IN THE UPPER TRIBUNAL **Appeal No. HS/1597/2019**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Special Educational Needs)

Between:

MS & LS

Appellant

- v –

Wakefield Council

Respondent

Before: Upper Tribunal Judge Mitchell

Hearing date: 12 July 2021, Rolls Building, London (via Cloud Video Platform)

Representation:

Appellant: Mr S Broach, of counsel, instructed by Simpson Millar Solicitors

Respondent: Ms H Lynch, of counsel, instructed by Wakefield Council's Legal Services Department

In the light of prevailing limitations on social contact, and the parties' agreement, the hearing was conducted remotely with counsel for both parties appearing via video-link.

DECISION

The decision of the Upper Tribunal, taken under section 11 of the Tribunals, Courts and Enforcement Act 2007, is to dismiss the appeal. The First-tier Tribunal's decision of 1 May 2019 (ref. EH 384/18/00002) did not involve an error on a point of law.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 I hereby make an order prohibiting the disclosure or publication of any matter likely to lead to a member of the public identifying the child with whom this appeal is concerned. This order does not apply to (a) the child's parents, (b) any person to whom any parent discloses such a matter in the due exercise of parental responsibility, (c) any person exercising statutory (including judicial) functions in relation to the child.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal taken on 2 April 2019 (ref. *SC 301/17/01605*) did not involve an error on a point of law. Under section 11 of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal dismisses this appeal.

REASONS FOR DECISION

Background

1. This case involves the education of a boy who was aged 11 at the date of the First-tier Tribunal's decision. I shall refer to him as S, and to the Appellants, S's parents, as "the parents", which I trust causes no offence. S was described in the First-tier Tribunal's statement of reasons (paragraph 3) as follows:

> "[S] is 11 years old and has a diagnosis of autism and learning difficulties and associated difficulties with speech, language, communication and sensory issues. He is currently a Y7 pupil at [A] School, an independent school."

2. The parents' present appeal to the First-tier Tribunal ("the tribunal) concerned the second iteration of S's EHC Plan, as prepared by Wakefield Council, the Respondent to this appeal. At the time of the first iteration, S attended a mainstream primary school but his EHC Plan named a maintained special primary school. The parents appealed to the tribunal and, in the meantime, in September 2017 made their own arrangements for S to attend A School, which is as an independent school with an 'autism resource', but is not approved by the Secretary of State under section 41 of the Children and Families Act 2014 ("2014 Act").

3. On that first appeal, the tribunal addressed the suitability of A School for S (p.398 of the First-tier Tribunal bundle). The tribunal was "left with some concerns regarding its suitability largely connected with [S's] peer group", but nevertheless concluded, on balance, that a placement at A School's autism resource could meet S's needs (paragraph 77 of the tribunal's reasons). The parents' appeal failed because the tribunal found that a placement at A School would involve unreasonable public expenditure (paragraph 91). However, S's parents decided to keep him at A School and did not transfer to the school named by the local authority in S's EHC Plan (the tribunal also found that school to be appropriate).

4. The next event was the local authority's review of S's EHC Plan in the light of his impending transfer to Key Stage 3 of his education. The reviewed, or second iteration of the, EHC Plan is in issue in the present proceedings. Section I (placement) of this plan named a maintained secondary special school, O School, rather than the parental preference which was for S to remain at A School. The parents once again appealed to the tribunal, but their appeal was dismissed.

5. I describe in more detail below the tribunal's reasons for finding that A School was not appropriate for S. For the time being, I note that the tribunal found that A School was not appropriate for S due to: minimal input from qualified teachers; involvement of multiple staff in S's schooling; poor curriculum design; absence of structured literacy sessions; inadequate oversight of targets; excessive leisure rather than educational activities (e.g. swimming); absence of a coherent life skills programme; S's isolation and inadequate access to a suitable peer group. These deficiencies would not be replicated at O School. The tribunal's finding that A School was not appropriate precluded it from naming that school in section I of S's EHC Plan.

6. The final hearing before the tribunal was on 19 March 2019 and it gave its decision on 1 May 2019 (I understand that the decision was sent to the parties the same day). Under the tribunal's procedural rules, any written application for permission to appeal against a decision must be received by the tribunal no later than 28 days after the decision notice was sent to the parties (rule 46 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008). If an application is made late, rule 46(4) requires the Appellant to request an extension of time under rule 5(3)(a).

7. On 17 May 2019, that is about two weeks after the tribunal's decision, the local authority wrote to the parents and asked whether they intended for S to remain at A School "against the conclusions drawn by the SENDIST Tribunal".

8. The primary time-limit for applying to the tribunal for permission to appeal to the Upper Tribunal against its decision expired on 29 May 2019. After this date, on 5 June 2019, the local authority wrote again to the parents warning them that if they failed to ensure S attendance at O School, or otherwise ensure that he received a suitable education, the authority might make a School Attendance Order, although the letter ended by stating that the authority "very much hoped" this would not be necessary.

9. On 14 June 2019 the parents' solicitor wrote to the local authority, stating that the "threat of a School Attendance Order [was] unnecessary, unreasonable and disproportionate". The letter added that the parents strongly disputed the tribunal's findings about A School's suitability but had decided not to mount a challenge because they would continue to fund S's placement at A School themselves. Had the parents known that the council intended to "take this stance", they would have sought to appeal to the Upper Tribunal. The solicitor asked the local authority to confirm, within seven days, that "the threat of a School Attendance Order" would be withdrawn. So far as I am aware, the local authority did not serve a School Attendance Order on S's parents.

10. On 25 June 2019, the local authority wrote to the parents' solicitor denying that it was trying to 'force' S to attend O School or that the authority deliberately waited until the time limit for applying for permission to appeal had expired before raising the issue of a School Attendance Order. The letter ended by noting that the parents had not challenged the tribunal's conclusion that A School was unsuitable and maintained that they "must either send [S} to [O School], which the FTT has found to be suitable, or make alternative suitable arrangements for his education". The authority requested that the parents, by 9 July 2019, confirm their intention either to arrange for S's transfer to O School or put in place alternative suitable arrangements for his education.

