LC and RC v Hampshire County Council
[2023] UKUT 281 (AAC)

IN THE UPPER TRIBUNAL **Case No. UA-2023-001082-HS**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (HESC Chamber)

Between:

LC and RC

Appellants

- v –

Hampshire County Council

Respondent

Before: Upper Tribunal Judge Zachary Citron

Hearing date: 14 November 2023
Hearing venue: Field House, Breams Building, London EC4

Representation:

Appellants: Ollie Persey of counsel, acting pro bono on behalf of IPSEA

Respondent: Paul Greatorex of counsel

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal dated 11 May 2023 under number EH850/22/00302 did not involve the making of an error on a point of law.

REASONS FOR THE DECISION

1. In what follows references to

    a. the "**tribunal**" and to the "**decision**" are to the First-tier Tribunal and its decision as referred to immediately above;

    b. numbers in square brackets are references to paragraphs of the tribunal's decision (unless otherwise indicated);

c. "**s**" or "**section**" are to sections of Children and Families Act 2014 (unless otherwise indicated); and

d. "**regulations**" are to regulations of Special Educational Needs and Disability Regulations 2014.

The appeal to the tribunal

2. The appeal concerned a boy of 13 (at the time of the decision), whom I will refer to as "O". O is the son of the Appellants, and has an EHC plan made by the Respondent. The decision records that O has a range of special educational needs that individually and cumulatively impact on his ability to learn.

3. The appeal to the tribunal was made under s51, which gives a right of appeal against, amongst other things, the special educational needs, and provision, specified in the plan, and the school named in the plan.

4. The Appellants were not legally represented at the tribunal hearing; they represented themselves.

5. Together, the bundles before the tribunal came to 963 pages.

6. The Appellants disagreed with the school named in O's plan, being C School, an independent special school for children and young people aged 8-19; they wanted Section I (named school) of O's plan left blank and for O to be provided with education otherwise than in a school (which appears to have been the position at the time of the decision – see [17]).

7. The tribunal allowed the appeal in that it amended Sections B (special educational needs), F (required special educational provision) and I of O's plan; and it made recommendations for the amendment of Sections C (health care needs) and G (required health care provision).

The Upper Tribunal proceedings

8. The Upper Tribunal received the Appellants' application for permission to appeal on 4 August 2023. The form indicated that, at that point, Appellants were (still) representing themselves i.e. did not have legal representation.

9. Acting inquisitorially, the Upper Tribunal procured, from the tribunal, electronic copies of hearing bundles and other documents held by the tribunal with regard to the Appellants' appeal.

10. On 23 August 2023 the Upper Tribunal issued my decision (made "on the papers") granting permission to appeal limited to the ground that it

seemed to me arguable that the tribunal's decision erred in law in its consideration of Section I, in that

a. it did not focus on the relevant legal question, being, whether C School was appropriate for O (the test in s40(2)(a)) – it appears from [109] that the tribunal's decision mistakenly applied the test in s39(4)(a) ("suitability" of the school for the "age, ability, aptitude or special educational needs" of the child); and

b. perhaps as a result of the arguable error above, it did not adequately explain what it made of the appellants' argument that C School, as a "SEMH school", was not appropriate for O because, in the words of the 23 March 2023 email from Mr M, an occupational therapist, on page 1348 of the tribunal's bundle, O would be a "potential target"; I was satisfied that the tribunal was conscious of this argument (see [108], second sentence); and it is arguable that the argument was relevant and material, even though Mr M was not specifically familiar with C School; however, the decision's reasoning for rejecting the argument, in the third sentence of [108] – that the parents' expert considered O "starting immediately at the school, rather than as proposed by [the Respondent] and [headteacher of C School, and a witness at the hearing]" – is arguably inadequate; and

c. if what the tribunal's decision was saying at [108] was that C School was inappropriate for O given his present health conditions, but *could be* appropriate for him, in the future, after an improvement in his health conditions, that reasoning was arguably wrong in law, as

    i. there is uncertainty as to whether C School will ever be appropriate for O; and/or

    ii. it is wrong in law to name a school in Section I that, at the time the EHC plan is in force, is neither "appropriate" (for O) (per s40(2)(a)) nor the school "to be attended" by him (per regulation 12(1)(i));

d. the arguable error above is, arguably, not addressed by [111] or [113], as these paragraphs deal with the ability of C School to deliver the special educational provision required by O, but do not, adequately, deal with the argument about the "appropriateness" of the school summarised at point b. above;

e. the arguable error is material because it resulted in C School being named in Section I (rather than Section I being left blank or it containing the *type of school* to be attended by O).

