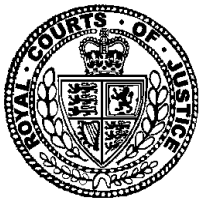

Neutral Citation Number: [2023] EWCA Civ 207

Case No: CA-2022-001469

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
HIS HONOUR JUDGE SEPHTON KC
(SITTING AS A JUDGE OF THE HIGH COURT)
[2022] EWHC 1777 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2023

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE STUART-SMITH
and
LADY JUSTICE ELISABETH LAING

- -

Between:

THE KING
(on the application of
PHILIP MILBURN)

Appellant

- and -

THE LOCAL GOVERNMENT AND SOCIAL CARE OMBUDSMAN

Respondent

-and-

OLDHAM METROPOLITAN BOROUGH COUNCIL

Interested Party

- -
- -

Steve Broach and **Alice Irving** (instructed by **Irwin Mitchell Solicitors**) for the **Appellant**
John Bethell (instructed by **Bevan Brittan LLP**) for the **Respondent**
Jamie Jenkins (instructed by **Oldham Metropolitan Borough Council Legal Services**) for the **Interested Party**

Hearing date: 17 January 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 28 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Stuart-Smith:

Introduction

1. The main issue in this appeal may be described as a demarcation dispute between the respective jurisdictions of the Respondent Ombudsman and the First-tier Tribunal (Special Educational Needs and Disability) ["SENDIST"]. The outcome depends upon the meaning and scope of section 26(6)(a) of the Local Government Act 1974 ["the LGA 1974"] and, specifically, on the meaning to be attributed to the words "a right of appeal, reference or review to or before a tribunal" in the context of that section. Without intending any disrespect to the persons who made the relevant decision, I shall refer to the Ombudsman generically as "it".

2. The Appellant, Mr Milburn, appeals against the decision of HHJ Sephton KC (sitting as a Deputy Judge of the High Court) and the order made in the court below on 8 July 2022. The order was based on reasons set out in a judgment dated 6 July 2022 ["the Judgment"]. The Judgment and order held that the Ombudsman had been right to disclaim jurisdiction in relation to some of the complaints made to it by Mr Milburn because the Ombudsman's jurisdiction was excluded by the terms of section 26(6)(a) of the LGA 1974.

3. For the reasons set out below, I have come to the conclusion that the Judge was right, essentially for the reasons he gave.

The factual and procedural background

4. Mr Milburn is an autistic man who was born in 1999. While of school age he had an Education Health and Care Plan ["EHCP"]. During his final year of school, his mother, Ms Thompson, started discussions with the Interested Party ["the Local Authority"] regarding his future educational provision. Mr Milburn did not wish to attend college and was seeking a bespoke package of education. The Local Authority refused to provide the proposed package and informed Ms Thompson that they would cease to maintain Mr Milburn's EHCP.

5. Acting on Mr Milburn's behalf, Ms Thompson brought an appeal against that decision to the SENDIST. As originally issued, the appeal was against (a) the Local Authority's decision that the EHCP was no longer necessary and should cease, (b) what the EHCP said about Mr Milburn's special educational needs, (c) what the EHCP said about the educational help/or provision that Mr Milburn required, and (d) the school/college/institution named in the EHCP. The stated reasons for the appeal included that "[Mr Milburn] refuses to go to college because he knows himself well enough to know that he will not cope in that environment"; and "[t]he LA have not considered [t]he true impact of Philip's complex presentation of autism on his ability to engage with learning and life."

6. On 1 October 2018, after standard form directions had been made, the Local Authority provided its response to the appeal and agreed to maintain Mr Milburn's EHCP; but disagreement remained about what educational provision it should specify, which then became the focus of the appeal. As recorded in an order for directions issued on 5 November 2018:

"… An Order was issued dated 18/10/2018 requiring parent to confirm whether the appeal had been resolved to her satisfaction and for the LA to submit a request for a consent order.

Parent responded by email dated 18/10/2018 expressing concerns that neither Philip nor herself had been consulted about the suitability of the LA's proposed placement, no evidence has been submitted in respect of Philip's needs and the provision required to meet those needs, the LA response being incomplete. Parent indicates that the LA's actions constitute unreasonable behaviour and requires confirmation that the LA concedes the appeal.

Whilst the LA may have now agreed to maintain Philip's EHC Plan it appears that there are still issues in the appeal relating to the content of the plan and no suitable placement appears to have been identified by either party.

Although there is a working document contained within the hearing bundle submitted by the LA it is undated and I am unclear as to whether this reflects the current outstanding issues between the parties.

In addition, the bundle submitted by the LA does not comply with the guidance on preparation of bundles in that the bundle is not fully indexed and does not contain any of the requests for change or Tribunal Orders issued in the appeal.

It is apparent that the appeal is not ready to be determined as the hearing bundle is deficient, the YP's views have not been obtained and it would appear that there is the potential for a judicial review claim in relation to the decision of the LA to refuse to provide Philip with a personal budget.

…

In order to determine what directions are appropriate to bring this appeal to a conclusion I feel that it is appropriate the case to be the subject of a telephone case management hearing.

It is ordered:

1. …

2. The appeal is to be the subject of an urgent telephone case management hearing to consider the position and to discuss:

a) Whether the appeal is opposed by the LA, and if so, to what extent;

b) The outstanding issues between the parties;

> c) The parties' views on placement;
>
> d) Why the LA have failed to obtain the YP's views;
>
> …
>
> g) The hearing bundle failing to comply with the hearing bundle guidance;
>
> h) Whether it is necessary and appropriate for the LA to provide a full and detailed response to appeal;
>
> i) Any further directions required to assist in bringing this appeal to a conclusion.
>
> 3. The parties shall provide their responses to the issues raised above in readiness for the TCMH by no later than noon on 07/11/2018.
>
> …"

7. By its response, on 7 November 2018, the Local Authority:

   i) Included amongst its list of outstanding issues: "4. Whether [Mr Milburn] has capacity and whether he wishes to stay in education and/or his views on the "bespoke package" requested by his mother.";

   ii) Said in its response to the question why it had failed to obtain Mr Milburn's views that, while it was standard practice for it to seek the direct views of the child or young person, in the last two years Mr Milburn had not attended the person-centred reviews with the SEN Assessment team. It said that Ms Thompson had been clear that she represented Mr Milburn and the Local Authority had no access to Mr Milburn. "This raises further concern, on the part of the LA, that [Mr Milburn] is not being given the opportunity to discuss his views about his education with independent professionals.";

   iii) Requested a further direction that Mr Milburn be made available for a capacity assessment and to discuss his views on the appeal in a meeting with officers of the Local Authority. It sought permission to file further evidence including the report of a Mental Capacity Assessment to be conducted by Adult Social Care with Mr Milburn.

8. At a case management hearing on 19 November 2018, at which Mr Milburn was represented by Mr Broach (Counsel who also represented Mr Milburn before us), the order recorded that:

> "Mr Broach objected to the Local Authority application for a capacity assessment to be made for [Mr Milburn]. The issue fell away because it was agreed that the real issue was litigation capacity and ascertaining [Mr Milburn's] views. It was agreed that Philip would meet with a Social Worker and manager from Adult Social Care in the next week."

9. The hearing of the appeal took place on 20 December 2018. On 29 January 2019, the SENDIST ordered the bespoke package of education that had been sought by Ms Thompson and Mr Milburn. The judgment of the Tribunal recorded that "[Mr Milburn] attended the hearing … and gave evidence. Philip's views were key to our determination, although not determinative in itself." That was confirmed by the body of the judgment, which recorded and gave significant weight to Mr Milburn's views while also resting on evidence from others including Ms Thompson, two witnesses who had worked with Mr Milburn in the past (one of whom was a Ms Barber) and who offered evidence about his complex presentation, and an Educational and Child Psychologist.

