HS/2730/2017

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision and Hearing

1. **This appeal succeeds**. In accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal (Health, Education and Social Care Chamber), made on 25th June 2017 (written decision) after a hearing 23rd March 2017 under reference EH845/16/00063, but only insofar as it relates to the powered wheelchair. I refer that particular matter to a completely differently constituted tribunal panel in the Health, Education and Social Care Chamber of the First-tier Tribunal for a fresh hearing and decision in accordance with the directions given below.

2. The parties should regard themselves as being on notice to send to the clerk to the tribunal as soon as is practicable any further relevant written evidence. The fact that the appeal has succeeded in relation to that matter at this stage is not to be taken as any indication as to what the tribunal might decide in due course. The new panel of the First-tier Tribunal will have to make its own independent findings on all relevant matters. It will of course have regard to evidence put before the first panel but must make its own findings.

3. I held an oral hearing of this appeal on 15th February 2018 at Field House (London). The appellant local authority was represented by Amelia Walker of counsel. Neither the respondent parent named in the Upper Tribunal papers (the mother of the young person in question) nor the young person himself attended in person but they were represented by Lachlan Wilson of counsel, instructed by Bolt, Burdon, Kemp solicitors. Both counsel also appeared below and I am grateful to them all for their assistance.

The Legal Framework

4. This appeal concerns a young person as defined in the legislation, rather than a child, and I will structure my references accordingly. Section 36 of the Children and Families Act 2014 provides for a local authority to assess the education, health and care needs of a young person in certain circumstances (an EHC needs assessment). This might result in the preparation of an EHC Plan (as it did in the present case). If, in the light of the assessment, it is necessary for special educational provision to be made for a young person in accordance with an EHC Plan, the local authority must secure the preparation of, and maintain, an EHC Plan (section 37(1) of the 2014 Act). Section 37(2) prescribes what must be specified in the plan. This includes specification of the special educational needs, the outcomes sought, and any special educational provision required.

5. Sections 20 and 21 of the 2014 Act, so far as is relevant, provide as follows:

> 20(1) A child or young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her.
>
> (2) … a young person has a learning difficulty or disability if he or she –

> (a) has a significantly greater difficulty in learning than the majority of others of the same age; or
>
> (b) has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.

> 21(1) "special educational provision" for … a young person means educational or training provision that is additional to, or different from, that made generally for others of the same age in [maintained schools or maintained post-16 institutions in England].

6. Section 21(3) defines "health care provision" and section 21(4) defines "social care provision". Section 21(5) provides as follows:

> 21(5) Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision).

7. I observe that "trains" in section 21(5) must relate to the activities within the meaning of "training" in section 21(1) and that by virtue of section 83(2) of the 2014 Act and section 15ZA(8) of the Education Act 1996, "training" includes full-time and part-time training, apprenticeship training, and (section 15ZA8(b)):

> (b) vocational, social, physical and recreational training.

8. The way that an EHC Plan is structured is specified in The Special Educational Needs and Disability Regulations 2014. Regulation 12 specifies nine sections of the plan, A to G, H1 and H2. Section B specifies the special educational needs and section F specifies the required special educational provision. In general terms the provision specified in section F is predicated on the needs specified in section B.

9. In East Sussex County Council v TW [2016] UKUT 528 (AAC) Upper Tribunal Judge Jacobs explained the working of the above provisions (references are to paragraph numbers of that decision):

> 15. For convenience only I use the terms direct and deemed special educational provision. Their choice and use carry no significance in the analysis. They are merely useful labels that provide a shorthand to refer to particular provisions.
>
> 18. Direct special educational provision is identified under [section 20 and section 21(1) and (2)] in the exercise of the local authority's education functions.
>
> 20. In London Borough of Bromley v SENT [1999] ELR 260 at 295 [Lord Justice] Sedley noted that educational and non-educational provision were not wholly distinct categories.
>
> 21. Section 21(5) recognises this by providing that social care provision is to be treated as special educational provision, and not as social care provision, if it educates or trains

