IN THE UPPER TRIBUNAL **Case No**. ***UA-2023-000977-HS***
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 166 (AAC)**

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

Between:

AG

Appellant

- v –

Brent Council

Respondent

Before: Upper Tribunal Judge Zachary Citron

Hearing date: 8 May 2024
Hearing venue: Field House, Breams Building, London EC4

Representation:

Appellant: by himself
Respondent: by Laura Thompson of Browne Jacobson LLP, solicitors

DECISION

The decision of the Upper Tribunal is to allow the appeal in part. The decision of the First-tier Tribunal dated 15 May 2023 under number EH304/22/00032 involved the making of an error on a point of law. However, the decision is not set aside.

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); and

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

The Appellant's appeal to the tribunal

2. The appeal concerned the Appellant's son, a boy of 9 (at the time of the decision), whom I will refer to as "**S**". The decision records that S had diagnoses of autism and global developmental delay. The decision also found that S's parents were separated and lived at different addresses; S lived with his mother during the week and stayed with his father, the Appellant, on weekends and every second Monday evening.

3. The appeal to the tribunal, made under s51(2)(c), was against the contents of the EHC plan made for S by the Respondent and communicated to him by letter on 11 April 2022. The appeal concerned Sections B, F, C, G, D and H1 and H2 of S's EHC plan.

4. The Appellant was not legally represented at the tribunal hearing; he represented himself. S's mother was a witness on behalf of the Respondent.

5. The tribunal dismissed the Appellant's appeal.

The Upper Tribunal proceedings

6. Acting inquisitorially, the Upper Tribunal procured, from the tribunal, electronic copies of the documents before the tribunal at the Appellant's appeal.

7. On 3 November 2023, the Upper Tribunal issued my decision (following reconsideration at an oral hearing) granting the Appellant permission to appeal on the sole ground that the tribunal arguably erred in law by not adequately explaining why, in making recommendations as to the content of sections D and H2 of S's EHC plan, it recommended giving S's mother sole discretion over what social care activities S should access (so rejecting the Appellant's argument, recorded at [30], that he be included in any social care provision).

8. The permission decision included the following background to the ground on which permission was given:

> *"Tribunal's recommendations as regards social care*
>
> 17. The relevant wording from S's EHC plan as approved by the tribunal, was as follows:

Section D:

S is supported by Brent Social Care in accordance with a Child in Need Plan. The 0-25 Disabled Children and Young People Service. The allocated worker will work closely with the family and S to ensure that the appropriate support is in place. This will be reviewed in line with the borough's Short Breaks process. S is currently in process of receiving 6 hours per week. This is provided through Direct payments which allows flexibility of services for S to access by [S's mother] choosing which activities S should access. This could be D A R E every Saturday. Alternatively It could be in line with activities of interests or linked to S's hobbies etc.

Section H2:

S is currently under a Short Breaks structure which allows regular social work visits, and multi professional meeting where the current care package would also be reviewed. Following this, the request of services would then be presented to Disabled Children and Young People's Resource Panel. S is currently in process of receiving 6 hours per week. This is provided through Direct payments which allows flexibility of services for S to access by [S's mother] choosing which activities S should access. This could be D A R E every Saturday. Alternatively It could be in line with activities of interests or linked to S's hobbies etc.

Further context from the tribunal bundle

18. By way of context, I note the following from the tribunal bundle:

a. the "cfa" report by the Respondent says (at page 551): 14 October 2020: Child Arrangement Order granted. Both child[ren] to remain in the care of their mother and have contact with their father. Contact arrangement staggered until it gets to 2 overnight contacts once per 2 weeks.

b. an email from [the Appellant] to the tribunal of 30 September 2022 says:

> "I must make it clear to the Tribunal that both parents have a Live With Court order. Both parents have equal rights. How much time the child spends with each parent per week during the school term (for your information, the children spend an equal amount of time with each parent during non-school terms) does not affect or override the rights and responsibilities of one parent or make one parent more or less important. The LA is constantly suggesting this to abstract and sideline the father to the detriment of a special needs child. The LA was rebuked by a family court for suggesting this previously. There is no primary and secondary carer or parent."

c. page 34 of the tribunal bundle ([the Appellant]'s "application for appeal") says: "Family court ordered in 2021 both parents (father and mother) have to live with order and parental responsibilities".

How the tribunal's decision dealt with the social care issue

19. At [21], "social care to include both parents" was listed (under the heading, *Section D*) as an issue between the parties (as was, at [22], under the heading *Section H2*, the need for regular social work visits and the short breaks structure).