11. The tribunal refused to admit the parents' late application for permission to appeal to the Upper Tribunal. According to the tribunal, the parents chose to ignore its decision, by declining to arrange for S's transfer to O School, and they could and should have made an in-time application for permission to appeal.

The First-tier Tribunal's reasons for its decision

12. The tribunal produced a lengthy statement of reasons for its decision which extended over 151 paragraphs. I shall first describe the specialisms of various professional witnesses who gave evidence. For the local authority, a Dr Lambley, a senior Speech and Language Therapist, gave oral evidence, and the authority also relied on the written evidence of a Ms Bettany who was described as a Highly Specialist Speech and Language Therapist and Clinical Lead for Special Schools. For the parents, a Ms Pearson, Speech and Language Therapist, gave oral evidence as did a Mr Hallett, an Educational Psychologist.

13. Dr Lambley's evidence was that it was important for S to have opportunities to interact with peers, but not necessarily 'mainstream' peers. What mattered were interaction opportunities suitably facilitated by appropriately skilled adults. Ms Bettany agreed and also thought that S needed opportunities to be taught in groups of children with similar communication strategies to his own. The tribunal considered Ms Bettany's evidence persuasive and found that S did not require access to mainstream peers although such access, if it occurred, would not be inappropriate (paragraph 70 of the tribunal's reasons). The relevance of this was that S would not have access to mainstream peers at O School but would do so at A School. The tribunal also agreed with Dr Lambley and Ms Bettany that S needed to be educated with peers of a similar developmental level in order to provide him with suitable social and educational opportunities for collaboration. The tribunal amended section F of S's EHC Plan (required provision) to specify education with a 'suitable peer group'.

14. The parents' witnesses gave evidence that S was happy at A School, which the tribunal accepted (paragraph 111 of the tribunal's reasons).

15. The tribunal found that certain aspects of the provision specified in section F of S's EHC Plan were absent at A School. The tribunal also found no evidence within S's timetable of "structured time for literacy sessions to support him in his early stages of mark-making" (paragraph 115 of the tribunal's reasons).

16. The tribunal found that S was highly sociable yet was taught in his own room for a significant proportion of the day at A School, and that he sought a greater level of interaction with other children (paragraph 118 of the tribunal's reasons). S's mainstream lessons at A School were limited to a weekly 30-minute Art lesson (paragraph 119). The tribunal described S's environment at A School as 'extremely isolating' (paragraph 119).

17. Mr Hallett gave evidence about A School's suitability but the tribunal gave his evidence little weight because there was a "lack of rigour and reliability on cognitive

testing" conducted by him (paragraphs 7 to 10 and 13 to 15 of the tribunal's reasons). The tribunal found that Ms Pearson's evidence, including her opinion that A School was suitable, was not to be dismissed and she was entitled to make that recommendation. Despite that, the tribunal also said that "[S's]…placement is outside her professional remit other than where they pertain to speech and language" (paragraph 121). While the local authority's professional witnesses did not specifically endorse either school, in the tribunal's opinion this only meant that "they have left the decision on placement to the tribunal" (paragraph 121).

18. The parents' counsel argued that their preference for A School was supported by Article 24 of the United Nations Convention on the Rights of Persons with Disabilities. The tribunal rejected this argument finding that A School did not itself offer an inclusive education (paragraph 144 of the tribunal's reasons) and that the parents' argument that O School would provide a 'segregated' education failed because it was secondary to the argument that A School was inclusive (paragraph 148).

Why the Upper Tribunal admitted the parents' application for permission to appeal

19. Rule 21(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 applies where the First-tier Tribunal has refused to admit an application for permission to appeal to the Upper Tribunal. If the application is renewed before the Upper Tribunal, it may not be admitted unless the Upper Tribunal considers it to be in the interests of justice to do so.

20. I decided to admit the parents' application for the following reasons:

> "I decide that it is in the interests of justice to admit this application. I am persuaded by the [parents'] arguments that it is in the interests of justice to extend time and admit this application. In particular, I am satisfied that [S's] parents acted with reasonable promptness, having regard to the complexity of this case, once they were informed that the local authority might seek a school attendance order…"

Grounds of appeal

21. The parents' application to the Upper Tribunal for permission to appeal contained lengthy written submissions that extended over 22 pages. I shall not add to the length of these reasons by describing those grounds for which I refused permission to appeal.

Ground 1

22. The first ground of appeal is that, in assessing the suitability or appropriateness of A School, the tribunal arguably erred in law by failing to ask itself what provision the school could reasonably be expected to deliver. If the tribunal's comparison of the contender schools proceeded on the footing that all A School could deliver was S's current provision, arguably it asked itself the wrong question in law. Arguably, the tribunal should have asked itself whether A School was capable of delivering those parts of the provision specified in section F of S's EHC Plan which, on the tribunal's findings, A School was not currently providing.

Ground 2

23. The second ground of appeal is that the tribunal arguably took into account an irrelevant consideration namely the absence of evidence of structured time for literacy sessions at A School, since no corresponding provision was specified in section F of S's EHC Plan. In granting permission on this ground, I observed that "in the light of the tribunal's extensive fact-finding, it might be argued that any such error could not have been material".

Ground 3

24. The third ground of appeal is that the tribunal arguably gave inadequate reasons for its finding that the A School environment was 'extremely isolating' for S. In granting permission to appeal on this ground, I observed as follows:

> "Arguably, the finding, given the language used, inferred that [S's] [A School] experience had negatively affected his well-being. If that reading is correct, the finding must be considered to have been of significance to the ultimate question whether [A School] was an appropriate placement. In those circumstances, arguably the tribunal was required to provide fuller reasons for the conclusion that [A] School had…been extremely isolating".

Ground 4

25. The fourth ground of appeal is that the tribunal arguably gave inadequate reasons for attaching limited weight, or disregarding, Ms Pearson's evidence insofar as she spoke to matters falling outside her specialism of speech and language therapy, in particular her views as to the suitability or appropriateness of A School.

Ground 5

26. The fifth ground of appeal was described as follows in my grant of permission to appeal:

> "The application concludes with a number of arguments based on Article 24 of the UN Convention on the Rights of Persons with Disabilities. I have decided to grant permission to appeal in respect of these arguments. I do so in order that the Upper Tribunal may consider the prior question of whether, and if so to what extent, the Convention applies to decision-making under the EHC Plan provisions of the Children and Families Act 2014."

