ME v LONDON BOROUGH OF SOUTHWARK
[2017] UKUT 73 (AAC)
UPPER TRIBUNAL CASE NO: HS/3102/2016

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 21 July 2016 under reference EH210/16/00011) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

REASONS FOR DECISION

A. Introduction

1. This appeal concerns the education, health and care plan for O, who was born in July 2005. The tribunal found that he has autism, severe language delay and global development disorder. He is functioning at P levels and has 1:1 support with limited inclusion in class teaching. For the most part, he cannot function independently, although he can feed himself. He has had a plan since February 2016 and had a statement of special educational needs before that. This case arises from the provision for his transfer to secondary education. The local authority named a special school in his plan, S school. The parents prefer SHC school, which is a mainstream school. The First-tier Tribunal dismissed his appeal, but I gave permission to appeal against its decision following an oral hearing.

2. I have had the benefit, as I did at the oral hearing, of argument from David Wolfe QC on behalf of the parents and from Alexander Campbell of counsel on behalf of the local authority.

3. In order to understand how the tribunal went wrong in law, it is necessary to set out the legislation that it had to apply and to analyse how it operates.

B. The legislation

4. The relevant legislation consists of sections 33 and 39 of the Children and Families Act 2014. They re-enact and extend sections 316 and 316A of, and paragraph 3 of Schedule 27 to, the Education Act 1996.

5. These are the versions of sections 33 and 39 as in force at the date of this decision:

> **33 Children and young people with EHC plans**
>
> (1) This section applies where a local authority is securing the preparation of an EHC plan for a child or young person who is to be educated in a school or post-16 institution.

(2) In a case within section 39(5) or 40(2), the local authority must secure that the plan provides for the child or young person to be educated in a maintained nursery school, mainstream school or mainstream post-16 institution, unless that is incompatible with—

(a) the wishes of the child's parent or the young person, or

(b) the provision of efficient education for others.

(3) A local authority may rely on the exception in subsection (2)(b) in relation to maintained nursery schools, mainstream schools or mainstream post-16 institutions in its area taken as a whole only if it shows that there are no reasonable steps that it could take to prevent the incompatibility.

(4) A local authority may rely on the exception in subsection (2)(b) in relation to a particular maintained nursery school, mainstream school or mainstream post-16 institution only if it shows that there are no reasonable steps that it or the governing body, proprietor or principal could take to prevent the incompatibility.

(5) The governing body, proprietor or principal of a maintained nursery school, mainstream school or mainstream post-16 institution may rely on the exception in subsection (2)(b) only if they show that there are no reasonable steps that they or the local authority could take to prevent the incompatibility.

(6) Subsection (2) does not prevent the child or young person from being educated in an independent school, a non-maintained special school or a special post-16 institution, if the cost is not to be met by a local authority or the Secretary of State.

(7) This section does not affect the operation of section 63 (fees payable by local authority for special educational provision at non-maintained schools and post-16 institutions).

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.

(2) The local authority must consult—

(a) the governing body, proprietor or principal of the school or other institution,

(b) the governing body, proprietor or principal of any other school or other institution the authority is considering having named in the plan, and

(c) if a school or other institution is within paragraph (a) or (b) and is maintained by another local authority, that authority.

(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—

(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

(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.

(6) Before securing that the plan names a school or other institution under subsection (5)(a), the local authority must (if it has not already done so) consult—

(a) the governing body, proprietor or principal of any school or other institution the authority is considering having named in the plan, and

(b) if that school or other institution is maintained by another local authority, that authority.

(7) The local authority must, at the end of the period specified in the notice under section 38(2)(b), secure that any changes it thinks necessary are made to the draft EHC plan.

(8) The local authority must send a copy of the finalised EHC plan to—

(a) the child's parent or the young person, and

(b) the governing body, proprietor or principal of any school or other institution named in the plan.

C. Analysis

6. Parents may wish to express their views on where their child is educated. They have two options. One is to specify a particular school. The other is to specify that the school should not be a mainstream school.