> a young person. This is what I call deemed special educational provision. Although this section reflects what [Lord Justice] Sedley said, I do not consider it appropriate to interpret it be reference to his remarks. It has to be interpreted in the context of the 2014 Act.
>
> 22. Section 21(5) only operates in respect of that part of the person's social care that also educates or trains. It does not apply to all social care, regardless of its effect. Take Theo's back problem. He may need some social care in respect of it, but that does not mean that it becomes special educational provision just because other parts of his social care package educate or train him. That would be an absurd result and contrary to the language and intendment of the provision.

10. The result of section 21(5) is that the particular identified social care provision becomes special educational provision, to be included in section F of the plan, and that it becomes part of the local authority's education obligations. Judge Jacobs continued:

> 25. The nature of the [First-tier Tribunal]'s task differs between direct and deemed special educational provision. For direct provision it may make its own decision on what a person's needs are and what provision is called for in the light of those needs. In doing so, it may add to the provision in the plan, amend it or remove it. For indirect provision the task is different. The tribunal's only role is to classify the social care provision to filter out that part of the provision that is properly classified as special educational provision under section 21(5). The tribunal has no jurisdiction over social care provision as such, because section 51 [of the 2014 Act, which provides rights of appeal] does not provide a right of appeal [in respect of social care provision]. The tribunal only has jurisdiction in so far as it is properly classified as special educational provision, at which point it comes within section 51(2)(c). It has no power to change in any way the provision that remains social care provision under section 21(4). Nor has it power to include social care provision in Section F of the plan. All it can do is to include additional direct special educational provision.

11. Although Judge Jacobs was referring in that case to social care provision, the same must be applicable to health care provision. His explanation was endorsed by Upper Tribunal Judge Ward in <u>ESCC v KS</u> [2017] UKUT 273 (AAC) (paragraph 66). Judge Ward also pointed out that "even if medical and nursing support is … essential for [the child] to be educated, that does not of itself make it special educational provision" (paragraph 89). The local authority in the present appeal has relied on that statement but I observe (1) the importance of the words "of itself" and (2) such support could come within section 21(5) if the specific requirements of that sub section are met.

12. Several other authorities were cited during the proceedings but many of them state well-established points or turn on their own facts (including <u>ESCC v KS</u>). However, it is relevant to refer to the decision of Mr Justice Owen in the Queen's Bench Division in <u>R v London Borough of Lambeth</u> [1995] ELR 374, decided under earlier but similar legislation. M was an intelligent competent 10 year old with worsening congenital muscle weakness which affected her mobility, in particular her ability to climb stairs (at school), which there was medical advice that she should not do. She was thus unable to use facilities on the upstairs floor, including the science room, the junior library and the curriculum support room. The local authority declined to have a lift installed at the school and M's mother sought judicial review of that decision. The

court decided that the provision of a lift could not be regarded as provision for an educational need and the judge stated:

> "The installation of a lift would be no more special educational need than is the provision of M's wheelchair".

Background

13. I set out the background facts as I understand them and in order to set my decision in context. I am not to be taken as making any finding of fact on any disputed matter. The relevant young person is a boy to whom I shall refer as "William" (not his actual name). He was born on 25th July 1997. The First-tier Tribunal described him as follows (paragraph 6):

> 6. … has a diagnosis of dystonic/dyskinetic cerebral palsy affecting all limbs following birth asphyxia. His underlying cognitive ability is largely preserved but he has significantly impaired motor and communication development. [His] physical movement is very limited to the control of his fingers and it requires immense physical effort to neurologically "program" any physical movement he wants to achieve. This creates physical and mental fatigue.

14. Until July 2016 William attended a non-maintained special school for pupils with profound physical difficulties. Subsequently (as eventually agreed by the appellant local authority) he attended a college on the basis of a 52 week residential placement.