20. At [30], under the heading *Evidence*, the tribunal's decision recorded that [the Appellant] wished to be included in any social care provision; he did not agree that he had been contacted by the social worker. At [32], the decision recorded the social worker's evidence that she had attempted to contact [the Appellant] but he did not respond; she had not therefore been able to obtain his perspective on the level of support needed. At [35], it recorded S's mother's evidence that [the Appellant] refused to be involved with social workers and did not want them to be involved with S.

21. At [51], the tribunal gave its decision on the sections of S's EHC plan dealing with social care. It said it deleted [the Appellant]'s allegations about Brent social care because it was not health provision reasonably required by the learning difficulties which result in S having special educational needs (and so did not belong in that section of the EHC plan). It said it had reinstated the Respondent's description of S's social care needs and his social care provision. It said that no relevant evidence was submitted by the Appellant to contradict the Respondent's wording in those sections.

Why I have decided there is an arguable error of law with regard to how the tribunal's decision dealt with this issue

22. The powers of the tribunal on appeal are, amongst other things, to make recommendation that the social care needs and/or provision should be specified, or amended, in an EHC plan. There is Upper Tribunal authority (e.g. *BB v London Borough of Barnet* [2019] UKUT 285 (AAC) at [8], and other cases cited there) to say that, in performing this (and its other) functions, the tribunal should give effect to s19.

23. [the Appellant]'s arguments seemed mostly aimed at showing that *the Respondent* had failed to give effect to s19; this may or may not be the case, but it does not assist him in showing any arguable error of law on the part of *the tribunal*.

24. However, it became clear in the course of the oral hearing that [the Appellant]'s underlying complaint was that the tribunal had recommended that S's mother be given sole discretion over the social work activities to be undertaken by S.

25. It seems to me realistically arguable that the tribunal's decision did not adequately explain at [51] (or elsewhere) why it had decided to make this recommendation, in the face of [the Appellant]'s arguments that he should be involved ([51] does say that the Respondent's wording was adopted "because no relevant evidence was submitted" by the Appellant to contradict it, but this, arguably, does not address the point, as it is not a matter of "evidence"). One can hypothesise as to why the tribunal took the course it did: given the state of relations between the parents, it perhaps thought that it needed one or other of the parents to make these decisions, and preferred the mother, as, on the face of it, she had been more cooperative with social services. However, the tribunal's thinking on this is not explained; and it seems to me realistically arguable that the tribunal could have taken other courses in the circumstances, such as:

    a. refraining from giving either parent a sole discretion, and instead specifying itself what social care activities were to be recommended; or

    b. giving [the Appellant] some say in these matters.

    It seems to me arguable that the decision erred in law by not explaining this matter adequately, on the well-known principle that a party must be given to understand why it has lost a case, in part so it can test whether there is an error of law in the underlying analysis.

26. I have not articulated this ground in terms of s19 as, without adequate explanation of why it recommended that S's mother be given sole discretion in this matter, it is difficult to know whether or not the tribunal took that section into account."

9. The Respondent made responses to the appeal on 17 and 22 January 2024. The Appellant made a reply to these, on 22 January 2024. In directions issued on 8 March 2024, I made the following observations:

> "I am concerned that both the Respondent's response, and [the Appellant]'s reply, paid insufficient attention to the following important points:
>
> 1. The purpose of this appeal before the Upper Tribunal is to decide whether there was a material error of law *in the decision of the First-tier Tribunal of 15 May 2023*. The purpose is *not*, for example, to determine whether the Respondent complied with section 19 Children and Families Act 2014.
>
>   If there was such an error of law in the First-tier Tribunal's decision, the Upper Tribunal will then have to go on to consider whether or not to set aside the First-tier Tribunal's decision and, if it does, whether to remake the decision itself, or remit the case back to the First-tier Tribunal for reconsideration.

Both parties to the appeal must focus their argument on the above issues.

2. The only ground on which permission to appeal has been given is that stated at the beginning of the permission decision:

> "that the First-tier Tribunal arguably erred in law by not adequately explaining why, in making recommendations as to the content of sections D and H2 of the Applicant's son's EHC plan, it recommended giving the son's mother sole discretion over what social care activities S should access (so rejecting the Applicant's argument, recorded at paragraph 30 of the First-tier Tribunal's decision, that he be included in any social care provision)."

Both parties to the appeal must focus their argument on this ground.