10. After the Tribunal decision, Mr Milburn and his mother made two complaints to the Local Authority about its conduct. The first complaint was made by Mr Milburn on 1 March 2019 ["the First Complaint"] and included five points of complaint. The first and third points of complaint were, in substance, that the Local Authority had attended the Tribunal without knowing his views and wishes and that their staff had behaved unethically and unprofessionally. The other points of complaint focussed on the Local Authority making inappropriate recommendations because of a failure to appreciate his needs and an asserted misreporting of a difficult meeting with him. After an interim response dated 1 April 2019, the Local Authority's Final Response was sent on 28 May 2019. The Local Authority recognised that it should have been more proactive and should have sought clarification of Mr Milburn's wish for direct communication; and it apologised for failing to have done this to the best of its ability. It rejected complaints in relation to Ms Barber and how she had conducted and reported on the difficult meeting; and it took the position that "some matters you raise have been part of or relate to the legal tribunal process and [Ms Barber's] input and actions relating to the tribunal matters": on that basis it said it would not be appropriate to enter into further detailed discussions with Mr Milburn about those matters.

11. On 24 April 2019, and acting on Mr Milburn's behalf, Ms Thompson sent a further letter of complaint ["the April Complaint"] to the Local Authority. There were 10 separate heads of complaint. The wide-ranging nature of the complaints is apparent from the headings. For example, Complaint 1 was: "The LA acted unlawfully in issuing a notice to cease to maintain [Mr Milburn's] EHC plan"; and Complaint 2 was: "The LA failed to engage with the arguments explaining why all of the bespoke package was "educational".

12. Three of the 10 complaints require closer attention. Complaint 7 was: "The LA made scurrilous and unfounded accusations against me." Under the heading "Preventing Philip from having his voice heard", Ms Thompson recorded that at a previous Tribunal hearing, a Judge had ruled that Mr Milburn did not have capacity to bring a legal action and that this had been re-visited and reinforced by the Judge at the telephone case management hearing on 19 November 2018. This provides context for what is recorded in the order of that date, which I have set out at [8] above, and for Ms Thompson's subsequent role in acting for her son.

13. The current appeal derives from Complaints 8 and 9, which have subsequently come to be known as Complaint/Ground/issue A and B respectively.

14. Complaint 8 was that: "The LA made numerous claims that it had sought Philip's views but in fact it failed to obtain Philip's views and wishes; when the LA received evidence

regarding Philip's views and wishes, the LA ignored it." In explaining the basis for this complaint, Ms Thompson first said: "During the TCMH of 19.11.18, when asked by the Judge, the LA was unable to offer any explanation for why it had failed to obtain Philip's views and wishes directly. The Judge had to direct the LA to obtain Philip's views and wishes." She went on to criticise the stance that the Local Authority had taken, which she said ignored the recommendation from the Educational Psychologist that college would not be suitable. This complaint replicated almost verbatim a submission that had been made to the Tribunal in a document prepared by Counsel and dated 12 October 2018. She complained that the Tribunal's orders had not been complied with and that the Local Authority had ridden roughshod over her son's views. She criticised the Local Authority for submitting a witness statement from Ms Barber and calling her at the SENDIST appeal hearing, stating that Ms Barber had not seen or spoken to Mr Milburn for 10 years. And she criticised the Local Authority for having claimed to have sought Mr Milburn's views when, in fact, it had not done so. There is a clear area of overlap between Complaint 8 and the substance of the First Complaint, which I have summarised at [10] above.

15. Complaint 9 was: "Unreasonable behaviour by the LA during the lead up to the Tribunal hearing." The main constituent elements upon which Ms Thompson relied in support of this complaint were that (i) the Local Authority failed to submit an amended Working Document by the deadline imposed by the Tribunal, (ii) the Local Authority then requested to postpone the Tribunal hearing to enable it to arrange a mental capacity assessment, and (iii) the Local Authority did not request to speak to Mr Milburn after the commencement of the appeal to the Tribunal on 16 July 2018. (I note in passing that the continuing failure to deal with the Working Document as required by the Tribunal between 2 and 19 November 2018 was the subject of Complaint 10.) She said that the behaviour of which she complained in Complaint 9 had caused mental torture to her son, ignored the impact on him of their actions, denied him the education to which he was entitled, and caused her increased workload and stress.

16. The Local Authority's response to the April Complaint was by letter dated 22 July 2019. In relation to parts of Complaints 1, 2, 3, 5, and 6, the Local Authority declined to address some of the points being made in the April Complaint on the basis that they related to "matters considered as part of the SENDIST tribunal and lie out of scope of the complaint process." Complaints 7 and 9 were taken together. The writer of the response letter wrote: "In line with our response to your previous recent complaints we do sincerely apologise that we had not made greater efforts in the previous two years to meet with Philip. Please be assured we will meet with Philip again as part of his annual review." In relation to Complaint 8, the writer accepted that "although I am satisfied that officers were acting in good faith at the time, we should have realised much earlier that Philip you had grown in confidence and that you had wanted to engage positively directly with our staff. I would want you add my own further sincere apology to you Philip for this oversight in staff not proactively seeking your direct views and wishes at that time." There was an assurance of better liaison with young people in the future.

17. At the conclusion of the response, the writer outlined steps that would be taken in the future and continued:

> "In addition to the above as a further outcome in respect of the fault I have found, in that we should have more proactively sought and offered interim educational provision for Philip

> during the interim period; For this period, in recognition of avoidable loss of education provision it has been agreed that we will pay Philip the amount of £2,400."

The Ombusdman's decision

18. On 15 August 2019 Ms Thompson complained to the Ombudsman on her own behalf and on behalf of Mr Milburn. She repeated the complaints that she had made in the April Complaint. In brief outline, she stated that the matters complained of had caused her extreme stress and a significant additional workload; that they had delayed the Tribunal hearing (referring specifically to the request for an MCA assessment); and that they had caused Mr Milburn mental torture and denied him the education to which he was entitled.

19. After providing a draft decision in February 2020, the Ombudsman reached its final decision on 22 July 2021. Two elements of the decision are relevant to and are the subject of the challenge in the present proceedings. The Ombudsman arranged the complaints into four sub-groups, of which the fourth was called complaint (d). We are directly concerned with what the Ombudsman called complaints (d)2 and (d)3. These were what had in the April Complaint been Complaints 8 and 9 respectively. In the Court below they were called Complaints/issues A and B respectively, and I will adopt that terminology from now on where practicable. I will also adopt the Ombudsman's shorthand, whereby maladministration and service failure are referred to as "fault" and an adverse impact caused by fault is referred to as "injustice".

20. The Ombudsman first provided a summary of its final decision as follows:

> "Ms [Thompson] complains about the Council's response to her request for a bespoke education package for her son, Mr [Milburn]. We find that delay by the Council caused Mr [Milburn] an injustice. Mr [Milburn] missed out on education as a result. The Council offered him a payment to recognise the disruption to his education. *Some matters in the complaint relating to the Council's dealings with Ms [Thompson] during the appeal process are either outside the Ombudsman's remit or should not be pursued further as it would not be appropriate and would not achieve more for Ms [Thompson] and her son.* The Council has agreed to apologise for comments made about Ms [Thompson] in correspondence with her. The Council has offered a suitable remedy for the impact of the faults found." (emphasis added)

As explained later in the decision, the emphasised sentence included a reference to Complaints/issues A and B.

21. The Ombudsman provided a summary of its role and powers as follows:

> "4. We can decide whether to start or discontinue an investigation into a complaint or part of a complaint within our jurisdiction. *(Local Government Act 1974, sections 24A(6) and 34B(8), as*

amended) For example we may decide not to start or continue with an investigation or part of an investigation if we believe:

• it is unlikely we could add to any previous investigation by the Council, or

• it is unlikely further investigation will lead to a different outcome, or

• we cannot achieve the outcome someone wants.