Legislative framework

EHC Plans

27. Section 33(2) of the Children and Families Act 2014 provides that, generally, a local authority must secure that a child's EHC Plan provides for the child to be educated in a mainstream school unless that is incompatible with the wishes of the child's parents or the provision of efficient education for others. A mainstream school means a maintained school or Academy that is not a special school (section 83(2)).

28. Section 33(6) of the 2014 Act provides as follows:

> "[section 33(2)] does not prevent the child…from being educated in an independent school…if the cost is not to be met by a local authority or the Secretary of State."

29. Section 37(2) of the 2014 Act provides that an EHC Plan is a plan specifying certain matters including the child's special educational needs and the special educational provision required by the child.

30. During the preparation of an EHC Plan, section 38(2) of the 2014 Act requires a local authority to send a draft plan to the child's parents and give them notice of certain rights including that they may request that a particular school falling within section 38(3) is named in the plan. The schools falling within section 38(3) include maintained schools and independent special schools approved by the Secretary of

State under section 41, but not other independent schools. Accordingly, A School fell outside section 38(3). If a child's parents duly request a school falling within section 38(3), the EHC Plan must name the school unless it is unsuitable for the age, ability, aptitude or special educational needs of the child or the child's attendance at the school would be incompatible with the provision of efficient education for others or the efficient use of resources (section 39(3), (4)).

31. In the absence of a duly made parental request under section 38(2) of the 2014 Act, the local authority must secure that the plan names a school which the authority thinks would be appropriate for the child or specifies a type of school which the local authority thinks would be appropriate (section 40(2)).

32. Where a local authority maintains an EHC Plan for a child, the authority must secure the special educational provision specified in the plan for the child (section 42(2)). However, this does not apply if the child's parents have made suitable alternative arrangements (section 42(5)).

UN Convention on Rights of Persons with Disabilities ("the Convention")

33. The United Kingdom is a signatory to the Convention which it ratified on 8 June 2009. However, the Convention has not been incorporated into the law of the United Kingdom.

34. Article 24 of the Convention is about education. Article 24(1) provides that "States Parties shall ensure an inclusive education system at all levels". Article 24(2) provides that "in realizing this right", States Parties shall ensure various matters including that:

> "(a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
>
> (b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live…".

The arguments

Ground 1 – A School's capability to deliver the provision specified in EHC Plan

35. Mr Broach, for the parents, argues that the tribunal failed to take into account that S's placement at A School had always been funded by his parents, rather than the local authority. In determining whether A School was appropriate, the tribunal asked itself whether the provision required by section F of S's EHC Plan was being made at A School. This was the wrong question. Since S's placement at A School was not made with a view to delivering specified section F provision, it should have come as no surprise that the provision made did not precisely match that in section F. The correct question, which the tribunal failed to ask, was whether A School was *capable* of delivering the specified section F provision.

36. Ms Lynch, for the local authority, submits that, before the final tribunal hearing, the parties agreed outstanding issues in relation to section F of S's EHC Plan. At no point did the parents argue that A School provided something other than section F provision nor did they argue that A School could provide something substantially different than its current curriculum, staffing and other arrangements. The tribunal convened to hear the appeal on four occasions between October 2018 and March 2019. During this period, A School made several minor alterations to its 'educational offer' in response to concerns expressed by the authority's witnesses. Ms Ward, Head of A School's Autism Resource, also gave extensive oral evidence about what the school currently provided and what it could provide. For example, Ms Ward was questioned at length about staffing arrangements, but it was clear that A School did not intend to alter its staffing arrangements. In those circumstances, the tribunal was entitled to conclude, by the date of the final hearing, that A School was providing all that it could reasonably be expected to deliver.

37. Ms Lynch further argues that, in this ground, the parents seek to criticise the tribunal for failing to deal with a point that was not put to it. The parents did not argue that A School could alter the provision made for S in order fully to deliver section F provision. It is not open to the parents to argue before the Upper Tribunal that the First-tier Tribunal erred in law by failing to deal with an issue that it was not asked to deal with.

38. Paragraph 111 of the tribunal's reasons said that the tribunal needed to consider whether "the provision as set out in the EHC Plan is being made for [S]". Mr Broach submits that this disclosed a misdirection in law. Since S's placement at A School was self-funded, there was no obligation on A School to secure the provision in

section F of his EHC Plan. The question that should have been asked, but was not, was whether A School was *capable* of delivering the specified section F provision with any additional resources from the local authority in order to discharge its duty under section 42 of the 2014 Act. Ms Lynch's argument that the tribunal was entitled to conclude that A School was delivering all that it could reasonably be expected to deliver misses the point as does her argument that the parents seek to rely on a point that did not arise for determination before the tribunal. The tribunal focussed on what A School was *in fact* delivering, not what it was *capable* of delivering. The tribunal's reasons show that it approached the appeal on the basis A School could deliver no more than its current provision for S. Ms Lynch disagrees and argues that the evidence showed that A School did not intend materially to alter its arrangements for S's education.

39. The parent's case was not that A School provided something other than the section F EHC Plan, submits Ms Lunch. This misses the point, responds Mr Broach. The parental case, and Ms Ward's evidence, was that A School was suitable for S based on his progress, happiness and the supporting professional evidence. If the tribunal had concerns about A School's capability to deliver the section F provision, it needed to question Ms Ward about it. In the absence of such questioning, the tribunal's conclusions were unsupported by evidence and, furthermore, arrived at unfairly. The local authority's argument that the tribunal was entitled to find that A School was providing all that it could reasonably be expected to deliver overlooks the absence of any such finding within the tribunal's reasons. The authority argue that the evidence before the tribunal showed that A School did not intend to change its teaching arrangements but, whether or not that was the case, it was certainly not clear on the evidence that A School was incapable of changing, say, its teaching arrangements were it to be named in section I of S's EHC Plan or that A School was so inflexible that it could not accommodate a requirement for S to be taught by a specified and limited number of teachers.