It is not readily apparent to me why evidence of what has happened *subsequent to the issuance of the First-tier Tribunal's decision*, or indeed *any evidence that was not before the First-tier Tribunal*, is relevant to the ground as set out above. Any party wishing the Upper Tribunal to rely on such evidence will therefore need to explain (in their skeleton argument and/or in their oral submissions at the hearing, as per the directions below) why they think it is relevant to the ground of appeal."

10. I am grateful to both the Appellant and to Ms Thompson for their written and oral arguments in preparation for, and at, the hearing on 8 May 2024.

Some relevant law

Social care needs and social care provision in an EHC plan

11. Section D of an EHC plan sets out the child's "social care needs which relate to their special educational needs or to a disability" (regulation 12(1)(d) Special Educational Needs and Disability Regulations 2014)

12. Section H2 sets out "any other social care provision reasonably required by the learning difficulties or disabilities which result in the child … having special educational needs" (regulation 12(1)(h)(ii) of those regulations). "Social care provision" means the provision made by a local authority in the exercise of its social services functions (s21(4)).

13. In an appeal such as the Appellant's, the tribunal had the power to recommend that Sections D and/or H2 of S's EHC plan be amended or that certain social care needs or social care provision be specified (regulations 4 and 5 Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017).

Adequacy of reasons

14. There are many well-known authorities on adequacy of reasons. The Respondent cited *Meek v City of Birmingham DC* [1987] IRLR 250, where Lord Bingham (thein in the Court of Appeal) said (at paragraph 8):

> It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of a refined legal draftsmanship but it must contain an outline of the story which has given rise to the complaint and a summary of the tribunal's basic factual conclusions and a statement of the reasons which led them to reach the conclusion which they do so on those basic facts. The parties are entitled to be told why they have won or lost. There should be a sufficient account of the facts and the reasoning to enable the EAT or on further appeal this court to see whether the question of law arises…

15. As this appeal concerns certain arguable "gaps" in the tribunal's reasoning, I have also borne in mind the following well-known principles:

    a. the reasons of the tribunal must be considered as a whole.

    b. the appellate court should not limit itself to what is explicitly shown on the face of the decision; it should also have regard to that which is implicit in the decision. *R v Immigration Appeal Tribunal, ex parte Khan* [1983] QB 790 (per Lord Lane CJ at page 794) was cited by Floyd LJ in *UT (Sri Lanka) v SSHD* [2019] EWCA Civ 1095 at [27] as explaining that the issues which a tribunal decides and the basis on which the tribunal reaches its decision may be set out directly or by inference.

    c. the following was said in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 (a classic authority on the adequacy of reasons), on the question of the *context* in which apparently inadequate reasons of a trial judge are to be read:

> "26. Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. … If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing or to direct a new trial.
>
> ….

> 118. ... There are two lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision."

Why I have decided that the ground of appeal is made out

Parties' main submissions

16. The Respondent argued that the tribunal *had* adequately explained why it decided to give S's mother sole discretion over what social care activities S could access: as the decision stated at [51] (explaining why it reinstated the Respondent's description of S's social care needs and his social care provision), the Appellant had not adduced relevant evidence to contradict that wording.

17. The Appellant pointed to the wording he had sought to insert at Section D of S's EHC plan (and in the particular the underlined passages below, as supporting his argument that he *had* provided the tribunal with a positive proposal as to social care):

> "S's safeguarding and welfare issues must be the utmost priority when coming into contact with allocated workers from Brent Social Care. The constant change of support workers and social workers with no experience of working with children who have Autism and learning difficulties has caused emotional and mental harm to S and his sister. The harm that is been done by the current social worker to S and his sister can not be taken lightly. It will not be to the best interest of S for the tribunal to give this social worker the cover to continue to do harm.
>
> The support from Brent social care must be to support S in the generalisation of social, communication and OT skills taught to situations outside of the school and also to support him with his academic progress.
>
> The support that Brent social care provides for S is inconsistent and sometimes not in the best interest of S. <u>Any future support provided must be in consultation with both parents and advice from the professionals that support S at school.</u>
>
> Brent social care claim: 'The allocated worker will work closely with the family and S to ensure that the appropriate support is in place'. This claim is false. Brent Social Care, as can be seen in their proposal for this EHCP documents and the report submitted as evidence to the tribunal, they have lost sight of working to the best interest of S because of their desire to isolate and marginalise a parent. As stated

> above, any future support provided must be in consultation with both parents and advice from professionals that support S at school."

