IN THE UPPER TRIBUNAL **Appeal No.** HS/1340/2017
ADMINISTRATIVE APPEALS CHAMBER

Before Judge S M Lane

This decision of the First-tier Judge IS NOT SET ASIDE. Although the decision of the First-tier Tribunal involved the making of an error of law, the Upper Tribunal exercises its power NOT to remake the decision, under section 12(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

REASONS FOR DECISION

1. The appellant parent appealed with my permission against the First-tier Tribunal's ('F-tT') decision of 17 March 2017, issued under reference no. EH888/16/00032.

2. I heard the appeal at the Rolls Building, London EC4A 1NL on 18 September 2017. The appellant was represented by Mr Jack Anderson, of counsel, instructed by HCB Solicitors. He did not represent the appellant at the F-tT. The respondent was represented by Mr Thomas Amraoui of counsel, instructed by the Lancashire County Council (the 'LA'). Mr Steven Martin, from the Local Authority was present during the hearing, as was Mr Anderson's pupil

3. Although the appellant sought permission to appeal on a number of grounds, I granted permission to appeal on one issue which has two parts: whether the F-tT made an error of law by failing to deal with section 9 of the Education Act 1996, and if so, whether this was material. Mr Anderson confirmed that he was not pursuing the remaining grounds except insofar as they impacted on section 9 issues.

The Background

4. The appeal concerns the appellant's son, J, who is 12 years old. He has complex special educational needs arising from autism, visual impairment, post traumatic stress symptoms and had trouble with anxiety. J had been home schooled since mid-January 2016 when his placement at R School, a secondary school for pupils with global learning difficulties, broke down.

5. There is no doubt that his special educational needs required special educational provision. The LA prepared an EHC Plan for J. They considered that J's needs would be appropriately met by P School, a 'generic' special maintained school whose pupil cohort included children with a variety of learning difficulties. Approximately 25% of its students were autistic, with a further 25% exhibiting autistic traits. The evidence before the F-tT, which it accepted, was that autism-awareness was pervasive at P School, (§ 10). The F-tT was satisfied that P School's was suitable for J.

6. The appellant expressed a preference for J to attend O School, an independent special school for autistic pupils. All pupils attending O School are autistic but may, in addition, have other kinds of learning difficulties. The appellant considered that an

autism-specific setting of this sort was necessary if J's needs were to be catered for and for him to make progress. The F-tT found that O School was also suitable for J.

7. The cost of J's attendance at O School was very much more expensive than it would be at P School. The F-tT found that P School would cost £31,610 per year. This included the cost of transport to and from school, but not of extra speech and language therapy which was required in Section F of the EHC Plan. The yearly cost of O School, including transport and therapies, was £102,572. The difference was accordingly around £70,962.00 per year.

8. The LA submitted that the circumstances were such that the appellant's preferred school need not be named because the cost of J's attendance at O School was incompatible with the efficient use of resources for the purposes of section 39 of the CFA 2014.

9. The problem with the F-tT's decision is that, although the F-tT dealt with section 38 of the CFA 2014, it did not direct its mind to section 9 of the Education Act 1996 (EA 1996), at all. This was a necessary step for the F-tT as I explain below. Its failure to do so was an error or law, but for the reasons I give below, I decline to set the decision aside. This is because no tribunal considering the issue properly could have come to any other decision.

The legal framework

10. EHC Plans are formulated under the CFA 2014. Section 39(3) of the CFA 2014 requires that they must secure that the EHC Plan names the school or other institution specified in a request made to it pursuant to section 39(1). Section 39, as relevant, is as follows:

> **39 Finalising EHC plans: request for particular school or other institution**
>
> (1) This section applies where, before the end of the period specified in a notice under section 38(2)(b), a request is made to a local authority to secure that a particular school or other institution is named in an EHC plan.
>
> …
>
> (3) The local authority must secure that the EHC plan names the school or other institution specified in the request, unless subsection (4) applies.
>
> (4) This subsection applies where—
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> (a) the school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned, or
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> (b) the attendance of the child or young person at the requested school or other institution would be incompatible with—
> (i) the provision of efficient education for others, or
> (ii) the efficient use of resources.
>
> (5) Where subsection (4) applies, the local authority must secure that the plan—

(a) names a school or other institution which the local authority thinks would be appropriate for the child or young person, or

(b) specifies the type of school or other institution which the local authority thinks would be appropriate for the child or young person.