Ground 2 – mark-making

40. Mr Broach, for the parents, argues that provision in the form of 'structured time for literacy sessions to support [S] in his early stages of mark-making' (see paragraph 115 of the tribunal's reasons) was not an issue on the appeal. No linked provision was made in section F of the EHC Plan as ordered by the tribunal. The tribunal took an irrelevant consideration into account in its determination that A School was unsuitable.

41. Ms Lynch, for the local authority, argues that the development of S's early literacy and writing skills cannot properly be described as an irrelevant consideration before the tribunal. The tribunal heard evidence about these matters and section F of S's EHC Plan, as prepared by the authority, included provision for a "multi-sensory developmental structured but predictable curriculum that allows him to develop and generalise his emerging literacy…skills" and also said that S "needs access to support with pencil control to help him develop a functional grasp". At no stage did the parents challenge these parts of section F. Alternatively, if this was an irrelevant consideration, it was not material to the tribunal's decision and the tribunal did not err in law by taking it into account. The mark-making finding was part of the tribunal's general findings about timetabling and staffing arrangements at A School and, given the extent of the adverse findings made, could not on its own have made a difference to the tribunal's overall conclusion.

42. Mr Broach argues that Ms Lynch's submissions miss the point. The parts of the EHC Plan referred to by Ms Lynch 'simply do not go to mark-making'. The issue was only mentioned in section B of the EHC Plan, that is needs rather than provision to meet needs, where it stated that "[S] does not tend to indicate an interest in mark-making". The alternative materiality argument overlooks that the tribunal's finding was a significant part of the wider finding that A School was unsuitable.

Ground 3 – the tribunal's finding that A School was 'extremely isolating

43. The tribunal's finding that A School was "extremely isolating" for S was 'highly pejorative', argues Mr Broach for the parents and needed to be supported by cogent evidence. Yet the tribunal's reasons cited no evidence in support. Furthermore, the finding was entirely unreasoned, in all probability due to the lack of supporting evidence.

44. For the local authority, Ms Lynch argues that the tribunal's 'extremely isolating' finding cannot properly be read as incorporating a finding that, at A School, S's well-being was negatively affected. The tribunal accepted evidence that S was happy at A School, and its reasons properly explained why it considered A School to be 'extremely isolating'. That conclusion reflected the reality of the tribunal's findings of fact which included that, at A School, S was taught alone for the vast majority of the time in his own room, had very few opportunities for peer interaction, the frequent group learning and social interaction that were important for S were absent, and S was "clearly seeking a greater level of interaction with other children". The tribunal was entitled to conclude that, while S was perfectly content at A School on a day-to-day basis, the set-up at A School deprived him of vital educational opportunities to interact with and learn from peers with similar communication abilities.

45. Mr Broach argues that the local authority's recourse to the argument that the tribunal's reasons should be read as a whole itself reveals the absence of reasoning for this 'very striking' finding. Furthermore, there was no supporting evidence before the tribunal. The evidence in fact showed that S was a valued part of the A School community who was engaged in a wide range of activities including with his mainstream peers. And the argument that the tribunal's finding did not incorporate a finding that A School had had a negative impact on S's well-being does not work. An 'extremely isolating' school experience cannot rationally be considered beneficial for a child.

Ground 4 – tribunal's treatment of Ms Pearson's evidence

46. S had autism, which is a social communication impairment, argues Mr Broach for the parents. Therefore, evidence from a speech and language expert such as Ms Pearson was highly material to the tribunal's analysis of A School's suitability. It was not open to the tribunal to reject or give limited weight to Ms Pearson's evidence insofar as it went beyond the speech and language provision required by S (see *D v SENDIST and others* [2006] ELR 370). The tribunal needed to deal with Ms Pearson's evidence but failed to do so. It was not bound to accept her evidence, but it was required to address it. The tribunal's approach overlooked the fundamental importance of S's communication needs. This error was magnified by the local authority's evidence; not only did none of the authority's professional witnesses expressly prefer one placement over the other, Ms Bettany's evidence was that S's progress at A School was "very pleasing" and "within an expected range for children of his needs attending a specialist provision with an adapted curriculum". At the hearing, Mr Broach drew my attention in particular to Ms Pearson's report at p.307 of the First-tier Tribunal's bundle in which she expressed the opinion that A School was 'highly suitable' for S.

47. Ms Lynch, for the local authority, submits that the tribunal did not reject Ms Pearson's evidence in its entirety. The tribunal agreed with much of Ms Pearson's evidence. To the extent that the tribunal's conclusions were not those contended for by Ms Pearson, they were supported by evidence and adequately reasoned. Any argument that the tribunal was bound to accept Ms Pearson's views as to the suitability of A School because the local authority's witnesses declined to express a categorical view on suitability is unsustainable. Those witnesses' concerns about A School were not devalued because they 'simply left placement as a matter for the tribunal'.

48. It is not the parental case, submits Mr Broach, that the entirety of Ms Pearson's evidence was left out of account. The tribunal took her evidence into account insofar

as it concerned speech and language provision but disregarded her evidence in relation to placement suitability even where her evidence was linked to S's speech, language and communication needs, i.e. Ms Pearson's area of professional expertise and which, albeit to an artificially limited degree, the tribunal had already found persuasive. Ms Lynch misdescribes the parental case by arguing that the tribunal was not bound to accept Ms Pearson's suitability evidence simply because the local authority's witnesses did not express a categorical view. The parents' case was that Ms Pearson's evidence should be accepted because it was cogent and compelling, and not contradicted by the local authority's evidence. It should have been obvious to the tribunal that a speech and language therapist's professional opinion as to suitability was, in principle, highly relevant given that S's special educational needs were a function of his autism which is primarily a communication disorder.

Ground 5

49. The parties' written submissions on ground 5 were overtaken by the Supreme Court's judgment on 9 July 2021 in *R (SC, CB and 8 children) v Secretary of State for Work & Pensions and others* [2021] UKSC 26 ("*SC*"). That judgment, which was given after the parties had supplied skeleton arguments for the hearing, was the focus of much of counsels' oral submissions. I should record my admiration and gratitude for the way in which both counsel were able effectively to reformulate their ground 5 arguments in response to such a significant and lengthy judgment having been given only one working day before the hearing (judgment was given on Friday 9 July 2021; the hearing was on Monday 12 July 2021). My note of the hearing indicates that I allowed the parties a further month in which to supply supplementary written submissions on ground 5, but no such submissions have been received.