11. I refused permission to appeal on any of the other grounds put forward by the Appellants in their application for permission to appeal. The

Upper Tribunal subsequently received a request from the Appellants that the grounds on which permission to appeal had been refused, be reconsidered at an oral hearing. In directions issued on 7 September 2023, the Upper Tribunal directed a "rolled up" hearing covering both the ground on which permission had been granted, and the grounds on which permission was refused.

12. The Respondent made a written response to the appeal, drafted by Mr Greatorex, dated 14 September 2023.

13. The Appellants' skeleton argument and reply, drafted by Mr Persey and dated 20 October 2023, condensed the "additional" grounds (for which permission to appeal was sought) to

    a. elements of "ground 1" for which permission had been refused on the papers (procedural errors with regard to Mr M's evidence) and

    b. "ground 5" (errors with regard to Section G of O's plan).

    At the hearing, Mr Persey said that the Appellants no longer wished to pursue their application on "ground 5".

14. I am grateful to both counsel for their very helpful submissions, in writing and orally.

Further detail of the findings in the tribunal's decision

15. The decision stated, in the section under the heading *Our findings* ([54] to [114]), that all working with O should be focusing on supporting him returning to school-based learning. It referred at several points to O's "transition" to school-based learning.

16. The decision found (at [68]) that it was not inappropriate for the special educational provision O reasonably required to be made "in a school" (and so s61 did not apply), albeit that O would require an extended transition period before he was "able to attend school". At [69], the decision said:

> "The idea that [O's] special educational provision can only be delivered either in school or not in a school has to be changed to one of their being more flexible".

17. At [88], the decision agreed to the inclusion of the following in Section F:

> "a) O will have very gradual transition back to an educational setting which will include:
>
> • Identification with O of what the setting can offer him in the long & short term (what routes or paths it will open for him),

> • Virtual tour of the setting, Visit to the setting, out of hours, (i.e., no pupils), Visit to the setting during a typical day,
> • Identification with O of safe spaces that he can go in the school when / if feeling overwhelmed or anxious,
> • Practice in navigating around the setting so that O can access this safe space fluently,
> • Carrying out the 'Landscape of School' questionnaire with O and key staff, prior to O starting, to explore more of his thoughts / views prior to transition.
> • Prior to starting, there needs to be agreement between home, setting and O regarding uniform expectations.
> • Prior to starting at the setting, O, his family, and the setting should have agreed contingency plans for O when he is experiencing ill-health. This will need to include staff responses to O's reduced ability to manage his emotional regulation when unwell and plans for him to access education during this time."

18. [106] to [114] were under the subheading *Section I*. It was said in this section that:

    a. the Appellants opposed C School in particular because they said it was a school focusing on children within SEMH difficulties as their primary area of special educational need; the Appellants had provided "comments" from "a number of professionals" who worked with O, indicating that "an SEMH school" would not be suitable for him ([107]);

    b. the tribunal had not been persuaded by this evidence, as the Appellants' experts

        i. were not aware of C School

        ii. focused on the fact that O might become a victim in a typical SEMH school, for example by witnessing restraint being used

        iii. appeared to consider O starting immediately at the school

        iv. appeared to be unaware that C School provided education for children and young people with SEMH difficulties and other complex needs often associated with autism)[108]);

    c. the tribunal had considered whether C School would be a suitable placement for O in terms of his age, ability, aptitude and special educational needs; it recalled that this was not same legal test as to whether it is inappropriate for special educational provision to be made in a school; there were no disputes about

C School being suitable in terms of O's age, ability and aptitude ([109]);

d. when deciding whether C School would be able to meet O's special educational needs, the tribunal was not limited by whether it (the school) could deliver the required provision but (rather) whether it was realistic to expect it to do so *in a reasonable period*. The tribunal was satisfied that C School will be able to provide the special educational provision O currently requires, even though all of that "to start with" would be "offsite" ([111]);

e. the tribunal concluded that C School "is suitable for O because it will be able to meet his special educational needs as set out in Sections B and F" of his plan ([114]).

Why I have found that the decision did not err in law

19. It was common ground that, at [109], when considering the appeal against the school named in Section I of O's plan, the tribunal applied a test based on s39(4)(a) – namely, whether C School was suitable for O's age, ability, aptitude, and special educational needs – but that, as a matter of law, it should have applied the test of s40(2)(a) – was C School appropriate for O? (The reason the tribunal should, as a matter of law, have considered the s40(2)(a) test, is that the Appellants had not requested that the Respondent secure that a particular school be named in O's plan – they wanted no school to be named, and for O to be educated otherwise than in a school).