15. William's mother appealed to the First-tier Tribunal against the contents of the EHC plan that had been drafted by the appellant local authority. After a hearing and adjournment and further written submissions there was a large measure of agreement between the parties. The First-tier Tribunal's final written decision and reasons were dated 25th June 2017. The First-tier Tribunal directed various changes in the detailed contents of the plan but the only aspect that is relevant for this appeal to the Upper Tribunal relates to the provision and use of a powered wheelchair, in respect of which the First-tier Tribunal made findings and orders. On 25th August 2017 the Deputy Chamber President of the First-tier Tribunal refused to give the local authority permission to appeal against the decision of the First-tier Tribunal. It now appeals by my permission given on 3rd October 2017. There were then detailed written submissions and on 6th December 2017, at the request of the local authority I directed that there be an oral hearing of the appeal. This took place before me on 15th February 2018. William's mother opposed the appeal and sought to "cross-appeal" against the finding of the First-tier Tribunal that the provision of a powered wheelchair was not in itself educational provision. No "cross-appeal" was necessary or appropriate as the relevant issue was in any event wrapped up in the matters raised on the appeal.

The First-tier Tribunal

16. References to the First-tier Tribunal are to the paragraph numbers of its decision. The tribunal identified the issue as "whether the provision of a powered wheelchair for [William] should be considered special educational provision or healthcare provision" (paragraph 9). An educational psychologist gave evidence to the First-tier Tribunal that "a powered wheelchair is an essential tool for all aspects of [William]'s life and that his ability to be able to use one is the basis for everything else he has to do or accomplish" (paragraph12). Without the wheelchair

William could not access education, make expected progress and attain the expected outcomes in relation to his independence. The tribunal saw a video clip from footage of William using his powered wheelchair, apparently with a communication aid attached to it in some way (paragraph 17). In subsequent written evidence the educational psychologist confirmed his view that it was essential for William to have his current VOCA device specially mounted to his wheelchair to allow mobility and communication via one switch, which he can operate. (This appears to also be referred to as AAC equipment.) If he were to move to using an eye gaze communication system it would still be necessary for the screen to be permanently fixed to his wheelchair and be carefully positioned to ensure his ability to communicate (paragraph 19).

17. In written evidence (see paragraph 18) an occupational therapist noted that William spent the majority of his waking day in his powered wheelchair and "despite his significant motor impairment he is able operate it using the back of his right hand which is really the extent of his motor function". Without a powered wheelchair it would be impossible for William to acquire the necessary skills to live as independently as possible. The combination of the communication aid and the powered wheelchair allows William to move around independently and converse with others and to make his own choices and decisions. A powered wheelchair "is an essential tool" in all aspects of William's life.

18. The First-tier Tribunal recorded (paragraph 36) that the local authority did not dispute that William was dependent on the powered wheelchair in all aspects of his life. Their evidence was that a powered wheelchair was provided to William by the local NHS Trust through their wheelchair services team. If the tribunal were to find that the powered wheelchair educates or trains William within section 21(5) and should be specified in section F of the plan, the authority would not be responsible for the powered wheelchair outside of the school environment. This result would be "absurd".

19. The parents argued (paragraph 37) that the severity of William's needs meant that in order to achieve the outcome of promoting his independence an electric wheelchair has to be considered as special educational provision, especially because the AAC equipment is mounted on the wheelchair. They were also concerned that issues would arise if the powered wheelchair were not maintained properly and any repairs and adjustments made quickly, and that cuts in NHS funding could result in any replacement not being provided.

20. The key parts of the First-tier Tribunal's reasoning and conclusions are in paragraphs 39 and 41:

> 39 … The powered wheelchair is an inanimate object and we could not see how in isolation it can be said to educate and train [William]. It is however an aid or appliance that he uses daily throughout his waking hours. We decided that a fundamental distinction has to be made … between the provision of the powered wheelchair and [his] use of it once provided. We accepted that to require the [local authority] to provide the powered wheelchair as special educational provision would result in an artificial distinction being made between educational and non-educational activities, where it is accepted by both parties that [William] needs the use of it at all times when he is awake and chooses to use it. Our decision is that the provision of a powered wheelchair by health services was rightly specified in section G of his EHC plan, as it legally requires it to be provided to him at all times.