5. The law says we cannot normally investigate a complaint when someone can appeal to a tribunal. However, we may decide to investigate if we consider it would be unreasonable to expect the person to appeal. *(Local Government Act 1974, section 26(6)(a), as amended)*

6. We cannot investigate a complaint if someone has appealed to a tribunal. *(Local Government Act 1974, section 26(6)(a), as amended)*

7. The First-tier Tribunal (Special Educational Needs and Disability) considers appeals against council decisions regarding special educational needs. We refer to it as the 'SEND Tribunal'. A young person or their parent may appeal against a decision to cease to maintain an EHC Plan or about the special educational provision set out in the Plan.

8. Caselaw has established that where someone may appeal or has appealed to the SEND Tribunal, the Ombudsman cannot investigate any matter which is 'inextricably linked' to the matters under appeal. *(R (on the application of ER) v The Commissioner for Local Government Administration [2014] EWCA Civ 1407)*.

9. The Court of Appeal confirmed that the Ombudsman cannot consider a complaint when the complainant has pursued an alternative remedy, even if it does not provide a complete remedy for the injustice claimed. *(R v Commission for Local Administration, ex parte Field [1999] EWHC 754 (Admin))*

10. If we are satisfied with a council's actions or proposed actions, we can complete our investigation and issue a decision statement. *(Local Government Act 1974, section 30(1B) and 34H(i), as amended)*

22. After setting out the factual background of the initial disputes, the tribunal proceedings and the First and April complaints at paragraphs 14-25, the Ombudsman dealt with what it was calling complaints (a) to (c) at paragraphs 26-40. In summary:

i) Complaint (a) concerned the Local Authority's decision to cease to maintain Mr Milburn's EHCP. The Ombudsman held that it could not consider this part of the complaint as Ms Thompson had secured Legal Aid to challenge the decision on Mr Milburn's behalf. She had threatened legal action and began an appeal

to the Tribunal. "We cannot consider a complaint once someone has appealed to the Tribunal". There is no challenge to that determination;

ii) Complaint (b) concerned the Local Authority's response to Ms Thompson's request for a bespoke education package for Mr Milburn. The Ombudsman held that it was not competent to assess Ms Thompson's proposal for a bespoke package and rejected the complaint for essentially the same reason as its rejection of complaint (a), saying: "This is the Tribunal's job. Ms [Thompson] appealed to the Tribunal. The Ombudsman cannot consider the matter." There is no challenge to that determination;

iii) Complaint (c) concerned the Local Authority's failure to make provision for Mr Milburn's special educational needs in the period before the Tribunal. This was not the subject of, or an issue raised in, the Tribunal proceedings. The Ombudsman found both fault and injustice but concluded that the offer of £2,400 that the Local Authority had made by its letter of 22 July 2019 was a suitable remedy for the injustice caused by the Local Authority's faults. There is no challenge to that determination.

23. It is convenient to mention complaints (d)1 and (d)4 before turning to the complaints that are the subject of the present appeal. In summary:

i) Complaint (d)1 concerned the Local Authority's allegation that Ms Thompson was pursuing her own interests rather than those of her son. The Ombudsman addressed it at paragraphs 53 to 59 of the decision, considering each document relied upon in turn. In relation to one document ("Document B") it found fault in the comments that the Local Authority had made as the Local Authority had produced no evidence to support them. There is no challenge to that determination;

ii) Complaint (d)4 concerned the Local Authority's decision to send a witness to the Tribunal who Ms Thompson considered not to be an appropriate witness because she had not seen Mr Milburn for many years and so was not aware of his views. The Ombudsman pointed out that the quality of the witness' evidence had been specifically considered by the Tribunal who had commented that she presented as "an impressive and credible witness", albeit one whose evidence was generalised and lacking insight into Mr Milburn's complex presentation because she had not seen Mr Milburn for some years. The Ombudsman concluded that "[as] this was an issue inextricably linked to the matter under appeal and dealt with by the Tribunal … this part of the complaint is outside the Ombudsman's jurisdiction." There is no challenge to that determination.

24. Turning to complaint (d)2 (now known as Complaint/issue A), it was that "the Council made numerous claims it had sought Mr [Milburn's] views from him but in fact failed to do so and then ignored evidence about his views and wishes when provided." The Ombudsman's reasons for rejecting this complaint were set out at paragraphs 60-66 of the decision:

> "60. Based on the evidence I have seen, I consider that the question of the extent to which the Council sought and took account of Mr [Milburn's] views is outside the Ombudsman's

jurisdiction. Ms [Thompson] argues that the Council's failure to take proper account of her son's views resulted in inappropriate provision being included in his EHC Plan. She and Mr [Milburn] wanted him to have a bespoke package of education and the Council did not agree. This was a key issue in the appeal.

61. The Tribunal Order in November 2018 ordered the Council to explain why it had "failed to obtain [Mr [Milburn's]] views". The Council responded by submitting Document C, … . So the Tribunal considered the matter as part of the appeal process. The Judge then heard evidence from Mr [Milburn] directly, took his views about his education into account and allowed the appeal. The Tribunal decision in January 2019 said Mr [Milburn]'s views were 'key' to its decision.

62. In my view, then, the question of whether the Council had properly obtained Mr [Milburn]'s views is inextricably linked to the matter under appeal. This means that based on the law and case law referred to in paragraphs 6, 8 and 9 above, this matter is outside the Ombudsman's jurisdiction. If this is the case it means I cannot make findings of fault on the matter or recommend a remedy for any injustice caused as a result.

63. Ms [Thompson] and Mr [Milburn] achieved the outcome they wanted as the Tribunal upheld the appeal. I recognise that Ms Thompson does not consider this sufficient. She would like a financial remedy to recognise the distress caused to her and her son by the Council's actions in failing to seek Mr [Milburn]'s views. However the courts have decided that even if a Tribunal does not provide a full remedy, it does not mean the Ombudsman can do so where an alternative legal route has been used.

64. Even if it is disputed that this matter is outside the Ombudsman's jurisdiction, I do not consider it appropriate to comment on it when the Tribunal has already considered it. Also I do not think I could achieve any more for Ms [Thompson] and Mr [Milburn] by pursuing the matter further because, for the following reasons, I consider the Council has offered a suitable remedy for this part of the complaint.

65. I do not doubt the distress and frustration both Ms [Thompson] and Mr [Milburn] experienced in their attempts to secure suitable education for Mr [Milburn] once he left school. It is likely that some of that distress and frustration could have been avoided if the Council had sought Mr [Milburn]'s views directly much sooner. But on balance, it seems unlikely that all of the distress and frustration would have been avoided. In light of the differences between the education proposed by the Council and the package suggested by Ms [Thompson] and Mr [Milburn], an appeal to the Tribunal was always likely.

> 66. Also, the Council has confirmed it has learned lessons from the complaint and its review of the SEND service. It has worked directly with Mr [Milburn] to obtain his views. It has explained the improvements it has made to its Annual Review paperwork to better capture the views of young people and families. It says it has also had further legal training and has regular discussions between the SEND team and the complaints team about how to handle disputes. The Council says Ms [Thompson] has given positive feedback on her more recent dealings with the SEND Team."

25. Complaint (d)3 (now known as Complaint/issue B) was about the Council's other failings in the lead up to the Tribunal and was dealt with more shortly, as follows:

> "67. Ms [Thompson] complains that the Council failed to comply with the Tribunal's orders and deadlines, failed to produce adequate documents for the Tribunal, and sought to postpone the hearing in order to carry out an MCA of Mr [Milburn]. We consider that the issues raised in this part of the complaint are outside the Ombudsman's jurisdiction. But even if this is not the case we are exercising discretion not to investigate them further as our view is it would not be appropriate to involve ourselves in Tribunal processes."