20. The question was whether this legal error was material i.e. did it affect the outcome of the appeal? The Appellants argued that this should be answered in the affirmative because:

a. although the individual words "appropriate" and "suitable" had very similar meanings in this context, there was a significant difference between (i) asking whether a school was appropriate for O, and (ii) asking whether it was suitable *for O's age, ability, aptitude, and special educational needs* – the italicised wording narrows down the enquiry to the specified items, whereas the enquiry about "appropriateness" was uncircumscribed (or holistic), and therefore looked to a broader spectrum of criteria than (just) *age, ability, aptitude, and special educational needs*;

b. because it applied the "wrong" test, the tribunal failed to enquire adequately into evidence, like Mr M's, which indicated risks to O's welfare/safety at C School (more detail on this below); and

c. if it had correctly so enquired, the tribunal would have found that these risks rendered C School inappropriate for O – and so it could not be named in O's plan, per s40(2)(a).

21. This argument engaged aspects of "ground 1" on which permission to appeal had been refused "on the papers"; specifically, arguments that there had been material errors in law in respect of the tribunal's treatment of Mr M's evidence. The background to this can be seen at [10] and [15], and in Mr M's 23 March 2023 email (on page 1348 of the tribunal's bundle):

    a. [10] stated that after the first of the two hearing days (17 March and 24 April 2023), the Appellants sought permission to call Mr M as a witness. It then said: "After discussion with [LC, one of the Appellants], and after clarifying that neither the [Respondent] nor the panel would have questions for him, it was agreed that he did not have to attend."

    b. [15] was under the heading *Evidence*, and followed a paragraph dealing with the admission of late evidence from the Appellants (which was not opposed by the Respondent) shortly before the second hearing day (including an email from Ms Lawrence, a specialist speech and language therapist, of 20 April 2023). It said:

> "Reference was made to another document, an email message from Mr M, but we have not been able to locate it. We were told it contained his views about naming an SEMH school for O, and that his views were similar to those of Ms Lawrence. We decided to proceed without it, rather than causing delay, as there was already evidence in support of the parents' position."

    c. Mr M's 23 March 2023 email was in response to an email of 17 March 2023 from the Appellants, which said:

> "The [Respondent] have proposed an outreach programme at C School for O with the aim of transitioning him onto the school site and mixing with peers.
>
> Are you aware of the school? It's a SEMH behavioural school and the head confirmed that O would witness restraint and they restrain 1-4 times a week.
>
> Please could you share any comments on how you think this would be suitable to meet O's needs?

    d. Mr M's email was as follows:

> "I am not aware of the school, but in principle any SEMH school caters for children who have mainly Social, Emotional and Mental Health challenges. Within SEMH schools, there is a big percentage of children who have experienced trauma and abuse (I am not sure what is the ratio in this school) who are A LOT more sophisticated than O in the area of social engagement and participation, which could make O a potential target. I have significant experience working with LAC children

> (looked after children) and the majority of the children that I work with who have required an specialist provision within a SEMH school are not within the ASD spectrum and present significant attachment and behavioural needs, mainly in the form of externalising behaviours (hyperactivity, aggression both physical and verbal, and conduct problems) which are diametrically opposed to O's profile and needs. I feel that an SEMH school will be detrimental for O's development and to the progress he has made over the last couple of years.
>
> I am happy to expand on this if required."

22. The renewed application for permission to appeal on "ground 1" was on the basis that Mr M's email evidence "should have been admitted" and/or the tribunal should have heard from him orally.

23. In my view, there is no arguable procedural error of law here related to "admitting" Mr M's email, as it is clear from all the circumstances (and despite what is said in [15] about the tribunal not being able to locate an email from Mr M) that the tribunal *did* take into account Mr M's 23 March 2023 email: [108] refers to the Appellants' experts evidence focusing on the possibility of O becoming a "victim in a typical SEMH school, for example by witnessing restraint being used" – this is a clear allusion to the contents of Mr M's email.

24. As to whether the tribunal erred in agreeing with LC that Mr M would not give oral evidence, in my view this turns on whether the tribunal properly understood the opinions Mr M was expressing in his email – which Mr Persey summarised (correctly in my view) as an opinion that O's welfare/safeguarding would be materially at risk at C School (due to the "sophistication" of other pupils (on account of trauma and abuse) there as compared to O) – in other words, the risk that he would become a victim or a target at the school.