> 41. Taking into consideration the use of aids and appliances once provided, we concluded that it was essential for [Williams]'s education and training to ensure that the powered wheelchair was fit for purpose and available to him at all times whilst in a learning environment because without it he is unable to access the education and training relevant to the development of his independence skills … it is essential for him to be able to move around college independently and to make his own choices and decisions. Only this will appropriately ensure that the outcomes already specified in section E of his EHC plan are achieved. If [he were] not to have access to his powered wheelchair even for a short period of time, it would have a profound effect on the development of these skills, as well as the holistic development of his independent communication skills. The effective access to education and training is also supported by his AAC which is mounted on his powered wheelchair. Both of the systems are essential tools to facilitate [his] independence. We therefore order that the [local authority] should ensure that both [his] powered wheelchair and his AAC [are] maintained and repaired to ensure that it [sic] is always available to him whilst he is in the learning environment. For [William] this for 52 weeks per year whilst in his residential college setting.

The Grounds of Appeal

21. As is often the case, the grounds of appeal overlap and are repetitive. I start with the written grounds of 18th September 2017 identified in the application for permission standing in Ms Walker's name.

22. The first ground relates to the application of section 21(5). If, as the First-tier Tribunal decided, the powered wheelchair does not educate or train William, it should logically have followed that its maintenance and repair should not be considered as special educational provision. The First-tier Tribunal failed to consider whether maintenance and repair can educate or train William. The fact that the powered wheelchair is essential to enable William to access education and training does not mean that it also educates or trains him. Since the tribunal found that William requires the powered wheelchair in all aspects of his life to mobilise in different environments, there is nothing specific about the educational environment necessitating its use.
I find this latter point to be particularly weak. There is no rule that special educational provision is provision which is exclusively educational and there is no requirement of exclusivity in section 21(5). In ESCC v KS Judge Ward drew a distinction between (a) equipment which fulfilled no educational purpose but was to facilitate family and social life out of school and (b) equipment where inevitably there may be a degree of "dual use" but it is a service fundamentally being provided in a school and for school purposes (paragraph 85).

23. The second ground relates to inconsistency in reasoning. The First-tier Tribunal took the view that designating the provision of the powered wheelchair would create an artificial distinction between its use in the educational and non-educational environments. However the same would result from the order that the local authority repair and maintain the wheelchair while William is in the learning environment. Contrary to the tribunal's assertion, he would not always be in the learning environment – for example, when he goes home or takes other trips. There is a gap in the ordered provision as to which service would be responsible for repair and maintenance outside the learning environment. The third ground seems to repeat the second

ground in different words. I do not think that the real point here is inconsistency in reasoning. The real argument (taken together with the fifth ground – see below) is that the approach and conclusions of the First-tier Tribunal are irrational in the circumstances of this case.

24. The fourth ground, which goes on for three pages, is really a natural justice/fair procedure argument and can be stated simply. The First-tier Tribunal failed to put to the parties for comment the distinction between the provision of the wheelchair and its repair/maintenance. Had it done so the local authority would have pointed out the illogicality of this proposal, that (lacking expertise) the local authority would in any event have had to look to the NHS for this service. Although I am generally very resistant to any suggestion that a tribunal has to submit a draft of its decision to the parties for comment, I accept that it would have made sense for the tribunal to have discussed this issue with the parties. However, it is not necessary for me to decide formally whether there was a breach of the rules of natural justice and fair procedure, and the parties are now fully aware of this as an issue.

25. The fifth ground is that the First-tier Tribunal failed to order provision which could realistically be provided and to take evidence on whether its proposal was "in fact possible or realistically achievable".