18. The Respondent contended that the Appellant's wording "simply sought to criticise the Respondent, with no evidence to support those assertions"; and that the Appellant "did not make any amendments to the working document to identify the social care provision that he believed was required"; nor did he "put forward any evidence or information as to the activities he would like S to access"; the Respondent submitted that, per the evidence before the tribunal, the Appellant "did not want S to access social care provision" (paragraph 16 of their skeleton).

19. The Respondent's arguments rested heavily on evidence summarised at [32], in the section of the decision under the heading *Evidence*, where the tribunal recorded evidence given by the Respondent's social worker at the hearing to the effect that

> "… she agreed that both parents needed to be considered in relation to social care provision. She said that she had attempted to contact the Appellant but he did not respond. She was not therefore able to obtain his perspective on the level of support required."

20. The Respondent also pointed to evidence in the tribunal bundle, being the social worker's "cfa" (child and family) assessment from February 2023, which said (in the "analysis and recommendation" section) as follows:

> "A new social work assessment was requested due to S being in Tribunal. The purpose of the assessment was to obtain a holistic perspective from each family member where possible and to ensure that the assessment captures the family's needs well.
>
> Unfortunately this has not been the case as [the Appellant] has not engaged with the assessment process and wishes no social care involvement. [The Appellant]'s perspectives would have been key as he has raised concerns that S would benefit from being within an alternative school provision. [The Appellant] has also shared with the social worker that he does not wish for Social Workers to be involved with his children as he believes it is not positive for S."

21. The Respondent contended that because the Appellant had been uncooperative with, and highly critical of, Brent social services, this meant that the Appellant did not want S to access any social care provision – and so, to give him any say over social care provision would be perverse. *VS and RS v Hampshire CC* [2021] UKUT 187 (AAC) was said to be relevant, as it "accepted that, where a Tribunal does not have sufficient evidence before it to make recommendations in respect of social care provision, then it is reasonable for it not to do so – so long as that is clearly stated". The Respondent submitted that the Appellant "had a clear objection to social care input" and "did not

want to engage with the service", and so "the only reasonable response" was to give S's mother, alone, power to choose the activities S should access. The Respondent contended that it would not have been appropriate for the tribunal itself to specify social care provision activities, as this would "unnecessarily have restricted the provision that S could access". To involve the Appellant in choosing social care activities for S "without any evidence as to what that might look like, would leave the provision at risk of breaking down", which plainly would not be in S's interests.

Upper Tribunal's analysis

22. On the face of it, the decision's reason for recommending that S's mother be given sole discretion over what social care activities S should access – despite the decision acknowledging, at [30], that the Appellant, as S's father, wanted to be involved as well – was an absence of "relevant evidence" from the Appellant. What the decision seemed to have in mind in terms of "evidence" that the Appellant could have submitted, but did not, was evidence of the kinds of social care activities he would (positively) want S to take part in (as the Respondent pointed out, part of the Appellant's suggested Section D wording consisted of complaints about Brent social services' input to date). This reasoning seems to me problematic:

    a. if the allegedly "missing" evidence (from the Appellant) was evidence specifying exactly what social care activities S should access, then this was entirely at odds with the social care provision that the decision ultimately decided was required, as that, too, was not "specific" in this respect, but rather gave S's mother (alone) the right to choose social care activities;

    b. the absence of such "evidence" cannot, therefore, be a rational, or fair, explanation for why the decision gave S's mother that sole discretion;

    c. if the true explanation was that the tribunal had reasoned that, given the Appellant's strongly-worded complaints about Brent social services to date, it was likely that he would "block" *any* social care activities if he had any role in choosing them, then this is in turn problematic because

        i. the decision had itself recorded (at [30]) that the Appellant had said that he wanted to be involved in social care provision for S (and the decision had not made any findings to the effect that, if involved, the Appellant would simply "block" *any* social care activities); and

ii. the Appellant's suggested wording at Section D did not, on the face of it, object to *any* social care activities, but rather required, in future, consultation with *both* parents and "professionals" supporting S at school.