Although not expressly stated, it is clear that the Ombudsman considered these issues to be outside its jurisdiction because they fell within that of the Tribunal.

26. The Ombudsman set out its final decision in paragraph 71 as follows:

> "I find that the Council was at fault in failing to provide for Mr [Milburn]'s special educational needs under his EHC Plan while he was appealing to the SEND Tribunal. I consider the Council's offer of £2,400 is an appropriate remedy for the disruption to Mr [Milburn]'s education caused as a result. I consider parts of the complaint are outside the Ombudsman's jurisdiction, or if they are not, then we will not investigate as the Ombudsman does not wish to trespass on the conduct of the Tribunal, and the Council's apology for its failure to seek Mr [Milburn]'s views about plans for his education sooner is a suitable remedy for the alleged injustice this caused. The Council has also put in place improvements in its procedures and agreed to apologise to Ms [Thompson] for comments made. I am satisfied with the Council's actions to remedy the injustice caused and so I have completed my investigation."

These proceedings

27. Mr Milburn issued these proceedings on 21 October 2021. In his Statement of Facts and Grounds, he picked up on the use of the phrase "inextricably linked" which, as set out above, the Ombudsman had used in its summary of principles and its rejection of complaints (d)2 (now known as Complaint/issue A) and (d)3 (now known as

Complaint/issue B). He challenged the Ombudsman's disclaimer of jurisdiction on that basis and, in addition, challenged the Ombudsman's decision not to exercise its discretion to investigate those aspects of the complaint if it was wrong on the jurisdiction issue.

The Judgment

28. HHJ Sephton KC set out the background at [3]-[11] of the Judgment, including paragraphs 6, 8, 9, 60-64, 67 and 71 of the Ombudsman's decision, all of which I have set out above. The issues for him to decide were agreed and he identified them at [12] of the Judgment as follows:

> (1) Did the Defendant misdirect itself in law as to the scope of his jurisdiction, specifically:
>
> (a) What is the correct interpretation of s.26(6) Local Government Act 1974?
>
> (b) Did the Defendant have jurisdiction to investigate the relevant parts of the Claimant's complaint (Complaints/issues A and B)?
>
> (2) Was the Defendant's decision to exercise any discretion he had not to investigate Complaints/issues A and B irrational?
>
> (3) Did the Defendant fail to provide adequate reasons for refusing to investigate Complaint/issue B?

29. It appears from [20] of the Judgment that the lead submission to the Judge on behalf of Mr Milburn was that the Ombudsman had erred in concluding that Complaints/issues A and B were "inextricably linked" with Mr Milburn's appeal to the Tribunal. On issue 1(a) the Judge held at [26] that: "In order to decide whether the Ombudsman has jurisdiction in a case such as the present, it is necessary to determine whether, in relation to the action (or omission) complained of, the complainant "has or had a right of appeal, reference or review." If yes, then … the Ombudsman lacks jurisdiction." He held at [27]-[28] that this was not affected by the decision in *R (ER) v Commissioner for Local Government Administration* [2014] EWCA Civ 1407, [2015] ELR 36. He concentrated on the need properly to characterise the issue which the Ombudsman is being invited to investigate; and he cautioned that:

> "it is necessary to be extremely careful about extracting the words "inextricably linked" as a touchstone for future decisions about jurisdiction, because there is a danger that this phrase might distract from the necessary focus upon the question whether the substance of the complaint is something in respect of which the complainant has a right of appeal, reference or review before a tribunal."

30. Turning to Complaint/issue A, at [29] he subdivided Complaint/issue A as raising two matters:

> "(a) One matter is that the Council failed to obtain Mr Milburn's views and wishes, and when it received evidence regarding them, it ignored them.
>
> (b) The other matter is a complaint about the "numerous claims" that the Council had sought Mr Milburn's views from him when in fact it had not."

31. Dealing with the first matter raised under Complaint/issue A he upheld the decision of the Ombudsman for the reasons he set out at [30]-[31] of the Judgment:

> "30. … The Council was obliged to have regard to Mr Milburn's wishes (CFA 2014 s 19). The Council ceased to maintain Mr Milburn's ECHP because it considered that it was no longer necessary for the plan to be maintained. The gravamen of Mr Milburn's complaint about the Council's decision to cease his ECHP was that it had not consulted him or considered his views. The substance of Mr Milburn's appeal, made pursuant to CFA 2019 s 51(2)(f), was the Council's failure to consider his views. The Council's failure to seek and consider Mr Milburn's views was egregious, having regard to the Council's statutory obligation to consider them, and particularly deplorable in the light of Mr Milburn's vulnerability. I have no doubt that it caused Mr Milburn and Ms Thompson enormous upset. But in my view there can be no doubt that the failure to obtain and act on Mr Milburn's view was something in respect of which he had a right of appeal to a tribunal. It therefore fell outwith the jurisdiction of the Ombudsman. Consistently with authority such as *Field* and *ER*, the consequence is that, since the Ombudsman is precluded from investigating this issue, Mr Milburn has no remedy in respect of the Council's deplorable conduct in not seeking or acting on his views."

He concluded that the Ombudsman had given sufficient reasons for its decision and continued at [31]:

> "Although, for the reason given earlier in this judgment, I am wary of the phrase "inextricably linked", I believe that the decision correctly concludes that the Ombudsman lacks jurisdiction because the Council's failure to seek or heed Mr Milburn's views formed the substance of the appeal before the Tribunal."

32. The Judge then held at [32]-[33] that the "numerous claims" were a different matter. Although there had been no submission to him that the matters complained of were excluded from the Ombudsman's jurisdiction on the basis that they could be the subject of an appeal to the Tribunal, they had not been dealt with in the Ombudsman's decision. He therefore concluded that the Ombudsman's mind had simply not been turned to the "numerous claims" head of complaint. He dealt with the question of discretion separately: see below.

33. Turning to Complaint/issue B, the Judge held that all the matters there raised concerned the procedure of the Tribunal. It had been argued on behalf of Mr Milburn that the sanctions of adverse costs orders or striking out were ineffective. The Judge's response at [34] was:

> "In my judgment, all of the matters raised in Issue B concern the procedure of the Tribunal. Mr Broach argued that whereas the sanctions available to a court under the Civil Procedure Rules are apt to control a litigant's bad behaviour, the Tribunal's sanctions to order costs or to strike out are so hobbled as to be toothless. I make no judgment whether a tribunal's sanctions are ineffective; it seems to me that the only question I have to decide is whether Mr Milburn was entitled to refer to the Tribunal about the matters complained of. I conclude that they were all matters in respect of which Mr Milburn had the right to refer to the Tribunal, which is master of its own procedure: see Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care) Rules 2008, rule 5; and which had the express power to deal with failures to comply with directions: see rule 7(2). These matters are therefore excluded from the jurisdiction of the Ombudsman by LGA s 26(6). If the Council conducted itself in relation to the Tribunal proceedings in the manner alleged by Mr Milburn, their behaviour was reprehensible. However, since the Ombudsman lacks jurisdiction to entertain the complaint about such behaviour, Mr Milburn cannot raise these issues before him."

34. In the light of his conclusions about jurisdiction, the Judge held that the question of discretion only arose in relation to the "numerous claims" matter. The Judge held that the Ombudsman had not advanced any reasoned basis for exercising their discretion not to entertain or investigate that part of the complaint.

35. In the result, therefore, the Judge quashed the decision not to investigate the second of the matters arising under Complaint/issue A. There is no cross-appeal against that element of his decision. However, he also held that the first of the matters arising under Complaint/issue A and the matters arising under Complaint/issue B were excluded by LGA 1974 s. 26(6). Mr Milburn's challenge to those aspects of the Ombudsman's decision therefore failed but is renewed by this appeal.