The Respondent Parent's Argument

26. Mr Wilson argued that the importance of maintenance of the wheelchair was discussed in evidence, including the consequences of any breakdown. Ensuring that all devices required for access in the education setting are maintained and repaired is capable of amounting to an education provision. In the circumstances it would be the equivalent to the provision of therapy or a waking day curriculum. The NHS would in any event contract out maintenance and repair to appropriate expert technicians. On this last point I observe that (a) this is not necessarily the case – the NHS does employ various types of technicians in addition to medical staff and (b) there was no evidence on this from the NHS. Later, Mr Wilson argued that what may be an acceptable delay in a health care setting before repairs were effected would not be an acceptable delay in an education setting. I find this to be a most extraordinary argument.

27. Mr Wilson also argued that the First-tier Tribunal was in error in finding that the powered wheelchair is not educational provision, especially in view of the finding that it is essential for William to exercise independence of judgment in his movement about the college. It is quite distinguishable from a mechanical lift in a school. In her written reply of 4th December 2017 Ms Walker sought to prevent the Upper Tribunal considering this point on the basis of arguments about the proper procedure in the Upper Tribunal. Her approach was unhelpful and contrary to the ethos of this chamber. On the substantive point, she challenged the comparison to therapy or a waking day curriculum. She suggested that the closest comparison would be to a prosthetic limb or to crutches. The fact that William uses the wheelchair in an educational setting does not make it provision that educates or trains him. Mr Wilson countered that the wheelchair provides as much education and training as the AAC communications device; William has to learn how to use the powered wheelchair and exercise independent decision making about where and when he wishes to go.

Conclusions

28. The starting point must be the definition in section 21(1) of "special educational provision". Clearly the provision of a wheelchair is additional to provision made generally for others of the same age. Is it "educational or training provision"? The First-tier Tribunal's characterisation of the wheelchair as an "inanimate object" is unhelpful. Inanimate objects can be educational or training provision (books?). However, in paragraph 41 of its decision (see my paragraph 20 above) the First-tier Tribunal reaches the conclusion that William's use of the wheelchair educates or trains him for the purposes of section 21(5). If that is correct, I do not really see how the provision of the wheelchair is not "educational or training provision" for the purposes of section 21(1). For what purpose is special educational provision provided if not for use?

29. There is no rule excluding from consideration as special educational provision that which provides access. The comment about the wheelchair by Mr Justice Owen in the London Borough of Lambeth case (see paragraph 12 above) was an incidental remark and was not setting out a legal rule. If (and it might be a big if) the use of the powered wheelchair educates or trains, there is no rule excluding its provision from being educational or training provision. I acknowledge that there might then be wider issues as to whether any provision that comes within section 21(5) does not thereby also come within section 21(1) and whether a definitive allocation to section 21(1) or 21(5) has to be made but the arguments in these proceedings did not address those particular issues and I confine what I say about that to the facts of the present case.

30. I agree with the criticism of the distinction that the First-tier Tribunal made between (a) supply or provision and (b) repair or maintenance. I do not rule out that being a possible distinction in an appropriate case but there would have to be evidence and an explanation as to how that would work (and see paragraphs 23 to 25 above).

31. The First-tier Tribunal was in no doubt about the importance of a powered wheelchair to William's life (see paragraph 20 above) but I am not satisfied that it made adequate findings and gave an adequate explanation as to how William's use of the wheelchair actually educates or trains him. Is it because learning to use it, and developing and applying that learning, in itself amounts to education or training? If so, is this a one-off process that only takes a very short time, like learning to make a cup of tea? Is it an ongoing, developing and cumulative process, like learning computer skills? Is there nothing to learn in this process but only from the facilities that the wheelchair enables William to travel to?

32. I accept that these are difficult issues, not assisted by the drafting of the legislation. However, in my view the omissions and errors in approach of the First-tier Tribunal mean that its decision was made in error of law.

H. Levenson
Judge of the Upper Tribunal
14th March 2018