits that the needs for a nurse was not just abut medication. I have dealt with the evidence on which he relied for the purposes of his closing submission on this point. I add that the evidence of Ms Jeffrey was a bare sentence, unsupported by reasoning, and was outside the scope of her expertise as an educational psychologist. I therefore do not accept that submission.

21. Mr Greatorex relies on a number of further reasons why the FtT's decision should not be considered to be in material error of law on this Ground. From the above, he does not need them and I say no more about them.

Issue (ii) – Amendments to the Plan to refer to S's carers

22. The background to this was S's undisputed need for S to have a consistency of approach. The FtT did not find robust evidence to show that S would not be able to generalise her skills outside without the provision of a residential placement "especially if there was a consistency of approach by her carers outside of the college day." It continued:

> "The tribunal note that there does need to be a consistency of approach and therefore where all provisions state that there must be a consistency of approach then in the final column "carers" should be added to the list of those

> who shall deliver such an approach. The tribunal did consider all the rest of the detailed provision and found that it could be delivered within the college day with a consistent approach then being carried over by [S's] carers."

In consequence of (and consistently with) the FtT's order, in the final EHC Plan the word "carers" has been added in the column headed "To be provided by" in three places in Section F i.e. where it was stated that a consistency of approach was needed.

23. Mr Wolfe submits that the effect of this is that elements of provision in section F are to be provided out of hours by S's "carers". Those carers are privately engaged and funded by S's property and affairs deputy using money from S's personal injury award. The award requires (or at least is premised on) S to that extent providing her own special educational provision. That is said to be unlawful, as attempting to delegate the local authority's statutory responsibilities to the young person, by analogy with *A v Cambridgeshire* [2002] EWHC 2391. At [60] Pitchford J accepted a submission that

> "if the tribunal found special educational needs included, for example, the provision of specialist communication skills training in the home, the LEA, and not the parent, was under a statutory duty to provide it. Only if any separate arrangements made by the parent for provision were objectively suitable, would the LEA be relieved of that duty. In my judgment, the LEA would not be performing its statutory duty if directly or indirectly it imposed upon the parent, when specifying special educational provision under s 324(3), an obligation to meet part or all of that provision herself."

24. I note that the decision is not addressing whether a local authority would be in breach of statutory duty by failing to deliver the provision mandated by the statement of SEN but, rather, the prior point of whether it was lawful to specify such provision in the first place. As is evident, that was a decision based on s.324 of the Education Act 1996.

25. Section 42 of the 2014 Act is differently expressed, but is to similar effect, providing so far as relevant that:

> "(2) The local authority must secure the specified special educational provision for the child or young person.
> …
> (5) Subsections (2) and (3) do not apply if the child's parent or the young person has made suitable alternative arrangements.
>
> (6)*"Specified"* , in relation to an EHC plan, means specified in the plan."

It was not suggested that *A v Cambridgeshire* did not represent good law. It is an authority of some 20 years' standing and does not appear to have been doubted.

26. Mr Greatorex submits that as a specialist tribunal, the FtT must be taken to know that carers and parents cannot provide special educational provision. Whether it knows it or not (and I am not quick to infer that it does not), a failure to apply it

correctly in an individual case may provide reasons for the Upper Tribunal to intervene and that is what I conclude has happened here, for the reasons below.

27. Clearly there are times when parents or carers may become involved, outside the school day, in reinforcing what has been done in school by trying to act consistently with it. That is not of itself special educational provision. The difficulty with this part of the FtT's decision, however, is that it expressly stipulated aspects in which the carers were to provide special educational provision. That is the effect of the amendments to the EHC Plan which the FtT ordered. It is also, tellingly in my view, evident from the contrast between the first and second sentences set out at [22] above between the areas where it was necessary to stipulate that the carers were to be among those delivering the special educational provision and "all the rest of the detailed provision" where the carers did not have to be added and it was sufficient for them to carry over a consistent approach. This conclusion is further strengthened, in that para 43 of the FtT's decision shows that it was aware that there were limitations on what it could order in the domestic sphere, yet it chose to make this provision by the carers. Nor was this a case in which "suitable alternative arrangements" had been made through the parents or by S herself through her Deputy. The Deputy was not asked.