…

11 Section 9 of the EA 1996 requires a LA (and the F-tT on appeal) to have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expense.

Education Act 1996

s. 9 Pupils to be educated in accordance with parents' wishes

In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local education authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.

12 In addition, section 578 of the EA 1996 provides that the CFA 2014 (insofar as it deals with special educational needs) is encompassed in the' Education Acts', whilst section 83 of the CFA 2014 requires the provisions of Part 3 of the CFA 2014 to be read as if contained in the EA 1996 -

Education Act 1996

s. 578 In this Act 'the Education Acts' means this Act together with the following Acts –

…

The Children and Families Act 2014, Part 3 and section 100

Children and Families Act 2014

s. 83 Interpretation of Part 3

(7) EA 1996 and the proceeding provisions of this Part (except so far as they amend other Acts) are to be read as if those provisions were contained in the EA 1996.

13 The result is that a provision of the EA 1996 may have an impact upon a provision in the CFA 2014. In my view section 9 of the EA 1996 is one of those provisions and, as under Schedule 27 paragraph 3(3) of the EA 1996 (the 'old law'), it has a role to play in determining the resolution of a conflict between a parent's choice of a school for their child and an alternative school or institution proposed by the LA in Section I of an EHC Plan. So even though section 39(4) of the CFA 2014 appears to furnish a self-contained solution to that conflict, section 9 nevertheless requires the decision maker to have a further look at the dispute from the different viewpoint of whether public expenditure would be unreasonable.

14 The tests under section 39(4)(b)(ii) and section 9 are different. The exception in section 39(4)(b)(ii) is satisfied if the child's attendance at the requested school would be *'incompatible with the efficient use of resources'.* In *Essex County Council v SENDIST* [2006] EWCH 1105 at [27] Gibbs J considered that the test to be applied was 'will the

costs be so high as to be incompatible with the efficient use …of resources', in other words, 'disproportionate'.[1]

15 The test in section 9 is whether the parental choice would represent 'unreasonable public expenditure'. This requires the tribunal to consider the impact of the parent's choice of school on the public purse generally, and not just on the particular LA which has responsibility for the pupil.[2] When weighing up the respective costs of the competing schools/institution proposed by the parties, it is necessary to take a 'holistic' view of the particular pupil to get a full picture of his needs (*O v London Borough of Lewisham* [2007] EWHC 2130 [34] – [36] Deputy HC Judge Andrew Nichol QC. The tribunal is, however, 'constrained by the statutory framework within which LAs and tribunals operate': *O v London Borough of Lewisham* [2007] EWHC 2130 [34] – [36]; *W v Leeds City Council and Special Educational Needs and Disability Tribunal* [2005] EWCA Civ 988 at [50] – [51] per Wall LJ, and at [43] per Judge LJ*:*

> 50 '…Because of his condition, C is manifestly a child with multiple needs who poses enormous challenges for those who have to attempt to care for him and provide him with education. such a child's educational needs simply cannot be viewed in isolation; nor can his section 17 [a reference to s 17 of the Children Act 1989] needs; nor, for that matter, can his need for services provided by the Health Authority and CAMHS. A holistic approach is necessary, and with inter-agency cooperation, essential, particularly since two of the bodies with statutory responsibilities… are part of the same local authority.
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> 51 At the same time, of course, the Tribunal is a creature of statute , and its powers are limited to the areas of responsibility given to it by the Education Act 1996 and the consequential regulations…In a case, such as the present, the Tribunal, in my judgment, had to tread a delicate line between properly informing itself of the 'full picture' relating to C, and limiting its decision to a careful assessment of C's special educational needs within that picture'. per Wall LJ
>
> 43 'within the relative statutory frameworks, a holistic approach should be adopted by the various bodies with different responsibilities for C (the child), per Judge LJ.