Placement, needs and delivery

7. It is important to understand what sections 33 and 39 do and do not do. They are concerned with placement. They impose duties, albeit qualified ones, on local authorities to secure that a child's plan names a school or identifies a type of school. The sections are not concerned with the child's special educational needs and provision or with the delivery of that provision. Those matters are subject to separate duties. Section 37 requires the local authority to specify in the plan the child's needs and the provision required to meet those needs. Section 66 imposes a duty on the particular school to use its best endeavours to secure that the provision is made.

8. The nature and extent of a child's needs and their provision become relevant under section 33 if they cannot, even with reasonable steps, be delivered in a way that is compatible with the efficient education of others.

Section 39

9. If the parents want their child to attend a specific school, whether mainstream or not, section 39 applies. The local authority must accede to their request unless one or both of two conditions are satisfied (section 39(3)). One is that the school is unsuitable (section 39(4)(a)). The other is that it would be incompatible with the efficient education of others or with the efficient use of resources (section 39(4)(b). If the local authority does not have to accede to the parents' request, it must identify a school or type of school that is appropriate for the child (section 39(5)). The issue then has to be considered further under section 33.

Section 33

10. Mr Wolfe described section 33 as establishing a statutory preference for a mainstream school subject to a parental veto, relying on *Bury Metropolitan Borough Council v SU* [2010] UKUT 406 (AAC) at [19]. The section applies in two circumstances. It applies if the parents have not asked for their child to attend a specific school. It also applies if they asked, but the local authority has decided not to accede to the request under section 39. In either case, the local authority must secure that the child be educated in a mainstream school unless one or both of two conditions are satisfied (section 33(2)). One is that this would be incompatible with the parent's wishes (section 33(2)(a)). The other is that it would be incompatible with the efficient education of others (section 33(2)(b)). A local authority is only allowed to decide that this second condition is satisfied, in respect of either a particular mainstream school or mainstream schools in its area as a whole, if there are no reasonable steps that could be taken to prevent the compatibility.

11. If the local authority refused a request by the parents under section 39, it must identify a school or type of school that would be appropriate. That is what section 39(5) provides.

The order for consideration

12. The terms of sections 33 and 39 show that section 39 should be considered first and section 33 only applies if the local authority does not accede to the parents' request under section 39: *R (MH) v SENDIST v London Borough of Hounslow* [2004] ELR 424 at [71]. That case is authority not just for the order in which the sections are to be considered, but also for the proposition at [79]-[80] that they are separate, meaning that a school rejected under section 39 may still be named under section 33.

Appropriateness

13. This concept is used in section 39(5). It is also used in section 40(2); that section deals with cases in which parents have not asked for their child to attend a specific school. Both imposes a duty on the local authority to name a school or type of school that is appropriate for *the* child. I do not know how the child by reference to whom the test has to be applied can be separated from the child's age, ability, aptitude and needs. How else could appropriateness be judged? I have not heard any argument on how appropriateness relates to suitability, or on how the duty under section 39(5) relates to the qualified duty under section 33, which applies if the local authority does not accede to the parents' request under section 39 (see the opening words of section 33(2)).

14. One possibility is that 'appropriate' merely provides a link back to section 33 and operates as a shorthand reference to the requirements of that section without adding any additional requirement that has to be satisfied. That is how I interpret it, without the benefit of argument. Why should there be an additional requirement just because the parents had applied unsuccessfully under section 39, especially as appropriateness arises in section 40 when application has been made? The local authority would surely wish to find a school or type of school that was appropriate for a child, whether or not section 39 had been considered. And the authority would surely want to take account of the child's age, ability, aptitude and needs.

15. This is a convenient point to move on to suitability.

Suitability

16. Section 33 does not contain any express provision equivalent to section 39(4)(a) that the school is suitable for the child: *R (MH) v SENDIST v London Borough of Hounslow* [2004] ELR 424 at [69] and *Bury Metropolitan Borough Council v SU* [2010] UKUT 406 (AAC) at [7] and [21]-[22].