50. *SC* concerned whether legislative restrictions on the amount of child tax credit payable to a claimant responsible for more than two qualifying children breached the UK's obligations under the UN Convention on the Rights of the Child (UNCRC). It was argued before the Supreme Court that its judgment in *DA* [2019] UKSC 21 required a domestic court, where applicable, to assess whether the UNCRC has been breached. Lord Reed, with whom the seven other Supreme Court Justices agreed, rejected this argument. Firstly, unincorporated treaties, although intended to bind State parties, are "not contracts which domestic courts can enforce": *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, p 499 *("International Tin Council")* (paragraph 75 of his Lordship's judgment). Secondly, such treaties do not form part of the law of the United Kingdom: *International Tin Council* at p 500 (paragraph 77). Finally, the Human Rights Act 1998 does not give

domestic legal effect to unincorporated treaties; the only treaty to which it gives effect is the European Convention on Human Rights: *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312, para 53) (paragraph 79).

51. Lord Reed described how European Court of Human Rights' case law may have given rise to misunderstandings about the domestic legal effect of unincorporated treaties. While international law is frequently, and rightly, taken into account by the European Court, it does not regard international treaties as if they were directly incorporated into the European Convention so as to, by that route, impose specific obligations on contracting states (paragraphs 80 to 83 of his Lordship's judgment). Accordingly, the European Court's case law provides "no basis…for any departure from the rule that our domestic courts cannot determine whether this country has violated its obligations under unincorporated international treaties" (paragraph 84). Any other reading of Supreme Court case law misunderstands its judgments (paragraphs 85 to 96). Lord Reed's said that it is not "appropriate for domestic courts to determine whether the United Kingdom has violated its obligations under unincorporated international law" (paragraph 2(7)(i)).

52. At the hearing, Mr Broach, for the parents, referred me to paragraph 137 of the Supreme Court's judgment in *R (JS) v Secretary of State for Work & Pensions* [2015] 1 WLR in which Lord Hughes identified three ways in which an international treaty, in that case the UN Convention on the Rights of the Child, may be relevant in domestic law. Mr Broach relies on the first namely "if the construction (i.e. meaning) of United Kingdom legislation is in doubt, the court may conclude that it should be construed, if otherwise possible, on the footing that this country meant to honour its international obligations". Mr Broach also relies on Lord Haddon-Cave's judgment in *Smith v Smith* [2016] 1 WLR, at paragraph 77, which he submits is to a similar effect. Mr Broach submits that his argument is not that the tribunal should have ruled on whether the UN Convention on the Rights of Persons with Disabilities would be breached by S's placement at O School – he concedes that is precluded by *SC* – but rather the Convention should have been used as a 'tool of statutory construction'. In Mr Broach's submission, the Supreme Court's judgment in *SC* leaves untouched Lord Hughes' analysis in *JS*.

53. I asked Mr Broach at the hearing to explain how his suggested tool of statutory construction would operate in relation to a statutory terms that are arguably not ambiguous but are instead broad terms used by the legislature in enactments which

deal with matters that, by their nature, admit of a multitude of considerations and for which a more specific term would improperly constrain decision-making. Mr Broach submitted that Lord Hughes' third reasons extended to cases of uncertain legislative terms.

54. Ms Lynch, for the local authority, disagrees that "appropriate", as used in section 40(2) of the 2014 Act, is ambiguous. 'Appropriate' is a perfectly clear word but its application is informed by the circumstances of a particular case. This is not the same thing as either ambiguity or uncertainty.

55. Mr Broach argues that Article 24 of the UN Convention on the Rights of People with Disabilities cannot be considered aspirational in nature so as to render it incapable of performing the interpretative function described by Lord Hughes. Article 24's provisions about inclusive education are very clear. Section 40(2) of the 2014 Act, on the other hand, is not clear. It does not define 'appropriate' and there is scope to apply Lord Hughes' approach in construing section 40(2).

56. Ms Lynch, for the local authority, draws my attention to the European Union (Definition of Treaties Orders) (Revocation) (EU Exit) Regulations 2018. By virtue of the Regulations' revocation of the European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009, Ms Lynch submits it cannot be argued that the Convention has any type of direct effect in domestic law.

57. Mr Broach submits that the local authority's written argument that the Convention adds little to the Equality Act 2010 adds nothing. He also argues that the authority's reliance on the 2018 Regulations is misconceived. The Regulations' revocation of the 2009 Order has no bearing on case law about the interpretative role that may legitimately be played by international law agreement to which the United Kingdom is a party. The tribunal should have at least considered whether S's placement at O School might have amounted to segregation within Article 24 of the Convention and, if so, interpreted section 40(2) of the 2014 Act so that A School could not be considered an appropriate placement for S. Ms Lynch submits that this is a thinly disguised attempt avoid *SC's* prohibition on domestic courts making findings as to whether an unincorporated international agreement has been breached.

Conclusions

Ground 1

58. The local authority's case is that A School / the parents had every opportunity to persuade the tribunal that the school was capable of modifying it provisions to meet the tribunal's concerns but did not do so. However, Ms Lynch does not identify any finding within the tribunal's reasons that deals with A School's capacity to modify its provision in order to meet the tribunal's concerns.

59. I agree with Mr Broach, for the parents, that it is important to identify the legal framework pertaining to A School before the local authority reviewed S's EHC Plan and named O School in section I of the plan. The parents' appeal against the first iteration of S's EHC Plan was unsuccessful but not on suitability grounds. The tribunal found that A School was suitable for S but, as I have said, the appeal was dismissed on the ground that S's placement there would constitute unreasonable public expenditure. Given that background, the relevant legal context before S's EHC Plan was reviewed was that:

(a) S did not attend the school named in section I of his EHC Plan, which was a maintained special school, so that A School, which S did attend, was, in legal terms, essentially a stranger to S's EHC Plan;

(b) A School must have been considered a suitable alternative arrangement to S's attendance at the school named in the EHC Plan; and

(c) the local authority were relieved of their duty under section 42(2) of the 2014 Act to secure the provision specified in the plan: see section 42(5) which disapplies the section 42(2) duty where a child's parents "have made suitable alternative arrangements".