28. This was therefore an error of law by the FtT. The question is then what should be its consequences. Mr Wolfe submits that the error calls into question the FtT's refusal to accede to the parents' request for a residential placement. Mr Greatorex says that if the inclusion of carers in the right hand column is held to be objectionable, they should simply be removed from it.

29. I prefer Mr Wolfe's submission. There is considerable internal inconsistency within the FtT's para 35. As mentioned at [22] above, the FtT stated that it had not found "robust evidence that [S] could not generalise her skills unless via a residential placement and, more generally, that there was no robust evidence for Section F provision to be delivered via a residential setting". That at first sight uncompromising approach however is then modified by suggesting that no reason had been shown why she should not be able to generalise "especially if there was a consistency of approach by her carers outside of the college day". "Especially if" is not the same as "provided that"; the former leaves open that while consistency of approach by the carers might strengthen the position, the underlying proposition might still hold good. However, that is undermined by the following sentence:

> "The tribunal note that there does need to be a consistency of approach and therefore where all provisions state that there must be a consistency of approach then in the final column "carers" should be added to the list of who should deliver such an approach**."**

30. The reiteration that there does need to be a consistency of approach undermines the view that the word "especially" merely enhances the argument and brings consistency on the part of carers much closer to be being an essential precondition.

31. It is difficult to regard the FtT's addition of carers in the right hand column as mere belt and braces or the product of well-intentioned enthusiasm to maximise

consistency in S's best interests or, as Mr Greatorex invites me to conclude, at most, careless use of language, because para 35 clearly contemplates careful gradation of two levels of securing a consistent approach, one of which involved the delivery of special educational provision. This is not, as Mr Greatorex sought to characterise this Ground, the product of microscopic forensic analysis; rather, it appears to be a clearly stated position on the part of the FtT. Removing the references to "carers" would change the special educational provision the FtT ordered to be delivered, something I would not regard as generally appropriate for a judge to do when sitting alone, without specialist panel members, in an appellate jurisdiction. As the FtT's approach to special educational provision outlined above was the basis on which it rejected the parents' amendments seeking residential provision, that would point to a need for the decision to be set aside and the case reheard. I return to the question of remedy after considering the remaining Grounds.

Issue (iii) – the FtT's treatment of support outside school hours

32. The parents had sought the following amendment ("reference point 85"):

> "[S] should be supported to engage in social activities in the evening with her peers to improve both her physical health and interpersonal skills".

33. The FtT dealt with this together with another amendment directed to after school activities ("reference point 83"). It reasoned as follows:

> "43. The tribunal is unable to order a consistent routine whilst in the home environment and to this end reference point 83 wording sought should read as follows: [S] requires a structured predictable and constant daily routine whilst in college with structured after-college activities which allow her to balance her social and emotional needs."
>
> 44. With regards reference point 85 this is repetitious in relation to the educational provision found above but the tribunal do believe that it should be moved to Section H2 as a recommendation for "[S] to be signposted to social activities in the evening and weekends within her community to improve her physical health and interpersonal skills." The issue is that the extended power sections are no longer within the tribunal's remit and thus such a recommendation is unable to be formally given but perhaps the parties will be able to look at this issue outside of the tribunal process. The wording as it stands in section F is to be removed."

34. Mr Greatorex submits that the evidence referenced in support does not support such provision in any event. Certainly it is not compelling, but the FtT appear to have accepted that some provision in this area was desirable. Mr Wolfe KC has a string of sub-grounds relating to this part of the FtT's decision, but I consider they are all wide of the mark. The point was that if and to the extent that it amounted to special educational provision, it was repetitious of reference point 83. That was why the tribunal did not include it. It did not involve any disagreement with the expert evidence, weak on this point as it was. Its reasons were therefore adequate. Even if the tribunal had visibly given consideration to whether the provision was deemed educational provision within s.21(5) and concluded that it was, it would still have

been repetitious of reference point 83. What the tribunal did was to recognise the limitations on what it could order in the home environment and resolved what would otherwise have been duplication between reference points 83 and 85 by honing point 83 into one that more properly concerned special educational provision, while recognising that an adapted point 85 could be useful in relation to social care provision not amounting to special educational provision. As I have concluded from its decision that this was the FtT's thought process, I also reject the suggestion that this was a further example of the FtT tailoring section F to accord with what it wanted to say in Section I.