17. In *Harrow Council v AM* [2013] UKUT (AAC) at [27], Judge Mark was concerned with what is now section 33. He said:

> 27. In my judgment, the apparent incompatibility between the provision of suitable education and the requirement to name a mainstream school without express regard to the suitability of the child for the child can only be reconciled on the basis that the local authority is under an absolute

> obligation to make a school suitable …, subject only to the qualification in section [33(2)(b)].

He went on at [28] to refer to what is now section 33(4) and (5), which somewhat undermines his use of the term 'absolute'. I would prefer to call the duty a qualified one.

18. Judge Mark's analysis is consistent with the terms of section 33, which have no condition equivalent to section 39(4)(b)(ii), which imposes a condition of compatibility with the efficient use of resources. Given the obligations to specify and provide for special education needs and provision, such a reference would be otiose.

Incompatibility

19. This test arises under section 33(2) and 39(4)(b).

20. *Essex County Council v SENDIST and S* [2006] ELR 452 was an efficient resources case. Gibbs J at [29] described 'incompatible' as a strong term, if anything stronger than 'prejudicial to', although nothing turned on the difference in that case.

21. In deciding whether attendance would be incompatible with the efficient education of others, the test to be applied is whether the impact of attendance would be 'so great as to be incompatible with the provision of efficient education' to others: *Hampshire County Council v R and SENDIST* [2009] ELR 371 at [47]. It is not sufficient to show that attendance would have some impact. It is necessary to identify what that impact would be and then consider whether that would be incompatible. This applies to section 33(2)(b) and 39(4)(b).

22. Upper Tribunal Judge Mesher considered this issue further in *NA v London Borough of Barnet* [2010] UKUT 180 (AAC), also an efficient education case. he said:

> 33. Mr McKendrick … accepted that it was not enough … that the quality of education provided for other children would be reduced from the very highest standard to something a little lower. But, on the other hand, he submitted, it did not have to be shown that no meaningful education at all would be provided for some other child or, as the head teacher had put it in his statement, the admission of the child in question would tip the school into failure.
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> 34. I agree with Mr McKendrick in that respect… 'Efficient education' indicates a standard, not the very highest desirable standard or the very basic minimum, but something in between … Although 'incompatible' is indeed a very strong word, indicating that there is no way of avoiding the admission of the single child involved reducing the quality of education provided to some other children with whom he would be educated below that standard, its force must be applied in the context of that standard.

35. I do not think that the Upper Tribunal should go any further in attempting to define the standards embodied in 'efficient education'. I merely draw attention to the guidance in paragraph 40 of the *Inclusive Schooling* document that it means:

> 'providing for each child a suitable and appropriate education in terms of a child's age, ability, aptitude and any special educational needs he/she may have.'

36. What I take in particular from this section of discussion is that the test of incompatibility with the efficient education of other children under paragraph 3(3) is also quite a sophisticated one. It must in my judgment be applied by reference to the circumstances only of the child in question and other children who are already known or predicted to be in the category of those who would be educated with the child. Although the overall context of the school will be relevant, especially in relation to whether adjustments can be made elsewhere to avoid an incompatibility that would other otherwise arise, the circumstances of other children who might possibly be admitted, particularly as the result of other outstanding appeals, cannot be taken into account. Depending on the circumstances of particular cases, it will often be necessary for a tribunal to identify just what difference it finds that the admission of the single child would make before it can go on to make the judgment about whether the degree of impact

D. How the tribunal went wrong in law

23. Against that background, I can now explain how the tribunal went wrong.

24. As Mr Wolfe put it at the hearing of the application, the tribunal got off to a bad start by listing the issues as follows:

> 2. Whether the parents' choice of school … can make appropriate provision to meet O's needs, or to make reasonable adjustments so that his educational needs could be met;
>
> 3. Whether O's educational needs could be met in mainstream school;
>
> 4. Whether the LA's choice of school … could meet O's education needs.