The Grounds of Appeal

36. There are two grounds of appeal:

i) Ground 1: the Deputy Judge erred in his conclusion that the substance of the Claimant's appeal to the Tribunal was the Council's failure to consider his views and, therefore, that the Defendant did not have jurisdiction to investigate part of the complaint.

ii) Ground 2: It was wrong for the Deputy Judge to conclude that the Council's conduct in the lead up to the Tribunal hearing were actions 'which the person

has or had a right of appeal, reference or review to or before a tribunal' such that the Defendant did not have jurisdiction to investigate part of the complaint.

The Legal Framework

The obligations of the Local Authority

37. Part 3 of the Children and Families Act 2014 ["the CFA 2014"] makes provision for a local authority's functions to include supporting and involving children and young persons with special needs or disabilities. Section 37(1) provides that, where in the light of an EHC needs assessment it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan, the local authority must secure that an EHC plan is prepared and maintained. Pursuant to section 37(2), for the purposes of Part 3 of the CFA 2014 an EHC plan is a plan specifying (a) the child's or young person's special educational needs, (b) the outcomes sought for him or her, (c) the special educational provision required by him or her, and other prescribed matters. Pursuant to section 42(1) and (2), where a local authority maintains an EHC plan for a child or young person, it must secure the specified special educational provision for them. The circumstances in which a local authority may cease to maintain an EHC plan for a child or young person are narrowly drawn by s.45(1) as being *only if* (a) the authority is no longer responsible for the child or young person, or (b) the authority determines that it is no longer necessary for the plan to be maintained.

38. Section 19 of the CFA 2014 provides that, in exercising its functions under Part 3 of the Act, a local authority in England must have regard to various matters in particular including "the views, wishes and feelings of the child … or the young person."

39. The Special Educational Needs and Disability Regulations 2014 ["the 2014 Regulations"] supplement the procedural framework established by Part 3 of the CFA 2014 for assessing a child or young person with special educational needs and the procedure for making, reviewing, amending and ceasing to maintain an EHC plan. The section 19 general obligation on the local authority to have regard to the views, wishes and feelings of the child or young person is supplemented by specific provisions of the 2014 Regulations. Thus, regulation 7(a) requires a local authority, when securing an EHC needs assessment, to consult the child and the child's parent or the young person, and to take into account their views, wishes and feelings. Regulation 12(a) requires a local authority, when preparing an EHC plan, to set out the views, interests and aspirations of the child and his parents or the young person. Regulation 19(a) requires a local authority, when undertaking a review of an EHC plan, to consult the child and the child's parent or the young person, and to take account of their views, wishes and feelings. Regulation 31(1)(a) requires a local authority, when considering ceasing to maintain a child or young person's EHC plan, to consult the child's parent or the young person.

40. The 2014 Regulations also address the powers of the Tribunal on an appeal. Regulation 43(2) identifies powers that are included by reference to particular sub-sub-sections of Section 51(2) of the CFA 2014. Thus, for example, where the appeal is made under section 51(2)(f) – a decision of a local authority to cease to maintain an EHC plan – the powers of the tribunal include a power to order the local authority to continue to maintain the EHC plan in its existing form or with amendments: see regulations 43(2)(e)-(f).

Appeals to SENDIST and the SENDIST procedure rules

41. Section 51 of the CFA 2014 gives a child's parent or a young person a right of appeal to the SENDIST against the matters set out in subsection (2), which provides as follows:

> "(2) The matters are—
>
> (a) a decision of a local authority not to secure an EHC needs assessment for the child or young person;
>
> (b) a decision of a local authority, following an EHC needs assessment, that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan;
>
> (c) where an EHC plan is maintained for the child or young person—
>
> (i) the child's or young person's special educational needs as specified in the plan;
>
> (ii) the special educational provision specified in the plan;
>
> (iii) the school or other institution named in the plan, or the type of school or other institution specified in the plan;
>
> (iv) if no school or other institution is named in the plan, that fact;
>
> (d) a decision of a local authority not to secure a re-assessment of the needs of the child or young person … following a request to do so;
>
> (e) a decision of a local authority not to secure the amendment or replacement of an EHC plan it maintains for the child or young person following a review or re-assessment …;
>
> (f) a decision of a local authority under section 45 to cease to maintain an EHC plan for the child or young person.

42. Section 51(4) authorises the making of regulations which make provision about appeals to the SENDIST in respect of EHC needs assessments and EHC plans. Those regulations are the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008/2699 ["the SENDIST procedure rules"]. Rule 2 identifies the overriding objective and the parties' obligation to co-operate with the Tribunal in terms that, despite some common aspects, are distinctly different from those applying to litigation pursuant to Part 1 of the Civil Procedure Rules. The overriding objective of the SENDIST procedure rules is to enable the Tribunal to deal with cases fairly and justly: rule 2(1). Dealing with a case fairly and justly includes avoiding unnecessary formality and seeking flexibility in the proceedings: rule 2(2)(b). Parties must help the Tribunal to further the overriding objective and co-operate with the Tribunal generally: rule 2(4).

43. Rule 5 of the SENDIST procedure rules permits the Tribunal to regulate its own procedure and gives it extensive case management powers including the power: (a) to extend or shorten time for compliance with any rule, practice direction or direction; (b) to permit or require a party to amend a document; (c) to permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party; or (d) to stay proceedings. Rule 7 provides that if a party has failed to comply with a requirement in the Rules, a practice direction or a direction, the Tribunal "may take such action as it considers just", which may include waiving the requirement, requiring the failure to be remedied, or (in certain circumstances) striking out a party's case. Rule 10(1)(b) empowers the Tribunal to make an order in respect of costs if it considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.

44. The obligation to ascertain the views of the child or young person is also reflected in the SENDIST procedure rules. Rule 21 governs the response to the application notice. Rule 21(2) provides that the response must include (in addition to various formal requirements): "(e) in a special educational needs case brought by a parent of a child, the views of the child about the issues raised by the proceedings, or the reason why the respondent has not ascertained those views".

45. Taking the provisions of section 19 of the CFA 2014, the 2014 Regulations and the SENDIST procedure rules together demonstrates a consistent emphasis on the obligation upon a local authority to have consulted the child or child's parent or young person and to have taken their views into account, and upon the Tribunal, by the mandatory procedural requirements of the response, to build those views (or the reasons why the views have not been ascertained) into its deliberations. It is, to my mind, inconceivable that the Tribunal could consider the matters that may be the subject of an appeal to it pursuant to section 51(2) of the CFA 2014 without taking into account the views of the young person. It is also plain that the views of the child or young person are a necessary element of any decision-making by the local authority. Whether a failure to consult would of itself be sufficient to cause a local authority's decision to be set aside by the Tribunal is not a question that arises for decision on the facts of this case; but the views of an affected child or young person will be material for the Tribunal's deliberations even if (as in this case) not determinative of the outcome. While the use of synonyms is always risky, it can fairly be said that the process of consulting the child and obtaining their views is integral to the decision-making processes of the local authority and, in the event of an appeal, the Tribunal.

46. The Local Authority drew our attention to two Upper Tribunal decisions in which, it submitted, the Upper Tribunal had accepted that the Tribunal shares the obligation imposed on a local authority by section 19 of the CFA 2014. In *S v Worcestershire County Council (SEN)* [2017] UKUT 92 (AAC), UT Judge Mitchell addressed the question briefly and concluded that;

> "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."

In *M & M v West Sussex CC (SEN)* [2018] UKUT 347 (AAC) at [35], UT Judge Mitchell went further:

> "If the full legislative context is considered, we see that:
>
> (a) Whenever a local authority is exercising functions relation to an EHC Plan, section 19 of the 2014 Act requires the authority to have regard to the "views, wishes and feelings of the child". It would not accord with the statutory purpose if this requirement were to fall away once an appeal is made to the First-tier Tribunal. And, in any event, the Upper Tribunal has already decided that the section 19 (a) to (c) obligations apply on appeal (*S v Worcestershire CC (SEN)* [2017] UKUT 0092 (AAC))."