25. In my view, the tribunal did adequately apprehend that point, in the two points it made at [108] in response to that view (which, in turn, were adequately explained):

    a. first, O would not be attending C School's site to begin with. This point clearly ties in with what is said at various points in the decision about an "extended" and "gradual" "transition" before O started to attend at the school's site. This point, in my view, acknowledges the risk pointed out by Mr M, but says that it can be mitigated, in effect by deferring O's starting to attend at the site of C School;

    b. second, that, despite Mr M's experience that most children requiring specialist provision within an SEMH school were *not within the ASD spectrum*, C School provided education for children with SEMH difficulties and other complex needs *often associated with autism*. This point is, in essence, that the

tribunal did not think that the safety/welfare risk was as serious as Mr M feared, even when, after "transition", C would attend the site of C School.

26. Given the above, I do not consider that the tribunal erred, procedurally, in agreeing with LC that it would not hear oral evidence from Mr M, essentially because I am not persuaded that oral evidence would have made any material difference to the tribunal's decision. I do not agree with Mr Persey's submission that, due to its mistake about the precisely correct legal test to apply, the tribunal somehow fettered its discretion, or failed to act inquisitorially, in relation to the points raised (being, essentially, opinion evidence) by Mr M in his email. Rather, the tribunal understood those points adequately, and adequately explained its response to those points, in the decision.

27. For the same reasons, I am not persuaded that the tribunal's error, in applying the wrong legal test, was material. The issue of materiality for which the Appellants argue – that the mistake caused the tribunal to overlook, or insufficiently take into account, the welfare/safety risks highlighted by Mr M – is not borne out. In my view, the tribunal's decision adequately took these risks into account, and so would have reached the same conclusions, had it applied the correct "holistic" test (whether C School would be "appropriate for O"), rather than the incorrect "circumscribed" test (whether C School was "suitable for O's age, ability, aptitude and special educational needs").

28. This then leaves the question, raised in limb c. of the permitted ground of appeal (see paragraph 10c above), of whether the "transition" approach at the heart of the tribunal's decision – and its first response (at [108]) to the risk raised by Mr M's evidence – resulted in the tribunal naming a school that, at the time of its decision, was not "appropriate for O" (per s40(2)(a)) and/or was not the school "to be attended" by him (per regulation 12(1)(i), being the legislation that describes what Section I of the plan must contain).

29. Mr Greatorex's response to these points submitted that, in giving permission under limb c, the Upper Tribunal confused the issue of *attendance* with the issue of *whether provision is made on-site or off-site*. Mr Greatorex submitted that the effect of the tribunal's decision was that O would be a "registered pupil", or "on the roll", at C School, which would become responsible for his education. O would be required to attend C School but, it was submitted, that means attendance "in accordance with the rules prescribed by the school": see *Isle of Wight Council v Platt* [2017] UKSC 28, [2017] 1 WLR 1441. Mr Greatorex prayed in aid two provisions of Education Act 1996:

    a. section 444(3)(a) (absence from school with leave is not a failure to attend regularly at the school);

b. section 29(3) (governing body of maintained school may require registered pupils to attend a place outside school premises for purposes of receiving instruction or training).

30. Mr Persey did not pursue limb c. of the permitted ground of appeal, either in his skeleton argument or in his oral submissions. Prompted by questioning from me at the hearing, Mr Persey confirmed that the Appellants do not pursue the limb c. line of argument.

31. I will not therefore say more about the line of argument in limb c. of the permitted ground of appeal, given that it is not now argued by either party. I would however note that Mr Greatorex's submissions about what it means to "attend" a school (in the language of regulation 12(1)(i)) seem to me somewhat at odds with what Upper Tribunal Judge Rowley said about this in *NN v Cheshire East Council* [2021] UKUT 220 (AAC) (a case cited to me in this appeal), namely that

    a. "to be attended by" means "to be present at" (see [43] of *NN*) and

    b. presence at the school *for at least part of the time* is sufficient (for the school to be named in Section I) (see [47f] of *NN*) – such that, by implication from the italicised words, never being present at the school, over an indefinite period, would be insufficient for that purpose.

32. However, given the position of the parties, this is not the case to express a decided view on whether a plan that calls for an extended and gradual "transition" prior to a child's attendance at the site of a specified school, can lawfully name that school in Section I as the school "to be attended" by the child.

Conclusions

33. For the reasons given above

    a. permission to appeal on the other "ground 1" arguments pursued by the Appellants on "oral reconsideration" is refused; and

    b. the ground of appeal on which permission was given "on the papers" has not been made out.

34. The appeal is accordingly dismissed.

Zachary Citron
Judge of the Upper Tribunal

Authorised for issue 17 November 2023