60. Section 42(5)'s disapplication of the duty under section 42(2) was total. While A School continued to be a suitable alternative arrangement to S's placement at the school named in the first iteration of section I of S's EHC Plan, the local authority was relieved of the entire duty to secure the special educational provision specified in section F of the plan. A local authority might, in such circumstances, legitimately seek to monitor the placement, in order to satisfy itself that the alternative

arrangement remains suitable, but there are many forms that such monitoring activity may take.

61. S's EHC Plan had no direct legal purchase over A School. It was not named in section I of S's EHC Plan and, accordingly, there was no contractual lever that the authority could have brought to bear with a view to ensuring that the provision at A School matched that described in section F of the plan. Of course, it cannot be gainsaid that, in these circumstances, an independent school ought to give very careful consideration to the provision described in section F of a child's EHC Plan, but it cannot safely be assumed that, if such a school delivers an education that does not in all respects match that described in section F, the school is *incapable* of delivering that provision. This may raise questions about the school's appropriateness but not necessarily. I acknowledge that the EHC Plan will of course have to be statutorily reviewed by the local authority at some stage. But that does not alter the point that, where a parent makes suitable alternative arrangements at an independent school for a child's education, it cannot be assumed that the school is incapable of delivering specified section F provision merely because the provision currently made does not in all respects match that in the plan.

62. The above remarks are made in the abstract. However, every case has a context which will include of course the arguments put to a tribunal. At this point, I should note that present counsel, who are both experienced in education law, also appeared before the First-tier Tribunal.

63. The local authority argue that the parents did not argue before the tribunal that A School provided something other than section F EHC Plan provision nor did they argue that A School could provide something substantially different than its current curriculum, staffing and other arrangements. I must therefore identify the arguments put to the tribunal.

64. The parents' notice of appeal to the tribunal argued that S was making excellent progress at A School, and that section F of his EHC Plan was flawed because it was not individualised, specific nor quantified (p.22 of the tribunal's bundle). Certain amendments were sought on the ground that these would reflect the teaching expertise currently enjoyed by S at A School, and the parents also sought amendments to section F's specified speech and language therapy provision. For the most part, however, the notice of appeal sought to demonstrate that the local authority's preferred school, O School, was inappropriate. The local authority's

response to the appeal did not argue expressly that A School was incapable of delivering the required section F EHC Plan provision (p.29, First-tier Tribunal bundle). In relation to section F, the authority set out its reasons for disagreeing with the parents' criticisms and why the authority considered the parents' proposed amendments inappropriate. The local authority argued that a placement at A School would be incompatible with the avoidance of unreasonable public expenditure and, alternatively, that A School was unsuitable. The local authority's criticisms of A School included: it could not provide the multi-sensory curriculum that S required (paragraph 26 of the response); S was unable to "access the content of mainstream Year 7 lessons" (paragraph 27); it did not provide a suitable peer group for S (paragraph 27); and S's 'meaningful interaction' with other pupils, whether at a similar developmental level or more able, was 'severely limited' (paragraph 27).

65. A School provided a written statement dated 31 October 2017 which set out why it considered itself able to meet S's needs (p.262 of the First-tier Tribunal bundle). The statement:

(a) asserted that the school's specialist staff were able to employ strategies to manage, amongst other things, S's 'sensory difference';

(b) explained the school's policy for pupils with learning disabilities to attend mainstream lessons 'as appropriate to their needs and abilities';

(c) described why S had 1:1 support at all times and access to his own room, which included that "all our pupils have access either to their own room or to a room shared by only one or two others at most because they are sensitive to environmental or sensory distractions";

(d) described S's contact with other pupils. At A School S had: (unspecified) sessions timetabled with other autism resource pupils, learning walks with a social component, a sixth form mentor; normal access at school mealtimes playtimes; and enjoyed with other pupils common access to the autism resource. The statement also said that S had "an ongoing programme of inclusion based on his particular needs".

66. The parents' written tribunal submissions, dated 16 September 2018, dealt with certain of the local authority's concerns as to the suitability of A School (p. 331 of the First-tier Tribunal bundle):

(a) A School promoted S's social development through offering him access to the "wider community of a mainstream school";

(b) S accessed the mainstream school for PE, swimming, drama, Forest Garden, and break and lunch times. The intention was to extend S's access to the mainstream school;

(c) regarding peer group, the parents disagreed that O School would offer access to an appropriate peer group, and said that at A School S was already benefitting from working with another pupil at a similar developmental level.

67. The parties' agreed schedule of outstanding matters in dispute, dated 15 October 2018, identified certain issues in relation to section F of S's EHC Plan. Apart from the required model of required SLT provision and the necessary qualifications and experience of staff, all matters began "whether S needs" certain provision. In relation to section I, the matter in dispute was of course whether A School was suitable. The list of outstanding matters did not include the question whether A School was capable of providing section F provision, to the extent that it might not already do so.

68. I agree with Ms Lynch's description of the parental case before the tribunal. As the above description of the arguments presented to the tribunal illustrates, the parents argued that A School was suitable and disputed the need for various types of provision that the tribunal ultimately found to be required. The parents did not rely on an alternative argument to the effect that the current provision at A School could be modified to meet the local authority's concerns. Both parties were represented by experienced education law specialists and, in my judgment, the tribunal's inquisitorial role did not call for it to introduce, or suggest introducing, an alternative argument to that advanced on the parents' behalf.

69. Mr Broach argues that paragraph 111 of the tribunal's statement of reasons, in which it instructed itself that its task was to consider whether A School was making for S the provision specified in section F of the EHC Plan, discloses a misdirection in law. In the context of this case, I do not agree. The parties' agreed list of disputed section F matters was connected to the provision currently made at A School and the authority's case was that certain deficits in A School's provision rendered A School inappropriate. Given the parties' stances before the tribunal, I do not accept that paragraph 111 discloses a legal misdirection. It may well have been different had the First-tier Tribunal been asked to address whether A School was capable of delivering

any section F provision that it was not, or might not have been, currently providing. However, the tribunal was not asked to address that point.