47. We heard limited argument on this point. On that basis my provisional view is that it is not technically correct to say that section 19 itself imposes the same obligation upon the Tribunal as upon the local authority because section 19, by its express terms, imposes the obligation solely on the local authority. However, for the reasons I have given, it does not matter; what matters is that the views of the child or the young person will always be material for consideration by the Tribunal and will, in that sense, be integral to the exercising of the Tribunal's extensive powers on an appeal pursuant to section 51 of the CFA 2014.

48. A further point emerges from the procedural and case management powers to which 1 have just referred. As in any contested form of dispute resolution, issues will arise that are of necessity within the power of the forum in which the dispute is being conducted to decide. As appears from the SENDIST procedure rules that I have summarised above, the Tribunal has an overriding duty based on the overriding objective and an overarching power to regulate its procedure to that end. It is therefore seised of and empowered to deal with both general and particular aspects of its proceedings. Specific instances are the power to shorten or extend time for compliance – relevant where one party is in default and the other party wishes to press on; or the power to require a party to provide or amend documents – relevant where one party considers that the other party is dragging their heels over the production of court/tribunal documents or information in that other party's control. General instances are the Tribunal's power to take such action as it considers just in the face of non-compliance with a requirement of the rules, a practice direction or a direction; and the power of the Tribunal to make orders for costs. The criteria for making an order for costs may be more restrictive than is the case in adversarial litigation before the Courts; but they remain broadly drawn, the question being whether the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings. These powers go hand in hand with the powers of disposition established by regulation 43(2) of the 2014 Regulations. In summary, the statutory provisions and regulations to which I have referred establish a comprehensive framework for resolution of all aspects of and ancillary to the matters that may be the subject of an appeal pursuant to section 51 of the CFA 2014.

The jurisdiction of the Ombudsman

49. The Ombudsman is established under Part III of the Local Government Act 1974 ["the LGA 1974"]. Pursuant to section 24A(1) and section 26(1), the ombudsman may investigate:

> "(a) alleged or apparent maladministration in connection with the exercise of the authority's administrative functions;
>
> (b) an alleged or apparent failure in a service which it was the authority's function to provide;
>
> (c) an alleged or apparent failure to provide such a service.
>
> (d) … ."

50. Section 24(6)-(7) gives the Ombudsman a broad discretion in the following terms:

> "(6) In determining whether to initiate, continue or discontinue an investigation, a Local Commissioner shall, subject to the provisions of this section and sections 26 to 26D, act in accordance with his own discretion.
>
> (7) Without prejudice to the discretion conferred by subsection (6), a Local Commissioner may in particular decide–
>
> (a) not to investigate a matter, or
>
> (b) to discontinue an investigation of a matter,
>
> if he is satisfied with action which the authority concerned have taken or propose to take."

51. Section 26(6) limits the jurisdiction of the Ombudsman and is the key provision for the purposes of this appeal:

> "A Local Commissioner shall not conduct an investigation under this Part of this Act in respect of any of the following matters, that is to say, -
>
> (a) any action in respect of which the person affected has or had a right of appeal, reference or review to or before a tribunal constituted by or under any enactment;
>
> (b) any action in respect of which the person affected has or had a right of appeal to a Minister of the Crown; or
>
> (c) any action in respect of which the person affected has or had a remedy by way of proceedings in any court of law:
>
> Provided that a Local Commissioner may conduct an investigation notwithstanding the existence of such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect the person affected to resort or have resorted to it."

Section 34 provides that "action" here includes failure to act. So section 26(6)(a) must be read as excluding investigations in respect of any action or failure to act in respect

of which the person affected has or had a right of appeal, reference or review to or before a tribunal.

52. A further limitation upon the Ombudsman's jurisdiction is provided by section 26(8) which provides that the Ombudsman shall not conduct an investigation under Part III of the Act in respect of any such action or matter as is described in Schedule 5 to the Act. Paragraph 1 of Schedule 5 describes "The commencement or conduct of civil or criminal proceedings before any court of law." It follows that the Ombudsman has no jurisdiction to investigate the conduct of civil or criminal proceedings before any court of law. There is no equivalent provision excluding the Ombudsman's jurisdiction to investigate the conduct of proceedings before the Tribunal. The only statutory provision in relation to excluding the Ombudsman's jurisdiction where there are or may be proceedings before the Tribunal is to be found in section 26(6)(a) of the Act; and the scope and extent of the exclusion of jurisdiction depends upon the proper interpretation of that provision.

53. There is limited authority on the approach to be taken to section 26(6)(a) of the LGA 1974. Before turning to it, it is convenient to note some features of the statutory provisions. The first is the different language adopted in subsections 26(6)(a), (b) and (c) respectively. Starting at the end, (c) only excludes jurisdiction where the person affected "has or had a remedy" by way of proceedings in any court of law. The reference to a remedy is entirely general: the nature of such a remedy is neither identified nor circumscribed. By contrast, there is no reference to a "remedy" in (a): what matters there is whether the prospective investigation concerns any action or failure to act in respect of which the person affected has or had "a right of appeal, reference or review to or before a tribunal". A similar distinction can be drawn between the terms of (c) and of (b), where the question is whether there is any action in respect of which the person affected "has or had a right of appeal to a Minister of the Crown". When (b) is compared to (a) is apparent that (a) is more widely framed in two material respects: first, by the inclusion of the words "reference or review" and, second, by the inclusion of the words "to or before.". On the assumption that the different wording is deliberate, it must follow that section 26(6)(a) is not limited to those actions (or failures to act) which of themselves give rise to a right to appeal to the tribunal.

54. There is no self-evident rationale for the inclusion of the whole phrase "right of appeal, reference or review" or the words "to or before" in section 26(6)(a); nor have the researches of counsel identified any authoritative explanation for this wording. On normal principles of statutory construction, and without reference to authority, I would hold that there is no reason to limit the meaning of the words to originating processes or applications by which issues are brought before the Tribunal. The words are wide enough to cover an issue of which the Tribunal has or may become seised in the course of its proceedings, however the issue may arise or be brought before the Tribunal for determination.

55. The leading case on the application of section 26(6)(a) of the LGA 1974 is *ER*. I adopt the summary of the facts provided by the Judge below at [18] of the Judgment:

> "…[T]he placement of N, a child who had a statement of special educational needs, broke down in October 2006. The local authority offered a placement at Moorcroft School from November 2007. N's mother was dissatisfied with the placement

> and appealed to the Special Educational Needs and Disability Tribunal. On 7 May 2008, the tribunal allowed the appeal and N was placed at Penhurst School from June 2008. The claimant complained to the Ombudsman that the local authority had failed to provide N any education between November 2006 and November 2007 (the first period), and secondly of their failure to do so in the period from November 2007 to June 2008 (the second period). The Ombudsman upheld the complaint in respect of the first period, holding that Hillingdon had failed to arrange alternative education provision for N while seeking a suitable full-time place for him. She recommended the payment of financial compensation in respect of the first period. The Ombudsman rejected the complaint relating to the second period. She did so on the basis that Hillingdon had offered education for that period at Moorcroft School; and, although the Tribunal found this to be unsuitable, it was not for her to 'determine the suitability of education, regardless of the decision of the … Tribunal'."