23. In essence, the decision's reasons are in my view inadequate on this point because they do not engage with what the Appellant actually suggested in his proposed wording (as above: consultation with parents plus "professionals") – and, it would appear from [30], at the tribunal hearing – and do not explain why the tribunal rejected this. The explanation cannot, logically, be (as it appears to be on the face of [51]) that the Appellant's proposal was not specific enough, as the tribunal went on to recommend something of no greater specificity (that S's mother choose the social care activities); and it cannot be inferred from the context (such as the evidence given and submissions made at the tribunal) that the tribunal had decided, on the basis of the Appellant's complaints about Brent social services' input so far, that he would block *any* social care activities (as this would be an important, and sensitive, finding for it to make – and it did not make it). Moreover, such a finding (about expected obstruction by the Appellant to *any* social care activity) would not fully explain why the tribunal gave S's mother sole discretion over social activities, as the Appellant's proposals also gave "professionals" from school a say in choosing such activities, and there is no explanation of why this aspect was rejected in the decision.

24. The result is that the Appellant is left without fairly understanding why he lost on this point; and the appellate tribunal is unable to probe as to whether there was legal error in the tribunal's thinking in arriving at its conclusion. It follows that there is material legal error in the decision on this point.

Respondent's alternative arguments

25. The Respondent submitted that even if the tribunal erred in law by inadequately explaining this aspect of its decision, the error was immaterial because "any alternative proposal would have been fraught with difficulties and impossible to implement in any practical sense"; the Respondent alluded in particular to the difficulty of deciding who should receive the "direct payments" (that pay for social care activities).

26. In my view, these are assertions about what the tribunal would inevitably have found – but are unsupported by any findings actually made by the tribunal. It is similar to the point made above about the tribunal not having made a finding about the Appellant's 'obstruction' of *any* social care activity: had such a finding been made, then the Respondent's point here would have traction. But no such finding *was* made; nor can it fairly be inferred.

27. The Respondent made a further argument in the alternative, to the effect that, "in S's case, Section H2 does not actually identify the provision that S should receive; it only states what he is receiving i.e. it is simply a matter of fact."

28. I cannot accept this argument: in law, Section H2 sets out the social care provision reasonably *required*. This section of S's EHC plan cannot be said to be a mere description of present circumstances.

Section 19

29. The Respondent cited *S v Worcs CC* (SEN) [2017] UKUT 0092 (AAC), where, at paragraphs 70-73, the Upper Tribunal considered a ground of appeal based on s19 (concerning the need to have regard to views, wishes and feelings – in this case, it was the views etc of the child that were at issue):

> 70. I am not persuaded by the local authority's argument that the section 19 obligations cannot apply to the First-tier Tribunal because they are high-level strategic functions that could not have been intended to apply to the Tribunal. They are not strategic functions. They are obligations which apply to and are designed for the benefit of specific children and young persons.
>
> 71. Nevertheless, this was an appeal brought by a young person. It was Robbie's appeal. Dealing with his case inevitably involved the Tribunal having regard to his views, wishes and feelings. I do not accept that the Tribunal failed to give adequate reasons for not following his wishes. While the Tribunal did not in terms explain why it would not implement his wishes, it explained why it rejected his case which amounts to the same thing. This ground does not succeed.
>
> 72. The participation and enabling aspects of section 19 did not feature prominently in argument. However, if the First-tier Tribunal discharges its obligations under its procedural rules, including the overriding objective, it will be doing as much as would be required if it were subject to the section 19 obligations.
>
> 73. For the above reasons, by way of general guidance to the First-tier Tribunal I do not see any need for it to complicate its business by expressly seeking to act in accordance with section 19 of the CFA 2014. It should simply act in accordance with the overriding objective and, if it does, will be acting in the spirit of section 19.

30. I agree that this appeal does not succeed on grounds of breach of s19 by the tribunal (and, indeed, permission to appeal was not given on such ground).

Why I have refrained from setting aside the tribunal's decision

31. Given the nature of the error of law in the decision that has been identified, my inclination, had I set the decision aside, would have been

to remit the case back to the tribunal for reconsideration – it would not have been appropriate to remake the decision myself.

32. The Respondent submitted that such course of action would have been purely academic, because the EHC plan which was the subject matter of the decision had, in effect, been superseded by a new EHC plan for S, which was issued on 14 February 2024, and which contained identical social care provisions to those which are the subject matter of this appeal; the Appellant had notified an appeal against that new EHCP plan; and that there was to be a hearing of that new appeal to the tribunal, in due course.

33. I agree that to remit this case back to the tribunal would be an academic exercise in these circumstances; I therefore refrain from setting the decision aside (which would have forced me to choose between remitting, and redeciding). My hope and expectation is that this decision will be placed before the tribunal considering the Appellant's "new" appeal, so that the points made in it can be borne in mind when deciding that appeal.

Zachary Citron
Judge of the Upper Tribunal

Authorised for issue 6 June 2024