70. The parents' alternative argument is that the tribunal acted unfairly by not inviting submissions on A School's capacity to educate S differently (so as to deliver the section F provision considered necessary by the tribunal). I do not agree. The parties' respective cases were coherently advanced by experienced counsel. This was not a case of a tribunal relying on a new point that the parties had not had the opportunity to address. The argument is that the tribunal should, of its own motion, have introduced, or suggested introducing, an alternative parental ground of appeal. Fairness did not require the First-tier Tribunal to take this course.

71. For the above reasons, ground 1 is not made out.

Ground 2

72. Even if A School's failure to provide structured time for literacy sessions to support S's early stages of mark-making was an irrelevant consideration, argues Ms Lynch for the local authority, the tribunal did not err in law by taking it into account. The finding could not have made a difference to the tribunal's decision so that any error was not material. I agree with Ms Lynch's submission. On a fair reading of the tribunal's reasons, the absence of this 'structured time' was not of such significance as to show that, had the matter not arisen, the First-tier Tribunal might have found A School to be appropriate. Mark-making provision had no bearing on the tribunal's main concerns, such as staff continuity, peer group and inclusiveness, and I am satisfied that, absent the mark-making finding, the tribunal would have arrived at the same decision. Ground 2 is not made out.

Ground 3

73. I accept Ms Lynch's submission that, if the tribunal's reasons are read fairly and as a whole, the finding that S's time at A school was 'extremely isolating' related to his educational experience at A School rather than the totality of his experience as a pupil at the school. In the light of the tribunal's other findings of fact, the finding that S's education there was extremely isolating was adequately reasoned. The finding was rationally connected to, and on a fair reading derived from, the tribunal's other findings such as the finding that, most of the time, S was educated in a separate room on his own. If the tribunal's reasons are read as a whole, the 'extremely

isolating' finding was adequately reasoned. I agree with Ms Lynch that it would be a misreading of the statement of reasons to interpret the finding as intending to mean that, at A School, S's general well-being was adversely affected by his isolation. As Ms Lynch submits, the tribunal accepted evidence that, at A School, S was happy. It would not have done so had it thought that, due to the manner in which S was taught at A School, he had become in some way socially isolated and that this had had a negative effect on his well-being.

Ground 4

74. Mr Broach's submissions for the parents incorporate the argument that autism is essentially a social communication impairment. This has not been seriously challenged and is in line with generally accepted definitions. For example, the Explanatory Notes to the Autism Act 2009, at paragraph 11, state as follows:

> "Autistic spectrum conditions are lifelong conditions which affect how a person communicates with, and relates to, other people and the world around them."

75. If paragraph 111 of the tribunal's reasons is read in isolation, it is difficult to ascertain with precision what the tribunal made of Ms Pearson's evidence. Paragraph 111 begins by noting that Ms Pearson, as well as Mr Hallett, 'endorsed' A School. The tribunal found Mr Hallett's evidence unpersuasive but not Ms Pearson's which it considered "much more balanced". The reasons then said "we do not dismiss her recommendation and accept that she is entitled to make it". But this was followed by the statement that "[Ms Pearson's] professional expertise is in speech and language" in contrast to the tribunal's role which was to consider the "totality" of S's special educational needs and corresponding provision. The tribunal's final remark was that "a consideration of all aspects of [S's] special educational needs and corresponding placement is outside her professional remit other than where they pertain to speech and language".

76. Paragraph 111 of the tribunal's reasons began with a finding that Ms Pearson gave balanced evidence, including her endorsement of A School, and her recommendation was not to be dismissed. But the tribunal ended its analysis by finding that her professional remit did not extend to the 'totality' of S's needs and corresponding provision, which reads like a rejection of her evidence insofar as it strayed into the 'totality' of S's needs and required provision. What is clear is that the tribunal did not reject Ms Pearson's evidence insofar as it concerned direct provision

of speech and language therapy. And if the tribunal rejected Ms Pearson's evidence on matters unconnected to the communication aspects of S's placement at A School, for being outside her 'remit', it was entitled to do. The grey area in between concerned the tribunal's treatment of Ms Pearson's evidence insofar as it went beyond direct speech and language therapy provision and expressed views about the suitability of A School for a child such as S with a condition exemplified by impairment of social communication.

77. I find it very difficult to accept that, in principle, a speech and language therapist has nothing relevant to say about the appropriateness of a particular school for a child with autism, save for the suitability of the school's arrangements for direct provision of speech and language therapy (by which I include connected matters such as staff training and monitoring of therapy provided by staff who are not qualified therapists). No child can be entirely self-taught and, accordingly, a child's education is bound to involve some form of communication. Similarly, no process of socialisation can take place without some communication. Where a child's condition involves, as with autism, a communication impairment, it might be thought obvious that a speech and language therapist would have much of relevance to say about matters going beyond the direct provision of speech and language therapy and extending into the communicative environment of a particular school. At the very least, proper reasons would need to be given by a tribunal for rejecting a speech and language therapist's evidence on such matters.

78. However, Ms Lynch argues, in so many words, that the tribunal did not really treat Ms Pearson's evidence in the way suggested by paragraph 111 of its reasons. I must therefore examine the tribunal's treatment of her evidence about the suitability of A School insofar as it related to matters other than the direct provision of speech and language therapy. This really means her evidence about the special educational provision required to meet S's needs. It is true that Ms Pearson's written evidence concluded with ringing endorsements of the suitability of A School but, of themselves, such statements were of little material value. What mattered were Ms Pearson's reasons for endorsing A School and, in this case, those reasons related to the provision that she considered necessary and which, in her opinion, A School provided.