56. As Bean LJ (with whom Moore-Bick and Aikens LJJ agreed) pointed out, the local authority had a general duty to make provision for educating school children under section 19 of the Education Act 1996, and specific duties in relation to children with special educational needs under what was then Part IV of that Act and is now Part 3 of the CFA 2014. Part IV contained a parent's right of appeal to the Tribunal (as now provided by Part 3 of the CFA 2014). There was no right of appeal to the SENDIST or any other tribunal against a failure to discharge the general duty to make provision for educating school children under section 19 of the Education Act 1996. The appellant argued that the Ombudsman could investigate (and recommend compensation for) the failure to provide education to N from November 2017, even though the decision which led to that failure – naming Moorcroft rather than the appellant's favoured school – had been the subject of a successful appeal to the SENDIST.

57. At [25]-[28], Bean LJ reviewed the relevant authorities including:

i) Dicta of Woolf LJ in R *v Commissioner for Local Administration ex parte Croydon London Borough Council* [1989] 1 All ER 1033. Woolf LJ said that s 26(6) covers a situation where:

> "if the complaint was justified, the person concerned might be entitled to obtain some form of remedy in respect of the subject matter of the complaint if he had commenced proceedings within the appropriate time limits. The commissioner is not concerned to consider whether in fact the proceedings would succeed.";

ii) The well-known observations of Lord Denning MR in *R v Local Commissioner for Administration for the North and East of England ex parte Bradford Metropolitan City Council* [1979] QB 287, at 310:

> "Parliament was at pains to ensure that the commissioners should not conduct an investigation which might trespass in any way on the jurisdiction of the courts of law or of any tribunals."

iii) The observation of Turner J in *R v Commissioner for Local Administration ex parte PH* (unreported) 21 December 1988 that it was not the intention of Parliament underlying the LGA 1974:

> "to have provided two remedies, one substantive by way of judicial review and one compensatory by way of the local commissioner. … Where a party has ventilated a grievance by means of judicial review it was not contemplated that they should enjoy an alternative, let alone an additional, right by way of complaint to the [Ombudsman]";

iv) The observation of Keene J in *R v Commissioner for Local Administration ex parte Field* [1999] EWHC 754 (Admin) in the context of the application of section 26(6) to a situation where planning permission had been refused that:

> "I take the point that the statutory appeal to the Secretary of State against a refusal of planning permission provides no compensation for the delay which inevitably occurs. However, the fact is that wherever there is a right of appeal to a Minister of the Crown (the situation dealt with in Section 26(6)(b)), there will inevitably be some delay if the right is exercised, as it often will be, and where there is such delay, loss may very well result, as it has in the present case. Yet Parliament has chosen expressly to exclude jurisdiction on the part of the Local Government Ombudsman in such cases.
>
> It seems to me that in those circumstances Parliament must have contemplated that there would arise situations where loss had been suffered and where no remedy for that loss would be provided, and yet the Local Government Ombudsman would have no jurisdiction to intervene. I therefore do not find the argument based upon the lack of remedy through the statutory appeal to the Secretary of State persuasive on this particular issue."

58. The Court of Appeal's conclusion in *ER* was shortly stated at [30]-[31]:

> "[30] Judge Stewart observed that what ER's complaint to the LGO really boiled down to was failure to provide a service (namely suitable education) under s 19; and that what the appeal to SENDIST boiled down to, albeit under s 324, was whether the type and nature of the school should be in N's statement. 'The reality', said the judge, 'was that there was an inextricable linkage between the two'. I agree.
>
> [31] In my view one could characterise Hillingdon's decision in this case either as an action (the naming of an unsuitable school) or as a failure to act (the failure to name a suitable school); but either way it was fairly and squarely within s 26(6)(a), as being an 'action' in respect of which ER had the right of appeal to SENDIST. It is true that a consequence of that wrong decision

> was that Hillingdon failed for a period to discharge their s 19 duty to N. But I reject the submission that the LGO has jurisdiction to investigate the consequences of a decision if investigation of the decision itself is excluded by s 26(6)."

59. I endorse the Judge's cautioning against "extracting the words "inextricably linked" as a touchstone for subsequent decisions about jurisdiction". The adoption of words of qualitative description when trying to interpret and apply what are essentially straightforward words in the statute may help to provide an indication of the ideas encompassed in the statutory language; but that is the limit of their permissible function. As explained by Bean LJ in [30] cited above, the absence of any education for N during the period was attributable to the failure to include a suitable school in N's statement. The appellant could not escape the clutches of section 26(6) simply by reformulating the same problem in different language. It was not wrong to describe the two formulations as "inextricably linked" – if anything, it could be said to have been an understatement when describing what others might call two sides of the same coin. The most important lesson to be drawn from [29] of *ER* is that the Ombudsman's jurisdiction (or lack of it) depends upon substance rather than tendentious formulations.

60. The decision in *ER* flowed from the fact that the appellant had a right of appeal to the Tribunal in respect of the failure to nominate a suitable school in N's plan. What *ER* did not elucidate was what meaning should be attributed to the words "a right of appeal, *reference or review to or before a tribunal*". I would take my lead from Lord Denning MR and tend to a construction that ensures that the Ombudsman does not conduct an investigation which might trespass in any way on the jurisdiction of the tribunal. That is best achieved, in my judgment, by giving the words of section 26(6)(a) their fullest reasonable meaning. As I have said, the words of section 26(6)(a) are deliberately broader than merely applying to the primary subject matter of an appeal by virtue of the words "reference or review" and the words "to or before" a tribunal. It seems to me that the most natural meaning to be given to section 26(6)(a) is that it excludes the jurisdiction of the Ombudsman when there may be an overlap and consequent risk of trespass between the issues that may be raised for determination in Tribunal proceedings, on the one hand, and that may be raised by the prospective investigation, on the other. Dealing always with substance (and trying not to be distracted by tendentious formulations) this means that the forbidden overlap is not merely in relation to the main subject or substance of the appeal (as was the case in *ER*) but includes those ancillary issues that may fall to be decided by the Tribunal. Trivia may, of course, be ignored. But, typically, matters that arise in the course of Tribunal proceedings, such as procedural failings or conduct that is said to be in breach of the Rules, practice directions or directions or that is said to be unreasonable, are included within the ambit of section 26(6)(a).

Ground 1

61. As a preliminary observation that applies to both grounds, it is necessary to read both the decision of the Ombudsman and the reasoning of the Judge fairly, in context and with a view to understanding what they meant rather than sedulously picking and criticising individual words or phrases. A good working example is the use of the phrase "inextricably linked". In his submissions to us, Mr Broach submitted that paragraph 8 of the Ombudsman's decision, which I have set out at [21] above, was "wrong" because it elevated the phrase to statutory status. I disagree. Paragraphs 4-10

of the Ombudsman's decision were not attempting to set out a comprehensive account of the applicable law; instead, they were providing a short and concise summary (amplified by reference to relevant authority) that was intended to be and was readily accessible to the intended readers, Ms Thompson and Mr Milburn. The provenance of the phrase "inextricably linked" is clear: it derives from the judgment of HHJ Stewart QC (as he then was) in *ER* and was adopted by the Court of Appeal at [30], it being an entirely appropriate descriptive phrase in the context of *ER*. Provided one does not make the unwarranted assumption that paragraph 8 of the Ombudsman's decision, or even the Court of Appeal's reference to "inextricably linked" in *ER*, were intended to be a full account of all relevant principles relating to section 26(6)(a) of the LGA 1974, it is apposite, apt and sufficient. The Judge recognised the risks of using "inextricably linked" either as a shorthand or a touchstone for future decisions, and he was right to do so. But that does not necessarily mean or even suggest that the Ombudsman's use of the phrase in its decision was wrong or led the Ombudsman into error.

62. Ground 1 concerns Complaint/issue A and, specifically, the first of the two limbs of Complaint/issue A, which I have set out at [30] above. The complaint as it was presented to the Ombudsman is summarised at [14] above. The Ombudsman's reasons for declining jurisdiction in relation to Complaint/issue A were set out at paragraphs 60-63 of its decision, which I have set out at [24] above. The Judge's reasons for rejecting Mr Milburn's challenge were set out at [30]-[31] of the Judgment, which I have set out at [31] above.