25. I accept that the issues identified by a tribunal will be those in dispute and need not involve a comprehensive statement of the relevant law. I also accept that they may reflect factual issues rather than legal ones. That said, there are problems with the tribunal's list. There are signs of a system here - the first issue appears to relate to section 39, the second and third to section 33 – but it is not worked out correctly. I will take just a couple of points.

26. Part of the problem lies in the language. The tribunal has expressed the issues in language other than that of the statute. 'Reasonable adjustments' is not used in sections 33 and 39; it is now associated with the Equality Act 2010. Presumably, the tribunal meant 'reasonable steps'. Although 'appropriate provision' is used in section 39(5), the tribunal probably meant to refer

collectively to the requirements of suitability and compatibility under section 39(4), which have to be considered before section 39(5) applies.

27. It is not just the choice of words that is the problem; it also leads to uncertainty about what issues the tribunal was considering. If 'reasonable adjustments' refers to the 'reasonable steps' condition in section 33(3) and (4), it has no place under section 39 and logically belongs at the end of the analysis, not at the beginning. If it doesn't refer to section 33(3) and (4), what precisely does it mean and how does it relate to the statutory conditions?

28. I move now from the statement of issues to the tribunal's reasons, which follow its rehearsal of the salient points of the evidence. These start off well. The tribunal identified the issue as placement and noted that O's parents had requested that he remain in mainstream education at SHC school. It recorded that the local authority had argued that the conditions in section 39(4) were not met and that the tribunal accepted that argument. It noted the evidence that SHC school had pupils with autism, but only with needs less profound than O's. The school would need to train staff and purchase resources. So far, the tribunal appears to be dealing with section 39(4)(a).

29. The tribunal then went on to find that the school could not make reasonable adjustments, as it would need to adapt buildings, which would affect the education of other children. It is not clear whether this is dealing with section 39(4)(b)(i) or section 39(4)(b)(ii) or section 33(4). Next, the tribunal accepted evidence that O's needs could not be met in mainstream education at all. It ended by stating that the SHC school did not satisfy the terms of section 39(4) or section 33(4). It did not mention those sections, but it is fair to interpret the reasons as referring to them.

30. The first error of law is that the tribunal's reasons are inadequate. Mr Campbell's submission on behalf of the local authority demonstrates that. He has taken 7 pages to dissect and analyse 2 pages of reasoning by the tribunal in an attempt to show how its findings and reasons relate to the statutory requirements that arose for consideration. Any reasons that require that much attention to find their relationship to the statutory provisions are inadequate regardless of anything else. One of the functions of reasons is to explain to the parties how and why the tribunal made its decision. Another is to demonstrate that the tribunal had acted lawfully under the legislation. The reasons in this case fail to satisfy either test.

31. The second error of law is that, regardless of whether the tribunal came to the right conclusion, it has not shown how it dealt with the necessary individual steps in the analysis that I have set out in Section C. The reasons tend too much towards conclusions rather than a structured analysis. I always resist prescribing how tribunal's should structure their reasons. Form should follow from the substance. But whatever form they take, the reasons must show how the tribunal applied the individual requirements of the legislation. Given the complex

package of issues that the tribunal had to consider in order to make its decision in this case, it failed to do that.

32. The third error of law is that the tribunal failed to take account of the duty to specify, and make provision for meeting, O's special educational needs. It seems to have limited itself to the issue of placement. That was wrong. It was not possible to segregate that issue, as the duties in respect of O's provision form the necessary context in which section 33 in particular has to be applied unless and until the tribunal came to the issue of reasonable steps. This is, for me, the most fundamental of the errors that the tribunal made.

33. That is more than sufficient to justify and require me to set aside the First-tier Tribunal's decision. For completeness, I broadly agree with Mr Wolfe's approach and his criticisms of Mr Campbell's approach, although I think that it is possible to make more sense of the tribunal's reasoning than Mr Wolfe professes to be able to manage. I do, though, commend Mr Wolfe's analysis of the law as a sound basis on which the tribunal at the rehearing can structure its consideration and explanation of the issues that arise for decision.

Signed on original
on 15 February 2017

Edward Jacobs
Upper Tribunal Judge