79. Paragraph 111 of the tribunal's reasons can be read as a blanket rejection of Ms Pearson's evidence insofar as it extended beyond the direct provision of speech and

language therapy. However, a careful reading of the tribunal's entire, extensive statement of reasons shows that it did not, in fact, take that approach:

(a) Ms Pearson thought that S had made progress in several areas at A School (paragraph 39 of the tribunal's reasons). The tribunal found that there was "some evidence of progress across all areas of the curriculum commensurate with the passage of time" and S's progress was "no more than would be expected for children with his needs with supportive staff and an adapted curriculum" (paragraphs 42 and 42). While the tribunal did not expressly accept or reject Ms Pearson's evidence, its findings were not inconsistent with her opinion;

(b) regarding S's peer group, Ms Pearson's evidence was that S found interaction with mainstream peers "more positive because they are more predictable and safer than interactions with other children with significant learning difficulties" (paragraph 57). The tribunal found that Ms Pearson's evidence "relates to preference and previous habit, and does not demonstrate why [S] needs to have mainstream peers", and, in making this finding, the tribunal analysed Ms Pearson's evidence of observed interactions between S and his peers at A School (paragraph 68). The tribunal preferred Ms Bettany's evidence that S needed the opportunity to interact and communicate with children with similar communication strategies, which it considered supported by her observations of S at A School (paragraph 69). The tribunal did not disregard Ms Pearson's peer group evidence. Her evidence was not accepted but the tribunal explained why it preferred other evidence;

(c) Ms Pearson's evidence was that S required a school that offered specialist 1:1 support for children with autism and associated communication difficulties (paragraph 72), together with a "total communication approach" (paragraph 73). The tribunal agreed with much of Ms Pearson's evidence but did not accept that S needed to be taught in a specialist autism resource. Such a resource was unnecessary. What mattered was for S to be educated in an autism friendly environment with a total communication approach (paragraph 79). The tribunal therefore agreed with much of Ms Pearson's evidence regarding the type of educational setting required by S. It certainly did not reject Ms Pearson's evidence out-of-hand;

(d) Ms Pearson's evidence was that S required intensive 1:1 support but "with the right peer, 1:2 could work" (paragraph 81). Here, Ms Pearson was offering a professional opinion about support other than speech and language support. The tribunal found that S did not require the 'constant' 1:1 support currently provided at A

School, which had been more or less recommended by another parental witness Mr Hallet. Instead, the tribunal found that 1:1 support may well be necessary for much of the time but not constantly (paragraph 86). This finding was not inconsistent with Ms Pearson's evidence;

(e) on the question whether S needed to be taught in his own room, Ms Pearson's evidence was that he coped well socially but needed 'downtime' and, at times, preferred to withdraw. In Ms Pearson's opinion, S needed a quiet, low arousal space (paragraph 92). The tribunal accepted Ms Pearson's evidence which was said to be in broad agreement with the other professional evidence (paragraph 95).

80. Despite the apparent rejection of Ms Pearson's placement suitability evidence suggested, or hinted at, by paragraph 111 of the tribunal's reasons, if the reasons are read as a whole it shows that the tribunal did in fact take into account Ms Pearson's evidence insofar as it extended beyond the direct provision of speech and language therapy. Some evidence was accepted and, to the extent that the tribunal disagreed with Ms Pearson's evidence, it gave intelligible reasons for doing so.

81. Had the First-tier Tribunal rejected Ms Pearson's wider communication-related evidence about placement suitability, simply because she was a speech and language therapist, I would have found that the tribunal erred in law. However, it did not take this approach. It is true that the tribunal's ultimate placement decision differed from Ms Pearson's endorsement of A School, and this may have been what the tribunal meant in paragraph 111 of its reasons when it said that Ms Pearson's placement-specific evidence fell outside her professional remit. However, the evidential foundations of Ms Pearson's endorsement of A School, which were based on the provision that she considered necessary for S, were dealt with by the tribunal. Ground 4 is not made out.

Ground 5

82. Section 40(2) of the 2014 Act applies where a child's parents have not duly requested that the child's EHC Plan names a school falling within section 38(3). It provides as follows:

> "(2) The local authority must secure that the [EHC Plan]—

(a) names a school…which the local authority thinks would be appropriate for the child…concerned, or…".

83. The fulcrum of Mr Broach's ground 5 submissions for the parents is his argument that the word "appropriate", as used in section 40(2) of the 2014 Act, is ambiguous (or uncertain). If the meaning of appropriate is not "in doubt", there is no scope for the Convention to be taken into account as an interpretative tool in the manner that Mr Broach submits was described by Lord Hughes in *JS*.

84. I agree with Ms Lynch for the local authority that the meaning of "appropriate" in section 40(2) is not in doubt (nor ambiguous or uncertain). It is a broad term but not an ambiguous one. In order for a school to be 'appropriate', it must be able to provide the education that a particular child requires. This follows from the fact that a child's school is of fundamental importance in delivering to a child the special educational provision that the child's needs require. If a school is so able, the school is appropriate. While the application of section 40(2) in a particular case may be uncertain without a thorough examination of the facts, that does not mean that 'appropriate', as used in the provision, is ambiguous. In my opinion, the legislature chose to use a broad term such as this because a multitude of considerations are likely to be relevant in determining which school (or schools) are able to provide the education required by a particular child with special educational needs. A narrower term would have run the risk of artificially constraining the factors that could be taken into account by a local authority and, on appeal, the tribunal.

85. Since I find that the meaning of 'appropriate', as used in section 40(2) of the 2014 Act, is not in doubt, ground 5 is not made out. Since ground 5 is not made out, it would not be appropriate for me to give any guidance about the extent to which the Convention might be relevant in the operation of the EHC Plan provisions of the 2014 Act.

86. I add that I agree with Ms Lynch that Mr Broach's submission that the tribunal should have at least considered whether S's placement at O School might have amounted to 'segregation', contrary to Article 24 of the Convention, is in substance an argument that the tribunal should have determined whether such a placement would be in violation of Article 24. The Supreme Court's decision in *SC* precludes such an approach. Indeed, the tribunal should not in my opinion have considered whether placement at A School would be 'inclusive' for the purposes of Article 24. There is no substantive difference between determining whether the Convention has

been violated and whether it has been adhered to. However, the tribunal's mistaken consideration of Article 24 compliance was clearly immaterial and does not amount to an error on a point of law.

Costs

87. The parents also apply for a costs order against the local authority. Since this appeal is dismissed, that application need not be considered.

Mr E Mitchell,
Judge of the Upper Tribunal.
Signed on original on 22 November 2021.