16 The approach in *O v London Borough of Lewisham* and cases following it is binding following adoption in *Haining v Warrington Borough Council* [2014] EWCA Civ 398 [19][27]ff.

17 It is important to bear in mind, however, the context in which the case law has been developing in testing the elasticity of the holistic approach. The *Leeds* case, for example, did not involve section 9 at all. It mainly concerned the question of whether the special educational needs identified in Part 2 of the pupil's Statement of Special Educational Needs were properly supported by provision made for those needs in Part 3 of the Statement. The specific issue that required attention was whether the pupil needed a waking day curriculum. The tribunal rejected this need. It supported that view by having regard to the provision the social services department would provide for the

[1] The provision Gibbs J was dealing with was paragraph 8(2) of Schedule 27 of the EA 1996, which is the same as section 39(4)(b)(ii) of the CFA 2014 and bears close similarity to (4)(b)(i).
[2] *CM v London Borough of Bexley* [2011] UKUT 215 (AAC).

pupil under its duties under the Children Act 1989. The 'holistic' approach that the Court of Appeal approved in *Leeds* was the tribunal's use of information from social services to help determine where educational and non-educational provision should end in that case.

18 In both *O v Lewisham* and *Haining* the issue was whether the identifiable cost of respite care that the local authority would otherwise have had to spend if the pupil attended their preferred school could be set off against the cost of the parent's preferred school in order to reduce the difference between the two. These were straightforward quantifiable calculations. In *CM v London Borough of Bexley* [2011] UKUT 215 (AAC), the question related to the impact on the public purse where there was an arrangement between two local authorities regarding attendance by a pupil from one at a school in the other area. This was, again, a straightforward quantification.

19 The above cases can be contrasted with *K v London Borough of Hillingdon* (SEN) [2011] UKUT 71 [29]. The parents wished the child to attend a residential independent school providing a waking day curriculum whereas the LA considered a maintained special day school to be suitable. The question before Upper Tribunal Judge Pearl was whether the F-tT erred by taking the position that 'social and health provision, however compelling they may be' must be excluded when considering the educational advantages of a placement. The answer to that question must have been yes, insofar as the public purse had to be considered more generally than just the LA's education budget. Had the costs saved by the LA and health authority been set off against the cost of the parent's preferred school, the cost of the latter might not have been unreasonable.

20 If that is all Judge Pearl meant to say, it is plainly correct. But Judge Pearl referred to the LA and tribunal (on appeal) taking 'account of wider social and health benefits' in conducting the balancing exercise regarding unreasonable public expenditure under section 9 [29], and a 'broader calculus' [33]. He confirmed his view that this broader calculus was required by reference to a Statement in the case given by the chief executive of IPSEA. This is an organisation offering free legal advice on special educational needs, including special educational needs litigation, to parents [32]. Judge Pearl does not explain the reason for admitting this Statement. The chief executive deposed:

> 'For all children with a statement it is our experience that any attempt to silo their educational needs from their social care needs or medical needs often prove impossible. For example, to attempt to isolate when learning is an educational need and when learning is a social need is a false exercise…It is therefore almost impossible for this group of children [with special educational needs] to separate, predict and assess the benefits that arise directly only in relation to formal educational needs as opposed to care needs. In many cases it is a false exercise to attempt to do so as, like with younger ordinarily developing children, they need to learn continually whilst awake. What is different however is that in order to make progress this has to happen in a more planned, structured and formalised way. To consider the wider benefits of a particular school placement is therefore essential when considering the special educational needs of a child.'