63. Faced with the submission that the Ombudsman had erred in relying on or applying the phrase "inextricably linked" as if it were a statutory provision, the Judge was right to emphasise the need to concentrate upon the substance of the complaints in issue. The focus of Mr Milburn's challenge has now shifted to the Judge's references to the "substance" of his appeal to the Tribunal.

64. What then was the substance of the complaint in respect of which the Ombudsman declined jurisdiction? As I have set out at [14] above, Ms Thompson placed at the front of Complaint 8 that the Local Authority had failed to obtain Mr Milburn's views and wishes despite its claims to the contrary. She included in the complaint that the Local Authority's failure led to an order of the Tribunal requiring the Local Authority to make good their omission. Furthermore, she relied almost verbatim on a submission that had been made to the Tribunal by the document dated 12 October 2018 to the effect that the Local Authority had shown "a blatant disregard for [Mr Milburn's] views".

65. While it is correct that the original formulation of Mr Milburn's appeal to the Tribunal did not expressly cite the failure to obtain his views, I consider it to be clear beyond argument to the contrary that the failure became an issue of which the Tribunal became seised and on which it ruled. For the reasons I have given in [45] above, the obtaining and consideration of the affected person's view was integral to the Tribunal's decision-making process. In the present case, the existence of the issue before the Tribunal is demonstrated by the order for directions on 5 November 2018, which recorded Ms Thompson's concerns that neither she nor Mr Milburn had been consulted about the suitability of the proposed placement, which she characterised as unreasonable behaviour. The order provided for an urgent hearing to discuss (amongst other issues) why the Local Authority had failed to obtain Mr Milburn's views. The Local Authority responded on 7 November 2018 and the issue was evidently discussed on 19 November 2018 when "it was agreed that the real issue was … ascertaining [Mr Milburn's] views":

see [7]-[8] above. The Tribunal ensured that it was fully appraised of Mr Milburn's views as recorded in its judgment. The issue of the Local Authority's failure to take Mr Milburn's views into account was thus resolved by the Tribunal's processes, orders and proceedings.

66. In these circumstances, the reasoning set out in paragraphs [60]-[62] of the Ombudsman's decision, when read fairly and in context, is unimpeachable. The Ombudsman was right to say that the Local Authority's failure to take proper account of Mr Milburn's views was "a key issue in the appeal." Its brief summary of how the issue was resolved, including that Mr Milburn's views were "key" to the Tribunal's decision, was as apposite as it was concise. Its conclusion that the question whether the Council had properly obtained Mr Milburn's views was inextricably linked to the matter under appeal before the Tribunal was fully justified. The absence of a financial remedy was nothing to the point, as explained by Keene J in *ex parte Field*.

67. The Judge was therefore right to reject the challenge in respect of the first part of Complaint/issue A. His conclusion is now challenged on the asserted basis that the failure to obtain Mr Milburn's views was not "the substance" of the Claimant's appeal to the Tribunal. Once again, I consider that too much weight is being placed on the choice of a particular word. It is of course correct that there was other evidence before the Tribunal; but, as I have just outlined, the failure to obtain Mr Milburn's views and the subsequent obtaining and consideration of those views constituted a substantial part of the issues that had to be and were resolved by the Tribunal. I might not have described them as "the" substance; but the sense of the Judge's reasoning in the Judgment is clear. For the reasons I have given above, I would describe the issue of the failure to obtain or to consider Mr Milburn's views as "integral to" the Tribunal's decision-making process and determination. That is no more to be taken as a pseudo-statutory touchstone than "inextricably linked": but it may help to convey the closeness of the connection between the issues that were raised in the Tribunal (and of which the Tribunal was seised) and the issues that it is now said should be considered by the Ombudsman.

68. For these reasons I conclude that, on a proper understanding of section 26(6)(a), the jurisdiction of the Ombudsman to deal with this aspect of Mr Milburn's complaints was within the ambit of the section and was therefore excluded. I would therefore dismiss the appeal on Ground 1.

Ground 2

69. Ground 2 concerns what was Complaint 9 and became Complaint/issue B. I have summarised the complaint as presented to the Local Authority and the Ombudsman in [15] above. The Ombudsman's response is set out at [25] and [26] above. As appears from [20] of the Judgment, the main thrust of Mr Broach's submissions to the Judge was that the Tribunal's case management powers and the way in which they were required by authority to be exercised were not apt to address the mischief about which Mr Milburn now wishes to complain. The Judge's reasons for rejecting the challenge on Ground/issue B are set out at [33] above.

70. In my judgment, the Judge's reasons cannot be criticised. The main constituent elements of the Complaint that were said to amount to unreasonable behaviour by the Local Authority were:

i) The failure to submit an amended Working Document by the deadline imposed by the Tribunal. This had been raised by the Tribunal's order of 5 November 2018: see [6] above; and it was a matter in respect of which the Tribunal had the power to extend time for compliance or to take such other action as it considered just, whether or not the Local Authority's conduct of the proceedings was unreasonable;

ii) The Local Authority's request to postpone the Tribunal hearing to enable it to arrange a mental capacity assessment. This issue was raised by the Local Authority in its response on 7 November 2018: see [7] above. The Tribunal was seised of the issue after Mr Broach objected on 19 November 2018 to the application for a mental capacity assessment. The issue was resolved ("fell away") when it was agreed that the real issue was litigation capacity and obtaining Mr Milburn's views: see [8] above;

iii) The Local Authority not requesting to speak to Mr Milburn after the commencement of the appeal to the Tribunal in July 2018. This goes to the conduct of the appeal, since it is closely related to the question of the Local Authority's failure to seek Mr Milburn's views and the need for those views to be obtained so as to enable the Tribunal to reach its determination on a proper basis. It appears to have been addressed by the agreement on 19 November 2018 that Mr Milburn would meet a Social Worker and manager from Adult Social Care in the following week: see [8] above.

71. Applying the approach to section 26(6)(a) that I have outlined above, the Judge was both entitled and correct to conclude that the issues that formed the substance of Complaint/issue B were matters in respect of which Mr Milburn had the right to refer to the Tribunal within the meaning of section 26(6)(a). For the reasons I have set out above, the precise manner in which an issue is (or can be) raised before the Tribunal does not matter. What matters is whether, as a matter of fact and of the procedure adopted by the Tribunal, the issues could be brought to (or before) the Tribunal for its management and resolution. Ms Thompson (and, of course, those representing her and Mr Milburn before the Tribunal) were fully conscious of the Tribunal's case management powers and it formed part of their overall complaint that the Local Authority was not complying with Tribunal's orders: see [14] above. The Judge also had the case management powers of the Tribunal well in mind, and referred to them expressly. As a matter of fact, the issues that form the subject of Ground 2 *were* brought before the Tribunal and were subject to its case management powers. Those powers included the power to award costs if the Tribunal were to be persuaded that the Local Authority's conduct was unreasonable so as to justify making an order in accordance with established principles. Ms Thompson was aware of that power as she wrote to the Local Authority on 18 October 2018: "If the LA continues to resist the appeal, I will be making an application for costs." We do not know whether an application for costs was ultimately made. If it was, it appears that the Tribunal not persuaded. The absence of a financial remedy is, as before, nothing to the point.

72. For these reasons I conclude that, on a proper understanding of section 26(6)(a), the jurisdiction of the Ombudsman to deal with this aspect of Mr Milburn's complaints was within the ambit of the section and was therefore excluded. I would therefore dismiss the appeal on Ground 2.

Lady Justice Elisabeth Laing

73. I agree.

Lord Justice Moylan

74. I also agree.