Issue (iv) – the suitability of school G

35. The FtT concluded that School G was able to meet all of the Section F provision. Mr Wolfe submits that there was provision in section F which School G could not meet. It fell under two headings (a) "increasing skills in relation to showering and (b) facilities which are easily accessible and wheelchair accessible". (The point in relation to the latter is that the site needed to be suitable to enable S to maintain her independence in walking so far as possible as well as suitable for wheelchair use for those occasions when she was not able to walk). Both the points were raised in Mr Wolfe's closing submission to the FtT.

36. The answer to (a) is that the provision required was a structured educational and practical programme…to include education and training in increasing the following skills (there then followed a list including various personal care skills of which showering was one), various "other life-skills in domestic tasks" and others concerned with understanding monetary value and managing money. I had understood that what was being complained about was the lack of a shower at School G for training purposes, though I note from Ms Read's second witness statement that there is a shower onsite. However, even if there is some reason why that was not available, it is possible to educate and train without having to provide hands-on on-site experience (and it is the programme as a whole which is required to be practical and not each and every part of it). Whilst I acknowledge the centrality of life-skills and independence to a young person such as S, a tribunal is not required to address every argument put to it, even those of lesser consequence, and there is no incompatibility between its conclusion and the provision actually ordered on the showering point.

37. In relation to mobilising around the site, para 16 of Section F set out the provision to ensure that "[S's] physical needs will be understood and met". It makes provision for (among other things) encouraging S with her independence when mobilising, for supporting her when navigating new environments and uneven surfaces and that wheelchair use was "where necessary to the activity involving longer distances". It also provided that S "needs an accessible environment". Clearly wheelchair accessibility did need to be part of consideration by the FtT to ensure that the provision was met for those activities "involving longer distances". It is also clear that the special educational provision ordered included support when S was negotiating uneven surfaces, so the intention was not that difficulty in negotiating such surfaces would result in excessive wheelchair use and compromise of her walking ability. Mr Greatorex appears right to say that there was no evidence specifically directed to the terrain and associated mobility issues. There is no reason

to conclude on the material before me that School G was not suitable because of incompatibility of its terrain with the associated provision in nuanced terms in Section F and the bare assertion of concern by the parents was not enough to raise a significant question requiring a detailed and specific reason to be given for the FtT's reasons to be adequate.

38. As to remedy, I have concluded that the FtT erred in law on one Ground and one Ground only. Nevertheless, for the reasons given at [31] above, that was important and material to whether S required residential provision and, through that, to the school or type of school to be named in Section I. While S's parents were prepared to accept School G on a temporary basis as the "least worst" option, there was a substantive dispute about the institution to be named from September 2022 and, though we are now in November, that remains a live issue. I do not see the limited acceptance of School G as militating against the Order I would otherwise be minded to make, nor the possibility floated by Mr Greatorex that by the time the rehearing came on, College N might still not have made a decision regarding S's proposed admission.

39. Mr Greatorex asks rhetorically what else the FtT could have done. The answer would depend on where its consideration of the evidence led it. If confining itself to special educational provision it could lawfully order led it to conclude that residential provision was needed, that would have put down an important marker as to the provision S requires and the consequences for the institution or type of institution to be named in Section I would have had to be worked through in the face of the not inconsiderable difficulties in finding a suitable placement.

40. Nor in my view does the fact that S's annual review is due in December militate against the order I would otherwise be minded to make. That will itself take time and, if disagreement between the parties ensues and cannot be resolved by mediation or otherwise, there will have to be fresh First-tier Tribunal proceedings to adjudicate upon that. It is my understanding and that of counsel that new appeals to the FtT are currently taking about 50 weeks to be heard, so the delay involved in that alternative route does not provide a satisfactory answer for a young person needing to develop increased independence as she approaches adulthood and whose education has previously been significantly disrupted because of the Covid pandemic. Cases where the Upper Tribunal has found an error of law, set the FtT's decision aside and remitted it are heard very much more quickly. Thus, practical considerations are in alignment with the Order I would be minded to make and thus I do so in the terms at the head of these Reasons.

41. For completeness, I note that although it was mentioned by the FtT in giving permission to appeal, no challenge was made in the Upper Tribunal in respect of the FtT's para 36.

C.G.Ward
Judge of the Upper Tribunal
Authorised for issue on 16 November 2022