21 This evidence is problematic if only because it is not clear how these views fit into the statutory framework within which LAs and tribunals operate. It appears to be aimed at changing the whole perspective from which a tribunal is to consider a placement from its statutory basis of suitability to meet a pupil's special educational needs (subject to unreasonable expenditure), to one which takes the need for waking day curriculum as a

starting point. There is nothing to suggest that the balancing exercise in section 9 is involved. I doubt whether Judge Pearl would have intended to change the nature of the exercise under section 9 by the side wind of this evidence. If he did, I would be unable to agree with him.

The calculation in this appeal

22 It is not necessary to come to a final conclusion on how broad the calculus under section 9 is in deciding this case. As I said at the outset, it is clear that the tribunal made an error of law in failing to have regard to section 9.

23 Section 12(2) and (4) of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) gives the Upper Tribunal wide powers when a error of law is found:

> 12 (1)…
> (2) The Upper Tribunal –
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
> (b) if it does, must either –
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
> (ii) remake the decision.
> (3)…
>
> (4) In acting under subsection (2)(b)(ii) the Upper Tribunal –
>
> (a) may make any decision which the First-tier Tribunal could make if the F-tT were re-making the decision and
> (b) may make such findings of fact as it considers appropriate.

24 I have come to the conclusion that, despite the error, it would be inappropriate to set the F-tT's decision aside, and I decline to exercise my discretion to do so.

25 When the costs and benefits of the two schools are compared, it is inevitable that any reasonable tribunal properly directing itself to the law and facts would have come to the same conclusion as that which this F-tT reached.

26 The application of section 9 is the last step in the process of determining the special educational needs, provision and placement for a pupil with special educational needs. If the tribunal has otherwise done its job properly, it will have established the primary facts from which a decision on reasonableness or unreasonableness can be made. I am satisfied that (apart from deciding whether the extra expenditure is unreasonable) the F-tT made the necessary findings of fact to provide the basis for maintaining the decision. It is only to make the finding of secondary fact that the extra expenditure is unreasonable and to explain why.

27 It is not necessary to have one or two specialist members sitting with me to carry out the weighing exercise given the huge difference in costs between the schools. I am setting out the essential findings and some of the evidence. It shows that the two schools were materially similar and both were suitable for J. The evidence and findings were well explored and explained:

(i) The parent's view was that J required an ASD-specific setting. They were convinced that J was more able than the bulk of test scores showed, that he needed a smaller school (O School) than P School and that he would be traumatised at P School.

(ii) The F-tT found J was autistic, had severely impaired vision, had social communication problems, restricted language, restricted interests consistent with autism, post-traumatic stress disorder symptoms and some continuing anxiety. He required SaLT (speech and language teaching) input and occupational therapy for his problems, a sensory-calm environment in a school where the ethos was designed to include pupils with autism and learning difficulties. It accepted that J was sensitive to, and did not like, noise, and became stressed and anxious at certain types of noise.

(iii) J was not more able than suggested by some of the test results. This was explained at some length.

(iv) J needed peer group with similar diagnostic profiles and cognitive level. P's peer group met this need. P School had a number of high functioning ASD pupils. P would be placed at the outset in a small group of 7 (of whom 2 were ASD diagnosed and 3 had ASD traits). All were in moderate to severe range of learning difficulties, all of them were verbal. J would be in a group of children with mixed social skills, some higher than his. He could be moved up to study for GCSEs or be moved into the independent learning group when the time was right.

(v) The F-tT accepted that J needed individual teaching (1:1) when he recommenced at school and needed incremental integration with peers. At P School, J would have 1:1 individual teaching until he was integrated, however long that might take. At O School, children were taught individually in separate rooms and came together as and where appropriate to complete their learning. The systems shared important similarities in terms of the individual attention an autistic child needed.

(vi) J needed a highly differentiated curriculum devised by autism trained staff and delivered by teachers experienced or with expertise in autism. It accepted that he needed to have a key worker with ASD training or experience throughout the day. The EHC Plan gives many examples of the kind of input he required, which it is not necessary to repeat here. In short, however, he needed a high level of input throughout the week from staff experienced or expert in autism. Both could provide these.

(vii) The F-tT did *not* accept that J needed an ASD specific setting. A school with the appropriate ethos, such as P, was appropriate. P School teachers had regular ASD training, though not all had the same tuition. Staff working with J required experience or expertise in autism, which was available at P School. An occupational therapist working with J did not need to have special sensory training. P School could deal with his

mental health problems. The F-tT made a specific finding on the evidence that J's anxiety levels had reduced. Both schools could provide what was required.

(viii) J needed a calm, low stimulus environment. The layout and facilities of P School met the requirements included in the EHC Plan, i.e., low stimulation, sensory-calm place. Pupil numbers were small, though not as small as O School. There was a sensory room that would be available for J. P School had appropriate OT and SaLT as did O School. The area in which J would be taught at O School was 'always quiet' as most of the pupils were anxious. (Section C, 254).

(ix) The main differences between P School and O School are that O School is smaller overall and O School was a specialist autism school. The F-tT found this was not necessary.

(x) The children at O School could also have additional complex learning difficulties, as at P School.

(xi) At O School, 4 out of their 6 teachers had post graduate qualifications in autism (C, 253). The remainder did not. They were, however, given continuing training in autism. The teachers at P School did not have the same number of qualifications, but instead had considerable experience and expertise, which was what the F-tT found to be necessary in the EHC Plan. Indeed, what the F-tT found and included in the EHC Plan was that J needed to be 'educated in an environment where the school ethos is designed to include pupils with autism and learning difficulties.' An autism specific setting was not required.

(xii) P School had OT and SaLT available, as did O School. Both schools had sufficient experience with visually impaired students (indeed, P School seemed to have greater experience) and both would buy in a specialist teacher ('QTVI – qualified teacher of the visually impaired).

(xiv) Both schools would adapt the curriculum for J.

28 The evidence was carefully explored and adequate reasons were given for its conclusions. I note that there was evidence in the First-tier bundle from both schools on the school environments.

29 The difference in cost between these two school was more than £70,000, year on year. It is impossible to see any sufficient advantage in the parents' preferred school that could possible make the £70,000 difference anything other than unreasonable expenditure.

30 Finally, I mention Mr Anderson's reminder regarding the need to have regard to exhortation in section 19(d) of the CFA 2014:

19 Local authority functions: supporting and involving children and young people

> In exercising a function under this Part in the case of a child or young person, a local authority in England must have regard to the following matters in particular—
>
> (a) the views, wishes and feelings of the child and his or her parent, or the young person;
> (b) the importance of the child and his or her parent, or the young person, participating as fully as possible in decisions relating to the exercise of the function concerned;
> (c) the importance of the child and his or her parent, or the young person, being provided with the information and support necessary to enable participation in those decisions;
> (d) the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes.

31 Mr Anderson argued that, in considering whether the extra cost of the parents' preferred school was unreasonable, it was necessary to have regard to facilitating the child's development and to help him achieve the best possible educational and other outcomes. In *Devon County Council v OH (SEN)* [2016] UKUT 292 (AAC) Mr Andersons submissions must have been more complex. It is discussed at great length in that decision and I see little point in belabouring the provision, given the minor role it plays in the CFA 2014 and in relation to the substantive provisions.

32 Section 19 is exhortatory. It is clear from the way the parent ran this case, and the careful way the tribunal dealt with the appeal that this exhortation must have been ever before the F-tT. I cannot see how this exhortation can affect the meaning of section 9.

[Signed on original]

S M Lane
Judge of the Upper Tribunal

[Date]

01 December 2017